EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms K Czech-Aboustait	v	Predator Nutrition Online Limited

Heard at: Leeds (via CVP) On: 24 November 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Ms D Janusz (Consultant)
For the respondent: Ms J Kaur (Director of the Respondent)

CORRECTED JUDGMENT

1. 'Predator Nutrition Limited' is removed as the respondent in this claim and 'Predator Nutrition Online Limited' is substituted into its place.

2. In breach of contract, the respondent has failed to pay the claimant her full notice pay entitlement and, consequently, it is ordered that the respondent pay the claimant the gross sum of £1916.67.

REASONS

Substitution of respondent

1. There was some initial confusion from the claimant about who the identity of her employer was. Most of the material from the respondent, including its website and from its witnesses during the hearing, refer simply to the trading title 'Predator Nutrition'. There are five 'Predator Nutrition' companies, all but one appearing to be controlled by the same person and all but one registered at the same address. The outlier, Predator Nutrition Limited, went into liquidation on 7 January 2022.

2. The claimant issued these proceedings against Predator Nutrition Limited on 7 July 2022. Shortly thereafter, it emerged that there was an error in the respondent served with the claim. Another claim was issued under a different claim number against Predator Nutrition Online Limited, and that claim was on its face out of time; it is now withdrawn following our preliminary discussion. The correct identity of the respondent was brought to me as a preliminary issue. It was accepted by all parties that 'Predator Nutrition Online Limited' is the correct employer for this claim – that being the entity on the employment contract.

3. The respondent did not consent to the name of the respondent in these proceedings being amended, as would normally occur in these circumstances. Instead, Ms Kaur submitted that the claimant and her representative had made a mistake and should not benefit from being able to correct that mistake now. In her view, the claim against Predator Nutrition Limited should be struck out if not withdrawn, and the claim against Predator Nutrition Online Limited should be dismissed as out of time.

4. Despite these submissions, the respondent was prepared to deal with the claim in the hearing allocated. It had produced a bundle in the name of Predator Nutrition Online Limited, under this claim number, and had submitted witness evidence. It seemed to me that the parties were willing and prepared to deal with the case today and so I was initially surprised that an amendment or substitution would not be agreed.

5. Rule 34 of the Employment Tribunals Rules of Procedure 2013 give an employment judge the power to, on their own initiative, add a party to proceedings if (1) it appears that there are issues between [the added party] and an existing party which fall within the jurisdiction of the tribunal, and (2) it is considered in the interests of justice for those issues to be determined. A party can also be removed if it is apparent that they were included by mistake.

6. The parties agreed that the claimant was employed by Predator Nutrition Online Limited. There is an issue between them about the length of notice pay required by the employment contract. The parties were prepared to deal with those issues in the hearing on the day and no further time or expense was required to hear those issues. It was apparent that the claimant had issued proceedings against Predator Nutrition Limited by mistake in circumstances where that mistake appears to have been easily made. I consider that it is in the interests of justice, in those circumstances, for a substitution to be made.

7. Consequently, I ordered that Predator Nutrition Online Limited should be added as a respondent in this case, and Predator Nutrition Limited removed. The respondent was therefore substituted and the parties were immediately able to move on and produce evidence to argue their cases – as they had been prepared to do from the start of the hearing.

Background

8. The respondent supplies body building and sports supplements, sold through an online platform. The claimant began employment with the respondent as a customer service assistant on 5 July 2021. On 1 November 2021, the claimant's job title and role was changed to 'Purchasing Manager'. The respondent says that her performance was unsatisfactory in this role, and she was notified of dismissal with one month's notice on 15 March 2022.

9. There is only one issue in dispute in this case – what notice period was operational between the parties when the claimant was given notice by the respondent on 16 March 2022? The claimant says she is entitled to two months' notice because this is what her contract says. The respondent says that the claimant was given a new contract following a change in job role, which she agreed to based on her conduct, and which afforded her only one month's notice (which was paid).

10. To resolve this dispute, I heard evidence from the claimant in support of her own case. In support of the respondent's case, I heard evidence from Mr E Sattar (Head of Operations) and Ms M Griffin (Office Manager). Ms Griffin's statement was only filed and served on the morning of the hearing but the claimant was content to allow it to form part of the evidence for the hearing, so I allowed it in. I also had access to a bundle of documents running to 33 pages. Page references in this judgment are references to the pages of that bundle.

Relevant facts

11. The relevant facts as I find them are as outlined below. These facts are found on the balance of probabilities which means that, on the evidence before me, I consider that these facts are more likely than unlikely to reflect what happened between the parties. Where there is any conflict in the evidence, I explain at the material point which evidence I prefer and why.

12. The claimant commenced employment on 5 July 2021 as a customer service assistant. A contract of employment was at pages 1 to 10, dated 7 September 2020 on its cover page but 7 September 2021 elsewhere. It was signed by the claimant on 7 September 2021 and this is the date the parties agree that the written contract was concluded. It contained the following relevant terms:-

    12.1. Clause 14.1 –

    "The period of written notice required to be given by either party to terminate this agreement shall be 2 months."

    12.2. Signature clause –

    "I Kamila Klaudia Czech Abousteit agree to the terms of this agreement and Schedule 1 and understand that the agreement constitute [sic] the main terms of my contract of employment within the company".

13. The respondent witnesses contend, and I accept, that no other employees on the same grade/level as the claimant would have 2 months' notice required by their employment contract.

14. The claimant applied through an internal route to transition into the position of 'purchasing manager'. She was successful and moved into that role from 1 November 2021. There was no uplift in pay despite the apparent promotion and there was a transition period where the claimant was fulfilling both roles. It is common ground that the claimant was not initially provided with any update to her employment contract to reflect the change in title or role.

15. The claimant contends that she never received an updated employment contract and that these terms were the only ones in force when she was given notice to terminate her contract.

16. The respondent began to perceive issues with the claimant's performance in January 2022. There is an email chain between the claimant and the respondent's Mr Hoare from pages 23 to 25. These are from 16 March 2022, but in them performance management steps from January and February are discussed. I am satisfied that issues were raised with the claimant in mid or late January 2022, with a review to take place on 25 February 2022 to see if there was any improvement in performance.

17. On 21 February 2022, a document bearing the title 'PNContract_KKLaudia.doc' was modified on the respondent's system. A screenshot confirming this was shared on the morning of the hearing. The respondent says that the was given this updated contract of employment, which was the same as the one shown at pages 11 to 21. That document bears the following features and relevant clauses:-

    17.1. It has "DRAFT" written in the top right hand side of every page.

    17.2. It is undated with no date of agreement inserted.

    17.3. It is not signed by either party.

    17.4. Clause 3.1 –

    "You will now be employment to work as a Purchasing Manager with effect from 1 November 2021…"

    17.5. Clause 6.1 –

    "You will continue to be paid £23,000 gross per annum…"

    17.6. Clause 14.1 -

    "… the period of written notice required to be given by either party to terminate this agreement shall be 1 months [sic]."

17.7. Clause 21.1 –

> "This agreement is in substitution for any previous contract of employment or other discussions or arrangements relating to your employment with the Company and which are deemed to have been terminated by mutual consent as from the date of this agreement."

17.8. Schedule 1 – a 28 point list of duties in the form of a job description.

17.9. Signature clause –

> "I Kamila Klaudia Czech Abousteit agree to the terms of this agreement and Schedule 1 and 2 and understand that the agreement constitute [sic] the main terms of my contract of employment within the company".

18. To support its contention that the claimant was given a copy of this document, Mr Sattar said that:

18.1. he prepared the document and gave it to the Claimant 'some time after Christmas' in a brown envelope;

18.2. he gave two other members of staff contracts in envelopes at the same time;

18.3. the claimant took the envelope away with her;

18.4. when chased about returning a signed version of it, the claimant told him that she had not had chance to look at it yet;

18.5. the claimant did not challenge that she was given only one month's notice at the time; and

18.6. the claimant gave a copy of the contract back to him after being served her notice and said that she did not need it anymore.

19. Ms Griffin also added:

19.1. she saw and heard Mr Sattar give a brown envelope to the claimant and a couple of others; and

19.2. she recalled that the claimant had mentioned it in a whatsapp group but that she could not retrieve that comment because she had left the group.

20. In relation to the last point, it then emerged that Ms Griffin was still part of that whatsapp group but she said that she had deleted it. The claimant says she made no such comments.

21. There is a direct conflict in the evidence between the parties about this central point. The claimant is adamant that she did not receive a new contract. The respondent witnesses are equally adamant that the claimant did receive a contract and, indeed, engaged in conversations about it and returned it. They cannot all be correct.

22. There are reasons to treat all three of the witnesses' evidence with some caution. The claimant has plainly been advised that she is owed a month's wages if the 'new' contract was not in force, and she seemed to me to be very focused on what the others in the office were able or unable to see or hear rather than mounting a strident defence that she had never been given a new contract. I found Mr Sattar's evidence to be extremely vague on all of the relevant detail. He could not recall really when he passed over the contract, or the context of doing that. He could not recall any substance of any discussion, or when they took place either. His witness statement did not assist in those points.

23. Ms Griffin's evidence was extremely difficult to accept. She could not recall when the contract was said to be passed to the claimant, either, and admitted that she could not be certain that what she saw was the claimant being handed a new contract at all. Ms Griffin's only point of any force was that the claimant had discussed the new contract in a whatsapp group, although she could not recall what the conversation was about. Her claim that she could not access those comments because she left the group was clearly inaccurate, and her explanation that she had deleted the group and then forgotten all about it seems unlikely to me. But there was no indication of deliberate dishonesty or a conspiracy at play either, and the claimant's representative did not uncover anything from either respondent witness in cross examination.

24. I am left, then, with two people saying that the contract was given to the claimant, and the claimant alone saying it was not. I am satisfied that a contract was prepared, even in draft form, on 21 February 2022. It seems unlikely to me that the respondent would go to the effort to prepare a new contract and then not issue it to the claimant, even in that draft form. The claimant's primary argument was that the contract from page 11 was created after the dismissal to justify only paying her one month's notice. This cannot be the case, although it does appear that the timeline would fit with the respondent shortening the notice period after deciding to dismiss her.

25. In my view, taking into account all of the evidence, I prefer the evidence of the respondent on the balance of probabilities. This means that I find the following as facts:

    25.1. Between 1 November 2021 and 21 February 2022, the claimant had meetings about her job description for the purchasing manager role;

    25.2. On 21 February 2021, the respondent prepared a draft contract for the claimant in the form shown from page 11;

25.3. The draft contract was handed to her on or shortly after 21 February 2021;

25.4. The claimant took a copy of the draft contract away; and

25.5. The claimant never returned a signed copy of the contract.

26. Mr Sattar confirmed that the respondent did not signal the claimant to the shortening of her notice period within the contract. I am satisfied that the version of the contract, in 'draft' form without any dates of agreement, is the version given to the claimant. The respondent would not provide anything but the latest version as evidence in the hearing.

27. The respondent considered that there were problems with the claimant's work. She was put through performance management steps which culminated in her dismissal.

28. In my view, it is not relevant whether or not the claimant returned a copy of the draft contract after being given notice of termination of her contract. The claimant was given the contract. There is no evidence anywhere of any express agreement, and her returning it would not assist the respondent in its case that the terms of the document were incorporated.

29. The claimant was given written notice to terminate her employment on 16 March 2022. She was told her last working day on 14 April 2022 and she did not dispute this at the time notice was given. It is clear from correspondence and from the evidence of the witnesses that the claimant was upset at having been given her notice. She felt that she had been treated unfairly. The claimant then submitted a grievance about her notice pay on 30 June 2022.

Relevant law

30. Employment contracts may be varied by agreement. Contracts may be varied unilaterally (usually by the employer) only where there is clear language allowing such an act in the circumstances which have arisen (Wandsworth Borough Council v D'Silva and another [1998] IRLR 193 CA). Where there is no such ability to unilaterally vary, variation of contract can only be concluded by agreement between the parties. Agreement to vary need not be concluded in writing, so long as the circumstances show that there has been an agreement to vary the contract (Simmonds v Dowty Seals Ltd [1978] IRLR 211 EAT).

31. An employee cannot agree to a variation if they are not aware of the change. In Cowey v Liberian Operations Ltd [1966] LR 45, the claimant was found not to have had his contractual notice period reduced from three months to one month, even though he signed a memo agreeing to the change, because he understood from a senior member of staff that the change would not actually apply to his job role. The employer was found not to have done enough, against that understanding, to draw the claimant's attention to the fact of the alteration and the intention that it should apply to him.

32. An employment contract is founded upon contractual principles just like any other, and there must be valid consideration for any variation to the contract. This can be complicated in an employment context where, for example, pay may go up according to market value even if job roles stay the same. A promise to perform an existing contract will not form valid consideration (WRN Ltd v Ayris [2008] IRLR 889 QBD), although a reduction in pay or degradation in terms may constitute valid consideration where the alternative would lead to losses of the jobs which were subject to the variation (Burke v Royal Liverpool University Hospital NHS Trust [1997] ICR 730 EAT).

33. Under Section 1 Employment Rights Act 1996, an employee is entitled to a written statement of particulars. From 6 April 2020, this is a 'day 1 right' and a document must be provided on the first day of employment. Where there is an alteration to contractual terms, including for example to job title or notice period, an employer is required to notify the employee of that change within one month of the change taking effect (Section 4(1) Employment Rights Act 1995). Where an employer remains in breach of s1 or s4 obligations at the time proceedings are issued, then the Tribunal is required to follow the instructions of Section 38 Employment Act 2022, which may lead to an additional award being given.

34. It is possible for an employment contract's terms to be varied impliedly through the conduct of the parties after a proposed or purported alteration is communicated. A court or tribunal is able to make such a finding, although this is a "course which should be adopted with great caution" (Jones v Associated Tunnelling Co Ltd [1981] IRLR 477 EAT). In that case, Browne-Wilkinson J said:

> "if the variation relates to a matter which has immediate practical application (eg the rate of pay) and the employee continues to work without objection after effect has been given to the variation (eg his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where the variation has no immediate practical effect the position is not the same".

35. Elias J considered a similar point in Solectron Scotland Ltd v Roper and ors [2004] IRLR 4, EAT. There, he said:

> "the fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change, they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with

the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct."

36. It naturally follows that, where there is no immediate practical effect to a supposed change to contractual terms, it is more difficult to establish that the change has been agreed or accepted by conduct (Aparu v Iceland Frozen Foods Plc [1996] IRLR 119 EAT). Whilst each case turns on its own circumstances, it is difficult for an employer to show that silence in response to a proposed change will mean that the change is accepted (Abrahall and Ors v Nottingham City Council and anor [2018] ICR 1425 CA).

37. Wess v Science Museum Group [2014] 10 WLUK 124 concerned variation to the notice period. In that case, HHJ Eady QC decided that the employee had consented to the change in her notice period. Although the employee had objected to a regrading of her role, she did not object to the alteration of the notice period term. When she sought to argue that the notice period was incorrect nine years after the variation, it was found that she had agreed by conduct because she had worked under those 'new' contractual terms for nine years. The Judge considered it relevant that the employee had had access to her contract for all that time, was sophisticated enough to object to some of the terms, and was for some of the nine years a Union representative who must have had cause to look at contractual terms from time to time.

Discussion and conclusions

38. The case law demonstrates that the employee having knowledge of the proposed change of term is not the same as the employee having agreed to the proposed change of term. The claimant's case is that she had no knowledge of the purported shortening of her notice period and so could not have agreed to it. I have found that she was given a copy of the employment contract, and so it is possible that she knew or should have known about the change to that term. But did the claimant agree to the change?

39. To answer the question about whether or not the notice period was impliedly agreed, I must perform an analysis through the lens of the Jones, Roper, Aparu and Abrahall decisions outlined above. Changing of a notice period is not a term which would have immediate practical application normally, although in this case the notice was given within about three weeks of the change purportedly being made. The change to this term would not be highlighted to the claimant until the moment notice is given, and even then her appreciation of the change is reliant upon her remembering that the notice used to be two months and then had been shortened to one month.

40. In submissions, the respondent agreed with me that the claimant had not signed the contract or indicated express agreement. It agreed that the document likely had 'draft' on the top of it and it agreed that the claimant's attention was not drawn to the shortening of the notice period. However, the respondent argued that the claimant not objecting to the one month's notice period is indicative of her agreeing that that

is the correct period (and therefore indicative of agreement with the term changing). In other words, the claimant continuing to work her contract is only referable to her accepting the notice period (like Roper). This argument has a certain attractiveness to it, but it does not persuade me for the following key reasons:

40.1. the claimant is plainly unsophisticated in legal matters and only asserted her rights after having the benefit of advice, which could explain the delay to object;

40.2. I believe the claimant's explanation that she thought that she was being given a short notice period because of bad performance, and she could recall instances from her contract where the notice period would be shorter; and

40.3. the claimant did not ultimately accept a shorter notice period and did object through raising a grievance and bringing this breach of contract action.

41. Consequently, in my judgment, the claimant working her one month's notice period and not raising an issue until after that is also referable to her ignorance and trust that the respondent would not curtail her rights wrongly. The claimant continuing to work is not referable only to agreement with the contractual change. Instead, I consider that the claimant's case is more similar to the findings in Abrahall. No efforts are made to draw the claimant's attention to the alteration to her notice period. Where other alterations are signalled, with wording such as "you will now be employed as" and "you will continue to be paid", there is no signalling at the 'new' clause 14.1.

42. Further, the respondent's own evidence indicates that the claimant had not read the new contract. Mr Sattar said that the claimant had not had time to read it, and that the next he knew of the contract, the claimant was returning it to him unsigned. As set down by Cowey, the claimant cannot have agreed to the shortening of her contractual notice period if she had not agreed to it. The very act of returning the contract unsigned, after the notice was given, would be an even clearer indication that the claimant had not agreed to the change. If she did indeed say that the document was not necessary, then she plainly did not see that it had contractual force because she had not agreed to the terms within it.

43. I have considered whether Wess assists the respondent with its case. In my view, it does not. In that case, the employee was sophisticated with employment contracts and had worked under the disputed terms for nine years. Here, the claimant had been given a contract with a new term, not highlighted to her, and only had the document in her possession for no more than three weeks before she was given notice. It is doubtful, to my mind, that the claimant would have been given sufficient notice of the change of terms and conditions even if it had been highlighted.

44. Taking the above considerations together, I conclude that the claimant did not agree to the shortening of her notice period from two months to one month. It is common ground that there was no express agreement. I can find no indication that there was an implied agreement either. The claimant did not accept the shorter term by her

conduct. For that reason, the original two months' notice period continued to apply when the claimant was given her notice. She is owed an additional month's pay.

45. The respondent sought to argue that the claimant must have known there would be a new contract when she changed roles in 1 November 2021 because the job title in her old contract would not apply. This is not a strong point – the claimant's contract continued on its old terms in absence of new ones. Matters such as job title and role are clearly capable of being varied by oral agreement, as would have happened here. Anything else not discussed, such as the length of notice period, would not change. The respondent had the responsibility to update the claimant's written employment of particulars. It did not do so on time, and so it does not seem fair of it to try to use this against the claimant in these circumstances.

46. Finally, as I have deliberated this judgment, it crossed my mind that I cannot easily identify any consideration for the shortening of the claimant's notice period in February 2022. The claimant moved into her role in November 2021. The job title change was effective contractually from that agreed date notwithstanding the lack of writing on the point. The change of duties were also settled – and must have been, because the claimant was being judged to not be performing to those standards before 21 February 2022. The claimant's salary changed the same. What, then, is the claimant offering as consideration for the shortening of the notice period? It seems to me that the answer there might be 'nothing', particularly because the length of notice period has no impact at all on the respondent business or the claimant's job role during normal working. This argument was not pursued in either direction in the hearing and so it does not inform the outcome of the case. It is, though, a point that should be considered should anyone look at this decision again.

47. I do note that the claimant was not provided with a written statement of particulars upon the initial commencement of her employment, there being over two months between her starting her role and the provision of a contract of employment. The respondent has breached s1 Employment Rights Act 1996, but there is no award for this because a contract was given for that initial period (if late). I also note that the claimant performed a new role from November 2021, but that a new contract was not provided capturing that change until a time in excess of one month following it. At the very earliest, the notification was given on 21 February 2021. The respondent has breached s4(1) Employment Rights Act 1996 but, as I have found that a contract was given to the claimant (even if not agreed), no additional award is made under s38 Employment Act 2002.

Employment Judge Fredericks

22 December 2022

Note: Full reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless requested in writing within 14 days of the sending of this judgment.