EMPLOYMENT TRIBUNALS

Claimant: **Mr S Ferryros**

Respondent: **Arapina Bakery Ltd**

HELD: London South ET (by CVP) ON: 11 November 2022 & 7 February 2023

BEFORE: Employment Judge McCluskey

REPRESENTATION

Claimant: **In person**
Respondent: **Mr P Wise-Walsh, Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(i)The unfair dismissal complaint is dismissed, the Tribunal having no jurisdiction to hear the complaint.

(ii)The breach of contract complaints are not well founded and are dismissed.

REASONS

Claims and issues

1. The claimant brought claims for unfair dismissal and breach of contract. The claimant wrote to the Tribunal on 23 June 2022 to clarify that he did not wish to pursue an unfair dismissal claim. He clarified in that correspondence that he was bringing a wrongful dismissal claim because he did not receive any notice pay after being dismissed with immediate effect (page 42 of bundle).

2. At the outset of the hearing the Tribunal discussed the claimant's schedule of loss with parties. The claimant clarified that he was claiming damages for breach of contract following his dismissal, for the period 22 February – 28 February 2022. The claimant got a new job with effect from 1 March 2022 and does not seek damages after 28 February 2022. The claimant clarified that he

was also claiming damages for breach of contract in the period 7 February – 21 February 2022 when he was paid for part-time working hours rather than full-time working hours.

3. It was agreed with parties that the issues to be determined by the Tribunal were (i) whether the claimant was entitled to damages for breach of contract following his dismissal on 22 February 2022 and, if so, how much (the respondent says the reason for dismissal was gross misconduct such that the claimant is not entitled to damages) (ii) whether the claimant was entitled to damages for breach of contract in the period 7 February- 21 February 2022 and, if so, how much (the respondent says it had lawfully given notice to change the claimant's hours to part time working).

Procedure, documents and evidence heard

4. The Tribunal heard evidence from the claimant and on his behalf, from Ms Oleta Haffner, Pastry Chef with the respondent. The Tribunal heard from the following witnesses on behalf of the respondent: Ms Michaela Pontiki, owner and General Manager of the respondent; Ms Sun Young Hong, Operations Manager of the respondent; and Mr Ian Chambers, external business consultant to the respondent.

5. There was a tribunal bundle of approximately 86 pages. The respondent also provided written closing submissions.

6. The final hearing was listed for half a day on 11 November 2022. There was not enough time to hear all the witness evidence. The case was listed for a further one day on 7 February 2023, having regard to availability of parties and the Tribunal. The hearing concluded at the end of the day on 7 February 2023 and judgment was reserved. The Tribunal apologises for the time taken to issue this reserved judgment and reasons.

Fact-findings

7. The respondent is a bakery. It employs approximately 11 employees. The claimant started his employment with the respondent on 11 October 2020. He was engaged as a part time marketing associate.

8. On or around 1 March 2021 the claimant's hours of work increased. He became a full-time marketing associate, working 5 days a week Monday - Friday.

The employment contract

9. On 26 February 2021 the claimant signed an employment contract with the respondent ("the employment contract") (page 65).

10. The employment contract provided at clause 14.1 that "*In the case of theft or an action jeopardising the company's assets, performance, customer's [sic] service, image, values and brand awareness the company reserves the right to terminate the contract with immediate effect and involve the relevant parties for further investigation*" (page 64).

11. The employment contract provided at clause 14.2 that "*For the 2 years of employment, the employee needs to give 2 months of notice period. More than*

2 years the employee is obliged to give 3 months notice to the company" (page 64)

12. The employment contract provided at clause 15.1 that "*The disciplinary and grievance policies are not contractual in effect and do not form part of the employee's contract of employmen*t".

13. The employment contract provided at clause 2.3 that during the three months' probationary period the applicable notice periods were one week's notice from the respondent to the claimant and one month from the claimant to the respondent. This had been crossed out by the claimant at the time of signing the employment contract. The clause was not applicable as the claimant had already worked for more than three months with the respondent.

14. The employment contract was silent as to the notice period which the respondent required to give to the claimant to terminate his employment once the probationary period was completed.

Claimant's performance

15. From around March 2021 when he became full-time, the claimant started making more errors in his work. Some social media posts had typing errors in them (pages 67 – 68). There were errors in the design and printing of marketing materials (pages 69 –70). These types of error were ongoing. Ms Pontiki, owner and General Manager of the respondent; was concerned about the adverse effect of the claimant's errors on the respondent and its brand. She asked Mr Ian Chambers, external business consultant to the respondent to help her check the claimant's work.

16. Mr Chambers monitored the claimant's work. He corrected errors made by the claimant on social media and in marketing materials. He observed that the social media posts were not generating much engagement. In around October 2021 the claimant met with the claimant to discuss her concerns, which had been confirmed to her by Mr Chambers. The claimant was dismissive of her concerns.

17. On or around 25 November 2021 Ms Pontiki met with the claimant. Ms Assunta Cucca, an external business consultant was also in attendance. Ms Pontiki asked the claimant to create a marketing plan. Ms Pontiki and Ms Assunta encouraged the claimant to revise and improve the plan. The claimant missed deadlines set by Ms Pontiki and did not create a marketing plan which Ms Pontiki or Ms Assunta considered to be of an acceptable standard.

18. By the end of 2021 and into January 2022 the errors in social media posts and marketing materials were continuing (page76 – 77).

24 January 2022 meeting

19. On Monday 24 January 2022 Ms Pontiki invited the claimant to attend a meeting with her.

20. Ms Sun Young Hong, Operations Manager was also in attendance at this meeting. Ms Pontiki told the claimant that she intended to move the claimant back to part time hours. She told the claimant his new working hours would be

on Mondays, Wednesdays and Fridays. She gave the claimant 2 weeks' notice of the change. She confirmed this in writing to the claimant by email on the same date (page 77). She told the claimant that she would provide him with a new brief to fit his 3 days of work, a scaled down version of what he had been producing on the 5 days of work (page 77).

After 24 January 2022 meeting

21. The claimant worked on a full-time basis for two weeks until Friday 4 February 2022.

22. The claimant did not agree to working 3 days only after this date. He insisted that he work for 2 months before the change was implemented. The respondent did not agree.

23. During the week beginning 7 February 2022 the claimant was absent due to illness (page 60). He received statutory sick pay.

24. During the week beginning 14 February 2022 the claimant worked for 3 days. This was due to issues with Ms Pontiki's laptop. The claimant was paid for 3 days.

25. On 18 February 2022 the claimant sent Ms Pontiki an email (page 84). The claimant said that his employment contract with the respondent was being terminated with the change to part time hours. He said he was entitled to 2 months' notice of the change. He relied on clause 14.2 of the employment contract. He said "*To be clear, I will continue to work my two months' notice period...*".

21 February 2022 meeting

26. On Monday 21 February 2022 Ms Pontiki met with the claimant in the bakery. During the meeting the claimant shouted at the claimant in an abusive manner within earshot of customers and staff.

27. The claimant said that: he would remain as a full time employee for 2 months from the meeting on 24 January 2022; he intended to turn up for work every day as if he was a full-time employee; he would force entry into the respondent's premises if necessary to ensure that he turned up for work every day; he would remain in the respondent's premises and sleep there if necessary; he considered that the other staff members were corrupt.

28. Ms Hong was sitting nearby in the bakery during the meeting. She did not hear what was being said but could hear the claimant's fury.

29. Ms Pontiki felt threatened, vulnerable and unsafe during the meeting.

30. At the end of the meeting Ms Pontiki told the claimant that he was dismissed with immediate effect. She told him she couldn't have someone with "that energy" in her company.

31. After the meeting Ms Pontiki asked the claimant to stay at work for the rest of the day to do a handover of his work to her and Ms Hong. The claimant did so.

22 February 2022 dismissal email

32. The respondent terminated the claimant's employment with immediate effect on 22 February 2022 by sending an email to him (page 85). She said "*The turn that our conversation took yesterday, due to you not accepting the company's decision was mentally and physically threatening to say the least. I am sure you can appreciate that I nor any of our employees is allowed to be bullied, under no circumstances whatsoever. Additionally, I feel that after many warnings over emails and an additional verbal warning about typos on public digital platforms, our newsletters, wrong wording on posts, and wrong positioning of posts our brand image and brand image has been significantly compromised in public. Therefore it is unfortunate that we will have to terminate your employment with immediate effec*t*...*"

Observations on the evidence

33. The content of what was said by the claimant at the meeting on 21 February 2022, and how it was said, is disputed.

Demeanour on 22 February 2022

34. In terms of how the claimant spoke to Ms Pontiki, he denies that he raised his voice or that he was shouting. He denied that he was furious. The evidence of Ms Pontiki is that the claimant was shouting at her. The evidence of Ms Hong, who was sitting nearby, is that she could hear the fury of the claimant.

35. The Tribunal was satisfied on balance that the claimant was shouting and was furious in the meeting. This was witnessed by Ms Hong. Further, it was clear that the claimant was unhappy about the change to part time working, he had taken legal advice about the matter and had emailed Ms Pontiki on 18 February 2022 to say that he did not agree with her actions. Ms Pontiki was telling him in the meeting that he was now working part time hours and she would not change her mind. The wishes of the claimant were not being met and the Tribunal is satisfied that on balance the evidence of Ms Pontiki and Ms Hong about the claimant shouting is more likely than not.

36. In the claimant's evidence in chief, he says that at the end of the meeting Ms Pontiki dismissed him as she couldn't have someone with "that energy" in her company. This also supports the evidence of Ms Pontiki and Ms Hong that the claimant's demeanour, in terms of how he was speaking to Ms Pontiki, was not "calm and extremely professional" as alleged by the claimant.

What was said on 22 February 2022

37. In terms of what was said by the claimant at the meeting, certain key aspects of this are disputed by the claimant. Ms Pontiki said that the claimant said: he would remain as a full time employee for 2 months from the meeting on 24 January 2022; he intended to turn up for work every day as if he was a full-time employee; he would force entry into the respondent's premises if necessary to ensure that he turned up for work every day; he would remain in the respondent's premises and sleep there if necessary; he considered that the other staff members were corrupt.

38. The claimant in his evidence in chief says that he said in the meeting that he would remain as a full-time employee for 2 months from the meeting on 24 January 2022. He said, "*From there she said that I'm currently working part*

time, which I respectfully denied as my contract says that my notice period is two months, and I will work under protest as full time until the end of my probation period". The reference to his probation period is not correct as the claimant was not working a probation period. It is not disputed therefore that the claimant said in the meeting that he will work under protest for two months from when he was first given notice of change of hours on 24 January 2022. This is also supported by the claimant's email of 18 February 2022 where he says, "T*o be clear, I will continue to work my two months' notice period*..." (page 84)

39. The claimant denies saying that (ii) he intended to turn up for work every day as if he was a full-time employee; (iii) he would force entry into the respondent's premises if necessary to ensure that he turned up for work every day; and (iv) he would remain in the respondent's premises and sleep there if necessary.

40. On balance the Tribunal is satisfied that the claimant did say each of those statements to Ms Pontiki. The Tribunal is satisfied that as the claimant had said to Ms Pontiki that he would continue to work full time hours under protest, it is likely that there would have been a conversation between them about how the claimant intended to do this. Ms Pontiki says that there was such a conversation, and those are the statements which he made. The claimant simply denied that he made those statements. Thie claimant did not offer any evidence about what he did say, beyond that he would work under protest. As stated, it seems unlikely that the conversation would have stopped there. It would have been a legitimate question for Ms Pontiki to have asked, ie: how he would work full time under protest. The Tribunal accepts, on balance, that she asked that question and that in response the claimant made each of those statements.

41. As already stated, in the claimant's evidence in chief, Ms Pontiki told the claimant he was dismissed with immediate effect at the end of the meeting as she couldn't have someone with "that energy" in her company. The Tribunal concluded that this also supported the evidence of Ms Pontiki about what was said, and that the claimant was not "calm and extremely professional" as alleged by him.

42. The claimant relied on the fact that Ms Pontiki had asked him to stay at work for the rest of the day, to support his position that he had not made these statements. In the claimant's evidence in chief however he says that at the end of the meeting he was dismissed with immediate effect. When he was packing his belongings to leave, Ms Pontiki asked him to stay to prepare a handover of his work with her and Ms Hong. The Tribunal did not consider that being asked to stay for the rest of the day to prepare a handover work was supportive of the claimant's position that he had not said (ii) he intended to turn up for work every day as if he was a full-time employee; (iii) he would force entry into the respondent's premises if necessary to ensure that he turned up for work every day; and (iv) he would remain in the respondent's premises and sleep there if necessary.

43. The claimant relied on a text message Ms Pontiki sent to the claimant on 22 February 2022. The text message was not in the bundle, despite standard Tribunal case management orders for exchange of documents having been

made. The claimant said that the text message included a sentence to the effect that "we need to think about whether we can continue". The respondent did not object to this evidence. Mr Wise –Walsh put it to the claimant that this was consistent with the evidence of Ms Pontiki about the claimant's demeanour. The claimant denied that was the case. The Tribunal did not agree that such a sentence supported the claimant's position that he had behaved calmly and professionally in the meeting. On the contrary, it pointed to something serious having happened.

44. Ms Pontiki's evidence was the claimant said in the meeting that the other staff members were corrupt. The claimant denied this. In support of his denial, he said that he had spoken to other staff members later that day. The Tribunal was satisfied that on balance the claimant said this. There had been previous conversations with the claimant about his performance, including based on reports from other staff members. It was entirely plausible that the claimant could make accusations about other staff to Ms Pontiki when furious, but still speak to staff members later that day. On balance, the Tribunal accepted that whilst the claimant was furious, he had said that other staff members were corrupt.

How Ms Pontiki felt

45. Ms Pontiki's evidence was that she felt threatened, vulnerable and unsafe by the claimant's conduct during the meeting. The Tribunal has found that the claimant was shouting and behaving in a furious manner towards Ms Pontiki. The Tribunal has found that the claimant said to Ms Pontiki he intended to turn up for work every day as if he was a full-time employee; he would force entry into the respondent's premises if necessary to ensure that he turned up for work every day; he would remain in the respondent's premises and sleep there if necessary.

46. Having made these findings in fact about the claimant's conduct and demeanour, the Tribunal is satisfied on balance that Ms Pontiki felt threatened, vulnerable and unsafe during the meeting. The Tribunal is satisfied that was the case, even although Ms Pontiki asked the claimant to prepare a handover with her, with Ms Hong also present, after the meeting.

47. How Ms Pontiki felt during the meeting is further supported by her email of dismissal on 22 February 2022 where she said that the conduct of the claimant was "mentally and physically threatening" and bullying.

Law

48. Section 86 Employment Rights Act 1996 (ERA) gives employees the right to certain minimum periods of notice on termination by the employer. The statutory provision operates to vary any non-compliant contract of employment. Section 86(1) provides that the *notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—(a) is not less than one week's notice if his period of continuous employment is less than two years.*

49. Where it is essential to imply some term into the contract of employment the court does not have to be satisfied that the parties, if asked, would in fact have agreed the term before entering into the contract. The court merely has to be

satisfied that the implied term is one which the parties would probably have agreed if they were being reasonable. Thus, for the 'officious bystander' test, as well as the business efficacy test, the courts have introduced an element of objectivity/reasonableness (**Courtaulds Northern Spinning Ltd v Sibson and anor 1988 ICR 451, CA**)

50. In a wrongful dismissal claim the Tribunal is not concerned with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (**Enable Care and Home Support Ltd v Pearson EAT 0366/09**).

51. Where the employee has committed a repudiatory breach of contract, an employer has a choice whether to accept the repudiatory breach or whether to affirm the contract. Where the employer decides to terminate the contract, then they have accepted the repudiatory breach by the employee. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal. Repudiatory breach is often looked at by the courts as akin to gross misconduct.

52. In determining whether there has been a repudiatory breach, the question is whether the conduct "*so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment*" (**Neary v Dean of Westminster [1999] IRLR 288**)

53. **Neary** was considered more recently by the Court of Appeal in A**desokan v Sainsbury's Supermarkets Ltd [2017] I.C.R. 590,** at paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that some deliberate actions which poison the relationship obviously fall into the category of gross misconduct.

54. Gross misconduct means misconduct so serious that it breaches the contract of employment in such a way as to relieve the other party to the contract of being bound by it. Most such terms are implied. A classic formulation of the implied term of confidence and trust between employer and employee was set out in **Woods v PWM Car Services (Peterborough) Ltd 1981 IRLR 347**, as approved in **Malik v BCCI (1997) IRLR 468** that a party to the contract must not "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

Submissions

55. The claimant made brief oral submissions. He said that he did not agree to the change in his working hours from full time to part time. He said that the respondent had data which showed that marketing activities were going well. This had not been made available. He said that he had responded to questions asked of him in the Tribunal to the best of his knowledge as had his witness Ms Haffner.

56. Mr Wise-Walsh made oral submissions supplemented by written submissions. In summary he said as follows:

57. The respondent was entitled to summarily dismiss the claimant on 22 February 2022 because of his behaviour the previous day which constituted gross misconduct and/or the respondent was entitled to summarily dismiss him because of his cumulative serious incompetence (a series of acts amounting to a breach of trust and confidence and gross misconduct). Paragraph 14.1 of the claimant's contract of employment entitled the respondent to terminate the claimant's employment "*14.1 In case of theft or an action jeopardising the company's assets, performance, customer's service [sic], image, values and brand awareness the Company reserves the right to terminate the contract with immediate effect and involve the relevant parties for further investigations.".*

58. On 21 February 2022, the claimant acted entirely unreasonably. As part of the conduct, he accused Ms Pontiki and other members of staff of being "corrupt". The respondent dismissed the claimant with a reasoned email sent on 22 February 2022. That email expressly referred to paragraph 14.1. The claimant was left in no doubt as to the dismissal and the reasons for it.

59. In those circumstances, there was no entitlement to notice pay. There was no wrongful dismissal. The Tribunal is therefore invited to dismiss the claim. If the Tribunal finds that the claimant did not commit gross misconduct, damages for the period after 22 February 2022 should be limited to 1 week.

60. The claimant's contract of employment was silent as to the termination notice period that the employer had to provide to the employee. The Tribunal is therefore entitled to imply the statutory notice period into the contract of employment. As the claimant had been working between one month and 2 years, the statutory period of notice is 1 week. This is relevant to the change of hours on 24 January 2022. The claimant was entitled to 1 week of notice of the change but received two weeks. There was no breach of contract.

Conclusions

61. The Tribunal has made findings in fact only as necessary to determine the issues identified. There is no unfair dismissal complaint. It is a wrongful dismissal complaint. For the purposes of the wrongful dismissal complaint, the Tribunal considered its own view and made findings in fact about what it determined, on balance, to have happened.

22 February 2022 dismissal

62. The Tribunal directed itself to the question - was the claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the respondent to summarily terminate the contract on 22 February 2022.

63. The Tribunal has made findings in fact about what it determined on balance to have happened on 21 February 2022. Those findings in summary were that: the claimant shouted at Ms Pontiki in an abusive manner within earshot of customer and staff, saying that he would remain as a full time employee for 2 months from the meeting on 24 January 2022; he intended to turn up for work every day as if he was a full-time employee; he would force entry into the

respondent's premises if necessary to ensure that he turned up for work every day; he would remain in the respondent's premises and sleep there if necessary; he considered that the other staff members were corrupt. Ms Pontiki felt threatened, vulnerable and unsafe by the claimant's conduct during the meeting.

64. Having made these findings in fact, the Tribunal concluded that the claimant has, without reasonable and proper cause, conducted himself in a manner calculated to destroy or seriously damage the relationship of confidence and trust between him and the respondent. The Tribunal accepts that the claimant felt aggrieved that his hours of work had been reduced. That did not entitle him to say the things which he said and in the way that he did so. Those actions were deliberate. They had the effect of making Ms Pontiki feel threatened, vulnerable and unsafe and of poisoning the relationship between the parties. Put another way the things which the claimant said and the way he did so amounted to gross misconduct.

65. In those circumstances, the Tribunal is satisfied that his actions on 21 February 2022 amounted to a repudiatory breach of his contract of employment, which the respondent accepted by dismissing him on 22 February 2022, and that he was not wrongfully dismissed.

66. For completeness, the claimant in submissions said that the respondent had data which showed that marketing activities were going well. This had not been made available by the respondent. The Tribunal accepts that there is likely to be data which shows positive marketing activities. That does not mean that Ms Pontiki and Mr Chambers did not have concerns about the claimant's performance. The Tribunal accepted that they did so and accepted that there were incidences of poor performance by the claimant as set out in the findings in fact. The Tribunal has not, however, found that the performance of the claimant amounted to a repudiatory breach of his contract of employment, entitling the respondent to summarily dismiss him. Rather as already stated, it was his actions on 21 February 2022 alone upon which the Tribunal reached its decision.

67. The claim of wrongful dismissal on 22 February 2022 is accordingly dismissed.

Prior to 22 February 2022

68. The claimant asserts that he was entitled to two months' notice to change his contractual terms from five days to three days' work per week. He asserts that the notice of change of hours, to which he did not agree, is a termination of employment under his old contract and re-engagement on a new contract.

69. The claimant's contract of employment is silent as to the notice of termination of employment to be given by the respondent to the claimant. The notice period from the claimant to the respondent is two months. The claimant asserts that the same notice period of two months from the respondent to the claimant should be implied into the contract. The practical effect of this for the purposes of this claim, in so far as quantified by the claimant, is for two days of pay in the week beginning 14 February 2022 when he worked three days that week rather than five days.

70. The Tribunal accepted that the claimant did not agree to the reduction in his hours. Whilst he may not have said so straight away, he was clear in his email of 18 February 2022 that he did not agree to the change.

71. The Tribunal accepted that the change in hours from five days per week to three days per week and the consequent reduction and change in duties did amount to radically different terms and there was therefore a termination of the claimant's old (full time) employment contract. The question arises therefore as to notice period to which the claimant was entitled to bring the old contract to an end.

72. Mr Wise-Walsh submitted that the notice period to be implied into the claimant's old contract was the statutory notice period of one week, as set out in section 86 of ERA. The claimant asserts that the term to be implied is two months.

73. The Tribunal directed itself to the decision of **Courtaulds Northern Spinning Ltd v Sibson and another 1988 ICR 451, CA**. There the Court of Appeal said that where it is essential to imply some term into the contract of employment the court does not have to be satisfied that the parties, if asked, would in fact have agreed the term before entering into the contract. The court merely has to be satisfied that the implied term is one which the parties would probably have agreed if they were being reasonable. Thus, for the 'officious bystander' test, as well as the business efficacy test, the courts have introduced an element of objectivity/reasonableness.

74. The Tribunal noted that the employment contact contained a clause setting out notice periods in the three months' probationary period. This had been crossed out by the claimant at the time of signing the contract as it was not applicable. The notice periods in the probationary period were one week's notice from the respondent to the claimant and one month from the claimant to the respondent.

75. The Tribunal noted that the notice period required to be given by the respondent to the claimant was shorter than that from the claimant to the respondent, during the probationary period. The Tribunal noted that the notice period from the claimant to the respondent increased from one month to two months, once the probationary period was completed. The Tribunal concluded that at the time of entering into the contract the parties would, if they were being reasonable, probably have agreed to an increase in the notice period from the respondent to the claimant from one week to two weeks, after the probationary period was completed. In other words, a doubliing of both notice periods when the probationary period was completed. The Tribunal observed that a period of two weeks' notice was double the statutory minimum notice required by section 86 ERA, during the first two years of continuous service.

76. The Tribunal therefore determined that the notice period from the respondent to be implied into the contract of employment was two weeks. This was the notice which had been given to the claimant to reduce his hours of work. Accordingly, the Tribunal was satisfied that there had been no breach of contract by the respondent prior to 22 February 2022.

77. The claim of wrongful dismissal on the change of contract effective from 14 February 2022 is accordingly dismissed.

Employment Judge McCluskey

Date: 10 April 2023

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