# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr S Rider**

**Respondent:** **Vector Resourcing Ltd**

**Heard at:** **London South (via video (CVP)** **On:** **12 July 2023**

**Before:** **Employment Judge Leith**

**Representation**
Claimant: In person
Respondent: Miss Woolford (Commercial Director)

**JUDGMENT** having been sent to the parties on 19 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

Issues

1. The claimant brings a complaint of breach of contract, in respect of his notice period.

2. I discussed the issues with the parties at the beginning of the hearing. It was agreed that the issues for the Tribunal to determine were as follows:

    a. Was the claimant entitled to be paid for his notice period following his resignation on 30 November 2022?
    b. If so, it was common ground that his notice period was 3 months, and he was not paid for it.
    c. What damages are therefore due to the claimant in respect of his notice period?

Procedure, documents and evidence heard

3. I heard evidence from the claimant, Mrs Medway (Managing Director of the Respondent), and Miss Woolford (Commercial Director of the Respondent)

4. The parties had exchanged documents in accordance with the Tribunal's directions. Mrs Medway and Miss Woolford had also prepared witness statements, which had been sent to the Tribunal but not to the claimant.

5. I gave the claimant some time at the start of the hearing to read the statements. He confirmed thereafter that he was happy to proceed with the hearing. The claimant had prepared a paginated bundle of documents numbering 176 pages, which had not been sent to the respondent (although they had seen the documents contained within it). The respondent confirmed that they were happy to proceed having been given a short period of time to familiarise themselves with the layout of the bundle. In addition to the bundle, I had before me some further documents which had been disclosed by the respondent but were not included in the bundle.

6. After hearing evidence, I had the benefit of short submissions from Miss Woolford on behalf of the respondent, and from the claimant.

7. In coming to my decision, I have considered all of the evidence before me, whether or not I expressly refer to it in this judgement.

Law

8. The terms of a contract of employment may be varied by the parties by express agreement. Such agreement may be reached orally or in writing. An agreement to vary a contract must by supported by consideration.

9. A term may be implied into an employment contract by custom and practice if such a term is regularly adopted. The test for implication of a term by custom and practice is that it must be reasonable, notorious and certain (*Devonald v Rosser & Sons* [1906] 2 KB 728)

10. A contract must be terminated in accordance with its contractual provisions. Where a contract provides that it can only be terminated in notice, that notice must be given by the party seeking to terminate it.

11. In respect of damages for breach of contract, the following principles apply:

    a. If an employee was contractually entitled to a bonus or commission, the court will estimate what he would have received during the damages period and include it in the award (*Addis v Gramophone Co Ltd* [1909] AC 488).
    b. The tribunal will not make awards for discretionary bonus or commission, even if the employee had a reasonable expectation that it would be paid (*Lavarack v Woods of Colchester* [1967] 1 QB 278 (CA))
    c. The Tribunal can compensate for fringe benefits, but only for the value or use of those to the employee personally.
    d. Employees are under a general duty to mitigate losses. Any sums earned during the damages period must be deducted from the award of damages.

12. The burden of proof in showing a breach of contract is on the claimant. The burden of proof in showing a failure to mitigate loss is on the respondent. In each case, the standard is the usual civil standard of balance of probabilities.

Facts

13. The claimant was employed by the respondent as a Senior Recruitment Consultant from 2 April 2007. The claimant's contract of employment was in evidence before me. The contract made express provision for termination on notice. Either party could terminate the contract on giving three months' notice. The contract provided that the respondent could make a payment in lieu of notice at its sole discretion. It also provided that the respondent could put the claimant on garden leave, again at its sole discretion.

14. The claimant's employment contract contained restrictive covenants. I do not need to deal with the substance of those restrictions.

15. On 30 November 2022 at 8.38am, the claimant emailed the respondent's Managing Director, Mrs Medway, resigning from his post. He purported to give three months' notice. The claimant had secured an alternative role which he intended to take up after his resignation (although he did not refer to this in his resignation email).

16. Mrs Medway emailed the claimant at 8.48am the same morning asking him to remain at home. Mrs Medway's evidence was that she wanted the claimant to remain at home until either she or Miss Woolford, the Commercial Director, had had the opportunity to speak to him. Her evidence was that this was in order to avoid any disruption in the office.

17. Notwithstanding Mrs Medway's email, the claimant attended the respondent's head office that morning. He returned all of his home working equipment. He additionally gave the respondent a business handover document. The claimant was not asked to do so by Mrs Medway, or anyone else. His evidence was that he did so because his understanding was that every senior consultant who had left the respondent previously had been required to leave site immediately and had not worked any further. Mrs Medway, in her evidence, disagreed with that contention. Her evidence was that over the 27 years that the respondent has been trading, employees have left under a number of different circumstances. Her evidence was that some had gardening leave, some worked their notice, some did not work their notice, and some left immediately. I will deal with this point in my conclusions.

18. Miss Woolford emailed the claimant noting that he had returned his equipment and asking when he planned to return his company car. The claimant responded that he would like to keep the car until he could find a

suitable replacement, and asked if there was "any flexibility on his gardening leave".

19. Some correspondence then followed regarding the new role the claimant intended to take, and the effect of his restrictive covenants upon this. The claimant indicated that he planned to start his new role in early January 2023.

20. Later that afternoon the claimant spoke to Miss Woolford. A transcript of that call was in evidence. In the call:

    a. Miss Woolford indicated that Mrs Medway had not instructed the claimant to take garden leave and had assumed that he would work out his notice.
    b. The claimant explained that, when Mrs Medway told him to go home, he had assumed that that was what she had meant.
    c. There was some discussion regarding the claimant's restrictive covenant. The claimant explained that he had anticipated that he would serve out three months on garden leave, then have a further three months during which he was covered by his restrictive covenant.
    d. The conversation then returned to the claimant's notice period. Miss Woolford indicated that she understood the respondent's position to be that they would not pay the claimant for the notice period if he did not work it. The claimant said that he had not at any point said that he would not work notice or did not want to do so.
    e. Miss Woolford asked the claimant if he would be willing to work the notice if Mrs Medway required him to do so. The claimant responded that he hadn't even thought that it would be an option to consider. Miss Woolford then asked claimant directly if he would be willing to serve three months' notice. The claimant responded "I mean, if I'm honest, no, not for three months. If you wanted to do it for, if you wanted me to do it through December and um, and then I have the ability to, to leave at the end of December to then start at the new company in January then that's why I would consider doing. But whether that's the best use of my time, I'm not so sure".

21. On 1 December 2022, Miss Woolford emailed the claimant confirming the outcome of their conversation the previous day. The email started by saying this:

> "Our view from the actions taken by you yesterday is that you arrived at the Hartfield office with your equipment that was provided to you to do your job and with some notes for a handover, exhibiting no intention and no interest in providing any notice or doing further work. Whether this was an assumption or what you have mistakenly read as being historic for how other employees appear to have exited, these actions did not provide Vector with the ability to sanction, agree, or provide any instructions over the notice period."

22. The email noted that the parties had agreed the following:

> "Your employment was terminated by you, yesterday Wednesday 30 November 2022 and we will remove the contractual requirement to work 3 months' notice, and thus this period will not be paid."

23. The email then went on to deal with the claimant's restrictive covenant. Miss Woolford noted that the respondent was willing to agree to shorten the duration of claimant's restrictive covenant on the basis that there was an express agreement regarding what the claimant would be doing in his new role. She explained that the respondent wanted a copy of the claimant's new employment contract, plus a written undertaking from his new employer regarding the work he would be doing. There was no suggestion in Miss Woolford's email that the agreement regarding the waiver of the claimant's notice period was in any way condition upon the point regarding the restrictive covenant.

24. The claimant's evidence was that he understood that the agreement regarding waiving his notice period was subject on the points regarding his non-compete, and on how his new employer would react to them. I will deal with this in my conclusions.

25. The claimant replied to Miss Woolford's email. He apologised for the way he had conducted himself on 30 November. He did not take any issue with the suggestion that he had waived his three-month notice period.

26. On 2 December 2022, the claimant returned his company car. On the same date, he explained to the respondent that his new employer had refused to give the undertaking they sought. He also indicated that he was not willing to give the respondent a copy of his new employment contract.

27. Miss Woolford responded setting out some concerns the respondent had about the claimant's position, and about the way he had chosen to exit the respondent on 30 November 2022.

28. On 6 December 2022, the claimant emailed Miss Woolford saying this:

> "Contractually we need to agree on serving my 3 month notice period:
>
> - I am prepared to go onsite or work my notice remotely. This will allow me to provide a full handover and any training required.
>
> Or
>
> - I am put on paid gardening leave"

29. The next day, Mrs Medway responded:

"Your comments below are noted, but you have already negotiated with us on the matter of notice which has been reduced to zero to assist you".

30. On 14 December 2022 Mrs Medway emailed the claimant giving him the opportunity to reconsider his resignation. The claimant confirmed that he would not be withdrawing his resignation. He indicated that his contract stated that he was entitled to either three months' notice or gardening leave.

31. The claimant contacted ACAS on 5 January 2023. The Early Conciliation certificate was issued on 25 January 2023, and the claim was issued on the same date.

Conclusions

32. The claimant's contract of employment did not entitle him to either payment in lieu of notice or garden leave. Both were at the sole discretion of the respondent. In particular, I find that there was no implied obligation on the respondent to give the claimant either garden leave or payment in lieu of notice. I reach that conclusion for the following reasons:
    e. The claimant's contract was set out in clear terms.
    f. The claimant did not adduce any evidence that there was an established practice of staff being given either garden leave or payment in lieu of notice. Taken at its highest, his evidence was effectively that he understood that previous employees at his level had not worked out their notice period in the office.
    g. Set against that, Mrs Medway's clear evidence was that staff had previously left under a variety of arrangements.

33. The respondent did not offer the claimant either garden leave or payment in lieu of notice. What they did agree to do was to accept his resignation without notice. I conclude that that was consistent with what the claimant indicated, by both his words and actions, that he wished to do. I reach that conclusion for the following reasons (notwithstanding the fact that the claimant's resignation email indicated that he was giving three months' notice):
    a. The claimant had already prepared a handover note and handed it over along with his IT equipment. I find that that was not done in response to Mrs Medway's email. He had certainly not been asked by Mrs Medway to do it. Rather, I consider that it was because of his own anticipation or intention that he would not have to work any part of his notice.
    b. The claimant was clear that he intended to start his new role in early January 2023. His notice period would not have expired until the end of February 2023. It follows that he cannot have anticipated working his notice period.
    c. When the claimant was asked directly by Miss Woolford if he would work his notice, his immediate response was, somewhat tellingly, that he had not thought about it. He then indicated that he was unwilling to do so.

d. Insofar as his was that he was always willing to work his notice period, I consider that that was post-event rationalisation. His actions and words at the time gave a better picture of his intention at the relevant time.

34. I conclude therefore that the parties agreed that the claimant's notice period would be waived. That was a mutually agreed variation of his contract. The variation was instigated by the claimant's indication that he was not willing to work his notice period, and concluded when Miss Woolford, by her email of 1 December 2022, indicated the respondent's agreement. The consideration for the variation was the respondent's agreement not to require the claimant to work his three-month notice period (which he had made it clear he did not wish or intend to do).

35. I further conclude that the agreement to waive the claimant's notice period was not conditional upon an agreement being reached regarding the restrictive covenant. I reach that conclusion for the following reasons:
    a. The claimant had, by his conduct, effectively indicated that he did not wish to work his notice period on the morning that he submitted his resignation. At that point, the restrictive covenant had not been discussed.
    b. When discussing the notice period with Miss Woolford, the claimant was clear that he did not wish to work it. He did not link that to whether an agreement could be reached regarding his restrictive covenant.
    c. Miss Woolford's email of 1 December dealt with the matters separately.

36. In my judgment, the claimant's reaction to Miss Woolford's email of 1 December 2022 is also telling. The claimant replied to it relatively quickly, but he did not query or take issue with the part about his notice. The first time he took any issue with the point regarding his notice was not until 6 December 2022. By that point, I conclude that the agreement in respect of his notice period had already been reached. He could not unilaterally undo it and insist on working his notice. The respondent offered him the opportunity to withdraw his resignation, but he elected not to do so.

37. It follows then, that the claimant was not entitled to be paid for his notice period, given that the parties had mutually agreed on 1 December 2022 to waive it. The respondent was not in breach of the claimant's contract of employment. The claim fails and is dismissed.

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Employment Judge Leith

4 August 2023