



# EMPLOYMENT TRIBUNALS

## *Claimant*

1. Mr M Payne
2. Mr D Rapp

v

## *Respondents*

IC Markets (UK) Ltd

**Heard at:** London Central (by CVP)

**On:** 6 October 2023

**Before:** Employment Judge Brown

## Representation

**For the Claimants:** Both in person

**For the Respondent:** Ms S Dervin, Counsel

# JUDGMENT

The judgment of the Employment Tribunal is that:-

- 1 **The Respondent did not breach the Claimants' contracts when it paid them one month's notice pay. The Claimants' complaints of breach of contract fail.**

## REASONS

1. By a claim form presented on 2 August 2023 the First Claimant, Mr Mark Payne, brought a complaint of breach of contract by failure to pay notice pay against the Respondent, his former employer.

2. By a claim form presented on 3 August 2023 the Second Claimant, Mr David Rapp, also brought a complaint of breach of contract by failure to pay notice pay against the Respondent, his former employer.

3. I heard evidence from the Claimants. There was a 350 page Bundle of documents. Mr Rapp and Mr Payne both presented written skeleton arguments, which they also relied on as evidence. The parties made submissions.

4. The parties agreed that Respondent had paid each of the Claimants 1 month's notice pay on termination of their employment. The Claimants contended that their correct contractual notice period was 3 months, so that the Respondent had been in breach of contract by failing to pay the Claimants their full notice period.

### **Findings of Fact**

5. Mr David Rapp, the Second Claimant, was emailed an offer of employment as CEO of the Respondent by Mariella Paisanou, a representative of the Respondent, on the 7 October 2022, Aristi Kalafati, the Respondents Global Head of HR was copied into the correspondence, p 123.

6. Mr Rapp was then emailed an Employment Contract by Mariella Paisanou on 19 October 2022. Aristi Kalafati was again copied into the correspondence.

7. The contract contained the following clause regarding a probationary period: "5.2 The first six (6) months of the Appointment shall be a probationary period and the Appointment may be terminated during this period at any time on one month' notice by either party or, in the case of the Company, payment in lieu of notice. We may, at our discretion, extend the probationary period for up to a further six (6) months. During the probationary period your performance and suitability for continued employment will be monitored." P137.

8. Mr Rapp replied by email on 20 October 2023 at 10.43, asking to amend clause 5.2 and saying, " 5.2 – I would be more comfortable with the probation period being a fixed 6 months with no option to extend. Please consider updating the clause." p124.

9. Mr Payne, the First Claimant, had been sent a contract in the same terms. On 24 October 2022 he also emailed Ms Paisanou, p127, saying, "I only have one question, which concerns the probation period (clause 5.2). Is it possible to have a shorter probation period without the possibility of extending it? I think the 6 months referred to in the contract is quite a long period."

10. Ms Pisanou replied to Mr Payne on 25 October saying, "Yes sure. I have amended to a fixed period of 3 months." P128

11. Mariella Paisanou, also replied to Mr Rapp on 24 October 2022, copying in Aristi Kalafati, agreeing that 'probation can be for a fixed period of three months. Amended in the attached draft'. P125.

12. Mariella Paisanou also sent a WhatsApp message to Mr Rapp on the same day, confirming, following a conversation with Aristi Kalafati, that, "probation period can be 3 months – no extension". P126

13. Clause 5.2 of the contract was changed to:

"The first three (3) months of the Appointment shall be a probationary period and the Appointment may be terminated during this period at any time on one

month's notice by either party or, in the case of the Company, payment in lieu of notice. During the probationary period your performance and suitability for continued employment will be monitored." P180.

14. However, clauses 5.3 and 5.4 of the original contract remained unchanged. They provided,

"5.3 If you are absent from work due to incapacity during your probationary period for a period which exceeds one week your probationary period will be extended by the period of your absence to allow adequate monitoring of performance.

5.4 At the end of the probationary period, you will be informed in writing if you have successfully completed your probationary period. If you do not receive any written confirmation, you should assume that your probationary period continues."

15. The Claimants each signed the amended contracts, as did Andrew Budzinski for an on behalf of IC Markets, p321 (Mr Rapp) and p280 (Mr Payne).

16. Both Claimants' amended contracts also contained the following "Entire Agreement" clause:

36. Entire agreement

36.1 This agreement and any document referred to in it constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

36.2 Each party acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement."

17. The Claimants commenced work for the Respondent on 1 November 2022.

18. Their 3 month probationary period was therefore due to end on 30 January 2023.

19. On the 6 February 2023, Mr Rapp WhatsApp'd Mariella Paisanou saying "before you go can you sort out the passing of Marks and My probation. It ended at the end of jan so would like to get that boxed off if we can." Mariella Paisanou, replied with a thumbs up emoji, and said "sure should Arisiti just send an email?" Mr Rapp replied further saying, "yes that would be great", p336.

20. Mr Rapp told the Tribunal that confirmation that the Claimants had passed their probation had been given by telephone by Mariella Paisanou, and via Microsoft Teams messages. He said that he communicated this to Mr Payne.

Calls were not recorded. Mr Rapp told me that Microsoft Teams chats were automatically deleted after 3-months in line with the Respondents IT policy. p346,

21. There was no documentary evidence that the Respondent provided written confirmation that the Claimants had successfully completed their probationary periods. The Claimants clearly asked for written confirmation. I considered that the absence of documentary evidence of that written confirmation was therefore significant. I concluded, in the absence of such documentary evidence, that no written confirmation was provided to the Claimants that they had successfully passed their probation.

22. On 29 March 2023 the Claimants were visiting the Cyprus offices of IC Markets. They met Aristi Kalafati (Group Head of HR), Andreas Thrasyvoulou (Group Head of Compliance) and Yiannis Argyrou (Group Head of Finance). They discussed possible revision of their notice period from 3-months to 1-month. Both the Claimants declined to accept that change. The Claimants asked whether they had passed their probation and Aristi Kalafati said that they had. No written confirmation was provided, however.

23. On 2 May 2023 a Ross Donoghue sent the Claimants a contract addendum, asking them to sign and date it and send it back. He said "Just to let you know all employees in the group have now moved to a 1 month notice period." P339. The addendum provided for an amendment to clause 5.1, stipulating a 1-month notice period, coming into force retrospectively on 24 March 2023.

24. The Claimants did not sign the addendum.

25. On 23 May 2023 the Claimants' employment was terminated with one month's notice by Andreas Thrasyvoulou, to whom Mr Rapp reported, p344.

## **Law**

26. By *Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994* the Employment Tribunal has jurisdiction with regard to contractual claims arising or outstanding at the termination of the employment of an employee.

27. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 confirmed that, when construing a contract, pre-contractual negotiations should be excluded as inadmissible simply because they were usually irrelevant to the question which the court had to decide, namely, what the parties could reasonably be taken to have meant by the language which they had finally adopted to express their agreement.

28. The House of Lords also decided that, if the context and background drove a court to conclude that something had gone wrong with the language of a contract, the law did not require it to attribute to the parties an intention which a reasonable person would not have understood them to have had. Where it was clear both that there was a mistake on the face of the document and what correction ought to be made in order to cure it, in that it was clear what a

reasonable person having all the background knowledge which would have been available to the parties would have understood the parties by using the language in the contract to have meant, the court was entitled to correct the mistake as a matter of construction.

## **Decision**

29. The Claimants contend that they were entitled to 3 months' notice to terminate their employment, but the Respondent only paid them one month's notice.

30. It was not in dispute that the Claimants were employed pursuant to their signed written agreements at p321 and p280.

31. I considered that the contracts should be construed as a whole, so that clause 5.2 of the contracts should not be read in isolation. Accordingly, the proper construction of the contracts included all of clauses 5.2 – 5.4 and clause 36.

32. Clause 36 specifically provides that the contract constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

33. While clause 5.2 provides for a 3 month probationary period and does not provide for any extension, clause 5.4 provides, "At the end of the probationary period, you will be informed in writing if you have successfully completed your probationary period. If you do not receive any written confirmation, you should assume that your probationary period continues." P301.

34. I considered that clause 5.4 meant that, if the Claimants did not receive written confirmation that they had completed their probationary periods, then their probationary period continued and they continued to be subject to a 1 month notice period.

35. Pre contractual negotiations are not ordinarily admissible when construing a contract. Applying *Chartbook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, I did not consider that there was any ambiguity or obvious mistake in the terms of the contracts which the Claimant signed. The wording was clear and comprehensible and was capable of sensible and straightforward construction. There was no obvious defect in the contractual wording. While clause 5.2 did not provide for the possibility of extension of the probationary period, both clauses 5.3 and 5.4 did. Those clauses did not contradict clause 5.2; 5.2 was simply silent on the subject of an extension.

36. It was not necessary to give the contract any different meaning to that which its wording provided for. The wording provided, according to clauses 5.3 and 5.4, that probation could be extended in certain circumstances. In particular, clause

5.4 provided that, in absence of written confirmation of successful completion of the probationary period, the probationary period continued.

37. It was not in dispute that the Claimants' initial 3 month probationary periods ended at the end of January 2023.

38. The Claimants relied on a WhatsApp exchange on 6 February 2023, when Mr Rapp asked Mariella Paisanou "before you go can you sort out the passing of Marks and My probation. It ended at the end of jan so would like to get that boxed off it we can." Mariella Paisanou, replied with a thumbs up emoji, and said "sure should Arisiti just send an email?" Mr Payne replied further saying, "yes that would be great", p336.

39. I decided that the proper construction of that exchange was that Ms Paianou was acknowledging the request for written confirmation and was asking Mr Rapp if the written confirmation should be provided in a particular form by another person. Mr Rapp agreed that that would be the correct method for written confirmation to be given.

40. I concluded that Ms Paisanou did not herself give the confirmation that the Claimants had successfully passed their probationary periods.

41. No other written confirmation was ever given

42. That being the case, pursuant to the terms of their contracts, the Claimants remained on probation. As a result, when they were dismissed, their contractual entitlement was to 1 month's notice. The Respondent did not breach their contracts of employment when it paid them only 1 month's notice.

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Employment Judge Brown

Dated: ...6 October 2023.....

Judgment and Reasons sent to the parties on:

12/10/2023

For the Tribunal Office