



EMPLOYMENT TRIBUNALS

Claimant: Mr D Tofield

Respondent: Accenture

Heard at: Bristol (by video-VHS) **On:** 30 November 2023

Before: Employment Judge Livesey

Representation:

Claimant: Mr Menzies, solicitor

Respondent: Ms Quigley, counsel

JUDGMENT

1. The Respondent's name is amended by to Accenture (UK) Ltd.
2. The Claimant was contractually entitled to four weeks' notice at the time that he resigned. His claims, all being contingent upon his contention of an entitlement to a longer period of notice, are accordingly all dismissed.

REASONS

Background

1. By a claim form dated 27 May 2023, the Claimant brought complaints of unpaid notice pay, unpaid holiday pay and breach of contract.
2. The Claimant's case was that he was employed under a contract of employment dated 10 June 2022 which provided for a 12 week notice period. Having actually commenced work on 7 July, he alleged that his probationary period (six months) expired on 6 January 2023. He resigned on 11 January, giving 12 weeks' notice but was not paid for that period; he was paid for four weeks in lieu of working his notice.
3. The Response was received on 4 July. The Respondent's case was that the Claimant resigned during his probationary period which, under his contract, required him to give four weeks' notice. It alleged that the Claimant's offer letter set a shorter notice period for new starters during their probationary periods and that that period had not ended because he had not received written notice to that effect. He did, however, receive a meeting invitation

dated 4 January at which his performance was to have been discussed. He resigned before that meeting took place.

4. On 19 July, the Respondent applied to have a Preliminary Hearing listed to consider an application under rule 37; it alleged that the Claimant had no reasonable prospects of success in the claim.
5. Rather than list a Preliminary Hearing as requested, Employment Judge Emerton determined that the issue concerning the interpretation of the contract could be determined as a substantive preliminary issue.

Evidence

6. The Claimant gave evidence in support of his claim. It had been intended that Ms Wilson, the Respondent's Employee Relations Manager, would also have given evidence. Due to connectivity problems, that proved impossible, but Mr Menzies indicated that he had only had two questions of marginal relevance for her in cross examination and Ms Quigley was happy to proceed without her evidence.
7. A bundle of documents was produced (R1), references to which have been cited below in square brackets.

Facts

8. The following factual findings were made on the balance of probabilities. Most of the facts were agreed.
9. The Claimant was employed as an Associate Director within the Respondent's Strategy and Consulting department, based at its Cheltenham offices.
10. An offer letter dated 28 March 2022 [26-9] stipulated that his employment was to have been subject to a probationary period of six months. It further stated that written notification of the end of his probationary period was required to effectively bring it to an end [27]:
"Your probationary period shall automatically continue until such time as you are informed in writing that it has successfully been completed."
He signed the offer letter to indicate his agreement to the terms therein [29].
11. The Claimant's contract dated 7 July 2022 (but signed on 10 June [30-40]), stated that the notice period required from him was 12 weeks unless he was working under his probationary period as a new starter, in which case the notice was as specified in the offer letter (Clause 9.1) [35]. Clause 24.3 [39] stipulated that the contract contained the entire agreement, but there was a specific carveout in respect of the offer letter;
"If you are a new joiner, this contract should be read in conjunction with your offer letter, which will contain some additional terms applying to you."
12. On 4 January 2023, the Respondent invited the Claimant to a meeting to discuss his performance on 11 January at 2:30 pm [41]. That invitation

predated the end of the six months probationary period. The letter expressly referred to his “*potential to progress within the organisation in a permanent role*”, acknowledging that he had been working under a probationary period up until that point. Issues were raised about perceived poor performance and he was warned that there was a possibility that his employment could have been terminated. The letter was followed by a Microsoft Teams invitation the following day [42].

13. On 11 January, before the meeting at just after 1:00 pm, the Claimant resigned. He purported to give 12 weeks’ notice [44]. In reply, the Respondent sought to exercise clause 9.2 of the contract and stated that he would receive four weeks’ pay in lieu of notice and that his last day of work would have been 12 January ([45] and [48]). It clearly stated that it viewed the Claimant as still having been within his probationary period.
14. Correspondence between the parties continued. The Claimant complained about an injury that he had allegedly sustained as a result of defective chair, but his contention that the Respondent’s calculation of his notice entitlement was wrong was notably absent after the initial exchange [46-56]. It was only when solicitors became involved that the matter reared its head again [57].

Relevant legal principles

15. In this case, there had been no dispute that the express contractual terms were to have been found in the Claimant’s offer letter and the contract itself (see the Claimant’s solicitor’s email of 14 March 2023 [57]). His case had been that implied terms ought to have existed so as to have neutered the effect of the automatic extension clause in the offer letter.
16. The Claimant’s position changed during the hearing. Mr Menzies sought to argue, first, that the contract (Clause 24.3) was ambiguous and ought to have been read *contra preferentum*. Secondly and in any event, he argued that the offer letter was inconsistent and ought to have been construed in a way that caused the probationary period to have ended at the expiry of six months. Importantly, all reliance upon implied terms was abandoned.
17. Although Mr Menzies did not address me on the law in any detail, I was well aware that there was a requirement in law for the contract to have been sufficiently clear and certain for it to have been given meaning by me. It was important to remember that certainty was not necessarily compromised because it was not possible to pinpoint an exact date upon which an event was to have occurred (*Whitney-v-Monster Worldwide Ltd* [2010] EWCA Civ 1312, CA).
18. Any ambiguity would normally be interpreted against the party who sought to rely upon it to the other party’s detriment, the *contra preferentum* principle.

Discussion and conclusion

19. As to Mr Menzies' first point, the operation of Clause 24.3 as an entire agreement clause; during his evidence, the Claimant contended that he had understood that the entire agreement clause to have been just that, notwithstanding the last sentence [39]. He considered that the preceding sentences effectively cancelled the effect of the last sentence. But he could not explain why he had been entitled to receive his 'golden hello' (a sum in excess of £13,000, paid under the offer letter) if the contract was to have been read so as to have been the entire agreement. The contract had merely referred to his annual and monthly salary entitlement.
20. Clause 24.3 was clear, in my judgment, and it clearly contained a carve out and/or exception for someone in the Claimant's position. It expressly incorporated the terms in the offer letter in such a situation.
21. Next, Mr Menzies sought to argue that the offer letter term was 'deeply unreasonable' and contained a 'howling mountain of ambiguity'. His point was that the letter appeared to create a six month probationary period, which might not have been six months at all. It might have been many years long.
22. Mr Menzies appeared to argue that the letter was unfair and/or uncertain.
23. As to the first of those points, fairness did not appear to be a question which affected my interpretation of it as a contractual term. Mr Menzies did not submit that, as a matter of law, the parties could not have agreed a term which was more favourable to one side than the other. The Claimant did not have to take the job on the basis of the offer. Mr Menzies complained that the contract could have remained in its probationary state for ever. If it had extended to two years, the Claimant would still have achieved employment protection. If did not like such an extension, he could have left. Had the Respondent not had reasonable grounds for extending the probationary period, somebody in his position may have argued that it had been in breach of the implied term of mutual trust and confidence. That, of course, did not arise in this case.
24. As to the second point, the offer letter was not inherently unclear or uncertain as a term? There are several reasons why it might not have been possible to have achieved the ending of a probationary period to coincide exactly with the six month anniversary of the start of employment; an employee might have been on a period of leave for illness absence when the anniversary passed. More importantly, the Respondent reserved the right to extend it (and devise the mechanism for it to happen) in situations where issues of perceived under performance arose.
25. Through his solicitors, the Claimant had accepted that the offer letter had contained an express term in relation to the automatic extension of his probationary period, but it was asserted that that term "*must be subject to an*

implied term that this clause will only be used where it has not been possible to write to the employee before their probationary period expired” [57]. It was not then asserted under what principle such a term was to have been implied. Mr Menzies sought to distance himself from that argument entirely during the hearing.

26. On the basis of the arguments which were run, the contract and offer letter were clear, certain and unambiguous and they operated together with the effect that the Claimant was still serving as a probationary employee at the point that he resigned. His notice period was four weeks only.

27. It was agreed that of his claims were contingent upon a finding that he had been entitled to a longer notice period and all claims were therefore dismissed.

Employment Judge Livesey
Date 30 November 2023

Judgment & reasons sent to the Parties on 18 December 2023

For the Tribunal Office