



EMPLOYMENT TRIBUNALS

Claimant: Mr Harry Jones

Respondent: Ford Mainwaring Limited

Heard at: Birmingham (via CVP)

On: 10 October 2023

Before: Employment Judge Bennett

Representation

Claimant: Mr Jones, Claimant's grandfather

Respondent: Ms Letts, Employment Tribunal Advocate

JUDGMENT having been sent to the parties on 10 October 2023 (attached here as Appendix 1) 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

1. Reasons for the judgment (attached at Appendix 1) were given orally on 10 October 2023 at the end of the hearing, and the written judgment was dated the same day. The Claimant's representative initially requested a transcript of the hearing on 19 October 2023 but, the Tribunal having contacted him to clarify the request, he confirmed on 31 October 2023 that he was in fact seeking written reasons.

Application to strike out

2. At the outset of the hearing there was an outstanding application from the Respondent for a strike out or deposit order on the basis that the claim had no or little reasonable prospect of success. I clarified with Ms Letts that this application was being pursued and I proceeded to consider it and give oral reasons for my decision.
3. It was not open to me to make a deposit order as this was the final hearing. Further, I was not persuaded by the Respondent's arguments that the claim had no reasonable prospect of success for the following reasons:
 - (a) The Respondent relied on an assertion that the Claimant had 'mis-remembered' the terms of the contract that was entered into – this amounts to a difference of opinion so it cannot be said there is 'no reasonable prospect of success'. I also noted that the Claimant had raised concerns about the veracity of the contractual documents put before the Tribunal and I considered that it was appropriate to explore these concerns through oral evidence;
 - (b) The Respondent said that the claim was well out of time if the Claimant was claiming that it should have been an apprenticeship agreement that he was given rather than a contract for plumber's mate. However, I did not understand this to be the claim that the Claimant was pursuing. Rather, I understood the Claimant's claim to be that he was not enrolled onto a suitable

apprentice course. The Respondent's argument in response to this was that the Claimant affirmed the contract. Whilst I considered this argument had merit I did not consider it a foregone conclusion such that the Claimant's claim could be said to have no reasonable prospect of success.

4. In view of the above, having considered the representations from both parties as expressed in their emails to the Tribunal, the application to strike out the claim was refused.

Application to amend the claim

5. Having discussed the Claimant's claims with Mr Jones, the Claimant then applied to amend his claim to include a breach of contract in relation to 3 weeks' outstanding notice pay.
6. I outlined to the parties the guidance in the case of Selkent Bus Company Limited v Moore [1996] ICR 836 and the balancing exercise that applies in amendment applications. I explained that time limits are one element of the more general test and, it being common ground that the claim for notice pay was out of time, the question would be whether it was 'not reasonably practicable' for the Claimant to bring the claim in time and, if so, whether it was brought within such further time as was reasonable.
7. Having given the parties a short break to prepare I heard their submissions on the amendment application and then gave an oral decision which was to allow the amendment application for the following reasons:
 - (a) It was not reasonably practicable for the Claimant to bring the claim in time as:
 - (i) He did not have a copy of his contract of employment at the time of his dismissal, as evidenced by his requests for a copy of this;
 - (ii) It was not unreasonable that he would not remember the specific notice provisions contained within the contract;
 - (iii) He was only sent a copy of the contract by the Respondent after the relevant time limit had expired;
 - (iv) Bearing in mind that the Claimant was not professionally represented, he raised the matter within a reasonable time after being sent the contract – he made the Respondent aware of it just a few days later.
 - (b) It would cause significant prejudice to the Claimant to refuse his application as it would remove his only avenue of claiming for his unpaid notice period.
 - (c) There was some fault to be attributed to the Respondent for not providing the Claimant with a copy of his contract sooner.
 - (d) The Claimant took steps to bring it to the Respondent's attention and the Respondent was aware of the potential claim at the earliest opportunity, even if a formal application to amend had not been made;
 - (e) No further evidence or documentation was needed and all parties were in a position to deal with the claim during the present hearing.

Having dealt with preliminary matters, the claims and issues to be determined during the hearing could be identified as follows.

Complaints

8. The claims brought by the Claimant were:
 - (a) breach of contract in respect of a failure to put him on an apprenticeship training course;

- (b) breach of contract in respect of unpaid notice pay. The Claimant says he was entitled under his contract to 1 month's notice whereas he in fact received 1 week's pay.

Issues

Apprenticeship training

- (c) Was it a term of the contract that the Claimant would be put on an apprenticeship training course?
- (d) If so, by what date?
- (e) Did the Respondent breach that term?
- (f) If so, at what time did the breach occur?
- (g) Did the Claimant waive the breach or affirm the contract?

Notice pay

- (h) What was the Claimant's notice period?
- (i) Was the Claimant paid for that notice period?

The Law

9. I have considered the Employment Tribunals Extension of Jurisdiction Order 1994 which gives the Employment Tribunal jurisdiction in breach of contract claims in certain circumstances.
10. I have also considered the case law concerning construction of contracts and the requirement for certainty within contracts. This establishes that the individual terms of a contract must be sufficiently clear and certain for the courts to be able to give them meaning. It is therefore in the interests of both parties to ensure that a term is not too obscure to be enforceable. In Polymer Products Ltd v Pover EAT 599/80, for example, a term that on transfer of job location the employee would be offered new duties, relocation allowance and salary 'all to be mutually agreed' was held to be too vague and uncertain. The statement was no more than an 'agreement to agree' and was not binding.
11. In Puntis v Governing Body of Isambard Brunel Junior School EAT 1001/95 the EAT had to consider a situation where a deputy head teacher had told P, a teacher, that her temporary promotion would be made permanent. The deputy head had said: 'Have no fears, Sue, your [promotion] will be made permanent.' The EAT commented that although a promise could form the basis of a contract if the promisee relied on it to his or her detriment, there was no evidence that P had acted to her disadvantage as a result of what the deputy head had told her. The EAT concluded that the deputy head's remark was so brief that any contract arising from his remark would have been void for uncertainty. In particular, there was no indication of when the permanent appointment would be made or what work P would be required to perform to justify her promotion.
12. In searching for the true meaning of contractual terms, I must take into account the circumstances surrounding the making of the contract as an aid to construction and to clarify any ambiguities.
13. In relation to notice pay an employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

The Hearing

14. The Claimant was not present at the hearing and he was represented by his grandfather, also Mr Jones. For the purposes of these written reasons and to avoid confusion, I refer to the grandfather as 'Mr Jones' and to the Claimant as 'the Claimant'.

15. Mr Jones explained that the Claimant was away for work and would not attend the hearing. I explained that it would affect the weight to be placed on the Claimant's evidence if the Respondent was unable to cross-examine him and I offered to pause the hearing so that Mr Jones could explore with the Claimant whether he may be able to join the video hearing at any point. Mr Jones indicated that he wished to proceed without the Claimant.
16. I had regard to the bundles submitted by the Claimant and the Respondent as well as to the Tribunal documentation on the file. I saw witness statements from the Claimant and from Mr Grant Stuffins, a director of the Respondent. The Claimant did not appear to give evidence and so the weight that I afforded his witness statement, which was not tested in cross-examination, was reduced. Mr Stuffins was cross-examined by the Claimant's representative and I also asked him some questions.

Findings of fact and Analysis

17. Many of my findings of fact were agreed, others I decided on a balance of probabilities.
18. This case was largely reliant on the background documentation. In respect of the Respondent's witness, Mr Stuffins, he was clear when he did not know the answer to a question and he also gave answers which did not necessarily shed the Respondent in the best light, which I take as an indication that he was answering the questions to the best of his ability. I recognise that he was not directly involved in the matters that have given rise to these claims and his ability to shed light on matters was therefore limited. However I consider that his evidence was straight-forward and honest.
19. As already mentioned, the Claimant was not present and so could not be cross-examined by Ms Letts.
20. By way of introduction, the Claimant worked for the Respondent from 13 September 2021 until 21 March 2023. During this time he was based at the Respondent's headquarters in Newcastle-under-Lyme. The parties differ as to whether the Claimant was employed as a 'plumbers mate' or an apprentice pipe-fitter plumber but it is common ground that he spent time gaining experience as a plumber and assisting the Respondent in a junior role.

13/9/21 Contract

21. The Claimant raised concerns about the veracity of this document. His representative pointed out that the appearance of the type on the first page does not match that on the second page and that the metadata is missing.
22. The Claimant's representative accepted that it was the Claimant's signature on the second page of the document and that the second page of the contract was correct. Mr Stuffins was unable to shed any light as to why the two pages of the contract appear different. He confirmed that the Claimant's contract was kept on the central server with a copy in the employee's file.
23. I have taken into account that the terms of the contract (which refer to a 'plumber's mate') appear potentially inconsistent with the terms of the offer letter on 27 August 2021 which states that the Claimant is being offered a position as an 'apprentice'. Also, more importantly, I note the email from Mark Cleverly on 8 November 2021 – this email envisages that Claimant *will* certainly undertake training. It states : 'your training may be delayed' and '..we may have to wait until next year, ultimately this means that your college starts in September 2022'.
24. I am not satisfied that the first page of the contract at page 34 of the bundle is in fact the contract signed by the Claimant on 13 September 2021. I arrived at this conclusion having taken into account the terms of the offer letter and the fact that the 8 November email appears to be confirming to the Claimant for the first time that his training will not take place in September 2021. I take into account the fact that the Respondent does not appear to have an in-house HR team and so it strikes me as unlikely that the contract would have been changed following the offer letter and prior to the Claimant starting employment if it was still envisaged that he may be able to start a training course imminently

(which I find it was). It would be unusual for a small employer to be so assiduous in respect of employment law.

25. I also take into account that a copy of the contract was not provided to the Claimant (following his requests) until after he put in his Tribunal claim form. It was in fact provided to him on 30 June 2023, which is the same date that the Respondent's ET3 Response was prepared.

What was the real agreement between the parties?

26. I conclude that the initial agreement between the parties was that the Claimant would be an apprentice and would be enrolled onto a training course. I do not find that this is a matter of dispute between the parties.
27. On 27 August 2021 the Claimant received a job offer specifying that he was being offered the position of 'apprentice pipefitter'. The offer stated that the Claimant would be 'expected to attend college' and invites the Claimant to a further meeting to discuss start date and 'training'. It states that the Respondent will in the meantime "attempt to contact BESA with a view to hopefully picking up on your previous training". It was the Claimant's position, as described by Mr Jones, that the Claimant would never have been able to 'pick up' his previous training course because it was so long ago. I nonetheless find that this is what was envisaged by both parties given the statement in the letter of 27 August which refers to a telephone conversation between them.
28. In the offer letter the Claimant's job title is stated to be 'Apprentice' and under the heading 'Responsibilities' it states: 'Training with and assisting engineers whilst gathering experience to complete formal apprenticeship'. It was clearly envisaged that the Claimant would undertake a training course and work towards a formal apprenticeship but the details of the training were not set out at this time because they had not been finalised.
29. It appeared to be accepted by both parties that the Respondent made enquiries about continuing the Claimant's previous training but realised that this was not going to be possible.
30. I have found that the contract that was then entered into by the parties was not the contract that appears at page 34 of the bundle as the first page was different. I am satisfied on a balance of probabilities that the original document stated that the Claimant was an apprentice and I find that this was a term of the contract entered into between the parties.

Did the Respondent breach the contract by not signing the Claimant up to a training course?

31. Despite working under an apprenticeship contract, in reality the Claimant was carrying out the work of an apprentice but was not being provided with training. He continued to work for the Respondent on the basis of a promise of future training.
32. The Claimant received pay of £7.50 per hour which I find is consistent with the Claimant being on an apprentice contract.
33. I find that the training course was originally due to start in September 2021. This is when both parties originally believed it would start when the Claimant started employment. It was apparent by 8 November 2021, at the latest, that the training would not start that year but the Claimant was told, and he believed, that a course would commence the following year in September 2022. September 2022 was at this point viewed as a longstop date.
34. On 19 April 2022 a letter was sent to the Claimant following a performance review at the end of his probationary period.

35. As an aside at this point I note that the job offer letter dated 27 August 2021 states that the offer of employment is subject to 'the satisfactory completion of a six month probationary period'. Although it is not directly relevant to the claims before me I recognise that the Claimant referred to a 3 month probationary period being set out in the handbook but I consider that the terms of the 27 August 2021 letter overrode these as the letter was specifically tailored to the Claimant.
36. The April 2022 performance review occurred 7 months after the Claimant started employment rather than 6 months but I am satisfied from the terms of the letter that the purpose of the meeting on 13 April 2022 was indeed to carry out a performance review. I recognise that review meetings can be delayed and do not always happen on the exact date that they are due.
37. I find that the Respondent had genuine concerns about the Claimant's performance linked to the amount of sickness absence that he had taken, and that taking into account the written warning from the previous year it was felt necessary to extend his probationary period until 30 June 2022. The letter states 'at this time it will be decided if you have passed your probation and if you will continue to work with the business'.
38. I find that at or around the time of this April 2022 performance review the Respondent decided not to register the Claimant for a training course in September 2022.
39. I consider that the failure to register the Claimant for a training course in September 2022 was a breach of the agreement between the parties.

Waiver/Affirmation

40. I now turn to look at whether the Respondent's breach of contract was waived and the contract was affirmed by the Claimant. I find that it was.
41. I have not heard evidence as to when the Claimant realised that he would not be provided with training in September 2022 as intended. It must have been apparent to him, at the very latest, by the end of September 2022. The Respondent's representative referred me to paragraph 13 of the Claimant's second witness statement (at page 109) which states that "the Claimant fully expected the Respondent to give a start date for college in September 2022. Unfortunately there was no start date from the Respondent."
42. The Claimant's representative says that the Claimant continued to ask questions about when training would start and he then believed that he would be put on a course in September 2023. In the absence of oral evidence on the matter from the Claimant I am not satisfied that the Claimant's case on this point is borne out by the documentation. The Respondent's breach of contract, namely the decision not to put Claimant on a training course, was clear by the end of September 2022. Yet there was no grievance raised by the Claimant. Further, there are no emails before me to show that the Claimant was questioning the lack of training, or to suggest that the Claimant may be entered onto a training course the following year.
43. Following the failure to enrol the Claimant in September 2022 the Claimant did not bring an employment tribunal claim within 3 months or, indeed, until after he was dismissed by the Respondent. He was not working under protest. I find that he implicitly accepted the work that was being offered by the Respondent by continuing to work for the Respondent as he had been doing. He continued to carry out the functions of an apprentice but by now without any expectation of a training course.
44. I am not satisfied that there was an ongoing breach of contract, as suggested on behalf of the Claimant. The breach took place in September 2022. The Claimant continued to work for at least 5 more months and in doing so he affirmed the contract and waived the breach. The Claimant's claim for breach of contract in relation to the failure to put him on an apprentice training course must therefore fail.

45. I note as a postscript that, even had the Claimant's claim been successful, he would not have been able to recover compensation for the 2 years spent without a training course at the Respondent and he would have been limited to losses flowing from the breach. As I have found that the Claimant affirmed the contract in September 2021 and September 2022 any loss would be very limited, especially given that he sensibly took steps to mitigate his loss and managed to get signed up with a new apprentice provider very swiftly.

Notice pay

46. I have found that the Claimant was not still in his probationary period at the time of his dismissal. The requirement for terms of notice is therefore as set out in the 13/9/21 contract. The relevant paragraph appears on the second page, which is signed by the Claimant, and I am satisfied that these are the terms governing his employment. The contract states that:

Notice of termination to be given by employer is:

1 months service up to successful completion of your probationary period – 1 week;

On successful completion of probationary period but less than 5 years service – 1 month

47. The Respondent paid the Claimant in respect of one week's notice.
48. I therefore conclude that the Claimant is entitled to the unpaid amount of 1 month less 1 week in respect of a breach of contract by the Respondent in relation to payment of notice pay.

Schedule 5 Employment Act 2002 cases

49. Because the Claimant has been successful in relation to an element of his claim I am obliged by Schedule 5 Employment Act 2002 to consider whether, when the proceedings were begun, the Respondent was in breach of its duty to give the Claimant a written statement of employment particulars or a change to those particulars. If so I must award two or four week's pay.
50. In considering whether the Claimant was given a copy of his contract when he signed this at the outset of his employment I bear in mind that it would be normal practice for an employer to provide counterpart copies or a copy to the employee. Also, there is no indication that the Claimant requested a copy by email (or otherwise) after he signed the contract on 13 September 2021 or in fact until March 2023. I note the Claimant did not keep a copy of the letter that he was given when he was told of his dismissal – he refers to scrunching it up - and I infer from this that it may be that he does not appreciate the importance of keeping such documentation.
51. On the other hand the Respondent's record-keeping appears to be a little haphazard. During Mr Stuffin's evidence there was talk of warnings and disciplinary/performance matters which are not reflected in the documentation. This is something that should be improved and I consider that some of the sense of injustice that has brought about this claim may have been avoided if there had been better processes followed.
52. I recognise however that the Claimant was sent a formal job offer and there is evidence that a probationary period review meeting was carried out and followed up by email. I conclude that HR processes are generally followed. Mr Stuffin's evidence was that it is normal practice to give an employee a copy of the contract or post it to their address.
53. Looking at the evidence before me in the round and, again, without the benefit of the Claimant's oral evidence, I find on a balance of probabilities that the Claimant was provided with a copy of his contract of employment at the outset of employment. There is therefore no award due under Schedule 5 EA.

Remedy

54. It was agreed between the parties that the correct figure in respect of the unpaid notice pay was £9.18 per hour x 8 hours per day x 18 days (3 weeks and 3 days) = £1,321.92 gross.

Employment Judge Bennett

13 November 2023



EMPLOYMENT TRIBUNALS

Claimant: Mr H Jones

Respondent: Ford Mainwaring Limited

Heard at: Birmingham (by CVP)

On: 10 October 2023

Before: Employment Judge Bennett

REPRESENTATION:

Claimant: Mr Jones, Claimant's grandfather

Respondent: Ms Letts, Employment Tribunal Advocate

JUDGMENT

The judgment of the Tribunal is as follows:

Notice Pay

1. The complaint of breach of contract in relation to notice pay is well-founded.
2. The respondent shall pay the claimant **£1,321.92** as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay.

Apprenticeship training

3. The complaint that the respondent was in breach of contract by failing to provide the claimant with apprenticeship training is not well-founded and is dismissed.

Failure to provide a written statement of employment particulars

4. The respondent was not in breach of its duty under s38 Employment Act 2002 to provide the claimant with a written statement of employment particulars.

At the outset of the hearing the Tribunal also gave judgment on a preliminary issue as follows:

Strike Out

5. The complaint of breach of contract in respect of apprentice training is not struck out under Employment Tribunal Rule 37(1)(a) on the grounds that it has no reasonable prospect of success.

Employment Judge Bennett
10 October 2023

