



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Dare

**Respondent:** Demipower Limited

**Heard at:** Watford by video

**On:** 03 April 2024

**Before:** Employment Judge R Russell

## Representation

Claimant: In person

Respondent: Mr N Radcliffe, Head of People for Respondent

**JUDGMENT** having been sent to the parties on 01 May 2024 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

## Introduction

1. This case was heard on 03 April 2024. Oral reasons for the decision were given on 03 April 2024. The judgment was signed on 03 April 2024 and sent to the Tribunal on that date for issuing to the parties. The Tribunal sent the judgment to the parties on 01 May 2024. The Claimant requested written reasons on 10 May 2024. The request was therefore made within the time limit set out in Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.
2. I had written evidence in the form of two bundles of documents: a Claimant bundle of 24 pages and a Respondent bundle of 54 pages. References to page numbers below are to either the Claimant's ("C") or Respondent's bundle ("R"). I heard oral evidence from the Claimant. In the absence of witness statements and with the Claimant's agreement, I treated what he had written at paragraph 8.2 of his claim form as his witness statement [R8]. He was questioned on his evidence. I heard oral submissions from the Claimant and Respondent.
3. Early conciliation began in this case on 11 September 2023 and ended on 13 September 2023 [R1]. The Claim was presented on 12 October 2023 [R2].

By a response submitted on 29 January 2024 the Respondent defends the Claim **[R14]**.

4. In the Claim, the Claimant had claimed unfair dismissal and a failure by the Respondent to give the required notice of termination of employment under his contract (often referred to as wrongful dismissal).
5. On 04 January 2024 the Tribunal wrote to the Claimant with a strike out warning. This was because the Claimant did not appear to have the required two years' service to allow him to bring a complaint of unfair dismissal. He was given until 18 January 2024 to give reasons why the complaint of unfair dismissal should not be struck out **[R28]**. No reasons were given.
6. I clarified the Claimant's dates of employment at the outset of the hearing. These were agreed between the parties as 01 June 2022 to 07 September 2023. The Claimant accepted that he did not have the required length of service to bring a complaint for unfair dismissal and was not entitled to bring this complaint. I therefore struck out the unfair dismissal complaint at the outset of the hearing. I gave oral reasons for doing so. Section 108 of the Employment Rights Act 1996 requires a claimant to have not less than two years' service to make an unfair dismissal complaint. The Claimant was employed by the Respondent for less than two years.
7. By agreement of the parties, the Respondent's name was amended to Demipower Limited.
8. I clarified with the parties at the outset of the hearing that the only issue that remained for me to decide was the question of whether the Claimant had been wrongfully dismissed.

### **Issues**

9. The parties agreed that the issues I had to determine were, was the Claimant dismissed?
10. If the Claimant was dismissed, what was his period of notice? Was he paid for this notice? If not, what is he owed?

### **Findings of fact**

11. The Claimant was employed by the Respondent as a Regional Manager covering the Southwest and Wales from 01 June 2022. The Respondent is a franchisee of the KFC fast-food chain. The Claimant was employed under a contract of employment signed on behalf of the Respondent on 15 April 2022 and by the Claimant on 11 July 2022 **[R33]**.
12. The contract of employment contains a notice clause at paragraph 14 **[R38-9]**. Clause 14.2 states:

*The Company's notice to employees with continuous service from one week to two years will be 1 week. Thereafter, employees are entitled to receive one additional week's notice for each year of continuous employment (up to a maximum of 12 weeks' notice).*

13. Clause 14.3 states:

*After successful completion of your probationary period, but less than five years' service your notice period will be three months.*

14. The wording of clause 14.3 is not entirely clear. The parties accepted that they had intended, and understood, clause 14.3 to mean that the Claimant had to give the Respondent three months' notice to terminate his employment.
15. The Claimant's probationary period was 6 months [R35]. The Claimant had passed his probationary period.
16. I therefore find that, at the relevant time, the Claimant was contractually entitled to receive one week's notice from the Respondent to terminate his employment. The Respondent was, at the relevant time, contractually entitled to receive three months' notice from the Claimant to terminate his employment.
17. Clause 14.4 of the employment contract gives the Respondent the right to make a payment in lieu of notice. The right is stated to be discretionary and applied whether notice to terminate the contract is given by the Claimant or Respondent.
18. The Claimant reported to Richard Benton, Operations Director. There was a telephone conversation between Richard Benton and the Claimant on the evening of 06 September 2023. The Claimant had, by this point, decided to resign. He did not mention his resignation to Richard Benton during that conversation.
19. The Claimant claims that late on the evening of 06 September 2023, he sent an email from his personal account containing his resignation to Richard Benton, Richard Campbell in HR, and the HR team. The parties agreed that no resignation was received by the Respondent on 06 September 2023. I therefore find that no resignation was communicated by the Claimant to the Respondent on 06 September 2023.
20. A meeting took place between Richard Benton and the Claimant on the morning of 07 September 2023 at a KFC in Swindon. The parties' recollection of this meeting varies. The Claimant says that he resigned at this meeting before his employment was terminated by the Respondent. The Respondent says that the Claimant handed over a resignation letter to Richard Burton at this meeting after the Respondent communicated its decision to terminate the contract.
21. The parties agreed that the Claimant handed a resignation letter to Richard Burton at that meeting. The wording of the letter is unambiguous. It begins with: 'I hereby tender my resignation as per my contract'. He thanks his team for their support and hard work. The letter ends with 'Please advise on the process for pension monies etc that would need to be paid over to myself [C1]. The letter is typed apart from the date. The word 'Date' is typed. Beside this is a handwritten date of 06/09/2023 [C1].

22. Shortly after 6pm on 07 September 2023 the Claimant emailed Richard Burton about arrangements to return his company property on 08 September 2023 'as per our discussion this morning at Swindon Delta with regards to my resignation dated 6<sup>th</sup> September 2023' [C2]. Richard Burton replied a few minutes later with the relevant details and ended 'I will also confirm everything in writing and send to you via email as discussed' [C2].

23. On 08 September 2023 Richard Benton posted a letter dated 07 September 2023 to the Claimant [R47]. This was received by the Claimant on 09 September 2023. The relevant parts of this letter are as follows:

*"We met on 7<sup>th</sup> September 2023 at KFC Swindon Delta to discuss your performance and I explained to you that unfortunately you have not reached the standards outlined in your terms & conditions of employment to demonstrate your suitability for the role of Regional Manager.*

*At this stage you informed me that you had resigned last night (6<sup>th</sup> September 2023) and had emailed your resignation into the HR team, you also handed me a resignation letter with a handwritten date of the 6<sup>th</sup> September 2023. From checking with the People team and reviewing monitored Demipower email inboxes we have no evidence of this submission, as such the original decision to terminate your employment supersedes your letter which was handed in on the 7<sup>th</sup> September 2023.*

*It is with regret that I confirmed to you that your employment was therefore terminated as of 7<sup>th</sup> September 2023.*

*Your dismissal was effective from 7<sup>th</sup> September 2023 and the Company will make you a payment in lieu of your notice period of 2 weeks..."*

24. Richard Benton, who remains employed by the Respondent, was not a witness in these proceedings. His account of the meeting on 07 September 2023, as reflected in emails and minutes of subsequent meetings, differs from that of the Claimant.

25. On 12 September 2023 Richard Benton emailed Dipti Patel, People Business Partner, with his account of what had taken place at the meeting [R49]. This account is broadly consistent with what was written in the letter to the Claimant on 07 September 2023. It differs in one significant respect. In his email to Dipti Patel, he says that he began the meeting by informing the Claimant that 'based on your capabilities within role as a Regional Manager the decision has been made to terminate your contract'. At this point, the Claimant asked whether he had received his resignation letter and handed over a copy.

26. This account of 12 September 2023 is repeated in an email of 22 September 2023 from Richard Burton to Alim Janmohamed, CEO [C12]. It is also reflected in minutes of a meeting between Richard Burton, Alim Janmohamed, and Dipti Patel on 22 September 2023 [C13]. These minutes record Richard Burton reading a pre-prepared letter to the Claimant regarding his capability, at which point the Claimant handed over his resignation letter. Richard Burton did not give the Claimant the letter terminating his

employment at that meeting as he had wanted to check the relevant process to follow given that the Claimant said he had resigned.

27. Under cross-examination, the Claimant was insistent that he handed over his resignation letter before he was dismissed. He maintained that the meeting began with a discussion of the Claimant's performance. He then handed Richard Burton his resignation letter, to which Richard Burton replied that this was a spanner in the works as the Respondent had intended to terminate the Claimant's employment. Under cross-examination, it was suggested to the Claimant that there had been an intention to dismiss him but that Richard Burton had to 'change direction' when the Claimant resigned. Again, the Claimant was insistent that he had resigned before being told of the Respondent's intention to dismiss him.
28. In determining which account of the meeting on 07 September 2023 should be preferred, I acknowledged that only the Claimant had been questioned on his evidence. The Claimant was unwavering in his version of events. I also considered the closest contemporaneous written accounts of what happened. The email sent by the Claimant to Richard Burton on the evening of 07 September 2023 mentioned his resignation. The reply from Richard Burton did not refute this. It did not mention that the Claimant had been dismissed. It simply said that everything would be confirmed in writing. That confirmation from Richard Burton, sent the following day and dated 07 September 2023, recounted how a discussion was had about the Claimant's performance and 'at this stage' the Claimant handed over his resignation letter. This is consistent with the Claimant's oral account, which is that the discussion on performance was interrupted by the Claimant handing over his resignation and before the Respondent dismissed him.
29. I therefore find that while the Respondent may have been intending to terminate the Claimant's employment at that meeting on 07 September 2023, the Claimant resigned from his employment first. He communicated his resignation to the Respondent by handing Richard Burton a letter of resignation on 07 September 2023. Richard Burton did not hand the Claimant a letter terminating his employment at this meeting.
30. Following his resignation and before his employment ended, the Respondent dismissed the Claimant. On 09 September 2023 the Claimant received the letter from Richard Benton dated 07 September 2023 dismissing him [C3]. His dismissal was said to be effective from 07 September 2023 and the Respondent would make a payment in lieu of notice. Given the ambiguity about what was said to the Claimant at the 07 September meeting, I find on balance that the Claimant's employment ended on 09 September 2023 when he received notice from the Respondent that his employment would be terminated and that he would be paid a payment in lieu of notice.
31. The Claimant was given the right to appeal against the decision to dismiss him. He appealed on 13 September 2023 [C7]. On 14 September 2023 he was invited to attend an appeal hearing against 'the decision to short service dismissing you on Thursday 7<sup>th</sup> September 2023' [C8]. An appeal hearing was held on 22 September 2023 [C18]. The outcome of the appeal was to uphold the Respondent's decision to dismiss the Claimant. The outcome letter states that the Respondent took the decision to dismiss the Claimant and that

the Respondent 'will uphold the decision to dismiss you' [C17] with effect from 07 September 2023.

32. The parties agreed that the Claimant had been paid two weeks' notice by the Respondent on termination of his employment.

## Law

33. A resignation is the termination of a contract of employment by the employee. For the contract to come to an end, the resignation must be communicated to the employer by the employee (*Edwards v Surrey Police* [1999] IRLR 456, EAT).
34. Under section 86(2) of the Employment Rights Act 1996 an employee who has been continuously employed for one month or more must give his employer not less than one week's notice to terminate his contract. If a longer period is specified in the contract of employment, it is this longer period that applies. Once notice is given, the contract will usually end when it expires.
35. If an employer cuts short the employee's notice period by paying the unexpired period of notice as a payment in lieu, this may amount to a dismissal unless the contract gives the employer the right to make a payment in lieu of notice (*Marshall (Cambridge) Limited v Hamblin* [1994] ICR 362, EAT; *Fentem v Outform EMEA Limited* [2022] EAT 36).
36. A distinction must be drawn between a situation where the termination date is effectively brought forward by an employer cutting short the notice period, and the situation where a dismissal intervenes during the notice period.
37. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives Tribunals the power to hear claims for breach of a contract of employment or other contract connected with employment where the claim arises or is outstanding on the termination of the Claimant's employment.
38. In a wrongful dismissal claim, where the Claimant was not given notice or paid for his notice period, the question is whether the Claimant was in repudiatory breach of his contract of employment such that the employer was entitled to dismiss him without notice. A repudiatory breach is where the employee was guilty of conduct so serious entitling the employer to summarily terminate the contract without notice (*Enable Care and Home Support Ltd v Pearson* EAT 0366/09).
39. Unlike a claim for statutory unfair dismissal, questions of reasonableness regarding the employer's behaviour do not arise in a complaint of wrongful dismissal.
40. Section 86 of the Employment Rights Act 1996 sets out the rights of employees to minimum periods of notice. It 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 is not less than one week's notice if his period of continuous employment is less than two years. If there is a longer period of notice given in the contract, that longer period will apply.

41. There is no breach of contract if an employer exercises its contractual discretion to make a payment in lieu of notice (*Breakspear v Colonial Financial Services (UK) Limited* [2022] EWHC 1456).
42. Contractual notice by post to terminate the contract does not take effect until the employee has read the letter containing the notice or had a reasonable opportunity to do so (*Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2018] ICR 882).

## **Conclusion**

43. The Claimant resigned from his employment on 07 September 2023. He communicated his resignation to the Respondent by handing Richard Burton a resignation letter at a meeting held on that date. While the Respondent may have intended to terminate the Claimant's employment, it was the Claimant who resigned before the Respondent's intention was communicated to him.
44. At the time of the Claimant's resignation, his intended last date of employment was uncertain. He was contractually obliged to give three months' notice of termination. The notice began to run from 07 September 2023.
45. The Respondent subsequently dismissed the Claimant with effect from 09 September 2023. This was done by a letter dated 07 September 2023 and received by the Claimant on 09 September 2023. The Respondent's intention to dismiss the Claimant is unambiguous. The result of the Respondent's actions is that between the Claimant's resignation and what would have been the end of his employment, there was an intervening dismissal.
46. The Claimant was entitled to be given one week's notice by the Respondent to terminate his contract of employment. He had not completed two full years' of continuous service, which would have entitled him to two weeks' notice. The Claimant was given a notice payment equivalent to two weeks' pay. This was one week more than he was contractually due.
47. The Respondent had the contractual discretion to pay the Claimant a payment in lieu of notice. It exercised this discretion by making a payment in lieu. It was contractually entitled to do so.
48. The Claimant was given the notice to which he was entitled from the Respondent under the contract of employment. His Claim is therefore dismissed.

Employment Judge R Russell

Date 27 May 2024

REASONS SENT TO THE PARTIES ON  
30 May 2024

FOR THE TRIBUNAL OFFICE