



# EMPLOYMENT TRIBUNALS

**Claimant:** Simon Cocking

**Respondent:** BFS Group Limited

**Heard at:** Cardiff ET by video

**On:** 20<sup>th</sup> June 2024

**Before:** EJ W Brady

## **Representation**

**Claimant:** Mr Fullagar (Solicitor)

**Respondent:** Ms Churchhouse (Counsel)

# RESERVED JUDGMENT

1. The Claimant's claim for Breach of Contract is not well-founded and is dismissed.
2. The Claimant's claim for the unauthorised deduction of wages is not well-founded and is dismissed.

# REASONS

## **Introduction:**

1. The Respondent is a UK service wholesaler and distributor trading as "Bidfood". The Claimant was employed by the Respondent as a General Manager of the Respondent's Chepstow depot from 19 June 2023 until his dismissal on 31 December 2023. The Claimant Claims that he was wrongfully dismissed as he says he was not paid sufficient payment in lieu of notice. He also claims that there was an unauthorised deduction from wages.
2. ACAS was notified under the Early Conciliation Procedure on 14 February 2024 and the certificate was issued on 27 March 2024.

## **Claims and Issues:**

3. The Claimant has brought claims for wrongful dismissal and unauthorised deduction of wages. The issues were agreed at the start of the hearing.
4. Breach of Contract:
  - 4.1 What was the Claimant's notice period
  - 4.2 Was the claimant paid for that notice period?
  - 4.3 If not did the Claimant do something so serious that the respondent was entitled to dismiss without notice?
5. Wages:
  - 5.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?
  - 5.2 Were the wages paid less than he should have been paid?
6. Both parties agreed at the outset that under the terms of the contract of employment, the claimant was entitled to one week's notice for the duration of his probation period. The Claimant refers to the terms of the contract, particularly clause 3 which states, "*Your employment is subject to an initial probationary period of six months. If a satisfactory level of performance and conduct is achieved during this time, you will receive written confirmation that you have completed your probationary period. However your probationary period may be extended – if it is, your line manager will discuss the reason for this with you. Until you have been told that you have successfully completed you probationary period, you may not be subject to our full disciplinary procedure.*"
7. The Claimant's claim is that there must be a rational exercise of the discretion not to pass the probationary period and that the decision not to pass the Claimant was irrational or perverse. The Claimant relied on the case of *Braganza v BP Shipping Limited* 2015 UKSC 17 and asked the Tribunal to consider (i) whether the decision was made in good faith or was arbitrary or capricious, or (ii) whether the decision-making process was rational and whether it was consistent with its contractual process.
8. The Respondent's case is that the Respondent had an express right to dismiss an employee under clause 13 of the contract, and could give 1 week's notice, or payment in lieu of notice. The Respondent said that any implied term that the decision must be rational must be read consistently with the express term. The Respondent said that English law does not recognize the implied term as a means to fetter the right to terminate the contract of employment and that the Respondent had an express right to dismiss with one week's notice and not to pass the probation for any reason.
9. The Respondent also argued that even if there had been an implied term as argued by the Claimant, there was not an irrational exercise of the discretion in this case and that the Claimant did not reach the satisfactory standard to pass the probation period.

#### **Procedure, Documents and Evidence**

10. The Tribunal heard evidence from the Claimant and from Mr Dow from the Respondent company and both the Claimant and Mr Dow also provided written witness statements.
11. There was a tribunal bundle of 94 pages plus an additional 2 pages, incorrectly paginated as pages 91 and 92.
12. Both parties also provided written closing submissions.

**Findings of Fact:**

13. Mr Cocking's employment with the Respondent commenced on 19<sup>th</sup> June 2023. He was employed as a General Manager. His role was to manage the Chepstow depot with regard to legal compliance, health, safety, stock security and to line manage the heads of department.
14. Mr Cocking's offer of employment set out his objectives:
  - 14.1 Credible "Bidford Wales" sales plan and strategy to go live in Jan/Feb 2024 to include full breakdown of range, RTM, sales operating plan, marketing initiatives, Welsh provenance supply lines.
  - 14.2 Welsh operational plan to transform current service and operating procedures to maximise the Welsh plan and secure greater Welsh market share.
15. Mr Cocking's terms and conditions stated at Clause 3 that his employment is subject to an initial probationary period of 6 months. If a satisfactory level of performance and conduct is achieved he would receive written confirmation that he had completed his probationary period. The clause states that the probationary period may be extended, and that "Until you have been told that you have successfully completed your probationary period, you may not be subject to our full disciplinary procedure".
16. Clause 13 of the Terms and Conditions state, "*From the start of your employment with us to the end of your probationary period (as described in the Probationary Period Clause above, including where extended) you must give and will be entitled to receive 1 week's notice of termination of employment.*". It then states, "*After you complete your probationary period you are entitled to twenty six weeks' notice of termination of employment.*" With regard to payment in lieu of notice, the terms state in Clause 13, "*We may, at our sole and absolute discretion, terminate your employment forthwith at any time by serving a notice in accordance with this clause and undertaking to pay to you a sum equivalent to your basic salary in lieu of any required period of notice or unexpired part thereof.*".
17. During his employment, Mr Cocking received performance reviews at week 3, 7, 11, 15, 19, 23 and then the probationary review form.
18. The Claimant said that he had no indication that there were any difficulties with his performance as he had been marked as "adequate" in all his reviews. However, I find that from week 15 onwards, some difficulties are noted on the reviews, such as, "*feeling lost and confused, bemused with somethings being uncovered, needed a reset. Chepstow's performance, lots of areas not where they should be*".
19. During the six month period, Mr Dow also had other concerns about Mr Cocking's performance. He gave evidence to say he had concerns that Mr Cocking seemed to become less frequently on site after 2:30pm than he had previously. There were operational failings at Chepstow depot and so he took the decision to hold twice evening calls at 8pm and 10pm for a period of 2 weeks. During those 2 weeks, Mr Cocking said that he was unable to attend the 10pm meetings due to the fact that he was an early riser and wished to start work at 7am, despite having a flexible working arrangement.
20. Mr Dow also had some concerns about a potential breach of confidentiality.

21. Mr Dow also had some concerns that had been raised by other members of staff about spending more time with some members of staff than others.
22. The Probation meeting was arranged for 18<sup>th</sup> December 2023. Prior to that meeting, Mr Dow discussed his concerns with his colleagues, the Senior Director and Senior HR Director and it was agreed that Mr Cocking should fail his probation on the grounds that:
  - 22.1 he had failed to meet the objectives set in his offer letter
  - 22.2 That there was lack of confidence in Mr Cocking's ability to fix or remedy the issues faced operationally at Chepstow
  - 22.3 That the negative concerns about Mr Cocking's continuing employment outweighed the positives.
23. The meeting took place on 18<sup>th</sup> December 2023, during the meeting Mr Cocking stated that his performance had been "wishy washy". In his oral evidence, he accepted that he had been told at that meeting that he had not passed his probation period and that his employment had been terminated. He accepts that he was told that he was due to be paid one week's pay in lieu of notice, but in fact the company agreed to pay him until the end of December, thereby paying him 3 weeks' pay in lieu of notice.
24. A letter was sent by the Respondent company to Mr Cocking on 22<sup>nd</sup> December 2023, confirming that his employment had been terminated and that he would be paid 3 week's pay in lieu of notice, despite being only entitled to 1 week's pay in lieu of notice.

### **The Law**

25. The case of *Geyes v Societe Generale, London Branch* [2013] ICR 117SC, Lady Hale said that "it was an obvious necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised and how and when it is intended to operate". The contract terminated when the employer sent the Claimant a letter stating that the payment it had been made to him was made under the clause.
26. The Claimant referred me to the case of *Braganza v BP Shipping Ltd* 2015 UKSC 17 which he says allows a tribunal to consider whether a decision was made in good faith or was arbitrary or capricious and whether the decision-making process was rational and whether it was consistent with its contractual process.
27. In *Manor House Healthcare v Hayes and anor* EAT 1196/99, an employer's discretion to withhold a bonus was subject to the implied obligation of trust and confidence, so that the discretion could not be exercised in bad faith or capriciously.

### **Conclusion**

28. On 18<sup>th</sup> December 2023 (the day before his probation period ended), Mr Cocking attended the meeting and was told that he had not passed his probation period and that his contract would be terminated.
29. According to Clause 3 of the Contract of Employment, Mr Cocking had not therefore passed his probation period. He was told that his contract

would be terminated. Following the case of Geyes, however, it is clear that he was notified on 21 December 2023, and the contract did not come to an end until 31 December 2023, therefore, 2 weeks after he had been told that his contract was ending and that he had not passed his probation period. I find that as he had not been told that he had passed his probation period, his probation period was extended and therefore, under Clause 13, he was entitled to just one week's notice, when in fact he received 3 weeks payment in lieu of notice.

30. I have to also consider whether the Respondent acted in bad faith or capriciously in deciding not to pass Mr Cocking's probation period. Unfortunately, Mr Dow did not raise all the misgivings that he had about Mr Cocking with him before the meeting on 18<sup>th</sup> December 2023. However, I accept Mr Dow's evidence that he wanted the appointment of the general manager's position to succeed and that he had a number of concerns about Mr Cocking's performance. As this is not an unfair dismissal claim, I do not have to consider whether the decision was within the band of reasonableness, but I am satisfied that it was not exercised in bad faith or capriciously. I do not find that there was a breach of contract in this case. The terms of the contract permitted the Respondent to extend the probation period and terminate the contract with one week's notice or payment in lieu of notice. In fact, the Respondent agreed to pay Mr Cocking 3 weeks' pay in lieu of notice.
31. With regard to the unauthorised deduction of wages, I did not hear any evidence in respect of holiday pay. The evidence that I heard related to the claim for notice pay only for the reasons I have given, I do not find that any more payment in lieu of notice was properly payable. I therefore dismiss the claim for the unauthorised deduction of wages.

Employment Judge W Brady

Date 28 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 1 July 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

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