

Neutral Citation Number: [2025] EAT 150

Case No: EA-2024-000175-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 September 2025

Before :

HIS HONOUR JUDGE JAMES TAYLER

Between :

MR YOOSEFINEJAD

Appellant

- and -

EAST SPACE LTD

Respondent

Ms Courtney Step-Marsden for the Appellant
The Respondent did not attend nor was represented

Hearing date: 23 September 2025

JUDGMENT

SUMMARY

CONTRACT OF EMPLOYMENT

The Employment Tribunal erred in law in dismissing a wrongful dismissal complaint on a basis not argued by the respondent.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against a judgment of the Employment Tribunal, Employment Judge Shukla, after a hearing on 12 January 2024. The judgment was sent to the parties on 15 January 2024.
2. The claimant commenced employment with the respondent on 1 April 2023. He entered a written contract of employment pursuant to which his duties were described as “Operations Director”, although the respondent contended that in reality his role was that of a general manager.
3. The contract of employment included the following provisions:

6. PROBATIONARY PERIOD:

6.1. Your probationary period is three months from commencement of employment. Your probationary period may be extended at our discretion. We will confirm in writing when you have satisfactorily completed your probationary period. ...

20. NOTICE:

Subject to any other term of this agreement, your employment shall continue until terminated by either party giving the other not less than: by you shall be 8 weeks prior notice; and by the Company, shall be 8 weeks’ notice for up to 5 years’ service; and for 5 or more years’ continuous service, shall be 1 week for each full year of employment up to a maximum of 12 weeks’ notice. ...

22. TERMINATION

22.1. Notwithstanding clause 22 of this agreement, we may, in our sole and absolute discretion, terminate employment at any time and with immediate effect by paying a sum in lieu of notice (Payment in Lieu) equal to the basic salary (as at the date of termination) which you would have been entitled to receive under this agreement during the notice period referred to at clause 22 (or, if notice has already been given, during the remainder of the notice period) less income tax and National Insurance contributions. For the avoidance of doubt, the Payment in Lieu shall not include any element in relation to (i) any bonus or commission payments that might otherwise have been due during the period for which the Payment in Lieu is made, (ii) any payment in respect of benefits which you would have been entitled to receive during the period for which the Payment in Lieu is made and (iii) any payment in respect of any holiday entitlement that would have accrued during the period for which the Payment in Lieu is made. You shall have no right to receive a Payment in Lieu unless we have exercised our discretion in this clause.

22.2. We may also terminate employment with immediate effect without notice and with no liability to make any further payment to you (other than in respect

of amounts accrued due at the date of termination or required to be paid by law) if you:

22.2.1. are guilty of any gross misconduct, gross negligence or serious breach of your contract of employment; or

22.2.2. are convicted of any criminal offence (other than an offence under any road traffic legislation for which a fine or non-custodial penalty is imposed); or

22.2.3. become of unsound mind or a patient under any statute relating to mental health; or

22.2.4. cease to be eligible to work in the United Kingdom.

22.3. Our rights under this clause are without prejudice to any other rights that we might have at law to terminate employment or to accept any breach of this agreement by you as having brought the agreement to an end. Any delay by us in exercising our rights to terminate shall not constitute a waiver thereof.”

4. The claimant was dismissed with immediate effect on 14 June 2023. The claimant was sent an email confirming his dismissal:

Hi Felix

As per our conversation just now.

I’m writing to officially terminate your contract. Today’s date is the 14th July 2023.

I want you to know that I really have appreciated your time with us and sorry for all involved that it hasn’t worked out.

As per our conversation I’m happy to pay you until the end of the month, but you will not be required to work from today onwards.

I wish you all the best in the future Felix. Stay in touch.

Bests

5. The claimant submitted a claim to the Employment Tribunal on 24 October 2023. In so far as is relevant to this appeal, the claimant claimed a shortfall of notice monies.

6. At box 3 of the ET3 response the respondent stated:

Felix was inside his probation period when I let him go.

7. At box 5.3 the respondent stated:

Felix was let go inside his probation and it is my understanding that this only required 7 days' notice. I did however want to give him a little more and paid him 12 days.

8. At box 6.1, the respondent set out some issues that had been raised about the claimant's performance by his colleagues. The respondent did not plead that the claimant had been guilty of a fundamental breach of his contract and that the repudiation had been accepted by providing short notice.

9. It does not appear that the issues were identified at the commencement of the hearing in the Employment Tribunal.

10. The claimant had submitted a witness statement setting out his version of events and his contention that he should have been paid full contractual notice of 8 weeks. The respondent had not provided a witness statement.

11. The claimant gave evidence before the respondent.

12. Mr Edwards gave evidence for the respondent. He stated that in retrospect he thought that he should have dismissed the claimant for gross misconduct.

13. The Employment Tribunal made a number of findings about the contract of employment at paragraph 4 and the complaints that had been made by fellow employees at paragraph 5:

5. On 14 June 2023, Mr Edwards received verbal complaints from other employees, which are also recorded in two emails, about the claimant's conduct. The emails said as follows:

- a. The claimant is not working the hours a GM [general manager] is required to work.
- b. Lack of support on shifts and physical presence at the venue.
- c. Poor understanding of venue operations and priorities.
- d. Lack of initiative/proactivity.
- e. Delegating tasks yet unable/unwilling to help or take on tasks of his own;
- f. Lack of understanding and assistance with finance and reporting.
- g. Poor handling of security issues leading to animosity among the security team and venue staff.

h. There is little or no effort from the claimant in coming to events even semiregularly. Most of the staff barely know him. Security have even commented that they don't feel comfortable liaising with him about events because he's never there. He just has not been the extra pair of hands that we hoped a new GM would be.

i. A lot of the staff feel it is unfair someone holding a managerial role while not pulling their weight when everyone works so hard.

14. The Employment Tribunal dealt with dismissal at paragraph 6:

6. Mr Edwards dismissed the claimant on that day, and paid him for another 12 days, ie to the end of June 2023, which was also the end of the claimant's probationary period. Mr Edwards said he had thought that the claimant was entitled to the statutory period of notice, that is a week's notice period (ie 5 days), but decided to pay him for 12 days.

15. The Employment Tribunal reached its conclusions about the claim for notice pay at paragraphs 10 to 13:

Conclusions on claim for notice pay

10. The claimant submitted that under his contract, he was entitled to 8 weeks' notice pay, as there was no separate notice period in the contract for probationers. The respondent said that, in retrospect, he would have dismissed the claimant for gross misconduct.

11. I find, on the balance of probabilities, that the claimant committed a fundamental (or serious) breach of his contract of employment, which entitled the respondent to terminate his contract with immediate effect. I accept the respondent's evidence that the claimant had lost (or perhaps never gained) the confidence and respect of his team, and was not performing his job to the standard expected. In the context of a probationary period, I find it was crucial to the contract of employment that the claimant demonstrate a basic ability to carry out the role. I accept the claimant was in serious breach of the standards expected of him, in light of the emailed feedback from his colleagues.

12. I find also that the respondent accepted this breach, in dismissing the claimant. The claimant argued that, by giving notice pay to the end of June (and the end of the claimant's probationary period), the respondent elected to affirm the contract of employment. I reject this argument, as it is plain from the facts that the respondent did not intend to continue with the claimant's contract of employment. The claimant did not work for the respondent after 14 June 2023. An analogy may be made with the reasoning in *Quilter v Falconer* [2020] EWHC 3294, para 121 (what matters is whether repudiatory breach has been unambiguously accepted; employee not necessarily taken to have affirmed the contract by giving short period of notice). There is no ambiguity in this case.

13. The claim for notice pay is accordingly dismissed.

16. The claimant appealed on a number of grounds. The respondent did not attend the hearing, having informed the EAT that insolvency proceedings were on foot. The Companies House website shows the respondent company as active. In those circumstances, I decided to hear the appeal on its merits in the absence of the respondent.

17. The notice of appeal raises five grounds. The second ground contends that the Employment Tribunal determined the complaint on the basis of a defence that had not been raised by the respondent. A helpful summary of the relevant law is provided in the Court of Appeal's decision in **Phones 4U Ltd (in administration) v EE Ltd & Others** [2025] EWCA Civ 869:

194. Drawing the threads together, I would summarise the position as follows:

a) The starting point is that a judge is not entitled to decide a case on a basis that has neither been pleaded nor canvassed before him. His function is limited to deciding the issues put before him.

b) Where, as in *Al-Medenni* and *Satyam*, a 'theory' advanced by the judge is outside the scope of the pleaded issues (in the sense of the facts necessary to establish a claim or defence: *Shagang Shipping* at [98]), that will generally be a clear indication that reliance on that theory is impermissible.

c) However, the key point is the interests of justice and, in particular, the question of prejudice to the losing party.

d) This may mean that, even if an uncanvassed 'theory' is not outside the scope of the pleaded issues, it would be unfair in all the circumstances of the case for the judge to rely on it. Conversely, in some cases it might not be unfair for the judge to depart from the scope of the pleaded issues, although generally only if this was fully addressed at trial.

18. It would have been open for the respondent to assert that the claimant was guilty of a repudiatory breach of contract that had been unambiguously accepted by the respondent, notwithstanding the fact that 12 days' pay was paid in lieu of notice. However, the respondent had not pleaded that it accepted a repudiatory breach on the part of the claimant. That issue was not raised at the outset of the hearing. There was no witness statement from the respondent. At most Mr Edwards suggested that he should have dismissed the claimant for gross misconduct.

19. The determination of the complaint on a basis not advanced by the respondent was an error

of law. There was no contractual right to give shorter notice during the probation period. The claimant was entitled to be paid for his full notice period. That is the only possible determination of the complaint, and I substitute a judgment to that effect.

20. In the light of that decision, I do not need to go on to deal with the remaining grounds, save that I would note that the Employment Tribunal did not resolve the conflict as to the precise nature of the claimant's duties. While it accepted the respondent's assertion that colleagues had made complaints, the Employment Tribunal did not expressly determine whether any of the complaints were valid or state in what way the claimant had fundamentally breached his contract of employment. The grounds challenging the finding that the claimant was in repudiatory breach of contract would have also succeeded if necessary.