EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

Miss M BENNETT	Claimant
-AND-	
WARREN JOHNSON LIMITED	Respondent
Employment Judge:	Mr J S Burns
Representation:	Claimant in person
Respondent:	Mr K Wilson (Counsel)

Judgment

The claims are dismissed.

Reasons

1. The claim in the ET1 was for breach of contract. The Claim was not clearly explained and on a fair reading of the ET1 appeared to be a claim for misrepresentation which fell outside the jurisdiction of the Tribunal.

2. In her witness statement the Claimant stated "*My claim is against Warren Johnson Ltd (W) for breach of contract and wrongful dismissal for enticing me away from a job I had and for hiring me for a job that the MD Richard Tompkins knew did not exist, thereby breaching their contract with me, and then firing me by lying about the reasons for my dismissal*."

3. The Respondent complained about lack of particularisation and clarity in the claim and applied for case-management and an adjournment, which I refused. However, I did question the Claimant and her father to try to ascertain whether what was complained about could be reasonable categorised as a contract claim within the jurisdiction of the tribunal. In response to my questioning and prompted by my attempt to explain the relevant law to the Claimant as a litigant in person, the Claimant (via her father) suggested that the claim was for breach of the implied term of trust and confidence and that the breach consisted in the Respondent having failed to implement a specific formal plan for the Claimant's integration into the Respondent's business and/or not giving her new work (ie access to the Respondent's existing clients) after her arrival. I decided that although this had not been expressly pleaded, it should have been reasonable apparent to the Respondent that this was the substance of what the Claimant was complaining about, and that having regard to the witness statements and other evidence before me, it could be tried reasonably and fairly without further delay.

4. The Claimant explained at the outset that the damages she was claiming (capped at £25000) were the wages she would have earned had she not resigned from her previous employer in order to join the Respondent.

5. I heard evidence on oath from the Claimant and from Ms A Chandler Scott, an HR manager employed by the Respondent, and referred to a bundle of documents and a Respondent's skeleton argument.

Facts

7. The Claimant was a highly-paid employee of Premier. She wanted a new job so approached the Respondent in 2019. The Respondent which is a public-relations business wanted to expand its Culture Department. Discussions took place during pre-contract negotiations about the Claimant bringing over her existing clients from Premier and, when established in her new role with the Respondent, her taking on new work with the Respondent's existing clients so as to build up and expand its business.

8. The Claimant signed an employment contract with the Respondent in January 2020 and started in early February 2020.

9. There was a whole agreement clause in the contract which excluded prior discussions and representations. Under the contract the Claimant was entitled to one week's notice of termination during her probation period. The contract made no reference to the pre-contract discussions about the Claimant's integration after her arrival.

10. After the start of her employment with the Respondent the Claimant, who had been appointed into the senior role of Associate Director of Culture, worked alongside an employee Stella who was also in the Culture Department. The Claimant found that she was not given new clients (ie the Respondent's existing clients) to work with as fast as she had hoped and expected. The Respondent adopted the approach with the Claimant (as it did with other new employees) of taking the integration process gradually; and in particular waiting for a reasonable period of mutual assessment before allowing the new recruit to take over and deal face-to-face with the Respondent's new clients.

11. I do not find it was ever agreed during the pre-contract discussions (which were in any event expressly excluded by the whole agreement clause) or in the written contract, or informally during the employment itself, that that there would be a specific deadline or date by which the Claimant's integration would have reached a particular point or be completed.

12. It is clear that by 11 March 2020, just over one month into her employment, the Claimant had become unhappy about the approach of at least one senior co-employee namely Gemma in relation to the Claimant's integration. The Claimant sent a complaining email in general terms about this to Richard Tompkins, then Managing Director, and he replied the same day stating "*Let's chat when I'm back in but keen to work this through*."

13. The Covid19 pandemic started to affect the Respondent's business in March 2020. The Claimant's clients (who worked in the performing arts and whom she had hoped to bring from Premier) ceased to be viable clients.

14. Given the nature of the Respondent's business, it expected to be severely impacted by the effect of the pandemic and associated government measures on the entertainment industry. The Claimant was employed primarily to work on and manage live events (including during the Edinburgh Fringe Festival), which were almost all been cancelled. As such, there was little work for the Claimant to carry out in the short term and, in the Respondent's assessment, it was unlikely that the Claimant would have a role to return to in the medium term. The hoped-

for expansion in the Culture department had not occurred and had become completely unfeasible.

15. The Respondent had to respond to this situation and looked to reduce its liabilities by dismissing some employees and furloughing others. New recruits and those with short notice entitlements and whose roles had been reduced or rendered redundant by the lock-down were an obvious choice for dismissal.

16. Those employees who were furloughed were retained with salaries capped at the Corona Virus Job Retention Scheme cap of £2500 per month.

17. The Respondent decided to dismiss the Claimant and served her with notice of termination of her employment by letter dated 19 March 2019. The Claimant was given one week's notice in accordance with clause 1.6 of the Employment Contract (as she was still on probation) and was informed that she would be paid in lieu of her accrued but untaken holiday. The Respondent paid the Claimant £4,053 on or around 31 March 2020 in fulfilment of those entitlements.

18. The Claimant sent an email on 1/4/2020 asking for the Respondent to change its mind, re-employ her and furlough her. Ms Chandler-Scott on 6/4/2020 sent a full response explaining the business reasons why the Respondent had decided against this.

Law pertaining to the implied term of trust and confidence

19. There is a term implied by law in all employment contracts that an employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of trust and confidence between employer and employee…. a balance has to be struck between the employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. (Malik v BCCI 1997 IRLR 462 at 468 - Lord Steyn in the House of Lords)

20. As it is implied into all employment contracts, the term cannot be effectively excluded by a whole agreement clause in a written contract.

21 The implied term will be breached only where there is no reasonable or proper cause for the employer's conduct.

22 The test as to whether there has been a breach of the implied term is an objective one. The motives of the employer are not determinative or relevant. If conduct, objectively considered, is calculated or likely to cause serious damage to the relationship between employer and employee, a breach of the implied term may arise.

Assessment and Conclusion

23 The Respondent was entitled to terminate the Claimant's employment with notice for any reason (or no reason at all) without this amounting to a breach of contract. The termination was not a breach of contract.

24 There was no term that the integration had to proceed at a specific rate or by a certain date.

25. It is not proved clearly exactly what Gemma said or did which the Claimant was unhappy about, but in any event when she complained about this to the MD, he responded immediately expressing a wish to work matters out – ie affirming the Claimant in her position.

26. There was no breach of the implied term of trust and confidence. The Respondent acted reasonably and for sensible business reasons in approaching the Claimant's integration gradually and then deciding to dismiss her when the pandemic struck.

27 In any event the damages which the Claimant told me she claimed in these proceedings (namely her lost income with Premier,) were losses flowing from the Claimant's decision to resign from the previous employment which took place before the Claimant's employment with the Respondent started, and according could not on any view be damages arising from any breach of contract by the Respondent.

28. If the damages claim had been focused more conventionally on the salary she lost as a consequence of being dismissed by the Respondent, that would have failed for the reasons already given. She lost her salary with the Respondent because she was terminated lawfully under the terms of the written contract, which termination was not a breach.

29. The Claimant had no contractual or other right as against the Respondent to be furloughed. This depends on mutual agreement and not simply on the wishes of the employee.

NOTE

The hearing took place over CVP. From a technical perspective, there were no difficulties. The participants were told that is was an offence to record the proceedings.

J S Burns Employment Judge
London Central
23/10/2020
For Secretary of the Tribunals - OLU

date sent to the Parties – 26/10/2020