



EMPLOYMENT TRIBUNALS

Claimant: Ms L Wood

Respondent: BDSA Limited

Heard at: London Central (via CVP) **On:** 11th June 2021

Before: Employment Judge Nicklin

Representation

Claimant: Mr W Lewis (Counsel)

Respondent: Mr J Roddy (Paralegal)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

1. It is the judgment of the tribunal that the Respondent is in breach of contract for failing to pay the Claimant her remaining 8 weeks' notice to which she was entitled under the terms of her employment contract, as varied.
2. The Respondent shall pay the Claimant **£5,923.07** gross, subject to any deductions from that sum for tax and/or National Insurance as may be applicable.

REASONS

Introduction

1. By a claim form presented on 1st January 2021, the Claimant brought a claim for breach of contract and/or unlawful deductions from wages in respect of a period of 8 weeks' unpaid notice pay.
2. The claim was listed for a 2-hour full merits hearing. There was a previous listing of the claim on 30th April 2021 before Employment Judge M Joyce. The case was postponed with case management directions to prepare for this hearing.

3. During the course of this hearing, it became apparent that there would be insufficient time to hear the evidence and cross examination of the witnesses, hear submissions, deliberate and give judgment. I therefore informed the parties that judgment would be reserved. This allowed for the time allocated to be fairly used for evidence and submissions. Given the case had already been postponed once, I concluded that this was in accordance with the overriding objective and would deal with the case justly and fairly without any further delay or additional expense to the parties.
4. The Claimant attended the hearing and gave sworn evidence. She was represented by Mr Lewis, of counsel. The Respondent company was represented by Mr Roddy, a paralegal. Ms Pyndi Shankar, a project coordinator at the Respondent who provides business support to its director, gave sworn evidence on behalf of the Respondent.
5. I was provided with an electronic bundle running to 193 pages and witness statements for each of the two witnesses.

Issues

6. At the beginning of the hearing, I clarified the issues with the parties.
7. The issues are:

Notice pay

- 7.1. Did the parties agree, on 26th March 2020, to vary the Claimant's contract of employment to include a 12-week notice period instead of a 4-week notice period? The Claimant contends that a variation was agreed in writing between herself and Mr Broom, whom she said was acting in his capacity as a director (at the time) of the Respondent. The Respondent contends there was no variation and the original contract applies.
- 7.2. If the Claimant is entitled to a 12-week notice period, how much notice pay is owing? The Respondent accepts that it gave 4 weeks' notice (paid during employment).

Findings of Fact

8. I make the following findings of fact.
9. The Respondent describes itself as an architectural activities company, based in Leicester. It trades using the name 'Brown Studio'. The Claimant was employed from 10th April 2017 as an Interior Designer (and latterly as Associate Interior Designer), working at the Respondent's London office. Her employment was terminated on 5th October 2020 by reason of redundancy. Whilst section 5 of the ET1 claim form says that the Claimant's employment was continuing when she submitted the claim, this is an error. The Claimant was given written notice of termination of her employment on 7th September 2020, following a redundancy process. This provided for 4 weeks' notice and confirmed that her employment would terminate on 5th October 2020.
10. The Claimant's original terms of employment included a contractual notice period of 4 weeks. The Claimant did not have a copy of her own contract upon commencing employment. Her evidence was that she had been issued with a contract at the outset, but this had the name of a different employee on it – a Ms Wallace. I accept the Claimant's evidence that she did not have a contract

bearing her own name until March 2020. Ms Shankar was not employed by the Respondent at the time and could not contradict the Claimant's evidence on the point. As noted below, the Claimant had a PDF version of a contract saved with her own initials but bearing Ms Wallace's name until she carried out her own amendments to it in 2020. It is more likely than not that such a file was saved with her initials because that was the contract provided to her.

11. I accept the evidence of the Respondent that 4 weeks was the standard notice period operated for employees within the business (unless an employee's statutory entitlement exceeded this). Ms Shanker confirmed that all staff contracts say four weeks and there was no evidence to suggest that employees routinely enjoyed a period of notice any longer than this (although, as above, a longer serving employee may be entitled to more if they had worked for the Respondent for 5 or more years). I find that, despite not having a written contract bearing her own name, both parties knew and understood that there was a 4-week notice period after the Claimant's probationary period (which was the first 3 months of employment). In the absence of a written contract in her own name, these were the terms that applied. This accords with the Respondent's standard practice and the Claimant's understanding that she did not have a notice period longer than 4 weeks until the contract was varied.
12. In March 2020, the Respondent began a consultation process with its employees in respect of a proposed restructure to ensure its future viability as a business. This process involved consultations regarding potential redundancies. As the Claimant confirmed in her witness statement, she was aware of this process from March 2020.

Amendments to the Claimant's contract

13. The Respondent uses a computer programme called 'ActivTrak'. This software can be used to monitor an employee's work computer to ensure that an employee's use of the Respondent's IT systems accords with the standard of behaviour and performance at work policy, as set out in the Respondent's Staff Handbook.
14. On 18th March 2020, ActivTrak records show (by virtue of screen shots which were included within the electronic bundle) that, at around 4.58pm, the Claimant opened a PDF document of a standard staff contract on her work computer, retrieved from an email (p.135). This contract had the name of Ms Wallace at the top but was saved as a file with the title: "Brown Studio Contract LW". I find that this is in reference to the Claimant as it carried her initials. At 5.01pm that day, the Claimant was recorded as viewing the notice period section of the contract (p.136). At 5.03pm, having deleted the word 'four', the Claimant inserted 'twelve' into paragraph 4.2 of the contract using the edit function on her PDF software, so that it read "By either side giving twelve weeks' notice".
15. On 19th March 2020 at 3.52pm, ActivTrak records show the Claimant printing out the edited contract, saved with the same file name (p.140). The edited contract had the Claimant's name at the top (p.141). The Claimant also confirmed in her evidence that, using her personal email at work, she then emailed a copy of the edited contract to her partner on 26th March 2020 in order to keep it safe so she would not lose it (p.145).

16. On 23rd March 2020 the Claimant spoke with Mr Chris Browne, the director of the Respondent. During this meeting, the Claimant told Mr Browne that she had a copy of her employment contract and that she would forward it to him. For various operational reasons, the Respondent did not have a full record of its staff documentation and contracts. These events are referred to in an email from Ms Shankar to the Claimant chasing up a copy of the contract on 4th May 2020 (p.178). The Claimant accepted in her evidence she received this email. I accept that the Claimant had promised to provide a copy of her contract in March. The events as recorded by Ms Shankar in paragraph 8 of her witness statement accord with the difficulties the Respondent found itself in; it did not have a full record of documents and had been through a challenging period in which a former director of the business was reported to the police, investigated and prosecuted.
17. On 26th March 2020, the Claimant says that she spoke to Mr Gary Broom (who was a director of the Respondent until 31st March 2020 and was the person later reported to the police by the Respondent for other reasons). The Claimant alleges that she told him she was concerned about working without a contract and handed him a copy of a contract bearing her name with a 4-week notice period set out in section 4. She claims they both signed that contract (and a copy appears in the electronic bundle starting at p.44). She then says that she asked him, on the same occasion, if she could have a longer notice period given that the Claimant had been promoted to the Associate Interior Designer role. The Claimant alleges that she and Mr Broom then signed the edited contract containing a 12-week notice period on the same day. A copy of this contract is in the electronic bundle starting at p.51.
18. I find, on balance of probabilities, that the Claimant and the Respondent did vary the Claimant's employment contract to extend the notice period to 12 weeks on 26th March 2020. This is because:
- 18.1. I accept the Claimant's account of these events. I considered her to be a clear and straightforward witness who did not exaggerate events. Her evidence that she only previously had a contract in the name of Ms Wallace accords with the original document she edited, which was saved as her contract with her initials.
- 18.2. The Respondent had faced a period of some administrative disorganisation which it was seeking to remedy through Ms Shankar's business support role. However, it relies on the fact that its IT contractor found the '4 week' version of the contract signed on 10th April 2017 in the system. Ms Shankar, quite understandably, did not have any personal knowledge about when that document came into existence. I find that it is likely that a contract in the Claimant's own name was not signed on 10th April 2017 and that it was backdated because the Claimant had originally been issued with a contract bearing someone else's name at the top.
- 18.3. There is no evidence from Mr Broom to support or deny the Claimant's account. The Respondent has good reasons for not wishing to involve Mr Broom in these proceedings, given its report to the police and his subsequent prosecution. However, at the time of his meeting with the Claimant, he was still a director of the Respondent and there was no evidence before me to suggest that he could not, in that capacity, bind

the company acting as one of its officers. The Respondent did not call any evidence from Mr Browne, the remaining director, to deal with questions of Mr Broom's authority or the practice between the directors when agreeing contracts. I find, on the balance of probabilities, that Mr Broom, as a director, did have authority to vary the Claimant's contract on behalf of the Respondent at the time. Why he decided to agree to increase the Claimant's notice to 12 weeks is ultimately a matter for the Respondent.

- 18.4. Both contracts are in the electronic bundle. Both are signed by the Claimant and appear to have been signed by Mr Broom. Ms Shanker believed that the documents did bear Mr Broom's signature. Both signatories have given the date of 10th April 2017 on both versions. The '12 week' notice could not have been signed then; nobody suggests that was the notice period agreed at the commencement of employment. It is more likely than not that these documents were both signed by the Claimant and Mr Broom on or around 26th March 2020, as the Claimant says. The Claimant gave Mr Broom the second version (the '12 weeks' notice version) after he had signed the '4 weeks' version and they had a discussion before reaching further agreement. It is unlikely that Mr Broom would sign one of the documents and not the other given that they both bear his signature and the same date. On close inspection, they are clearly not identical copies as the signature and dates are not in exactly the same place in what appears to be an identical signature box. This is also the case for the Claimant's signatures and date.
- 18.5. The events are also supported by the fact that the Claimant then emailed her contract to her partner on the same day it had been agreed with Mr Broom. The file was then titled: "Lara Wood – Contract.pdf". It is more likely than not that the Claimant sent this to her partner at this point because she had obtained the Respondent's agreement to the varied contract and therefore wanted to retain a copy privately.
- 18.6. Whilst Ms Shankar explained that Mr Broom left the office (with his keys retained at the office) on 11th March 2020 and was then set up to work from home, she was not there on 26th March 2020 to be able to say what did or did not happen in the office.
- 18.7. The '12 week notice' contract does not include an updated job title or salary. I have considered why that is the case given the Claimant says she had been promoted and wanted the longer notice period. I find that, whilst this was an unusual situation where the employee carried out the amendments herself and presented it to the director (rather than being issued with a new contract by the Respondent), the Respondent had clearly not established (by that stage) an organised and structured system for dealing with HR matters. This is well evidenced by the fact that the Claimant only had a contract bearing someone else's name for almost 3 years. The Claimant believed that "*if you need something done, do it yourself*" (as recorded at paragraph 11 of her witness statement). This is what she did. The Claimant's objective was plainly to secure a better notice period, probably in circumstances where a redundancy situation may be ahead. However, even if this was an unusual situation, the draft was agreed by a director of the Respondent and signed accordingly. The fact the other aspects of the document

were not updated is likely because the amendments were carried out by the Claimant, looking to improve the notice period. She did not focus on those other matters which were uncontentious.

- 18.8. I have considered the point made that the Claimant was not forthcoming with the Respondent during 2020 in explaining, through email correspondence with Ms Shankar, how and where the latest version of the contract was formed or in providing a copy of the contract when she had been advised that the Respondent did not have it (Mr Broom was no longer a director or involved with the Respondent at this point). The Claimant was chased for her contract on 12th June 2020, responding on 15th June 2020. She said she would let Ms Shankar know when she had located a copy. This was not provided until 27th August 2020. On 28th August, Ms Shankar sent the '4 weeks notice' version of the contract (as signed by Mr Broom in March 2020) to the Claimant, after it had been found by the IT contractor. The Claimant was challenged about the '12 weeks notice' version and, in reply, she confirmed that she was *"unhappy with the terms in my initial contracts (I even was issued a contract with another person's name), and Gary signed a contract agreeing to twelve weeks notice. As this was the latest contract issued to me, this is the contract that is in use, and I expect it to be honoured"*. Further questions were put to the Claimant by email on 11th September 2020. The Claimant replied on 14th September as follows:

"I suggest you refer to your own records to answer the questions you have raised; it is not the responsibility of the employee to provide this information. Furthermore, I am most unhappy with the implication related to the genuineness of the signature in the contract and I suggest you contact Gary Broom directly to verify this".

The Claimant was a little uncooperative with the Respondent and could have been more prompt and forthcoming during these exchanges. However, in the context of what was a redundancy process and the Claimant not having an established working relationship with Ms Shankar, I do not consider that these concerns, as raised by the Respondent, undermine the Claimant's evidence about the events of 26th March 2020.

Redundancy

19. As a result of the Respondent concluding that the '4 week notice' contract applied (which was dated 10th April 2017 but, as I have found, was signed by Mr Broom on 26th March 2020), the Claimant was given only 4 weeks' notice from 7th September – 5th October 2020, when her employment terminated.
20. The parties agree that the Claimant's annual salary at the point of termination of her employment was £38,500.

Law

21. The tribunal has jurisdiction to hear claims for breach of contract pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order"). This includes a claim for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries), which a court in England and Wales would, under the law for the time being in force, have jurisdiction to hear and

determine; it is not excluded by Article 5 (which does not apply here) and is a claim which arises or is outstanding on the termination of the employee's employment.

22. Section 13 of the Employment Rights Act 1996 ("ERA") provides for the right not to suffer unauthorised deductions from wages. So far as relevant to this case:

- (1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
 - (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
 - (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*
- (2) *In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
 - (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
 - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- (3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

23. For the purposes of a claim of unauthorised deductions from wages, so far as relevant, 'wages' are defined in section 27(1)(a) of the ERA as:

any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

Conclusions

24. I conclude that the parties did agree to vary the contractual terms of the Claimant's employment from 4 weeks to 12 weeks on 26th March 2020. This was effected by Mr Broom signing an amended written contract of employment stating 12 weeks. It was dated 10th April 2017, as the first day of employment, but took effect upon the parties agreeing the variation. Mr Broom was a director of the Respondent and had authority to bind the Respondent accordingly. Whilst a '4 weeks notice' version of the contract was signed on the same date, this was superseded by the subsequent contract with a longer notice period which was the last agreed form of contract concluded between the parties.

25. It follows that the Respondent was in breach of contract by terminating the Claimant's employment on 5th October 2020 without giving her a further 8 weeks' notice to which she was entitled by virtue of the variation to her contract in March 2020. This means she was wrongfully dismissed and is entitled to be compensated for the 8 weeks' notice pay.

26. The parties agreed the basis of the calculation of the 8 weeks' notice pay at the end of the hearing, save that the Claimant suggested the calculation was £38,500 / 12 months / 4 weeks x 8 weeks = £6,416.64. It was accepted by counsel for the Claimant that this was not a conventional way of calculating 8 weeks. I conclude it is the wrong approach as the monthly sum divided by 4

weeks does not give the correct weekly amount when dividing the annual salary.

27. I prefer the Respondent's calculation which was: £38,500 / 52 weeks x 8 weeks = **£5,923.07 gross**. This is based on the Claimant's annual salary at the time of termination of her employment, which was agreed between the parties. As notice pay sums are liable to tax and National Insurance deductions, the Respondent must pay this sum to the Claimant, subject to first deducting any tax and/or National Insurance which may be applicable.

Unlawful deductions from wages

28. As the Claimant's employment terminated without her full notice being given and/or paid, the claim is, in my judgment, properly disposed of by finding a breach of contract in the circumstances. However, insofar as the claim was alternatively brought as a claim for unlawful deductions from wages on the footing that the Claimant should have been entitled to 8 weeks further employment and pay under notice, then, to the extent that it is necessary to do so, I conclude that such a sum was properly payable under the contract of employment, as varied, for the reasons given above. Accordingly, any deduction to the Claimant's wages by not paying her was not authorised under section 13 of the Employment Rights Act 1996 because the Claimant has plainly not consented (in writing or otherwise) to the making of such a deduction at any time.

Outcome

29. The claim therefore succeeds and the Respondent must pay the Claimant £5,923.07 gross, subject to any deductions for tax and/or National Insurance which are applicable from that sum.

Employment Judge Nicklin

Date 6th July 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
07/07/2021

FOR EMPLOYMENT TRIBUNALS