



EMPLOYMENT TRIBUNALS

Claimant: Mr. A. Narimani
Respondent: Boots Opticians Professional Services Limited

Heard by CVP (Watford)
On: 9 January 2022
Before: Employment Judge S. Matthews

Representation

Claimant: Mr. R. Narimani (father of claimant)
Respondent: Ms. Holden (Counsel)

RESERVED JUDGMENT

1. The respondent was in breach of contract for terminating the contract without notice.
2. The claimant did not suffer a loss and is only entitled to nominal damages. I make an award of £25 for nominal damages.

REASONS

Introduction

1. The respondent operates a chain of optometrists. In February 2021 the claimant was offered the position of Pre-registration Optometrist with the respondent to commence in the summer of 2022, when he had completed his undergraduate degree. The respondent subsequently withdrew the offer before the claimant started work. The claimant claims breach of contract and notice pay in a claim form issued on 11 June 2022.
2. The claimant was represented by his father and the respondent by Ms. Holden of Counsel.
3. I heard sworn evidence from the claimant and from his father, Ramin Narimani. On behalf of the respondent I heard sworn evidence from Kabir Khan (Hub manager) and Trevor Few (Head of Opticians- London and East Anglia). I considered the documents from a bundle of 167 pages. The numbers in brackets below are references to pages in the bundle. In addition I was referred to a letter between the claimant's father and the respondent dated 7 January 2023 which set out details of the damages the claimant seeks and which are listed at paragraph 9 below.

Issues

4. The issues for the Tribunal to consider were discussed and agreed at the outset of the hearing as follows:
5. Did this claim arise or was it outstanding when the claimant's contract was terminated? If not, the Tribunal will not have jurisdiction to hear the claim.
6. It is accepted that the respondent withdrew the offer of employment. What was the reason for the withdrawal?
7. Was that a breach of contract?
8. How much should the claimant be awarded as damages?
9. If there was a breach how much should claimant be awarded as damages? The claimant claims:
 - 9.1 One week's notice pay
 - 9.2 Holiday pay that would have accrued during the one week notice period
 - 9.3 Extra travelling costs for a minimum period of two years and four months
 - 9.4 Four months' pay to represent the time it would have taken to complete the disciplinary process and termination of contract
 - 9.5 A sum to represent the loss of the difference in the salary between a pre-registration and qualified Optometrist over a period of four months.
 - 9.6 The value of a Boots Colleague discount card.

Facts

10. Having heard the evidence, I make the following findings of fact on a balance of probabilities.

Offer

11. After a competitive selection process the claimant was offered the role of 'Pre-registration Optometrist' on 20 February 2021 (34-36). The start date was 25 July 2022, some 17 months later. At the time the claimant was still at university. The respondent's normal recruitment process for this role was to recruit in advance so that the role could be taken up on graduation. The role was intended to enable employees to qualify as an optometrist in accordance with the requirements of the General Optical Council. It requires the employee to be supervised by a qualified optometrist.

The Contract

12. The claimant received the offer letter dated 20 February 2021 (34-36) together with a contract (37-44) and accepted the offer. The relevant terms of the Contract are:

Termination provisions.

13. The contract is described in the offer letter as 'fixed term' to expire on 20 August 2023 (34). This was intended to align with the expected date of qualification. The contract itself is headed 'Contract of Employment -Fixed Term'. However, the contract terms provide that it can be terminated earlier by notice. The notice period during the three-month probation period is one week (37). On completion of the probation period the notice period is four weeks (42). The claimant submitted that the contract could only be terminated during the probation period for unsatisfactory performance. I find that this is not the case. The termination provisions do not state that termination is to be based on performance only. I find that either party can terminate during the probation period for any reason.
14. The bundle contains a document entitled 'Guidance on managing performance, conduct and attendance concerns during the probation period' (153-155) but I find that this is guidance and does not constitute a term of the contract. In any event, as set out below, it is accepted that the reason for termination was not performance, conduct or attendance and so this guidance does not apply.

Place of Work

15. The contract refers to the Uxbridge store as 'your normal place of work'. There is a term providing for transfer to another store 'within reasonable travelling distance' (38).

Conditions of Offer

16. The offer letter states that 'our offer is subject to the satisfactory completion of your studies and in accordance with GOC regulations, obtaining a second class or better degree at your first attempt'.
17. Counsel for the respondent submitted that it was a condition of the offer that a supervisor was available, but I do not find this to be an express or implied term of the contract. The conditions refer only to the employee's degree and his qualifications. The contract does not contemplate the non-availability of a supervisor. The offer letter provides for the employee to be moved to another store if the store 'no longer meets the requirements outlined by the General Optical Council' (34).

Other benefits

18. The contract provides that the employee will qualify for other benefits on completion of the probation period (39). This includes a Boots discount card (144).

Contact with Mr Khan pre termination

19. In the period between receiving the offer and the withdrawal of the offer the claimant was contacted by Mr Khan (Hub Manager for a group of stores including Uxbridge). In April 2021 Mr. Khan discussed with the claimant the possibility of him working part time as an Optical advisor/assistant before taking up his role as pre-registration optometrist (97). The claimant indicated that he did not wish to accept the part time role as he wanted to be paid more.

20. Between the dates 10 May 2021 and 10 August 2021 Mr. Khan advised various colleagues that he had concerns about the claimant's attitude and discussed whether it was possible to withdraw the offer (56 to 61). Ultimately no decision was made, and no action was taken in respect of his concerns.
21. On 11 October 2021 Mr. Khan revisited the possibility of the claimant working part time at the store prior to taking up the pre-optometrist role. He stated in a What's App message to the claimant that they may need to withdraw the offer as his prospective supervisor was not willing to supervise someone who had not worked for the respondent before commencing the training scheme. The claimant agreed that he would work there as an Optical advisor/ assistant straight after his exams from about April 2022.
22. Shortly afterwards, on 27 October 2021, Mr. Khan was informed by the prospective supervisor that she was pregnant and that she expected to go on maternity leave in June 2022.

Termination of contract

23. Mr Khan contacted Shannon Linton (Recruitment Partner) to inform her that the prospective supervisor was pregnant and enquired about withdrawing the offer to the claimant (62). Shannon Linton asked him to look at alternative practices in the area that may be able to 'support' the claimant before withdrawing the offer (63).
24. On 14 December 2022 Mr. Khan advised Shannon Linton that he had not been able to find an alternative (64). She replied that they would revisit the issue in January 2022 as there were some pending moves.
25. On 20 January 2022 Shannon Linton notified Mr. Khan that they had explored all options and he was to withdraw the offer. She sent him a verbal script and model letter (70). Mr. Khan contacted the claimant by telephone on 1 February 2022, verbally withdrew the offer and sent a follow up letter (74).
26. The script and letter Mr. Khan had been recommended to follow provided for one week's paid notice (70), but this was not offered in the letter he sent (74). Mr. Khan could not explain this in evidence.

Grievance

27. The claimant raised a grievance by email dated 14 February 2022 (78-79). His complaint was that the offer was withdrawn because he refused to work for the respondent part time when Mr. Khan contacted him in April and October 2021. In evidence today he accepted that was not the reason and that the genuine reason for the withdrawal of the offer was the non-availability of a supervisor.
28. The grievance was heard by Trevor Few (who was at that time the 'Head of Centres of Expertise') on 15 March 2022 (91-95),
29. Following the meeting he offered the claimant a contract at two alternative stores where there was a supervisor available (134). Both had travelling distances of two hours or more. The claimant declined those offers because of the travel distance (139).

30. On 4 April 2022 Mr Few wrote to the claimant with the outcome of the grievance. He stated that if he did not wish to accept a contract at either of the alternative stores he would be prepared to pay one week's notice (136). The claimant indicated that this was not acceptable to compensate him (139) and it has not been paid.

Financial Loss

31. The claimant was offered a role as a Pre-registration optometrist at Vision Express in Slough on the same date as he would have started at the respondent (159). He accepted in evidence that the salary was higher than he would have earned at the respondent. However he said that his concern was that the store was not able to give such wide experience and that it would take longer to complete the necessary competencies and achieve qualification.
32. Mr. Ramin Narimani gave evidence that if the claimant had been employed at the respondent's Uxbridge branch he could have given him a lift to work and that would have saved him incurring travel expenses.

Law

Jurisdiction

33. The contractual jurisdiction of employment tribunals is governed by section 3 of the Employment Tribunals Act (ETA) 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 ('the Order'). Under section 3(2) ETA 1996 and Article 3 of the Order for a tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment and must seek one of the following:
- damages for breach of a contract of employment or any other contract connected with employment
 - the recovery of a sum due under such a contract, or
 - the recovery of a sum in pursuance of any enactment relating to the term or performance of such a contract.
34. In Sarker v South Tees Acute Hospitals NHS Trust [1997] ICR 673, EAT, the EAT considered whether an employment tribunal had jurisdiction to hear a contractual claim relating to a contract that had been terminated before the employee in question had actually started work.
35. The EAT noted that the term 'employee' is widely defined in the Employment Rights Act 2010 (ERA) as anyone who has entered into a contract of employment, and that there is no requirement that the worker must actually have started performing the appropriate duties under the contract. The 'employment' begins when a contract of employment is entered into, not when an employee starts work under that contract and the phrase 'the termination of the employee's employment' in Article 3 has to be construed by reference to the termination of the contract of employment, whether or not the employee has started work.

36. I was referred by Counsel for the respondent to Peninsula v Sweeney [2004] IRLR 49, which relates to the requirement in Article 3 that a claim arises or is outstanding on the termination of the employment contract. That case related to the payment of commission which the claimant had achieved during his employment but which, under the terms of the contract, did not fall due for payment until after the date of the termination of his employment. The claim for commission did not 'arise' on the date of the employee's termination because at that stage he had only a prospective right to the payment of commission for which he could not sue until it had matured into an actual right. If a payment is only contingently due, it is not possible to claim payment until the contingency has happened. Before then, all that can be claimed is a declaration of entitlement to the payment if and when the contingency does happen, but a claim of that sort does not fall within Article 3 and therefore the Tribunal does not have jurisdiction to deal with it.

Breach

37. Once an offer has been made and accepted a contract is formed and can only be terminated by the giving of notice in accordance with the contract. I was referred by the claimant's representative to McCann v Snozone Ltd ET/3402068/15.

Remedy.

38. In the event of a breach of contract the claimant is entitled to be returned to the position he would have been in if there was no breach. In the case of an employment contract in practice this means that he is to be compensated for the benefit that he would have received had he been employed until the end of his notice period. He is entitled to recover only such losses as were reasonably contemplated as liable to result from the breach when the contract was made and is not entitled to recover losses that are too remote. He has a duty to mitigate his loss. When the defendant is liable for a breach of contract, the claimant is entitled to nominal damages although no actual damage is proved.
39. The claimant's representative referred to the 'Gunton extension'. In the case of Gunton v Richmond-on-Thames BC [1980] IRLR 321 it was held that where an employer's breach consists of a failure to follow a contractual procedure, damages may be increased to compensate for the additional period which would have had to elapse had the employer honoured the contractual procedure.

Submissions

40. The claimant's representative argued that Mr. Khan withdrew the offer because of his perception of the claimant's conduct. He should have carried out a disciplinary procedure and that would have taken at least four months. The Gunton extension would apply. He argued that the claimant's losses should be calculated over at least two years because the contract of employment required him to work a further year to avoid having to pay back his training expenses. The loss over those two years consisted of travel costs and the benefit he would have gained from the discount card. He also argued that it would take the claimant longer to complete his training by four months

and he was entitled to the difference in salary for a period of four months between a pre-registration optometrist and a fully qualified optometrist.

41. Counsel for the respondent argued that the reason for termination was non-availability of a supervisor and the contract could not be performed as a result and was frustrated. She referred to the evidence that it was the claimant's own decision not to accept placements at the other stores. If I do find that there has been a breach of contract she submitted that the loss was one week's notice and, as the claimant was not being paid at the time of termination, there was no financial loss. In respect of jurisdiction, she argued that the claim did not arise at termination because the contract was conditional on a supervisor being available and that distinguished it from Sarker where there was an unconditional contract.

Conclusions

Jurisdiction

42. The first issue to be determined is jurisdiction. The contract was a contract of employment notwithstanding that the claimant had not commenced working for the respondent at the date of termination. The terms of the contract were that the claimant would start work on 25 July 2022 and would be subject to a three-month probation period during which his employment could be terminated at any time and for any reason by either party. There was no term that entitled the respondent to terminate the contract without notice if no supervisor was available. There was no term enabling the respondent to terminate the contract on notice prior to 25 July 2022. The claim for notice and notice pay arose on termination because the contract he entered into gave him the right to start the role on 25 July 2022.
43. The right to the discount card did not arise on termination because the contract provided that the claimant would only become eligible for the card once he had completed his probation. The Tribunal therefore has no jurisdiction to decide that issue. I will deal with the other remedies claimed below.

Reason for withdrawal of job offer

44. I was asked to decide the reason for withdrawing the offer but that does not in itself determine whether there was a breach of contract. I have found that the respondent or the claimant could terminate the contract for any reason during the probation period by giving one week's notice. However, as the claimant argued that the respondent should have followed a disciplinary procedure (the Gunton extension) it is relevant that the reason for the termination was not performance, conduct or attendance. The respondent has argued that the contract was terminated by the claimant's failure to accept an alternative placement, but I have found that is not the case as the contract had already been terminated when that offer was made. In addition, I find that the contract was not frustrated as the contract was capable of being performed. There were supervisors available at other stores and the claimant could have been asked to transfer to another store as envisaged in the offer letter.

Was this a breach?

45. The withdrawal of the offer was an anticipatory breach of contract. The respondent indicated that it did not intend to honour the terms of the contract when the time for performance arrived in July 2022. I find that the breach occurred on 1 February 2022 when Mr. Khan informed the claimant that the respondent was terminating his contract and failed to give notice and pay the notice pay specified in the contract.

How much to award in damages

46. The claimant is entitled to be put in the position he would have been in if the contract had not breached. I have found that this is a week's notice which could have been given at any time during the probation period.

47. I have found that the Gunton extension does not apply for the reasons set out at paragraph 14 above; the guidance was not a term of the contract and the reason for terminating the contract was not performance, conduct or attendance.

48. The claimant has mitigated his loss by accepting a job with Vision Express in which he is paid more than he would have been paid by the respondent and therefore I find that there is no loss in respect of a week's notice pay and holiday.

49. In respect of the claim for travel costs and for loss of salary on the grounds that it may take longer to complete the training I have found that the claimant's contract could have been terminated on one week's notice and the losses therefore do not flow from the breach of contract. In any event the losses are too remote in that they cannot be reasonably said to have been foreseeable.

50. The offer of one week's notice on 4 April 2022 (136) post-dated the termination of the contract and the Tribunal has no jurisdiction to decide that issue.

51. I therefore find that the claimant has not suffered a loss. He is entitled to nominal damages only for which I award the sum of £25.

Employment Judge **S. Matthews**

Date 2 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12th February 2023

GDJ
FOR EMPLOYMENT TRIBUNALS