



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Day

**Respondent:** Colchester Construction Services Limited

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** Monday 21 September 2020

**Before:** Employment Judge Russell

**Representation**

**Claimant:** In person

**Respondent:** Mr M McMahan (Director)

## JUDGMENT

**The Claimant's claim for breach of contract fails and is dismissed.**

## REASONS

1 By a letter of 6 June 2019, the Claimant was offered employment with the Respondent. It was an express term of the offer that he would be subject to a six-month probationary period during which time his could be terminated on one week's notice. It was also an express term that upon conclusion of the probationary period, the Claimant's employment could only be terminated on four weeks' notice on either side. The terms of the offer were agreed and signed by the Claimant and Mr McMahan, on behalf of the Respondent. The employment commenced on 15 July 2019.

2 Around the same time, the Respondent standardised its terms and conditions of employment. The written contract sent to the Claimant on 25 June 2019 included terms which differed from those in the offer letter in respect of notice. Clause 1.3 of the contract stated that the employment was subject to a probationary period of six months. Clause 16.1 provided that after one month's completed service, the Respondent must give notice of termination of one week for each completed year of service (subject to a maximum of 12 weeks). By clause 16.2, the Respondent reserved the right but placed itself under no obligation to make a payment in lieu of notice. The contract did not include a clause entitling the Claimant to four weeks' notice after completion of his probationary period.

3 The Claimant's evidence is that he was concerned that clause 16.1 it did not accurately reflect the agreement set out in the offer letter, he spoke to Mr McMahon who assured him that the term applied only during the probationary period and, thus reassured, he signed the contract and made a manuscript annotation on his copy. By contrast, Mr McMahon's evidence was that in the short time between the offer letter and the contract being signed, he discussed a number of matters with the Claimant, including the notice period, and the Claimant agreed to the change and signed the contract.

4 The employment relationship appeared to be progressing well. On 15 January 2020 there was a brief discussion about the Claimant probationary period. The Claimant's evidence is that he was told that his probationary period had been satisfactorily completed. Mr McMahon's evidence is that the Claimant was told that his probationary period was being extended because the Respondent was concerned about its precarious financial position. I do not need to resolve that dispute to decide this case. The Respondent had no contractual right to extend the Claimant's probationary period due to concerns about its own finances, rather than concerns about the Claimant's performance. Mr McMahon's evidence that this was a permissible contractual variation was not plausible and did not reflect well on his credibility, it gave the impression that he was prepared to give any answer which might support the Respondent's case rather than evidence which was straightforward and truthful.

5 On balance I preferred the evidence of the Claimant as to what was agreed in respect of notice at the outset of his employment. It is noticeable that at no point in Mr McMahon's witness statement does he say that the variation to the notice period was expressly agreed by the Claimant. This is surprising given that the Claimant's notice entitlement is at the heart of this dispute. Furthermore, in his cross-examination of the Claimant, Mr McMahon gave a list of matters discussed which did not include notice period. Finally, as he accepted in cross-examination by the Claimant, the reason that the Claimant's probationary period was subsequently extended was to make sure that he fully understood that the one-week notice period was still in force. If there had been an express agreement to change the notice period, as Mr McMahon said in evidence, such a step would not have been necessary. I find that the Claimant's probationary period was extended because the Respondent was contemplating terminating the Claimant's employment due to its financial situation and Mr McMahon was concerned that he would otherwise be entitled to four weeks' notice.

6 On 23 January 2020. the Claimant met with Mr Bullock and Mr McMahon. It is agreed that most of the conversation took place between the Claimant and Mr McMahon, with Mr Bullock playing only a limited role. Mr McMahon told the Claimant that his employment was being ended and that he would be paid one week's notice. There was a discussion about the final dates of work and what would happen during the notice period. The Claimant's evidence is that he was led to believe that he would not have to attend work during his notice period and, during the discussion about his final dates of work, he was told to "do what you want" by Mr Bullock. Mr McMahon's evidence is that during the discussion he made it clear that the Claimant was required to work his notice period but that there would be some flexibility about working from home and looking for other work. It is not in dispute, however, that the words "payment in lieu of notice" (or equivalent) were not said.

7 On balance, I find that the parties did not agree an immediate termination of employment with payment in lieu rather that the Claimant may not need to discharge all of

his duties during the notice period. In common terms, a period akin to garden leave during which the Respondent did not require the Claimant to attend the office or perform all of his duties, simply those required for an orderly handover. That is consistent with both parties' evidence that the Claimant would therefore be enabled to look for alternative work during the weeks' notice period. There was no contractual term entitling the Claimant to payment in lieu of notice and the Respondent did not exercise its discretion to agree to make such a payment. In the circumstances, I conclude that there has been no breach of contract by the Respondent in failing to pay the Claimant in lieu of notice.

8 In the alternative, and even had the Claimant been entitled to pay in lieu of notice, this is a claim for breach of contract and therefore for damages. The Claimant would be obliged to give credit for sums earned in mitigation and on his own evidence he commenced new employment on the Monday morning at the same salary. In other words, he has fully mitigated his loss.

9 For all of these reasons the claim fails and is dismissed.

**Employment Judge Russell**  
**Date: 13 October 2020**