



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Davis

Respondent: PayStream My Max Limited

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 4 February 2022

Before: Employment Judge Ayre

Representatives:

Claimant: In person

Respondent: Mrs H Bennett, Legal Senior

JUDGMENT

The claim for breach of contract / notice pay fails and is dismissed.

REASONS

Background

1. On 1st October 2021, following a period of Early Conciliation lasting from 24 August 2021 to 15 September 2021 the claimant presented a claim for notice pay.
2. The claimant alleges that she is entitled to four weeks' pay totaling £9,400 gross, following the termination of an assignment that she undertook with Unipart whilst employed by the respondent. In support of her claim she relies upon the terms of a contract between the respondent and a recruitment agency Digital Gurus.

3. The respondent defends the claim. It says that the claimant's employment was not terminated until she resigned in November 2021 and that she is not entitled to any notice pay.
4. The case was listed for a final hearing today. The hearing took place via Cloud Video Platform. The claimant gave evidence and I heard evidence from Mr Julian Ball, director of the respondent.
5. Both parties also submitted documents to the Tribunal which I have considered when reaching my decision

The Issues

6. The issue that fell to be determined at the hearing today was the following:

Did the respondent breach the claimant's contract of employment by failing to pay her notice pay?

Findings of Fact

7. The claimant was employed by the respondent from 28th June 2021 until 12th November 2021 when she resigned in an email in which she wrote: "*Can you please cancel my employment with you*".
8. The claimant's employment with the respondent was governed by the terms of an employment contract that was signed by the claimant on 28th June 2021 and which contained the following relevant clauses:

"Duties

...2.3 The Employer will assign the Employee from time to time to carry out Services for Clients...

2.4 The Employee is obliged to complete any Assignment which is offered to and accepted by the Employee. If the Employee wishes to terminate an Assignment, the Employee must give the Employer at least one month's notice. Termination of an Assignment is not termination of the Employee's employment by the Employer or by the Employee and does not affect the continuity of the Employee's employment...

Duration and Notice

5.1 If the Employee wishes to terminate his employment, the Employee must give the Employer one months' written notice. The Employer must give the Employee notice in accordance with the current statutory minimum period of notice to terminate the Employee's employment.

5.2...when the Employee is not on an Assignment, the Employee is obliged to contact the Employer each and every Monday by 12pm to notify the Employer of his availability to undertake further Assignments...

Grievance and Disciplinary Procedures

17.1 Disciplinary and Grievance Procedures based on those recommended by ACAS will generally be followed. These procedures are not contractual, and the Employer reserves the right to depart from them at its discretion....

Entire Agreement and No Variation

20.1 This Agreement sets out the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes and replaces all prior communications, representations, warranties, stipulations, undertakings and agreements whether oral or written between the parties. All other terms, express or implied by statute or otherwise, are excluded to the fullest extent permitted by law.

20.2 The terms and conditions contained or referred to in this Agreement relating to the supply of the Services shall be to the exclusion of any terms and conditions submitted at any time whether printed or sent with any order form or otherwise.

9. The respondent had a contract with a recruitment business, Digital Gurus Recruitment Limited ("**Digital Gurus**"). Under that contract the respondent agreed to supply the claimant to work as a Business Analyst for one of Digital Gurus' clients, Unipart Group Ltd ("**Unipart**"). The claimant was not a party to the contract between the respondent and Digital Gurus.

10. The terms of the contract between the respondent and Digital Gurus contained the following clauses:

"Term and Termination

...

9.3 Digital Gurus shall be entitled to terminate the Assignment forthwith without notice or liability at any time in the event of any of the following: (a) The Client terminates an Assignment by reason of the Personnel's inappropriate conduct, breaks in service, unsuitability, lack of technical ability, lack of performance, persistent minor breaches of these Terms or Client rules and regulations; ...

9.4 Digital Gurus may terminate the Assignment without cause and for whatever reason by serving the notice period stated in the Assignment Schedule...

General

...

13.7 Both parties agree that these Terms shall not be enforceable by a third party by virtue of the Contracts (Rights of Third Parties) Act 1999 and these Terms or any Assignment can be rescinded or varied by agreement between the Parties without the consent of any such third party. For the purposes of this clause a third party means any person who is not party to this contract."

11. For the purposes of the above contractual provisions, the 'Assignment' was the assignment of the claimant to work for Unipart, who are a client of Digital Gurus, the 'Client' is Unipart and the notice period in the Assignment Schedule is 4 weeks.
12. The claimant began an assignment with Unipart on 28th June 2021. She worked for Unipart for just three weeks. On 14th July the Project Manager at Unipart told her that her assignment was to be terminated. She subsequently received written confirmation from Digital Gurus that her assignment to Unipart was being terminated with effect from 16th July 2021, in accordance with clause 9.3a of the contract between Digital Gurus and Unipart.
13. Although the claimant's assignment to Unipart terminated on 16 July, her employment with the respondent did not terminate. The respondent did not terminate the claimant's employment and the claimant did not give notice to terminate her employment until some months' later, in November.
14. I asked the claimant, during her evidence, which term of her contract of employment had been breached. She was not able to identify any express or implied term of her contract of employment that the respondent had breached. Instead, she relied upon the termination provisions in the contract between the respondent and Digital Gurus, to which she was not a party.
15. When I asked the claimant on what basis she considered that the terms of the contract between Digital Gurus and the respondent could be enforced by her, she replied that the terms of her employment contract did not specifically deal with the issue of the termination of an assignment.

The Law

16. The Tribunal's jurisdiction to hear claims for breach of employment contracts is conferred on it by the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Article 3 of that Order provides that:
- "Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum...if –*
- ...(c) the claim arises or is outstanding on the termination of the employee's employment."*
17. It is a fundamental principle of contract law in this country that contracts can only be enforced by the parties to the contract and cannot be enforced by third parties. This principle of 'privity of contract' is subject to the Contracts (Rights of Third Parties) Act 1999 which provides that, in some circumstances, a third party can enforce a term of a contract either where the contract expressly states so, or where the term confers some benefit on the third party. This does not apply,

however, where, on a proper construction of the contract it was not the parties' intention that the third party would be able to enforce the term.

Conclusions

18. The Tribunal only has jurisdiction to hear claims for breach of contract which arise or are outstanding on the termination of employment. When the claimant presented her claim her employment was ongoing, and it only terminated some time later.

19. The claimant has not adduced any evidence that the respondent breached the terms of her contract of employment. She was unable even to identify which term of her contract she believes the respondent breached.

20. Instead, she sought to rely upon a term in the contract between the respondent and Digital Gurus. She is not a party to that contract and therefore, in line with the principle of privity of contract, cannot enforce it.

21. Clause 13.7 of the contract between the respondent and Digital Gurus expressly excludes the application of the Contracts (Rights of Third Parties) Act 1999. In addition, there is an 'entire agreement' clause in her contract of employment which prevents the terms of any other contract or document being incorporated into that contract.

22. The respondent has not breached any term of the claimant's contract. The respondent did not terminate the claimant's employment and the claimant is therefore not entitled to any notice pay.

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

Employment Judge Ayre

4 February 2022
