



EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT

MR K CUMMINS

V

RESPONDENT

IAMYIAM LIMITED

HELD AT: LONDON CENTRAL

ON: 28 MARCH 2023

EMPLOYMENT JUDGE EMERY

REPRESENTATION:

For the claimant:

In person

For the respondent:

Ms L Puica (company owner)

JUDGMENT

The claim of breach of contract and unlawful deduction of wages are well founded and succeed.

REMEDY JUDGMENT

The claimant is awarded the sum of **£13,254.00**.

REASONS

1. Reasons were given at the hearing and written reasons were requested.

The Issues

1. The claimant was dismissed after 10 months' employment. The claimant contends that he is contractually entitled to 90 days' notice pay and he claims business expenses he says he incurred on the respondent's behalf but not paid. The respondent contends that the claimant was dismissed within his probation period, and he is only entitled to pay in lieu of one week's (5 working days) notice, which was paid to him.

Witnesses and Tribunal procedure

2. I heard evidence from the claimant and from Ms Puica, the respondent's Managing Director. I read the documents provided to me, including a statement from the claimant.
3. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The facts

4. The claimant was employed from 1 February 2022 to 30 November 2022. His employment contract contains the following clauses:

14. PROBATION

14.1. Probationary periods will be for six months from the start date of employment. At its discretion, the Company may extend probationary periods by a further reasonable period, up to a maximum of six months. Procedural information is included in the Company Handbook.

14.2. Employment may be terminated at any time during, or at the end of the probationary period by either the Company or yourself, by giving no less than five working days' notice

15. NOTICE PERIOD

15.1. Following successful completion of the probationary period, employment may be terminated by either the Company or yourself, by giving no less than 90 calendar days' notice in writing.

5. The company handbook states:

Probation

The probation period for all employees is six months from the start date of employment. During this time, your performance, conduct and suitability in the role will be reviewed by your line manager.

Employees will have regular meetings with their line manager to ensure that they are supported in understanding the objectives they should aim to achieve and to monitor performance. ...

At the Company's discretion, we may choose to extend an employee's probationary period by a further reasonable period of up to a maximum of six months. At the end of your probationary period, including any extensions thereof, employees will be informed in writing whether they have successfully passed their probationary period.

If an employee's performance, conduct or suitability in the role is deemed unsatisfactory and unlikely to improve within a reasonable timeframe, the Company may terminate employment during or at the end of probation, giving no less than five working days' notice in writing

6. The respondent's position is that the claimant's performance was poor, that it made this clear to him in regular meetings throughout his employment as he was not achieving revenue targets.
7. The claimant was emailed on 1 December 2022, stating that his last date of employment was 30 November 2022. He was told to "look carefully" at his employment contract which allows for probation to be extended "*As per your consistently missed revenue targets and contractually agreed targets as per Appendix 5, your probation had indeed been extended till 31 Jan 2023.*" It referred to his contract stating that written confirmation would be provided only when he had passed probation.
8. The email states that when making an offer of employment to him, a revenue target of £4.6m was "*clearly discussed*" with him, following his presentation to the Board in November 2021. It says that he had only achieved £12,000 revenue by 30 June 2022 "*when your probation was extended*". The letter states that had. Had been given "*clear feedback*" at monthly performance meetings and weekly calls with Ms Puica. It says that he was given "*verbal notice*" by Ms Puica at a company off-site on 20 October 2022 that if £200,000 closed revenue was not paid by 30 November his employment would be terminated "*due to non-performance*". He was told that he had been given "*verbal notice by all Board members*" at the same off-site. It says he was given written notice on 16 November 2022 of termination on 30 November 2022.
9. The claimant's evidence is that he did not have 3- or 6-month review, and he believed he had passed his probation. He was never told that his probation period was being extended. He says that the respondent's position is wrong, that revenue of £4m could not be achieved in the first year of employment, he argued the respondent had "*nothing*" to back up its claims that his performance was poor. He said that he thought "*everything was fine At no time before October was I told that my performance was not right.*"

10. The claimant says that he never saw the handbook. He points out that the handbook specifies that it does not form part of his contract of employment.
11. The claimant says that at the 18 October 2022 offsite meeting he was told that a decision had been taken to relocate the sales team to the US, that he was told then he was not performing, that he was given new contract stating his salary would be reduced, his start date was expressed as 12 December 2022, that he would be under a new probationary period. It was in this contract that he says a £4.6m income target was specified. He says that after a few days reflection he decided he would not sign this contract. He says that he was not given verbal notice of dismissal at this meeting.
12. The respondent argues that his original contract states that he was required to have a signed contract valued at £100,000 and 7 proposals valued at £1m total after 3 months employment (Appendix 5 contract page 21). The claimant's case is that these were aspirational that no one could meet these targets for a new product launch, it was *"impossible to meet"*.
13. Ms Puica argues that there are Apple notes which detail her meetings with the claimant. She sent these through to the Tribunal during the hearing. These suggest that the first issue of concern raised with the claimant was in June 2022 *"- Deal by deal - poor performance to date Board meeting coming ... revenue missing ... end of line"*. The next issue appears to have been raised at the offsite on 17-18 October 2022: *"offsite - serious chat not working – [no] money in the bank ... notice served..."*. On 15 November: *"revenue 0 v forecast – issue termination agreement..."*
14. The claimant accepted in his evidence that there were discussions in October and November, although he does not accept he was given notice in October 2022. He disputes the negative comments in the June 2022 notes. He argues that messages from Ms Puica show that his performance in July/August 2022 was good: Examples of positive comments in messages include: *"Boom- well done ... Great news ... Boom – well done ... Boom!! star ... You are on a roll-boom – lots of cash ..."*. He said it was *"obvious"* that he was doing a good job, that the messages he was getting clearly showed the respondent was happy with his performance.
15. The respondent's case is that the decision to extend the claimant's probation was taken at a June 2022 Board meeting, although it was not recorded in writing. The claimant denies being told this: *"I would have remembered this and would have followed up in writing, the respondent is lying..."*
16. The respondent argues that its practice is to confirm probation has been passed in writing: that a failure to get anything in writing means that probation has not been passed. Ms Puica argued *"Until then no one knows whether they have passed probation"*. She said that *"we believed there would be value [with the claimant].... alarm bells sounded at the end, in October when I said that he needs to deliver £200k at end October otherwise it will be the end of the road. He said he would do so..."*

17. Ms Puica argued that the claimant's contract "*removes any doubt*", together with the handbook it "*clearly stipulates*" that written confirmation will be given when probation is passed.

Conclusions on the evidence and law

18. I concluded that at no time was the claimant told that his probation period was being extended - at the June 2022 meeting or otherwise. If he had been told this it would have been recorded in the Apple note and Board minutes. Clause 14 of his contract of employment states that probation will be for 6 months, unless extended. The 'extension' needs to be communicated.
19. I did not accept that a failure to tell him or to record in writing that his probation had been passed meant that, contractually, the respondent was entitled to say that it had not been passed and in fact had been extended. I concluded that to extend a probation period, employees must be told of this fact and how long their probation is being extended by. A decision needs to be made and communicated to the employee. The claimant was not told his probation was being extended. An employer cannot expect an employee to assume that a probation period has been extended when they have not been told this.
20. I accept also that the claimant was never told that his probation would only be passed when he was told so in writing: I accept that he may have been aware a handbook existed, but he was never given access to it.
21. I therefore concluded that the claimant passed his probation period because he was never told he had not passed it, and he was never told it would be extended when there was opportunity to do so at various meetings.
22. The claimant is therefore contractually entitled to 90 days' notice of dismissal. The claimant was given notice on 16 November and his dismissal was 30 November 2022. I concluded that he is entitled to a further 75 days payment in lieu of notice. This is based on his net earnings.
23. This sum falls due as both a breach of contract and as an unlawful deduction from his wages.
24. The claimant's average net monthly salary was £5,375.20. A daily rate: $\times 12 / 365 = \text{£}176.72$ daily pay. $\times 75$ days = **£13,254.00**.
25. The claimant did not proceed with his claim for unpaid expenses.

EMPLOYMENT JUDGE EMERY

Dated: 22 May 2023

Judgment sent to the parties
On

22/05/2023

For the staff of the Tribunal office

Notes

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Judgments are published online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.