EMPLOYMENT TRIBUNALS

Claimants: Ms Sarah Arnold

Respondent: GBA Services Ltd

Heard at: Manchester (by CVP) **On:** 8th February 2021

Before: Employment Judge Newstead Taylor (sitting alone)

REPRESENTATION:

Claimants: Ms Sarah Arnold (In person)

Respondent: Mr M Silvey (Consultant)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The respondent was in breach of contract by dismissing the claimant on 2 July 2020 either for failing to demonstrate her suitability for the role during her probationary period or due to capability.

2. The damages due as a result of the respondent's breach of contract are assessed as nil.

REASONS

Introduction:

1. The respondent is a logistics company, based in Lancashire, that operates across a number of industries. On 16 December 2019, the respondent employed the claimant as a Client Relationship Manager. On 18 June 2020, the claimant gave 3 months' notice, commencing on 19 June 2020, of her resignation. On 2 July 2020, the respondent dismissed the claimant for failing to demonstrate her suitability for the role during her probationary period. This claim is concerned with that dismissal.

The Tribunal Hearing:

2. The hearing took place on 8 February 2021.

3. The claimant represented herself. She gave evidence.

4. The respondent was represented by Mr. M Silvey, a consultant. Mr. Ian Mountford, the respondent's UK Sales & Marketing Director and the claimant's Line Manager, gave evidence. Ms. Kelly Serridge, who works in Human Resources at the respondent, observed, but took no part in the hearing.

5. A joint bundle of 205 pages had been prepared for the Employment Tribunal ("the Tribunal.") Also, there was an Additional Email Bundle from the claimant totalling 4 pages, a witness statement from the claimant comprising 25 paragraphs, a witness statement from Mr Mountford comprising 12 paragraphs and 4 pages of written submissions from the respondent. Ms Arnold, Mr Mountford and Mr Silvey each confirmed that they had access to a complete copy of all of the documents. I read the bundles and the witness statements. I informed the parties that they should refer me to the documents on which they relied regardless of my reading and the cross references in the witness statements. References in square brackets in this Judgment are to the pages of this bundle.

6. At the outset of the hearing, I raised with the parties my concern over the duration of the hearing. On 10 December 2020, the hearing had been listed for 1 hr. The parties had been ordered to write to the Tribunal if they did not think the time estimate was sufficient. Neither party had written to the Tribunal. I was concerned that, in light of the (approximately) 213 pages of documents and two witnesses, it was likely

that the hearing would take the majority of the day. Both Ms. Arnold and Mr. Silvey confirmed that they were available for the full day. However, Mr. Mountford was only available until 12.45 as he had a meeting starting at 13.00. Mr. Silvey, on behalf of the respondent, expressed some concerns about getting to Mr. Mountford's evidence before 12.45 and the potential prejudice caused by the hearing going part-heard. Therefore, Mr. Silvey raised the possibility of adjourning the hearing. However, Mr. Silvey accepted that if Mr. Mountford's evidence was taken first, thereby ensuring that his evidence concluded by 12.45, the remainder of the hearing could be dealt with within the day and there would be no risk of going part heard. The claimant was content with this approach too. Further, Mr. Silvey confirmed that he and his client were content for the remainder of the hearing to take place in Mr. Mountford's absence. Therefore, in order to ensure that the hearing remained effective and in accordance with Rule 41 of the Employment Tribunal Rules of Procedure 2013 ("the Rules"), I directed that Mr. Mountford's evidence was taken out of turn.

The Claims & Issues:

7. This is a claim for breach of contract.

8. On 19 June 2020, the claimant gave 3 months' notice of her resignation. Accordingly, the claimant's resignation was due to take effect on 18 September 2020. However, on 2 July 2020, the respondent dismissed the claimant stating that her last date of employment was 31 July 2020. In the circumstances, the claimant claims damages for the period 1 August 2020 – 18 September 2020, being the remainder of her 3-month notice period. For the avoidance of doubt, the claimant accepts that she was paid everything due and owing to her up to 31 July 2020.

9. The respondent denies the claim. The respondent contends that the claimant was dismissed on 2 July 2020 either for failing to successfully complete her probationary period or due to capability [paragraphs 19-20/25.]

10. At the beginning of the hearing, the parties agreed that the main issue for determination was whether or not on 2 July 2020 the respondent breached the employment contract by dismissing the claimant for failing

to successfully complete the probationary period or due to capability. Further, the parties agreed the following sub-issues:

10.1. Was a probationary period a term of the employment contract?
10.2. If so, what were the terms and conditions of the probationary period?
10.3. Did the claimant successfully complete the probationary period or not?
10.4. Did the respondent dismiss the claimant due to capability?
10.5. If so, was any relevant contractual procedure incorporated into the employment contract?
10.6. If so, did the respondent comply with the relevant contractual procedure?

11. The claimant seeks compensation. The claimant prepared a schedule of loss totalling £7,559.44 [193-194.] Specifically, the claimant seeks:

11.1.	Salary: 6 weeks at £980.77 pw	=	£5884.62
11.2.	Holiday pay for 6 weeks	=	£784.00
11.3.	Employer's pension contributions	=	£218.82
11.4.	Legal fees	=	£672.00

12. Mr Silvey, on behalf of the respondent, agreed the claimant's calculations in her Schedule of Loss. As the claimant's losses included £672 of legal fees, I clarified with Mr Silvey if the respondent was accepting that the claimant's claim for costs came within the Tribunal's limited jurisdiction under Rule 76 (1) (a-c) of the Rules. Mr Silvey confirmed that the respondent did not accept that the case came within Rule 76 (1) (a-c). Accordingly, the respondent's agreement to the sums claimed excluded the claim for legal fees. Further, Mr Silvey made clear that the respondent did not accept that the claimant was in fact owed damages for a 6-week period or at all. He contended that there were a range of possible outcomes dependent upon the Tribunal's findings of fact. However, if the Tribunal found that the claimant was owed damages for the remainder of her notice period, being 6 weeks, then the claimant's calculations, excluding legal fees, were agreed.

Findings of Fact:

13. I make the following findings in this case.

14. On 6 December 2019, the respondent wrote an offer letter to the claimant. The respondent offered the claimant employment as Customer Relationship Manager. The salary was £51,000 plus bonus per annum, being £4,250 gross and £3,185 net payable on the 15th day of each month. The claimant also had a car allowance of £5,000 per annum. The working hours were 40 hrs per week. The claimants start date was 16 December 2019. The offer letter stated *"**Pension:** You will be automatically enrolled into 'Nest' the company's pension provider after your three-month probationary period."*

15. On 16 December 2019, the claimant started work at the respondent. The claimant's original contract of employment is at [49-71.] The employment contract provided that:

*"12 **Unsatisfactory Performance and Misconduct***

12.1 An employee may be dismissed for unsatisfactory performance or misconduct, after a prior warning has been given, in accordance with the disciplinary procedures as set out above. Whilst it is not possible to detail all types of misconduct, the general type of conduct which is covered by this paragraph is set out below.

12.2 Negligence, carelessness or genral lack of capability in performance of the employee's duties...

13 Disciplinary Procedure

13.1 Please refer to the disciplinary procedure in the staff handbook.

...

16 Periods of Notice

16.1 To be given by the company to the employee: ..

4 weeks to 1 year's complete service 1 week ...

16.2 The employee must in turn give at least three months' notice of intention to terminate employment with the company, once the initial 4 week' period has

been completed. The notice will vary with length of service, though both parties may agree more if mutually beneficial to do so.

16.3 The company reserves the right to make payment in lieu of notice as it deems necessary."

16. On 19 December 2019, the claimant confirmed that she had received or had made available to her a copy of the respondent's Staff Handbook [159.] The Staff Handbook states, so far as relevant, as follows:

"*Welcome to the GBA Family. You are employed on the terms and conditions set out in your separate contract of employment …*

The policies and procedures set out in this handbook apply to all employees unless otherwise indicated...They do not form part of the terms of your contract with us, which are provided to you separately. Your contract of employment sets out your job title, hours and place of work, probationary period, salary, holidays and holiday pay, sickness absence reporting procedure and sick pay, your entitlement to and obligation to give notice to terminate your contract and the duties of confidentiality and restrictions that continue to apply after the termination of your contract of employment." [75]

*"**Company Policies***

The following section of the handbook sets out the policies and procedures which are relevant to your employment with us. Unless expressly stated, these policies and procedures do not form part of your contract of employment." [79]

"**12. DISCIPLIANRY AND CAPABILITY**

OVERVIEW

12.1 *All employees are covered by this policy, which sets out how we will deal with allegations of poor performance or misconduct. It does not form part of your employment contract but applies regardless of how long you have been our employee. Self employed contractors are not covered.*

12.2 We reserve the right to amend this policy at any time.

WHEN WE WILL TAKE INFORMAL ACTION

12.3 Sometimes we will choose to discuss a misconduct or performance issue with you before taking formal action. If this fails to resolve the problem, or we feel this approach is inappropriate in the circumstances, we will normally use this procedure.

HOW WE INVESTIGATE

12.4 When we investigate a misconduct or performance issue, we may hold one or more meetings We will not take disciplinary or capability action without

inviting you to a formal meeting, but – depending on the specific circumstances – that hearing may be the only meeting we invite you to attend. In other words, there may not be separate meetings for the investigation and disciplinary stages....

THE DISCIPLINARY ACTION AND DISMISSAL PROCESS

12.18 These are the three stages of our procedure for dealing with cases of poor performance or misconduct.

> *12.18.1 First stage: We will issue you with a first written warning...*
>
> *12.18.2 Second stage: if there is an active first written warning on your record and your performance has failed to improve or you are involved in further misconduct, we will usually issue you with a final written warning. In serious cases of poor performance or misconduct, we may issue a final written warning without first issuing a first written warning...*
>
> *12.18.3 Third stage: If there is an active final written warning against you and your performance has failed to improve or you are involved in further misconduct, you may be dismissed. You may also be dismissed for a serious case of misconduct or poor performance, or if you are involved in gross misconduct...*
>
> *12.18.4 Sometimes we are prepared to explore other actions short of dismissal. These may include deploying you to a different role, demoting you, and/or extending your final written warning period to allow us further time to review how to respond.*

12.25 We reserve the right to vary the disciplinary/capability process based on your length of service." [116-120]

17. At no stage, did the respondent inform the claimant that the disciplinary/capability procedure was being varied with regards to her based on her length of service.

18. In January 2020, the claimant agreed with the Ashford Depot to have a conversation instead of a visit as the Depot was preparing for Brexit.

19. On 24 February 2020, Mr Mountford completed both the claimant's Month 1 and Month 2 reviews. Mr Mountford accepted that paragraph 8 of his witness statement, which stated that *"The claimant attended a two-month review on 24th February 2020, which detailed some satisfactory*

comments and some concerns regarding her performance.", was wrong in that the claimant did not attend these reviews. Both reviews were completed online, in the claimant's absence and sent to Human Resources. The claimant received good gradings in all categories save that the claimant received 4 satisfactory gradings out of 15 in the Month 1 review and 7 out of 15 in the Month 2 review. However, as the claimant achieved at least satisfactory in all categories there was no basis to extend the alleged probationary period by one month [165 & 170.] The claimant did not receive the Month 1 and Month 2 reviews until they were provided on 12 September 2020 within these proceedings.

20. On 25 February 2020, the claimant attended the Ashford Depot along with Kelly Ann Hall and one other.

21. On 17 March 2020, the claimant received a new employment contract with enhanced annual leave provisions. Specifically, her annual leave entitlement increased from 28 to 33 days [26-48.]

22. Between 23 – 24 March 2020, the respondent had internal discussions, evidenced by emails [171-176], about the claimant. In summary, Peter Zak and Mr. Mountford did not believe that the claimant fitted the respondent's culture. However, as she had shown some positive sides it was agreed that Mr Mountford would document the issues he had with the claimant's performance and then when she returned from furlough the respondent would look at putting her on a performance improvement plan ("PIP"). In fact, Mr Mountford accepted in his evidence that he did not document the issues he had with the claimant's performance or raise these with the claimant.

23. On 25 March 2020, the respondent offered the claimant furlough at 80% or her wage and she accepted [177-178.]

24. On 19 April 2020, the claimant was auto enrolled into the respondent's Nest pension [179.]

25. Between 11 and 18 June 2020, the claimant communicated with Mr Mountford via text message [180.] Primarily, the claimant was seeking an update as to *"when to start back at work."* Mr Mountford's response

was that he would be able to update further after a full headcount review on 18 June 2020, but that at present there were no plans until furlough was relaxed and then the respondent may look at part time options. On 18 June 2020 at 14.13, the claimant text messaged Mr Mountford again asking *"Hey Ian any news?"* Mr Mountford did not reply.

26. On 18 June 2020 at 20.56, the claimant emailed her notice of resignation to Mr Mountford. The claimant's notice, dated 19 June 2020, stated:

"I hereby give 3 month's notice to resign from the post of Customer Relationship Manager.

This has been a difficult decision for me to make but under the circumstances I feel it is the right decision.

I wish GBA Services continued success and I have no doubt that it will continue to grow and prosper in the years ahead." [184]

27. On 19 June 2020 at 08.43, Mr Mountford acknowledged receipt of the claimant's resignation notice [180.]

28. Between 19 and 30 June 2020, the claimant and Mr Mountford exchanged text messages as follows:

28.1. On 19 June 2020, the claimant text messaged Mr Mountford stating *"… as you are aware I am on one week's notice from the company and that leaves me in a very vulnerable position should Gba decide to make the role redundant..."* [181]

28.2. On 29 June 2020, the claimant texted Mr Mountford *"Any update Ian?"*

28.3. At 11.50 on 30 June 2020, the claimant texted "*hi Ian please can you or HR confirm they have received and accepted my resignation dated 19 June? It would be great to start a dialogue to understand the exit process."*

28.4. At 13.19 on 30 June 2020, Mr Mountford replied stating *"Hi Sarah, speaking to HR you are only entitled to one week's notice but we will keep you in the business on furlough until 31st July when I get all details in writing I will call you."* [181]

28.5. In response, the claimant requested a call and then texted *"Ian my contract states 3 months notice period for resignation. How have they arrived at 1 week?"*

28.6. *Mr Mountford replied "HR will write to you explaining the decision in full I guess if you're not happy with it then you will have to make a complaint to HR."* [182]

29. On 30 June 2020, the claimant forwarded her email, dated 18 June 2020, and notice of resignation, dated 19 June 2020, to Jane Dawe, Head of Human Resources at the respondent [183.]

30. On 2 July 2020, the claimant received a letter from the respondent stating that she had been unsuccessful in her probationary period and that her employment with the respondent would end on 31 July 2020 [185.]

31. On 3 July 2020 and on a number of occasions thereafter, the claimant requested evidence (such as notes of 1:1 meetings and appraisals) of her alleged failure to demonstrate suitability for the role during the probationary period [186 & Additional Email Bundle.] Save for the documents included in the bundle, the respondent did not provide any such documentation.

32. On 18 September 2020, the claimant's employment would have terminated in accordance with her 3 months' notice of resignation.

The Law:

33. A resignation is the termination of a contract by the employee. The employment contract will not terminate until the employee has communicated his or her resignation to the employer by words or conduct; ***Edwards v Surrey Police*** **1999 IRLR 456 EAT.** S. 86 (2) of the Employment Rights Act 1996 ("ERA") sets down minimum periods of notice of termination. Specifically, employees who have been continuously employed for one month or more are required to provide at least one week's notice. However, this is the minimum period required and the employment contract can provide for a longer period which will apply instead. An effective resignation should be clear and unambiguous. It must, expressly or impliedly, contain an ascertainable date on which the resignation will take effect. Once a clear notice of resignation has been given it is effective. A resignation does not have to be accepted by the employer nor can it be unilaterally withdrawn; ***Dootson v Stoves*** **Ltd EAT 486/90.** However, the employment contract remains in full force and effect during the notice period.

34. An employee is dismissed by his or her employer if the contract under which s/he is employed is terminated by the employer whether with or without notice; S.95 (1) (a) ERA. The effective date of termination in relation to an employee whose employment contract is terminated by notice, whether given by the employee or the employer, is the date on which the notice expires: S.97 (1) (a) ERA.

35. A claim for breach of contract is a claim that one party has breached the express and/or implied terms of the contract. A breach of contract may occur where an employer terminates an employee's employment without carrying out the disciplinary procedure which has been incorporated into the employee's contract; **Gunton v London Borough of Richmond [1994] ICR 727.** The possible remedies for a breach of contract are (i) a declaration that the respondent was in breach of contract and (ii) damages. However, damages are assessed in the same way as damages for breach of contract in the civil courts. This means that the purpose of damages is to put the claimant in the position they would have been in had both parties performed their obligations according to that contract. Therefore, the employee's remedies in such circumstances may be limited to damages for the period up to which s/he would have been employed had the correct procedure been followed; **Gunton v London Borough of Richmond.** Accordingly, it is possible for a claimant to obtain a declaration that the respondent was in breach of contract, but not to be awarded any damages.

Discussion & Conclusions:

36. I find that the claimant was not subject to a 3-month probationary period or any probationary period.

37. I have taken into consideration Mr Mountford's evidence that all employees at the respondent were subject to a 3-month probationary period. However, the claimant's employment contract does not refer to a probationary period of 3 months or at all. Notably, this is contrary to the Staff Handbook which states that the employment contract sets out an employee's probationary period [75.] In fact, the only reference to a probationary period is in the offer letter which states that the claimant will be auto enrolled into the Nest pension on successful completion of the 3-month probationary period [158.] The offer letter does not (as it does for salary, holidays, hours of work etc) have a bold heading of **'Probationary period'** followed by details of the probationary period. Therefore, the contractual documentation is, in effect, silent as to any probationary period and its associated terms and conditions. As a result, I find that a 3-month probationary period or any probationary period was not a term of the claimant's employment contract.

38. Further, this contractual silence is re-enforced by the fact that between 16 December 2019 and 31 July 2020 there were no discussions between the claimant and the respondent about the alleged probationary period. It is of particular note that during her employment, the claimant was not invited to, informed of or provided with the outcomes of the Month 1 and Month 2 Reviews. In fact, the claimant did not see the Month 1 and Month 2 review documents until they were provided during the course of these proceedings. Also, the claimant was not informed of or invited to a Month 3 review. In fact, there is no evidence that a Month 3 review was ever intended to take place. In the circumstances, the claimant was understandably unaware of any alleged probationary period.

39. Accordingly, I find that the respondent breached the claimant's employment contract by dismissing her for failing to successfully complete a probationary period which she was not contractually subject to.

40. Alternatively, if that is not correct and the claimant was subject to a 3-month probationary period, then I find that she successfully completed such probationary period. In reaching this conclusion, I rely on the fact

that Mr Mountford agreed to the claimant's request to increase her annual leave and, approximately 2 days after the alleged probationary period ended, the claimant was issued with a new employment contract with enhanced annual leave entitlement. I find that the only reasonable explanation for the claimant receiving an improved employment contract at this time was that she had passed the alleged probationary period. Next, the claimant was offered furlough without any conditions such as the extension of her probationary period. Finally, on 19 April 2020, the claimant was auto enrolled onto the respondent's Nest pension. The offer letter clearly states that this will happen on completion of the probationary period [179.] I have considered the respondent's evidence that this was an automatic process that occurred during the early part of the first lockdown. However, I have concluded that, whilst not carrying great weight, it does indicate that the claimant had successfully completed her probationary period. If this was not the case, then auto enrollment could have been delayed or the claimant could have been informed that the autoenrollment did not indicate successful completion of the probationary period.

41. I have also considered the respondent's alternative case, being that the claimant was dismissed due to capability namely poor performance in her role.

42. I reject the suggestion that the claimant was dismissed due to capability. I do so because there is no evidence that poor performance was ever discussed with the claimant prior to the dismissal. I note that Mr Mountford had some concerns regarding the claimant's relationship building. This is evidenced by the comment in the Month 2 review stating that the claimant *"… does need to forge better relationships with Depot Management and Regional Ops."* [170] However, it was a point of dispute between the parties as to whether or not Mr Mountford raised those concerns with the claimant. Mr Mountford claimed that he did. He referred to speaking to the claimant about incidents involving Kelly Ann Hall and Deena Hamilton. The claimant denied that any such conversations had taken place. Despite having been asked to document the issues he had with the claimant, Mr Mountford did not do so. Consequently, there are no documents evidencing Mr Mountford having raised any such issues with the claimant. The respondent has not brought any further witnesses to provide supporting evidence as to the claimant having *"built barriers with colleagues and offended a number of people."* Therefore, the Tribunal has only the evidence of the claimant and Mr Mountford on this point. I find that where there is a dispute between the evidence of the claimant and Mr Mountford, I prefer the evidence of the claimant. This is primarily because Mr Mountford's sworn evidence has already proved to be incorrect, as detailed in paragraph 19 above, and is not supported by corroborating evidence. Accordingly, I

find that whilst Mr Mountford had some concerns regarding the claimant's relationship building, he, as he said in his oral evidence, 'did not consider this to be a huge case of under-performing' and did not discuss these concerns with the claimant or document them. Further, I put it to Mr Mountford that there was nothing in the text messages he exchanged with the claimant that referred to poor performance. His response was that this was because he was a positive person. I find that, whether he is a positive person or not, if there was a real concern about the claimant's performance then this would have been raised with the claimant. It was not.

43. Further, I find that it was a contractual requirement that the claimant received a prior warning before being dismissed for unsatisfactory performance. I note that the Disciplinary & Capability Policy in the Staff handbook is non-contractual. However, I have concluded that paragraph 12.1 of the employment contract makes it a contractual requirement that before dismissing for poor performance an employee has received a prior warning [35.] In reaching this conclusion, I have noted the punctuation of paragraph 12.1 which places the words "*, after a prior warning has been given,''* between commas and, by so doing, separates them from the reference to the Disciplinary procedures. The claimant had not received such a warning. I have considered the respondent's submissions on paragraph 12.25 of the Staff Handbook which states that, due to length of service, the Disciplinary & Capability Policy could be varied. I accept that it could be so varied, but I do not accept that the contractual provision for a prior warning in the employment contract could be varied. Further and for completeness, I do not accept that the Disciplinary & Capability Policy could be varied without informing the claimant of the variation, a matter that was conceded in evidence by Mr Mountford. To allow otherwise would be to place the claimant in a position where, at any given time, she would be unsure about the precise terms of the Policy. Also, I note that there was no positive evidence that the respondent had consciously chosen to vary the Disciplinary & Capability Policy with regard to the claimant. Instead, it appeared to be an argument raised in an attempt to address the failure to follow the Policy.

44. Accordingly, I find that the respondent did not dismiss the claimant due to capability, but if I am wrong and the respondent did then the respondent breached the claimant's employment contract by failing to carry out the Disciplinary & Capability procedure which had been incorporated into the employment contract - namely the giving of a prior warning; **Gunton v London Borough of Richmond.**

45. Therefore, I must consider what, if any, damages the claimant is entitled to as a result of the respondent's breach of contract. I remind myself that the purpose of damages is to put the claimant in the position she would have been in had both parties performed their obligations according to the contract. In this regard, I note that despite her notice of resignation the claimant's employment contract continued in full force and effect until the 18 September 2020. The claimant's resignation did not prevent the respondent from dismissing the claimant during the period of her notice in accordance with the terms of the employment contract. Specifically, during the notice period the respondent was entitled to dismiss the claimant with 1 week's notice [paragraph 16.1 /36.] Also, I note that both the claimant and Mr Mountford accepted in cross examination that the capability procedure could have been complied with by 31 July 2020. Therefore, I find that the contract could have been lawfully brought to an end by 31 July 2020. Accordingly, the claimant would not have been employed for any longer period than she was and, as she was given 1 week's notice and paid in full to 31 July 2020 [187], I assess the damages due as a result of the breach of contract as nil; ***Gunton v London Borough of Richmond.***

_____

Employment Judge Newstead Taylor

Date: 22 February 2021

_____

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
23 February 2021

FOR THE TRIBUNAL OFFICE