



EMPLOYMENT TRIBUNALS

Claimant: Mr N Fox

Respondent: Kooltech Limited

HELD AT: Manchester

ON: 20 February 2017

BEFORE: Employment Judge Tom Ryan

Appearances:

Claimant: In person

Respondent: Mr D Bansal, Solicitor

JUDGMENT having been sent to the parties on 22 February 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim by Mr Fox for breach of contract. Specifically he claims that the respondent was in breach of contract in failing to pay him any bonus (which it is agreed would have been for £3,000) because, according to the respondent, he failed to achieve the target that would have triggered that bonus.
2. That target was set out in the claimant's key performance indicators on a document headed "Key Performance Information", in particular the goal to develop and launch the Kooltech eCommerce Sales Channel.
3. The date for that to be achieved was originally 31 March. It was put back to 1 April and then to 4 April 2016. The date is insignificant in my judgment because it is common ground that by none of these dates was the Kooltech eCommerce Sales Channel launched.
4. The claimant was employed by the respondent in May 2015 because of his experience in website design and launch. The respondent, which is a leading distributor and supplier of air conditioning equipment predominantly to the wholesale

trade, did not have an eCommerce website, they only had a website which told prospective purchases what their stock was and how they could buy it, but not through the internet, and they wanted to launch that service.

5. The respondent had an existing website supplier. That was a company called Kerridge who were also known in the documents as "K8". However, it was suggested that the respondent should go to another company Visualsoft, for the purposes of obtaining this particular type of website.

6. The relevant factual history seems to me to be as follows.

7. There was a meeting with Visualsoft on 3 July 2015. Minutes of that are at pages 31-48 of the bundle, and it is clear that in the heading "Website Integration" on page 40 there was the need for software that would either pull information from the K8 site, or the K8 site would push it to the new website to be designed and built by Visualsoft, in relation to produce information, prices and customer terms. Clearly the basis of the customer terms were discussed to some degree in that meeting. Mr McMahon, the operations manager, who gave evidence before me was present, and he talked about reducing the number of different price term files and the numbers of accounts with unusual set ups.

8. The position was as I understand it from Mr Mills, the national marketing and positioning manager, and I do not believe this to be seriously challenged by the claimant, that in the relevant year the respondent had some 1,100 customers.

9. The vast majority of those customers fell into what, for the purposes of this judgment, I shall call a "discount banding zone", and there were some 8-10 different zones, different discount plans if you will. In addition there were a number of further customers, 10 according to the document at page 40 or 12 according to Mr Mills' recollection, of customers who had what I might call "idiosyncratic" pricing structures.

10. By way of example for one of those the structure might look basically like a Band A zone but there would be variations; sometimes in percentage terms, sometimes a term that they would buy particular items of equipment for a particular net price and that would be held for the customer and therefore provide an additional incentive to buy.

11. That information was obviously known to the company, and obviously known to the website provider because that is where the information was stored, but there was a need to be able to integrate that into the new Visualsoft system that was to be set up.

12. The claimant was employed to be the project coordinator to develop, customer test and launch this new website for a range of products by that particular date, 31 March 2016.

13. It is common ground that the key performance indicators do not specifically say anything about the trade discount prices, but the respondent's case is that it was obvious that that is what was involved. Shortly after the original meeting, or it may have been shortly before whichever it was, the claimant had prepared, at page 167, a chart indicating what matters would go into phase 1 and what matters would go into phase 2 of the development.

14. Under phase 1, and it is common ground these were phase 1 matters, was list prices, account details, sales orders, basic product details and stages of order. According to the chart, discount terms were said to be in phase 1; the claimant in evidence denied that they were a phase 1 item. I do not accept his evidence on that point. It seems to me that the claimant was well aware from the meeting that there needed to be trade terms or discount terms including in the setting up of the website.

15. After the meeting Visualsoft provided a specification, and it appears that this was seen by Mr Fox and approved by him. Ms Beth Riley from Visualsoft, who gave evidence before me, explained quite clearly that the design of the website did not itself mean that there would be software or the necessary functionality to drag off the Kerridge website the discount information, or that they were going to arrange for the Kerridge to push that information into the Visualsoft package. The possibility for it was there but I note that under the heading "Trade Accounts – Customer Groups" which is exactly the sort of thing that the respondent was describing but under their old system, there is a note at the end: "Please note that additional functionality will require a bespoke quotation based on your specific requirements".

16. That the claimant was aware that there was some need for trade account information to be included in the website is shown by the email exchange on 18 September 2015 at pages 44 and 45. He had emailed some questions to Rich Himsworth of Visualsoft who replied on that day and in reference to something called phase 1 where apparently in some document it said: "Discount terms/price to be applied to approved accounts once the customer logs in", the question was asked by Mr Fox, "Is this part of the trade account manual" to which he received the answer, "Yes it is". So clearly that as well suggests that the claimant knew what was included.

17. Ms Riley, giving evidence pursuant to a witness summons issued at the behest of the claimant, said that on 25 September 2015 when the project started Mr Fox had advised Visualsoft that he would be happy to launch without Kerridge, that is without their functionality, if they could launch in January. Visualsoft advised, and Ms Riley was the project lead for Visualsoft on this project, that it would be possible to launch without Kerridge and that they would also need to launch without other bespoke features, as they were all tied together, explaining that it would not be possible to guarantee a launch date in January dependinf on issues raised during testing. Then she said this:

"With this in mind Neil mentioned a launch with Kerridge and the bespoke integrations Visualsoft advise at this point that a launch date in January would not be achievable."

18. Whatever then Visualsoft thought was to be integrated, and there are a number of bespoke integrations in the quotation, it did not include this one, of either the bespoke pricing structure for the few customers or the discount pricing which applies to some 95% of the customers according to Mr Mills.

19. There was then a meeting on 16 March at the Visualsoft office with the claimant and one of Ms Riley's colleagues, Kevin, and "go live" was scheduled for 31 March. There was a discussion about the site launching without the full product range because the existing website was only a customer management site and

therefore it was recommended launching as soon as possible to ensure the website was generating sales.

20. On 30 March Ms Riley said that they should advise they needed to receive sign off by midday to launch the following day. She said that later that afternoon she had a phone call with Neil and that “go live” would be assessed first thing in the morning.

21. There was some question about whether a director was in hospital but in my judgment nothing turns on that, and she said she also had a phone call with Mr Mills who advised that he would confirm the launch by 9.30 the following morning. She then says this:

“On the morning of 31 March, launch date, Neil called to advise they were not able to launch the site as they hadn’t had time to do sufficient testing and they also had queries on the order/customer process. With this in mind ‘go live’ was rescheduled for 21 April.”

22. The claimant then had an exchange of emails with Ms Riley on 4 April 2016 (page 165), or rather he sent an email to her on that date. Nobody was asked about this in evidence, it was only drawn to my attention by Mr Bansal during submissions. It is to Ms Riley, copied to Mr Mills and Mr McMahon, the respondent’s witnesses, and Mr Tickle who I understand to be a Visualsoft employee, saying:

“Just to let you know, we are presenting the site to Murray [reference I think to the senior member of the management staff] on 12 April 2016 so I need your help with crossing off some outstanding and new issues raised by our testing updating of the site admin. Here are a few of the current quandaries we need updating on: customer types, test account...”

And he said this:

“Kevin Tickle has been trying to set up an account for Mr McMahon so that he can test but is hitting a snag. Can you please look at this urgently?”

23. Shortly before this, I think on 30 March, Mr McMahon had said he wanted to test from Glasgow the website. There was an issue about whether this website was down before that. It had gone across to them by a URL being provided by Visualsoft, but he had attempted to try and set up an account to run a test purchase and he could not do so. Two other things were not apparently working also: the price on application function and the branch locator function.

24. The emails that I have just described then on 4 April were followed by further emails at pages 195-198.

25. On 8 April at 9.45am Mr Fox wrote to Ms Riley saying, “how are the terms brought through and what is the process for linking existing K8 account?”. Mr Atkinson of Visualsoft replied at 1.47pm that day:

“We are only currently import [sic] retail prices as there was no details about trade prices in the project proposal specification. Could you give a bit more information about it and we can look into it?”

26. Ms Riley followed that up with an email at 5.20pm saying they were looking into it, and then the significant email is from Mr Fox to Ms Riley at 6.32pm that evening. He said this:

“From what I see from the recent emails I am at a loss as to what you guys thought we were going to do regarding customers. I can’t believe we had all this communication with Kerridge for months and all we get for it is retail pricing..” [It actually says ‘ide retail pricing’ but I am sure it is a typographical error]

And he said:

“It’s quite simple. Customer either chooses to pay retail as a cash customer or we set him up on a discount structure that is brought through from K8 to the site. The customer can then buy on account or pay by card. This was always the bare minimum we wanted. I’m going to look like a complete idiot if this isn’t the case at the meeting. This has to be dealt with on Monday or at least a plan of action in place.”

27. That evidence, despite Mr Fox’s best endeavours to persuade me to the contrary, suggests to me that he well knew that trade pricing either for the bespoke group of some ten or so clients, but more particularly for the entire cohort of trade customers, which is the vast bulk of the respondent’s customers, was going to be needed. There would be no incentive to a customer of the business going onto an eCommerce website if they were simply going to be quoted retail terms and their own discount plan was not available to them on the website. It is wholly improbable that anybody within the respondent involved in devising this new website would have thought otherwise.

28. The claimant’s case is “No, no, no, that is not specified in the KPI” – that is right. He is correct about that and he therefore says, “Well therefore I’ve launched or am ready to launch Kooltech eCommerce Sales Channel and I am entitled to my bonus”.

29. In my judgment one only has to state the proposition to see the inherent fallacy. It is clearly implicit that the eCommerce Sales Channel will have at launch the functionality that will enable the employer, with tweaking because of course there are always errors in these things, to provide the vast majority of their clients the opportunity to purchase online.

30. It had been hoped that in the first year there would be some £50,000 of sales. That has not proved to be right, and Mr Mills tells me they were looking for £150,000 of online sales as well as their other trade counters and sales representatives producing sales in this way. These respondents something in the order of £30,000 or more, setting this up, and it is inconceivable that they would expect not to have the necessary functionality as part of it, and inconceivable for Mr Fox to believe otherwise, and to the extent that he says that was his belief I am afraid I simply do not accept it.

31. The reality is that unless the respondent put back the “go live” date for this website beyond the date which would have triggered the bonus for anything other

than good reason then he would have been entitled to complain, but in fact they had good reason. Although they were not aware of the trade price issue until after the decision was taken to defer the launch, the decision to defer was taken for a legitimate reason, namely that a senior member of staff, Mr McMahon, wanted to try it out to make sure it worked and that the functionality was there and he could not even register an account.

32. That in itself, in my judgment, would have been enough, for the respondent legitimately to defer the launch. And it is quite clear as well to my mind that the claimant recognised that there was a need to defer the start date, as Ms Riley's evidence showed there was insufficient time for testing. He was the project manager. He should have arranged things so as to make sure that firstly the website did what it was required to do and secondly that it was provided to the respondent to do their own internal testing. I accept entirely Ms Riley's evidence and the claimant's evidence that when they tested it, it worked, but what was required was a system that the respondent generally could operate.

33. In order to trigger the bonus the claimant had to deliver the website so that it was able to go live by the date in the KPI, which was 1 April, which the respondent agreed extended to 4 April. The fact that this was then needed to be remedied and that Visualsoft provided the remedy without charge and it was either, on the claimant's evidence, still not ready by the time the website eventually went live or on Mr Mills' evidence with the discount pricing, it seems to me does not matter. What it clearly shows is that a considerable amount of work had to be done after the start of April through towards the latter end of June to get this done. That is work that should have been done before and the respondent was entitled to look to the claimant to make sure that it went through.

34. In those circumstances I do not think the claimant has demonstrated that he achieved the target that was set. Whether it is on the narrow ground or the broad ground, it seems to me that he has failed to establish on the balance of probabilities that the respondent was in breach of the term when Mr Mills decided that the bonus should not be paid.

35. There is a further dispute between Mr Mills and the claimant as to whether Mr Mills agreed at the point of dismissal that the bonus would be paid. I am satisfied that Mr Mills did no such thing, not least for the fact that I cannot believe that Mr Mills, knowing what the KPI that he had helped draft would have included, would have agreed to do any such thing at a point when the claimant was being dismissed, in part at least I think, because this job had not fulfilled the employer's expectations.

36. So insofar as there is a dispute between them on that issue, I prefer the evidence of Mr Mills.

37. In order to succeed in a complaint of breach of contract the claimant must establish the contractual term, the breach and the loss that has flowed from the breach.

38. Although there is no dispute about the extent of the loss, nor indeed the existence of the term the claimant has failed to establish a breach of that term.

39. In those circumstances I dismiss the claim.

40. I should conclude by apologising to the parties for the length of time is taken to produce a written version of these reasons albeit they were given orally to the parties on the day of the hearing. This has been to the pressure of other judicial work.

Employment Judge T Ryan

6 June 2017

REASONS SENT TO THE PARTIES ON

13 June 2017

FOR THE SECRETARY OF THE TRIBUNALS