



EMPLOYMENT TRIBUNALS

Claimant: Mr Philip Wright

Respondent: Ruddle Merz Water Services Limited

HELD AT: Leeds

ON: 15 & 16 August 2017

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimant: Mr J French, Counsel

Respondent: Ms A Reindorf, Counsel

JUDGMENT having been sent to the parties on 17 August 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, taken from the transcript of the oral decision delivered immediately upon the conclusion of the case:

REASONS

1. The Respondent business was set up in 2009. It was originally a division of Ruddle Merz Limited. Its purpose was to provide advice to businesses in reducing their water charges and other related costs. The Claimant was brought in to head that operation specifically because of his long experience in the water industry. The Respondent company was incorporated in 2014 and at that point the Claimant became its managing director, a member of the board and also a shareholder with a 25% holding. He remained the sole water professional upon the board. He was in receipt of a very lucrative salary package. In the last four years of employment his earnings were in six figures. Throughout the entirety of the company's existence from 2009 it underperformed as against the expectations when it was originally set up and as against the projections given by the Claimant when he commenced work.

2. In the first part year and in the next three/four years, that is until March of 2013 it made a loss. In the years 13/14, 14/15 and 15/16 it made a modest profit before tax which was very much on a plateau at around the £100,000 level. It is accepted that in the last of those three years the reason why profits were maintained at that magnitude was however simply because of a reduction in staffing costs. Particularly there had been no business development manager in place and the staff salary costs were reduced accordingly. It was not a happy position. Most particularly I find that in the year in which the Claimant was dismissed - his employment having terminated on 2 November 2016 that is in the year April 16 to March 17 - the company was in dire financial straits. Ultimately within that financial year, although the Claimant was not there for half of it, it received fee income of only £675,000 and made a loss of £316,739.
3. It is right that within the first three months of that financial year that is April, May and June performance was very much on target as against budget or slightly in excess of it. However thereafter from July onwards it deteriorated rapidly. I do not accept the Claimant's account that that deterioration in performance is solely due to a change in sales marketing strategy. I find as a fact on the evidence I have heard that this must indeed, as the Respondent contends, reflect failings in the preceding 12 to 18 months. It is common ground that there is that lead-in time between the initial stage of negotiating contracts and that finance actually coming on stream. Within the first three months of the year the figure is somewhat distorted because May is the month when accrued fees come in in any financial year. And so in May of 2016 the actual fee income was just under £450,000 but it appears that the majority of this would be the accrued fees from contracts on a recurring basis generated in preceding years.
4. I do note that it appears not to be purely coincidental that, given the 12 to 18 month lead-in period, the success in those first three months April, May and June would relate to contracts negotiated almost certainly before February 2015 when there was last a business development manager in place. For various reasons there were significant problems in recruiting and it took some 11 months before somebody finally came on board to fill that role again. In the interim of course the responsibility for managing sales and marketing fell upon the Claimant. It does appear therefore that defects in the period prior to the starting to "fall off a cliff" which can be dated from July 2016 would be due to failures in that preceding 12/18 months and after February 2015.
5. I also find as a fact that notwithstanding the Claimant's protestations there was inadequate future work in the pipeline to get over the problems and drag the company back from that cliff face. I accept in particular Mr O'Shea's evidence that he was wholly dissatisfied with the Claimant's explanation that he has in his head some 17 improvement strategies in place but that he was unable to identify them. That there was a clear lack of leadership over this period is my finding. I therefore find that the Claimant as the managing director in a responsible position, as the sole water professional and attracting a high salary, not only should have been aware of that dire situation but in fact was. To an extent therefore he appears to have been in denial over this when claiming that the company was still in a good growth period and there were sufficient projects to meet projected income for the future months of that year. He must, I find, in all honesty have known that was an inaccurate assessment of the viability of the company.

6. There had been, it is accepted, some tensions between the Claimant and the other three members of the board in relation to their approach to marketing strategy. The difference was in the level of their aspirations for the company so that on both sides it is accepted that there was a feeling that this was three against one. However it is right that notwithstanding the financial state of the business the Claimant continued on the face of it to enjoy the confidence of the board although they had their disagreements. But from March 2016 that trust and confidence rapidly began to be eroded. It was then that the Claimant presented his budget for the forthcoming year which was never approved by his fellow board members; the reason for that is that it showed a marked decline in the projected figures that had been agreed the previous year.
7. The budget and business plan approved in March 2015 for that year indicated pre tax profit anticipated of £140,000 whereas the Claimant's revised budget proposals based on the actual sales performance in the preceding year - where as I have already commented the only reason profit was of the same magnitude, around £100,000, was because of reduced salary costs - therefore produced a revised profit for that year of £44,000. So that is less than half the profit on the previous year and £100,000 thereabouts down on the original projected figure.
8. Faced with that disagreement the other members of the board brought in a consultant Mr O'Shea. He was to advise on marketing strategy. That he did. In the course of his initial one month contract from June to July he however appreciated that in his opinion that leadership of the company under the Claimant was inadequate. He therefore reported privately to the board of RM Limited, that is the other three directors. All that the Claimant was aware of was the revised sales process agreed by Mr O'Shea with the other members of the team and which was presented to the Claimant on 22 June. I accept that the Claimant did acknowledge that he would follow that process though it does appear to me on the evidence I have heard that that was only with some reluctance. he throughout expressed reservations, to say the least, and disagreed with that approach as he had previously and for some time disagreed with the approach of his other three board members
9. Throughout this period as I say I am quite satisfied the Claimant in reality was aware of the impending financial crisis and the lack of adequate preparation to deal with that. He was also now aware that a revised strategy was being proposed to address those issues. Also shortly after the involvement with Mr O'Shea the responsibility for sales and marketing was removed from the Claimant although this would be a key element ordinarily of the role of the managing director of a small to medium size business of this nature.
10. Mr Ruddle who had considerable previous experience initially in the brewing industry in sales and marketing took on that responsibility on behalf of the board. And there was of course then a proposal to seek to replace the gap left by the outgoing business and development manager and there was an eventual appointment in October shortly before the Claimant was dismissed. That new appointment was not to report directly on an unbroken line to the Claimant. So he was to be relieved of that responsibility; and that position was made expressly clear at a meeting between the Claimant and Mr Ruddle on 8 October 2016. On that occasion the Claimant was told in the most express terms that the rest of the board had lost confidence in him as managing director. He was told that he had "failed as managing director", and that "the company is 7 years old and going

nowhere. Under any other ownership you would have been placed by now". But at that stage, as Mr Ruddle frankly acknowledges he still considered that the Claimant, because of his water industry expertise, was still competent on the delivery side of the business. So he did say that the board had 100% confidence in him. And it does appear from the evidence he has given before me that the Claimant would indeed have been prepared to accept a removal of his sales and marketing responsibility to concentrate only on the operational side although at that stage Mr Ruddle was envisaging that he would not lose his status but would retain his title as managing director, and indeed also his high salary. At that stage there was clearly no intention on the part of Mr Ruddle or the other board members of the Respondent to actually dismiss the Claimant notwithstanding the historic failures in his leadership.

11. The situation did however change rapidly. And so on 2 November the board passed a resolution that his employment should be terminated with immediate effect. That was because the financial viability of the business was in such severe doubt under his stewardship as managing director that the only best chance of succeeding was to remove him from the business. That decision was communicated in a letter from Mr Ruddle on the same date 2 November 2016.
12. The Claimant was entitled to six months notice and he was paid that and not required to remain in employment.
13. The key question I have had to resolve is, against that background that I have summarised very briefly indeed, what was the reason or if more than one the principal reason for dismissal? It is of course for the respondent to show what was the reason and that it was potentially fair.
14. I have heard Mr Ruddle who I find an impressive and truthful witness. More particularly of course I have the letter that he wrote following the board meeting on 2 November. The "board meeting" - more likely to have been simply in the form a discussion between the fellow directors - certainly led to their substantial agreement. Within that letter the key parts are: "the reason for our decision is that after seven years with you as managing director company profits are still nowhere near where they should be and urgent action needs to be taken now to turn the company around and ensure that it begins to make the profit it should have been making under your leadership. Further the board having lost confidence in your ability to manage and grown the company your continued employment would not be tenable for any of us". And that very simply I accept within this factual matrix was the reason for dismissal. The remainder of the board were not confident that under the Claimant's leadership this company remained viable. It is right to observe that the Respondents therefore attach three potential labels to that set of facts to describe the dismissal on the grounds of capability or conduct (on the basis that the mismanagement of the company is so egregious as to cross the barrier into conduct) or alternatively to ascribe it to some other substantial reason, the loss of trust and confidence.
15. I should say that closely related to the factual reason for the dismissal is the timing of it. I accept Mr Ruddle's evidence that what principally shifted his mind was a realisation whilst the Claimant was off sick, which he had been from 12 October, that he appeared to be adding no value even as operational director and that there was disquiet among the staff. That was principally confirmed in a personal conversation Mr Ruddle had with a key member of staff Mr Danesh, but

also came to light as a result of the further involvement of Mr O'Shea, Mr O'Shea again having been called in some time shortly after the Claimant went off sick to seek to facilitate the ongoing management of the company. At that initial stage I accept that this was solely with a view to managing during the Claimant's temporary absence. However during the course of this further involvement Mr O'Shea also ascertained, and therefore communicated in conversation with the other directors, that there appeared to be no great added value at that particular point. Whatever the Claimant may have done historically in bringing his expertise to the company, by this stage not only was he admittedly to be deprived of his sales and marketing responsibility but also the operational director side of his work was able to be left to his team. Of course it is right to note that to an extent a manager is there to manage and organise those who do the work but again in business of this nature and given the Claimant's key position and his particular expertise it is understandable that Mr Ruddle took exception to what he perceived as someone who was not only literally absent because of his sickness but absence in reality by reason of the fact he was not doing his job. That clearly is what shifted the Respondent's position from the earlier stage as at the meeting on 8 October when it was anticipated the Claimant would remain, albeit in a reduced capacity.

16. The Respondent contend the principal reason for termination is in fact capability. My own view that it is more properly on these facts as I find them labelled as some other substantial reason, although they are essentially distinctions without a difference in this particular case. The reason I consider that the principal reason, looking at the letter of dismissal, is some other substantial reason is because it is expressed so clearly in terms of the lack of trust and confidence on the part of the other board members. But of course that lack of trust and confidence, although it had been eroded for some time, had specific regard to the lack of profits which had arisen because of the perception of the Claimant's incapability and failure to deliver as managing director.
17. That is the reason I would ascribe on these facts but I say it is virtually indistinguishable from the Respondent's own contention that this is a capability dismissal where the evident failings of the key employee was such as to lead to the destruction of trust and confidence. I do not consider this in fact crosses the line so that it can properly be said to relate to his conduct. There are I am satisfied inadequacies of the Claimant in a managerial position unable to oversee sufficiently the strategy for growth and able to ensure adequate performance and, as it transpired from the latter conversations with Mr O'Shea and Mr Ruddle, inability to properly motivate the team to provide sufficient standard of leadership. These are however to my mind issues of capability rather than of culpable misconduct, though, as I say, I prefer to categorise the principal reason as the ensuing and overarching loss of trust and confidence
18. The next question is whether in all the circumstances it was fair or unfair to have dismissed the Claimant for that potentially fair reason. The key issue that concerns me at this stage is whether or not even in those circumstances the Claimant should have received a warning, as it must be conceded that the manner of his termination was somewhat brutal. He was off sick with depression at the time. It also followed very shortly from the indication of 8 October that he would remain in post and it therefore did come suddenly. But on balance I conclude that this was fair because of the unique position of the Claimant with his expertise and the

centrality of his role to the business and the fact that these failings had grown over a substantial period of time. I am not prepared to (and indeed must not) substitute my view for that what I consider is that of a reasonable employer. They were faced with a financial crisis of potentially cataclysmic proportions. They reasonably decided to take swift action.

19. Although the effect on the Claimant was no doubt personally devastating I must balance the fairness to the Respondent's business as well as that to the injury to an employee and I consider in these circumstances they acted reasonably, that is the action they took was within the range of responses open to a reasonable employer in this situation. I repeat again the Claimant was highly paid. From those to whom much is given much is demanded. The Respondents were able to terminate his contract with some substantial cushioning of the blow because of his favourable severance terms and the long notice pay; that is expressed so within the dismissal letter when they decided they had no option but to terminate with immediate effect. Having lost confidence it would not be tenable to keep him in place. In those circumstances it is also reasonable not to have given him a further express warning or to have sought any improvement.
20. The Claimant in the reasonable belief and view of the other members of the board had demonstrated an inadequacy to function properly as the managing director they required. They did not have confidence in him and it is very different from the position of any ordinary employee who has targets which he is failing to meet and might be able with sufficient incentive -or to quote one of the earlier authorities "the threat of the bull behind them to force him to leap the fence" - to improve. Here we have a seven year pattern of continued underperformance, lack of adequate strategy for the future and ultimately the decision taken in the teeth of financial crisis. So for those reasons I consider the dismissal, whether it be properly described as I would have it as some other substantial reason or alternative as capability, is fair notwithstanding the lack of specific warning in this case. So my judgment is that the Claimant was fairly dismissed.

Employment Judge Lancaster

Date 31st August 2017