



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr A Hoggins

and

Respondent

Recruitment Solutions (Services) Limited

Held at Reading on

8 August 2017

Representation

Claimant: Miss K Boakes, counsel
Respondent: Mr R Morton, solicitor

Employment Judge

Mr S G Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Unfair Dismissal - section 98 Employment Rights Act 1996

2. The Claimant was dismissed with notice on 31 October 2016 and that was the effective date of termination. The dismissal was unfair. This complaint is successful.

Failure to Give a Statement of Employment Particulars – section 38 Employment Act 2002

3. The Respondent was in breach of the duty to give the Claimant a statement of employment particulars when the proceedings were begun. This complaint is successful.

Remedy Hearing

4. The case will now be listed for a one day hearing to determine what remedy is appropriate.

Reasons

5. This judgment was reserved and written reasons are attached.

REASONS

Submissions

- 1 Claimant On 31 January 2017 the Claimant presented complaints to the Employment Tribunal alleging unfair dismissal and failure to give a statement of employment particulars.
- 2 Respondent On 13 February 2017 the Respondent presented a response. All claims were resisted.

Evidence

- 3 The Tribunal heard evidence on oath from the Claimant Mr Andrew Hoggins.
- 4 The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Mike Yardley (Director).
- 5 The Tribunal also read documents in a bundle provided by the parties.
- 6 From the evidence heard and read the Tribunal made the following findings of fact.

Findings of Fact

Background

- 7 The Respondent is a recruitment company. The Claimant was initially employed on a temporary basis as a "Resourcer" on 7 January 2013. He was engaged on a permanent contract on 1 March 2013 and signed a contract of employment on that date. The Respondent employed 4 Resourcers alongside 4 Consultants. The role of a Consultant was to place suitable candidates to meet client requirements in order to generate revenue. The role of a Resourcer was to find candidates for vacancies which had been generated by the Consultants.
- 8 At some point (which was uncertain) between October 2013 and February 2015, the Claimant was promoted from Resourcer to Consultant. Thereupon his duties changed, his pay was increased, he earned commission on sales, and he was given additional benefits including the use of a company car and a mobile telephone. Despite this, the Respondent did not give the Claimant a written statement containing particulars of the change and this was conceded by the Respondent.

2015

- 9 There was no dispute that the Claimant's sales performance throughout 2015 met the Respondent's expectations and the Respondent was pleased with his performance regarding sales and the profit generated.

2016

- 10 The Claimant's sales/profit performance dropped from the beginning of 2016 and he was consistently failing to meet his sales targets. In his evidence, he accepted that *"between the period of January 2016 to May 2016 my figures had dropped in all but one month"*.
- 11 The Claimant's explanation for the drop in his performance was that his *"Google"* work had been shared with another consultant *"Leah"* and that had affected his figures. Also that the Resourcers were not filling vacancies he had procured.
- 12 Mr Yardley said that he had warned the Claimant that sales based upon Google enquiries were unreliable and that although the Claimant had been successful in 2015 based almost solely on Google enquiries, because of their unreliability, his sales/profit had dropped accordingly in 2016. He said he had told the Claimant on several occasions to get out more and sell directly to clients rather than relying upon the Google enquiries.

Performance reviews

- 13 On 14 July 2016 Mr Yardley called the Claimant into his office for a performance review. He accepted that he did not give the Claimant any warning or notice of the meeting. Mr Yardley's note of the meeting read as follows:

*"Andy Hoggins – Performance Review
Thursday 14th July 2016*

We have discussed your performance and figures across the first half of 2016. A failure to hit targets during this period coupled with a lack of sales activity has left us with cause for concern.

It was agreed that you would spend two days a week out visiting clients in the Berkshire area, trying to win new or old business. I will need the sales day reports each week.

A review will be taken in 4 weeks time. Hopefully, there will be a marked improvement in your figures and prospective clients and we can continue to grow your desk and push the company forward. However, if there is not

an improvement, we will have no other option than to terminate your employment with Recruitment Solutions.

I will be on hand to assist you as much as possible during this period. Please come to me with anything that you might feel will help you.

- 14 Mr Yardley claimed that there was a further review meeting on 18 August 2016 but the Claimant denied that any such meeting took place. There was evidence in the bundle to show that the Claimant had sent an email on 18 August 2016 asking for a review meeting and that Mr Yardley had agreed to a meeting but there is no record of the meeting actually taking place. Mr Yardley said that was his mistake and he should have recorded the meeting. The Tribunal preferred Mr Hoggins' account that although both of them intended to hold a meeting, it did not take place. Mr Yardley had recorded all other aspects of the performance review meticulously in writing and, bearing in mind the seriousness of the situation whereby the Claimant had been warned his employment may be terminated, it was implausible that if the meeting had taken place, no record was made of it.
- 15 A further review meeting between the Claimant and Mr Yardley took place on 26 September 2016. That was recorded in writing as follows:

"Weekly Sales Report

Consultant: Andy Hoggins *Date 26/09/16*
Number of temporary workers currently out 15
Number of clients currently supplied 8

Notes Focus on achieving meetings, increase margins as neutral vendors margins are small.

Targets to be reached for Monday 31st October 2016

<i>Site visits</i>	15	<i>per week</i>	
<i>Telesales calls</i>	30	<i>per day</i>	
<i>Sales email</i>	10	<i>per day</i>	
<i>Client meetings attended</i>	1	<i>per week</i>	
<i>Number of temporary workers</i>	30	<i>(Target)</i>	
<i>Number of clients supplied</i>	12	<i>(Target)</i>	
<i>Gross Profit for the 5 week month</i>		£12,500	<i>(Target)</i>

I agree that the Monthly targets outlined are realistic and achievable in the next five weeks and are to be reviewed at the end of this period. I understand that to reach these targets I will have to concentrate my efforts

whilst in the office on telesales and produce a high number of cold calls and visits to potential new customers.

*Signed by Consultant [A Hoggins]
Signed by Director [M Yardley]*

*Date 26/09/16
Date 26/09/16"*

Dismissal

- 16 Despite this 5 week performance improvement plan agreed in writing on 26 September 2016, 9 days later, on 5 October 2016, Mr Yardley considered that the Claimant's sales figures were still unsatisfactory and decided to terminate his employment. He called the Claimant to a meeting at a Costa coffee shop and informed him that after failing to hit any targets in 2016, and with his figures continually falling, the Respondent had no other option but to terminate his employment.
- 17 The Claimant's dismissal was confirmed in a letter of the same date as follows:

*"Wednesday 5th October 2016
REF: Termination of Employment*

Dear Mr Hoggins

Further to our meeting earlier today, I can confirm the termination of your employment with Recruitment Solutions (Services) Ltd with your notice period ending on Monday 31st October 2016.

You are not expected to attend work during your notice period but need to make yourself available to take phone calls with any queries that may arise.

Full payment of outstanding holidays, all commission earned and outstanding holiday will be paid to you on Monday 31st October and your P45 will follow. This is on the agreement that all company property is returned prior to that date including the Company Car, Mobile Phone, all keys to the premises and any other company property that you are in possession of.

We thank you for your hard work and commitment during your employment and wish you all the success in the future. I will be happy to receive any reference requests on your behalf to assist your quest for new employment."

- 18 The Claimant was not given any warning or notice in advance of the dismissal meeting and nor was he given an opportunity to appeal afterwards.
- 19 On 31 January 2017 the Claimant presented his complaint to the Employment Tribunal.

Relevant Law

- 20 Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.
- 21 *Section 98. General.*
- (1) *In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
- (a) *the reason (or if more than one the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it-*
- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.*
 - (b) *relates to the conduct of the employee, ...*
- (3) *In subsection 2(a) –*
- (a) *“capability” in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality ...*
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - (b) *shall be determined in accordance with equity and the substantial merits of the case.*

- 22 In James v Waltham Holy Cross UDC [1973] ICR, it was said that an employer should be slow to dismiss an employee for incapability without first telling the employee of the respects in which he was failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance. In other words, there should be:
- (a) Proper investigation/appraisal of the employee's performance and identification of the problem;
 - (b) Warning of the consequences of failing to improve; and
 - (c) A reasonable chance to improve.
- 23 In Alidair v Taylor [1978] ICR 445, the Court of Appeal said that the test of a fair capability dismissal (aside from procedure) has two elements:
- (a) Does the employer honestly believe the employee is incompetent or unsuitable for the job?
 - (b) Are the grounds for that belief reasonable?
- 24 A Tribunal has to decide whether there was sufficient material in front of the employer which satisfied him of the employee's competence or unsuitability and for which it was reasonable to dismiss. An employer must therefore produce evidence of poor performance and show that this was the real reason for dismissing the employee.
- 25 An employer will not be expected to create a new post for an employee in such a case but if a suitable alternative job is available it may be unreasonable not to offer this post to the Claimant rather than dismiss him.
- 26 The Tribunal must not substitute its own view for that of the employer, but must assess the employer's conduct against the range or reasonable responses.
- 27 In the ACAS Code of Practice on Disciplinary and Grievance Procedures, the introduction to the code states that it is designed to help employers and employees deal with disciplinary and grievance situations in the workplace and confirms that disciplinary situations include poor performance. The code contains the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide employees with an opportunity to appeal.

Decision

Unfair dismissal – Section 98 Employment Rights Act 1996

28 This complaint was set out in paragraphs 22 and 23 of the ET1 particulars of claim as follows:

“22. If, which is denied, the Tribunal is of the view that the Claimant was dismissed for a potentially fair reason, the Claimant will say that his dismissal was unfair and did not fall within the band of reasonable responses. In particular the Claimant will say:

22.1 Recruitment Solutions did not implement and follow any investigation and/or appraisal of the Claimant’s performance and identification of the problem before taking the decision to dismiss the Claimant;

22.2 Recruitment Solutions failed to put in place any real objective procedure for measuring performance and/or allowing the Claimant the opportunity to undertake the same;

22.3 the Claimant was not provided with support and/or training during any alleged period of appraisal of his performance before his dismissal. The Claimant will say that he was not offered specific training on marketing/networking to procure new business or provided with the support of a competent Resourcer that was able to fulfil his new referrals;

22.4 the Claimant was not provided with warnings of the consequences of his failure to improve;

22.5 the Claimant was not afforded a reasonable opportunity to improve before the decision to dismiss was taken;

22.6 Recruitment Solutions did not consider other alternatives to dismissal such as redeployment; and

22.7 the Claimant was not afforded the right of appeal to his dismissal on 5 October 2016.

23. The Claimant will say that all times of his employment, until his dismissal, he had a clean employment record; with no prior disciplinary warnings for performance of his duties. In addition the Claimant will say that the first-time Recruitment Solutions enacted any form of capability procedure was from 26 September 2016 and he was dismissed one week into any such procedure.”

- 29 The Claimant was not provided with written reasons for his dismissal but he accepted that the reason was capability which is a potentially fair reason for dismissal under section 98(2) and (3) of the Act.
- 30 The Tribunal found that the reason for dismissal in this case was capability. No other reason was suggested or apparent.
- 31 The Claimant claimed, however, that the dismissal was both procedurally and substantively unfair. The Tribunal found that to be so.
- 32 Other than warning the Claimant of the consequences of there being no improvement in his sales figures on 14 July 2016, none of the procedural requirements set out in James v Waltham Holy Cross UDC were complied with.
- 33 There was no proper investigation or appraisal of the Claimant's performance. Nor any identification of the problem with his sales figures other than to require him to spend 2 days a week out visiting clients hoping to win new or old business. There was no evidence of any enquiry into the Claimant's complaint that his Google enquiries work had been shared with another employee or that the Resourcers were not filling vacancies he had procured. Nor was there any enquiry into his assertion that he had made efforts to attract new clients and been out of the office trying to sell to new clients.
- 34 In particular, the Claimant had not been given a reasonable opportunity to improve. The 5 week performance improvement plan agreed between Mr Yardley and the Claimant on 26 September 2016 was summarily terminated by Mr Yardley on 5 October 2016. Mr Yardley's account of the dismissal meeting referred to a 12 week opportunity to improve referring back to the review in July 2016. He made no reference, however, to the 5 week performance plan agreed between them in writing on 26 September 2016.
- 35 There was no evidence that at any point the Respondent offered the Claimant any additional training or supervision in order to improve his performance.
- 36 The Claimant had a legitimate expectation that he would have a full 5 weeks to improve his performance and that it would be reviewed on 31 October 2016. The summary termination of that plan was unreasonable in the circumstances.
- 37 Additionally, there was a failure to follow the basic steps set out in the ACAS Code of Practice on disciplinary procedures. Indeed, Mr Yardley

accepted during cross-examination that no process was followed. The Claimant was not warned or given any notice of the dismissal meeting on 5 October 2016. He was not informed that he was entitled to be accompanied at the meeting. There was no written evidence produced at the meeting and the claimant was not given any right to appeal against the dismissal. No alternatives to dismissal were considered.

38 In these circumstances there was no reasonable investigation and no sufficient evidence in front of the Respondent to show incapability for which it was reasonable to dismiss. The dismissal was outside the range of reasonable responses.

39 The Tribunal found that the dismissal was both procedurally and substantively unfair.

Failure to give statement of change of employment particulars – Section 38 Employment Act 2002

40 The Respondent conceded that when the proceedings were begun, it was in breach of the duty under section 4 of the Act to give a statement of particulars of the changes to the Claimant’s employment when he was promoted from Resourcer to Consultant.

41 The Tribunal found this complaint proved.

Remedy

42 The case will now be listed for a hearing to determine what remedy is appropriate in view of the above findings.

Employment Judge Vowles

.....7 September 2017

Sent to the parties on:

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For the Tribunal Office