



EMPLOYMENT TRIBUNALS

Claimant: Mr S Casey

Respondent: UPS SCS (UK) Limited

HELD AT: Manchester

ON: 12 December 2017

BEFORE: Employment Judge Humble

REPRESENTATION:

Claimant: Ms J Wilson-Theaker, Counsel

Respondent: Mr D Northall, Counsel

JUDGMENT

The judgment of the Employment Tribunal is that:

1. The claimant was not wrongfully dismissed.
2. The respondent was not in breach of the claimant's contract of employment in respect of any failure to pay a bonus entitlement. The respondent has not made unauthorised deductions from the claimant's wages.
3. The claims are dismissed.

REASONS

1. The hearing took place at Manchester Employment Tribunal on 12 December 2017. The claimant was represented by Ms Wilson-Theaker of Counsel and the claimant gave evidence on his own behalf. The respondent was represented by Mr Northall of Counsel and evidence was taken from Mr Adam Wallace, a Branch Manager, Mrs Suzanne Smith, Sales Director for the respondent's north region, and Mrs Lisa Bradshaw, Human Resources Officer. Evidence in chief was taken by way of written statements which had been prepared by the parties. The Employment Tribunal were referred to an agreed bundle of documents which extended to 266 pages.

2. Evidence and submissions were concluded late on the afternoon of 12 December 2017 and judgment was reserved.

The Issues and the Law

3. The claims were for wrongful dismissal, or breach of contract, in respect of the claimant's notice pay. The claimant was summarily dismissed for an alleged repudiatory breach of contract. The respondent alleged that the claimant re-aligned two sales accounts from another region to his own region in breach of company procedures and for personal gain, and that this amounted to the falsification of documentation and to fraud. He was summarily dismissed for gross misconduct. The claimant denies that he acted in breach of company procedures and maintained that he had the permission of management to assign the accounts to his region.

4. In respect of a breach of contract or wrongful dismissal claim, it is for the respondent to prove a repudiatory breach justifying summary dismissal. The Tribunal needs to be satisfied on the balance of probabilities that the employee committed the misconduct alleged, and that it was sufficiently serious to amount to a repudiatory breach. The burden is on the respondent to show on a balance of probabilities, relying not only on matters known to it at the time but if necessary on after acquired evidence, that the conduct of the Claimant was such as to fundamentally repudiate the contract of employment. This is commonly called "gross misconduct", and was explored by the Court of Appeal decision in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285, CA among many others.

5. There was a further claim for breach of contract and unauthorised deduction from wages pertaining to a bonus payment which the claimant claimed was owed. The respondent denied that any money was due to the claimant. It was for the claimant to show on the balance of probabilities that there was an unauthorised deduction from wages and/or breach of contract in respect of unpaid bonus.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the Employment Tribunal did not make findings on all of the evidence before it but only those matters which were relevant to the issues to be determined):

6. The claimant commenced work for UPS SCS (UK) Limited ("the respondent") on 1 September 2015. The respondent operates a national and international delivery service and the claimant was employed as an Accounts Executive and was assigned a territory in the Stoke area. He was required to develop business and service clients that fell within the Stoke-on-Trent postcode ("the Stoke territory").

7. On 25 March 2017 the claimant received a letter from the respondent inviting him to attend a disciplinary hearing on 5 April 2017. It was alleged that the claimant had requested that some customer accounts be aligned to him which were not within the Stoke territory. The two accounts concerned were Brooks Automation and Mini-Cam, both of which were businesses based in the Manchester region. A disciplinary hearing was convened and on 12 April 2017, having heard from the claimant and given him an opportunity to put his case, the respondent summarily dismissed the claimant. The outcome was confirmed in a letter dated 20 April 2017 (page 232-236 of the bundle).

8. The respondent's findings were, in essence, that the claimant had committed an act of theft or fraud by deliberately falsifying company documents, or by providing false information with an intention to mislead. It was determined that the claimant

had failed to follow company procedures and by realigning the accounts from Manchester to the Stoke territory obtained a personal gain from two accounts which ought not to have been aligned to him. The claimant appealed against his dismissal (page 238-240) and an appeal hearing was convened on 24 May 2017. On 26 May 2017 the respondent wrote to the claimant advising him that his appeal was unsuccessful and that the allegations against him had been upheld.

9. This case revolved around two forms which are reproduced at pages 156 and 163 of the bundle. These were headed "Realignment Forms" but the forms in fact served two purposes. One was a request for a realignment of an existing sales account, and the other purpose was to align a new account to a particular territory and/or an accounts executive. The particular accounts at issue in this case were referred to as T-accounts which meant that the businesses were known to the respondent, and the respondent was making deliveries to them, but they did not have a specific accounts set up with the respondent. This meant that, while deliveries were made to the businesses, the revenue received was not assigned to any particular account executive. Until January 2017 accounts executives did not receive any benefit from revenue received from a T-account. It was announced at a conference in January 2017 that this system would change and that accounts executive would receive commission from sales on T-accounts. The claimant was aware of this proposed change from January 2017 but he was not aware of when it was due to take effect, and it was not communicated to him in any documentation.

10. The claimant's case is that he believed that Amanda Fielding, who was the existing Manchester representative, was due to leave the Manchester region to service a different area from 14 February 2014. The claimant had a conversation with Amanda Fielding who informed him that she was due to leave, and the claimant asked whether he would be able to service her sales region to which she did not raise any objection. The claimant subsequently became aware of two T-accounts, Brooks Automation and Mini-Cam Limited, which were both within the Manchester postcode but with whom the current incumbent, Amanda Fielding, had not had any direct contact. The claimant submitted a realignment form for Mini-Cam Limited on 24 February 2017 (page 156) and a further form in respect of Brooks Automation on 7 March 2017 (page 163), seeking to have those accounts aligned to the Stoke territory.

11. The essential the question in this case was whether the claimant committed a repudiatory breach of contract by completing those forms incorrectly and specifically by omitting to complete a box on the form which stated "*current territory*". The claimant did complete a box to state the current area was the "*North*", which encompassed the claimant's Stoke territory as well as Manchester and many other territories operated by the respondent, but he did not complete the box entitled "*current territory*" with "*Manchester*" which was the territory in which both accounts were based in line with their post codes. That box was left blank. There was a further box which said "*current sales resource*" which was also left blank by the claimant. That did not appear to be contentious since it appeared to be accepted by the respondent that the account had not been specifically assigned to Amanda Fielding at that stage. The claimant complete the other relevant boxes in the form: "*new area*" in which he inserted "*North*"; "*new territory*" in which he inserted "*Stoke*"; and "*new sales resource*" in which he inserted "*Sean Casey*".

12. The claimant submitted the forms by email to Mr Woodhouse and to Mr Joughlin respectively, who were the relevant line managers at the time. Mr Woodhouse was not ordinarily the claimant's line manager but was covering for Mr Joughlin. There was some argument to the effect that the claimant was seeking to take advantage of the absence of his usual line manager when making the request to Mr Woodhouse but nothing much turned on that point. The forms were validated by each of the managers and the accounts were assigned to the claimant's Stoke territory.

13. At some point, shortly thereafter, Amanda Fielding became aware that these accounts had been "*transferred out*" of the Manchester territory and she complained that the claimant had taken some accounts from her territory since, although Ms Fielding was due to move territories, she had not yet relocated. Mr Joughlin confronted the claimant on about 15 March to enquire why he had sought the allocation of Manchester accounts to his region. The claimant admitted in evidence that he said to Mr Joughlin that he was "*chancing his arm*" in seeking to re-align the accounts to the Stoke territory, but said that this comment was taken out of context and he had meant that he had seen an opportunity to make a potential "*quick sale*" for the respondent. His case was that there was nothing deceitful about requesting these territories to be transferred; it was the respondent's responsibility to check the territories and to validate the request once the forms were submitted. In this instance the respondent's management did validate the request and the business accounts were transferred to him in line with their procedures. He immediately benefitted from the new accounts since some income from the T-accounts was allocated to him rather than to Amanda Fielding, albeit at only a minor level of about £100.

14. The Tribunal accepted the claimant's evidence that he was not aware of when the proposed change to the system of allocating commission from T-accounts was due to take effect, but nor did he enquire or seek any confirmation upon when it would take effect. His focus was on the future benefit of the sales which he believed he would generate from that region; he did not seek to check whether he would gain any immediate benefit from the re-alignment of the accounts.

15. There was a significant amount of extraneous evidence in this case which focussed upon the investigation, disciplinary process and the respondent's reasons for dismissal. The focus of the tribunal however was simply whether there was a repudiatory breach of contract on the part of the claimant and the case turned upon whether the claimant had properly obtained the permission of management to re-assign accounts in the Manchester postcode to his Stoke territory. The Tribunal did not accept the claimant's evidence that, during the conversation with Mr Joughlin on 15 March, Mr Joughlin said he did "*not mind*" the claimant re-aligning the accounts to the Stoke territory. This did not fit with the other evidence before the Tribunal. It was Mr Joughlin who investigated the matter following the complaint received from Amanda Fielding and the statements provided by him during the disciplinary process were not consistent with the claimant's account (pages 198 and 228-229). Mr Joughlin in fact formed the view that the claimant had deliberately deceived the respondent and he recommended that disciplinary action should commence. There was no suggestion by the claimant that there was any ill-feeling between him and Mr Joughlin, or that Mr Joughlin had any axe to grind.

16. The claimant's assertion that management had approved the forms that he had submitted was correct, but the pertinent question was whether the claimant in

submitting those forms had deliberately excluded the “*current territory*” and was therefore deceitful by omission; had done so in the hope that accounts (which were not in his territory and to which he would not ordinarily be entitled) would be transferred to him without proper enquiry by the respondent’s management?

17. On the balance of probabilities the Tribunal held that the claimant did deliberately omit the Manchester territory from the relevant box. The Tribunal was persuaded by the evidence of Mrs Smith and Mr Wallace that it was a very rare occurrence that an account would be assigned outside of the territory to which it was designated by post code. On the rare occasions that it had been done it was at the specific request of a client, or where an existing accounts executive did not have the specific skills to service a particular customer. Mrs Smith was not aware of any instance in which a re-designation of an account to another territory occurred without the express knowledge and approval of management. Mr Wallace in his evidence said that if accounts started to be allocated to accounts executives from other territories, then it would result in “*anarchy*” since representatives would be looking to grab customers from each other rather than customers being retained and serviced within their own territories. He was only aware of one instance of an account being assigned outside of its designated territory (based on postcode) in a seven year period. The claimant’s case was that this practice was more frequent but he was only able to provide one specific example of it occurring, which again suggested it was a rare occurrence.

18. While technically it was correct for the claimant to assert that the respondent had authorised his request the Tribunal held, on the balance of probabilities, that there was an element of deceit on the claimant’s part. He deliberately omitted the current territory from the pertinent box. It was noticeable that, while this was an unusual request, the claimant did not in either of his covering emails in which he made the request to his line managers (pages 155 and 162) explain that he was seeking a realignment of an account from another territory. Nor did he otherwise contact management to explain that he was seeking an account from another territory to be assigned to him. The claimant was (in his own words) “*chancing his arm*” or, as it was put in cross examination, “*making a land grab*” for accounts based in another Account Executive’s territory. It was not greatly relevant whether Amanda Fielding had already left that territory or was about to leave (over which there was some dispute); the fact was that the claimant was seeking to obtain new accounts from outside his territory for his own financial benefit and he withheld relevant information from management while seeking to obtain those accounts. Nor did it matter greatly whether the financial benefit was immediate or would crystallise in the future.

19. The Tribunal was satisfied on the balance of probabilities that the claimant deliberately withheld information on the forms submitted to management such that he would benefit from sales revenue from accounts outside of his region. The management of the respondent were remiss since they did not properly check the forms and so the request was validated without proper due diligence but that does not deflect from the claimant’s blameworthiness. The Tribunal did not accept that the claimant had properly obtained management’s approval to service those accounts since it was obtained on a false premise. Nor did he have permission from Amanda Fielding to obtain those accounts as he claimed, although she may have indicated in general terms that she had no objection to him working in her region given that she was about to leave.

Conclusions

20. The Tribunal therefore held that the claimant did commit an act of misconduct. As to whether that misconduct amounted to a repudiatory breach of contract, this was less clear cut than was suggested by the respondent. While there was an element of deceit by omission, there is a fine line between an opportunistic salesman seeking to enhance his own figures by “playing the system” and dishonesty. This was not a case of theft since no monies were taken from the respondent. There may have been an immediate adverse impact upon Amanda Fielding’s income but the claimant was not aware of that at the time, although it might be added that he did not take any due care to find out. There would potentially be a significant gain from new business from those prospective clients, and it was this opportunity that the claimant was focussed upon rather than intending to take money from Amanda Fielding to his own advantage. Nevertheless, the Tribunal held that there the claimant deliberately withheld relevant information from the form which was submitted to management and he deliberately omitted to explain the situation to management with the aim of obtaining sales accounts to which he would not otherwise be entitled. There was deceit in that conduct and, on the balance of probabilities, the Employment Tribunal found that it did amount to a repudiatory breach of contract. On that basis the wrongful dismissal claim is dismissed.

21. The claim relating to the bonus payment can be quickly dealt with. In the claim form it was suggested that the claimant was owed £2,961.01. It seems that this was based upon a quarterly bonus of £3,750, which was payable provided that the claimant met his targets for the relevant quarter. The difficulty for the Tribunal was that the claimant failed to present any evidence at all in support of his contention that he was entitled to that bonus. The claimant did not draw the Tribunal to any specific formula for the bonus or any sales figures achieved by him during the relevant period to illustrate the bonus which it was alleged had been achieved, or why it differed from the figures provided by the respondent. The bonus claim was not referred to at all in the claimant's witness statement which stood as his evidence in chief.

22. Mrs Bradshaw gave some evidence upon the bonus entitlement on behalf of the respondent. Her evidence was that a bonus payment was made in full if 100% of target was achieved in any given quarter, no bonus was payable if less than 90% of target was achieved, and a reduced bonus was paid if between 90% and 100% was achieved. The claimant attained somewhere around 93% of his target during the relevant period and therefore only received a small proportion of his bonus. A statement was provided showing a figure of £778 was paid (pages 157-161), which the claimant accepted he had received. Mrs Bradshaw was unable to provide any further details in respect of figures or any details of the specific formula upon which the calculation for the bonus was based. She said that it was done by a computerised system and, while she conceded that the computerised system must operate some formula, she said that it was a complex one and she did not have any specific understanding of it and there was no other any documentary evidence as to how it operated. The respondent’s case was that the claimant had been paid everything to which he was entitled in line with the computerised system and there was no further payment due to him. No other evidence was available to the Tribunal.

23. In the absence of any positive case from the claimant and any documentary evidence to establish that he was entitled to any further payment, the Tribunal held that the claimant had failed to discharge the burden upon him to prove that there had

been a breach of contract or an unauthorised deduction from wages. Accordingly, that claim was dismissed.

Employment Judge Humble

Date: 4th January 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 January 2018

FOR THE TRIBUNAL OFFICE