



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS

MEMBERS: Ms A Sadler
Mr M Sparham

BETWEEN:

Ms N Bonomie

Claimant

and

Pretzel Films Ltd

Respondent

ON: 19 & 20 June 2018
24 July 2018 (in chambers)

Appearances:

For the Claimant: Mr G Turner, Solicitor

For the Respondent: Mr T McArdle, Solicitor

JUDGMENT

1. The claimant was not dismissed contrary to section 104 of the Employment Rights Act 1996 and her complaint of unfair dismissal fails.
2. The respondent did not make an unlawful deduction from the claimant's wages.

REASONS

1. In this matter the claimant complains that she was automatically unfairly dismissed for asserting a statutory right (that the respondent had made an unlawful deduction from wages) and that she is owed wages in respect of unpaid commission. Her claim of wrongful dismissal has been withdrawn as the respondent eventually paid her, in May 2018, what she was due in respect of her notice period.

Evidence

2. We heard evidence from the claimant and for the respondent from its two directors Mr P Bickford and Mr J Davis. We also had an agreed bundle of documents before us in addition to a sizeable number of documents relied upon by the claimant that were disputed by the respondent. It was a feature of the case that the documents were generally poorly prepared which delayed proceedings and introduced unnecessary confusion. This was particularly disappointing given that both parties were professionally represented. With proper preparation we anticipate that we would have been able to conclude the hearing within the allotted two days and avoid the delay occasioned by having to meet separately in chambers.
3. Although both Mr Bickford and Mr Davis appeared to be open, full and frank in their evidence to the Tribunal we have real concerns regarding their underlying approach to matters of honesty.
4. In the case of Mr Bickford, we were referred in particular to an email he sent on 14 September 2016 to his team headed 'IMPORTANT FAVOUR TO ASK!'. In this email he asks them to 'cover' him if his wife called the office and asked for him or a number of others. He set out a series of what he expressly called lies that they should tell. Within the email he says:

'NB every good blag needs solid truth!!'

Mr Bickford's explanation of this email was that he was making a joke. Having regard to the entirety of the email and his family circumstances at the time that he told us about, we do not accept that evidence. We find this email to be compelling evidence that when it suits Mr Bickford he will lie.

5. Further, it became apparent that in the course of disclosing documents in these proceedings Mr Bickford copied and pasted emails into a word document and then deleted or added content. We conclude that he did this because he believed it suited his case. A particular example is the disclosure of an email exchange between Mr Bickford and Ms Cutler of Herbert Smith who had, justifiably, made a complaint about the claimant. In the word version of Mr Bickford's reply to the complaint it says:

'...so I want to ensure we're on the same page and she [the claimant] is not on the project moving forward.'

In the original email however that paragraph finishes after 'page'. There are other examples which are referred to below.

6. We also have concerns about Mr Davis's credibility. It became apparent in the evidence that he sent texts to the claimant after the dismissal meeting (also referred to below) that said he had had no idea what was going to happen and that he was not very happy about the dismissal. He then wrote a glowing reference for her. In his evidence he said that the texts were simply untruthful as he did not want to hurt the claimant and that parts of the reference were also untrue. Again, we find that when it suits Mr Davis he will lie.

7. These concerns cannot be answered by simply saying that they are indicative of the industry that the directors were operating in or that the respondent is a small company. Integrity is integrity.
8. The respondent says that the claimant is similarly willing to lie and points to her CV – which contains questionable exaggerations of her past experience – as an example. Whilst not defending the practice of making inaccurate statements in a CV, there is no doubt that it is generally accepted that CVs will present the best possible interpretation of an individual's experience. If there was any 'over-egging' by the claimant in her CV, that was of a different order of magnitude to the untruthfulness of the respondent's witnesses described above.

Relevant Law

9. Unfair dismissal: The dismissal of an employee is as a matter of law automatically unfair if the reason, or principal reason, for the dismissal is that the employee alleged that the employer had infringed a right of his/hers which is a relevant statutory right. It is immaterial if the employee has the right or whether that right has in fact been infringed as long as the claim is made in good faith (section 104 of the Employment Rights Act 1996 ("the 1996 Act")).
10. The burden of proof in establishing the reason for the dismissal is on the claimant – albeit that this has been described as a 'light burden' (Serco Ltd v Dahou 0027/14/1408 EAT).
11. Unpaid wages: If a worker suffers an unauthorised deduction from his or her wages he or she may make a complaint to the Tribunal (section 23 of the 1996 Act). Where the total amount of wages paid is less than the total amount properly payable, the amount of that deficiency is a deduction (section 13). The definition of wages includes any bonus or commission payable under the contract of employment or otherwise.

Findings of Fact

12. Having assessed all the evidence, both oral and written, the Tribunal finds on the balance of probabilities the following to be the relevant facts.
13. Background
14. The respondent is a film and digital production company. It has two directors, Mr Bickford (founder and Managing Director) and Mr Davis (Creative Director). At the time of the events in question it had approximately 12 employees. It had no HR function. All strategic decisions were made by the directors with Mr Bickford appearing to be the dominant of the two.
15. The claimant commenced negotiations with the respondent in October 2015 for employment. At that stage the respondents decided to recruit somebody else. That arrangement did not last however and in March 2016 the

respondent advertised for a Business Development Manager. The claimant applied and negotiations again started between the parties for employment.

16. Agreement was reached that the claimant would commence employment on 25 April 2016. The job title was changed at her request to Development Producer. There was considerable disagreement between the parties as to the nature of the role that the claimant was engaged to do and also her own professional background. Much of this we find not to be relevant to the issues before us. In essence her role was to generate new business.

17. A basic annual salary of £40,000 was agreed. Although the contract referred to full time working, agreement was reached for it to be 4 days per week (one of which was at home). The claimant was also entitled to what is described in the contract as a bonus but was more accurately described during the hearing as commission as follows:

‘.7% of the first One Million Pounds and 5% thereafter, the amount used to calculate the bonus will be based on the closed job billing amount. Bonus will only be paid once the jobs are delivered and closed and will paid Quarterly.’

18. The claimant’s unchallenged evidence was that her target was later changed by oral agreement with Mr Bickford simply to obtaining two ‘logos’.

19. Commission

20. The amount of the commission payable is clear from the contract, but it is not clear what the criteria were for payment in terms of which ‘jobs’ qualified. The claimant’s evidence was that she was due commission if she had any involvement at all with the client that brought in the job. The respondent’s case was that she was entitled to commission only in respect of totally new work that she introduced.

21. In the absence of clarity in the contract itself, we find that neither of these assertions is wholly realistic and would not reflect the intentions of the parties when the contract was created. Instead, we find that commission would be payable if the claimant had played a significant part in the delivery and closure of the job.

22. The commission claimed in the claim form was ‘around ‘£17 to £20,000’. In the response form in it was agreed that £1,151.10 was owing to her.

23. In June 2017 the claimant set out in tabular form commission that she claimed totalling £14,592.95. By reference to that table the current position is as follows:

- a. Alex Fitness Gyms – £611.80 – now paid
- b. Alex Fitness Gyms – £22.45 – now paid
- c. RSA – £1,749.65 – still claimed
- d. Herbert Smith - £350 – now paid
- e. Vayner Media – £1,398.95 – still claimed
- f. Ann Summers – £167.65 – now paid
- g. Vayner Media – £1,863.75 – still claimed

- h. Vayner Media – £1,428.70 – still claimed
- i. Captain Morgan – £7,000 – no longer claimed

24. As far as RSA is concerned, we find that they were a returning client and long-term contact of Mr Bickford's. The claimant's contact with them was limited to asking to be introduced to new leads - as her email dated 10 November 2016 expressly says. Accordingly, she did not play a sufficiently significant role in the job to qualify for commission.

25. As far as Vayner Media is concerned, we find that this agency approached the respondent via its general email address further to which there were emails between them and Mr Davis where he set up a meeting to which the claimant was invited at the last minute. After that meeting the claimant's own email dated 28 September 2016 said:

'And just like that, Jamie Davis bagged an agency.'

indicating that it was his work that secured the job. We find that the claimant did not play a sufficiently significant role in the job to qualify for commission.

26. Dismissal

27. The respondent's case is that the reason for the claimant's later dismissal was her unsatisfactory performance. The evidence relied upon by the respondent supporting their case is as follows:

- a. Mr Bickford said that by September 2016 it was clear that the claimant was not performing as had been hoped and that they had a meeting in late September after which he wrote to her confirming his instructions to:

'...drop all other projects until our pipeline is getting full. I would like to see, by Monday, a full sales plan and pipeline run, target number of calls per week and follow ups from the weeks before. A well laid out, cohesive tracker of calls made and responses etc. We need to make target by December.'

- b. Mr Bickford emailed the claimant again on 23 September 2016 changing the date of their meeting and asking to go through:

'Package going out and to whom.
Pipeline plan.
Contact list/Spreadsheet.
Targets achieved so far.
Targets to reach by December.
What support needed.'

- c. An exchange of emails between the directors on 26 September 2016 shows Mr Bickford saying:

'Looking forward to sitting with Nicole... she's got until Christmas to deliver I think.'

and Mr Davis replying:

'yip, agreed. Don't tell her that though, I'm beginning to find out she's not great with that hanging over her head and she is the type to spend all her time looking for another job instead for concentrating on our job. Happy to snip the cord at the last min. thoughts?'

and Mr Bickford's reply:

'Oh no I wouldn't tell her. It's for you to know.'

- d. An email from Mr Bickford to Mr Davis on 17 October 2016 regarding 'Leon' (a friend of the claimant who had been employed for four weeks to assist her) where he said:

'he's as bad as she is... get it over and done with so I can get on with firing her pls...'

The claimant says that this was just another hot and cold outburst from Mr Bickford. We tend to agree that Mr Bickford does 'blow hot and cold' but this email is an indication of how he was thinking at that time – even if he later changed his mind or did not act on it straight away.

- e. Towards the end of the year it was agreed that a marketing executive would be hired to support the claimant and Mr Bickford and Mr Davis agreed with each other that that would give them a few months to see if it made any difference but if it did not they would have to end the situation.
- f. An email from Mr Bickford to the claimant on 1 December 2016 in which he said:

'I would like to have a job review with you before the Christmas break. Having assessed the last few months, I believe the job needs to change and have more dedicated time spent on it. I propose that you start to work full time, five days a week without any numerical change to your salary.'

When that email was first disclosed to the claimant's solicitors, it was in word format with the words after 'spent on it' removed. The claimant says that this shows Mr Bickford fabricated that version. That would appear to be correct as a section has been deleted. We infer that Mr Bickford did that as the part deleted could support the claimant's argument that she was performing satisfactorily especially in light of the subject line – which is visible on another copy of the exchange – which was 'Planning ahead for next year'.

- g. In any event, that job review meeting was held and as a result the claimant's target was changed to 10 meetings a month. On 7 December 2016 Mr Bickford emailed the claimant and asked her for a list of meetings that they have between then and Christmas.
- h. On 8 February 2017 Mr Bickford emailed the claimant and asked to see her client contact reports so far and said that target was not going to be met, again. The claimant says this may be a fake email

referring in particular to the fact that it is in word format, has no time of sending and, she says, was inconsistent with other comments to her. We find that it is perfectly possible that the claimant is correct and this is not a true copy of the original email. We find that Mr Bickford was perfectly willing to manipulate existing documents by, for example, deleting parts that he saw as either not relevant or not helpful, but have seen no evidence that he would falsely create an entire document that did not exist. On that basis we find on the balance of probabilities that he sent something on 8 February 2017 along these lines to the claimant but we are not convinced we have seen the whole document.

- i. In early March 2017 the directors agreed that it was time to make a decision regarding the claimant and if no new business came in shortly, she would be let go.
- j. On 22 March 2017 in an email exchange between the directors regarding another employee who they stated needed to be fired (the 'little Alex' referred to was in fact fired in September 2016), Mr Bickford said:

'If the girls don't deliver tomorrow they can go too'

which he said included a reference to the claimant.

- k. On 26 April 2017 Mr Bickford emailed the claimant stating that they were nearing the end of April and he feared targets were going to be missed. He asked for a detailed email of stats and next month's strategy by the following day.
- l. By mid/late April 2017 Mr Bickford was looking to contact other possible candidates for a new business development person for the respondent. Again, it appears that Mr Bickford manipulated the copy of the email on 24 April 2017 that was disclosed as he corrected a spelling error. The claimant says that another possible explanation for these emails is that the team was expanding. In the circumstances we do not find that alternative explanation to be plausible.

28. The claimant's case is that even if the directors had concerns of that nature they were not communicated to her and that to the contrary there were examples of them complimenting her on her performance and enjoying a good relationship with her. She says that she was dismissed because she had raised concerns about non-payment of her commission with Mr Davis on 18 May 2017 and with both the directors on 22 May 2017. The evidence relied upon by the claimant supporting her case is as follows:

- a. On 10 October 2016 Mr Bickford in the course of an exchange about the complaint that had been received from Herbert Smith said:

'You're doing great.'

Mr Bickford's explanation of this was that he was nurturing and encouraging the claimant who had had a 'meltdown' after the Herbert Smith complaint.

- b. On 21 October 2016 Mr Davis texted the claimant saying:

'Awesome hu[n]! You got PJ his logo
XXXXXXXXXXXXXXXXXXXX'

- c. In response to Mr Bickford's email of 7 December referred to above, she sent a list of planned meetings to which Mr Bickford replied:

'This is great work! Thank you.'

- d. She had a great quarter 4 which was reflected in a Christmas card she received from the directors in which Mr Bickford wrote:

'Happy Christmas lovely!
You have smashed Q4!!
So proud!!
PJ xx'

and Mr Davis said:

'What he meant to say was your doing an amazing job and always have done
Here's to an amazing 2017
Have a lovely break
Lots of love
J xxx'

Mr Davis's explanation of this card was that it reflected that the claimant was working very hard though not managing to convert that into results. Mr Bickford's was that he was trying to be encouraging. We find those explanations very surprising given the evidence of the directors' concerns about the claimant's performance at that time, but equally find their approach to management to be surprising at times. They were at times inconsistent and unpredictable – as the claimant put it blowing hot and cold.

- e. A text from Mr Davis to the claimant on 12 December 2016 in which he refers to 'nice work' on a specific account and:

'Yip amazing...Lots more work coming our way.'

- f. Exchanges of texts between the claimant and Mr Davis in late January and early February 2017 which were not directly relevant to work but showed a positive relationship between them and his mixed feelings about Mr Bickford. The claimant says that these texts made her feel valued and gave no sense of any performance concerns and that was a valid conclusion on her part.

- g. An email from Mr Bickford to the claimant on 17 March 2017 relating to a presentation on the following Thursday which suggests 'business as usual' and no indication of any intention to dismiss her.

- h. On 30 March 2017 the claimant secured Ann Summers as a client.
- i. After the dismissal meeting, Mr Davis texted the claimant and said:

'Totally left field, I had no idea...'

and

'Hey Lovely, I'm still lost for words, everyone is understandably devastated. Needless to say I'm not very happy about what he did...'

As stated above, Mr Davis says that contrary to these messages he did know that the claimant was to be dismissed for performance and agreed with it.

- j. On 26 May 2017 Mr Davis provided a reference to the claimant, on headed notepaper, which included:

'Nicole is a highly intelligent and hard working member of my team, she is proactive and gets the job done. She has succeeded in landing Pretzel some big clients.'

This reference was later withdrawn by Mr Bickford and Mr Davis's evidence was that the statement above was untrue.

- k. On 31 May 2017 Mr Davis texted the claimant and said:

'Since you left it's like all the work dried up!'

In his evidence Mr Davis said that again this was not true – all the work had not dried up – but he was trying to make the claimant feel better.

29. Having considered all that evidence, we find on the balance of probabilities that the directors – in particular Mr Bickford – did have concerns about the performance of the claimant. Those concerns had formed by 1 September 2016 and continued to varying degrees thereafter. Efforts were made to support her by bringing in additional resource at times but equally no express warnings – even informally - were given to her. Indeed, to the contrary, she was reassured on various occasions that she was doing well. This was perhaps as a result of efforts by Mr Bickford to encourage her and/or due to the close friendship that had developed between her and Mr Davis and his own weakness/misjudgment which led to him falsely reassuring her.

30. We have come to that conclusion having expressly considered the implications of Mr Bickford fabricating evidence when it suited him. There is sufficient unchallenged evidence, however, to support that finding.

31. The claimant's case of unfair dismissal is predicated on her having asserted a statutory right in respect of unpaid commission (which at the time she believed was £7,600 plus a likely further award re Diageo/Captain Morgan). She says that she made this assertion to Mr Davis on 18 May 2017 and again during the dismissal meeting referred to below. Mr Davis only

recollects a specific conversation about commission around Christmas 2016 when he says he asked the claimant why she had not claimed what was due to her and she said it was such a small amount that she was waiting for it to build up. He said that he did not recall it being mentioned on 18 May 2017 but if it was it was neither here nor there as it was such a small amount.

32. The claimant relies upon an exchange of texts with Brock – another employee and friend of the claimant – on 17 May 2017 as evidence of what she planned to say to Mr Davis the following day. Those texts show that on 10 May the claimant was upset about being excluded from a meeting with Diageo and Brock was encouraging her to make that point to the directors. Then on 17 May a number of texts indicate that she was very upset about the treatment but the context is her involvement in deals rather than commission. Indeed commission is not expressly mentioned. The claimant said she would chat to Mr Davis ‘tomorrow’ and later the claimant advised Brock she was having a meeting with Mr Davis the next day and when asked if she was going to lay it all out for him, she replied ‘Like fresh ironed sheets’ and ‘I refuse to beat around the bush’. The claimant’s evidence was that that included a reference to the commission she was owed.
33. We find in relation to the meeting with Mr Davis on evening of 18 May that the claimant did refer to unpaid commission, in the context of the main purpose of the meeting which was regarding the Captain Morgan bid which – if it had been successful – would have been worth significant commission (£7,000). We further find that Mr Davis would have mentioned this conversation to Mr Bickford given the very close nature of their relationship.
34. The dismissal meeting was on 22 May 2017, for Mr Bickford the next working day after 18 May and the day that, at the time, everyone thought they would get the Captain Morgan job.
35. Mr Bickford’s evidence was that that morning he and Mr Davis had their usual meeting discussing various matters including the claimant. He said they agreed that she had been given more than long enough but the lack of results spoke for themselves and that this was her last chance and if she had not lined up any concrete meetings she would be let go. He said that they discussed the pipeline generally but not Captain Morgan. We find that extremely surprising given that the decision was imminent and that this was one of the ‘logos’ that Mr Bickford had been after. We therefore find on the balance of probabilities that the directors did discuss Captain Morgan in their pre-meeting and therefore would have had the possibility of the claimant being owed commission in their minds.
36. Mr Davis’s evidence supports Mr Bickford’s account although of course at the time – as described above – he did not.
37. The claimant was called over to meet them. Mr Bickford said that he confirmed targets had not been met at all during the time she had worked for them but said it was not her fault at which point he told her that he was terminating her contract to which she got up and left. He says that the claimant did not raise the issue of unpaid commission.

38. The claimant's account is she did raise the unpaid commission, including Captain Morgan, straight away but Mr Bickford did not want to discuss it. He only wanted to discuss her pipeline and what meetings were lined up. She says that as she tried to answer Mr Bickford cut her off and eventually that she was fired.
39. An email was sent to the claimant confirming her termination on the same day. No reason was given.
40. The claimant's exchanges with Brock almost immediately after the dismissal meeting show her saying to him first that Mr Davis had reminded Mr Bickford about commission 'today', that she did not think it was a coincidence that she had been sacked on the same day as 'commission reminder' and:

'This is because I mentioned commission to Jamie on Thursday'
41. We find that the claimant did raise the issue of commission at the dismissal meeting. It is consistent with her having raised it with Mr Davis on the 18th, the expectation that Captain Morgan would close that day and her texts with Brock.
42. The claimant has relied on a text message from Mr Davis on 5 April 2017 as showing that the respondent was under considerable financial pressure at that time and this goes to why they did not want to pay her the commission she was due. Mr Davis said that there were no cash flow problems and that this message referred another company separate to the respondent albeit within Mr Bickford's Pretzel brand. There is insufficient evidence before us to accept the claimant's position on this.

Conclusions

43. Commission: We find that in respect of both Vayner and RSA the claimant did not play a sufficiently significant part in the delivery and closure of the business and accordingly she is not entitled to payment of the sums claimed.
44. Unfair dismissal: We have found that the claimant did assert a statutory right when she raised, on both 18 & 22 May 2017, that she was owed commission.
45. We do not find however that that was the principal reason for her dismissal. We find that there are reliable contemporaneous documents (in their original email format i.e. not word) which show that the directors had genuine concerns regarding the claimant's performance and talked about at least the possibility of terminating her contract well before she raised the commission issue. We do find that the timing of the dismissal may have been influenced by the belief that Captain Morgan was about to close in which case the claimant would have been owed £7,000, but even that does not make the assertion the principal reason.

46. Accordingly the dismissal was not automatically unfair. As the claimant did not have two years' service it is not open to us to consider whether it was fair on ordinary principles.
47. We observe that from the claimant's point of view it was not surprising that she believed that having asserted her statutory right was the reason for the dismissal. Apart from general requests for information and being chased by Mr Bickford re targets etc, she had received positive feedback from both him and Mr Davis. On some occasions (e.g. the Christmas card) it was very positive feedback. She was not aware of the exchanges between the directors where concerns were expressed about her performance and the possibility of terminating her contract as early as September and October 2017.

Employment Judge K Andrews
Date: 26 July 2018