EMPLOYMENT TRIBUNALS

Claimant: Mr A Kitching

Respondent: Crompton Lamps Limited

HELD AT: Leeds **ON:** 18 and 19 March 2019

BEFORE: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr J Shields, director

JUDGMENT having been sent to the parties on 21 March 2019 and the claimant having made an application in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

1. The respondent is a wholesaler of lighting equipment. It is a wholly owned subsidiary of GCH Corporation Limited (GCH). The claimant was appointed as managing director of the respondent on 6 September 2016. On 27 September 2018 his employment was terminated summarily by Ms Hutchins, CEO of GCH and Mr John Shields divisional director of GCH.
2. The claimant brings a claim for breach of contract. He contends it was unlawful to terminate his contract without notice. He was paid for one month, but his letter of appointment stipulated a notice period of six months.
3. The relevant provisions of the written contract are to be found in paragraph 18. It provides for those circumstances in which the respondent may terminate the employment without notice. The two relevant provisions are paragraph 18 (a) iii and v: if the employee is guilty of any gross misconduct affecting the business of the company or any group company or if the employee is, in the reasonable opinion of the company, negligent and incompetent in the performance of his duties.

4. The Tribunal heard evidence from the claimant and from Mr Shields. The respondent produced a bundle of documents of 76 pages and the claimant produced a supplemental bundle which ran to 339 pages.

5. The respondent relied on three sets of circumstances for terminating the employment without notice. The first concerned serious underperformance. Sales were £700,000 below what had been forecast by the claimant, he had purchased substantial stock which could not be sold of a value in excess of £400,000 and this had created serious cash flow problems. The claimant was said to be unaware of the poor margins being made on the stock he had purchased and ignored warnings. The second concerned the claimant's poor relationship with Ms Hayes a national accounts manager, who he texted late one evening using inappropriate language, describing her as pathetic. The third related to a business trip to Madrid, on which the claimant had been accompanied by his wife. The claimant was reimbursed by the respondent for her expense.

6. At this hearing, Mr Shields did not pursue the third reason as one which would have justified termination of the employment without notice. In closing submissions, he focused solely upon the first allegation. This was pragmatic and well judged. As to the second reason, the evidence demonstrated that the claimant had not sent a text accusing Ms Hayes of being pathetic, late at night. He had sent her text at that time telling her not to attend work the following day, but this was against a background of disharmony in the sales team which the claimant believed would not be assisted by Miss Hayes' attendance. Although he sent the message late at night it was after a works' event and Miss Hayes was leaving at the same time. Although not the most suitable time to communicate, it would not amount to an act of gross misconduct. The other concern was a failure of the claimant to inform the HR manager about an incident of harassment. An employee had drawn the claimant's attention to the fact she had received an inappropriate picture on Facebook from another employee. She told the claimant that she had blocked that employee because he had done it before and that she did not want the matter taking further. Although I was shown a copy of the inappropriate picture, a naked bottom, this was not shown to the claimant. An employee's request for confidentiality may, in appropriate circumstances, have to be overridden by an employer's duties of care to other employees. That said, the exercise of judgment by the claimant in this situation, concerning an employee's wish for confidentiality, could not be characterised as an act of gross misconduct.

7. The conduct the respondent relied upon in this hearing was serious underperformance arising from the purchase of a significant amount of stock known as luminaires. These were fittings for LED lights. The claimant had been responsible for purchasing over 200 new parts from China costing over £1 million. The respondent produced a list of 13 items which had led to a significant write-down in the 2018 accounts, because, put simply, these items were not selling and having to be disposed of at a loss. 10 of these concerned luminaires. By the end of December 2018, the write-off figure was in excess of £280,000.

8. This led to cash flow problems. The respondent had not operated in overdraft in the past but by May 2018 the overdraft reached £350,000. That soon recovered. It was within the respondent's permitted overdraft facility. The stock purchased that year was £788,000 higher than the strategic plan for 2018 projected. That had been prepared by the claimant.

9. The respondent also relies upon the low margins which were being made on luminaire products, criticising the claimant for the prices he was setting. Although these were not making a loss they were 58% below the projected strategic plan by May 2018.

10. The circumstances in which the claimant was dismissed did not follow any recognised procedure. On 27 June 2018 a meeting took place at the site of GCH in Bradford. At the end of that meeting Mr Shields asked the claimant to travel to a neighbouring site, some 10 minutes drive away, at which he met Ms Hutchins. Mr Kitching was informed of the concerns and told his employment was to be terminated immediately for negligence. He received a letter from Mr Shields, dated 6 July 2018, confirming the termination and the reasons for it. It stated that, as a gesture of goodwill, he would be paid until the end of July 2018 and continue to have use of the company car.
11. The question for me to determine is whether, in the reasonable belief of the respondent, the underperformance issues amounted to negligence and incompetence of its managing director. I am satisfied that this means the standards of performance must be reasonably believed to be both negligent and incompetent, to reflect the serious shortcoming required, as measured against customary industrial expectations, to permit an employer to terminate a contract of employment without notice. The alternative ground, of gross misconduct, set out in the contract of employment would be made out if there were gross negligence in performance, but on the facts of this case, would be a higher threshold.
12. The managing director of a company is in a position of significant responsibility and is expected to be held accountable for his/her decisions. That is reflected in the level of remuneration and status which the post carries. Measuring a managing director's performance must factor in the risks to which he exposes a business by such decisions and with regard to the autonomy he has to make them.
13. The poor financial picture portrayed by the significant amount of unsold stock purchased by the claimant raises questions of negligence and incompetence. For a conclusion to be reached regard must be had to all the circumstances, not selective considerations.
14. The respondent had historically sold lamps. The EU passed legislation outlawing the sale of particular lights with a certain wattage, leaving the respondent with a significant amount of stock, up to £1 million, which could not be sold. The claimant was appointed, against that history, to innovate sales in LED lighting. At the commencement of the claimant's employment, 37% of the respondent's sales were of LED lamps and 1% LED fittings. This increased to 57% of LED lamps. The sales of LED fittings increased to £2,100,000 from £200,000 during the claimant's tenure as managing director. The margins were 29% gross and 15% percent net. The market was becoming increasingly competitive. The Lighting Industry Association statistics demonstrated a fall of sales of 28% in 2018. It is noteworthy that in January 2018, at his annual appraisal, Ms Hutchins had awarded the claimant a pay increase of £4,000, to bring his salary to £92,000, in addition to a 2½% cost-of-living increase. This reflected the claimant's performance in turning the business around, by introducing a new website, recruiting a sales team and terminating employment of a number of underperforming staff.
15. I do not doubt that there were good reasons for the owners of the respondent to have concerns. They engaged consultants to evaluate the business and advise on growth plans in 2018. It was that work which drew attention to the concerns Ms Hutchins wished to speak to the claimant about and upon which Mr Shields had undertaken some further investigation.
16. The claimant acknowledged in his evidence that some of the purchases of fittings had not sold as he had would have hoped and expected. Taking a broader view, I would have expected the respondent to have recognised that the claimant was introducing sales in an area which involved speculation and risk and was new to

the business. I am satisfied, upon his evidence, that the claimant undertook research before purchasing stock. The respondent is a company which has sales of £14 million. The claimant was introducing a new product, expanding the breadth and depth of LED products sold. Inevitably that introduced an element of risk, because there was no previous formula to follow. The shortfall against his written forecast had to be measured in that context.

17. Against the background within which he was working I am not satisfied the actions of the claimant could be categorised by a reasonable employer as negligence and incompetence, notwithstanding some of his decisions turned out to be not as he had predicted or hoped for. Business involves some element of risk in a competitive market. The errors are not of sufficient magnitude to meet the threshold required under the definitions within his contract to permit summary termination of his employment.

Preparation time order

18. By rule 76(1), a Tribunal may make a preparation time order (PTO), and shall consider whether to do so, where it considers that a party has acted vexatiously, abusively, unreasonably, disruptively or otherwise unreasonably in… the way the proceedings (or part) have been conducted, or where the response had no reasonable prospect of success.

19. The claimant made an application for such an order because he said that the respondent had instructed a solicitor and barrister to attend a preliminary hearing but had not been represented at this hearing, that he had made a subject access request which revealed gaps in the disclosure, that there had been a refusal to add his witness statement and other documents to the bundle and that it had been a minefield obtaining information from the respondent.

20. I was not satisfied that there had been unreasonable conduct of the proceedings by the respondent such as to warrant consideration for the making of a PTO in this case. There had been correspondence from the parties to the Tribunal about problems in respect of adequate disclosure and preparation of the trial bundle. The respondent contended that the requests for disclosure were excessive and was for irrelevant material. The claimant had requested witness orders for 8 witnesses, but these were refused by the Tribunal as it was not satisfied those witnesses could give evidence which was relevant.

21. The parties did not address specifically what documentation it was said had not properly been disclosed, but it is apparent from the refusal of the witness orders that the claimant's approach to the issue in this case in the preparatory stages had been unnecessarily broad, having regard to the issues. Whatever difficulties which may have arisen, the disclosure process reached a satisfactory stage by the hearing date, insofar as both parties produced bundles which facilitated the proper determination of the issues.

22. It cannot be said to be unreasonable conduct of the respondent to instruct lawyers during the litigation, nor subsequently to decide not to instruct representatives.

23. The subject access requests are governed by data protection legislation which is overseen by the Information Commissioner and the Information Tribunal and not the Employment Tribunal. I was not able to discern how the disclosure under the Tribunal's rules could not adequately have met the needs of the parties in regard to relevant documentation.

24. The respondent cannot be said to have defended a case which had no reasonable prospect of success. Criticisms of the claimant's decision making were

valid and there was good reason for them to be assessed against the criteria in the contract of employment for summary termination.

Employment Judge D N Jones

Date 2 May 2019