



EMPLOYMENT TRIBUNALS

Claimant: Mr M Mostyn

Respondent: S & P Casuals Limited

Heard at: Nottingham **On:** 20 May 2019

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: Ian Proctor, Solicitor

Respondent: Paul Smith of Counsel

JUDGMENT

The Employment Judge gave judgment as follows: -

1. The claim of unfair dismissal fails and is dismissed.
2. The Claimant was dismissed in breach of contract in respect of notice pay and the Respondent is ordered to pay to the Claimant the sum of £6,430.20.
3. The Respondent has failed to provide to the Claimant a statement of initial particulars of employment and is ordered to pay to the Claimant the sum of £1,900.

REASONS

Background to this hearing

1. This matter originally came to the Employment Tribunal on 21, 22 and 23 November 2016 before my colleague Employment Judge Vernon and his members Mrs J C Rawlins and Mr M J Pavey. At that hearing the Tribunal dismissed the Claimant's claims for: -

- Constructive unfair dismissal
- Direct age discrimination
- Indirect discrimination on grounds of religion or belief
- Wrongful dismissal
- An award pursuant to section 38 of the Employment Act 2002

2. The Claimant appealed against that decision and the appeal came before the Honourable Mrs Justice Elizabeth Laing DBE on 22 February 2018.

3. The Employment Appeal Tribunal upheld Mr Mostyn's appeal and ordered that the matter be remitted to this Tribunal on the question of whether the constructive dismissal of the Claimant was fair, to be decided on the basis of findings of fact made by the Employment Tribunal at first instance and the documents which were before that Tribunal together with submissions now to be made by the parties. No new evidence was to be called on the issue.

4. The case for me therefore was decided on submissions only.

5. I had to determine what compensation the Claimant was entitled to for wrongful dismissal i.e. breach of contract in respect of notice pay.

6. I also had to determine whether the dismissal was unfair contrary to Section 94 of the Employment Rights Act 1996 ("ERA"). Her Honour Mrs Justice Laing had found the Claimant was dismissed and I had to decide: -

6.1 Have the Respondents established a potentially fair reason for dismissal? In this case they say capability.

6.2 If they establish a fair reason for the dismissal was it fair in accordance with the principles of Section 98(4) Employment Rights Act?

6.3 If the Claimant succeeds on either of those two claims then has there been a failure to provide a statement of particulars? On the face of it if the Claimant succeeds with one of the claims he is entitled to compensation either at the lower level of two weeks' pay or the higher level of 4 weeks' pay.

The hearing today before me

7. I had before me the: -

- Original bundle of documents
- Statements
- Submissions from both the Claimant and the Respondent

8. If I refer to page numbers it is from the original bundle of documents. I have not heard any additional evidence today.

Relevant facts

9. The Claimant commenced his employment with the Respondents on 25 May 2005. At that time his salary was £65,000 per annum. He was originally employed in the position of Sales Representative to cover the Manchester region.

10. The Respondent design, import and distribute clothing for sale to retailers. The Directors are Paul Bajaj and Shakehar Bajaj. They have a total of 30 employees.

11. At no stage did the Respondents issue him with a written statement of terms and conditions of employment.

12. In 2007 the Respondent opened a showroom in Manchester and because it was located close to the Claimant's home it was agreed the Claimant should use the showroom as a base. He retained his sales responsibilities and targets and took on additional duties as Manager of the showroom.

13. In 2010 his terms of employment were varied by agreement. His salary was reduced to £45,000 per annum and he was to receive commission at 0.75%.

14. Between 2010 and 2012 the Claimant generated sales in excess of £1 million. Sales reached their peak in 2012 at £2.1 million. However, his sales in 2013 declined to £0.754 million and by 2015 sales had declined further to £0.561 million.

15. The Respondents expressed concerns during the period 2014-2015 about his sales performance. An example of this is on 4 December 2014. An e-mail was sent by Paul Bajaj to the Claimant (page 73) saying:

“Totally so far - £22,500 down on last year! And last year you had a shocker!!!...”

16. The above is merely an example and emails in similar vein were sent to other members of staff. The Directors became increasingly exasperated by the Claimant's performance and in another e-mail dated 27 January 2016 (page 111) Mr Bajaj said to the Claimant:

“Down again – you have the worst annual sales figures from all of the sales guys by around 40%. Yet are the highest paid!”

17. It goes on to say:

“This means you earn more than we do, and surely that cannot be right.”

18. Between October and November 2015, the Directors had spoken to all sales staff including the Claimant about the financial performance of the company. No action was taken at the time other than the e-mails.

19. Mr Bajaj wrote to the Claimant on 19 January 2016 (page 107A) saying:

“I think we need to have a meeting soon. Cannot carry on like this.”

20. On 3 February 2016 Paul Bajaj had a meeting with the Claimant at the Manchester showroom. He was told that he would be invited to head office for a meeting. Following this the Directors wrote to the Claimant on 15 February 2016 to invite him to attend a meeting on 26 February 2016 (page 117). The letter says:

“We are very unhappy with the continued decline in your sales performance and your evidential inability to improve your performance. We must forewarn you that one likely outcome of this meeting is a restructuring of your pay package which may result in a reduction of your earnings.”

21. The meeting took place on 26 February 2016. It was attended by both directors of the company and the Claimant. At that meeting the Claimant produced a document (page 119-120). In the document he did not accept that he was at fault for any decline in sales performance. He blamed issues of quality and delivery and said that he had been a truly effective and loyal member of the business.

22. They discussed reducing the Claimant's salary to £25,000 per annum and him receiving commission payments of 5%. I am satisfied that the document at page 116 was produced to him which showed the decline in sales and refers to a new salary of £25k and 5% commission. The document at page 118 are the calculations made by Shakehar Bajaj prior to the meeting with him.

23. At the meeting the Claimant said that he was upset and accused the Directors of holding a disciplinary meeting with him. He was told it was not a disciplinary meeting but was to discuss his performance. They tried to assure him that they had no intention of dismissing him.

24. They explained their calculations and suggested a restructure of his pay which would mean that his basic pay would be reduced to £25K per annum but the Claimant said that he could not live on this money.

25. They listened to his arguments about the reasons why his underperformance was not down to him and the Directors responded by making suggestions as to how he could increase his sales. At the end of the meeting they hoped he would go away, take steps to improve his performance and consider the pay restructuring and talk to them about it. The content of the discussions was not confirmed in writing by either party.

26. The Claimant had accepted in his evidence at the original tribunal hearing that the Respondents were expecting him to go back to the directors with any alternative suggestions of his own. They did not hear anything from him for two weeks and on 8 March 2016 Paul Bajaj wrote to Chris Frost to instruct him to write a letter to the Claimant which was mistakenly copied to Mr Mostyn (page 122-123). It said;

"You need to write up a letter tomorrow and send it to Steve to check.
Mike is costing us on a daily basis.
Get it done tomorrow before 2 PM."

27. On 9 March 2016 the Claimant wrote to Shaker Bajaj (page 126-127). He said that he had been asked to consider an offer of reducing his salary from its current base level of £45K to £25K. He referred to the meeting on 26 February 2016 as being a disciplinary hearing, although he acknowledged that throughout the meeting they had said it was not a disciplinary meeting. He complained about the manner in which the meeting had been conducted and about his reduction in salary. He made clear that he would not agree to any unilateral change in his salary. He referred to the e-mail of 8 March 2016 mentioned above and said:

"This only seeks to prove that all trust and confidence between us has broken down."

28. He concluded saying:

"I consider your actions of last week to be so severe and underhand as to

allow me to consider my contract as having been breached. I ask that before I take legal advice on these issues you respond to my points above, within 5 days' receipt of this letter, to confirm to me the current position, the outcome of the above hearing and assurances there will be no unilateral variation of my wages."

29. On 14 March 2016 the Directors responded saying that the meeting on 26 February was a capability meeting, not a disciplinary meeting. They invited him to attend a grievance meeting on 18 March 2016 as they were treating his letter as a grievance (page 130).

30. On 15 March 2016 Mr Mostyn responded (page 131). He said that his letter was not a grievance. He said that if they considered that it should be dealt with as a grievance than they should use a letter as the basis for that grievance. He declined to attend the meeting that had been arranged for 18 March 2016. As them to let him "know the outcome of the grievance hearing as soon as possible".

31. On 18 March 2016 the Directors wrote again urging him to attend the meeting. The Claimant did not attend that meeting and on 24 March 2016 Chris Frost, the Manager, wrote to the Claimant saying that his grievance had been rejected. He said they were extremely disappointed that having raised matters he had not bothered to attend to answer questions about the matters he had raised. He went on to say that;
"To then chase a response a matter of days later rather beggars belief."
He said that the changes to the Claimant's contract would therefore be actioned as previously advised. He was told he had a right of appeal against the decision (page 133).

32. On 31 March 2019 the Claimant wrote his letter of resignation (page 141-144). He resigned on that day without notice. He said that the reasons for his resignation were those set out in his letter of 9 March 2016 and that he felt his position had become untenable. He accused the company of unilaterally reducing his salary from £45,000 per annum to £25,000 without consultation. He said that the issues though dated back to 2 October 2015 when he was told with others that the business needed to make cuts in order to save money.

33. He referred to his letter of complaint on 9 March 2016 and said that he had not received any proper response to that letter. Instead he had been invited to attend a grievance hearing which he had not asked for and then received a curt response on 24 March saying that his grievances had been rejected.

34. He said that he had set out in his original letter of 9 March that he considered the Respondent's actions to be so severe and underhand that he could consider his contract as being breached and that the Respondent's behaviour since 15 February 2016 had been intolerable and that he was resigning immediately without notice.

35. On 1 April 2016 his notice of resignation was accepted (page 145). He was paid up to that date and given his holiday pay also to that date.

The law

36. The claim of unfair dismissal is made under section 94 of the Employment Rights Act 1996 (ERA).

37. Section 95 Employment Rights Act deals with the issue of dismissal.

38. Section 98 Employment Rights Act provides: -

“(1) In determining for the purpose 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 principle reason) for the dismissal and;

(b) that it is either a reason falling within subsection (ii) 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 section 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.

(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 reasons 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.”

39. In his submissions to me Mr Price referred me to the section in **Harveys** on breach of contract. He said that the Claimant’s case before me is a straightforward proposition. That he was unfairly constructively dismissed as a result of the unilateral actions of his employer’s when they reduced his remuneration by some 50% in net terms. It is the Claimant’s case that that destroyed the trust and confidence that existed and was the reason that he resigned.

40. He referred me to the cases of: -

- **Industrial Rubber Products v Gillan** [1977] IRLR 389 and;
- The EAT decision in this case

41. He says that the Claimant was unfairly constructively dismissed as a result of the unilateral action of his employers when they substantially reduced his remuneration. He says this destroyed trust and confidence.

42. With respect though, he does not address the crucial question of whether the Respondents have been able to establish there was a potentially fair reason for the dismissal and if they did, was it fair in accordance with section 98(4) Employment Rights Act. What he says is that in any circumstances such a large reduction in pay must be unfair.

43. Mr Smith for the Respondents referred me to the cases of: -

- **Savoia v Chiltern Herb Farms Limited** [1981] IRLR 65
- **Berriman v Delabole Slate Limited** [1985] IRLR 305

44. Those cases inform me that I should not artificially attribute a reason for the dismissal but merely consider whether, even although the Respondent has acted in fundamental breach of the contract, it nonetheless had in all the circumstances acted fairly. It does not automatically follow that a constructive dismissal would be an unfair dismissal. He goes on to say, as the EAT in the present case was itself keen to stress, the test for the latter is different to the reasonable and proper cause component of the **Malik v BCCI SA (in liquidation)** 1998 AC 20 definition of the implied term of mutual trust and confidence, which is no longer in issue in this case.

45. He says that the reason for the Claimant's constructive dismissal is clear i.e. that it related to the Claimant's capability which was a potentially fair reason under section 98(2)(a) Employment Rights Act.

46. He says that the threatened imposition of the base salary reduction was a direct result of the Claimant's sales performance having nose-dived in the years 2013-2015.

47. He says that if I decide that the Respondents have established that capability was the reason I then have to go on to satisfy myself about the fairness of the dismissal and whether they acted reasonably in treating the Claimant's capability as sufficient reason to send the e-mail Mr Frost sent on 24 March 2016 about the imposition.

My conclusions

48. I accept that I am bound by the decision of the Employment Appeal Tribunal who found that the imposition of the reduction in salary did amount to a fundamental breach of the contract of employment and entitled the Claimant to resign. He was therefore dismissed.

49. I am also bound by the original tribunal finding that where there was a dispute of fact it should be resolved in the Respondent's favour for the reasons expressed in paragraph 48 of the original judgement. I am satisfied that the Respondents have established that the reason for the dismissal was capability. As Mr Smith says the genesis for the Claimant's resignation was the meeting with him on 26 February 2016. This was a capability meeting as found by the original Employment Tribunal. After this meeting and as a direct result of it he was told about the reduction in his salary in the letter of 24 March 2016, i.e. that this was going to be imposed on him. The cause of the imposition of this reduction was a direct result of the Claimant's sales performance.

50. I am satisfied that the cause of the Claimant's resignation and the reason for his constructive dismissal was one of capability.

51. I then must go on to consider the fairness of the decision to dismiss and in doing so I took the following matters into account: -

51.1 The Claimant who was 66 years old at the time of his dismissal was

an experienced salesman. His job was to generate sales for the Respondent and he understood this. Uncertainty and risk are inherent to this role and how they are remunerated. A salesman's salary is dependent upon him achieving sales and if he does not achieve sales that can be justified by his salary he cannot expect that salary to continue at the same level.

51.2 The measure for his performance was his sales and these had been in steep decline since 2013. This was over a period of three years.

51.3 He had been repeatedly spoken to and warned about the issue of his performance over this period of three years and his performance had continued to decline steeply.

51.4 He had been invited to a capability meeting on 26 February 2016 when they had discussed with him the issue of his performance and proposed a change in his salary with a reduction in his basic pay from £45,000 per annum to £25,000 per annum plus commission at 5% on sales exceeding £550,000. It was not a final proposal and the Respondent's expected the Claimant to return with a response to their proposal. He was invited to consider his position and come back to them.

51.5 He did nothing and as a result was the e-mail on 9 March 2016 which he received mistakenly.

51.6 This resulted in his letter of 9 March 2016 and the matters raised did not say specifically they were a grievance but they clearly were.

51.7 He was invited to a meeting on 18 March 2016. I am satisfied that the purpose of this meeting was to engage with him about his concerns and hopefully resolve the issue of his salary and commission. His behaviour in not attending the meeting when he should have carried out the instruction of his employer to attend showed that he was not prepared to discuss the Respondents proposal. I agree with Mr Frost's view that his behaviour in not attending the meeting "beggar's belief".

51.8 As he was not prepared to discuss their proposal they were left with no alternative but to implement it; hence the letter of 24 March 2016. In that letter Mr Frost gave him a right of appeal against the decision to implement the changes to his remuneration package.

51.9 He resigned in response to that.

51.10 I am satisfied that there had been a decline in his performance over a period of three years, when he had not performed and failed to deliver the sales expected of him and he had been given an opportunity to improve. That the respondents had carried out consultation with him not only about his performance but about their proposals to reduce his salary. The claimant though was not prepared to entertain any discussions about such steps.

52. I am satisfied in these circumstances that his dismissal was fair in all the circumstances of the case and fell within the band of reasonable responses taking into account the size and administrative resources of the employer's undertaking.

53. I am satisfied that whilst his decision to resign in response to the letter of 24 March 2016 that this amounted to a dismissal. It was nevertheless a fair dismissal and his claim for unfair dismissal fails and is dismissed.

Wrongful dismissal

54. In a claim of wrongful dismissal, it is not for me to consider whether it was fair or reasonable. I am bound by the decision of the Employment Appeal Tribunal in holding that the Respondents had committed a fundamental breach of the Claimant's contract of employment in respect of which he was entitled to resign and he is therefore entitled to his notice pay. The Claimant was entitled to ten weeks' notice. His net weekly pay was £643.02 per week and so the amount of notice pay he is due is £6,430.20. He did not work during the notice period and there are no deductions to make from that amount.

Failure to provide a statement of terms and conditions of employment

55. As the claimant succeeds with his claim of wrongful dismissal I go on to consider the provisions of Section 38 of the Employment Act 2002. That provides: -

“(1) This section applies to proceedings before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions listed in schedule 5.

(2) If in the case of proceedings in which this section applies: -

(a) the Employment Tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and;

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(i) or 4(i) of the Employment Rights Act 1996 (duty to give written statement of initial particulars or particulars of change) ...

The Tribunal must, subject to sub-section (5) make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies: -

(a) the Employment Tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and;

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(i) or 4(i) of the Employment Rights Act 1996.

(c) the Tribunal must subject to subsection (5) increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

- (4) In subsections (2) and (3): -
- (a) references to the minimum amount are the amount equal to two weeks' pay, and;
 - (b) references to the higher amount are to an amount equal to four weeks' pay.
- (6) The amount of a week's pay of an employee shall: -
- (a) be calculated for the purpose of this section in accordance with chapter 2 of part 14 of the Employment Rights Act 1996 and;
 - (b) not exceed the amount for the time being specified in section 227 of that act (maximum amount of a week's pay)."

56. One of the jurisdictions in schedule 5 is the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 which is the breach of employment contract and termination provision.

57. I am satisfied in this case that the Claimant having been successful with the claim for wrongful dismissal is entitled to at least the minimum of two weeks' pay. I am also satisfied that it is just and equitable in this case that he should receive the higher award i.e. four weeks' pay. The reasons are: -

- The Claimant had been employed for ten years
- He was engaged in a senior position
- Although these are small employers there really is no excuse for not providing him with a contract of employment

58. The relevant weekly pay in this case is £475.00 and four weeks' pay amounts to the sum of £1900 and I award this sum to the Claimant.

Employment Judge Hutchinson

Date 7 August 2019

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE