EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Taylor-Haw	**v**	**Chargemaster Limited**

Heard at: Watford **On**: 28 & 29 August 2019

Before: Employment Judge Jack

Appearances

For the Claimant: Ms A Carse, Counsel
For the Respondent: Mr J Bryan, Counsel

JUDGMENT

1. The claimant was unfairly dismissed.

2. The remedies hearing and any application for legal costs is adjourned until 29 October 2019 at a time to be fixed.

REASONS

1. This is a claim for unfair dismissal. Ms Alice Carse of Counsel appeared for the claimant. She called Mr Taylor-Haw, the claimant, as her only witness. Mr Joseph Bryan of Counsel appeared for the respondent. He called David Martell, the dismissing officer, as his only witness. There was an agreed bundle of documents and there was a supplementary bundle of unredacted documents. The significance of that I shall come to.

2. The following case was cited: Williamson v Chief Constable of Greater Manchester Police, UKEAT/0346/09/DN. In addition in his written submissions Mr Bryan referred to Plymouth City Council v White UK EAT/0333/13/LA but only an extract was cited. I, in the course of the hearing, drew the parties' attention to the case in the Employment Appeal Tribunal of Pillinger v Manchester Area Health Authority [1979] IRLR 430.

Procedure

3. Three procedural matters arose in the course of the case, two in opening and one concerning disclosure in the course of the second day. The first matter was the admissibility and relevance of a secret recording made by the claimant of a discussion he had with James Jean-Louis, the respondent's group commercial director, on the last day of the claimant's employment. I adjourned consideration of that until later in the trial. In the event Ms Carse was content to rely on what the claimant said in his witness statement. The discussions with Mr Jean-Louis appear in any event to have been of little relevance to the issues as they developed.

4. Second, an issue arose as to whether unredacted copies of certain documents should be provided. Ms Carse first argued that documents 101 to 119 in the supplemental bundle should be disclosed in unredacted form. Both parties agreed that I should read the documents in unredacted form in order to determine admissibility on the basis of course that, if I determined that they were not admissible, then I would ignore them in reaching my decision.

5. Mr Bryan argued that the documents in 101 to 119 contained a confidential matter and material covered by legal professional privilege and therefore should not be disclosed. Having read them, I held there was no evidence that legal professional privilege applied. No lawyer had given any evidence to that effect. Although the documents were copied to in-house lawyers, there was no evidence that this was in order to obtain legal advice. On the contrary, the discussions were of a commercial, rather than of a legal, nature. As to confidence, it is true that when the documents were prepared, the information was commercially sensitive but such commercial sensitivity had long since ceased to be significant when the matter came to trial. Carrying out the balancing exercise mandated by Plymouth City Council v White, I considered the documents were relevant and there was no need for any redactions. I accordingly ordered that copies should be provided to Ms Carse.

6. Ms Carse then sought to apply for unredacted copies of further documents. The first of these were diary printouts where the entries for the claimant had been reproduced but all other entries had been redacted. On looking at this initially, it seemed that the other entries were also entries pertaining to Mr Taylor-Haw. That was not clear on the face of the redacted documents but once it was clarified it was apparent that the redacted entries were in relation to other people and were irrelevant to any issues. Accordingly, I did not order that unredacted copies be provided.

7. Ms Carse then sought other documents in unredacted form. By this time, most of the morning had elapsed and there was a danger that the case would overrun if a similar degree of investigation of these other documents was required. I offered to defer consideration of the other documents until later in the case when it would be apparent whether these other documents were going to be material. After taking instructions, however,

she insisted that I determine the matter there and then. I accordingly did so. I determined that it was too late to raise the matter. The claimant had had the respondent's disclosure as long ago as March 2019. The claimant's solicitors first applied to the tribunal for an order in respect of the redacted documents by letter of 29 July 2019. An Employment Judge considered the application on 21 August 2019 and directed "no further orders are made at this late stage, matters can be discussed at the outset of the hearing on 28/8", and this is what occurred.

8. I had made determinations in respect of two classes of documents, presumably those which Ms Carse considered of her greatest importance. The same degree of argument was likely to be necessary for the remaining documents. As I have said, there was a serious risk of the case over running. Applying the overriding objective, in particular rule 2(b), (d) and (e), it was, in my judgment, proper to refuse the application. The delay in making the application from March until the end of July was unexplained, save that there had been some correspondence between solicitors. The claimant's solicitors must have been well aware of the difficulties any delay in applying to the Employment Tribunal would have on the tribunal's ability to determine the question of disclosure. Since Ms Carse refused my half way house of deferring consideration on balance of the documents, in my judgment the only proper way forward was to refuse the balance of the application and that it was I did.

9. Third, in the course of the cross-examination of the claimant, Mr Bryan put to him the passage in Mr Martell's witness statement at paragraph 41, which says:

> "The claimant was contacting potential customers, but that is all they were, there were plenty of maybe's but the majority never actually became customers. The claimant did bring in the following two leasing customers, Hitachi Capital and ALD Automotive, which between them generated revenues of £32,490 over the six month period, 1 March 2017 to 31 August 2017. These revenue figures were very considerably below the target set".

10. I had assumed that there were financial documents evidencing these rather precise figures and that they were in the bundle. However, it transpires that no financial figures had been disclosed and no financial documentation. I asked Mr Bryan how it came that no disclosure had been made of the financial documents. I asked Mr Bryan who had carried out the search for documents and was told in-house lawyers of BP had warned staff not to destroy documents. He did not say which in-house lawyers had carried out the searches; he did not identify which person had ultimate responsibility for these grievous failures to disclose documents. Prima facie the responsibility for ensuring proper disclosure would have lain with Pincent Masons. Had it been critical to my decision, I would have had to consider what inferences it was proper to draw. Ms Carse, however, did not cross-examine Mr Martell on this and I therefore think it would be wrong draw inferences against Mr Martell. The point may, however, be relevant to costs and on the remedy hearing.

The issues

11. The issues were the subject of agreement at the start of the case, although Mr Bryan correctly reminded me that in fact, one matter is mis-dated. The agreed list is as follows:

> 1 The claimant complains of ordinary unfair dismissal under section 98, Employment Rights Act 1996 (ERA). The issues which the ET will be required to determine at the final hearing are the following:
>
> *Unfair dismissal*
>
> 2 Had the requirements of the business for the purposes of which the claimant was employed by the respondent a) for employees to carry out work of a particular kind or b) for employees to carry out work of a particular kind in the place where the claimant was employed by the respondent, ceased or diminished or were they expected to cease or diminish?
>
> 3 If so, was the dismissal of the claimant wholly or mainly attributable to that fact. If so, the reason (or if more than one, the principle reason) of the dismissal that the claimant was redundant for the purpose of section 98(1)(a) ERA?
>
> 4 If so, did the respondent act reasonably in the circumstances in treating that reason as a sufficient reason for dismissing the claimant under section 98(4) ERA, in particular:
>
> (i) Should the respondent have considered placing the claimant in a selection pool with employees who carried out a similar or equivalent role, if such a role or roles existed and if necessary undertaking a scoring exercise or was the claimant's role unique?
>
> (ii) Did the respondent give sufficient consideration to suitable alternative employment for the claimant (if such suitable alternative employment was available on the evidence), as an alternative to dismissal prior to the notice period?
>
> (iii) Should the respondent have offered the claimant a suitable and alternative role (if such a suitable role was available on the evidence), during his notice period in light of the redundancy letter which stated "…should any suitable alternative positions become available during the notice period, we shall inform you of them"?

(iv) Should the respondent have offered the claimant an alternative role within BP, given BP's expansion of electrical charging operations? (If such an alternative role in electrical charging operations was available on the evidence)"

(v) Did the respondent genuinely, meaningfully consult with the claimant on the way of averting the claimant's redundancy?

(vi) Did the respondent give reasonable consideration to the claimant's suggestion that he should perform a three day a week role?

There are then various issues regarding remedy which I do not need to read out.

11.2 An additional matter was raised by Mr Bryan. He pointed out that in redundancy situations (as in other dismissal situations) the question whether dismissal was fair, includes the question whether dismissal falls within the band of responses of a reasonable employer.

11.3 In addition, both Counsel asked me to determine the issue of fact as to whether during the redundancy meetings, Mr Martell promised the claimant that he would not lose his share options. Both Counsel were also in agreement that I should make no determination of any contractual issues apart from that. In particular the claimant's rights under the share option agreements are being litigated in the high court, apart from the discreet factual issue which I have identified, I should make no determination of the true construction of the share option agreements. I have jurisdiction to determine the factual question raised because the ET1 in paragraph 11(f) says:

> "It is the claimant's case that the respondent sought to prevent him from exercising his valuable options by engineering a purported redundancy situation."

11.4 Although that averment achieved less prominence in the case before me, it was never formally abandoned.

The Law

12. The issues as set out above encompass the relevant statutory in case law which applies to the current case. However, I should read the relevant parts from section 139 of the Employment Rights Act 1996. This provides:

> "(1) For the purposes of this act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

(a) the fact that his employer has ceased or intends to cease:

(i) to carry on the business for the purposes of which the employee was employed by him; or

(ii) to carry on that business in the place where the employee was no employed; or

(b) the fact the requirements to the business:

(i) for employees to carry out work of a particular kind; or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or expected to cease or diminish.

(2) For the purpose of sub-section (1), the business of the employer, together with the business or businesses of his associated employers, shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that sub-section would be satisfied without so treating them)."

12.1 Of particular relevance in the current case is section 139 (1)(b)(i) and the question whether demand for work of a particular kind diminished. In the case of Pillinger, the facts were that the applicant was employed at a laboratory in Manchester as a research scientist. His salary came from funds provided by the Medical Research Council and the Cancer Research Campaign. These bodies and the committee which controlled how money was spent, made directions specifying the staffing needs of particular research posts. Until shortly before his dismissal, the appellant was a grade II officer but in April 1977 he was promoted to the rank of grade IIS officer. His dismissal arose after the joint committee amended its staffing requirements for the research project on which the appellant was engaged and ruled that a grade II officer only was justified. The Industrial Tribunal held that in the circumstances, the appellant had been dismissed for reasons of redundancy or alternatively that he had been dismissed for some other substantial reason within the meaning of paragraph of 6 (1)(b) of schedule 1 to the Trade Union & Labour Relations Act 1974.

12.2 Reading from the head note, the Employment Appeal Tribunal (Mr Justice Slynn, the President, Mr Hughes OBE and Mrs Sutherland), held the Industrial Tribunal had erred in holding that the appellant grade IIS officer had been dismissed on grounds of redundancy after the funding authorities had determined that a lower ranking grade II officer only was required on the research project with which the appellant was involved.

"A redundancy dismissal may arise in a situation of this kind where the work the more junior officer does is different from that done by

> the more senior person. It may then be possible to say that the requirement for the type of work done by the more senior person had ceased or diminished. In the present case, however, there was no suggestion that the type of work that the more junior scientists would do would be any different from that done by the appellant. Thus, it was not possible to say that there had been a diminution or cessation of the kind of work that the appellant was employed to do and that his dismissal was for redundancy within the statutory definition."

12.3 A key issue of fact is therefore whether work of a particular kind diminished at the respondents.

The Chronology

13. The claimant was born on 1 June 1957. On 9 May 2003 he was formally appointed as managing director of Electromotive Limited. This was a start-up company which he had formed. It specialised in the provision of chargers for electric vehicles. In mid-2005, Electromotive installed the first charging station in Covent Garden as a result of an agreement with Westminster City Council. The business expanded and in 2009 Electromotive established a new company called Charge Your Car Limited (CYC). This was initially a joint venture with Gateshead College in Newcastle and it ran a network of charging stations in Gateshead and the vicinity. In 2014, Electromotive bought out Gateshead College's share of the joint venture and became a 100% shareholder of CYC.

14. In the latter part of 2016, negotiations began between Electromotive and Mr Martell who was the Chief Executive Officer and the founder of a competitor company, Chargemaster plc. (After being taken over by BP, Chargemaster became a limited company, so it is as Chargemaster Ltd that it appears as respondent in the current case.) Agreement on terms was reached. One of the terms was that Chargemaster would continue to employ Mr Taylor-Haw and that he would be given share options: 166,660 shares in an enterprise management initiative scheme and 33,333 shares in an unapproved option scheme. The sale of Electromotive to Chargemaster completed on 25 January 2017. The proposed employment contract for Mr Taylor-Haw and the signing of the share option agreements did not complete on that date but that was subsequently remedied.

15. The original plan was that the claimant was to be the continuing managing director of Electromotive. Soon after completion however, that changed. It was decided that, although the claimant initially would keep his status of managing director of Electromotive, in fact the two sales staff which Electromotive employed, Mr Kevin Howell, who was the salesman for Electromotive, and Mr Gary Parker, who was the salesman for CYC, would move over to Chargemaster and would then cease to report to Mr Taylor-Haw. I do not need to give a detailed account of the meetings between the claimant and Mr Martell in this early period, but it became apparent that, if the Electromotive company were not going to keep going as a separate

business entity, then the claimant would need to be moved to another position. On 16 February 2017, there was a meeting between Mr Taylor-Haw and Mr Martell where Mr Martell suggested that the claimant should concentrate on developing business to leasing companies. Subsequently, that was extended so as to include sales to wholesaling departments.

16. I should at this point say a little about how the business of selling chargers had developed. In the period about which we are talking, there were three sorts of charger. The cheapest was a 7kW charger which was suitable for overnight charging of electric cars at domestic premises or small businesses. These chargers needed somewhere between 23 and 30 amps of electricity so they could not be put on an ordinary 13-amp circuit at a house. Instead, an electrician needed to install a separate circuit to operate the charger.

17. The second sort of charger was a 50kW charger. These charged a car within 20-30 minutes. They, however, are very significantly more expensive. They are direct current (rather than alternating current, as the 7kW versions are) and moreover require a separate electricity substation to operate, because of the amount of electricity used is so great.

18. The third type of charger, which was only just coming in at this period, was a 150kW charger. This type of charger is able to charge as quickly as filling a car with petrol. The outlets for sales of all these chargers are all different. Historically, local authorities would be major purchasers of the 50kW chargers but home sales and sales to property developers are important customers for the 7kW versions. The idea was that Mr Taylor-Haw would build up sales to car leasing companies who would provide end-users with the option to buy the electronic chargers as part of the leasing arrangements for the electronic vehicles. He would also build up sales to electrical wholesalers. These were the wholesalers who sell electrical goods to ordinary domestic electricians and obviously the idea was that the domestic electricians, when asked to install a charger for their domestic customers, would go to the wholesaler and buy those from Chargemaster.

19. Further, Mr Taylor-Haw was to be moved to be employed by Chargemaster, rather than by Electromotive as he had been up until then. There was a further change resulting from there being a degree of friction between Mr Taylor-Haw and the director of business development, Mr Mark Bonnor-Moris. In order to avoid that friction, Mr Martell decided that Mr Taylor-Haw should report directly to him rather than to Mr Bonnor-Moris. The contractual change was formalised in an Employment Contract of 1 April 2017 albeit it was backdated to January. Nothing turns on that.

20. On 22 May 2017 the claimant e-mailed Mr Martell. (The e-mails are at bundle 2/571.) In this, Mr Taylor-Haw said that he had been able to sell 40 to 50 home charge sales to Hitachi. By July of 2017, Mr Martell had become unhappy with Mr Taylor-Haw's performance. This was not that he had in any way misbehaved or was not working hard, it was simply that,

according to Mr Martell, Mr Taylor-Haw was not producing the results which he had expected. I have already commented on the position as regards disclosure in relation to the financial materials.

21. At any rate, on 30 August 2017, there was a first redundancy meeting. This was attended solely by Mr Martell and Mr Taylor-Haw. No other person was there either as a friend for Mr Taylor-Haw or as a witness taking minutes of the meeting. There was a second redundancy meeting on 11 September 2017 with again the same two men alone together. On 15 September there was an exchange of e-mails arising from that meeting and then on 20 September there was a third redundancy meeting.

22. In respect of each meeting, notes were subsequently prepared by Mr Martell but the handwritten notes of the first two meetings have been destroyed. There is only a computer-generated document from 2018 which purports to be the notes of the meeting. I will come back to what I need to determine in relation to the alleged breaches of procedure in respect of these meetings. On 4 October 2017, Mr Martell wrote a letter making Mr Taylor-Haw redundant. He was given one year's notice, pursuant to the terms of his employment contract, and was required to work out the one year for that. On 9 October 2017, Mr Taylor-Haw wrote to Mr Martell to raise some issues about how he might be paid in a tax efficient manner and saying that he did not intend to appeal against the decision that he had been made redundant. The letter says nothing about share options.

23. On 28 November 2017, there was an advertisement placed on the respondent's internal webpage, where they were seeking a "business development manager" at a wage of £32,000 per annum. That job, I should say, included potentially commission and a car on top. In January 2018, BP approached Mr Martell with a view to buying the Chargemaster company. That took some time to complete and it was only in July of 2018 that BP completed the purchase. In the meantime, there had been due diligence carried out by BP and on 3 May 2018 there is an internal e-mail from within BP which says

> "Folks, thanks for the script for the meeting this morning with Mr Martell very helpful and hopefully a productive meeting that moves us forward. Happy to do a call to bring everyone up to speed and agree on next steps. In essence …
>
> - Calvey [Taylor-Haw]: Harmonious redundancy. DM[artell] offered to procure a letter stating that CTH accepts the redundancy and confirming no issue
> - Challenge with this though is if we feel we do not have an obligation to pay out CTH's options – DM is willing to support our tactics on this issue."

24. On 18 September 2018, BP Legal (the in-house legal department of BP) wrote to Mr Taylor-Haw's solicitors saying that he had been made redundant from Electromotive and that he was not entitled to share options. On 4 October 2018, the one-year notice period expired and on 20 December 2018 the claimant issued his ET1 claiming unfair dismissal.

Determination of facts

25. The key factual question is whether the claimant's post was unique or whether he was in truth a mere member of the sales force, albeit one with a very high rate of pay. The evidence is that "Director of Partnerships", which was Mr Taylor-Haw's formal title, was a meaningless phrase. No one reported to him. Mr Martell's evidence shortly after 2:25pm on 28 August was that Chargemaster had 12 business development managers (the respondent's term for a salesman or woman) on the same level as the claimant, save that he was paid much more. They were on £45,000 a year plus benefits. Later he said business development manager is a sales force term. He explained that salesmen turnover £30,000 - £35,0000 per annum plus commission of typically £700 - £800 per month as well as a car. The top range he said was £45,000 per annum. Mr Bonnor-Moris and Mr Jean-Louis were on £60,000 plus a car. He accepted that in the salesforce you get turnover at all levels but that Mr Bonnor-Moris and Mr Jean-Louis had been there for five to seven years. As I have already said, there was a sales post advertised in November 2017.

26. I accept Mr Martell's evidence in relation to this. Mr Bryan argued, contrary to the evidence which he had called, that the work allocated to the claimant, namely building the leasing and wholesale business, meant that the particular kind of work differed from that carried out by other salesmen. I disagree. Individual salesmen were given particular tasks. As I have explained, the business of selling charging for electric vehicles is a complicated one with three sorts of charger. Naturally, the areas of the business were divided up between different salesmen but that is not to say that they were doing different types of work. In my judgment, the work that Mr Taylor-Haw was doing in building up the two areas of car leasing companies and electronic wholesalers was of the same nature of that of the other sales folk and Mr Martell's evidence is in agreement with that.

27. Accordingly, in my judgment there was no redundancy situation. There was no diminution in work for the salesforce as is evidenced by the fact that the respondent was seeking to recruit another business development manager on 28 November 2017. The sole reason for making the claimant redundant was his very high rate of pay.

28. I turn then to the second key factual question: was Mr Martell's decision influenced by consideration of the share options? His evidence was that he considered the share options were worthless because, as at October 2017, there was no offer to buy the respondent. I do not accept that evidence. The claimant's unchallenged evidence was that his options were exercisable at £1.50, whereas the respondent had raised money for shares in 2016 from investors at £3.80. The options were important to the claimant as his pension pot. I find it unlikely that he would not have raised any issues regarding share options at the redundancy meetings. I find as a fact that during the redundancy meetings, the share options were discussed and that Mr Martell assured the claimant that he would still receive his options. But for those assurances, in my judgment, the

claimant would have made much more of a fuss about his dismissal for redundancy. This is particularly so, since, as I have found, there was in truth no redundancy situation.

29. My conclusion is consistent with the note of Mr Martell's attitude to the issue in that internal BP note of 3 May 2018, which I have read. I find that Mr Martell was aware that the claimant might lose his share options if he were dismissed for redundancy, but there is insufficient evidence that this was a major consideration in his decision to dismiss.

Determination of the issues

30. Accordingly, I turn to the application of the facts to the law and the determination of the issues before me.

> 2. Had the requirements of the business for the purposes of which the claimant was employed by the respondent a) for employees to carry out work of a particular kind or b) for employees to carry out work of a particular kind in the place where the claimant was employed by the respondent ceased or diminished or were they expected to cease or diminish?
>
> Applying the facts to the law, the answer is No.
>
> That means I do not need to determine any further of the issues which are before me.

_____
Employment Judge Jack

Date: …05.09.19……

Sent to the parties on: …27.09.19.....

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For the Tribunal Office