



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Barker

Respondent: Gloveman Supplies Ltd

Heard at: Bodmin

On: Thursday 21 November
2019

Before: Employment Judge Matthews

Representation:

Claimant: In Person

Respondent: Mr M Peck – Managing Director

RESERVED JUDGMENT

1. Mrs Barker was unfairly dismissed.
2. The Respondent is ordered to pay to Mrs Barker unfair dismissal compensation totalling £7,532.50, comprising a basic award of £6,298.50 and a compensatory award of £1,234.00.
3. Mrs Barker's claim for a redundancy payment is dismissed.
4. The recoupment regulations do not apply.

REASONS

INTRODUCTION

1. Mrs Lorraine Barker claims that she was unfairly dismissed by the Respondent Company and is due a redundancy payment. The Company says that Mrs Barker was fairly dismissed, the reason for the dismissal was capability and there was no redundancy.

2. I heard from Mrs Barker. On the Company's side I heard from Mr Mike Peck. Each produced a written statement. There was an agreed bundle of documentation. All references in this Judgment are to pages in the bundle unless otherwise specified.
3. The case had been set down for two days. In the event, it was possible to hear the evidence and argument in a morning. Notwithstanding, I reserved Judgment to allow me to better consider the evidence and my conclusions.

FACTS

4. That part of the Company's business with which I am concerned sells personal protective equipment ("PPE"), cleaning, hygiene, consumables and equipment to a broad range of trade customers. I understand that it supplies around 5,000 product lines. The Company recorded that it employed some 40 people at the time of its response in these proceedings. It is, therefore a small to medium size company, which I have taken account of in reaching my conclusions.
5. Mrs Barker had continuous employment dating from 13 February 1995. Mrs Barker was dismissed with effect from 19 February 2019, receiving 3 months' pay in lieu of notice.
6. Mrs Barker's job was as a part time (30 hours a week) Field Sales Representative for Devon and Cornwall. The Company makes most of its sales using telesales and the internet from its offices. Mrs Barker was unique in that she was the only member of the Company's sales force that worked from home and her sales activity had typically involved more face to face contact. Telesales had grown in importance over the years and Mrs Barker conducted these from home. The uniqueness of Mrs Barker's role appears to stem from the Westcountry roots of Nicholsons (SW) Ltd, the business she started work for in 1995. That business had been taken over by the Suffolk and Westcountry based Company in 2012, at which time Mrs Barker's contract of employment had been transferred to the Company.
7. On 6 December 2012, Mr Matt Cox wrote to Mrs Barker (27-28). Mr Cox issued Mrs Barker with an informal warning for not achieving sales targets.
8. There is a record of a "*Performance Meeting*" between Mr Cox and Ms Lorraine Dinneen on the one side and Mrs Barker and a fellow sales representative, Mr Lee Woodbridge, on the other on 2 December 2013 (29-30). Mrs Barker and Mr Woodbridge were

required to come up with plans to address sales underperformance. Mrs Barker's plan is at 31.

9. On 13 August and 4 September 2014 Mr Peck sent Mrs Barker memos (32-33). Mr Peck explained that Mrs Barker had fallen short of sales targets and would be monitored. The upshot was a performance management meeting under the Company's Handbook procedures on 9 or 10 September 2014. I have not seen anything further on the outcome.
10. Mrs Barker's 2014 and 2015 appraisals throw no light on any criticisms of sales performance there might have been (34-42).
11. I have been shown no record of discussions with Mrs Barker about her sales performance during the just over four years period from September 2014 until early October 2018. Mr Peck's evidence is that *"the position was addressed on numerous occasions informally over an extended period of time, with various managers in the business."*
12. In any event, in early October 2018 it was Mrs Barker who contacted Mr Peck because she was concerned at the level of sales she was achieving and her role in the Company in general. They met on 30 October 2018. Ms Sarah Wilson (Mrs Barker's then line manager) was present. There is no written record of the meeting other than Mr Peck's subsequent letter. Mrs Barker comments:

"I approached the meeting with a positive attitude. I put forward my thoughts and suggestions. I was keen to explore other areas of the company I could work in. I felt we had a good meeting but I don't think we came to a conclusion on a way forward."

13. Mrs Barker says that she was, therefore, *"surprised and somewhat upset"* when she received Mr Peck's memo of 9 November 2018 (1-2). That memo can be referred to for its full content. It was headed *"Performance"*. Mr Peck reviewed Mrs Barker's previous year's targets, which he considered *"exceptionally low for an experienced member of the sales team, with 20+ years of experience"*. The figures record that Mrs Barker was falling a long way short of target. Mr Peck commented:

"Your average new customers per month is 4.67, the office average is 6.65 (this is an adjusted figure to reflect the part time hours you have)"

You have reached target 3 times in the last 12 months, the office average is 8.5

Your average sales per months are £1443k, the average office sales are £5,016 (again adjusted) this indicates that the customers that are being brought in are also ordering considerably more & repeating at a better rate than yours.”

14. Mr Peck went on to encourage Mrs Barker to “*widen your horizons with regards to customers*” and mentioned recent systems training Mrs Barker had undertaken and office days that had been suggested to her to see how others operated. Mr Peck concluded:

“If you feel there are any areas you need support on, please do not hesitate to let Sarah or Emily know in the office (In Kay’s absence [Ms Kayleigh Montgomery, Mrs Barker’s new line manager])

We have to see a significant increase in the level of business you are producing on a monthly basis, if this is not forthcoming, we will be forced to review your on-going employment within the company, at the very least we must start to hit target on a monthly basis with immediate effect.”

15. In considering what it was that triggered Mr Peck’s move to a more robust approach to Mrs Barker’s underperformance at this time, I note this in the Company’s Response Form in these proceedings (83):

“Subsequent to the meeting,” [that is the meeting on 31 October 2018] “the performance of Mrs Barker was brought into focus, as a relatively small percentage of the total group sales, this had gone somewhat under the radar for several months & should have been acted on earlier by senior management, rather than verbally with her line manager.”

16. On 20 November 2018 Mrs Barker replied to Mr Peck (3-4). In terms, Mrs Barker expressed surprise that a meeting held at her suggestion to look at how she could improve sales had turned into something else. There followed some detailed comment on selling. Mrs Barker ended by commenting that sales were looking more positive that month.

17. Mr Peck replied on the same day, 20 November 2018 (5-6). Mr Peck commented on sales and made some specific suggestions about target customers, products and talking to other sales staff in the office.

18. During the Hearing before me the parties were unable to agree on whether or not Mrs Barker's sales for November and December 2018 and January and February 2019 showed any improvement or not. It is, however, common ground that they did not achieve target. Indeed, it was Mrs Barker's evidence that her targets were impossible to achieve. Mr Peck took the contrary view, that they were easily achievable.
19. On 9 January 2019 Mr Peck sent Mrs Barker a memo, which can be referred to for its full content (7). In summary, against sales shortfalls in November and December, Mr Peck wrote:

"Please accept this letter as written confirmation, that unless sales improve dramatically in January, we will have no choice but to review your position in the company."

This level of under performance can no longer be acceptable, I would be grateful if you could attend a meeting with Kayleigh & Myself on Thursday 17th Jan at 9.30am, to discuss the problem, please feel free to bring along anybody you feel appropriate to accompany you to the meeting, and please let me know if you feel there is anything else the company can do to assist in helping you reach the given targets."

20. Mrs Barker attended the meeting on 17 January 2018 with Mr Peck and Ms Montgomery. Mrs Barker chose to be unaccompanied. Mrs Barker says that the meeting was short, she was stressed and she felt that it *"was more about going through the motions rather than come to any ongoing plan."*
21. I have not been shown any contemporaneous written record of this meeting but Mr Peck wrote to Mrs Barker on the same day (8). The memo included:

"At our meeting, you acknowledged that your performance had not been where you would liked it to have been, but were hopeful that you were now in a position to turn things around to get back to a more sustainable level." [There followed some suggestions on how this might be done.]

"To be clear, In the short term, we need to see January targets being achieved & a good start to Feb, as well as some new customers being brought on over the period to secure your current position in the company, in the expectation that this is achievable, we will then need to see a sustained period of targets being achieved to secure your

position in the company over the coming months, we will meet again on Feb 19th at 9.30am where hopefully we will be in a position to agree a clear long term plan for you, which will be very clear in its focus & also the implications if the targets cannot be met.”

22. It does not seem to me that Mr Peck’s message was entirely clear but, giving him the benefit of the doubt, it seems that he meant that Mrs Barker’s “*current position*” would not be “*secure*” if she did not meet the January target and make a good start to February before the meeting scheduled for 19 February.
23. The meeting on 19 February duly took place. Mrs Barker says that she explained that her sales had increased achieving 88% of target, a higher figure than other staff. (Mr Peck disputes this.) Again, I have seen no record of the meeting save the memo that Mr Peck sent to Mrs Barker later the same day (9). Mr Peck was to the point:

“Thank you for your time this morning, as outlined at our meeting, performance since my last memo of 17th Jan did not reach the required target in January, and to date in February, sales are well behind the targeted figures.

As a consequence and as laid out in previous memo’s, we have no choice but to terminate your employment with Gloveman Supplies Limited with immediate effect due to poor sales performance in recent months.”....

“We will initiate your three month notice period from todays date (you will not be expected to work this notice period), your final salary will be paid on 28th Feb, with any adjustment for outstanding holiday pay etc.”

24. As Mrs Barker had been invited to do in Mr Peck’s memo of dismissal, Mrs Barker appealed against her dismissal in a letter to Mr Tony Everett (Company Director) (10-12). The letter set out detailed grounds of appeal. The letter can be referred to for its full content. Among the grounds of appeal were that the Company had not observed its performance management procedures in terms of time allowed for improvement and the consideration of an alternative role. Mrs Barker also mentioned that her sales were improving, that she thought her job may have become redundant and various other sales related issues.
25. There was no appeal hearing. Rather, Mr Everett dismissed Mrs Barker’s appeal in a detailed letter of 28 February (13-15). The

letter can be referred to for its full content. These passages throw some more light on the subjects of historical sales performance and alternative roles:

“1. Your failure to hit targets has not just been over the period outlined in the documents that Mike Peck has sent you since November 2018, I have looked back as far as April 2016 & in that 34 month period, you have hit a target of circa £2,500 on only 8 occasions, once in 2016-2017, 5 times in 2017-2018 & twice in the current YTD. In that period you have sales of £56,430 against a target of circa £85,000, 66%. The figure you are targeted to achieve, is the lowest in the company, even allowing for the pro-rata days you are employed for.”....

“I cannot see any reference to you suggesting a role in Customer Services in your e mail of 20th November, which is the only correspondence I have seen from you to Mike. As an External Rep for the company, the role of Customer Services is one that is very different & requires a different skill set, I believe Mike does not see you being suited to this role & as such it is not something that could be considered.”

26. Subsequently, Mr Everett offered Mrs Barker a meeting if she wanted one but no meeting took place (see 16).
27. The Company has procedures in its handbook entitled “Resolving Problems” (43-48). These appear to be incorporated into Mrs Barker’s contract of employment (see 54 and 55). However, the full procedures may include wording expressing this not to be the case. The disciplinary procedures apply to job performance and include this on the subject of disciplinary appeals (46):

“You have the right to appeal against any disciplinary decision taken against you. Your appeal should be in writing and sent to the specified person within five working days of the decision and state the reasons for your appeal. You will receive a reply within a further five working days setting a date for an appeal hearing.”

28. The handbook also contains a section entitled “Dealing with Poor Performance” (36-37). I note this passage:

“If sufficient improvements have not been made, consideration should be given to whether you should be transferred to another role better suited to your skills set, or, as a last resort, dismissed.”

29. Happily, with effect from 18 September 2019, Mrs Barker has found other employment at a rate of pay in excess of that she was earning with the Company. Mrs Barker had some earnings from temporary employment prior to that.

APPLICABLE LAW

30. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his employer. Section 98 of the ERA sets out provisions for determining the fairness or otherwise of a dismissal. So far as it is relevant it provides:

“98 General

(1) In determining for the purposes 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 principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) 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 subsection 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.”....

“(3) In subsection (2)(a)-

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,”....

“(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 reason 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.”

31. The established test for a fair capability dismissal is well established. What the tribunal has to decide is whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss. It is for the employer to set the standards asked of employees and tribunals cannot substitute their own view of an employee's competence. Procedural issues include a proper appraisal of the employee's performance, an identification of the problem, a suitable warning and a reasonable chance to improve. The range of reasonable responses test also applies when assessing whether or not the employer adopted a fair procedure. There may be some onus on the employer to consider alternative employment, although it is well established that this is a low threshold to cross in the context of capability dismissals and an employer does not have to create a job for the affected employee in such circumstances.

32. The Acas Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code"), which came into effect on 11 March 2015 is relevant. It embraces poor performance. It will be taken into account when determining the reasonableness of a dismissal. If the dismissal is found to be unfair, the tribunal can increase an award of compensation by up to 25% for an unreasonable failure to follow the ACAS Code if it considers it just and equitable to do so. The ACAS Code does provide that an employer may choose to follow its own capability procedure. However, in doing so, the employer is expected to follow the basic principles of fairness set out in the ACAS Code.

33. Paragraph 26 of the ACAS Code provides:

“26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.”

34. Section 139 of the ERA, so far as it is relevant, provides as follows:

“139 Redundancy

(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 so employed, or

(b) the fact that the requirements of that 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 are expected to cease or diminish.”

CONCLUSIONS

35. It is for the Company to show a permissible reason for the dismissal and it puts forward “capability” under section 98 of the ERA. In short, the Company points to Mrs Barker’s inability to meet sales targets. That is a skills’ and aptitude related reason going to capability.

36. Mrs Barker suggests that the real reason for her dismissal was redundancy. In essence, as I understand Mrs Barker, she is saying that the Company’s requirement for sales representatives working remotely from the Company’s offices had ceased or diminished. There is some commentary on this in Mr Everett’s appeal outcome letter when discussing alternative employment (see paragraph 25 above). Overall, however, the evidence does not lead to that conclusion. If Mrs Barker had achieved her targets she would not have been dismissed. The reason for dismissal was not, therefore, anything to do with the Company’s need for externally based sales representatives. That Mrs Barker was such a representative was co-incidental rather than causal of the dismissal.

37. The Company has shown that the reason for dismissal was the reason it has given and that is a capability reason.
38. I must next consider whether there was material in front of the employer that satisfied it of the employee's inadequacy and on which it was reasonable to dismiss.
39. There is no question that Mr Peck had material from which he could conclude that Mrs Barker was not achieving her sales targets. The issues in this case arise from the question whether or not it was reasonable to dismiss Mrs Barker on that basis.
40. There are a number of factors here, which can best be considered in the context of the procedure a reasonable employer would have adopted in deciding to dismiss Mrs Barker in the circumstances.
41. The first of these is a proper appraisal of Mrs Barker's performance. It seems that Mr Peck did conduct a proper appraisal in the sense that the raw data showed that Mrs Barker was not achieving her sales targets.
42. Second is an identification of the problem. Here, the evidence is less compelling. However, it points to Mr Peck having thought about why Mrs Barker was underachieving and making some suggestions to address the problem. Applying the "range of reasonable responses" test, the Company did enough.
43. Third is the requirement that a suitable warning be given. Again, applying the "range of reasonable responses" test, it is tolerably clear that Mrs Barker knew her performance was under review and that Mr Peck issued her with a warning on 17 January that dismissal would result if January and the start of February did not see Mrs Barker's sales reach target.
44. Fourth, is a reasonable chance to improve. There are a number of issues here. Mrs Barker was a long serving employee who, it appears, had only been taken to task for not achieving her targets on a sporadic and piecemeal basis. It would have been reasonable for Mrs Barker to conclude that her underachievement as far as sales was concerned was of no great consequence. Mrs Barker, herself concerned at her sales performance, asked for a meeting in October 2018. That, as the Company's response in these proceedings explains, brought Mrs Barker's performance into focus (see paragraph 15 above). The result was that Mr Peck now made it his urgent business to sort Mrs Barker's sales out. Less than fourteen weeks elapsed between Mr Peck's first

indication to Mrs Barker (on 9 November 2018) that her performance might impact her continued employment with the Company and Mrs Barker's dismissal. In the context of Mrs Barker's long service and the relaxed approach the Company had taken to her sales in the past, that was not a reasonable chance to improve applying the "reasonable range of responses" test. For completeness sake I should add that I have taken account of the much older warnings and discussions the Company had with Mrs Barker about her performance. I have also taken account of Mrs Barker's evidence that her sales improved in January 2019, although I acknowledge equally that Mr Peck disagrees that this was the case.

45. That failure to allow a reasonable chance to improve renders Mrs Barker's dismissal unfair. It is compounded by two other factors. First, is the Company's failure to hold an appeal hearing with Mrs Barker. That was not only a failure to adhere to its own procedures (whether contractual or not) but also a failure to observe the ACAS Code. Second, although of less weight, is the Company's failure to address with Mrs Barker any question of her taking another post with the company such as that of an office based sales person. Mrs Barker mentioned this to Mr Everett who dismissed it on the basis that Mr Peck did not think Mrs Barker was suited to the role. That may well have been the case but a reasonable employer might still have been expected to address the issue with such a long serving employee. Indeed, the Company's policy on dealing with poor performance expressly envisaged this (see paragraph 28 above).
46. I am required to consider what would have happened had the Company allowed Mrs Barker a reasonable chance to improve, carried out an appeal hearing and considered transferring Mrs Barker to another post. In considering the first of these, a reasonable chance to improve, I take particular account of Mrs Barker's evidence that she could never have achieved her sales targets. I take this together with the evidence that Mrs Barker was clearly underperforming others sales targets in the Company and Mr Peck's conviction that Mrs Barker's targets were easily achievable. Against that background it seems to me that a dismissal would have resulted within a further twelve weeks. Furthermore, the appeal process could have been accommodated within that timescale and it is pretty clear that proper consideration of an alternative post for Mrs Barker would have had no result. The result, therefore, would have been a fair dismissal on or around 14 May 2019. On that date, Mrs Barker would have been dismissed with pay in lieu of notice.

47. I now turn to the question of remedy for the unfair dismissal. Mrs Barker has not asked that a reinstatement or re-engagement order be made.

48. Mrs Barker is entitled to a basic award. Mrs Barker's date of birth was 15 January 1967. At the date of her dismissal Mrs Barker was 52 and had the maximum 20 years' service that can count towards the calculation of a basic award. Mrs Barker's week's gross pay is agreed at £247.

$$52 - 41 = 11$$

$$11 \times 1.5 \text{ (age factor)} \times £247 = £4,075.50$$

$$9 \times £247 = £2,223.00$$

$$\text{Total: } £6,298.50$$

49. Mrs Barker is entitled to a compensatory award. No award is made in respect of the £50 claimed as costs incurred in searching for alternative employment in the absence of evidence to substantiate that claim. No award is made for the loss of a notice period as Mrs Barker received pay in lieu of notice. £500 is awarded for loss of statutory rights. Given my finding that a fair dismissal would have been the outcome after a further 12 weeks of employment, compensation for loss of earnings is limited to 12 weeks' loss of earnings. Mrs Barker's week's net pay is agreed at £236.88 (including a weekly pension scheme contribution of £9.88). Mrs Barker's loss, however was mitigated by her temporary net weekly earnings of £196.28 leaving a weekly loss of £40.60. (For the avoidance of doubt, in taking account of Mrs Barker's earnings from other employment, I have noted that these were paid for only 21 weeks. Having regard to the period covered by pay in lieu of notice, however, this almost covers the period up until Mrs Barker obtained other employment at higher pay. I consider this calculation and its result just and equitable.)

$$£40.60 \times 12 = £487.20$$

$$\text{Total: } £987.20 \text{ (including the } £500 \text{ award for loss of statutory rights)}$$

$$\text{Uplift of 25\% (section 124A ERA – failure to comply with ACAS Code) - } £246.80$$

$$\text{Total: } £1,234.00$$

Employment Judge Matthews

Dated: 1 December 2019

Judgment sent to parties: 10 December 2019

FOR THE TRIBUNAL OFFICE