



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112472/2019

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Held in Glasgow on 9 March 2020

Employment Judge J Hendry

10 **Mr T Borcescu**

**Claimant
Represented by:
Ms Murto -
Solicitor**

15 **FDM Group Limited**

**Respondent
Represented by:
Ms A. Stobart -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

- (i) The tribunal does not have jurisdiction and the claim for unfair dismissal is accordingly dismissed.
- (ii) The claim for commission being not well founded is dismissed.

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REASONS

1. The principal claim in this case is one of unfair dismissal. The claimant also claims wrongful dismissal and unlawful deduction of wages relating to unpaid commission. The respondent's position is that the claimant did not have two years' service to maintain his claim for unfair dismissal and that no sums were properly due to him at the point he was dismissed. The claimant accepted that he did not have two years' service.

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Issues

2. There were a number of legal and factual issues for the tribunal to determine. The principal issue was whether or not the claimant could maintain a claim for

unfair dismissal notwithstanding the fact that he did not have two years' full service. The Tribunal also had to explore if the claimant was properly entitled to a commission payment and whether this claim had crystallised at the point he was dismissed.

5 **Witnesses**

3. The tribunal heard from three witnesses. The claimant gave evidence on his own behalf. The respondents called Ms Julie Angus, Regional Recruitment Manager for Scotland and Ms Kate Croucher, University Partnerships Manager and UK Head of Recruitment.

10 **Findings in fact**

4. The claimant began his employment with the respondent company on 23 April 2019 as a Graduate Recruiter. The respondent terminated the claimant's employment on 25 July 2019. This occurred during his period of probation.
5. The claimant's contract of employment (JBp24-47) was signed by both parties. In terms of clause 2.2 of the contract, during the probationary period the respondents were entitled to terminate the claimant's employment by giving one weeks' notice.
6. Clause 6.1 of the claimant's contract sets out the claimant's basic annual salary of £20,000.
7. Clauses 6.5 and 6.6 of the contract sets out the basis on which the claimant earns commission in accordance with the company's commission plan. The payment of commission is discretionary.
8. At clause 6.8, the contract provides there is no right to commission if employment terminates at or prior to the date when commission might otherwise be payable.
9. The commission system operates in such a way that when a recruiter arranges for one of their candidates to start a paid technical training course, and they stay for at least two weeks, then that candidate is recorded against the recruiter's name on a sheet for the month that the candidate started and

the recruiter is eligible for commission. Once a candidate completes whatever course they are allocated to then they are placed in work with clients.

10. The claimant booked a candidate MK onto a course starting 15 July 2019. MK was one of the claimant's July bookings who could attract commission in due course. MK had failed his initial assessment course and should not have
5 been placed on a training course by the claimant. The respondent's computer records had been altered to show that he had apparently passed the course by resitting it on the same day as the assessment had been carried out. This was not the case. The claimant had access to the system and was in a
10 position to alter the records.
11. The respondent's payroll checked the July bookings in August to see if candidates had completed the course they had been sent on as arranged by the claimant. They amend the sheet to indicate where a candidate has failed to complete a course, in which case no commission is payable or, if they
15 stayed at least two weeks on the course then commission is payable to the recruiter. Payroll will then amend the sheet and send it to Ms Kate Croucher who checks it in the middle of the month to authorise the payment of commissions.
12. In the case of the July bookings that the claimant made, Ms Croucher checked
20 the sheets in mid-August.
13. Had the claimant's employment not been terminated then commission for the July candidates, once verified in August, would have become payable at the end of August. The payday in August was 30 August.
14. Ms Croucher was entitled to consider the fact that the claimant had been
25 dismissed for gross misconduct namely for dishonesty placing the candidate MK on an unsuitable course and falsifying the computer records to make it look as if MK had passed a resit on 6 June 2020.
15. Ms Croucher was also entitled to have regard to the provision in the contract, (clause 6.8), which indicated that the claimant had no right to commission if

employment terminated at or prior to the date where commission might otherwise be payable.

Wrongful dismissal/Commission

- 5 16. The claimant was the recruiter responsible for a candidate known as MK whose candidate code was 128648. The claimant's duties were to find the candidate, interview him initially to see if he would be suitable to move to be assessed as to his aptitude and qualifications. This was done over a full day at their Assessment Centre (AC). He had to explain the processes to the candidate and put him in an appropriate 'stream' depending on his experience and technical ability. Once the candidate passed the assessment day, he would book him on the appropriate training course if he passed and update the computer records.
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17. The assessment course takes place over a day. In the morning, there are skill-based interviews and for speech candidates, there are three interviews. There is then lunch. In the afternoon, there are written aptitude tests under exam conditions. The interviews and assessors meet for a washup session at 4pm to discuss candidate performance. The results were sent out at 5.38pm and recorded that MK had failed.
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18. The claimant was responsible for entering the data relating to the candidate after the assessment course on 7 June.
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19. The claimant was sent the information about the test results by a fellow employee, Ms Ashni Mehta, on 6 June (JBp49). It was clear from the results that MK failed the aptitude test, getting 6 points, but had passed the interview stage (JBp48-51). The claimant was aware that a candidate needed 7 to pass the aptitude test and 82 to pass the interviews. It was clear to the claimant that MK had failed, and he needed to re-sit. This would have to be done at a future assessment day.
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20. It requires authorisation for a candidate to change 'streams' during the recruitment process. The claimant had indicated that he had approval from Mr Dan Horan for MK to change to move to the 'testing' stream. Mr Horan
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confirmed to the respondent that he had not spoken to the claimant about MK (JBp80) and that in any event MK still needed to resit the assessment before starting a training course.

21. MK had failed by one point. The records showed that MK had apparently re-sat the tests on the same day as his original test. This would not have been possible. The fact that MK eventually re-sat the test and passed was false. The claimant was aware that MK had failed and that he would not be eligible for commission.
22. MK did not undertake a resit on 6 June and did not take a re-sit thereafter. The claimant was responsible for the candidate data. The data was changed from failed to pass on the system by putting in a resit on 6 June which is the same date as the original assessment centre day. The candidate was then given a start date for his course of 15 July 2019.
23. As an administrator Ms Mehta had no incentive to falsify any records. She had recorded that MK had failed the aptitude test.
24. The claimant was responsible for inputting the appropriate data. He was therefore responsible for inputting the data once he had received it from Ms Mehta. The only entry that Ms Mehta made on the candidate's records was on 10 June 2020 when she sent out a 'Welcome Pack' to him. She did so because she received an automated message that the candidate had passed the required tests. It was then up to the claimant as the recruiter to book the claimant onto the correct course or 'stream'.
25. On 23 July, concerns arose about MK as he was flagged up as problematic by the trainer of the course to which the claimant had assigned him. MK had failed the aptitude tests and so was not eligible to start a course until he had taken the re-sit. In addition, the trainer believed that MK had been put on an inappropriately difficult course for his aptitude and skills.
26. The claimant would become eligible for commission once it has been checked by a manager and authorisation given for payment in the following month. Payments become eligible in one month and payable at the end of the next.

27. At or about this time the claimant had been pulled aside by his manager Julie Angus and asked about MK and why he had been put on the more arduous 'TEST' training course. The claimant told her that Dan Horan had 'okayed' the change. She accepted the claimant's explanation at face value.
- 5 28. Because of the concerns that had come to light the records for MK were checked by a manager Marina Williams. She also asked the claimant why MK was on the TEST stream when he had not been passed for it. The claimant again said that Mr Horan had given authority. Mr Horan denied having spoken to the claimant about MK.
- 10 29. Ms Angus checked the records for MK on the respondent's 'Job Train' system (JBp53-55) which showed that the records had been falsified to show MK had passed through a resit. The information provided by Ms Mehta to the claimant showed that he had failed (JBp49-51). She noted that the entries had been made in the system by the claimant apart from one entry by Ms Mehta. Ms Angus concluded that the claimant had falsified the records by recording the
15 alleged resit and put the claimant on the first available course, although this meant changing 'stream' to a more arduous course, to get commission as quickly as possible. She took advice about the matter.
- 20 30. The claimant's manager invited the claimant to a hearing in relation this matter once it had become apparent that he should not have been put on this more testing course or any course at all. This followed investigations having been carried out by the respondent's managers after the initial concerns had been raised that MK was on the wrong course.
- 25 31. The claimant was aware some time prior to this meeting that the respondents were suspicious about MK's recruitment and questions were being asked about MK's recruitment. It was clear at the hearing that he knew what the issues were. He had told his colleagues just prior to the meeting that he was about to be sacked and had handed his current clients to another colleague.
- 30 32. The claimant's contract was terminated on the 25 July 2019. The reason given was that he had not successfully completed his probation period. Ms Croucher took the decision that the company was not bound to pay the

claimant commission due in August. The claimant was paid one week's notice as per his contract of employment.

33. Mr Horan accepted that in relation to another candidate, EH, the claimant had spoken to him and followed the correct procedure. Information in relation to EH and the claimant's involvement as recruiter only came to the respondent's attention after the dismissal had taken place and had played no part in the decision to terminate the claimant's contract.

Witnesses

34. I found the respondent's witnesses wholly credible and generally reliable in their evidence which was given in a straightforward and professional manner. The claimant is an articulate, intelligent and superficially persuasive witness whose evidence was contradicted by the respondent's witnesses, the documentation provided to the Tribunal and the circumstances surrounding this case which made it impossible to accept that he was a credible or reliable witness. I did not accept that he was confused by MK's results. He was by that time reasonably experienced in the role and was well aware what they indicated. He was aware that MK had failed. It was clear that he had been allowed to change stream without the necessary authorisation and to start an unsuitable course. It also became apparent in evidence that the claimant was not as he claimed 'blindsided' when he was called into the disciplinary meeting and that he knew perfectly well what his managers concerns were, what he had done and the likely consequences of his actions.

Submissions

35. Both parties lodged written submissions.

Claimant's Submissions

36. The claimant's representative dealt with his claims for unfair dismissal, wrongful dismissal and unpaid commission. He accepted that the Tribunal had no jurisdiction in relation to alleged breaches of confidentiality and alleged defamation.

37. She then set out in some considerable detail the findings in fact that she wanted the Tribunal to make. The claimant's position put simply was that someone else had altered the computer records (Ms Mehta) and that he had relied on information from her that MK had passed the assessment stage and was available to be placed on a training course. He had tried to clarify the position and had made a genuine mistake in relation to MK's placement due to lack of training. Ms Mehta had probably recorded that MK had passed the resit.
38. In relation to the disciplinary hearing the claimant contended that he had been taken completely unawares. He had earlier been asked by a Ms Williams who had put MK on the test stream and that this had come 'out of the blue'. He explained that he had dealt with many candidates. He mixed up the candidate he had called Mr Horan about and wrongly said it was MK. She had no right to conclude that the claimant had lied. He had two brief informal meetings with his line manager Julie Angus about these events before being taken into the final meeting and dismissed. The claimant was given no chance to explain his position, the meeting took only minutes and no notes or records were kept. His dismissal was later stated to have been because of an unsuccessful probationary period which was contradictory to the true position.
39. The submissions then turned to the question of the credibility and reliability of the witnesses.
40. In relation to unfair dismissal the claimant's representative drew attention to the EU Charter of Fundamental Rights that provides that workers are entitled to protection against unjustified dismissal. The two-year service requirement excludes many workers from this right. The two-year time limit should be set aside. The claimant then argued that as the company had paid him in lieu of notice that this demonstrated that they really knew that he was not guilty of gross misconduct. There was no proper disciplinary process and the company's disciplinary policies were implied in the contract. There is an implied right to a fair process (Chabbra v West London Mental Health NHS Trust) . The respondents did not follow the ACAS guidelines in any way. The respondents say they dismissed for gross misconduct but did not repeat this

reason in the letter confirming the dismissal. Their actions were in addition a breach of the implied duty of trust and confidence.

41. The claimant's representative referred to the case of Lock v British Gas ruling that commissions were pay. The commissions were not properly discretionary as there was a clear system for accruing commission. The commission had been earned before the dismissal and even if it was due at a later point it would have bene payable during the period of notice. Can I express my thanks for the very detailed and helpful submissions presented by the claimant's representative who has prepared them in both a language and legal system that is not her own?

Respondent's Submissions

42. Ms Stobart also prepared detailed written submissions and findings in fact.
43. The respondents first of all summarised the various claims that had been advanced. Their core position was that the claimant had been employed for three months as a recruiter. His probation was unsuccessful and was terminated because he dishonestly altered MK's records and put him on a training course to ensure that he became entitled to commission. He was not wrongfully dismissed and, in the alternative, he was in fundamental breach of his contract through his actions.
44. Counsel set out different proposed findings in relation to the wrongful dismissal and the other claims setting out the evidence that she submitted that the Tribunal should accept and taking the Tribunal though the various emails and other documents relating to the events around MK's recruitment and the claimant's involvement. She submitted that the claimant was not a credible witness and commented on the claimant's failure to give straightforward answers to questions during the hearing. He had used the confusion around the separate case of the candidate EH which he had discovered only after the ET had been lodged through a Subject Access Request to muddy the waters. The ET1 having made no reference to Mr EH. He had been 'less than truthful'

45. Ms Stobart then turned to the legal background. She submitted that the payment system for commission was clear. The claimant was guilty of serious misconduct and was in breach of his employment contract prior to any payment being due. The fact that the commission was payable under a scheme that was separate from the contract made no difference (Peninsula Business Services Ltd v Sweeney (2004) IRLR 49. The July commission was not payable until the end of August and by that time the claimant had left the respondent's employment.
46. In relation to wrongful dismissal the respondent's argued that was the employee's actions so serious as to constitute a repudiatory breach of contract entitling them to terminate the contract. In any event having been paid his weeks' notice in lieu even if the respondents had wrongfully dismissed there was no loss.
47. Counsel then turned to the alleged breach of trust and confidence issue suggesting that the point was misconceived on the facts and the claimant was himself in breach of his contract. No claim for holiday pay had been made and such a claim was time barred. The Tribunal had no jurisdiction to hear any unfair dismissal claim.

Discussion and Decision

48. The domestic law of the UK provides that an employee must have two years qualifying service before they can make a claim for unfair dismissal (Section 108(1) of the Employment Rights Act 1996. The claimant argued that this did not fully implement the obligations on the UK to protect workers as set out in Article 30 of the Charter of Fundamental Rights of the European Union. That article provides:

"Protection in the event of unjustified dismissal.

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices."

49. The qualifying service imposed by the UK has been the subject of legal challenge (Redfearn v Serco Ltd (2012) ECHR 1878) and has survived such

challenges as being within the margin of appreciation given to member states to implement the Articles terms. I find no persuasive basis to depart from that position. The claimant has insufficient qualifying service to take advantage of the right to unfair dismissal under Section 94 of the Employment Rights Act 1996 and accordingly the claim for unfair dismissal must be dismissed as the Tribunal has no jurisdiction to entertain such a claim.

50. The claim for wrongful dismissal proceeds on a different legal basis and the Tribunal had jurisdiction to consider such a claim. Under common law an employer can discharge an employee lawfully by giving notice. The remedy for wrongful dismissal would be measured by that notice. As the employers paid in lieu of notice any such claim is satisfied.

51. The claimant also sought payment of his commission. In terms of his contract (Clause 6.8) he is not entitled to payment of his contract is terminated prior to the commission being payable. The evidence reflects that the commission is not payable until certain events occur, not only that the candidate stays for two weeks, but also that the position is checked and the payment (which is also discretionary) paid in the wage run at the end of the month. The payment was not therefore 'due' until the 30 August by which time the claimant had been dismissed.

52. Even if this had not been the position on the balance of probabilities there was sufficient evidence, which I accepted, that the claimant was the person who had altered the records to show that MK had resat and passed his test and he had hoped to pass off this position. He was the person who would have benefited, and the evidence was that he was very proud of his high achieving record regarding commission earnings. It was simply not credible to suggest, as he did, that the administrator had done this nor that he was confused when he said that he'd spoken to Mr Horan to change MK's stream but had mixed him up with EH. That of course begs the question how one of the claimant's candidates, for whom he was responsible, ended up on a training course arranged by the claimant for which he was ineligible and ill suited. The alteration of the records for his own benefit in itself would have meant he was acting in breach of his contract disentitling him to the commission. The

respondents also had the right to refuse to pay the commission on the basis that the claimant was not an employee when it became payable at the end of August.

53. The claimant made reference to the implied duty of trust and confidence in his
5 submissions in relation to the failure, as he sees it to carry out a reasonable investigation and provide a proper disciplinary process. He also made reference to the Supreme Court decision in Chabbra v West London Mental Health NHS Trust 2013 UKSC 80) That case is authority for the proposition that an employee has an implied right to a fair disciplinary process. It is
10 however a case involving the court intervening though an injunction to prevent a flawed process occurring.

54. The process certainly here was not flawless. It was rather rushed. The principal objection the claimant had was that he said he did not know what the issues were had been 'blindsided'. That simply did not reflect the evidence.
15 He pointed to confusion over the reason he had been dismissed and who had taken the decision. Again, the process appeared a little rushed but his termination and the basis for it was made clear at the disciplinary meeting. The impression I was left with was that the respondents latterly said the dismissal was on the more neutral sounding basis of the claimant not having
20 passed his probation rather than for dishonesty and gross misconduct. This did not undermine the original or real reason for termination but was no doubt done to soften the likely effect of the termination on the claimant's future career. He had after all been a star performer in recruitment up to this point.

55. In the circumstances the investigation was sufficient to allow the respondents
25 to come to the views they did. No new evidence that would have shaken their position was led at the Tribunal which strongly suggests that a more detailed investigation would have made no difference to their findings and the ultimate outcome.

56. They had the contractual right to terminate the claimant's contract within the
30 probationary period and sufficient evidence before them to dismiss on the grounds of gross misconduct. The claimant might have been on strong

grounds, if he had the right to claim unfair dismissal, to argue that the disciplinary hearing did suggest that the matter was possibly predetermined, certainly hurried and there was no interest at that point in listening to the claimant's side of events. This might have possibly rendered the dismissal procedurally unfair but the counter argument would be that whatever process was adopted the result would have almost certainly have been the same. As noted earlier nothing came out at the hearing that suggested there would have been a different result.

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57. It must be borne in mind that the remedy as it were for an employee who believes that there has been a breach of the implied term of trust and confidence is resignation which of course did not occur here and a claim for unfair dismissal which was not open to the claimant.

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58. The claimant also argued that clause 6.8 is a penalty clause. The starting point is that the contract provides at clause 6.5 that payment of commission is at the company's discretion. This would allow them to refuse to pay if something untoward or questionable had occurred as here. The claimant by his actions was in breach of his duties towards his employers and for that reason alone would have been unable to demand payment of the commissions. It seems to be moot, therefore, whether the terms of the clause matter much but for completeness the clause does not have the attributes of a penalty clause as it is not dependent on a breach of contract occurring and being a fair estimation of loss and damage.

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59. Finally, any claim for holiday pay is woefully out of time and was not raised in the ET1.

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60. The various claims that have been made fail both in relation to the facts as I have found them and the applicable law.

5 Employment Judge: J Hendry
Date of Judgment: 21 May 2020
Entered in register: 03 June 2020
and copied to parties