



EMPLOYMENT TRIBUNALS

Claimant: Mr A Stirland

Respondent: Personnel Solutions (Midlands) Limited

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
By cloud video platform

On: 10 June 2021

Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: In person

For the respondent: Ms N De Lucis, director

REASONS

(for the judgment given at the final hearing on 10 June 2021)

Introduction

1. Mr Stirland brings a claim for unfair dismissal, notice pay and for commission that he says he was owed at the time of his dismissal but which was unpaid.
2. Personnel Solutions (Midlands) Limited deny they dismissed him: saying he resigned instead. They deny that they owe him notice pay as a result and deny they owe him commission because they say it was discretionary and they exercised their discretion not to pay it.
3. The hearing proceeded by video link. We planned to take breaks every hour but in fact the natural progress of the hearing, and breaks for deliberations, meant we never took them.
4. Mr Stirland represented himself and Ms De Lucis, the respondent's director, represented the company.
5. Because each party represented themselves, and with the parties' consent, both Mr Stirland and Ms De Lucis were sworn in together at the start so as to allow maximum flexibility and avoid difficulties about what did and did not count as evidence.
6. I heard therefore evidence from Mr Stirland and Ms De Lucis. I also heard evidence from Mr Parker, the director of Mr Stirland's current employer who

is Imperial Personnel, on the claimant's behalf because it related to the end of his employment with Personnel Solutions.

7. Neither Mr Stirland nor Ms De Lucis has prepared witness statements of their own evidence. I suggested and each party agreed that Mr Stirland would rely on the claim form and details of claim because he had written it and Ms De Lucis would rely on the response form and the extra details she had provided in reply to an order from Employment Judge Ahmed.
8. There was a witness statement from Mr Parker. Only part of it was relevant (the rest dealt with issues after the employment ended) and that is the only part I have considered.
9. Mr Stirland wished to call 2 other witnesses (Ms E Mann-Hatton and Mr C Embleton) who were to give evidence about events after the end of his employment. Those events and the proposed evidence about them shed no light on the issues before me. I concluded they were irrelevant and Mr Stirland agreed they need not be called. . I am satisfied that refusing to hear from him had no effect on the fairness of the hearing.
10. Personnel Solutions also wanted to call Mr J Walker. I refused to allow that because there was no statement from him. Ms De Lucis explained he was present in case I had any questions. I explained however the Tribunal is not investigatory and so it is up to the parties to decide who to call. Fairness required the other party should be aware of the evidence a witness was going to give. In this case it would be unfair for him to give evidence. I am satisfied that refusing to hear from him had no effect on the fairness of the hearing.
11. In evidence I asked some questions of the witnesses and assisted the parties (so far as necessary) to put any additional questions they might have that I had not covered.
12. I have taken all of the oral evidence into account.
13. Each party had prepared their own slim bundle of documents. I have taken into account all of the documents to which the parties referred me.
14. Each party made closing arguments about why they should win. I have taken those into account when coming to my decision.
15. Neither party complained about unfairness of the hearing. I am satisfied that each party had a fair hearing.

The issues

16. Ms De Lucis agreed that if Personnel Solutions had dismissed Mr Stirland, then the dismissal was unfair. This was a proper concession. The evidence showed nothing that suggested Personnel Solutions had followed a fair procedure when measured against e.g. **ACAS COP1** on disciplinary procedures.
17. Mr Stirland and Ms De Lucis agreed the amount of commission in dispute was £1052.50.
18. Ms De Lucis agreed that if Personnel Solutions dismissed Mr Stirland, he would be entitled to the minimum notice as set out in statute.

19. Mr Stirland confirmed he sought no loss of earnings for unfair dismissal.
20. The parties agreed that Mr Stirland's pay was £625 per week.
21. There I had to decide only
 - 21.1. Did the claimant resign or did the respondent dismiss him?
 - 21.2. If he were dismissed, how much notice pay was he entitled to?
 - 21.3. Was he legally entitled to any commission payment?
 - 21.4. If he were unfairly dismissed, how much should the basic award be and the compensatory award be?

Findings of fact

22. I am satisfied all witnesses have told me what they believe the truth to be. I go on to make the following findings of fact on the balance of probabilities.
23. Mr Stirland was born on 30 May 1987. Therefore the time of dismissal he was 33 years old.
24. He commenced his employment with Personnel Solutions on 30 April 2018. He was employed as a recruitment consultant.
25. His contract of employment provides so far as relevant
"Bonus payments and other benefits
"9.1. The employer operates a bonus scheme.
There is nothing else set out in the contract in relation to the bonus scheme.
26. The contract contains nothing to suggest he would be entitled to a different period of notice on dismissal other than that provided for in the **Employment Rights Act 1996 section 86.**
27. As to commission there is only one document that sets out the commission scheme. It reads as follows.
"Personnel Solutions (Midlands) Limited
"Commission Structure.
"All team members are costed in at £4,000 per head
"Any variations to this costing will be agreed beforehand and confirmed in writing.
"So a team of two has an £8K threshold. Commissioners is calculated at 20% above threshold which is shared between the team members. The split is normal equal share.
"So for example
"Team of 3
"Desk bills £20K
"Threshold, £12K
"Commission pot, £1600
"Usually split between 3 team members – equal share

“Commission is paid on a discretionary basis and is not guaranteed.”

28. On a number of occasions Ms De Lucis had exercised her discretion to withhold commission or pay a different amount to that which one might expect under the policy. For example, if a new person had joined a team and not had much time to contribute, then they might be discounted from the calculation and not receive a bonus themselves, or they might receive a smaller share. If someone were absent they too might be discounted both for the calculation and as a recipient. On other occasions she had paid a greater bonus than might otherwise be payable in strict accordance with the policy because she felt their work and success deserved particular recognition.
29. The respondent is a recruitment agency for workers in logistics and transport. Imperial Personnel are a direct competitor.
30. In mid-2020 Mr Stirland started to look for alternative employment. Eventually he found alternative employment with Mr Parker's company, Imperial Personnel. In mid-October 2020 he accepted their offer of employment. Mr Stirland intended that he would see out his employment with the respondent. He says he planned that his employment would end just after Christmas, Ms De Lucis believed he intended to leave on Christmas Eve. I do not believe it matters for the purposes of this case and so do not consider it further. Mr Stirland says his aim was twofold: he would not leave Personnel Solutions in the lurch during what is the busiest time of the year; it would also permit him to have a fresh start in the new year.
31. Ms De Lucis found out that Mr Stirland had taken alternative employment and was planning to quit. On 23 November 2020 when he arrived for work, she verbally invited him to a summary meeting. There was no forewarning, written invitation and no statement that he might be dismissed or had the right to be accompanied by a work colleague or trade union representative. Whether it was an ambush as Mr Stirland describes or not, Ms De Lucis told me it was not a disciplinary hearing.
32. Both parties have very different recollections of the content of the meeting. They agree the subject of Mr Stirland seeking alternative employment and having secured it with Imperial Personnel arose. However
 - 32.1. Mr Stirland says he told Ms De Lucis that he had been intending to resign in December but now intended to resign on 27 November. He says that Ms De Lucis instead dismissed him there and then, and he had to leave the premises.
 - 32.2. Ms De Lucis says that while she cannot remember the words used she has a clear recollection that he resigned there and then, and she accepted his resignation. He had to leave the premises because he had resigned, afterwards he went to his desk and appeared to be doing something on his computer she thought suspicious, he was going to work for a new employer who was a competitor and she wanted to maintain the respondent's confidentiality.
33. On 24 November 2020 8.45, Ms De Lucis sent an email to Ms Stirland as follows:

“Following our meeting yesterday I am confirming your employment with Personnel Solutions has been terminated with one week's notice. The reasons for this were explained to you at length during this meeting. I am very saddened you would have taken your salary and commission in December and then left with no notice, resulting in massive disruption over Christmas. I took the decision to end your employment to avoid this happening. It is also obvious you have been very distracted and been heavily job searching for the last couple of months, during work hours.”

[My emphasis throughout]

34. I have oral evidence from 2 witnesses who I am satisfied are truthful and honest. In my opinion the answer to what happened in that meeting is in the email. It was written by Ms De Lucis herself and so can only reflect her state of mind and belief. It was also written very close to the time when matters were fresher in her memory than now. The passages I have emphasised all show that Ms De Lucis at the time believed she had dismissed Mr Stirland with one weeks' notice. This tallies also with Mr Stirland's case. It also seems more plausible he would leave that day if he had been dismissed. There is no evidence he intended to resign summarily that day. Therefore I find as a fact that in the meeting on 23 November 2020 on the respondent's behalf Ms De Lucis said that she was dismissing Mr Stirland with one week's notice.
35. There are allegations that Ms De Lucis has sought to encourage employees of Imperial Personnel to join her and some allegations of non-Equality Act 2010 harassment of those staff. They are irrelevant to the issues I have to determine. I have heard no evidence on them. I reach no conclusions about whether the allegations are true or not.
36. It is common ground that when he left, Personnel Solutions did not pay any bonus or commission to Mr Stirland. Ms De Lucis emphasised the discretionary nature and explained she had decided not to exercise her discretion because he had been distracted during his employment from his role because he was looking for employment elsewhere. Therefore he simply had not committed like other staff. I am satisfied that Ms De Lucis is correct. It is inherently plausible an employee looking to work elsewhere would be distracted and not as committed while at work. Based on her evidence, I find as a fact she also felt let down he was going to work for a competitor.

Law

37. Generally unambiguous words of dismissal can be taken at their face value: **Sothorn v Franks Charlesly and Co [1981] IRLR 278 CA**. If there are exceptional circumstances (e.g. idle words spoken under emotional stress) then it may be appropriate to look behind what was said to see if truly there was a dismissal: **Martin v Yeomen Aggregates Ltd [1983] ICR 314 EAT**. Once a person has been dismissed (or notice given) then it cannot be withdrawn except with consent: **Willoughby v CF Capital plc [2012] ICR 1038 CA**.
38. An employee's expression of a future intention to resign is not enough to mount a resignation at the time that the employee expresses that future

intention is expressed: see e.g. **Ely v YKK Fasteners (UK) Ltd [1994] ICR 164 CA.**

39. When interpreting a document, one should try to discern what a reasonable persons would understand the words to mean in light of the facts available to the parties at the time the contract was created: **Arnold v Britton [2015] AC 1619 UKSC.** So far as allegations that an employer has not exercised its discretion is concerned, the key question is whether or not there has been a rational exercise of discretion in good faith. The Tribunal is not entitled to make the decision for itself, nor can the Tribunal simply decide if the exercise was itself reasonable: see **Clark v Nomura International plc [2000] IRLR 766 HC(QB)**
40. If a person is dismissed with 2 full years of service, but less than 3 full years, then they are entitled to 2 weeks' notice of dismissal, except in circumstances that do not apply here: **Employment Rights Act 1996 section 86.**

Conclusions

41. I have concluded as a fact that in the meeting on 23 November 2020 Ms De Lucis dismissed Mr Stirland. Applying the law I am satisfied that what was said at that meeting an unequivocal dismissal of Mr Stirland. I have come to that conclusion based on Ms De Lucis's own words in her own email to Mr Stirland the next day. There can be no possibility that it was an instantaneous emotional response because the email is about 24 hours after the meeting and confirms the dismissal. The text shows it was both in the meeting and the next her intention he be dismissed. Even if Mr Stirland had said he was planning to resign, that cannot have been a resignation as a matter of law because it related to the future.
42. Because she dismissed Mr Stirland and he had 2 years' full service, he was entitled to 2 weeks' notice pay.
43. Because she followed no process like that in the **ACAS COP1** such as investigation, invitation to disciplinary hearing with reminder of right to accompaniment and warning of potential dismissal, dismissal hearing, or decision letter with reminder of right to appeal, Ms De Lucis was correct in my view to concede the dismissal was unfair. It follows Mr Stirland is entitled to a basic award and a compensatory award.
44. Mr Stirland is not entitled to compensation for non-payment of the bonus. The only documentation produced by the parties clearly shows it is discretionary. No reasonable person could see otherwise. I do not accept that clause 9.1 of the contract of employment provides a contractual right to commission. A reasonable person would understand it to mean only that such a scheme existed. If the parties intended the scheme to be contractual it would have formed part of the contractual documents. The fact that they only refer to there being such a scheme but do not take the opportunity to set out what that is strongly suggests it is not a contractual nature. Therefore there is no entitlement in contract to the bonus or commission.
45. If I am wrong about that and the scheme is contractual, then the claim must still fail. The payment of commission is clearly discretionary and has been run that way for some time. Ms De Lucis has exercised her discretion

rationality and in good faith. She is entitled to reflect on the time he spent at work seeking new employment which would have impacted on his personal performance and on his departure to a rival business. Therefore there would be no breach of contract that gives rise to a claim for compensation.

Remedy

Notice pay

46. The claimant was entitled to 2 weeks' notice pay. He has received one. Therefore, he is entitled to one more. The parties agree a weeks' pay is £625. That is the amount I award.

Basic award

47. The claimant is entitled to a basic award for the unfair dismissal. At the time of dismissal, he had been employed for 2 complete years and was aged 33. The maximum amount of a weeks' pay for the purposes of the basic award at the time of dismissal was £538: **Employment Rights Act 1996 section 227** as amended. Therefore applying the **Employment Rights Act 1996 section 119** the basic award is $2 \times £538 = £1,076$.

Reinstatement or reengagement

48. The claimant seeks neither of these because he has found alternative employment. Therefore, the Tribunal is not able to make such orders: see the **Employment Rights Act 1996 section 112(3)**.

Compensatory award

49. The only compensation that the claimant seeks is for loss of statutory rights. The claimant had only just gained these and his employment was of a short duration. I believe £350 would do justice in this case.

Polkey and Contributory fault

50. There is no adjustment to be made to the compensatory award for the fact that he may have been dismissed fairly by the respondent in due course because he has not claimed any compensatory losses for loss of earnings flowing from his dismissal.
51. There is nothing in my opinion about the claimant's conduct which could be labelled culpable or blameworthy. Seeking and moving to alternative employment is a normal thing to do. No employer has an exclusive immutable claim to an employee's services. There is no credible suggestion he was being disloyal to the respondent by competing against it or helping a competitor while employed by it. Therefore, a reduction for contributory fault would be inappropriate.

Other matters

52. The claimant has not sought any other compensation or adjustments for unfair dismissal. Therefore the Tribunal has not considered matters further.

Postscript

53. The parties co-operated to narrow the issues between them substantially so that the case proceedings both calmly and efficiently. I would like to thank them for their co-operation and reasonableness.

Employment Judge Adkinson

Date: 16 June 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

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