



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH (remote hearing by CVP)

BEFORE: Employment Judge Harrington

BETWEEN:

Mr L Wilkins Claimant

and

LC Switchgear Limited Respondent

ON: 25 October 2021

APPEARANCES:

For the Claimant: In person

For the Respondent: Mr T Welch, Counsel

JUDGMENT

- (1) The Claimant was wrongfully dismissed by the Respondent in breach of contract.
- (2) The Respondent shall pay the Claimant the sum of £4,570.69 (four thousand, five hundred and seventy pounds and sixty nine pence) in damages.

REASONS

[The numbers in square brackets refer to page numbers in the hearing bundle or, where stated, paragraph numbers in a witness statement.]

Background

1 By an ET1 received by the Tribunal on 22 April 2020 the Claimant, Mr Lewis Wilkins, brings a claim for wrongful dismissal against his former employer and the Respondent in this matter, LC Switchgear Limited. The Respondent denies the claim.

2 At a hearing on 12 March 2021, the Claimant clarified his claim and this was summarised in my Case Management Order following that hearing. In summary, it is the Claimant's case that he was dismissed without any due process being followed. In his letter of dismissal, the Respondent made reference to issues concerning the Claimant's performance and attitude. On this basis the Claimant contends that the Respondent should have followed its disciplinary procedure, which is said to apply in situations of 'poor performance'. Accordingly, the issues for the Tribunal were as follows:

Wrongful Dismissal –

2.1 Did the Respondent dismiss the Claimant in breach of the Claimant's contract of employment?

2.2 In particular, did the Respondent terminate the Claimant's employment without following a procedure prescribed by the contract?

2.3 If the Claimant was wrongfully dismissed, what award of damages is made?

3 Throughout the hearing, the Claimant represented himself and the Respondent was represented by Mr Welch of Counsel.

4 The Tribunal was referred to the following materials:

4.1 Hearing bundle comprising 245 pages;

4.2 Supplemental pages:

4.2.1 Documents concerning the Claimant's job applications;

4.2.2 Emails concerning renewal of a short term contract in June 2021;

- 4.3 Witness statements from the Claimant, Mr Krummeck, Mr Fairhall and Ms Lowles;
 - 4.4 Respondent's skeleton argument dated 25 October 2021;
 - 4.5 Respondent's bundle of annotated authorities.
- 5 The Tribunal heard witness evidence from the Claimant, Mr Krummeck and Mr Fairhall and both parties made closing submissions.

Factual Background

- 6 The findings of fact are set out below. The standard of proof is on the balance of probabilities, namely what is more likely than not.
- 7 The Respondent designs, manufactures, installs and services switchgear, electrical disconnect switches, fuses and circuit breakers used to control, protect and isolate electrical equipment. The Respondent employs approximately thirty-five people.
- 8 The Claimant was employed in the full-time role of Assistant Internal Sales and Quotes Engineer from 26 February 2018 until 24 January 2020. At all relevant times, the Claimant's manager was Mr Tom Fairhall and the Respondent's General Manager was Mr Krummeck.
- 9 The Claimant successfully completed the three month probationary period for his role, as confirmed in a letter from Mr Krummeck dated 4 June 2018 [106].
- 10 Relevant contractual information concerning the terms of the Claimant's employment is included in the bundle. There are two Statements of the terms of employment, with relevant updated salary information [50-51]. Further, it is agreed that the full terms of employment which applied to the Claimant are contained in the document beginning at page 52 of the bundle [52-66]. The Respondent's internal reference for this document, as appears on the foot of the relevant pages, is 'Rev C'.
- 11 The following sections of the contractual document are of particular relevance to this claim,

'9.0 Disciplinary Rules and Grievance Procedure

The Company has detailed Disciplinary Rules and a Procedure for dealing with misconduct or poor performance issues. It operates so that employees are treated fairly and consistently and everyone is given a chance to improve their conduct and their performance.

11.2 Disciplinary Procedure

11.2.1 Offences Other Than Gross Misconduct

.....

11.2.3 *The employee shall be informed by letter the reasons for disciplinary action against them giving an explanation of his/her conduct, capability or other circumstances that have resulted in the action. The letter will also contain details of where and when a meeting will take place between the employee and two Managers/Directors. The employee will be given the opportunity to explain. He/she will be given a specific time to improve, accompanied by a verbal warning. Details will be recorded. In the event of satisfactory performance for six months, the record will be cleared and the employee notified of this action.*

11.2.4 *If the employee's conduct does not improve within the stated time, another meeting will be arranged and the employee will be interviewed by two Managers/Directors. A formal warning in writing will be given to the employee and all the circumstances recorded. In the event of satisfactory performance over a period of twelve months, the record will be cleared and the employee notified of this action,*

11.2.5 *If there is no improvement, or another offence is committed, a further interview will be arranged (in accordance with paragraph 11.2.4) with two Managers/Directors. When the Managers/Directors have reached a decision they will inform the employee and will make recommendations as necessary. Details will be recorded.*

11.2.6 *Following the recommendation of the Manager/Director responsible for the employee and before any decision is reached, there will be a full investigation of the facts. After this investigation, the decision of the Executive Management will be made known to the employee by a Director.*

11.2.7 *In the event of the employee refusing to accept this decision, the individual concerned will be informed of his/her right to appeal, within five days, to the Managing Director, who will set up an Appeal Committee consisting of the Managing Director and one other Director.' [64]*

12 In April 2019 the Claimant had his first appraisal. Mr Fairhall identified some issues in the appraisal including a need for the Claimant to increase his 'LCS product knowledge'. The Claimant did not sign the first version of the Performance Review document [109-110] but signed a slightly amended version on 12 April 2019 [111-112].

13 The Respondent also referred to a second appraisal, which was said to have taken place on 20 January 2020. The Claimant denied that there was ever a second appraisal but in its response to the claim, the Respondent stated, 'In fact, the meeting did take place...' [31]. The second appraisal is also referred

- to in both Mr Fairhall and Mr Krummeck's witness statements. Mr Fairhall refers to carrying out the second appraisal [see witness statement, paragraph 49] and Mr Krummeck refers to a conversation with Mr Fairhall, during which Mr Fairhall stated that the Claimant would not sign the second performance review. Mr Krummeck recalls advising Mr Fairhall to record on the review that the Claimant had refused to sign it and then to pass it to him for filing [see witness statement, paragraph 53]. A copy of the Performance Review document was signed by Mr Fairhall on 20 January 2020 [142-143]. The Claimant told me that he had first seen a copy of this document when he received a complete copy of his personnel file after his dismissal.
- 14 When asked about the second appraisal during his oral evidence, Mr Fairhall described having a very brief discussion with the Claimant when he had said that he wanted to talk about the Claimant's CV, things that he had done in his previous jobs and why he was having difficulty performing similar activities in the current job. Following this, Mr Fairhall referred to preparing for the 2020 performance review at the time of the Claimant's dismissal. He described the 2020 Performance Review document as '*a draft*'.
- 15 Having considered the evidence on this issue, I am satisfied that Mr Fairhall's oral evidence and the Claimant's evidence is to be preferred to the Respondent's documented case that a second appraisal took place with the Claimant in 2020. It is clear from Mr Fairhall's oral evidence that a second appraisal had not actually taken place prior to the Claimant's dismissal. Rather, Mr Fairhall had begun preparing for this and had completed a version of the review document. There had not been a formal meeting with the Claimant as had happened in April 2019 nor had the draft review document been shared with the Claimant. The Respondent's assertion that the meeting did take place is wrong.
- 16 On 24 January 2020 the Claimant was summoned to meet Mr Krummeck. Without any prior warning, Mr Krummeck told the Claimant that his employment was being terminated. It is agreed by the parties that the Respondent relied upon poor performance / capability as the reason for the Claimant's dismissal. The Claimant was handed a letter and was asked to pack up his things and leave [35-36].
- 17 The letter included the following,
- 'It has become increasingly clear that you are not developing effectively towards this senior role. There have been some issues with your performance and attitude in your assistant role which have clearly indicated that you do not have the ability or potential to graduate to this senior role...'*
- 18 The letter also referred to the Claimant's right to appeal against his dismissal, within 7 calendar days of receiving the letter.

- 19 The parties agree that, as set out above, the Claimant's contract of employment included a contractual disciplinary and grievance procedure, which applied to performance issues. In its ET3, the Respondent also accepts that it did not follow this procedure [46]. This was because the Respondent misunderstood which terms and conditions applied to the Claimant's employment. When considering its dismissal of the Claimant and how it would progress this, the Respondent had proceeded on the mistaken belief that the Claimant was employed on a later version of the Respondent's terms and conditions of employment, which did not provide for a contractual performance management procedure.
- 20 Mr Krummeck believed that a more formal disciplinary / performance management process was not required. Mr Krummeck also thought that the more formal procedure was only applicable if an employee had more than 2 years service. In his oral evidence to the Tribunal Mr Krummeck accepted that this was an error.
- 21 Following Mr Krummeck telling the Claimant that he was dismissed, the Claimant returned home and telephoned Neil Barnes, a director of the Respondent company. He asked Mr Barnes whether he was aware of what was going on and Mr Barnes confirmed that he did and he was in complete agreement with the decision to end the Claimant's employment. During the conversation Mr Barnes also told the Claimant that he should '*go find another job*'.
- 22 On 26 January 2020 the Claimant emailed Mr Krummeck and made a subject access request, asking for a copy of all data held by the Respondent concerning his employment. He also asked for '*evidence in regard to your assertions detailed in your letter dated 24 January 2020 and the reason for my dismissal*' [146].
- 23 Mr Krummeck responded by email the next day confirming that the documents would be posted as requested. With regards to evidence regarding the decision to terminate employment, Mr Krummeck stated, '*I have nothing further that I wish to add to the letter I issued you on Friday 24th January 2020.*' [146]
- 24 On 27 January 2020 the Claimant emailed Mr Krummeck and asked for a copy of his personnel file. This was received the next day. On 29 January 2020 the Claimant sent an email to Mr Barnes appealing against the decision to dismiss him. Mr Barnes acknowledged this on 30 January 2020.
- 25 On 5 February 2020 Mr Barnes wrote to the Claimant. The letter referred to the Claimant's wish to appeal against his dismissal and then provided information about what were said to be the Claimant's mistakes during his employment. Twenty matters were listed under a heading '*Failure to comply with your Job Description*' and a further ten matters under the heading

- 'General attitude'* [33-35]. Mr Barnes then stated that if the Claimant wished to contest the information provided, he was to set out exactly what his grounds for appeal were.
- 26 A further letter was sent to the Claimant on this date from the Respondent's company secretary [37-38]. This set out the payments being made to the Claimant upon the termination of his employment. In addition to being paid his salary up until 31 January 2020, the Claimant was paid the following further sums:
- | | | |
|------|-------------------------------|-----------|
| 27.1 | 1 month pay in lieu of notice | £2,606.10 |
| 27.2 | 1 month additional payment | £2,606.10 |
| 27.3 | accrued holiday pay | £874.18. |
- 27 On 9 February 2020 the Claimant wrote to Mr Barnes [38-39]. The Claimant referred to there being no evidence in his personnel file or elsewhere to support the reason given for the Claimant's dismissal. Further, he referred to having no warnings, either verbal or written, and no disciplinary hearings. The Claimant referred to needing training, which never happened.
- 28 On 12 February 2020 the Claimant sent a further email to Mr Barnes chasing a response to his email of 9 February 2020. A few hours later Mr Barnes sent a response with details of the proposed appeal hearing on 19 February 2020.
- 29 The Claimant responded on 17 February 2020. In that email, the Claimant referred to the disciplinary procedure as set out in the contractual terms. He then stated, *'My understanding is you are in breach of contract, as none of the contractual terms and conditions of employment qualifies my dismissal.'* [154].
- 30 In the event, the Claimant did not attend the appeal meeting on 19 February 2020. On 20 February 2020 the Claimant sent an email raising the point that Mr Barnes should not be hearing the appeal. In response, Mr Barnes emailed with details of a rearranged appeal hearing, with other directors, arranged for 25 February 2020.
- 31 The Claimant did not attend the rearranged appeal hearing on 25 February 2020. The Respondent wrote to the Claimant that day referring to the rearranged appeal at which two other directors, Brian Smith and Andy Seccombe, had been in attendance but the Claimant had not. The Respondent referred to their view that the matter was now concluded and that they hoped that the Claimant would find alternative employment [32-33].

- 32 On 17 March 2020 the Claimant contacted ACAS. Whilst a further offer was made by the Respondent to hold an appeal meeting, the Claimant did not agree to this.

Closing Submissions

- 33 On behalf of the Respondent, Mr Welch conceded that the Respondent's disciplinary policy contained a performance management process which applied contractually to the Claimant. However, he submitted that the Respondent complied or was otherwise prevented from complying with the performance management process. This was because the Claimant had acted in repudiatory breach of his contract of employment by abandoning the disciplinary procedure by failing to attend an appeal hearing.
- 34 In this way the Respondent submitted that the Claimant was prohibited from founding an action on the Respondent's alleged breach of the same process. Further it was the Respondent's case that the Claimant's performance was such that the process would not have made a difference.
- 35 In his oral submissions, Mr Welch said that following the contractual process would have been a very short matter – a matter of some extra weeks only. He also contended that by asking to appeal, the Claimant had waived the Respondent's breach of contract and was inviting the Respondent to continue to perform the contract. Applying that analysis, there was no wrongful dismissal as it was the Claimant who repudiated the contract; he had abandoned the contract by failing to attend an appeal hearing.
- 36 In his closing comments, the Claimant emphasised that the Respondent had failed to follow the contractual process. He submitted that he had not wished to proceed with the appeal process because the Respondent had already made its position clear when, after his dismissal, he was told to go and find another job. Further, the Claimant referred to the fact that when it was suggested to him that there had been a further appraisal in 2020, which the Claimant knew had not actually taken place, his trust in his manager, Mr Fairhall, had gone. The Claimant also contended that an uplift should be applied to any award of damages for the Respondent's failure to follow the ACAS Code.

Legal Summary

- 37 A breach of contract arises where one of the parties to a contract fails to comply with a contractual term. A claim may be brought for wrongful dismissal and damages where dismissal from employment occurs in breach of contract. For example, if the contract of employment stipulates that a particular procedure must be followed before an employee is dismissed, then a dismissal which is carried out without that procedure having been followed

- is necessarily wrongful (see for example, Gunton v Richmond-on-Thames LBC [1980] IRLR 321).
- 38 A breach will give rise to a claim for damages. This will generally be limited to compensation for the loss of the notice period and, if applicable, the employer's failure to follow a contractually-agreed disciplinary period.
- 39 The damages recoverable shall reflect the loss consequent upon the breach of contract and is subject to reduction for, for example, mitigation. The remedy is to put the employee in the position they would have been in had the contract been performed by the employer lawfully terminating the contract.
- 40 If a claim for wrongful dismissal relies on a breach of a disciplinary procedure, damages can be extended for the time it would have taken to have gone through the proper procedure (Gunton v Richmond-on-Thames LBC [1980] IRLR 321). The assumption is that the employer would have dismissed the employee at the first available moment open to him, after the procedure had been exhausted (Jancuik v Winerite Limited [1998] IRLR 63). The employer will therefore be assumed in an assessment of damages for wrongful dismissal to perform the contract in the way least burdensome to it. The assumption must be that the employer would have dismissed the employee at the first moment available to him.
- 41 Damages are based on contractual entitlement and not the loss of the chance to earn remuneration in practice and, in this way, an employee cannot recover compensation at common law for the chance that the following of the disciplinary procedure would have resulted in their saving their job. As previously stated, the measure of loss in a wrongful dismissal claim is to put the employee in the position they would have been in had the contract been performed. Remedy for losses arising outside the notional period for performance of the contract lies in the context of an unfair dismissal action, subject to qualifying service in most cases.
- 42 In its submissions, the Respondent has referred me to the cases of Johnson v Unisys Limited [2001] UKHL 13, Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58, Harper v Virgin Net Ltd [2004] EWCA Civ 271 and Wise Group v Mitchell [2005] ICR 896 and I have reminded myself of the relevant matters discussed in each of these cases.
- 42 The starting point when considering the appropriate measure of damages will be a sum equivalent to the wages which would have been earned between the time of actual termination and the time which the contract might lawfully have been terminated, together with the value of any fringe benefits which the employee would have received during the same period.

- 43 Claims for wrongful dismissal are generally confined to the notice period and any claim for breach of contractual dismissal procedures. They do not include non-pecuniary loss for injured feelings. Accordingly it is not possible to recover damages for mental distress, anguish, annoyance, loss of reputation or social discredit caused by the circumstances or manner of a breach of contract.
- 44 An award for stigma damages is only appropriate in a very limited number of cases. The cause of action must arise from the way in which the employee was treated prior to and independently of the dismissal and the principles in Bank of Credit and Commerce International v Ali & Others [2000] ICR 1354 must be satisfied, including that the misconduct on the part of the employer amounting to a breach must be serious indeed.
- 45 The ACAS Code of Practice on Disciplinary and Grievance Procedures applies to disciplinary situations including poor performance. It sets out key principles to ensure a fair approach is taken in such cases. Pursuant to Section 207A TULCRA, which applies to both claims of unfair and wrongful dismissal, an uplift can be awarded to damages awarded if it appears to the employment tribunal that the claim concerns a matter to which a relevant Code of Practice applies and the employer has failed to comply with that Code in relation to the matter, and that failure was unreasonable. The tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

- 46 In reaching my conclusions, I have taken into account the entirety of the witness evidence heard, the documentary evidence to which I have been referred and the submissions made by both parties.
- 47 Following the findings of fact, I am satisfied that the Claimant was dismissed in breach of contract. The Respondent was required by the Claimant's contract of employment to follow a performance management process and it failed to do so. I do not accept that the Respondent was prevented from complying with this process. The Respondent misunderstood the contractual position and considered it was not required to do so. Accordingly on 24 January 2020, the Claimant was wrongfully dismissed in breach of contract.
- 48 In submissions, the Respondent has encouraged me to find that the Claimant waived this breach of contract and that, by initially seeking to exercise his right to appeal, the Claimant elected to continue with the contract only to abandon it shortly thereafter by failing to attend an appeal hearing.
- 49 I do not accept this analysis of the relevant circumstances. From the Claimant's conduct, I am satisfied that he accepted that his employment had been brought to an end although he did not, of course, accept the reasons

given to him for the Respondent's decision. This is not a case where the contract continued beyond the Claimant's dismissal by, for example, the Claimant asserting that he regarded himself as still employed by the Respondent and that he was available for work if required. The Respondent's act of dismissing the Claimant brought the contract of employment to an end. Accordingly, the Claimant's decision not to proceed with attending the appeal hearing did not amount to a repudiatory breach of contract; the contract had already been brought to an end by the Respondent.

50 As stated, I am entirely satisfied that by failing to follow the contractual procedures and dismissing the Claimant at the meeting on 24 January 2020, without having followed the contractual procedure, the Claimant was wrongfully dismissed.

51 Next, I turn to the assessment of damages for the Claimant's wrongful dismissal. The Claimant is to be put in the position as if the contract had been performed by the Respondent and, it is assumed, that the Respondent would have dismissed the Claimant at the first moment available to it.

52 Pursuant to the contract, the following stages were required:

52.1 *The employee shall be informed by letter the reasons for disciplinary action against them giving an explanation of his/her conduct, capability or other circumstances that have resulted in the action.*

The letter will also contain details of where and when a meeting will take place between the employee and two Managers/Directors. The employee will be given the opportunity to explain. He/she will be given a specific time to improve, accompanied by a verbal warning. Details will be recorded. In the event of satisfactory performance for six months, the record will be cleared and the employee notified of this action.

[clause 11.2.3]

52.2 *If the employee's conduct does not improve within the stated time, another meeting will be arranged and the employee will be interviewed by two Managers/Directors. A formal warning in writing will be given to the employee and all the circumstances recorded. In the event of satisfactory performance over a period of twelve months, the record will be cleared and the employee notified of this action,*

[clause 11.2.4]

52.3 *If there is no improvement, or another offence is committed, a further interview will be arranged (in accordance with paragraph 11.2.4) with two Managers/Directors. When the Managers/Directors have reached*

a decision they will inform the employee and will make recommendations as necessary. Details will be recorded.

[clause 11.2.5]

52.4 *Following the recommendation of the Manager/Director responsible for the employee and before any decision is reached, there will be a full investigation of the facts. After this investigation, the decision of the Executive Management will be made known to the employee by a Director. In the event of the employee refusing to accept this decision, the individual concerned will be informed of his/her right to appeal, within five days, to the Managing Director, who will set up an Appeal Committee consisting of the Managing Director and one other Director.*
[clauses 11.2.6, 11.2.7]

53 Taking account of these multiple stages of the process, I consider that the first moment the Respondent could have completed the process and notified the Claimant of his dismissal would have been on or around 10 April 2020.

54 I have reached this conclusion on the basis of the following dates: that the letter referred to in paragraph 52.1 above was given to the Claimant on 24 January 2020, the first meeting was held on 28 January 2020, a four week period for improvement was given ending on 25 February 2020, the second meeting was held on 28 February 2020, a further four week period for improvement was given ending on 27 March 2020, a third meeting was held on 31 March 2020, a full investigation was carried out and concluded by 7 April 2020 and a decision taken and made known to the Claimant by, say, 10 April 2020.

55 The Claimant is therefore entitled to damages as if this had happened. The Claimant was paid up until the end of January 2020 and received a further months pay (say, for February 2020) and his notice pay. The Claimant should therefore be awarded the salary he would have received in March 2020 and up until 10 April 2020. The Claimant was overpaid his holiday pay by the Respondent, such that he has no further entitlement to additional holiday pay for this period of time.

56 It is clear in this case, and was conceded by the Respondent, that no process was followed to consider with the Claimant the concerns the Respondent had about his performance. The Respondent simply dismissed the Claimant. In this way, I do accept the Claimant's submission that there was a failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. I am also satisfied that that failure was unreasonable. There was no attempt to provide the Claimant with any opportunity to be fully informed of the issues that the Respondent had identified with his performance or for these to be discussed in an appropriate meeting, enabling the Claimant to provide his

response. In the circumstances, I am satisfied that it is just and equitable to increase the award of damages made to the Claimant by 20%.

- 57 I calculate the award of damages in the total sum of £4,570.69. This comprises: a further months pay in the sum of £2606.10, two further weeks pay up until 10 April 2020 in the sum of £1202.81 and a 20% increase in the sum of £761.78.
- 57 In conclusion, it is my judgment that the Claimant's claim of wrongful dismissal is well founded and succeeds. The Respondent shall pay damages to the Claimant in the sum of £4,570.69.

Employment Judge Harrington
21 December 2021

Judgment and Reasons sent to the parties on:
10 January 2022

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For the Tribunal Office

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