THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Davis	**v**	**P2CG Limited**

Heard at: London Central **On**: 28 February – 4 March 2022

Before: **Employment Judge Glennie**
Ms T Breslin
Ms M Jaffe

Representation:
Claimant: In person
Respondent: Mr B Carr QC and Ms T Barsam (Counsel)

JUDGMENT ON PRELIMINARY ISSUE AS TO REMEDIES

1. **The unanimous judgment of the Tribunal is that, in the absence of the discrimination found by the Tribunal to have occurred, the Claimant's employment with the Respondent would have terminated on 4 August 2016.**

2. **The remaining issues as to remedies will be determined at a hearing on a date to be fixed.**

REASONS

1. This hearing was listed to determine the following preliminary issue in relation to remedies: would or might the Claimant's employment have terminated in the absence of the discrimination that the Tribunal has found occurred and if so, when.

2. The Tribunal is unanimous in the reasons that follow.

3. This question can be answered with a date, or a percentage chance, or a combination of these, or in terms such that there is no such chance and

that the Claimant's employment would be continuing indefinitely. This last proposition is the Claimant's primary case. The Respondent's primary case is that the Claimant's employment would inevitably have been terminated on the same date as the one which in fact applied, 4 August 2016.

4. There is a range of possibilities between the parties' primary cases. The evidence and arguments in the present hearing was wide-ranging because of the need to cover all possibilities. In the event, the conclusion reached by the Tribunal is such that it is not necessary to refer to much of the evidence and argument, as it reflects the Respondent's primary case.

5. The Tribunal reminded itself that the burden is on the Respondent to prove its case in this regard.

6. The Tribunal heard further evidence from:

   6.1 Mr Pip Peel.

   6.2 Mr Jason Knight.

   6.3 Mr Douglas Elliott.

   6.4 Mr Barry Shaw (all these 4 on behalf of the Respondent).

   6.5 Mr Mark Davis, the Claimant.

7. There was a bundle of documents, and page numbers in these reasons refer to that bundle unless otherwise indicated. The Claimant also produced a separate bundle of documents in electronic form, described as his electronic disclosure bundle.

The Tribunal's judgment on liability

8. The Tribunal took its judgment and reasons on liability as its starting point. We will not repeat the background to the case, which is apparent from those reasons. The Tribunal's conclusions on liability did not, in the event, correspond with either party's case, in particular (with reference to this hearing) regarding the Respondent's state of knowledge of the Claimant's condition of diabetes. It follows that both parties were conducting their cases in the present hearing constrained by findings made by the Tribunal with which they did not agree (although for diametrically opposed reasons).

9. It is clear, however, that the parties and the Tribunal are bound by the liability findings. The Tribunal found the following findings in its liability reasons to be relevant to its determination of the present issue:

   9.1 (paragraph 16) "The Tribunal found the evidence of witnesses on both sides of the case to be unreliable on different matters. We did not conclude that either the Claimant, or the Respondent's witnesses, were to be preferred in general terms."

9.2 (paragraph 21) the Claimant's role with the Respondent differed from that with previous companies including PIPC, where he had also worked with Mr Peel, among others. The role with the Respondent did not just involve securing meetings with prospective clients: the Claimant would also be involved in making the sales, although not with account management in the longer term.

9.3 (paragraph 22) A sales target of £500,000 per annum was agreed for each of the directors, including the Claimant.

9.4 (paragraphs 32 to 34) There was some degree of dissatisfaction with the Claimant's performance in the latter part of 2015.

9.5 (paragraph 55) On 9 June 2016 Dr Rawling sent the Claimant a written warning. This said that he had delivered gross profit so far of £28,564 against a target for the year of £500,000, among other matters. The warning said that the Claimant had six weeks to recover the position, failing which the Respondent would consider further disciplinary action, up to and including dismissal.

9.6 (paragraph 57) The Claimant had not told the Respondent of his diagnosis by 9 June 2016. This cannot therefore have been the reason for what was said in the warning letter.

9.7 (paragraph 112.3) the Respondent knew of the diagnosis from a point somewhere between 11 July and 3 or 4 August 2016.

9.8 (paragraph 124) The Claimant's disability played some substantial part in the decision to dismiss him, in that "....Mr Peel took into account the Claimant's disability as something that meant that his performance was unlikely to improve, or at least lessened the chances of that occurring."

The present hearing

10. At the commencement of the hearing the Claimant made an application to rely on an expert's report directed to the genuineness or otherwise of various electronic documents. The Tribunal refused permission for this report to be used, for reasons given orally. The Claimant, however, relied on his own evidence, cross-examination and submissions in support of his contention that various documents had been forged. For example, document 49 in the Claimant's electronic disclosure bundle described a director performance review of 30.11.2015 as having properties which showed the document was created on 4.11.1997 and last modified on 9.6.2017.

11. Another example, which did not depend entirely on the electronic properties of documents, was a document at pages 1357 to 1358 illustrating the perceived attitude of various individuals at Deutsche Bank to the

Respondent's proposals. Metadata showed that this document was created on 30 May 2016, modified on 1 June 2016 and printed on 13 June 2016. The Claimant had located LinkedIn profiles for two individuals who appeared in the document which suggested that they did not join Deutsche Bank until November and October 2016 respectively.

12. Matters such as these, and the Tribunal's finding at the liability stage about manipulation of the email from John Lewis so as to insert the Claimant's name alongside a complaint, led the Claimant to make two submissions.

13. One was that the Respondent's evidence could not be relied upon at all. The other was that none of the documents produced by the Respondent could be relied upon. The Claimant relied on these arguments in support of his contention that the Respondent's witnesses (and in particular, Mr Peel) knew that he would not have been dismissed in the absence of the discrimination. He put it in this way in his submissions: "If the Respondent really believed I would have been dismissed anyway they would not have needed to forge documents". He also said: "There are undoubtedly more [forgeries] that we cannot see. The Respondent should not be allowed to prosper in the light of their contempt."

14. We reminded ourselves once again that the burden is on the Respondent to make out its case, and that it must do so by way of credible evidence. We were also very much alive to the point that assertions by a respondent in the present circumstances that they would have made the same decision in the absence of the element of discrimination should be treated with caution, as there is a clear commercial reason why a respondent would say this.

15. The Tribunal found, however, that there are three difficulties with the Claimant's approach. One is that the general point that finding that a party's evidence lacks credibility would not, of itself, mean that the opposite of what that party is saying must be true.

16. Second, although the Claimant asserted that many documents were forged or manipulated, he was not able to say what alternative content should have been included in them. For example, the Claimant asserted that the board minutes produced by the Respondent had been forged with a view to defending this claim, saying in submissions: "They must have felt their story was not strong enough". But he also said that it was impossible to know what the "true" content was: he only knew that they had been changed.

17. The third, and in the Tribunal's judgement the central point, concerns the warning given on 9 June 2016 in the email at page 581. Although the Claimant strongly disputes that this was justified, he has at all times accepted that the email is genuine and that the warning was given. The Tribunal's findings about the Respondent's knowledge of the Claimant's condition inescapably mean that the reason or reasons for the warning must have been non-discriminatory. The Respondent did not know about the Claimant's condition at this time.

18. The most obvious explanation for the warning is the one given by the Respondent: namely, dissatisfaction with the Claimant's performance. The Claimant strongly disagrees with the suggestion that there was anything to criticise about his performance, but even if the dissatisfaction was unreasonable, if it was real, it was the reason for the warning being given. There is no evidential basis for the Tribunal to find that there was some other reason behind the warning, but even if there was, that too must have been non-discriminatory because the Respondent did not know about the Claimant's condition at the time.

19. There followed a period of just under two months from the date of the warning to the Claimant's dismissal. During this period the Claimant did not achieve any sales. The pipeline documents for 2 August 2016 at pages 630-632 showed the following:

    19.1 A proposal of business with GSK having a 50% prospect of achieving revenue of £90,000.

    19.2 An opportunity with Waitrose with a 25% prospect of success of raising revenue of £170,000.

    19.3 Seven leads with potential revenue shown.

20. The Claimant stated that his pipeline was in fact better than this suggested and that he had maintained a shadow pipeline (in a meeting tracker). He also said in evidence that his way of working meant that he would bring in one big account per year, referring here to his work with the Respondent in previous companies such as PIPC.

21. As identified above as found in its liability reasons, the Tribunal has concluded that this was not what the Respondent required of the Claimant in his current role as a sales director. In particular, he was expected to make sales rather than simply create opportunities for sales. We found that by 2 August 2016 it was apparent to the Respondent that the Claimant had not turned the position around as required by the warning given in June. He had not made any sales, nor did he have any strong prospects of doing so. The prospect of his reaching or even getting near to his target for the year was no better than it had been in June.

22. Referring again to our decision on liability, the Tribunal found that it was not a coincidence that Mr Peel arranged the conference call of 4 August 2016 the day after the Claimant's poor performance at the meeting at Osterley on 3 August. It seemed to us probable that, had that not occurred, the question of the Claimant's continued employment would not have been addressed until the next board meeting.

23. The question that we have to determine, however, is whether the Respondent would have decided to dismiss the Claimant on 4 August had the element of discrimination not been present. That element was the discriminatory assumption or belief that the Claimant's condition meant that

his performance was unlikely to improve, or that it lessened the chances of that improvement occurring.

24. In assessing this matter the Tribunal has to take account of any reasonable adjustments that should have been made in the circumstances. The Claimant's position was and continues to be that his performance remained good at all times. He did not say to the Respondent at the time that his ability to do his job was affected by his condition. In fact, he maintained that 2016 was his "best year ever". The Claimant took on a broadly similar role with another company in November 2016 and on his own evidence performed very well in that job.

25. The Tribunal found that an employer in this situation might have sought advice about the Claimant's condition and any adjustments that should be made in respect of it: but had that inquiry have been made, the evidence is that no necessary adjustments would have been identified.

26. In the absence of the discriminatory assumption, the following relevant factors would still have applied as at 4 August 2016:

    26.1 The Claimant had not completed any sales since the June warning.

    26.2 The Claimant's pipeline did not suggest any real chance of meeting or getting near to his annual target.

    26.3 The Claimant was maintaining that his performance was good and that the Respondent had no reason to be concerned about it.

    26.4 The Claimant did not, at the meeting with Dr Rawling or otherwise, identify any immediate prospect of a sale such as might have convinced the Respondent to retain him in the hope that this might be realised.

    26.5 The Claimant's poor performance at the meeting on 3 August at Osterley.

27. The Tribunal therefore found that it was inevitable that the Claimant would have been dismissed on 4 August 2016 even in the absence of the discrimination. The discriminatory assumption was a factor in Mr Peel's mind when he decided to dismiss the Claimant; but if it were removed from consideration, the 5 factors listed above would still have been applicable. Given the terms of the June warning, the absence of sales or strong prospects of sales, and the Claimant's failure to accept that there was any problem about his performance, the Tribunal found that the Respondent was bound to have decided that he should be dismissed.

28. The Tribunal also found it probable that the precise timing of the decision to dismiss followed from Mr Peel's dissatisfaction with the Claimant's performance at the meeting on 3 August, in that it brought forward the

inevitable decision by a short period. That too would inevitably have been the same had the discriminatory assumption not been present.

29. The Tribunal's decision on this preliminary issue does not determine the entirety of the case regarding remedies. In the absence of agreement between the parties, the remaining issues will have to be determined at a further hearing.

Employment Judge Glennie

Employment Judge Glennie

Dated: ……..……28 May 2022……..……..

Judgment sent to the parties on:

28/05/2022.

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For the Tribunal Office