



EMPLOYMENT TRIBUNALS

Claimant
Mr D Wade

Respondent
Jansen UK Ltd

Heard at: Leeds by CVP **On:** 8 February 2023
Before: Employment Judge Davies

Appearances

For the Claimant: Ms Harty (counsel)
For the Respondent: Ms Kennedy-Curnow (Peninsula)

JUDGMENT having been given to the parties on 8 February 2023 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a complaint of unfair dismissal brought by the Claimant Mr D Wade against his former employer Jansen UK Ltd.
2. The Claimant was represented by Ms Harty (counsel) and the Respondent by Ms Kennedy-Curnow (Peninsula).
3. There was an agreed hearing file. I admitted a small number of additional documents during the hearing by agreement.
4. For the Respondent, I heard evidence from Mr E Ryan (Managing Director) and Mr D Lisle (Director). I heard evidence from the Claimant on his own behalf.

Issues

5. At the outset of the hearing, the Respondent conceded that it did not act reasonably in dismissing the Claimant, because of procedural shortcomings. The issues for me to decide were therefore as follows.

Unfair dismissal

- 5.1 What compensatory award should be made? In particular:
 - 5.1.1 What financial losses has the dismissal caused the Claimant?

- 5.1.2 Has the claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?
- 5.1.3 If not, for what period of loss should the Claimant be compensated?
- 5.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

Findings of fact

- 6. I found both the Respondent witnesses to be wholly lacking in credibility. Their witness statements were in numerous material respects inconsistent with documents or their oral evidence. That cannot be explained by oversight. Their statements were brief and they confirmed that they had read them and that they were true. At best, their evidence demonstrated a casual disregard for accuracy; at worst, deliberate dishonesty. Either way, I approached their evidence on the basis it was wholly unreliable. By way of a single example only:
 - 6.1 Mr Ryan gave evidence in his witness statement that the Claimant's original target was £2m. He accepted in cross-examination, when shown the written contract, that the Claimant's original target was £250k. His witness statement said that the Claimant's original target was subsequently reduced to £1m. When asked about that in his oral evidence he said for the first time that £2m was a shared target with someone else. His evidence about this was shifting and inconsistent. The evidence in his witness statement was entirely inaccurate.
 - 6.2 Mr Lisle said in his witness statement that the Claimant only ever sold one system throughout his entire employment. This was said in a single sentence paragraph, that was just one of fifteen. Mr Lisle accepted in cross-examination that he sold 4 large and 2 small systems. He was fully aware of this throughout. There was no plausible explanation for the inaccuracy in his witness statement.
- 7. By contrast, I found the Claimant's evidence truthful, consistent and reliable. There was one respect in which his witness statement was slightly different from his oral evidence, because he accepted in cross-examination that he might have suggested fire and re-hire, after he had been told he was to be dismissed to stop him acquiring employment law rights. I did not find that that fundamentally undermined his credibility. The evidence had the same overall thrust. This seemed to me simply to be an unremarkable concession in cross-examination when his memory was jogged, not a wholesale re-invention.
- 8. There was a complete absence of documentary evidence from the Respondent about targets, one-to-ones, performance reviews or warnings about performance.
- 9. I made the following findings. The Respondent, Jansen UK Ltd, is a supplier of poultry systems and equipment to breeders, broilers and layers across the UK. The Claimant started work for the Respondent as a Sales Manager with effect from 1 July 2019. His initial sales target was £250k. That equated to selling one large system.

10. The Claimant did not reach his target in the first year. He quoted sales of £2.4m, but only achieved sales of £30,860.
11. In 2020, the Claimant says his target was to sell 2-3 systems. Mr Ryan said in his witness statement that the Claimant's target was originally £2m (7 units) then revised down to £1m (4 units). He accepted in cross-examination that £2m was not the original target, then said the £2m was joint with someone else. Mr Lisle said the same, that his target was £2m then reduced to £1m. He made no mention of the target being shared with someone. Given their lack of credibility and the total absence of documentary evidence I preferred the Claimant's evidence. For same reasons, I accept his evidence that his target for 2021 and 2022 was 3-4 systems.
12. In 2020 the Claimant quoted nearly £10m and achieved sales of £854,365, exceeding his target.
13. In 2021 the Claimant quoted £6m but only achieved sales of £61,190. Obviously, he did not sell a large system that year and was substantially short of his target. There were a number of factors behind that – the pandemic, a brief period of furlough, inability to meet clients face to face, Brexit, and rising costs meaning that quotes had to be re-calculated before sales had been concluded.
14. In May 2021, Mr Lisle had a discussion with the Claimant about dismissal. I accept the Claimant's account of the conversation. He was told that he was to be dismissed because he had worked for the Respondent for one year eleven months and they did not want him to acquire employment rights. There was a second conversation, which the Claimant recorded. Agreement was reached that the Claimant would pretend to resign and would be reinstated after one month. That sham was originally relied on by the Respondent in its grounds of resistance in these proceedings as being genuine, so as to defeat the Claimant's unfair dismissal claim. It was only after a preliminary hearing at which EJ Maidment ordered disclosure and consideration of the Claimant's recording of the second conversation, that the Respondent conceded that the Claimant had two years' service.
15. The relevance of that today is that by May 2021 the Claimant's performance was evidently not up to target, but he was not dismissed for poor performance. He was purportedly dismissed and re-engaged to try and prevent him acquiring employment rights. The fact that it was the Claimant who suggested they re-engage him after he had been told he was to be dismissed does not alter that.
16. At the end of 2021 the Claimant had a heart attack and was off work for three weeks.
17. By the end of January 2022 the Claimant had quoted £2.8m and won £288,048. He was well on track to achieve his target. There was a sales meeting that month. The Claimant says that it was positive. Mr Lisle commented that he was their hardest working employee and things were looking great on the sales side. He was given a loose verbal target of selling 3 to 4 systems. There were still 11 months of the sales year to go. I accepted his evidence.

18. On 28 February 2022, Mr Ryan called the Claimant and dismissed him for “poor performance.” The Claimant had no prior warning and no process was followed. Mr Ryan said he wanted to set the Claimant the challenge of selling another system by the end of March. If he did, they would look at it again. That was all confirmed in writing by email. The Claimant replied, expressing shock and complaining that Mr Ryan and subsequently called him to berate him about a quote and asked if wanted him to “wipe his arse” for him.
19. I accepted the Claimant’s evidence about this. Mr Ryan’s was again inconsistent between his witness statement and his oral evidence.
20. Mr Lisle called the Claimant in March and offered to extend his notice by a month. The Claimant refused. He was not being offered any guarantee of reinstatement, just the suggestion that the Respondent would look again at his dismissal. He considered that it would be better to spend time looking for a new job, particularly as he had still had no response from Mr Ryan to the email he had sent him, now several weeks ago.
21. The Respondent said that the Claimant was dismissed because of not meeting targets. There was no documented concern or warning about that. The Claimant said no concern ever raised or warning given. I accept his evidence.
22. It made no sense that the Claimant would be dismissed for poor performance on 28 February 2022. He had had a poor year in 2021 and was not dismissed. At the start of 2022 he was already well on track to meet his target and was suddenly dismissed. Mr Lisle was asked about this when he gave his evidence. He said for the first time that there was a dispute about a £3k bonus that the Claimant felt he should have and the Respondent did not. There was a conversation between the Claimant and Mr Lisle. Mr Lisle said that he did not feel the Claimant was owed the bonus, because of poor performance. The Claimant said that he was contractually entitled to it. Mr Lisle told him that he begrudged paying it because of the Claimant’s poor performance. The Claimant said that that was Mr Lisle’s problem, not his. That got him thinking that the Claimant did not really care, so he spoke to Mr Ryan and said that it was not working. They agreed to terminate the Claimant’s employment.
23. Mr Lisle then attempted to backtrack in his evidence. He said that this was what made them decide to let the Claimant go, but they let him go because of low turnover.
24. I found that the reason the Claimant was dismissed was because he had insisted on being paid his contractual £3k bonus and Mr Lisle did not like it. That makes sense of why he was dismissed on 28 February 2022, at a time when his sales performance was going strongly, when he had not been dismissed in 2021 when his sales performance was less strong (for understandable reasons).
25. I pause to note that despite promises to pay that £3k, the Respondent never in fact paid. It is not claimed in these proceedings, but that is another reflection on the integrity of the Respondent.

26. The Claimant gave evidence that the profit for the Respondent on his sales was 17.4%. The Respondent said that it was 10%. I accept the Claimant's evidence. He wrote that figure into every quote he made, on Mr Ryan's instructions. The Respondent did not produce a single quote or document to evidence a different rate.
27. The Claimant has applied for hundreds of jobs over the past year. He still has not been successful. The Respondent suggested to him that his salary expectations were too high. They clearly were not. The many applications provided in evidence – which is not all of them – show a range of salaries above and below the Claimant's salary at the Respondent. I accept his evidence that he applies for every job in the salary bracket £30k-£70k if he has the skills and fit. He also applies for jobs at a lower salary. The only interview he has had was for a role in the Prison service paying a salary of £23k.
28. The Respondent did not produce a single advert or piece of evidence of a role at a lower (or any) rate of pay that the Claimant should and could have applied for.
29. The Claimant's gross weekly pay was £692.31 and the Respondent made employer's pension contributions of £120 per month or £27.70 per week.

Legal principles

30. As regards the remedy for unfair dismissal, a basic award is payable under s 122 and a compensatory award under s 123 of the Employment Rights Act 1996. The compensatory award is to be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as it is attributable to action taken by the employer.
31. Under s 123(4), the principle that employees must take reasonable steps to mitigate their losses applies. The dismissed employee should act as a reasonable person would act if they had no hope of seeking compensation from their previous employer: *Archbold Frieghtage Ltd v Wilson* [1974] IRLR 10. The Tribunal should ask what steps should reasonably have been taken; and when, if those steps had been taken, the individual have secured an equivalent alternative income: see e.g *Savage v Saxena* [1998] ICR 357. The burden of proving that the individual has not taken reasonable steps to mitigate their loss is on the employer.
32. Where the Tribunal considers that there is a chance that the employee would have been fairly dismissed in any event, then the compensation awarded may be reduced accordingly: *Polkey v A E Dayton Services Ltd* [1987] 3 All ER 974. Guidance on how to approach that issue is set out in the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568.
33. Under s 124(1ZA), the maximum compensatory award payable is the lower of a specified sum or 52 multiplied by a week's pay of the person concerned. The figure under s 124(1ZA)(b) is not meant to represent 52 weeks' losses. It is a statutory method of calculating the maximum compensatory award payable.

Case law makes clear that a week's pay is to be calculated in accordance with s 220 and 221 Employment Rights Act 1996. A week's pay is the amount payable under the contract of employment. It does not include the value of benefits in kind but can include pension contributions paid by the employer, as these are sums payable by it under the contract of employment: *University of Sunderland v Drossou* [2017] UKEAT 0341_16_1306.

Application of the law to the facts

34. I have made a finding about the reason for dismissal because of the Respondent's contention that the Claimant would have been fairly dismissed in any event. The reason for dismissal was because the Claimant insisted on payment of his £3k contractual bonus, not because of poor sales performance.
35. In those circumstances, the Respondent has failed to show that there was any chance it would have fairly dismissed the Claimant in any event.
36. The Respondent insists it would have fairly dismissed the Claimant in any event because he did not meet the costs of employing him. I do not need to get into the details of the arguments advanced about what those costs were. There were fair points on both sides – the profit margin was 17.4% not 10%, but the Claimant's costs include tax, NI, expenses and so on, not just his salary. I do not go into the detail of whether or not the Claimant met the costs of employing him because in 2021 he clearly did not meet those costs, but he was not dismissed. I do not accept that there was any chance he would have been dismissed for that reason sometime later in 2022, let alone fairly dismissed. That would have required warnings, a chance to improve and support to improve. There is no prospect dismissal would have occurred. Already by February the Claimant had sold one system and there were many more in pipeline. There was every chance he would have met his target that year. The fact that he did not make further sales during his notice period is hardly persuasive evidence. With the best will in the world, it is hard to be a convincing salesperson in those circumstances.
37. The Respondent has not discharged the burden of proving that the Claimant failed to mitigate his losses.
38. First, it was wholly reasonable not to accept the "offer" of a further month's notice, with no promise of anything concrete at the end. It was entirely reasonable not to want to return to a company whose way of doing business is for the managing director to sack you without warning by phone, ask you two days later if you want him to "wipe your arse", and then fail to respond to your communications about your dismissal. That was the more so given that there was no guarantee of further work at the end of the month. It was reasonable in those circumstances to focus on looking for a new job.
39. Secondly, the Claimant took every reasonable step to mitigate his losses. He applied for hundreds of jobs, at a range of salaries down to £30k and below and up to £70k. Unfortunately, he has not yet been successful. In those circumstances, his financial losses caused by his unfair dismissal are his full

losses to date, plus losses for a further period that it will take him to obtain a new job. I consider that is likely to be a further 3 to 6 months at least.

40. The Claimant's full losses include his loss of salary and bonus, pension losses and the loss of his company car, phone and fuel.
41. It is not necessary to calculate those losses in any detail, because it is immediately apparent that they will substantially exceed the statutory cap under s 124(1ZA)(b) Employment Rights Act 1996, namely 52 multiplied by a week's pay.
42. The cap in the Claimant's case is $52 \times (\pounds 692.31 \text{ gross weekly pay} + \pounds 27.70 \text{ employer pension contributions}) = \pounds 37,560$. That is the compensatory award payable to him.
43. The basic award was agreed as $\pounds 1632$.

Employment Judge Davies

10 March 2023