EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Berisha**

Respondent: **South West Aesthetics Ltd**

Heard at: **London South, by CVP**

On: **7 October 2024**

Before: **EJ Harley**

Representation
Claimant: Failed to attend
Respondent: Mr Howells (Counsel)

MY JUDGMENT of 7 October 2024 having been sent to the parties on 11 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1.This case was listed for a three-day hearing. The final hearing of this case was converted to a CVP hearing last Friday, after an application to adjourn made by the Claimant (the last working day before the hearing) was rejected by REJ Khalil. The REJ, having considered the submission and the medical evidence submitted, found that it was not evidence sufficient to warrant an adjournment. He was not satisfied that, while the evidence indicated he was unfit for work, the evidence did not support the contention that the Claimant was unable to attend a hearing in person or via CVP. It was his Order that the listing stand, and the case be converted to CVP.

2. I was shown this morning further correspondence from the Claimant sent on Friday 4 October after receiving the REJ's decision, and being sent the CVP joining instructions, disputing the decision, and stating that he would not appear at the hearing (ignoring the Tribunal's order). In that message he confirmed that he works from home. He sent a further email on Sunday (both these emails were sent outside working hours) claiming that - despite the fact that he works from home – his accommodation was not appropriate for a remote hearing. He made further assertions about his medical conditions which were not sustained by the medical evidence he had supplied or developed by new medical evidence. He complained that the Tribunal did not contact his witnesses. This is not the

Tribunal's role, unless there has been an application for a witness summons, which was not done here. It was his responsibility to notify and arrange for his witnesses to attend the hearing. No witnesses attended the hearing.

3. This matter was listed since Feb 2024. It should have been a priority for the Claimant to ensure he was in a position to attend this hearing and pursue his case. He is a home worker, so his suggestion that he could not join is not credible. With regards to the application – this was considered and rejected. He showed a lack of respect for the process by not attending the hearing which was listed to consider his appeal, and which he knew was scheduled to go on. It is not for any party to dictate the hearing schedule to the Tribunal.

4. There has been a significant history of the Claimant's non-compliance with orders, and his making late requests to postpone hearings, culminating in his refusal to supply his witness statement to the Respondent in accordance with Case Management requirements, which was remedied only after the intervention of the Tribunal. An adjournment now would have led to a relisting of this matter in 2026. This would not have been in the spirit of the overriding objective of dealing with cases without delay. The Claimants behaviour regarding this hearing and previous hearings indicates that he is not supporting the tribunal in its overriding objective by advancing his claim in an appropriate manner. The Respondent attended, as has his Counsel, incurring expenses and costs. The Judge was allocated the case and prepared to hear the matter having not been advised that the Claimant was not intending to attend. The clerk called the Claimant on his telephone at the Judges request, making 5 separate phone calls, none of which was answered. The clerk left a phone message advising the claimant to contact the Tribunal. He did not do so. The Claimant was fully aware he was expected to attend, and that his application to adjourn was denied. In his absence, the decision already having been made that this hearing should proceed, I considered the application to proceed in the Claimants absence and on the evidence supplied and considering the circumstances I was presented with I decided to proceed, as I am entitled to do under Rule 47.

5. The Respondent was represented by Mr Howells. I heard evidence under oath from Dr Kaedby, for the Respondent. Dr Kaedby adopted his witness statement, and I admitted it into evidence. I asked him a number of supplementary questions. In addition, even though the Claimant did not attend, and did not adopt his witness statement, I took the issues he raised in the statement and put those to Dr Keadby, in order to ensure that the elements of the Claimants case were considered, and that Dr Kaedby had an opportunity to answer accusations made. I have also had the benefit of a written submission from Mr Howells.

6. A list of issues was agreed at a Preliminary Hearing before EJ McCluskey and captured in a Case Management Order of 23 February 2024. These were as follows:

Unfair dismissal

1.1 Was the claimant dismissed?
1.2 What was the reason or principal reason for the claimant's dismissal? The respondent relies upon capability (performance) as being the reason
1.3 Was that reason a potentially fair reason within the meaning of section 98(2) of the ERA?

1.4 If the reason was capability, did the respondent act reasonably in treating this as a sufficient reason to dismiss the claimant in all of the circumstances? Specifically:

1.4.1. Did the respondent adequately warn the claimant and give him a chance to improve;

1.4.2. Did the dismissal fall within the range of reasonable responses that was open to the respondent in the circumstances?

Remedy for unfair dismissal

2. If there is a compensatory award, how much should it be? The Tribunal will decide:

2.4.1. What financial losses has the dismissal caused the claimant?

2.4.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.4.3. If not, for what period of loss should the claimant be compensated?

2.4.4. 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?

2.4.5. If so, should the claimant's compensation be reduced? By how much?

2.4.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.4.7. Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

2.4.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.4.9. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by their blameworthy conduct?

2.4.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.4.11 Does the statutory cap of fifty-two weeks' pay apply?

2.4.12 What basic award is payable to the claimant, if any?

2.4.13 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Holiday Pay

3.1 What was the claimant's leave year?

3.2 How much of the leave year had passed when the claimant's employment ended?

3.3 How much leave had accrued for the year by that date?

3.4 How much paid leave had the claimant taken in the year?

3.5 Were any days carried over from previous holiday years?

3.6 How many days remain unpaid?

3.7 What is the relevant daily rate of pay?

4. Wrongful dismissal

4.1 What was the claimant's notice period?
4.2 Was the claimant paid for that notice period?
4.3 If not, was the claimant wrongfully dismissed? Specifically:
  4.3.1 Did the Respondent breach the Claimant's contract of employment by dismissing them without notice or payment in lieu of notice?; and
  4.3.2 Did the Claimant's conduct amount to a repudiatory breach of their contract of employment and was that breach accepted by the Respondent when it dismissed the Claimant?
4.4 If the claimant was wrongfully dismissed, what sums (if any) should be awarded to the Claimant by way of damages for breach of contract?

Facts

7. I have found these facts on the balance of probabilities, on the basis of the evidence I heard, statements I reviewed and materials in the agreed bundle. For the avoidance of doubt, where there is a dispute over a fact and I have stated a finding, that is my decision as to that issue.

8. The Claimant was employed as a Sales Representative for the Respondent from 1st June 2019 and was given notice of dismissal by the Respondent on 9 September 2022, the employment ended with effect from 8th December 2022.

9. The Respondent is a small start-up business, selling medical grade aesthetic products, to be sold to aesthetic clinics, and other professional people qualified, certified and insured to administer these types of treatments. The Claimants' job involved finding leads for sales of these aesthetic medical products, and converting those leads into sales. This work involved a degree of demonstration, and so he was trained in the presentation and delivery of some of these non-invasive beauty treatments. The Claimant was at all times working alongside one other salesperson, covering other geographical areas. The Claimant was dismissed for failing to meet agreed sales targets.

10. Key allegations the Claimant made were that the Respondent paid him less than the industry standard. Dr Kaedby confirmed that the Claimant was paid less than his first colleague (who subsequently left the business), but that this colleague was already trained in the area of practice, had experience in medical sales and brought existing contacts with him, so these two employees were not initially on an equal footing.

11. The Claimant had suggested that the company was unsupportive during a bereavement. In evidence I was told that the Claimant was in fact given time off to attend a funeral abroad, that he was not contacted or disturbed with work queries while he was away, and he was not contacted until after he returned to the UK and that it was he himself who asked to return to work, to relieve loneliness. I accepted that account.

12. . The Claimant alleged in his statement that his salary was reduced without explanation. The evidence supplied in the agreed bundle clearly indicates that the reason and basis for the reduction was discussed, and clearly communicated to the Claimant. I saw evidence that on 11 Jan 2022, capturing the conversation which had taken place at a performance meeting, that the Claimant was given a warning to improve his performance, to meet a 5k per month sales target. The email referred to cost control measures (a salary cut) which would have to be put in place if the targets were not met. The target was evidently discussed, explained and agreed. I probed the basis for this target and was informed on oath by Dr Kaedby that the Claimant's colleague was achieving three times the target value, so that this was an achievable goal. Notification that the salary cut was being actioned owing to his failure to meet targets was communicated on 8 March 2022, and a contractual variation of the same date was signed and dated by the Claimant.

13. An improvement plan was set out and agreed from April 2022, detailing support and assistance which was identified as relevant. It emerged that one issue that arose and affected results was that the Claimant despite being given steers on the issue repeatedly targeted non-aesthetic beauty parlours which were not set up for or had staff trained in administering aesthetic beauty treatments. The targets were revisited at meetings on 14 April, 16 June, and 27 July. The claimant attended these meetings.

14. The Claimant had suggested that he was unable to source stock for clients, but the only specific stock issue identified was regarding what emerged was a discontinued line of face masks which were no longer stocked as the manufacturer refused to adapt their processes to maintain compliance with UK standards. He complained that he was offered less advantageous sales terms than his colleague. The Claimant produced no evidence to substantiate this allegation. The Claimant suggested that his clients were underserved by the business in terms of delivery times. The Respondent explained this to be a reference to one client based in Chelsea who asked for same day delivery on a Sunday (which was in any event only offered to clients close to the business' base, where the owners could offer to drop off stock on their way home). The Respondent agreed as a favour to meet her at the warehouse to provide the product, and having done so she did not show up.

15. The Claimant complained about losing his west London sales area, but it emerged that this was by agreement and that he was granted in its place by way of replacement the Essex area, where there is a very strong market for these products. Dr Kaedby denied the allegation that he or his colleague mocked the Claimant in a PIP meeting.

16. A final warning was issued to the Claimant in July 2022. The warning offered an opportunity to appeal the warning. The Claimant did not appeal. The warning outlined his underperformance issues. The Claimant did not challenge that allegation. He was given three months' notice of termination on 9 September 2022.

17. Dr Kaedby then outlined that the Claimant had through his actions generated a serious client complaint on 3 November. The claimant while performing a procedure - for which he was not certified by the business, and using a product they did not sell, - upset a customer, and then proceeded to use course and

unprofessional language to the business' client, who the Claimant had been introduced to in the context of the Respondents business. He called her "dumb one dumbo" and that they should "go f*ck yourselves". It also appears that this incident happened on company time. He was sent on 'gardening leave" for the remainder of his notice period and was asked to take 9 days leave having been given more than 18 days' notice to do so. The Claimant responded saying he did not recognise the letter or accept it. The employment came to an end on 8 December 2022.

The Law

19. Where dismissal is conceded, the Respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in s.98(1) and (2) of the Employment Rights Act 1996 ("ERA 1996").

> "98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:
> (a) The reason (or, if more than one, the principal reason) for the dismissal, and
> (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it:
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do…".

20. Section 98(3)(a) of the ERA 1996 defines capability as "in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality". If such a potentially fair reason is proven, the next question is whether the decision to dismiss was fair. Section 98(4) of the ERA 1996 states:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
> (a) Depends on the whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) Shall be determined in accordance with equity and the substantial merits of the case".

21. The essential elements to justify a dismissal for capability are captured in case law, but in essence require – that the employee be made aware of concerns, the employee be given time to improve in relation to those areas of concern, be warned of the consequences of failing to meet the concerns.

22. Counsel referred me to a number of cases. The case of Sutton & Gates (Luton) Ltd v Boxall [1978] ICR 67 [71 G to H] which explains the importance of warning and fair time to improve performance in capability dismissals: it speaks of giving a warning, suggests doing so several times, giving the employee an

opportunity to improve but if no improvement is forthcoming the employer is entitled to say , “we cannot keep you any longer.”.

23. In Wincanton Group PLC v Stone [2013] ICR D6 [14 to 17], the EAT held that a Tribunal must remember that a final written warning always implies, subject only to any contractual term to the contrary, that any subsequent misconduct of whatever nature will usually be met with dismissal and only exceptionally will dismissal not occur.

24. In respect of an employer’s reliance on a final written warning, the starting point should always be s.98(4) of the ERA 1996, namely whether it was reasonable for the employer to treat the reason for dismissal as sufficient to dismiss the Claimant. This involves considering whether it was reasonable to rely on a previous warning.

25. Turning to the issues in the case:

Unfair dismissal

1.1 Was the Claimant dismissed?
This is not in issue; the Claimant was dismissed from his job.

1.2 What was the reason or principal reason for the Claimant’s dismissal?
The Respondent relies upon capability (performance) as being the reason. There is no dispute that this was the reason.

1.3 Was that reason a potentially fair reason within the meaning of section 98(2) of the ERA? *Yes, capability is a potential fair reason.*

1.4 If the reason was capability, did the Respondent act reasonably in treating this as a sufficient reason to dismiss the Claimant in all of the circumstances? Specifically:

1.4.1 Did the Respondent adequately warn the Claimant and give him a chance to improve?

26. I saw evidence that on 11 Jan 2022, reflecting a conversation at a performance meeting that the Claimant was given a warning to improve his performance, to meet a 5k per month sales target. The target was discussed, explained and agreed. These targets were revisited at meetings on 14 April, 16 June, and 27 July. The claimant attended these meetings. He has not disputed in evidence that this was the agreed target, or that he ever met this target. As to his allegation that he faced hurdles that his colleague did not - it simply makes no sense that a business employing only two sales people, and relying on their sales to grow the business, would deliberately make it more difficult for one of them to sell their products, and he produced no evidence to sustain such a charge. It is clear that the issue was live between the parties, that the Claimant was aware of the performance issue and the basis for the concern and was given an opportunity to improve his performance.

27. A final warning was issued to the Claimant in July 2022. The warning offered an opportunity to appeal the warning. The Claimant did not appeal that warning. The warning outlined his underperformance issues. The Claimant did not challenge that allegation as being incorrect. There is therefore nothing to

suggest that this was an ill founded or inappropriate warning. It was clear to the business that by September there was no improvement possible from this employee. The Claimant was clearly warned, and was given the time, opportunity and support, to improve his performance.

1.4.2 Did the dismissal fall within the range of reasonable responses that was open to the Respondent in the circumstances?

28. Here the business was faced with a situation where the Claimant was warned in January that there was an issue and given targets to meet. The target is not met in any month he worked in the role. The issue is revisited on three further occasions and on a fourth (Sept 2022) he is given notice of dismissal. Bearing in mind that this was a small business, dependent on the sales of two sales people to sustain and grow the business, it was reasonable, given its resources and faced with ongoing losses (in part exacerbated by the Claimants inability to meet let alone surpass his sales targets), and having taken all the steps that they did to assist him, to dismiss the Claimant.

29. I have also noted the unprofessional behaviour the Claimant exhibited to the business's client, which included selling and administering products which the company did not sell or supply. Given the context of the existing business relationship between the company and the client - and the exposure this created for the company in the event of legal action, this level of unprofessional behaviour would have – in my view, on the evidence I was shown and heard - justified summary dismissal of the claimant without notice.

The claim for Unfair Dismissal is not well founded. This means that the dismissal was fair and the claim is dismissed. The question of remedy therefore falls away.

Holiday pay

30. The Claimant's witness statement did not identify the basis for his holiday pay claim. The exchanges between the parties in the bundle show that the Claimant was challenging the basis for requiring him to take 9 out of 11 days' worth of accrued annual leave during his garden leave. The law provides[1] that so long as the employee is provided with notice twice the length of the period of leave to be taken the employer can, if contractually sound, have the employee take that leave[2]. This is what occurred, leaving two days which was paid in the final salary payment as per the unchallenged salary statement. The claim form identified the full year's leave entitlement (wrongly captured as 28 days plus bank holidays, the contract provides for 28 days including bank holidays). This is not addressed in the statement, but it was not the tribunals understanding from the papers that the Claimant had not taken any leave during the year (had that been the case I would expect that to have been raised when the controversy arose between the parties in September). It is reasonable to assume that the figure in issue was the 11 days mentioned. In any event the Claimant did not outline any basis for claiming a full years unpaid leave, we have been offered no evidence on the bundle on that point, and the Claimant has not attended to assist us. Therefore I have no option but to dismiss this aspect of the claim.

[1] Regulation 15(3), Working Time Regulations 1998
[2] Regulation 15(2), Working Time Regulations 1998

The claim for Holiday pay is not made out and is dismissed.

31. The claim for Wrongful dismissal

4.1 What was the Claimant's notice period? *3 months*
4.2 Was the Claimant paid for that notice period? *Yes.*
Having been paid for his notice period he was not subject to wrongful dismissal.

The claim for wrongful dismissal is therefore not well founded and is dismissed.

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Employment Judge **Harley**

Date: 22 October 2024