



EMPLOYMENT TRIBUNALS

Claimant: Mr M. Worth

Respondent: Trackaphone Limited

Heard at: North Shields

On: Wednesday 1 November 2017
Tuesday 30 January 2018
Wednesday 31 January 2018

Before: Employment Judge Speker OBE DL (sitting alone)

Representation

Claimant: Mr B. Uduje - Counsel

Respondent: Mr Simon Goldberg - Counsel

JUDGMENT

1. The claimant was fairly dismissed. His unfair dismissal claim fails.
2. The claim for wrongful dismissal is dismissed.

REASONS

1 This Hearing involves claims by Martin Worth against Trackaphone Limited alleging unfair dismissal and wrongful dismissal.

2 Evidence for the Respondent was from three witnesses, namely Mr Philip Derry, Director and Chief Executive, Alan Davidson, Commercial Manager formerly a Director and Simon Derry, Director CTO and shareholder. Mr Phil Derry acted as the Investigating Officer, Mr Davidson was the Dismissing Officer and Mr Simon Derry, who is the son of Mr Philip Derry heard the Claimant's appeal.

3 The Claimant gave evidence at the Tribunal on his own behalf. I was provided with a bundle of documents consisting of 450 pages.

4 The issues in the case had been previously agreed in a Schedule filed with the Tribunal and set out the standard issues to be resolved in an unfair dismissal claim and a wrongful dismissal claim.

5 I find the following facts:-

- 5.1 Trackaphone Limited is a small company with only five employees, including the Directors. The business of the company is the provision of location tracking devices designed to protect vulnerable people. The

business engages with large and small companies as well as other agencies such as the Police and Government Departments. The Company was established on the 08 October 2002.

- 5.2 The Claimant formerly worked for Vodafone for some years and in 2005 he worked for the Respondent on a short term basis. At the time the company was looking for matched funding and in particular an investment of £100,000.00. Mr Worth expressed interest in this and discussed the proposal with Mr Philip Derry who loaned him informally a sum of money to enable Mr Worth to invest £100,000.00 in the company in return for a 10% shareholding. Mr Worth repaid that loan four months later on the sale of his Vodafone shares. From September 2005 to June 2007, Mr Worth worked for the Respondent Company as a non-Executive Director, Sales Development and Investor without pay. Following a board meeting on 01 June 2007, Mr Worth ceased to be a non-Executive Director and took on employment as an Executive Director, with the title of Sales and Marketing Director. All of the Directors received the same salaries at that time.
- 5.3 The employees all worked from their own homes, the Claimant's home being in Cornwall. When required, he travelled to meet Mr Derry or others as necessary. His work involved him travelling widely to meet customers and contacts. He would attend various business meetings and events in the UK and occasionally overseas. The Claimant's contract with the Respondent was dated 01 June 2007. The Claimant maintained it was signed in 2011 as part of arrangements to obtain finance from Barclays Bank. The Claimant accepted that he had signed that contract which was in similar terms to those signed by other Directors. The Claimant, as one of the Directors, signed the Bank Guarantee for the Company.
- 5.4 Prior to the events leading to the termination of the Claimant's employment, there had been no previous disciplinary action taken against Mr Worth and there was no record of any complaints as to his conduct or performance.
- 5.5 In September 2015, Mr Worth was introduced to a business in Cornwall, the trading name of which was Rugged Interactive. The correct corporate name was Design for Sport Limited t/a Rugged Interactive, but the company was referred to throughout these proceedings and the disciplinary process as Rugged Interactive. Its business was high-tech fitness equipment which was sold to trampoline parks and within the health sports and education sectors. At a meeting at Trackaphone Limited in October 2015, Mr Worth had referred to Rugged Interactive in a PowerPoint presentation as being one of a number of companies with whom there were opportunities to work in the future because of a commonality of technology. It was acknowledged that the two companies did not operate in the same marketplace. Mr Worth did not indicate at the time that he had an involvement or intended to have an involvement with Rugged Interactive.
- 5.6 Later in 2015, the Claimant became a Sales Consultant with Rugged Interactive and an advocate for that company and for Mr Simon Heep, a Director. He did not become an employee, but agreed with Rugged

Interactive to receive a 3% shareholding in the company in exchange for his sales consultancy activities. He was shown prominently on the Rugged Interactive website and was described as a Director. He did not seek to have that corrected and at no time did he ever ask for permission or agreement from the Respondent company or any of the Directors to become engaged or involved in Rugged Interactive. His case was that he did not need to do so, but the facts are clear that he did not seek any such permission. It was common ground that there was a specific clause in his contract stating as follows:-

c. The employee shall not during his employment be directly or indirectly engaged or concerned or interested in any other trade or business or the setting up of any business without the consent of the employer.

f. At all times during his employment, the employee shall use his best endeavours to promote and protect the interests of the employer and shall faithfully and diligently perform such duties and exercise such powers as may from time to time be assigned to or invested in him and shall not do anything that is harmful to the employer.

5.7 The Respondent was unaware of the nature of Mr Worth's involvement with Rugged Interactive. In 2016, Rugged Interactive submitted an application to make the pitch for investment in the television programme Dragons Den. Mr Worth was involved in the arrangements for this and attended a rehearsal at the television studios. Rugged Interactive were accepted to go on to the programme and filming took place at the BBC in Manchester on the 21 and 22 April 2016. Mr Worth attended with others from Rugged Interactive and he participated in the recorded filming. During the programme, investment was offered to Rugged Interactive by two of the "Dragons". The Claimant did not inform the Respondent of his involvement with this programme or presentation.

5.8 In February 2017, Rugged Interactive and Mr Worth were notified that the programme featuring Rugged Interactive was to be broadcast on 26 February 2017. Mr Worth sent an email to colleagues at Rugged Interactive but not by way of any formal notification. The programme appeared on 26 February 2017 and showed £100,000.00 of investment being secured for Rugged Interactive from Peter Jones and Deborah Meaden. Next day on the 27 February 2017, Philip Derry was notified by David Leadbetter about the Dragons Den programme and that Mr Worth had appeared. Mr Derry had been entirely unaware of this. David Leadbetter commented to the effect that Mr Worth had come across very badly in the show. Mr Derry was concerned. He checked and found that he had indeed received an email sent to others giving notification that the television show was to be broadcast. Mr Derry telephoned Mr Worth and asked him in a lighthearted manner whether he had a new job. Mr Derry found Mr Worth's response to be angry and defensive, saying that he was not working for Rugged Interactive. They met at a pre-arranged meeting that day at Visage, at which the possibility of future funding was to be promoted. Ian Bennett on behalf of Visage who was present, commented to Mr Derry about Mr Worth's appearance on the programme in negative terms. This caused Mr Derry concern because Visage were hoped to be of assistance in attracting investment to the Respondent company.

- 5.9 There followed an email about which considerable attention was addressed in the hearing. This was number 99 in the bundle and was an email from Ian Bennett to Phil Derry of the 08 March which read as follows: *“Morning Phil, I was on the road early yesterday morning and will be away this morning to meet Russell at Skipton. We will be in meetings and travelling together all day, so if you get the chance to call anytime. Did you get my message that we felt it will be appropriate (necessary) to reconcile and agree terms of Martin’s departure (dismissal, if that’s what you intend) to include resolution of his shareholding. Russell is absolutely convinced it will not be possible to do one without the other, I hope you are managing to sort things out without too much disruption, cheers Ian.”*
- 5.10 After this, Mr Derry noted the Rugged Interactive logo on Mr Worth’s car, but it was one of a number of stickers and logos. Mr Derry watched a recording of the Dragons Den programme and noted what he regarded as a poor performance indicating lack of preparedness and a troubling attitude. He also received comments from Simon Lock a Solicitor and important contact with Vodaphone, a very important customer of the company.
- 5.11 In the light of these matters, Mr Derry decided to instigate an investigation and decided that he should be the investigating officer and that Alan Davidson would be the Principal Officer if a Disciplinary Hearing took place and that his son Alan Derry would hear an appeal if one was necessary. Mr Derry gathered together other material including copies of items from the Rugged Interactive website and blogs and also consulted the Claimant’s Contract of Employment which included the terms previously mentioned. He then invited the Claimant to a meeting which took place on 06 March 2017, David Leadbetter attended with Mr Derry. The meeting was at a Regis office in London. Mr Derry did not give notification to Mr Worth as to what was to be discussed at the meeting or in particular set out any charges which were to be answered.
- 5.12 At the meeting, various matters were put to Mr Worth as well as the terms of his Contract of Employment. Five examples of dishonesty were listed out for him as well other charges including a serious breach of fiduciary duties and irregularity with regard to expenses. The meeting was acrimonious and Mr Worth did not agree any of the charges against him. From that meeting, Mr Derry produced a document headed “Investigation Report” dated 10 March 2017 and wrote that day to Mr Worth requesting that he attend a disciplinary meeting on 17 March 2017 at a Regis office in London to answer five allegations. With the letter was sent 48 pages of documents and a copy of the company disciplinary procedure. The letter said that the Investigation Report was also included, although Mr Worth said that it was not.
- 5.13 The disciplinary hearing took place on the 17 March and was conducted by Alan Davidson with David Leadbetter, Sales Manager attending as minute taker. Detailed minutes of this were produced to the Tribunal including annotations and amendments which were entered by Mr Worth himself to make the minutes an accurate representation of what occurred. They were very full minutes. At the meeting, Mr Worth was

given an opportunity to read the Investigation Report and to have further time if he required it.

- 5.14 On the 31 March, Mr Davidson wrote to the Claimant confirming the decision which was that the Claimant was being dismissed for gross misconduct with notice. The letter went through all of the allegations made and referred to the responses given by Mr Worth. It was stated that the allegations of breach of contract of employment, dishonesty, unauthorised absences and behaviour resulting in damage to the company as well as breach of fiduciary duty had been established save for some minor points. The letter also dealt with a grievance which Mr Worth had raised including an allegation that the whole disciplinary process was predetermined and there were various procedural aspects of the process which Mr Worth found to be unsatisfactory. The letter explained the grounds of the decision to dismiss and referred to Mr Worth's attitude at the meeting, his lack of remorse and his failure to say what he was intending to do about his relationship with Rugged Interactive.
- 5.15 The Claimant appealed against the decision by letter on the 07 April and the appeal was heard by Simon Derry on 02 May 2017. Following this, Simon Derry made some further investigations and then wrote to the Claimant on 16 May stating that the appeal was not successful and the dismissal would stand.

Submissions

6 Both Advocates provided detailed written submissions which were supplemented by oral argument. For the Claimant Mr Uduje argued that the dismissal was predetermined and had been in response to the email from Mr Bennett; that the company had decided that Mr Worth was going to be dismissed and that the entire process, including the investigation disciplinary hearing and appeal, were in fact a sham and were a response to a predetermined decision made by Mr Philip Derry. Mr Uduje submitted that Mr Derry had made that decision to dismiss in response to Mr Bennett's letter. As to the procedure, he argued that in many respects the entire process was fraught with unsatisfactory and unfair aspects; that Mr Derry was conflicted from being the investigating officer; that he should not have decided that a disciplinary hearing should take place; that Mr Worth should have been provided in advance with the charges before attending an investigatory meeting and that the persons chosen to fulfill the different aspects of the process were inappropriate.

Reference was made to various aspects of the ACAS code and Guidance which were not followed in this procedure. It was further argued that the charges against Mr Worth had not been made out and that there was no gross misconduct or repudiatory conduct and no basis for summary dismissal. Mr Uduje referred me helpfully to a number of authorities including ***Laws –v- London Chronicle (Indicator Newspaper) Ltd [1959] 1 WLR 698CA*** as well as authorities as to dishonesty. He challenged the findings on the alleged breach of fiduciary duty.

7 For the Respondent, Mr Goldberg suggested that the Claimant had been found to be moonlighting for another company. He had failed to disclose his external involvement with Rugged Interactive and had made a fraudulent claim for expenses. He had challenged having done anything wrong and his attitude was of

verbally attacking his accusers. He showed no remorse. The company had lost all trust in him and therefore he had to be dismissed. Mr Goldberg referred to the standard Birchall test in relation to misconduct dismissals and suggested that concentration should be on Mr Davidson as the dismitter and that Mr Worth had described Mr Davidson as having been very professional. The factual findings of the Claimant's conduct were very clear. The decision to dismiss fell within the band of reasonable responses and this also protected the process of the investigation which was also to be judged by the same test.

The Law

8 The statutory test of unfair dismissal is set out in Section 98(4) of the Employment Rights Act, Section 98(1) and emphasises that in determining for the purposes of this part of the Act whether 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 had.

9 It was also necessary for me to consider contract law in relation to the Claimant's Contract of Employment and to weigh his actions against the clauses which had been highlighted and to determine whether the conduct was such as to be repudiatory and amount to gross misconduct.

Findings – Unfair Dismissal

10 The first issue is to decide under Section 98(1) of the Employment Rights Act 1997, or if more than one principal reason for dismissal and whether this was a reason falling within Section 98(2) namely capability, conduct or redundancy, or some other substantial reason. It is correct to say that employees may often feel that their fate in dismissal proceedings is predetermined and that despite an elaborate disciplinary process and the application of complex disciplinary procedure, the employer is insincere and merely going through the motions. As has been argued, it is difficult for an employee in such situations to be able to substantiate this by evidence. It was argued that the present case is an exception by virtue of the letter from Mr Bennett and the comments which he made regarding the need to resolve Mr Worth's position and to dismiss him if that was what was intended and the relevance of that to the interests of the company. It is an important part of this case to resolve, because it goes to the question of whether I find that to be the true reason for the dismissal. Was it indeed misconduct, or was it a response to Mr Bennett's letter and concern by the company as to the implications of that. It could be suggested that this was a dismissal falling under Section 98 namely conduct or under Section 98(1)(b) namely some other substantial reason of a kind to justify dismissal, which might be irrelevant to the conduct but purely justified if for example an employer faced losing a very valuable or vital contract if an employee remained in employment.

11 In all unfair dismissal cases, it is necessary to examine carefully the decision which was taken to dismiss. In this case, the decision is said by the Respondent to have been taken by Mr Alan Davidson as the appointed Disciplinary Officer. It is of significance that he presented to the Tribunal as an honest and straightforward witness and that he was regarded by Mr Worth as having been very professional in

his conduct of the disciplinary hearing. The evidence shows that he was indeed extremely thorough and Mr Worth was given every opportunity to have his say and make his points and answer the charges put to him. I found from his evidence that Mr Davidson was a very impressive witness and I do not consider that even if pressure had been put upon him to decide the issue, that he would have submitted to it or made a decision other than one which he sincerely believed to be honest and fair.

12 I do accept that the context and the text of Mr Bennett's letter and the undertaking of investigations by Mr Derry raised legitimate concerns for Mr Worth as to whether the result was indeed predetermined. However I must look at the matter in the whole, and dispassionately, and apply the necessary statutory guidelines and assess the decision because Section 98(4) is about the decision taken to dismiss.

13 I do find that the reason for the dismissal by Mr Davidson acting on behalf of the company was a reason related to Mr Worth's conduct. There were numerous features involved in the allegations against Mr Worth, in particular the involvement with Rugged Interactive which was not disclosed. Only at a very late stage and during the hearing, did it become apparent as to the value of the shareholding which Mr Worth had received as consideration for his involvement on behalf of Rugged Interactive.

14 I find that it was reasonable on the evidence presented for Mr Davidson to conclude that the activities and the involvement of Mr Worth with Rugged Interactive were contrary to the Contract of Employment and contrary to the interests of the company and that they had been undertaken within time of the company, that is time which was paid for by Trackaphone as part of Mr Worth's employment with them.

15 I also find that Mr Davidson was justified in concluding that the explanation given with regard to the expense claim albeit a relatively small sum amounted to clear misconduct.

16 Accordingly applying the statutory test in Section 98(4) and determining whether dismissal is fair or unfair, having regard to the reasons shown by the employer, I find that taking into account the size and administrative resources of the employer's undertaking, the employer acted reasonably in treating this as a sufficient reason for dismissing the employee and I determine this in accordance with equity and the substantial merits of the case.

17 In assessing this, I have applied the well known gloss as to whether dismissal fell within the band of reasonable responses open to an employer and I find that it did in this case. As to procedure and the challenges which have been made on the way in which all of these matters were undertaken, I do find that Alan Davidson was able to conduct a fair disciplinary process with appropriate material and reach a decision as to dismissal. Accordingly I find that the dismissal was fair and that Mr Worth was fairly dismissed for misconduct which can properly be categorised as gross.

18 With regard to the wrongful dismissal claim, it should be apparent from my other findings that I am not persuaded that this was a case where Mr Worth can succeed in suggesting that he was guilty of gross misconduct. I find that the terms of the contract 2[c] and 2[f] were flagrantly breached by Mr Worth's activities. I

also find that his attitude during the Investigatory Hearing, Disciplinary Hearing, the Appeal Hearing and indeed during cross-examination amounted to a failure to acknowledge, and an unwillingness to accept, the duties he owed to the company. This may partly arise out of the fact that Mr Worth for many years held a very senior position and operated in a way within the company where he had no ongoing and continuous direct control over his activities. This may have led him to have a certain attitude with regard to how his duties to the company could be fulfilled and what activities he could undertake without the consent, knowledge or approval of his employers.

19 Mr Worth's attitude in the hearings and in the cross-examination, were evasive and this showed a very significant lack of any remorse. Where an employee is not willing to accept failings or matters put to him by his employer, or give anything like a realistic or reliable assurance as to the future, then the employer cannot be expected to continue to have any trust in that employee. His actions effectively amounted to a repudiation of his Contract of Employment. His own conduct entirely justified, in the circumstances, summary dismissal.

20 It is unfortunate to have to make this finding, in view of the fact that Mr Worth is someone who had given long and valuable service to this company and indeed invested in it and acted as a guarantor for it. However, the essential details are that the trust and confidence which the company should have in an employee had entirely broken down and this was the result in Mr Worth's conduct and his unwillingness to comprehend the significance of it and its relevance to the relationship with his employer.

Employment Judge Speker OBE DL

Date 14 February 2018