



EMPLOYMENT TRIBUNALS

Claimant: Mr G F Dolby
Respondent: Stuart Plant Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Norwich (CVP) **On:** 8-10 February 2021
Before: Employment Judge S Moore (sitting alone)

Appearances

For the Claimant: Mr M Bloom, solicitor
For the Respondent: Mr J Ratledge, counsel

JUDGMENT

(1) The claim for unfair dismissal succeeds.

(2) The Claimant is entitled to £42,000 compensation, being his gross annual salary prior to dismissal.

REASONS

Introduction

1. This is a claim for unfair dismissal. I heard evidence from the Claimant, from Mr Stuart Sayer, the Managing Director, owner and founder of the Respondent, and from Mr Russell Tregent, the Respondent's Rental Director. During the hearing I was referred to an agreed bundle of documents. On the basis of that evidence I make the following findings of fact.

The Facts

2. The Claimant was employed by the Respondent in the role of Business Development Manager from 4 January 2010 until his dismissal on 2 November

2018. His gross annual salary was £42,000. The business of the Respondent is the sale and rental of generators, pumps and lighting towers. It was formed in 1982 and is part of a larger group of companies that also includes Stuart Pumps Ltd and Stuart Well Services Ltd. The Claimant reported directly to Mr Sayer. Also reporting to Mr Sayer were Mr Nigel Hood, the Finance Director, Mr Rod Tebble, the Asset Director and Mr Tregent. The Respondent's Head Office is in Shropham in Norfolk, and it also operates out of service depots in Immingham in North Lincolnshire and Inkberrow in Worcestershire.

3. The Claimant's main role was to manage the Key Account Managers (KAMs) who were employed to obtain and retain the Respondent's customers. They reported directly to the Claimant. During the last year of the Claimant's employment there were two KAMs, Mr Malcolm Freeman, the KAM for the Midlands and East Anglia regions, and Mr Rod Morrow, the KAM for other regions. Ms Laura Taylor, the Depot Manager at Immingham also reported to the Claimant.
4. From about 2017 onwards the relationship between the Claimant and Mr Tregent became strained. In essence, Mr Tregent considered that the Claimant micromanaged the KAMs while the Claimant, on the other hand, considered he needed to monitor the performance of all the sales staff, including rental office staff who didn't report to him. This included measuring the turnover of each depot and expanding the monthly reports to include individual customer turnover analysed against each sale's person's figures. The Claimant also measured the quality of quotations, including the quality of quotations produced by the rental office. The Claimant, in conjunction with Mr Tebble, also used the tracker system fitted on company vehicles to monitor what the sales persons were doing, which led to friction when the Claimant and Mr Tebble discovered certain individuals, including Mr Freeman, and two other sales persons, Mr South and Mr Burgess, taking non work-related journeys during their normal working hours.
5. In March 2017 Mr Tregent resigned but later retracted his resignation.
6. On 5 January 2018 the Claimant sent an email to Mr Sayer stating he intended to raise a grievance against Mr Tregent. This arose out of the fact, the Claimant says, that in December 2017 Mr Tregent distributed a new price list to his sales team without discussing the list with the Claimant or including him in the distribution, and he also found out that Mr Tregent had planned a sales blitz for the Immingham depot without informing the Claimant. On 15 and 17 January 2018 the Claimant had lengthy discussions with Mr Sayer about his issues with Mr Tregent and in the event was persuaded not to pursue the grievance.
7. Also, in early 2018 the Claimant held a number of performance reviews of Mr Morrow, who had been identified as an underperformer at a meeting between the Claimant, Mr Sayer and Mr Tregent. Mr Sayer accepted in cross-examination that shortly after those meetings he instructed the Claimant to get Mr Morrow to "fall on his sword" and Mr Morrow resigned in February 2018. Mr Morrow was replaced by Mr Steve McNulty.
8. On 31 October 2018 Mr Freeman resigned.

9. On Friday 2 November 2018, at about 3pm, the Claimant received a telephone call from Mr Sayer asking him to meet him at 4pm in the Holiday Inn West in Peterborough for a “catch-up”. They met in the reception area of the hotel and spent about an hour talking about general business issues, including Mr Freeman’s resignation. They left the hotel and began to walk across the carpark. In April 2018 the Claimant had been given a new company car and Mr Sayer asked if he liked it. The Claimant replied he liked it very much. Out of the blue, Mr Sayer then informed the Claimant that he was being made redundant. Mr Sayer said the KAMs no longer needed managing by anyone and that two of the directors had approached him with a proposal to make the Claimant’s position redundant. The Claimant was required to hand over his mobile phone and laptop immediately. Mr Sayer then gave the Claimant a letter.
10. The Claimant was very upset. He walked over to his car and drove home. Once home he opened the letter. It begins by stating, “It is with regret that I am writing to inform you of the termination of your employment with Stuart Plant Ltd. Unfortunately, your position as Business Development Manager has become redundant and there is no other job function with the company that we can offer you”. The letter then sets out the Claimant’s redundancy entitlement before continuing, “We propose a clean break by mutual agreement therefore for the period of your notice, gardening leave rules will not apply. In exchange you will release your car and receive £8,000 severance pay.” The Claimant’s car was collected on Friday 9 November 2018.
11. There is a further significant disputed matter in respect of the events of 2 November. Mr Sayer says in his witness statement, and maintained in cross-examination, that whilst in the carpark, prior to giving the Claimant the letter, he offered the Claimant the position of KAM that had just become vacant by reason of Mr Freeman’s resignation. Notably, Mr Sayer accepted in cross-examination that the Claimant could have performed this role. Further it was common ground that although the status of the role of KAM was less senior than that of Business Development Manager, Mr Freeman’s gross salary was in fact more than the Claimant’s, namely £45,000. If the role of Business Development Manager was redundant, the position of KAM therefore constituted suitable alternative employment for the Claimant. I will return to this matter shortly.
12. On 5 November 2018, the Claimant sent Mr Sayer an email setting out his dismay and upset at his dismissal, and also requested payment of his annual profit share bonus. Notably the Claimant had been paid a bonus of £15,000 in respect of each of the two previous years. Mr Sayer acknowledged the email on the same date and said he would “be back soonest”. In fact, he never replied.
13. On 3 January 2019, the Claimant sent a letter to Mr Sayer bringing a grievance against Mr Tregent. On the same day he also submitted a letter, challenging the legality of, and appealing, the letter to dismiss him. In that letter he states (amongst other things) “There was no discussion about potential alternative job roles”. The Claimant did not receive a reply to either letter.
14. On 18 January 2019, the Claimant instructed his solicitors to write to Mr Sayer. That letter made the point (amongst others) that the Respondent had failed to consider the alternative vacant position of KAM. The Respondent did not reply to

that letter either. Mr Sayer, on behalf of the Respondent, did eventually respond to a further letter from the Claimant's solicitors of 6 February 2019, stating in a letter of 13 February 2019 that the Respondent's actions would be defended.

The Claimant's search for alternative employment post-dismissal

15. The Claimant's date of birth is 15 August 1947. Accordingly, at the date of his dismissal he was aged 71yrs. However, following his dismissal his financial circumstances were such that he needed to find alternative employment. On 12 November 2018 he applied for a role as Equine Account manager with Weatherbeeta Ltd and on 12 December 2018 he applied for a role with Anglian Water. Both applications were unsuccessful.
16. The Claimant's wife works for Marks and Spencer (M & S) in an administration role. She told the Claimant that M & S needed someone to monitor the CCTV footage at the Brotherhood Retail Park store in Peterborough. The Claimant approached M & S and was offered the role. He commenced employment in mid-December 2018, and worked 22 hours per week at the rate of £8.00/hr. However, in March 2019 he was told the CCTV role would be undertaken by central office and he was moved to doing a variety of jobs in the back office. In April 2019 the Claimant left M & S because he found the work repetitive and boring and he couldn't tolerate it any longer. Immediately afterwards, on 17 and 29 April 2019, he applied for a position at Gates Garden Centre in Oakham (having been told about the vacancy by his granddaughter) but he received no response to that application.
17. In the meantime, the Claimant had determined that as a result of losing his job with the Respondent he would have to sell the family home and downsize to a smaller property in a less expensive location. The Claimant gave evidence that he and his wife found a suitable property on 14 May 2019 and that he was unable to work for the next few months because he had to redecorate their existing house (in which they had lived for 35 years) to be able to sell it, and then pack up for the consequent move in or about October 2019.
18. From about October 2019 the Claimant began to apply for jobs again and between October 2019 and January 2020 he approached a number of companies seeking work in the power industry sector, including Abird East Midlands Power Solutions, Flying Hire Power Provider, WB Power Services, Mather & Stuart Power Solutions, and MEMS Power Generation. All these approaches were unsuccessful. The Claimant states, and I accept, that notwithstanding the law against age discrimination, at the age of 71 yrs he was unable to secure a role capable of leading to another career and he was forced to look for work, and take what he could get, in the way of positions that paid only the minimum wage.
19. With this in mind, in or about March 2020 the Claimant approached Baytree Nurseries for a position in a garden centre, Frontier Agriculture for a position as a grain sampler, G's Fresh for a position as a mushroom picker, and also made an application for a position on a poultry farm. All these applications were unsuccessful. However, on 29 April 2020 the Claimant did secure employment with World Wide Fruit, as packer/sorter of fruit. The contract was initially for 6 months but is now a permanent position. At present, at the age of 73 years, the Claimant

works 39.375 hours per week on a shift pattern with normal hours from 6.15am to 6pm for which he is paid the current minimum wage of £8.72.

The alleged offer of the KAM position

20. It is in the above context that I turn to the dispute of fact as regards whether in the carpark on 2 November 2018 Mr Sayer offered the Claimant the vacant role of KAM. His evidence was that the Claimant rejected out of hand the prospect of taking on the KAM role, and said something along the lines of “been there done that” and “it was time to hang up his boots.” The Claimant vehemently rejected that account of events and maintained that the KAM position had never been offered to him.
21. I prefer the Claimant’s evidence and find, on the balance of probabilities, that the offer of KAM was never made to the Claimant.
22. First, if Mr Sayer had any serious intent to offer the Claimant the position of KAM it beggars belief that he would have approached the matter in that way, standing in the carpark, having just told the Claimant out of the blue that he had been made redundant.
23. Secondly, if the Claimant had been offered the position of KAM, I have no doubt that he would have accepted it. As the account of events subsequent to his dismissal bears out, he plainly was not in a position (financially speaking) to “hang up his boots”. To the contrary, as a result of losing his job he has been forced to sell his family home and take up minimum wage, shift-work employment.
24. Thirdly, the Claimant’s dismissal letter had already been written. Notably that letter refers both to there being “no other job function with the company that we can offer you” and to the Respondent’s desire for “a clean break”. A “clean break” is, in my view, precisely what the Respondent hoped to achieve and Mr Sayer’s lack of response to the Claimant’s subsequent emails and letters bears this out. There was never any intention to offer, or even discuss, the KAM role with the Claimant.
25. Fourthly, Mr Tregent’s evidence was that he had a meeting with Mr Sayer and Mr Hood on 1 November 2018 at which it was decided the Claimant’s position would be made redundant. Following that meeting Mr Tregent was of the view that the Claimant would not be offered the role of KAM and in his witness statement he states that “I know the Claimant was not offered the role of KAM”. Mr Sayer’s evidence in this respect was therefore, as Mr Tregent accepted, something of a surprise to him.
26. Fifthly, the Claimant’s appeal letter of 3 January 2018 and the letter of the Claimant’s solicitors on 18 January 2019 make the point that the Respondent had failed to consider the alternative vacant position of KAM. When Mr Sayer eventually responded to the Claimant’s solicitors he did not dispute that point, and indeed the Response submitted by the Respondent pleads not that the KAM role was offered to the Claimant, but that the KAM role was not suitable alternative employment and consultation with the Claimant would have been futile.

Conclusions

27. The Respondent submits that the reason for dismissal was redundancy.
28. So far as is relevant, section 139(1)(b) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of a business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.
29. Although Mr Bloom for the Claimant disputes that redundancy was the reason for dismissal (or that the Respondent had any fair reason for dismissal) he did not challenge Mr Tregent's evidence as regards the revised structure of the business subsequent to the Claimant's dismissal. This shows that both KAMs now report to Mr Tregent. One of them being Mr McNulty, and the other being Mr Holmes, who has effectively replaced Mr Freeman, although under the different title of Area Sales Manager. Furthermore, the revised structure does not include the position of Business Development Manager and it was not suggested that such a position, in title or substance, still exists within the Respondent company.
30. Accordingly, whether or not the actual work the Claimant did as Business Development Manager has ceased or diminished, I am satisfied that the Respondent's requirements for an employee to carry out that work has ceased or diminished because that work is now being done by the Respondent's remaining directors and managers.
31. I am therefore satisfied that the reason for the Claimant's dismissal was redundancy.
32. Turning to the issue of fairness, Mr Ratledge submitted the dismissal was fair because the Claimant was offered the only suitable alternative employment available, namely the position of KAM, but the Claimant rejected the offer out of hand.
33. However, I have found as a matter of fact that the Claimant was never made this offer. What transpired in the carpark was referred to at various points on behalf of the Respondent as a "meeting" and "truncated consultation". This is an inaccurate description of events. What transpired in the carpark was merely a brief conversation in which Mr Sayer told the Claimant without warning that he was being made redundant. It was not a meeting, and the consultation was not truncated, it was non-existent. The dismissal was plainly unfair. Indeed, it is hard to conceive of a more brutal manner in which an employee's employment might be terminated.
34. I turn next to the issue of compensation.
35. Although the Claimant is currently in employment with World Wide Fruit, he has stated that if he had remained in employment with the Respondent he would have stopped working in December 2020 and retired at that point (by which time he would have achieved 50 years working in the power industry). The reason he continues to work now is because his reduced financial circumstances mean it is not possible for him to retire. Accordingly, the Claimant claims a compensatory award calculated to December 2020. Taking account of the sums the Claimant has

earned since his dismissal, the figure claimed is still in excess of, and therefore capped at, the Claimant's gross annual salary of £42,000.

36. Mr Ratledge does not contest the elements of the claim or the Claimant's arithmetic but essentially advances three arguments as to why, as a matter of principle, the Claimant is not entitled to the sum claimed.
37. First, Mr Ratledge submits that the Claimant's employment would in any event have terminated by the end of 2018 because of performance and relationship concerns.
38. In this respect, Mr Sayer said in his witness statement that in the year preceding the Claimant's dismissal he had been reviewing the Claimant's performance and considered that the Claimant was under-performing his role. However, there is no evidence to support that assertion. There is no evidence of any criticism of the Claimant in the year preceding his dismissal, and indeed he was paid substantial bonuses in both of the two years preceding his dismissal. Mr Sayer stated that the Claimant had failed to carry out an instruction to consider the Respondent's presence in East Anglia, relying on an exchange of emails in April and July 2018. However, the emails relied upon do not support this assertion. Further Mr Sayer stated the Claimant had provided him with inaccurate figures in an email dated on 4 July 2018. However, in evidence Mr Sayer was unable to specify what figures or inaccuracies he meant and there is no evidence that the problem (if it existed) was ever raised with the Claimant at the time.
39. There was also an assertion that the Claimant was responsible for a high turnover of staff and in particular the resignations of Mr Morrow and Mr Freeman. However again, this was not supported by any evidence. Further, as regards Mr Morrow, Mr Sayer admitted that he had asked the Claimant to get Mr Morrow to "fall on his sword". And as regards Mr Freeman, Mr Tregent said that in the week following the Claimant's dismissal he spoke to Mr Freeman to try to persuade him to retract his dismissal; the fact that Mr Freeman did not do so, knowing the Claimant was no longer employed by the Respondent, is not consistent with the Claimant being the reason why Mr Freeman had tendered his resignation.
40. I therefore reject Mr Ratledge's submission that, if not dismissed on 2 November 2018, the Claimant would in any event have been fairly dismissed shortly thereafter.
41. Secondly, Mr Ratledge submits that the Respondent's liability terminated when the Claimant found work with M & S and/or when he decided to leave that employment in April 2019. This, it is said, broke the chain of causation in respect of the loss flowing from the dismissal so that the losses the Claimant subsequently suffered were no longer attributable to the Respondent under section 123(1) ERA.
42. As regards the Claimant's employment with M & S it is well established that a reasonable but unsuccessful attempt to mitigate does not cut the chain between the wrongdoing and the loss which, on ordinary principles of causation, flow from it. In this case I consider the Claimant's actions both in taking the M & S job and leaving it when it mutated into something that was unsuitable for him were reasonable. On the one hand the fact he was prepared to move so quickly from a

relatively senior management role into a junior role on a minimum wage shows how anxious he was to secure some form of employment, but it was not incumbent on him to tolerate any working conditions, however menial, and I do not consider his decision to leave M & S in April 2019, after a relatively short period of time, either to be unreasonable or to break the chain of causation.

43. This leads to Mr Ratledge's third, more broad point, which is that the Claimant has failed to take reasonable steps to mitigate his loss.

44. In this respect, Mr Ratledge submitted the Claimant effectively set his sights too low and should have made more effort to find better paid work. Mr Ratledge submitted that if the Claimant had done this he would have found work that paid a similar salary to the one he had been paid by the Respondent within 3-6 months. In my judgment this submission fails to pay any regard to the fact that the Claimant was 71yrs old when he was dismissed. Notwithstanding the law against age discrimination the reality of the matter is bound to have been that the Claimant would have found it exceptionally difficult to find work that was commensurate with his previous employment. In this respect I except Mr Bloom's submission that the Claimant was driven to looking for and picking up work where he could, and that this work was bound to be at the minimum wage end of the spectrum. Further this is borne out by the evidence. The Claimant did approach a significant number of companies in his field of expertise but received no positive response. His willingness to undertake unskilled low-paid work demonstrates he recognised the unlikelihood of ever again gaining employment of the kind he had with the Respondent and his genuine need to earn what he could, rather than a misjudgement of his own potential.

45. Mr Ratledge further submitted that the Claimant failed to take reasonable steps to mitigate his loss by not looking for work during the period between May and October 2019 when he was preparing to move, and in the process of moving, house. In this respect, it was not disputed that the Claimant moved from a four-bedroom house in Peterborough, which had been the family home for 35 yrs, to a two-bedroom house in Spalding. Further the Claimant's evidence that he needed to decorate and make repairs to the house to put it in a saleable condition, and then to pack up the house and prepare to downsize into a smaller house was not disputed. Since the house move was entirely attributable to the fact of the Claimant having been dismissed unfairly, I do not consider the fact that the Claimant did not look for work during the period while he was preparing for and undertaking that house move means that he failed to take reasonable steps to mitigate his loss. Notably as soon as the move was complete the Claimant began again to search for employment and was eventually successful.

46. Overall, and looking at things in the round, I accept that the financial losses the Claimant sustained between the termination of his employment on 2 November 2018 and December 2020 are attributable to this Respondent's act of unfair dismissal and that it is just and equitable in all the circumstances to award him that amount by way of compensation, albeit subject to the statutory cap.

47. It follows that the Claimant is entitled to compensation in the sum of £42,000.

Employment Judge S Moore

Date: 26/2/21

Sent to the parties on:

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For the Tribunal:

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