



EMPLOYMENT TRIBUNALS

Claimant: Mrs L SEAGER

Respondent: EUROPEAN KITCHENS LTD

Heard at: Southampton

On: 6&7 March 2019

Before: Employment Judge Hargrove

Appearances

For the Claimant: In person

For the Respondent: Mr R Aireton, Solicitor.

JUDGMENT AND REASONS

It is adjudged that :

1. The claimant was unfairly dismissed;
2. If a fair procedure had been followed there was a 50% chance that the claimant would have been dismissed fairly within two months;
3. The claimant contributed to her dismissal by blameworthy conduct whereby the compensatory award should be reduced by a further 10%;
4. The claimant was entitled to a basic award reduced by 10%, amounting to £914.50, but the tribunal had insufficient information to calculate the total amount of the compensatory award.
5. The claimant was entitled to holiday pay calculated to take into account commission, but there may remain an issue as to whether the claimant was out of time for the claim so far as it related to the period up to the end of the holiday year on the 31st of December 2017, as opposed to the period from that date up to the date of termination of her employment.
6. The claimant's claim of non-payment of commission due on 2 contracts is well-founded and the respondent is ordered to pay £750 to the claimant.

REASONS

1 There follows a repetition of the orders sent out to the parties on the 16th of March.

1. By the 16th of March 2019 claimant must provide to the respondent copies of her payslips in her new employment from July 2018 to date; and documents evidencing all attempts to find alternative higher paid employment since July 2018.
2. By the 16th of March 2019 the respondent must indicate to the claimants and the employment tribunal whether it intends to submit that the part of the claimant's holiday pay claim including commission for the period prior to 31st of December 2017 is out of time and if so, the legal and factual basis for that submission.
3. Having made attempts to settle the remaining remedies issues via ACAS, the parties must notify the tribunal by the 30th of March 2019 whether the case has settled or whether a further hearing is required. In that event a remedies hearing will be listed at Southampton to take place for a period of three hours in the next following 3 months, and the parties must provide their dates of NON-availability for such a hearing.

2. By an ET1 submitted to the tribunal on the 24th of July 2018 the claimant brought claims of (1) unfair dismissal (2) wrongful dismissal/breach of contract and (3) for unpaid holiday pay, and commission on 2 particular sales. The following are the salient background facts, which are based upon the claimant's witness statement and her bundle, and two witness statements from the respondent, a short one which was exchanged prior to the hearing, and what was described by Mr Aireton as a substitute statement handed in at the outset of the Hearing with a shorter bundle of documents, to which I permitted the respondent to refer notwithstanding its lateness: –

2.1. The claimant was employed by the respondent as a sales design consultant from the 11th of April 2016 until her dismissal on the 8th of May 2018 on notice expiring on the 7th of June 2018.

2.2 Her original contract of employment is at pages 13 to 19 of the claimant's bundle. There is a provision for basic salary and sales remuneration at paragraph 4.1. After an eight week training programme and subject to its completion, the claimant was entitled to gross basic salary of £18,000 per annum +3% sales commission on all net sales managed solely by her, and 2% commission on any sales where she had had significant help from another member of staff.

2.3 The provision of plans and quotations by the claimant to the customer, and the conversion into an effective sale was an essential part of her role. Although not provided for in the contract, I accept that commission became due for payment when the customer paid 50% of the contract price, and was payable at the month end.

2.4 The respondent's director is Mr Rayner who gave evidence on behalf of the respondent. The respondent is a small company which sells kitchens in the Poole area as a franchisee of Schmidt kitchens.

2.5 During the claimant's employment there were one or sometimes two other sales staff employed by the respondent with whom she worked. There was a high turnover of staff. At least two were dismissed, and others left for varying reasons. In particular Nick Preston was dismissed in August 2017. Mr Andrew Jones left on 17 December 2017.

A Mr Stuart Partridge began in January 2018.

2.6. In about November 2017 the claimant was handed an amended page to her contract by Mr Rainer as a one-to-one meeting which she claims she was forced to sign, and was not given a copy. This was disclosed by the respondent only on day two of the hearing, and in response to the order of the tribunal. Materially to the issues in the case, there was a paragraph headed "clarification of minimum sales threshold" which stated:

"...there is a minimum performance standard of two individual sales per month. Failure to reach the standard over a consecutive period of three months will be a failure to meet the minimum standards required of a sales designer and could result in the termination of your employment..."

2.7 It is the respondent's case that the claimant was warned by Mr Rainer at regular Sales meetings from November 2017 about her sales performance. This is denied by the claimant. The respondent claims that the normal expectation in the trade was that the salesforce would achieve a 50% conversion rate from quotations to successful sales.

2.8 Mr Rayner notified the claimant and Mr Partridge, then the salesforce, sometime in April 2018 that Nick Preston would be rejoining the respondent at the end of April 2018. In fact he returned on Tuesday 8th of May 2018.

2.9. Meanwhile, on the 27th of April 2018 a chain of events began which ended with the Claimant's dismissal on the 8th of May. On the 27th of April 2018 the claimant was handed a letter by Mr Rayner (C 22). It notified a change in commission rates to 4% on Schmidt products and 1.5% on all other products. In addition, the letter notified the claimant of the imposition of a personal sales target of £38,700 per month from the 1st of May 2018 –

"This is the net figure and is based on our current average sale (2017) of £12,900 x 3. To achieve this target you need to be quoting twice the amount of converting 50% – based on current quote amounts this is very achievable. The key to making your target is converting at 50% which is a Schmidt standard. From this point I can assure you the company will be serious about these targets and failure to meet your target over a period of three months or more could result in the termination of your contract."

2.10. On Friday, the 4th of May 2018 Mr Rayner emailed the claimant notifying her of a meeting at the end of the day. There was no meeting but at 6 pm Mr Rayner gave her an envelope containing a letter (dated Saturday 5 May), and said there would be a meeting in the next week. In summary, in the final paragraph, following a

detailed criticism of the claimants sales record, of her use of the CRM (Customer Management System) as a sales tool, and of failures in project management, Mr Rayner gave her the option either of finding her another role “more suited to your strengths and abilities”, or, if she wished to continue in her sales role,” this letter serves as your formal warning that your performance in all the areas mentioned above must show immediate and ongoing improvement. If there is not an improvement in general standards and levels of performance related to your sales performance your employment will be terminated on the grounds of underperformance“.

- 2.11. The claimant drafted a five page detailed response raising a whole series of complaints about her treatment by the respondent and in particular asserting that she wished to remain in his sales role and to appeal against the final warning. Monday, 7th of May was a bank holiday. Shortly before 8 am on Tuesday 8th of May, the claimant emailed it to Mr Rayner. She arrived at work shortly after 9 am and claims that a number of her contacts, quotes and designs had been reassigned on the CRM system to Nick Preston, who had resumed his employment with the respondent on that day. A little later Mr Rayner asked her to return the key to the showroom and her access permissions were limited on CRM. I have no reason to doubt the claimant’s description of what next followed. At 11:36 am the claimant received an email from Mr Rainer stating “I will come to you for a short meeting at 11:40 am thanks”. The meeting did not take place until approximately 12:10 pm, the claimant having been given the opportunity to ask Mr Preston to be in attendance. Mr Preston apparently took notes, but those notes have not been produced to the Tribunal. The claimant however clandestinely tape-recorded the meeting and there is a transcript of pages 87 to 90 of the claimant’s bundle. The respondent does not dispute its accuracy. The claimant claims that she was given very little opportunity to speak, and that Mr Rayner frequently spoke over her. He was highly critical of her sales performance. The claimant indicated towards the end of the meeting “ why do you keep asking me the same question then? My answer is going to stay the same throughout. I would like to continue in my role as I have stated in my letter with the support required.” Mr Rayner left the room.
- 2.12. At 1 pm Mr Rayner placed a letter on her desk written in the following terms: –
“Following our meeting today I am writing to formally give you the notice required to terminate your employment with European Kitchens Ltd. The reasons for this were raised in the letter sent fifth of May 2018 the contents of which you refuse to accept. Therefore as you have no intention of addressing the issues addressed in that letter I have no option other than to terminate your employment. Your 30 days notice commences from the date of this letter. Due to the nature of the business being customer facing and sales based it is necessary that you are suspended from your duties with immediate effect. You are therefore required to take gardening leave until the expiry of your contract.”
The claimant handed in her keys handed in her keys and left the office.
3. That concludes the background circumstances relevant to the claimant’s unfair dismissal claim. There are, however, in addition claims for commission due on two contracts which the claimant asserts that she had concluded, but had not been paid; and the issue whether or not holiday pay was to be calculated based upon basic pay only or also to include commission payments. I conclude, having

considered all of the evidence submitted, that in respect of the commission issue, the order from the client Appleby had been signed on the 24th of April 2018 and that a deposit of 10% was paid on the 17th of April 2018, and a further 40% was paid by card on 5 May 2018. The order from the client Stonier was concluded on the 4th of May 2018. Although not signed on that day, the deposit of 50% was paid at the same time, the 4th of May. On the basis of the findings of fact and conclusions in paragraph 2.3 above, the claimant succeeds on that part of her claim. She was still in Employment when the necessary threshold requirement of the payment of 50% of the contract price was met.

As to the claimant's claim to an entitlement to an additional amount for holiday pay to take into account her commission payments, the evidence shows that in every month from September 2017 up to and including April 2018 the claimant received significant amounts by way of commission as follows: – in September 2016, £546.76, in November 2016, £936.31, in December 2016, £166.69, in January 2017 £894.47, in February 2017 £364.80, in March 2017 £79, in April 2017 £103.69, in May 2017 £1182.99, in June 2017 £847.11 p, in July 2017 £1050.96, in August 2017 391.10, in September 2017 £1657.29 p, in October 2017 £411.24, in November 2017 £274.28, in December 2017 £274.28, in January 2018 £1835.88, in February 2018 £3478, in March 2018 £873.40, in April 2018 £303.36. She only worked for five days in May 2018, and at the end of that month was entitled to be paid commission on the Appleby and Stonier contracts. I was referred by Mr Aireton to 2 recent cases, **Lock v British Gas 2017 ICR page 1**, and **Bear Scotland v Fulton 2015 ICR page 221**. The first is authority for the proposition (on remission from the ECJ) that holiday pay is due on normal remuneration including commission if it is a sufficiently regular aspect of the pay package for the employee's performance of the tasks for which he or she is employed. The evidence shows that the commission payments were a regular aspect of the pay package. Nor was there any three months break in the payments such as would trigger a time issue in line with *Bear Scotland*. Accordingly, the claimant succeeds in respect of holiday pay to which she was entitled for the period first of January to June 2018. I have left open for further submission however the issue whether the claim in respect of the holiday year ending on the 31st of December 2017 may be out of time, the claimant not having brought her claim in respect of that period until July 2018.

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4. Unfair dismissal – the relevant statutory provisions and the tribunal's identification of the issues.

4.1 Dismissal being admitted, the respondent has to establish on the balance of probabilities a reason for dismissal falling within section 98 of the Employment Rights Act 1996. The reason or principal reason must either be a reason specified in 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. The reasons specified in subsection (2) include a reason relating to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do; and a reason relating to the conduct of the employee. In a review by the Tribunal of the issues with Mr Aireton at the outset of the hearing, he asserted that the principal reason was capability, although he relied upon conduct and some

other substantial reason, being a breakdown of trust and confidence in the claimant, in the alternative. This lack of clarity reflects upon the fairness of the process subsequently followed by the respondent to effect the dismissal. The claimant's case was that the real reason for her dismissal was that Mr Ayrton needed an excuse for dismissing her in order to replace her with the returning Mr Preston, and that it had nothing to do with her performance or capability of performing the sales task.

4.2 If the respondent proves the reason for dismissal as set out above, the tribunal has then to decide whether the dismissal for that reason was fair or unfair applying section 98 (4) . That provides that

“The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employees 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.”

It is to be noted that there is no burden on either party to prove that the dismissal was fair, in the case of the respondent , or unfair, in the case of the claimant.

4.3 If there is a finding that the dismissal was procedurally unfair, the claimant succeeds but in assessing remedy the tribunal has to consider what the chances are that, if this employer had acted fairly, the claimant would have been dismissed in any event and if so, when. This is usually expressed in terms of a percentage reduction in the compensatory award. This is the principle derived from *Polkey v A E Dayton Service Ltd* and Section 123(1) of the Act, which states that “the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.”

4.4 A further deduction may be made by the tribunal for contributory fault from the basic and compensatory award. Section 122 (2) state: – “Where the tribunal considers that any conduct of the complainant before the dismissal... Was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any reason, the tribunal shall reduce or further reduce the amount accordingly. In relation to the compensatory award, Section 123 (7) states: – “Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.

5. The tribunal's conclusions.

5.1. As to the reasons for dismissal the tribunal accepts the respondent's case that the principal reason for her dismissal was a reason related to capability but allied to conduct in relation to the claimant's response to the receipt of the warning letter of the 27 April 2018. I reject the claimant's contention that she was dismissed merely because the respondent had re-employed Mr Preston and accordingly was using capability as a spurious or sham reason for dismissing the claimant. However the timing of the dismissal and its proximity to the arrival of Mr Preston was not a coincidence. It was deliberately timed when there was someone suitable to replace her. It explains why the process was concluded with such haste.

5.2. I do not accept that the claimant was given any formal warnings about her sales performance at the regular sales meetings, as claimed by Mr Rayner. However I do

accept that the claimant was notified by the letter of the 26th of June 2017 that she was expected as a minimum requirement to achieve a target of two successful individual sales a month. She did sign the amendment to her contract and although I accept that she was not given a copy to keep, I reject her claim that she did not read the amendment or take note of its effects. I accept on the balance of probabilities that after the amendment was signed, Mr Rayner must have reminded the salesforce of the new targets for sales at the regular sales meetings which followed.

5.3 I also accept that the respondent's letter of 27th of April 2018 setting out the claimant's new and increased sales targets and warning of the consequences of failure was a reminder of Mr Rainer's concerns about her sales performance. More fundamentally, I accept that in sending the warning letter of the 5th of May 2018, Mr Rayner had genuinely assessed the claimant's performance over the previous six months between September 2017 and April 2018, which revealed that the claimant had failed to achieve the target of at least two sales per month; and also failed the Schmidt 50% conversion target. In consequence, if the claimant chose to remain in her sales position it was on the basis of a written warning, but not a final warning as she interpreted it, that dismissal could result if she did not improve. I have serious doubts about the respondent's bona fides in offering an alternative post which was never identified, even at the Tribunal hearing. I consider that Mr Rayner had dismissal in mind at the time of that letter.

5.4. I find on the balance of probabilities that the claimant did speak to Mr Rayner as he alleges on the morning of Tuesday, the 8th of May, after she had emailed her detailed response to the warning letter but before she was called to the meeting at which she was dismissed. He claims that at the time of passing her him the letter she stated that she had every right to remain in her role and was able to do her job as she saw fit and there was nothing he could do about it. She adamantly denies it, but I note his reference to it at the outset of the recording of the meeting. I also find that some of the content of the claimant's letter was unduly challenging of Mr Rayner's authority which contributed to the decision to dismiss her (although as will be made clear, she had every right to challenge the preempt warning she was given).

5.5. As to the issue of fairness, I record that the whole process went from a warning to dismissal with undue haste. The claimant was not given any opportunity to improve her sales performance. The claimant was given no notice that he was now considering dismissal, nor did she have any time to prepare, and it was clear that Mr Rayner gave her little opportunity to respond at the final hearing and was not interested in what she had to say. He did not make available to her the sales record over the preceding 6 months. The claimant was not given the right to appeal the warning or her dismissal. These substantial defects constitute serious breaches of the ACAS code of practice on disciplinary and grievance procedures of 2015 and the 2017 Guide. The dismissal was clearly procedurally unfair.

5.5 Polkey/contributory fault.

I find that there was a 50% chance that the claimant would have been dismissed fairly within a period of two months from June 2018 because there are substantial grounds for concluding that the claimant's sales performance was below standard and would not have improved and/or that she would have refused to except that she had underperformed as a result of which she would have been fairly dismissed in the event that a fair procedure had been followed. I also find that there was contributory fault in the claimant's response to the respondent's disciplinary process, which I have limited to a 10% reduction of the basic and compensatory awards, having regard to the gravity of the procedural failures by the respondent.

6. Remedies issues. It was possible to calculate the basic award (less 10%). It was also possible to calculate the compensatory award for the first period of loss up to the date when the claimant found alternative employment. There were no pay slips produced by the claimant to establish what the claimant's continuing loss of earnings were. Nor did the claimant produce any evidence of attempts to find alternative employment at an equivalent or higher rate of pay. It was not possible in those circumstances to assess what further compensatory award the claimant might be entitled to, including for any future loss. I record however that the claimant is entitled to £350 for loss of statutory rights, and to the extra cost of travel to her new employment by car.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Hargrove

Date: 25 March 2019.

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and written reasons since February 2017 are now available online and therefore accessible to the public at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.