



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Z Passmore

Respondent

Fit For Sport Limited

and

Held at Croydon on 11 January 2018

Representation

Claimant: Mr C Passmore, Claimant's
Uncle

Respondent: Ms C Burton, Head of Human
Resources & Recruitment

Employment Judge Harrington

JUDGMENT

- 1 The Claimant was unfairly dismissed by the Respondent.
- 2 The Respondent shall pay the Claimant the sum of £21,006 (twenty one thousand pounds and sixpence).

REASONS

Introduction

- 1 By an ET1 presented on 22 August 2017 the Claimant, Zachary John Passmore, brings a claim of unfair dismissal against the Respondent, Fit For Sport Limited. The Claimant was employed by the Respondent from 6 July 2013 to 29 June 2017.
- 2 At the start of the full merits hearing, the issues in the case were clarified and confirmed by the parties to be as follows:
 - 2.1 The Claimant brings a claim of alleged unfair constructive dismissal. The Claimant resigned his employment by an email dated 30 May 2017 [84]. The Claimant asserts that he was constructively dismissed and relies upon an alleged repudiatory breach of the express term that, from 1 April 2017, he would be

paid the salary of £30,000 per annum for the role of Area Manager. The Claimant says that this term was agreed orally with Mr Alex Hudson, Regional Manager and that he was led to believe by the Respondent that such an agreement was in place.

- 2.2 Does the above allegation, if made out on the facts, amount to a repudiatory breach of contract?
 - 2.3 If so, did the Claimant resign in response to the Respondent's repudiatory breach of contract?
 - 2.4 Did the Claimant expressly or impliedly affirm the contract by actions or material delay indicating an intention to be bound by it subsequent to the breach such that he waived the breach and treated the contract as continuing?
 - 2.5 If the Claimant was dismissed, what was the reason for dismissal and was the dismissal fair in all the circumstances?
 - 2.6 If the Claimant is found to have been unfairly constructively dismissed, what compensation is he entitled to?
- 3 At the full merits hearing, the Claimant was represented by his Uncle, Mr Crispin Passmore and the Respondent was represented by Ms Chelsi Burton, Head of Human Resources & Recruitment at the Respondent. I heard evidence from the Claimant and, for the Respondent, from Ms Burton and Ms Deborah Spriggs, Business Support Director. Each witness provided a written witness statement. In addition I was referred to a trial bundle paginated 1 - 230. Both parties made closing submissions.
- 4 For the avoidance of doubt, the numbers appearing within square brackets in this judgment refer to the trial bundle and references to Mr Passmore are to Mr Crispin Passmore, the Claimant's Uncle and representative.

The Facts

- 5 The Respondent business is concerned with the provision of PE lessons in schools, kids camps and running after school clubs. The Claimant joined the Respondent in July 2013 as a Casual Activity Leader. His role developed and by September 2013 he worked for the Respondent 5 days per week including 2 days per week supporting the Respondent's Human Resources team, carrying out various administrative tasks at the Respondent's head office.
- 6 Around Spring 2014 a further change in the Claimant's role occurred, partly triggered by the fact that Alex Hudson, the Respondent's Regional Manager and the Claimant's line manager, was planning an absence from the business for around a month in the summer of 2014. The

Claimant began to support Mr Hudson, with a particular focus on camp planning, in addition to carrying out his existing role which included acting as site manager for Boutcher Primary School.

- 7 In the event, around October 2014, the Claimant became the Respondent's full time employee. The Claimant was paid £23,000 per annum and this salary was later increased from 1 May 2016 to £25,000 per annum. Although Ms Burton observed that the Claimant's written contract for the role of Regional Coordinator was not produced until 20 May 2016 [176], I accept the Claimant's evidence that he had in fact been doing that role for a number of months prior to receiving the contract and probably from around the summer of 2015.
- 8 Part of the Claimant's duties as Regional Coordinator included interviewing new recruits and putting together the relevant recruitment packs. The Claimant recorded the individual's salary, job title and school and gave the documentation back to the Respondent's People Team. It is relevant that the Claimant was able to decide upon a salary for an individual having been set a bracket, within which the salary was to fall, by Alex Hudson. In this way the Claimant did not require any further authorisation. In addition to setting salaries, the Claimant also had some involvement with salary increases for relevant staff. He would agree these with Alex Hudson and they would then be processed by the People Team.
- 9 In her witness statement, Ms Burton refers to the Respondent's salary increase authorisation process which she contends wasn't followed in the Claimant's case. That process is recorded in the 'Fit for Sport Financial Control Policy' [159-160] which was a policy apparently adopted on 1 December 2016. Of particular relevance the Policy states as follows,

'Salary increases are proposed by a Regional Manager / Head of Department received and checked by an appropriate Director and submitted to the CEO for approval.' [159]
- 10 In her evidence, Ms Spriggs stated that she should be sent the written authorisation and the change is then processed. Ms Spriggs, who is responsible for the Respondent's payroll, does not add any salary increases unless she has received authorisation from an appropriate person.
- 11 The Claimant told me in evidence that he was never informed of that process and, when carrying out his duties as Regional Coordinator, he was told by Alex Hudson to speak to the People team when increases to salaries had to be applied. I accept that the Claimant was unaware of the Policy and, in particular, that he was not told that salary increases had to be processed by being checked by a director and then being submitted to the CEO for approval. The Claimant was not instructed as to this process and, in the salary matters with which he was concerned,

was instructed by Mr Hudson to follow a different process of simply communicating with the People Team. I accept the Claimant's evidence on this issue as he was consistent on the point when asked repeated questions about the matter. Further, when giving evidence, the Claimant's account was straightforward and clear.

12 With regards to any increases to his own salary, the Claimant understood that any increases proposed by Alex Hudson had to also be approved by Craig Jones, Operations Director and Alex Hudson's line manager. During his evidence, the Claimant stated that Alex Hudson '*.. would obviously have to speak to Craig about it*' and that Alex Hudson would have to get authorisation and approval from Craig Jones.

13 The Respondent's business is organised into regions with each region allocated a regional manager and a regional co-ordinator. Due to company expansion and an increase in the volume of services being run in every region, around the start of 2017 it was determined to reorganise the structure. The Regional Co-ordinator role in each region was replaced with Area Managers – there being multiple Area Managers rather than a single Regional Co-ordinator, who would then work beneath the Regional Manager.

14 With regards to the most relevant matters concerning this change of structure and the imposition of different salary levels, there was a lack of clarity in the evidence provided by the Respondent. Ms Burton did her best to assist me but did not join the Respondent business until late January 2017. She told me that a Board meeting would have considered salaries but she was unable to tell me when this might have happened. Ms Burton made the following statements during her evidence,

'I had no understanding at the time of the process to be followed for setting the salaries for the area managers.....I have had to piece this altogether retrospectively'.

15 It is noted that Alex Hudson remains employed by the Respondent and would have been able to give direct evidence on the recruitment of the area managers and setting of the salaries, however the Respondent did not call him as a witness.

16 Considering the evidence before me, I am satisfied that in March 2017 the Claimant was offered the role of Area Manager, on a salary of £27,000 per annum, which he turned down. The Claimant considered that the Area Manager role had greater responsibilities than the Regional Coordinator role, even though there were to be three area managers in his region, replacing his existing role of Regional Coordinator. In particular, the Area Managers were allocated line management responsibility for some staff, requiring them to carry out appraisals. Further, they were given their own budget to manage rather than being directed on budgetary decisions by Alex Hudson. Some of these matters

are reflected in an email sent to the Claimant by Craig Jones around March 2017 [85-86].

- 17 Following the initial offer to the Claimant, there were a number of conversations between the Claimant, Craig Jones, Operations Director and Alex Hudson. The Claimant called Craig Jones and reported that he had been offered a salary of £27,000 by Alex Hudson to which Craig Jones responded that he would call Alex Hudson. This was followed by a text from Craig Jones to the Claimant as follows,

'Just got off phone to alex he is sending me his salary requirements for you and will confirm today. Miscommunication between me and alex previous.' [148]

- 18 On Friday 17 March 2017 the Claimant recalls Alex Hudson telephoning him. Alex Hudson told the Claimant that he had spoken with Craig Jones and had been told by Craig that he (Alex) had responsibility for making salary decisions and for managing his own budget. Further that Craig Jones had told him that he had the authority to agree the Claimant's salary with him.

- 19 On Monday 20 March 2017 the Claimant had a meeting with Alex Hudson in the Respondent's boardroom. During the meeting Alex Hudson stated that he would like to offer the Claimant £30,000 as a salary for the role of Area Manager. The Claimant responded that he accepted this offer and he thanked Alex Hudson. I am satisfied that this meeting occurred as set out and described by the Claimant. In particular, I find that Alex Hudson did not tell the Claimant that he would have to get the salary of £30,000 authorised or approved or signed off by anyone. Ms Burton very fairly accepted that she could not comment upon these conversations because she wasn't party to them. The Claimant, of course, was and I accept his account as to what happened.

- 20 Later that day the Claimant saw Craig Jones in the Respondent's office. Craig Jones asked whether everything had been sorted, the Claimant responded that it had been and Craig Jones then put his thumbs up. Text messages sent between Craig Jones and the Claimant that evening read as follows,

'Hi Craig, Thanks for listening Friday. I'll continue to work hard and I'm determined to be successful. Zac'

'Love that message. I know you will thank you for your hard work and commitment' [148]

- 21 On Thursday 23 March 2017, Alex Hudson sent the following email to Craig Jones,

'Hi Craig,

After our discussion on Friday.

Here are the salaries I would like my AM's to be on from April 1st.

*Zac - 30k
Alberto - £28k
Rob - £27k*

I will send to people team later today.

Kind Regards'
[145-146]

- 22 On 1 April 2017 the Claimant began to carry out the role of regional coordinator. On 3 April 2017 the Claimant was included in an email containing notes from an area manager meeting. An email from Craig Jones, dated 7 April 2017, requested that the Claimant be included in the Area Manager group email [17]. On 10 April 2017 Alex Hudson sent a detailed and lengthy email to his new team of area managers setting out the aims for the role and the framework within which the managers would operate [19 - 26]. On 13 April 2017 Craig Jones left the Respondent's employ [60].
- 23 Pursuant to the oral agreement reached on 20 March 2017 the Claimant's was to be paid the increased salary of £30,000 per annum from 1 April 2017. There is no evidence to suggest that between 20 March 2017 and 1 April 2017 the Claimant was told any differently and Ms Burton confirmed in her evidence that she did not believe that individuals were told that the pay rises had not been authorised by Craig Jones.
- 24 On 24 April 2017 Alex Hudson emailed Ms Spriggs querying the salary changes for the area managers [205]. In the email he referred to sending the changes through to Craig Jones earlier in the month and that they had then been sent through to Dean Horridge, the Respondent's CEO. Debbie Spriggs responded on 24 April 2107 stating that '*No salary increases have been authorised for these area managers and therefore are not included on this month's payroll.*' [204]. Later that day Dean Horridge emailed that he was unable to find a request or sign off for the salaries [204].
- 25 On 25 April 2017 Alex Hudson emailed both Debbie Spriggs and Dean Horridge asking for the salaries to be put through for the current month. Further email dialogue shows concern as to whether the Claimant's salary increase can be justified [206]. On 1 May 2017 the Claimant was notified by a text message from Alex Hudson that the pay rise to £30,000 had not been actioned [149]. Initially however Mr Hudson assured the Claimant that he would speak to Dean Horridge about it. On 4 May 2017 the Claimant received a company wide e-mail from Mr Horridge saying that all salary increases were to be capped [31].

26 Around mid May, Dean Horridge met with the Claimant to discuss the issue of his salary. During the meeting Dean Horridge acknowledged that the Claimant may have been promised £30,000 per annum by Craig Jones. However it was Dean Horridge's stance that he would now only offer the Claimant a salary of £27,500 per annum. On 26 May 2017 Dean Horridge sent the Claimant an email which included the following text,

'There seems to be some confusion from our meeting last week regarding your promised pay rise.

Whilst I acknowledge you may had been promised a figure by Craig, I had also said we are unable to give a pay increase of the amount you were asking for at this time.

.....

I have agreed to increase your salary to £27,500.' [56]

27 In response to this email, the Claimant wrote that he was disappointed and that he would work out his notice [55-56].

28 In a further email dated 27 May 2017 Dean Horridge thanked the Claimant for his email and decision to resign. Within this email, Dean Horridge referred to

'..the investigation which I am told pending with you on a staff member which may have not had the correct and signed paperwork in pace.' [54]

29 By an email on 30 May 2017 the Claimant formally tendered his resignation. He stated as follows,

'You will know the facts since then but it is clear to me that your refusal to honour a contractual agreement is unacceptable. It comes after a long period of broken promises to pay. The failure to pay what was agreed is a fundamental breach of my contract.' [84]

30 During his evidence the Claimant described losing faith after thinking that the salary he had agreed with Alex Hudson was fair and then realising that he wasn't going to receive that salary. The Claimant stated that his role became untenable, that the relationship was poisoned and he wasn't able to continue doing the job. The Claimant worked out his notice, leaving on 29 June 2017.

31 Prior to leaving the Respondent's employ, the Claimant pursued a grievance. He was interviewed on 20 June 2017 [97-119]. Craig Jones was interviewed on 22 June 2017 [120], Dean Horridge on 23 June 2017 [124] and Alex Hudson on 26 June 2017 [127]. During Alex Hudson's interview he said that he considered the Claimant's salary had been

verbally authorised [133] and that he thought it was ok to tell the Claimant that he would be getting £30,000 per annum [135]. A grievance outcome letter was sent to the Claimant dated 28 June 2017 [142]. In summary it was determined that the salary of £30,000 had not been appropriately authorised.

- 32 The Claimant decided not to appeal the grievance outcome. In the outcome letter, reference was made to the fact that action would be taken outside of the grievance to ensure that Alex Hudson's behaviour, of providing details of a proposed salary in emails, was not repeated. The Claimant was concerned for Alex Hudson. He considered that he had got him into trouble and that there would be action taken against him. The Claimant also told me that he felt threatened by the reference within Dean Horridge's email of 27 May 2017 to an investigation into the Claimant.
- 33 After leaving his job, the Claimant looked for a similar role for approximately 2 months. To aid his search, he posted his CV on a number of online recruitment agencies including Total Jobs and Monster. The Claimant also met with recruitment consultants at Love Recruitment. The Claimant was offered a job at a summer camp on a rate of £80 per day. However the Claimant did not consider this comparable employment and took the decision to retrain into the fitness industry. In the event, he decided to set up a company with his father and committed to a gym franchise.
- 34 Following research and preparation carried out by the Claimant, including finding a premises, it is planned that a gym will be opened around June 2018 and the Claimant will become the manager of that gym on a salary of £30,000. The Claimant will be a named director of the company which has the relevant franchise. The Claimant hopes to be receiving his salary from 1 April 2018.

Closing Submissions

- 35 In closing, Ms Burton summarised that it was the Respondent's case that a salary of £30,000 was requested but not authorised. The salary authorisation process had not been followed [159-160]. Further, the change in role given to the Claimant was not a promotion.
- 36 On behalf of the Claimant, Mr Passmore referred to the Claimant's evidence and the fact that an agreement was reached in discussion with Alex Hudson. It was observed that it was difficult to test the Respondent's case fully when key witnesses had not attended the Tribunal. In summary it was contended that the Claimant was entitled to rely on the outcome of his meeting with Alex Hudson in respect of an agreed salary of £30,000.
- 37 The Claimant's secondary argument was that, even if the correct processes were not followed, it was clear that the Claimant was left

thinking that the salary of £30,000 had been agreed. The Claimant was not told, for example, not to start the job because the salary hadn't in fact been agreed. The first the Claimant became aware that there was an issue was approximately a month later. It was further submitted that, at the very least, Dean Horridge did agree a salary of £27,500 and that should have been paid to the Claimant for the three month period during which the Claimant performed the role of Area Manager.

Legal Summary

- 38 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract of employment in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. This type of dismissal is referred to as 'constructive dismissal'.
- 39 In order to claim constructive dismissal, the employee must establish that:
- i. there was a fundamental breach of contract on the part of the employer;
 - ii. the employer's breach of contract caused the employee to resign
 - iii. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
- 40 In the case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract.
- 41 Contractual terms may be either express or implied. Express terms are those specifically agreed between the parties either in writing or orally. Often an employee will seek to rely upon an alleged breach of the implied term of trust and confidence.
- 42 A delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. However an employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract. Section 95(1)(c) of the ERA 1995 refers to a dismissal taking place where an employee resigns with or without notice. Accordingly the act of giving notice cannot by itself constitute affirmation.
- 43 Where a claimant is successful in his unfair dismissal claim, the usual remedy sought is an award of monetary compensation, ordinarily made up of a basic award and a compensatory award (section 118(1)(a) and (b) Employment Rights Act 1996). With regards to the compensatory award, pursuant to section 123(1) ERA 1996 the Tribunal shall award,

'...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 in so far as that loss is attributable to action taken by the employer'

- 44 Within the compensatory award, the heads of loss normally used include immediate loss of earnings (the loss incurred between the effective date of termination of the contract of employment and the date when the tribunal assesses the loss) and future loss of earnings (loss which may continue).
- 45 The claimant is under a duty to mitigate his loss and must take reasonable steps to obtain alternative employment (which may be starting up a business of the claimant's own if that was a reasonable thing to do). However the burden of proving a failure to mitigate is on the respondent.

Conclusions

- 46 In reaching my conclusions, I have taken into account the entirety of the witness evidence I have heard, the documentary evidence to which I have been referred and the submissions made by both parties.
- 47 As set out in my findings of fact above, I am satisfied that the Claimant was offered the salary of £30,000 per annum for performing the role of Area Manager, that this offer was made by Alex Hudson during a meeting on 20 March 2017 and that the Claimant accepted that offer. I do not accept the Respondent's contention that Alex Hudson had no authority to reach that agreement and I therefore find that the relevant contractual term, relied upon by the Claimant, did in fact exist.
- 48 The relevant context of the meeting on 20 March 2017 was that the Claimant had been told by Alex Hudson on Friday 17 March 2017 that it was he, Alex Hudson, who had been given authority to agree an appropriate salary with the Claimant for the role of Area Manager. Communications between the Claimant and Craig Jones, namely a text on Friday 17 March 2017 and a short conversation on 20 March 2017, also supported this understanding. There is further evidence that Alex Hudson himself thought he had the authority to agree the salary as demonstrated by a number of answers he gave during the investigation interview for the Claimant's grievance [133/135] and Dean Horridge also acknowledged that the promised salary may have been sanctioned by Craig Jones (see paragraph 26 above). Taking all of the evidence into account I am satisfied that Alex Hudson had been instructed to agree a salary with the Claimant and therefore he had authority to do so when he met and agreed terms with the Claimant on 30 March 2017.
- 49 It was not until a text from Alex Hudson on 1 May 2017 that the Claimant understood there was an issue with him being paid the salary he had

agreed. It follows from my findings, that there was an agreement to pay the Claimant a salary of £30,000 and that the Respondent failed to do so, that a breach of the contract occurred. The question of whether the breach is fundamental is essentially one of fact and degree and in this case, I consider that the Respondent's failure to pay the Claimant the salary he had agreed with Alex Hudson to be a repudiatory breach of his contract of employment. The level of an employee's remuneration is of fundamental importance to him and so it was to the Claimant in this case.

- 50 The Claimant resigned in response to the Respondent's repudiatory breach of contract. This particular issue wasn't seriously challenged by the Respondent. As noted in my legal summary, the fact that the Claimant worked his notice does not establish that he affirmed the breach and, in fact, the Claimant did not expressly or impliedly affirm the contract in any way such that he waived the breach.
- 51 The Respondent presents no arguments that, if dismissed, the Claimant's dismissal was fair. In this case, it is difficult to see what such arguments might be. In my judgment, the Claimant was constructively dismissed and his dismissal was unfair in all the circumstances.
- 52 Following these conclusions, I have proceeded to consider an award of monetary compensation. In his Statement of Claim/Remedy, the Claimant claims the following amounts:
- 52.1 Arrears of pay: £849.00;
- 52.2 Basic award: £1,467;
- 52.3 Compensatory award (39 weeks loss of earnings + 2% pension contribution + £489.00 loss of statutory rights): £18,684.06.
- 53 The Respondent takes no issue with the accuracy of the figures and the method of calculation. Having considered the schedule, I accept the Claimant's claims for arrears of pay, basic award and loss of statutory rights. This leaves a claim of £18,195.06 in respect of both past and future loss of earnings from 30 June 2017 until 31 March 2018.
- 54 I do have concerns about the evidence before the Tribunal concerning the Claimant's search for employment following his dismissal. I have not been taken to any documentary evidence to support the Claimant's oral evidence – for example, the Claimant's prepared curriculum vitae or correspondence with relevant job agencies. Nor have I seen documentary evidence to support the Claimant's evidence about opening a gym. However, despite these concerns, I do find the Claimant to be a witness of truth and I remind myself that it is for the Respondent to establish that the Claimant has failed in his duty to mitigate. The Respondent has not done this. It did not, for example, provide any job adverts for roles available over the last few months, which may have been appropriate for the Claimant. Therefore in all the circumstances

and on the balance of probabilities, I am satisfied that the Claimant has taken reasonable steps to obtain alternative employment.

55 Accordingly the Respondent shall pay the Claimant the sum of £21,000.06.

56 I do note that the Respondent raised the issue that the Claimant failed to appeal his grievance outcome. However the Respondent did not argue that this failure should sound in a reduction to any award received by the Claimant pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, which permits a tribunal to reduce an award by up to 25% if an employee has unreasonably failed to comply with the ACAS Code and it considers it to be just and equitable in all the circumstances. Whilst this did not form part of the Respondent's case before the Tribunal, I have considered the Claimant's reasons for not pursuing an appeal. These were that he was concerned both by comments made about action being taken against Alex Hudson, his line manager and a comment made by Dean Horridge about an investigation into the Claimant's own conduct. I accept that these were the reasons for the Claimant not appealing and in those circumstances, I do not, in any event, consider that the Claimant's failure to appeal his grievance was unreasonable such that a reduction to his award might be appropriate.

Employment Judge Harrington
Date: 21 February 2018