Refusal to extend employment with employer after dismissal was reasonable and did not amount to a failure to mitigate loss

In the recent case of Wade v Jansen UK Ltd an Employment Tribunal ruled that it had been reasonable for an employee to refuse to extend his employment with his employer after he had been dismissed and he had taken reasonable steps to mitigate his losses.

What happened in this case?

Mr Wade began working for Jansen UK Ltd as a Sales Manager on 1 July 2019. Mr Wade's role involved selling poultry farming systems and equipment. He met his sales target in 2020 but fell far short in both 2019 and 2021.

In May 2021, Mr Lisle, a manager at Jansen, had a discussion with Mr Wade about dismissal. Mr Wade was told he was to be dismissed because he had worked for Jansen for one year and eleven months and they did not want him to acquire employment rights. In a second conversation, it was agreed that Mr Wade would "pretend to resign" and that he would be reinstated after one month. The resignation and reinstatement went ahead.

In 2022 Mr Wade was given a sales target of selling three to four systems (i.e. between £750,000 to £1 million of sales). By the end of January 2022, he had made sales of £244,048 and was on track to achieve his target. Despite his positive sales figures, at the end of February 2022, Mr Ryan, Jansen's Managing Director, called Mr Wade without warning and dismissed him, ostensibly for "poor performance", without following any sort of dismissal process. Mr Ryan then said that he would set Mr Wade the challenge of selling another system by the end of March – and if he did that then they would reconsider the dismissal. This was later set out in an email. Mr Wade replied expressing shock but received no reply. A couple of days later, Mr Ryan called Mr Wade again to berate him about work and he asked him if he wanted him to "wipe his arse for him".

In March, Mr Lisle called Mr Wade and offered to extend his notice by a month. Mr Wade refused on the basis that there was no guarantee of reinstatement and he felt it would be better to spend his time looking for a new role.

Mr Wade brought a claim for unfair dismissal. Jansen conceded at a Preliminary Hearing that the resignation in May 2021 was a sham and that Mr Wade had the two years' service needed to proceed with the claim.

What was decided?

The Employment Tribunal found that the true reason for dismissal was not poor performance but an ongoing dispute about a contractual bonus owed to Mr Wade, which the company did not wish to pay. Jansen conceded that the dismissal was unfair as it had not followed a fair procedure prior to

dismissal.

Therefore, the only issue for the Tribunal to decide was what compensation should be awarded to Mr Wade. Where an employer is able to show that an employee would have been fairly dismissed in any event, the Tribunal can reduce the compensation award. Further, if an employer can show that the ex-employee failed to take steps to mitigate their losses compensation can be reduced.

Jansen argued they would have fairly dismissed Mr Wade for poor performance in any event. However, The Tribunal rejected this, finding that Mr Wade's performance in 2022 was good and he was on track to meet his sales targets. Further, it would have required warnings, a chance to improve and the provision of support. The Tribunal concluded that there was no chance of a fair performance dismissal taking place.

On the question of mitigation, Jansen argued that it was unreasonable of Mr Wade to have rejected the offer of working an additional month's notice. The Tribunal rejected this, finding it reasonable not to want to return to a company whose way of doing business was to sack without warning or process and a few days later to ask whether he wanted the Managing Director to "wipe his arse for him". Furthermore, there was no guarantee of further work at the end of the additional month. Accordingly, it was reasonable for Mr Wade to have refused the offer and focused on looking for a new job.

Jansen also argued that Mr Wade had failed to mitigate his losses by applying for suitable roles. However, Jansen did not produce a single job advert or piece of evidence of a role at a lower (or any) rate of pay that they said Mr Wade should

or could have applied for. In contrast, Mr Wade produced evidence that he had applied for hundreds of jobs after his dismissal. These applications were for different roles on a range of salaries, including salaries well below that paid to him by Jansen (around £36,000 per annum). He secured only one interview for a role paying £23,000 but was unsuccessful. The Tribunal concluded that Jansen had not discharged the burden of proving that Mr Wade had failed to mitigate his losses. The Tribunal awarded Mr Wade his full losses from the date of dismissal to the hearing and future losses of a further six months.

What are the learning points for employers?

Although only first instance, this decision raises a number of interesting points for employers to note.

First, it demonstrates that if you have concerns about an employee's performance you should avoid burying your head in the sand and instigate a performance management process. Only by following such a process can a fair performance dismissal be achieved. Here, the employer did have some genuine performance concerns but did not address them at the right time. By the end of the employment relationship the performance concerns were not live, meaning the employer lost the argument that it could have legitimately dismissed for poor performance.

Second, it underlines that as well as needing a fair reason for dismissal, an employer must follow a fair process, or risk the dismissal being procedurally unfair (as the employer ultimately had to concede here).

Third, on mitigation, it makes it clear that an employee only has to take reasonable steps to mitigate their losses – not any steps. Expecting an employee to extend their employment with an unscrupulous employer will not be viewed a reasonable step. In those circumstances, a dismissed employee is entitled to walk away and claim losses for any time they are out of work.

Fourth, it reminds us that the burden of showing that an employee has failed to mitigate their losses lies squarely with the employer. Simply asserting that an employee has failed in this respect is not good enough. The employer needs to collate records of jobs it says the employee should have applied for and present this evidence to the Tribunal.

Finally – although a rare occurrence – it shows that artificially stopping and restarting employment in an attempt to avoid employment rights will be viewed as a sham and will not work.

Wade v Jansen UK Ltd

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.