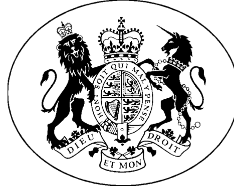
Case Number: 1600334/2016



EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Farooq**	
Respondent:	**Kukd.com Ltd**	
Heard at:	**Cardiff**	**On: 20 November 2018**
Before:	**Employment Judge S Davies (sitting alone)**	

Representation:
Claimant: **In person**
Respondent: **Mr T Davies, litigation officer and**
Mr S Ghafoor, legal officer

JUDGMENT having been sent to the parties on 22 November 2018 and reasons having been requested by the Respondent, in emails of 21 and 22 November 2018, in accordance with Rule 62(3) of the Rules of Procedure 2013:

WRITTEN REASONS

The Hearing

1. The remedy hearing was listed to deal with calculation of compensation in respect of the reserved liability judgment dated 28 November 2016, following the liability hearing on 31 October 2016.

2. There was delay in listing the remedy hearing as the Respondent unsuccessfully appealed i) the rejection on 11 March 2017 of their reconsideration application (**UKEAT/0110/17/JOJ**) and ii) the liability decision (**UKEAT/0149/17/JOJ** heard by HHJ Soole on 2 February 2018).

3. The Respondent was represented by Mr Ghafoor in respect of the application to recuse and the application for costs. The Respondent was represented by Mr Davies in respect of the remedy aspects of the hearing.

4. I was referred to the liability hearing bundle and the Respondent presented an additional remedy bundle. The remedy bundle included the Respondent's 'quantified calculations' (page 58); a table of the claims for quantification, in which none of the sums were agreed.

5. I heard live witness evidence from the Claimant and on behalf of the Respondent from Mrs Healey, Finance Manager, who produced two witness statements dated 27 January 2017 and November 2018 and from Mr Imran Jabbar, Sales & Marketing Manager, who relied on his witness statement (undated) produced for the liability hearing (as redacted at that hearing).

6. The hearing was dealt with in three stages: (i) application to recuse, (ii) remedy judgment and (iii) application for costs. I gave my decision in respect of each stage, prior to moving on to the next.

Application to recuse

7. The Respondent made an application that I should recuse myself from dealing with the remedy hearing because of the appearance of bias. Mr Ghafoor referred me to the case of **Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451** which indicates when a judge should consider recusal due to previous connections. Parties have a right to a fair trial by an impartial arbiter; process should ensure that justice is both done and seen to be done.

8. The basis for the application was that I was previously a partner in Capital Law, a firm of solicitors which had acted on behalf of two companies that had sued the Respondent. Firstly, an employment agency called Linea in 2011 or 2012 and secondly another employment agency called CPS in 2017. Mr Ghafoor could not give me the names of the solicitors involved in litigation but confirmed that it was not me.

9. The application was also made on grounds of the way I conducted the liability hearing on 31 October 2016 and the outcome. Mr Ghafoor raised a number of matters and assertions: I permitted the playing of an audio recording in evidence; my liability findings with regard to the meaning of the word 'images' (this submission was made with an accusation, made on two occasions, that the Claimant lied at the liability hearing); I used the word 'scrape' in my liability judgment and it was alleged that I had adopted this word from the Claimant's written submissions of 14 November 2016 and included it in my judgment in circumstances where the word was not used in evidence in the liability hearing; that the liability hearing was rushed and should have been listed for 2 days when only 1 day was allocated; subsequent to liability judgment, that I refused the Respondent's

reconsideration request and refused to consider additional documentary evidence submitted several months after the liability hearing (received at Tribunal in February 2017); and finally that my judgment was one-sided in favour of the Claimant.

10. The application also referred to the fact that the Respondent reported the Claimant to the Police after the liability hearing, alleging theft of data by the Claimant. The Claimant confirmed that he was interviewed by the Police and that no criminal charge was taken against him; he described feeling bullied by these actions.

11. I refused the application to recuse myself. I do not consider the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility of bias (**Porter v Magill [2002] 2 AC 357**).

12. My previous connection with Capital Law ended, as an employed partner, when I resigned and ceased practice in 2013. I was not involved in any litigation against the Respondent whilst I was a practicing solicitor and I have no recollection of the litigation Mr Ghafoor refers to. Mr Ghafoor was not able to give a name of the solicitor or solicitors involved. The litigation in 2017 cannot be relevant to the application; it took place four years after my departure from Capital Law and I have no knowledge of it whatsoever.

13. **Locabail** lists some factors which should <u>not</u> be objected to, including previous receipt of instructions by a judge to act for or against a party engaged in a case before her. By contrast, I was not involved in the litigation Mr Ghafoor relies upon.

14. I touch briefly on the involvement of the Police and the Respondent's allegation of theft; I cannot see how those circumstances have any relevance to the question of whether or not there is a perception of bias. I do not take this factor into account.

15. As for the way in which the liability hearing was handled and the content of my liability judgment, I do not propose to respond to those matters which have been subject to unsuccessful appeals to the EAT. Not all of the Claimant's claims were upheld, which undermines the suggestion that my decision was one-sided in his favour. This is not an opportunity for the Respondent to rehearse arguments rejected at appeal under the guise of a recusal application. The Respondent was professionally represented by a barrister, Mr C Howells, at the liability hearing. The Respondent was represented by another barrister, Mr J Jupp, at appeal. If there were procedural issues of concern, they should have been raised at the liability hearing, the appeal or at an appropriately proximate time. This hearing is not an opportunity to re-open the findings of my judgment two years after it was promulgated.

16. With regard to the Respondent's reconsideration application dated 23 January 2017, this was rejected on the basis that it was made outside the applicable time limit in Rule 71 of the Employment Tribunal Rules of Procedure 2013. The processes referred to by the Respondent are complete; there is no jurisdiction to re-open them.

17. I noted my concern that by making this recusal application the Respondent may be seeking to disrupt the proceedings from going ahead.

Remedy

18. The purpose of the hearing was to calculate the following sums due to the Claimant:

    a. Commission for periods commencing on 25 May 2015 and on 22 June 2015 (gross sum to be quantified)

    b. Unpaid arrears of pay for 14 days (gross sum to be quantified subject to any part payment made for January 2016)

    c. Unpaid holiday pay (gross sum to be quantified)

    d. Notice pay (net sum to be quantified)

Commission

19. Deductions from wages were made in respect of two periods; starting on 25 May 2015 and on 22 June 2015 (paragraphs 24 - 37 liability judgment).

20. The Claimant relies on the Respondent's commission statements (liability bundle pages 72 and 73) which cover the periods in question. The commission statements for the period starting 25 May 2015 state that the sum of £1,980 is due to the Claimant, when he reached his sales target. For the period starting 22 June 2015 the sum of £1,316.25 is due, where the Claimant just missed his target.

21. Those documents indicate that the target for sales was 40 per period but the Claimant's unchallenged evidence was that the target was in fact 32 sales per period. I accept his oral evidence. The commission statements indicate that he made 33 and 30 sales. I was also referred to page 84 / D2 in the liability bundle, an email from Mr Scurville of 27 July 2015, in it he indicated the Claimant made 33 and 32 sales (sign ups) in the relevant periods. For the purposes of the number of sales he made, the Claimant was content to rely on the commission statements rather than Mr Scurville's email.

22. The Respondent put it to the Claimant that one client, Verona, had been double counted but the Claimant denied that. I note that double counting was not apparent from the commission statement (which lists all clients by name). I accept the Claimant's evidence and find there was no double counting. The correct figures were calculated by the Respondent and appear in the commission statements.

23. The Claimant accepts that part payment was made to him (paragraph 35 liability judgment). The calculations to account for part payment are:

    a. For the period from 25 May 2015:
    £1,980.00 less part payment of £653.38 = £1,326.62.

    b. For the period from 22 June 2015:
    £1,316.25 less part payment of £493.59 = £822.66

24. A total deduction from wages in respect of commission of £2,149.28 (gross).

Arrears of pay

25. Employers are obliged to provide pay slips that clearly identify the nature of payments and deductions so that employees can understand them. Quantification of the claims for arrears and holiday took some time to consider, as the position is far from clear from the documents.

26. Mrs Healey's witness statement dated 27 January 2017 indicates that no payment is due to the Claimant under this head of claim but in her second statement dated November 2018, she asserts that 3 days payment is due. Mrs Healey asserts there was an overpayment to the Claimant for January 2016.

27. The Claimant's basic pay was 'held back' during December 2015 (Mrs Healey: paragraph 4 (page 63) and paragraph 53 of the liability judgment).

28. Mrs Healey refers to pages 69 and 71 of the remedy bundle; a pay slip dated 29 January 2016 which shows zero payment to the Claimant and a pay slip dated 26 February 2016 which shows payment to the Claimant of £1,324.63. In paragraph 5 of her witness statement of 27 January 2017, Mrs Healey states; "*in relation to pay date period 29 January 2016, I refer to pay slip marked 'Note 4'* (page 71) *during which Mr Farooq left the company. Until Mr Farooq's final dates and figures were agreed, his final pay was not paid until 26 February 2016. This payment included one week's holiday (we didn't pay him for in December). The final wage was for 11 days which he worked up to 19 January 2016, 2 days holiday he took from 2016 entitlement and 4.5 days holiday from 2015*".

29. The Claimant was sent a letter from Mr Rawlings (HR) dated 8 February 2016 (page 25 liability bundle and paragraph 56 of liability judgment). In it, Mr Rawlings refers to '*last months stoppage*'; which I find is a reference to a stoppage of pay in January 2016. This meaning accords with the pay slip of 29 January 2016, which indicates a zero payment. Mr Rawlings states '*we are prepared to release one week's salary and Sarah in payroll should have done that*'. Mrs Healey was taken to the letter and said she had not seen it before. She could not recall the instruction from Mr Rawlings, from almost 3 years ago. Mrs Healey accepted in cross examination, that she may be mistaken as to the nature of the payment / deduction referred to on the pay slips.

30. The Claimant accepted he received a direct payment by BACS on 7 February 2016. Mrs Healey says that this was for his rolled over holidays from 2015. The Claimant asserts instead, that it was for his stopped pay in January (referred to by Mr Rawlings in his letter of 8 February 2016). The timing of the BACS payment is consistent with Mr Rawlings' letter. I conclude that the deduction for 'wages advance' on the pay slip of 26 February 2016 is to reflect payment of 1 weeks' pay for January 2016 made direct by BACS to the Claimant on 7 February 2016.

31. I have not been shown a pay slip that indicates payment for any time worked by the Claimant during February or March 2016.

32. It is not surprising that the Claimant had difficulty in working out what payments were due to him. His entitlement to payment of basic salary was withheld in December 2015 (paragraph 4 of Mrs Healey's statement of 27 January 2017) and January 2016 (paragraph 72 liability judgment), payment was made by BACS direct into his account on a date other than pay day and his pay slips do not itemise or describe fully what payments and deductions they include (for example, the deduction for 'wages advance' of £499.37 (page 71) gives no explanation what the advance relates to).

33. The Claimant's unchallenged evidence was that he sought disclosure of documents relevant to pay from the Respondent, but this request was denied on the basis that he was 'embarking on a fishing expedition'. Documents that relate to pay will be in the possession of an employer and it is unreasonable and unrealistic to expect the Claimant to be able to accurately calculate and demonstrate what is due to him, if the documents he needs are withheld.

34. My liability judgment finds that quantification of this claim for compensation will take account of any part payment made for January 2016. I find that on 7 February 2016, payment was made for 5 days' work in January in

accordance with Mr Rawlings' letter. In the liability judgment I found that the Claimant worked for 6 days in January 2016 (paragraph 74); he has been paid for 5 of those 6 days.

35. I conclude that the unpaid arrears of pay totals 9 days (1 day in January 2016 and 8 days in February/March 2016 (paragraphs 75-78)). At a daily rate of £96 the total deduction amounts to £864.

Holiday pay

36. The Claimant says he has not been paid for 'rolled over' holiday from 2015. Mr Jabbar acknowledges (paragraph 72 witness statement) that 4.5 days holiday had accrued to but was untaken by the Claimant. Mr Jabbar said he and other members of management gave instruction to HR to make payment to the Claimant in respect of this untaken holiday, but Mr Jabbar could not confirm who carried out the instruction or to whom it was made.

37. I accept the evidence of the Claimant and Mr Jabbar that payment in respect of 4.5 days holiday was due from 2015. The Respondent has not demonstrated that payment was made. None of the pay slips I have been shown identify payment in respect of 2015 holiday. Mrs Healey said the 'wages advance' deduction of £499.37 on the pay slip of 26 February 2016 (page 71) was in respect of a BACS payment made for untaken holiday but in cross examination accepted that she may have been mistaken. I prefer the Claimant's account of what that figure relates to, as above. I find that the Claimant is due payment in respect of 4.5 days for the 2015 holiday year.

38. The Claimant says he took no holiday during 2016. The Respondent did not show evidence of holiday taken in the period that the Claimant worked during January 2016 (page 72 remedy bundle and paragraph 74 liability judgment). Mrs Healey said payment was made for 2016 holidays but payment was not itemised on the final pay slip. I accept the Claimant's evidence and find that he is due payment for accrued untaken leave in 2016.

39. The Respondent's holiday year runs from 1 January to 31 December (page 2 liability bundle). Holiday entitlement is calculated on a pro rata basis where an employee works for part of a holiday year. I calculate that the period worked amounts to 7 weeks in 2016. On an entitlement to 5.6 weeks of annual leave per year, I calculate that the Claimant is due ¾ of a week's leave for 2016 (or 3.75 days).

40. The total holiday payment due to the Claimant for 2015 (4.5) and 2016 (3.75) is 8.25 days at £96 per day; a total deduction of £792.

Notice pay

41. In closing submissions, Mr Davies indicated that the amount of the award for breach of contract (notice pay) was agreed. This claim for compensation is upheld in the agreed sum of £1,545.43 (net).

Application for costs

42. After my oral judgment on remedy, Mr Ghafoor made an application for costs on the basis of unreasonable behaviour by the Claimant.

43. The Respondent relied on the fact that a verbal agreement to settle was reached, but not concluded, following without prejudice discussions. Negotiations took place between the Claimant and Mr Ghafoor shortly after liability judgment was promulgated in November 2016.

44. During the application for costs, Mr Ghafoor made repeated references to the content of without prejudice material and the sums offered in negotiations. I required him to stop doing so and asked that he outline the nature of the application, without reading from extracts of emails between the parties. I indicated that once the nature of the application was understood, I would then ask the Claimant for his views on whether the correspondence was sent on a 'without prejudice' basis and whether he understood this term as a litigant in person.

45. The Respondent submitted that the Claimant made an offer of settlement and this sum was agreed on or around 6 December 2016. Subsequently the Respondent drafted a settlement agreement and the Claimant did not sign it. Mr Ghafoor asserted that later, in further negotiations, the Claimant asked for an increased amount in settlement in or around July 2017.

46. I was told that other possible causes of action were raised in the course of negotiation. There was an issue between the parties as to who had raised these matters.

47. Mr Ghafoor submitted that refusing to comply with the agreed verbal settlement and then later asking for more compensation was unreasonable conduct by the Claimant. He asserted that the emails he wished to refer to were sent on a 'without prejudice save as to costs' basis.

48. In reply, the Claimant submitted that the emails were sent on a without prejudice basis, and that he understood that term. The Claimant objected to selective reference being made to extracts of the without prejudice material. The Claimant said many of his emails were never responded to. The Claimant said he offered to meet up with Mr Ghafoor midway between Peterborough and Cardiff, in Birmingham, to discuss matters, as he says

he did not wish to cause the Respondent hardship. The Claimant submitted that the Respondent caused him upset by reporting him to the Police alleging theft; he says he felt bullied.

49. The Claimant agreed that there was a discussion with regard to settlement, but he did not feel able to sign the subsequently provided settlement agreement, which he felt pressurised to do within a short timeframe. The Claimant altered a confidentiality clause in the draft agreement so that obligations were mutual rather than one way in favour of the Respondent. This was not accepted, and the settlement agreement was never signed. The Claimant accepted he asked for an increased settlement sum when the Respondent later proposed settlement by COT3 agreement.

50. I allowed Mr Ghafoor the opportunity to reply; he alleged that the Claimant was not telling the truth (this was repeated on more than one occasion), he had not pressurised the Claimant and he had acted in good faith. Mr Ghafoor again started to read from without prejudice emails. After my further intervention to stop him from doing so, Mr Ghafoor interrupted me on more than one occasion and I had to ask him to allow me to finish speaking. Mr Ghafoor then said that the Respondent was not getting a fair hearing. When I asked what he meant by that comment, he referred to the grounds for the earlier recusal application. Mr Ghafoor also said that his character was ‘being blackened’ and he had not refused to disclose documents.

51. I referred the parties to Rule 76(1)(a) and the discretionary nature of any order for costs for unreasonable behaviour. I took into account the fact that the Claimant is unrepresented and has been throughout. In light of the nature of the application, I did not feel it necessary to see any documents. The parties could have reached an agreement on payment of a sum to settle the claims, without the need for a settlement agreement which provided for confidentiality. The option to pay what was due was open to the Respondent and would have avoided the need for remedy hearing.

52. I stressed that there is nothing unusual about a Respondent seeking signature of a settlement agreement or COT3. This is common practice, but that said, the Claimant was not obliged to sign an agreement if he was not happy with the wording or simply did not wish to. The Respondent was aware at an early stage, at the end of 2016, that the Claimant refused to sign the unamended settlement agreement. The parties cannot be said to have reached agreement, where the Respondent wanted a settlement agreement, but it was not signed.

53. The Respondent exercised its right to appeal the liability decision; a consequence of the appeal process is that there has been delay and additional cost in reaching the remedy stage.

54. Nothing in the Claimant's actions indicate to me unreasonable behaviour such that I should exercise my discretion to award costs against him. The application for costs is refused.

Employment Judge Sian Davies
Dated: 11 December 2018

REASONS SENT TO THE PARTIES ON

…………13 December 2018…………….

……………………………………………….
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS