



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr S Empson

Nimbus Property Systems Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A RECONSIDERATION

HELD AT Birmingham

ON 12th December 2018

EMPLOYMENT JUDGE Coaster

JUDGMENT ON A RECONSIDERATION

The judgment of the Tribunal is that

1. The claimant's claim for unlawful deduction from wages is well founded. The respondent is ordered to pay the claimant the gross commission of £8271.00.

REASONS

Background and Issues

1. On 8th October 2018 the claimant requested a reconsideration of paragraph 16 of the judgment promulgated on 24th September 2018 following a final hearing on 26th July 2018 (the Judgment). The parties were unrepresented at the final hearing.
2. I granted a reconsideration and further written submissions from both parties were invited. These were received from the respondent on 19th November 2018 and from the claimant on 23rd November 2018. I asked the parties whether they wished for an in-person hearing or for the reconsideration on paragraph 16 to be held 'on the papers'. This is not a reconsideration of the entire judgment but a reconsideration only of the splitting of the commission of 10% payable on the GVA sale in January 2018 reducing the claimant's share of the commission. The claimant wished for a hearing on the papers. The respondent was content to let me decide. Applying the overriding objective, I have decided to determine the reconsideration on the papers, that is on the submissions made by each party and with reference to the evidence and findings

of fact already made.

The Judgment

3. The judgment found that it was an express oral term of the claimant's employment contract that he was entitled to 10% of sales revenue that he achieved during his employment between October 2017 and January 2018 with the exception of one of the respondent's customers, GVA, which the respondent had claimed had not been a sale attributable entirely to the claimant's efforts. The findings of fact found at paragraph 6.52 to 6.57 of the Judgment are as follows and are undisturbed by this reconsideration:

"GVA Grimley Contract

6.52 The respondent had been in discussions since 2016 with GVA Grimley Limited (GVA) for the provision of software. Grimley evaluated the software and chose not to take a licence at that time.

6.53 During 2017 contact was maintained between the respondent and GVA. Mr Clements visited GVA in April 2017. The respondent was receiving referrals for the product from GVA without involvement from the claimant in July 2017. Email evidence supports the respondent's case that others at the respondent company and GVA were in touch with other in connection with the respondent's software and sales opportunities for it.

6.54 Mr Richard Howells, the then Associate Director of Client and Business Services for GVA, had not been asked to review again any product from the respondent after 2016 until the claimant got in touch. The claimant and Mr Howells were already well acquainted. The claimant now works for a company of which Mr Howells was acting CEO at the time of the claimant's engagement following his departure from the respondent.

6.55 In July 2017 when Mr Howells was still at GVA, the claimant requested Mr Howells to review again the respondent's software which had been through a re-development. The claimant re-presented the software to Mr Howells; Mr Howells found that the software interface had been improved and the data was more relevant to GVA, particularly GVA's current CRM/Case Management development.

6.56 Over a period of 5 months, Mr Howells entered into discussions with the claimant on the length of a contract and also with Mr Paul Davis, costs to create a bespoke Application Programme Interface integration. Mr Howells generally met with the claimant although on at least one occasion they were also joined by Mr Paul Davis.

6.57 GVA entered into a two year agreement with the respondent's Nimbus Maps at a reduced cost for 900 licences at £25,000 per annum as a loss leader and to generate market awareness of the platform. An invoice was raised in January 2018 and was paid in March 2018."

4. The conclusion reached was set out at paragraphs 15 and 16 of the Judgment which state:

"15. With regard to GVA, I note the evidence of Mr Howells. However the claimant

was not entirely responsible for the relationship between the respondent and GVA. There was ongoing contact between the respondent and GVA during 2016/2017 although I accept that Mr Howells may not have been the point of contact for others in the respondent's employment. The claimant may well be substantially responsible for re-igniting GVA's interest in the respondent's re-developed product but I find that he cannot claim 100% responsibility. He was referred to in the evidence as "kicking down doors" at GVA. This was through his association and friendship with Mr Howells. The claimant had contact with Mr Howells for 5 months. The relationship between the respondent and GVA far exceeded five months. The respondent suggested that the highest claim for commission on the GVA would be no more than one seventh. Mr Howells says that apart from negotiating costs on the API the claimant was solely responsible.

16. In the circumstances, I find that it would be equitable to award the claimant 50% of the GVA sales invoiced to GVA in January 2018."

5. The essence of the claimant's submissions in support of the request for a reconsideration and in response to my request for submissions from the respondent as to (i) the industry norm or alternatively its own practice in splitting commission) and (ii) had the issue been raised at the relevant time how would the respondent have dealt with it, are:

5.1 the Judgment was that there was an express oral term that the claimant would receive commission on sales at the rate of 10% and no term for business efficacy or other reason could or should be implied into the oral agreement made with the respondent through Mr Clements, the respondent's sales manager at the relevant time;

5.2 the need for splitting commission is not very common and is rarely covered in contracts and commission schemes;

5.3 where there is a need to split commission it would be dealt with in advance of a deal being completed, setting out the level of involvement of the participants and who instigated the deal;

5.4 managers and directors do not usually participate in a deal commission where they have supported a sales person to obtain the deal because they are remunerated through team performance, not their team members' individual sales achievements;

5.5 the GVA sales was important to the respondent and they had engaged the claimant at least partly because of his friendship with Mr Howells and the possible advantages that would bring;

5.6 even if the respondent had considered splitting the claimant's decision (which they did not) they would not have done so as they would have recognised it was a disincentive and the claimant would have objected.

6. The respondent's submissions were summarised in 6 numbered paragraphs at page 4 of 5 pages submitted . Paragraphs 1 – 5 are no more than a challenge to the findings of fact and conclusions of the Judgment, disputing a principal finding of the Judgment namely that there was a express oral term between the respondent and the claimant that he would be paid 10% on sales revenue achieved. The respondent reiterates that the commission scheme in place at the time was discretionary not a contractual right.
7. There is an appropriate forum to appeal the Judgment; I therefore do not deal with these submissions as they are not relevant to the issue under reconsideration save for the comments in paragraph 9 below.
8. At paragraph 6 of the respondent's summary of its submissions, it is stated that there should be no commission payment at all to the claimant because it is the respondent's standard practice that no commissions are paid where the person in question has been served with formal written notice of their employment coming to an end or are no longer employed by the respondent on the date the commission payment becomes eligible for payment.
9. It is clear in the Judgment that I found that the respondent's standard commission structure was not brought to the attention of the claimant, let alone agreed with him. It is irrelevant, therefore, whether or not any other employee such as Mr Clements was engaged on the respondent's standard commission structure. It is also irrelevant whether the industry norm is to have a commission similar to or the same as the respondent's standard commission structure. I accept that the respondent's standard commission structure is typical of the industry norm. The difficulty for the respondent is that its standard commission structure wasn't a term of the claimant's contract of employment. This was a result of the respondent's own omission.
10. I accept the claimant's submission which is supported by the evidence at the hearing, that the GVA contract for the respondent's software was extremely important to the respondent. The claimant was engaged with the intention and hope that he would win a contract from GVA. He succeeded in doing so and prima facie would be entitled to his commission at 10%. The respondent objects because other people were involved in supporting the product purchased by GVA. Mr Davies had been in attendance at one meeting with Mr Howells and the claimant. The respondent also submits that it was Mr Davies, not the claimant who was responsible for the alternatively the bespoke API element of the sales revenue from GVA.
11. I was provided with a new piece of documentary evidence which in itself is surprising at this late stage. It was not included in trial bundle. It has been disclosed to the claimant by the respondent. As the email is relevant to this decision I therefore admit it in evidence.

12. The email dated 11th October 2017 is from Mr Clements to Mr Simon Davis and sets out the propose deal with GVA. It asks the question: *“Commission paid for Sam on the first year only?”*

13. There are two questions to be determined: (i) was there an agreement to split the GVA commission (including the element relating to the bespoke software modification; and (ii) was the GVA commission payable for the first year only.

Splitting commission

14. I found that there was no discussion between Mr Clements and the claimant as to a threshold before commission can accrue. I now find that there was also no discussion specifically on the splitting of the GVA commission between the claimant and other members of staff. This is for two reasons: first, on the basis of the 11th October 2017 email, Mr Clement, writing to Mr Simon Davis, did raise the subject of whether the claimant should receive commission for one year but did not include in his proposals and requests for comments from Mr Davis, any question of splitting the claimant’s commission with members of staff and particularly not with Mr Paul Davies, the managing director. Raising it in this email would have been an obvious time to do so, if splitting commission was the respondent’s practice. If there had been a reply in the positive to this email it would no doubt have been disclosed by the respondent.

15. Second, split commissions are not referred to in the respondent’s standard commission structure document. This strongly suggests that splitting commission is not a practice that the respondent follows. Splitting commission cannot be considered in isolation of the original discussion on sales commission in July 2017 which is when it should have taken place if it was to take place at all.

16. With regard to the commission claimed by the claimant on the API element of commission on GVA sales revenue, the respondent says that GVA would not have taken the licences unless the API and salesforce integration were also agreed and provided and that the main sale was therefore dependent on this aspect. The respondent attributes the success of the API element of the GVA sales revenue entirely to Mr Paul Davis. Mr Howells’ evidence however was that he discussed the costs to create a bespoke API integration with the claimant and Mr Paul Davis. He stated that the API integration was raised by the claimant as an option and prices confirmed by Paul Davis. Clearly the API element was an integral part of the GVA sale agreement.

17. In the circumstance set out in paragraphs 14 and 15 above, there insufficient evidence to conclude on the balance of probabilities that the splitting out of the API element of the commission claim was agreed with the claimant. I therefore find that the claimant is also entitled to this element of his commission claim.

Period of sales revenue applicable

18. The amount of the GVA sale was £25,000 per annum for two years. The respondent says that the claimant knew that commission was for one year only, and not two years agreed with GVA. The email of 11th October 2017 raises a one year commission period as a question. There was no evidence apart from the respondent's assertion that the claimant knew of the limit on his commission for GVA to one year, that this proposal by Mr Clements was acted upon and agreed with the claimant. Having checked my notes of the hearing and the witness statements there was no evidence that confirms on the balance of probabilities that there was an agreement with the claimant to reduce the two year agreement with GVA to one year's commission.

19. In conclusion, the claimant is entitled to 10% commission on sales between October 2017 and January 2018 on sales totalling £82,710. He is therefore entitled to an award of £8,271.00.

Employment Judge Coaster

12 December 2018