EMPLOYMENT TRIBUNALS

Claimant: Mr V Kaye

Respondents:
1. Telecoms (GB) Limited
2. Telecoms Solution (GB) Limited

HELD AT: Manchester **ON:** 13 and 14 November 2018

BEFORE: Employment Judge Ross
Mrs S Ensell
Ms M Dowling

REPRESENTATION:

Claimant: First day, in person
Second day, Ms H Kaye, Daughter
Respondent: Mr R Long, Director

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for age related harassment pursuant to Section 26 of the Equality Act 2010 is not well founded and fails.

2. The claimant's claim for disability related harassment pursuant to Section 26 of the Equality Act 2010 is not well founded and fails.

3. The claimant's claim that he was unfavourably treated by the respondent when he was informed he could not take half a day to attend the hospital but had to take a full day, pursuant to Section 15 of the Equality Act 2010, is not well founded and fails.

4. The claimant's claim for unlawful deduction from wages in relation to non-payment of commission on holiday pay is well founded and succeeds. We order the respondent to pay the claimant **£758.68** within 14 days of the date of this judgment.

5. The claimant's claim for unlawful deduction from wages in relation to underpayment of one week's notice because it did not include commission is well

founded and succeeds and we order the respondent to pay the claimant £**316.38** within 14 days of the date of this judgment.

6. The claimant's claim for unlawful deduction from wages in relation to his pay in November 2017 because of an alleged arithmetical error of £100 is not well founded and fails.

7. The claimant's claim that the respondent failed to provide written particulars of employment is well founded and succeeds. We order the respondent to pay the claimant two weeks gross pay at the statutory maximum at the relevant time, 2 x £489 = £978.

8. The claimant's claim for failure to provide him with an itemised pay slip in breach of Section 8(2)(b) Employment Rights Act 1996 is well founded and succeeds. We declare that the respondent failed to identify the purpose of the deductions in the claimant's pay slips. We make no award because there was no unauthorised deduction from the claimant's pay slips save for the amounts we have ordered elsewhere.

9. The claimant's claim for unlawful deductions from wages in relation to failure to pay him commission for the contracts with the Elevator Company and G Brandon and Sons is well founded and succeeds. We find the claimant was entitled to a commission of 10% of the profit on each of these contracts once the equipment cost installation cost, settlement fees and telesales fees have been deducted. The Tribunal does not have the information to determine the amount due to the claimant. This element of the claim will be listed for a Remedy Hearing before this Tribunal (ELH 3 hours) but only if the respondent fails to pay the sum due within 28 days of the date of this judgment. (For the avoidance of doubt the Tribunal finds that the claimant was not entitled to 25% commission on these contracts).

10. The claimant's claim for 25% commission on the contract with TNC Granite is not well founded and fails.

11. The claimant's claim for unlawful deduction from wages in relation to excessive costs for deductions in relation to commission for November and December pay statements is not well founded and fails.

12. The claimant's claim for an unlawful deduction from wages in relation to a deduction of £150 for parking is not well founded and fails.

13. The Tribunal has no jurisdiction to determine any issue as to whether the amounts deducted for tax and national insurance were properly made. Such claims should be raised with HMRC.

14. The correct respondent is Telecom Solutions (GB) Limited and the first respondent Telecoms GB Limited is dismissed from these proceedings.

REASONS

1. The claimant was employed by the second respondent as a Telecoms Consultant between 1 March to 29 November 2017 when he was dismissed. He brought claims to this Tribunal which were identified at a Case Management Hearing held on 18 July 2018. The claims were

(1) A claim for age discrimination namely harassment pursuant to Section 26 of the Equality Act 2010 in relation to remarks made by Mr Long. He also relied on a comment made by Mr Deach and a comment by Ms Vanezi (see paragraph 6 of the case management note).

(2) The claimant also brought a claim for disability discrimination. There was no dispute that the claimant was disabled by reason of Type 1 Diabetes and that the respondent had knowledge of that condition during his employment. He brought a claim for harassment in relation to a comment made by Mr Deach at paragraph 8 of the claim form. He also brought a claim for Section 15 unfavourable treatment arising from disability in connection with a change in policy that was identified at paragraph 9 of the Case Management Order.

(3) The claimant brought various claims for unlawful deductions from wages. He brought a claim that the thirteen days holidays paid at the end of his employment were inaccurately calculated because they did not include commission. He brought a claim there was an unlawful deduction from his wages because a deduction had been made of a parking fee of £150. He also claimed that his final commission payment was inaccurate because he was paid 10% commission when it should have been 25% commission. He claimed that in November and December pay statements an excessive amount of costs had been deducted in relation to equipment which had reduced his commission. He further claimed that in November his pay statement was inaccurate because the net pay did not add up arithmetically.

(4) The claimant also said there was outstanding commission due for a deal he had completed for the elevator company and outstanding commission due for a deal he completed for TNC Granite and G Brandon.

(5) The claimant also brought a claim for failure to provide itemised pay slips and a failure to provide written terms and conditions.

2. The respondent denied all claims.

THE LAW

3. The relevant law is s26, s15 s136 Equality Act 2010.

<u>Discrimination arising from disability – section 15 Equality Act 2010</u>

Section 15 Equality Act 2010 states:

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

We had regard to Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKUEAT0397/14, IPC Media Limited v Miller [2013] IRLR 707; Pnaiser v NHS England [2016] IRLR 174; Hardy & Hansons PLC v Lax [2005] ICR 1565' Allonby v Accrington & Rossendale College [2001] ICR 1169; Hensman v Ministry of Defence UKR+EAT0067/14.

Harassment – section 26 Equality Act 2010

Section 26 Equality Act 2010 states:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(1) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(2) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

4. The relevant protected characteristics here are disability and age.

5. The Tribunal took into account the burden of proof provisions pursuant to section 136(2) and (3).

6. The Tribunal had regard to Igen Limited & others v Wong [2005] IRLR 258; Laing v Manchester City Council & others [2006] IRLR 748; Madarassy v Normura International PLC [2007] IRLR 246; Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865; and Ayodele v Citylink Limited [2007] EWCA Civ 1913

The Issues

7. The issues for us to determine were attached to the Case Management Order.

8. We read statements provided by the claimant from his witnesses Ms H Barker and Mr E Stratis. Neither of them attended the Tribunal and so we attached limited weight to their evidence because neither we nor the respondent could ask them questions. The claimant had not provided a statement as he had not understood a witness statement referred to himself. Accordingly, it was agreed that the information provided with the claimant's application to Employment Tribunal would stand as his evidence in chief.

9. For the respondent we heard from Mr Deach, Sales Manager and the claimant's line manager. We also heard from one of the claimant's colleagues Mr Andre Phang.

10. At the outset of the hearing the parties had not properly complied with the case management order to provide an agreed joint bundle. Having regard to the overriding objective the Employment Tribunal did not spend time apportioning blame. Rather, the Tribunal ensured that the case proceeded to hearing.

11. We permitted the claimant to add all the documents he had brought with him (some of which he said he had already disclosed to the respondent) to be included in the bundle. The Tribunal clerk assisted by copying these documents for all the parties. The Tribunal also gave time to the claimant to consider the bundle which had been prepared by the respondent. (For the respondent it was alleged that they had disclosed the bundle to the claimant in good time and provided information from Royal Mail tracking service to support this). The claimant denied he had received the bundle before the hearing.

12. The claimant did not attend the second day of the hearing. Fortunately, by that stage the evidence had been completed. Accordingly, the Tribunal permitted the claimant's daughter to provide submissions to the Tribunal, with the agreement of the respondent. The claimant did not attend because he had become ill overnight due to his medical condition of Type 1 Diabetes.

13. The Tribunal also noted that the previous day the Tribunal's attention had been drawn to a final Schedule of Loss supplied by the claimant. At that stage the Tribunal reminded the claimant that a Schedule of Loss would not normally be considered until after the Tribunal had determined liability in the case.

14. On viewing the schedule in detail overnight the Tribunal noted that the claimant appeared to be trying to add an additional head of claim, namely automatic unfair dismissal for asserting a statutory right via his Schedule of Loss. The claimant's daughter at the submissions stage the following morning (Day 2) was informed that the claims had been very clearly identified at a Case Management Hearing many months earlier and it was not possible to amend a claim to introduce a new head of claim never previously identified via a Schedule of Loss after the evidence had concluded.

Facts

15. We found the following facts : the respondent is a small business selling telecom systems to businesses. It employs approximately 25 people. The sales team consists of approximately 5 people (three Sales Representatives, a Trainee and Mr Deach the Sales and Marketing Manager). We find that during the course of the claimant's employment there were also, at one stage, an additional five employees in a call centre. The staffing levels varied over the relevant period.

16. We find the claimant responded to an advertisement, see page 60 of the bundle, which was for a Telecoms Consultant. The post is advertised with Telecoms Solutions (GB) Limited with a basic salary of £20,000 plus commission.

17. We find the interview was conducted by Mr Deach. There was no dispute that the claimant had the use of a company car and he received the £20,000 basic pay in the sum of £1,666 per month. We found from the text messages we saw in the bundle that he was also supplied with a work mobile telephone.

18. We find there was an agreement in place in relation to commission. There were no written documents in relation to this agreement. The claimant did not have a written contract of employment either.

19. We find the verbal agreement in relation to commission formed part of the claimant's unwritten contractual terms. The agreement was that the company paid commission to the sales consultant on 25% of profit on a sale once it was completed. The profit was calculated after deductions had been made for equipment cost, installation, settlement and telesales. For example, see page 38.

20. The claimant said that the payment was payable after the contract had been concluded and one month in arrears. Mr Deach agreed this was the way that the commission was calculated. Mr Deach could not inform us as to the timing of the commission payment as he said this was a matter dealt with by payroll. The Tribunal finds there was no evidence to contradict the claimant's assertion that commission was normally paid monthly in arrears after a contract was concluded.

21. We find that in September 2018 Mr Deach held a meeting with the sales team where he explained that from now on the commission arrangement would be 10% of the profit (after deductions for equipment costs, installation, settlement and telesales) where a sales person had concluded two deals or less in any calendar month. We find that if a sales person had concluded three deals or more the existing 25% of net profit commission arrangement would still apply. We also find based on the evidence of Mr Deach that once a sales person within a month had achieved three deals then all of the contracts including the first two would attract commission payable at 25% of net profit. We rely on the evidence of Mr Deach that it would be very unusual to conclude two deals or less in a calendar month. He informed us he had achieved 12 deals in the previous month despite his other responsibilities as a manager.

22. We accept the evidence of Mr Deach that when he held a meeting with all the sales staff in September 2018 he explained the new scheme. We accept his evidence that he placed details of the new scheme on a board in the meeting room. We accept his evidence that the new terms of the commission scheme were not applied retrospectively. There was no evidence given by the claimant that he objected to the change in commission terms either verbally or in writing.

23. We turn to consider the claimant's wages. There is a lack of clarity about the precise sums the claimant received in March and April. He told us that he received the basic pay of £1,666 gross every month (£20,000 divided by 12 monthly payments). We also found he received commission. In May we find the claimant received a total of £6,770 which comprised £1,666 basic plus commission of £6,484 making a total of £8,150. Deductions were made in the sum of £1,630 which we were informed was tax and national insurance although it is not identified specifically as such in the payslip. In that month the claimant also received an additional sum of £200 for a car.

24. In June the claimant received a net figure of £4,726, see page 22. In July he received £3,144, page 24. In August he received £3,516 see page 25 – 37. In September he received £3,389, page 26 and 32. In October he received £3,348, see page 27 and 33, in November he received £2,368 see page 34. In December he received £1,273 see page 35. This included accrued but outstanding holiday pay of 13 days at basic pay plus one week's pay in lieu of notice also calculated as basic pay and an outstanding sum of £40 commission.

25. We find that the commission was payable in arrears. For example, the sales achieved in October reflect in November's wage slips. The claimant accepted in evidence he received commission from the contract he secured with TNC Granite but stated he did not receive commission for the contracts he said he secured with the Elevator Company or G Brandon and Sons.

26. We rely on an email from Mr Long to the claimant of 6 December 2017 in the bundle that there appeared to be an intention on the part of the company to pay the claimant any outstanding commission on these two contracts despite the fact he had left the business.

27. We find in the absence of any written agreement or any evidence that commission was not payable after an individual left the business or any direct evidence that the commission payable in relation to these companies was due to another employee that the claimant is entitled to a commission on a 10% basis for the Elevator Company and G Brandon and Sons. We find the relevant figure is 10% because due to delays in signing these contracts, they were not completed until Dec 2017 as identified in the document found in the bundle at page 41. Accordingly, we find both commission payments were payable in January 2018. Therefore as there were only 2 commission payments due in that month we find the commission was payable at 10% of the profit after deductions and not 20%.

28. We find the claimant's comments that the installation charges were excessive on the contracts concluded as shown in November and December payslips is no more than speculation. The claimant himself agreed he had no evidence for his assertion other than a suspicion. We accept the evidence of Mr Deach that there were wide varieties in costs of contracts depending on the nature of the contract and the type and nature of it.

29. The claimant was dismissed on 29 November 2017. The respondents stated it was partly for poor performance and partly because of the way the claimant conducted himself in the workplace.

30. On the termination of employment, the claimant had accrued twenty-one days statutory holiday entitlement in accordance with the Working Time Regulations 1998. The claimant stated he had taken all five bank holidays and been paid for them in this period (two days at Easter, two days in May and the August Bank Holiday). He agreed he had taken three further days, one full day and four half days. The claimant could not recall when he had taken those dates. Accordingly, the balance of holidays due to him was 13 days which he was paid at a basic rate of pay.

31. The Tribunal has calculated the sums paid to the claimant in accordance with his November payslip, see page 34. When the basic award, £1,666 is added to the commission £1,294 a total of £2,960 is reached. The deduction is £592. The net pay is therefore £2,368. The Tribunal does not understand why the claimant says there is a shortfall of £100 on arithmetical basis in relation to this payslip. The Tribunal finds the arithmetic is correct.

32. The claimant did not receive a conventional itemised pay slip. The Tribunal finds this surprising in a business which employed twenty-five people. Most employees even in a small business are provided with a payslip which identifies their national insurance number, their name, payment period and it individually identifies the amount of tax and national insurance paid. The claimant did receive a document which was emailed to him which identified his basic pay, commission, the total amount and any deductions although it did not identify the nature of the deductions

for example tax or national insurance. Neither was there any identification of holiday pay in the documents supplied during the course of his employment. Some deductions were clearly identified such as the car parking in the final pay slip and the holiday pay in the final payslip.

33. There is no dispute the claimant had use of a company car. He accepted that during the short course of his employment with the respondent he accumulated four parking tickets and three speeding offences. The disputed £150 deduction in his final pay slip is in relation to parking tickets. The claimant did not dispute that he had incurred £150 in parking tickets and was responsible for it. His argument was that he was not obliged to pay it because he had not consented in writing to any such deduction.

34. The claimant accepted that he had paid parking tickets incurred during the course of his employment with the respondent. He accepted he had received the email from Mr Long addressed to all employees at page 73 of the bundle. The email states "the last one is parking tickets, if you get one please pay it or I get billed off the lease company and if I get any more I will charge you and pay the bill and deduct it from your wages and please be advised the lease company admin charge is £100 on top of the bill so I would pay it if I was you". There was no evidence that the claimant objected either verbally or in writing to being told it was his responsibility to pay parking tickets incurred by him when using a company vehicle.

35. The claimant referred to "short dismissal procedure" when answering questions at Tribunal. The Tribunal reminded itself that this is not a claim for unfair dismissal. The Tribunal does not understand what the claimant is referring to in relation to a "24-hour short dismissal procedure".

36. The claimant said he had not contacted HMRC in relation to his deductions which the respondents said were for tax and national insurance but which were not clearly identified.

37. The claimant describes himself in an age group of "over 55". Mr Deach his manager told us he is similar age as he will turn 55 this year. He said there were both older and younger people in the sales team.

38. The claimant alleged he was called "a fucking old cunt" and "an old twat" by Mr Long on numerous occasions. Mr Long did not give evidence to the Tribunal (he attended as a representative). We find it is likely he made these comments to the claimant. We find Mr Long used coarse language in his emails and a forthright tone. An email at page 70 refers to the use of the sexual word "cunt". It is made in reference to a member of staff. We find he often used language such as "little shit" and "taking the piss" in emails to staff see page 63. The tone of the number of emails is hectoring see page 65.

39. We find the claimant also used offensive language. We refer to a communication in a What's App group in the bundle where the claimant states "I didn't know it was your birthday. How old? 65 you old cunt". We find that elsewhere in the bundle the claimant has used offensive racist language see page

10 and 12 on his work phone in a What's App group. He also regularly uses offensive swear words.

40. We turn to the second comment the claimant relies upon namely Mr Deach saying "even though you are nearly sixty you don't look that old you're just bald". In cross examination Mr Deach emphatically denied making this comment. We prefer his evidence to that of the claimant. Mr Deach gave context to the reasons why he was sure he had not made that remark. He explained that although he agreed there was "banter" within the sales team (see page 43), he considered it was important to know the person you were joking with in terms of what was appropriate and what was "over the line." He gave context by referring to joking with his father about his hair because he knew his father would not object. He explained a racist remark from the claimant was "over the line" which had resulted from the claimant being temporarily removed from the What's App group. He was sure he had not joked with the claimant with this alleged remark. He gave evidence that the claimant was not an easy man to work with. We prefer his recollection to that of the claimant. We find the remark was not made.

41. The last ageist comment relied upon by the claimant is a comment of Maria Vanezi "is that what happens when you get old you're always going to hospital". We were told Ms Vanezi was unable to attend the Tribunal because she had recently had a baby and was on maternity leave. We did not have a statement from her. In these circumstances we accepted the claimant's evidence because there was no counter evidence although we found it somewhat surprising that such a comment was made by an employee who was a Telesales Manager in another office.

42. We turn to consider the evidence about the policy of refusing employees namely the claimant to have a half day holiday. We rely on Mr Deach's evidence that there was no such policy that only half a day could be taken. We find as the claimant's manager any request for holidays went through him and this is reflected by the emails in the bundle. We find it is possible that the claimant had misunderstood the situation in relation to half days and holidays. We accept the evidence of Mr Deach that from time to time sales appointments could be cancelled for all sorts of different reasons.

43. Finally, we turn to the comment about "I see it appears you are taking your blood, why do you need to take it so often". We find it is likely that this comment was made. Mr Deach accepted that he did on one occasion enquire about why the claimant was taking his blood. He thought it was likely that this comment was made when he was training the claimant during the first week of employment.

Applying the law to the facts

Disability Discrimination

44. There is no dispute that the claimant was a disabled person by reason of Type 1 Diabetes and the respondent had knowledge of the condition at the relevant time. We turn to consider whether the respondent engaged in unwanted conduct when it made the comment "every time I see you it appears you are taking your

blood why do you need to take it so often". The claimant said he considered this amounted to unwanted conduct. There is no dispute that it related to the claimant's disability because it refers to the claimant checking his glucose levels because of his Type 1 Diabetes.

45. We turn to consider whether the conduct had the purpose or the proscribed effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Although we accept the comment was said we find that Mr Deach was simply curious about the claimant's condition and he had no intention to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him.

46. We turn to consider whether the conduct had the proscribed effect. We find it did not. We find that Mr Deach was simply making an enquiry of the claimant. The earlier emails make it clear he is sympathetic to time off where necessary for the claimant. We are not satisfied there is anything to suggest at all that the conduct had the proscribed effect. In reaching this conclusion we have taken into account the fact that the claimant did not say to Mr Deach at the time that he found his comments unwanted or offensive, neither did he complain to Mr Long. The claimant did not object until after he had been dismissed. We find this is suggestive of the fact that the claimant was not truly offended by the enquiry.

47. We turn to consider the Section 15 claim; the first question is whether the respondent treated the claimant unfavourably because of something arising in consequence of his disability when it informed him he could not take half a day to attend the hospital but had to take a full day? This claim fails at the first hurdle because we find it is factually incorrect. We are not satisfied the claimant was told there was a policy that he was required to take a full day of holiday.

48. It is inconsistent with the half day holidays the evidence clearly shows the claimant did take. Furthermore, there can be no purpose in the respondent requiring the claimant to take a full day's holiday. Mr Deach was very clear that once the claimant had returned from his hospital appointment there was always other work he could have done. We find it much more likely that the claimant has misunderstood the situation and a sales opportunity was cancelled for some other reason. Accordingly, this claim must fail.

49. We turn to the claimant's claims for age related harassment.

50. We have found that the comments that the claimant was a "fucking old cunt" and "an old twat" were made by Mr Long.

51. There is no doubt that the conduct was related to age because the word old is used in both comments

52. We have regard to the offensive language used by both the claimant and Mr Long and others in the workplace. We have had regard to the way Mr Long addressed employees in emails. We are not satisfied that there is anything to show that Mr Long had the proscribed intention.

53. We turned to consider whether the conduct had the proscribed effect. We find it did not. The claimant says now that he found the conduct unwanted but when taking into account the other circumstances of the case and whether it was reasonable for the conduct to have that effect, we find it was not. The claimant made offensive ageist comments to other employees and regularly used the word cunt and the word twat in his comments in the What's App group for sales staff.

54. The claimant suggested to the Tribunal there was a difference between Mr Long as a director making those comments and the claimant making those comments to his colleagues. In a very small company of no more than twenty-five employees we find this is an artificial distinction. Furthermore, the claimant was an assertive individual who was not shy at Tribunal of making his voice heard. In these circumstances it seems to us extraordinary that the claimant did not tell Mr Long or Mr Deach that he found it unacceptable to be spoken to in that way. We find if he was truly offended he would have done so. Therefore, we are not satisfied that the conduct had the proscribed effect.

55. The Tribunal has found the comment the claimant alleged Andrew Deach said "even though you are nearly 60 you don't look that old "you're just bald" was not said and accordingly the claim for harassment fails at that stage.

56. We turn to the comment of Maria Vanezi. We have found the comment was said, we find it was related to the claimant's age because it refers to the word "old".

57. We are not satisfied there is any evidence to suggest that Ms Vanezi, a manager who worked in another office and had limited dealings with the claimant had the proscribed intent.

58. We turned to consider the proscribed effect. We considered the nature of the comment, the ageist comments the claimant made to other members of the sales team, the fact that Ms Vanezi was not based in the claimant's office and the nature of the remark and find it is not reasonable for the conduct to have the proscribed effect and accordingly it fails.

59. We turn to consider the claimant's claims for unlawful deduction from wages. The claimant was paid the holiday pay due of 13 days accrued but untaken on the termination of employment. However, he was paid on the basis of basic pay only.

60. The Tribunal reminds itself of the guidance in Lock -v- British Gas 2016 EWCA Civ 983. When calculating the amount of holiday pay due on the termination of employment under the Working Time Regulations, the amount payable should include commission. The calculation date is the claimant's final day of employment. Commission should be calculated on the basis of the twelve or thirteen weeks prior to the termination of employment. The Tribunal added together the claimant's payments for September, October and November but inclusive of commission which totalled £3,389 plus £3,348 plus £2,368 equals **£9,105** and divided them by thirteen to reach a weekly figure of **£700.38**. The Tribunal divided that figure by 5 to reach a daily figure of **£140.07**.

61. The Court of Appeal decision in Lock confirmed that holiday pay payable at the higher rate i.e. inclusive of commission applies to the first 20 days statutory leave only. The claimant had already taken 8 days leave about which no complaint was made (see his claim form and grievance). Accordingly, of the remaining 13 days accrued but unpaid at the time he left he was entitled to commission on only 12 (12 plus 8 previous days taken is 20 days).

62. **£140.07** x 12 = **£1,680.84** plus one day at basic pay rate = £76.84, therefore the total is £1,132. The claimant received £999. The difference is **£758.68** and so this is the sum due to the claimant from the respondent.

63. The Tribunal turns to notice pay. The claimant did not have a written contract of employment. He is entitled to statutory notice of one week's pay on termination of employment. A week's pay is calculated in accordance with the Employment Rights Act 1996. It should include commission as "normal pay". The Tribunal used the average of the thirteen weeks prior to termination of employment i.e. £**700.38**. It deducted the amount actually received £384. The balance due to the claimant from the respondent for the one week notice pay period is therefore £**316.38**

64. The claimant sought a sum of £100 in relation to the November pay slip. Having done the calculation as set out in our finding of fact the Tribunal cannot find any arithmetical error and no sum is awarded.

65. There is no dispute the respondent failed to provide the claimant with written particulars of employment as required to do under Section 13 of the Employment Rights Act 1996. The Tribunal must award two weeks' pay for this failure and has a discretion to award up to four weeks' pay. Given the relatively short length of service of nine months the Tribunal awards two weeks' pay at the statutory maximum of £489 which equals £978 payable to the claimant by the respondent.

66. The claimant brought a claim for failure to provide itemised pay slips. The Tribunal reminded itself of Section 8 of the Employment Rights Act 1996. The respondent provided the claimant with a document which gave the gross amount of his wages, details of deductions and the net amount of his wages.

67. However, we find the respondent breached Section 8(2)(b) because it did not identify "the purpose for which they are made" in relation to the deductions. The respondent said the deductions were tax and national insurance. They may have been but the payslip did not show that. Accordingly, the Tribunal has made a declaration of a failure to comply with Section 8.

68. However, in terms of remedy the Tribunal turns to Section 12 of the Employment Rights Act 1996. We have made a declaration in accordance with 12(3)(b). However, we find there was no unlawful deduction in relation to the specific deductions other than those we have compensated the claimant for elsewhere. Accordingly, we make no other award.

69. We turn to deal with the claimant's claim for unlawful deductions in relation to commission. This was a frustrating issue for the Employment Tribunal. The agreement in relation to commission was not in writing. We find that the agreement

between the parties was as set out in our findings of fact and that the agreement was varied from 25% of profit due to a sales consultant once a contract had been completed after deductions, to 10% of the net profit where a sales consultant had concluded only two contracts or less in a calendar month.

70. Turning specifically to the claim in relation to the Elevator Company and G Brandon and Sons. The claimant gave evidence that he had secured those contracts and therefore was due the commission on them even after his employment ended. There was nothing in writing to suggest an employee was not entitled to commission after his employment ended. We heard no detailed evidence as to what had happened in relation to those contracts. A document in the bundle at page 41 stated that the contract for G Brandon and Sons had been declined but had since been re-signed and the contract in relation to the Elevator Company had been "delayed until December 2017."

71. We find that the contracts for Elevator Company and Brandon and Son were completed but after the claimant's departure, in December 2017. Accordingly payment for commission was due 1 month in arrears in January 2018. Given there were only these two contracts payable in January 2018 (the claimant agrees he was paid commission for the TNC Granite) we find then rule about 10% commission payable on profit on the contract, after deductions, is applicable.

72. The Tribunal did not have the information as to the invoice value, equipment cost, installation cost, settlement figure, telesales figure and net profit figure on the contracts of the Elevator Company and Brandon and Son to enable us to calculate the commission at 10%. The respondent is to disclose the invoice value, equipment cost, installation cost, settlement figure, telesales figure and net profit figure for the contracts secured with the Elevator Company and G Brandon and Son in December 2017 to the claimant and the Tribunal within 21 days of receiving this judgement.

73. **The Respondent will send to the claimant within 28 days of the date of receiving this judgement a payment of 10% commission on the profit of the contracts secured with the Elevator Company and G Brandon and Son after deduction of equipment cost, installation cost, settlement figure and telesales figure**.

74. If the respondent fails to provide the information required above or fails to provide the commission payment described at paragraph 71,or the amount of the commission payment is disputed the matter will proceed to a remedy hearing before this Tribunal, estimated length of hearing 3 hours.

75. The claimant claimed 25% commission on TNC Granite. The Tribunal relies on the evidence it has heard to find if only two contracts were concluded within a calendar month then only 10% commission was payable. The Tribunal relies on its finding that the claimant received a payment in the December payroll at page 40 for TNC Granite company at 10% and given that fulfilled the term of the unwritten commission agreement that claim fails.

76. The claimant made a claim for unlawful deduction from wages in relation to excessive costs he believed were used in November and December commission statements. The claimant admitted in evidence that he had no evidence for this other than a suspicion. Mere suspicion is not enough. The burden is on the claimant to prove his claim for unlawful deduction from wages. The Tribunal accepts the evidence of Mr Deach that installation costs in particular were very variable from one contract to another. The Tribunal finds this claim is speculative and fails.

77. Finally, the Tribunal turns to the claimant's claim for unlawful deduction from was in relation to the deduction of £150 for parking fees from his December payslip. The Tribunal turns to Section 13(1) and Section 13(2) of the Employment Rights Act 1996. A claim of Section 13(1)(a) permits deductions where they are authorised by a "relevant provision of the worker's contract". There is no dispute that the claimant did not have a written contract of employment.

78. We find there was a term in the claimant's unwritten contract that the claimant was responsible of paying fines and parking tickets incurred by the claimant when using the company vehicle. The claimant agreed in evidence he had previously paid fines and parking tickets incurred by him when he used the company vehicle.

79. Paragraph 13(2)(b) ERA 1996 permits deductions authorised by a contractual term whose existence and effect the employer has notified to the worker. Unlike Section 13(2)(a) there is no need for the contractual term itself to be in writing. Such terms can be express or implied. However, the existence of the relevant term must have been notified to the worker in writing before the deduction. Therefore, an oral agreement to a deduction will satisfy 13(2)(b) so long as the worker is given written notification before the deduction is made.

80. We find the claimant was given such a written notification because he was reminded of the term that parking fines incurred by an employee when using the company vehicle were payable by the employee when all staff including the claimant were sent an email on 9 November 2017 (see page 73 of the bundle).

81. The claimant agreed he received that email and was well aware that the company had informed him he must pay his parking tickets. Therefore we find the email of 9 November 2017 to all staff was a reiteration of an implied term which already existed rather than a change to the term.

82. We reminded ourselves that the claimant had not at any time objected either verbally or in writing to that term. His only objection was that he said he did not have a written contract of employment and had not consented in writing to the deduction for his parking ticket.

83. Accordingly, his claim under the Section 13 of the Employment Rights Act 1996 fails.

Employment Judge Ross

Date 27 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 November 2018

.....
FOR THE TRIBUNAL OFFICE

[je]

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2600145/2018**

Name of case(s): **Mr V Kaye** v **Telecom Solutions (GB) Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **30 November 2018**

"the calculation day" is: **1 December 2018**

"the stipulated rate of interest" is: **8%**

MR J PRICE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

EMPLOYMENT TRIBUNALS

Claimant: Mr V Kaye

Respondent: Telecom Solutions (GB) Limited

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Reserved Judgment with Reasons sent to the parties on 30 November 2018, is corrected as set out in block type at paragraphs 4 of the Judgment and paragraphs 60 and 62 of the Reasons.

Employment Judge Ross

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Date 12 December 2018

SENT TO THE PARTIES ON

17 December 2018

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.