



EMPLOYMENT TRIBUNALS

Claimant: Mr Simon Thomas

Respondent: Unitech Engineering Limited

Heard at: Birmingham **On:** 24 and 25 January 2019

Before: Employment Judge Battisby
(sitting alone)

Representation

Claimant: In person

Respondent: Mr K Hewines (Operations Director)

JUDGEMENT

1. The claimant's claims of unlawful deductions from pay are well-founded in respect of the sum of £550 for the alleged damage to the respondent's car and the sum of £300 in respect of the so-called "March threshold" and the respondent is ordered to pay him the sum of £850 gross.
2. All the other claims made for commissions and bonus payments due and for constructive unfair dismissal are not well-founded, fail and are dismissed.

REASONS

Introduction

1. By a Claim presented on 28 May 2018 the claimant brought claims of constructive unfair dismissal and for commissions and for a bonus due, but not paid, and also in respect of some unlawful deductions from pay. The claims were later summarised in a schedule within an email to the tribunal dated 2 July 2018. All claims were strongly denied. However, the money claims were all admitted as calculated by the claimant, but subject to liability as follows. The commissions claimed were for a total of £14,719.26. The bonus claimed was for the 2016 year in the sum of £4,500.00. The claims of unlawful deductions

were in the sums of £550.00 and £300.00. The figures were not agreed for the basic award and compensation claimed for constructive unfair dismissal.

The evidence

2. I heard evidence from the claimant who also produced a signed statement from Mr Wayne Regan. Mr Regan attended the tribunal but was later released with the agreement of both parties on the basis that he was simply corroborating the fact that two meetings took place on dates not contested by the respondents. For the respondents, I heard evidence from Mr Alexander Imlah their Managing Director, and Mr Karl Hewines, their Operations Director. I received 2 lever arch files containing the main bundle of documents (R1), a blue ring folder file with supplementary documents (R2) and a copy sales order book (R3).

The issues

3. The issues were identified as follows in respect of the money claims:
 - 3.1. Did the respondents fail to pay the 7 commissions identified by the claimant?
 - 3.2. Did the respondent fail to pay the bonus claimed for 2016 of £4,500?
 - 3.3. Were the respondents entitled to deduct £550 from the final pay in respect of damage to his company car?
 - 3.4. Were the respondents entitled to deduct £300 from the final pay for not reaching the March sales threshold?
4. With regard to the claim of constructive unfair dismissal:
 - 4.1. Was the claimant dismissed i.e. did the respondent breach the so-called trust and confidence implied term, meaning, did it without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?
 - 4.2. If so, did the claimant affirm the contract before resigning?
 - 4.3. If not, did the claimant resign in response to the respondent's conduct or to put it another way, was it a reason for the claimant's resignation? It need not be the reason for resignation. The conduct on which the claimant relies as breaching trust and confidence was the failure to pay the commissions and bonus and the way he was treated during 2017 which, he said, undermined him and was calculated to force his resignation.

The facts

5. The facts I find are as follows on the balance of probabilities and, where I refer to page numbers, these are found in the bundle R1.
6. The respondents, Unitech Engineering Ltd, are an engineering company manufacturing and supplying equipment primarily into the food industry. About 70% of such goods are from their range of standard products and about 30% consist of bespoke stainless fabricated products. A major part of what they supply to the food industry consists of large-scale industrial washers for items such as very large vegetable trays.

7. The business was started in 1991 by Mr Imlah and his wife and currently it has a turnover of some £10 million with five serving directors and about 158 employees. The Company has an HR manager with a team of three people and has a number of HR policies and procedures in place such that one would expect.
8. The employment of the claimant commenced on 26 July 2010 with an associated company called Unitech Machinery Ltd as a junior sales person; changes to his employment took place culminating with an agreement with the respondents in 2015 to become an area sales manager for the Midlands. An employment contract preserving continuity of employment was signed on 27 January 2015 (pp 31 to 36). The claimant remained so employed until resigning with effect on 28 February 2018. He gave notice on 31 January 2018 (pp 117 to 118) and was requested to go on paid garden leave for the period of notice.
9. His contract provided for a basic salary £31,500 at the date of leaving together with commission and bonus provided for in Clause 9.1 of the contract (p.32). The commission and bonus schemes were expressly discretionary and subject to annual revisions. The trading year was January to December and every January the previous year's figures were announced at a sales team meeting. The team would be told the targets and commission rates and bonus arrangements for the coming year. These were then communicated personally to each sales person and the communications to the claimant from 2014 to 2017 are in the bundle (pp 37 to 43).
10. As far as the bonus for 2016 is concerned, the parties agreed that this would be payable at the rate of 0.75% of the value of yearly sales provided, firstly, that the claimant's target of £600,000 sales was met and, secondly, that the sales mix was for the sale of secondary items, namely washers, not to exceed 20% of the total sales (p41-42). This was because the gross profit margin on the so-called secondary products was much less than on engineering products. Commission was to be payable in any event once a monthly sales threshold of £10,000 had been met. Therefore, the respondents took a strict approach to calculating and paying the bonus and applying the formula. The bonus was calculated after the end of each December and paid in the following year. Finally, it was accepted by the claimant that the bonus was non-contractual (see, for example, his email of 1 March 2017 - p56). As for payment of commission, it was agreed before me by the parties that the effect of the various documents at the relevant time for the purposes of this claim was as follows:
 - i. Monthly sales of at least £10,000 had to be made.
 - ii. Commission on manufactured goods would be 3%.
 - iii. Commission on bought in goods would be 1.5%;
 - iv. Commission on washers would be 2%, if the gross profit margin exceeded 35%, and 1.0%, if the gross profit margin was between 30 and 34%. No commission would be payable if the gross profit margin was under 30%.
 - v. Commission on washers would only be paid once all payments due on the order had been made and a margin analysis completed.
 - vi. Commission was payable after the monthly sales threshold of £10,000 had been reached and once all monies due under each

contract had been received and one month in arrears of the final payment.

- vii. In any event, it was a discretionary payment and also subject to target margins being achieved; and
- viii. Leavers ceased to be entitled to commission not earned prior to leaving.

11. Unfortunately, as far the commissions are concerned, the documents do not make entirely clear the position regarding leavers with regard to the monthly sales threshold. They simply stated each year that the claimant would continue to receive commission after his £10,000 threshold of 3% on manufactured items and 1.5% on bought in items had been met. The last communication confirming this was a letter from the respondents to the claimant dated 13 April 2017 (p44). The agreement did not specify the month in which the threshold of £10,000 sales had to be achieved. It could have been the month in which the sale was made, the month in which the final payment was made by the customer, or the month in which the commission was paid to the employee. There was no evidence of what happened in practice with other leavers.

12. Prior to leaving the respondents, the claimant never earned a bonus. He accepted his figures never warranted one, but he felt the respondents should have exercised a discretion to pay him a bonus for his very good year's results in 2016. In that year, on the respondents' figures, he achieved sales of £814,764.20 against the target of £600,000. The respondents say this was made up of general engineering sales of £472,457.20 and sales of washers of £342,307, so the washer sales amounted to 42% of the total. The claimant says the total sales were actually £949,404 and that £134,640 worth of sales in relation a contract with JLR were wrongly transferred to Unitech Machinery and discounted in their calculations. This split had been discussed and agreed at a project meeting on 18 November 2016 (pp100-102). However, even if that sum had been counted and taken as engineering product, the secondary sales would still have amounted to 36%. On either basis, the figure was substantially more than the 20% limit and no bonus was therefore payable. However, the claimant felt he had exceeded his target by such a large amount that a bonus should have been properly considered. He did not raise any issue over this until the end of February 2017. At the end of January 2017, he suffered a serious accident severing a tendon in his finger. He had surgery to repair this on 2 February and was off work until the 19th. He was receiving statutory sick pay while off and wanted to be allowed to work from home to continue to earn his full salary. The respondents would not agree and felt that, if he could work at home, he should be able to come into work in his office and it would be better if he did so. They did a health and safety assessment and arranged for somebody to collect and take the claimant home. He did this for 5 days.

13. On about 27 February, the claimant met Mr Hewines. The claimant had heard from a colleague that Mr Hewines had said that he would not be getting a bonus, so he challenged Mr Hewines on this. When Mr Hewines confirmed this as a fact, the claimant stormed off feeling very angry and went home. However, the next day, when things had settled down, they had another meeting. The claimant came to an agreement regarding the February pay that was due. In respect of days off, the claimant would take half of them as holiday and the respondent would pay for the other half. The claimant indicated that he would prefer to stay at home under his then current "fit to work" note rather than risk

further injury at work. Mr Hewines accepted this and went on to explain about the bonus and why he did not qualify for it, but gave some reassurance for the claimant by saying that he would be happy to review the decision again in June 2017. I take it there was a clear implication from this that a decision to review it in the claimant's favour would depend on the claimant's ongoing performance. All this was confirmed in an e mail of 28 February (p 55) to which the claimant responded (p 56), where he concluded that he was grateful for the respondent making the position on the bonus clear and appreciated the offer to review it in June. The claimant returned to work on 31 March.

14. On 3 April, he was called to a meeting together with his colleague, Mr Regan, and was accused by Mr Imlah of going off on smoking breaks too many times. He challenged this and asked Mr Imlah for more particulars. At this point Mr Imlah backed off and started talking about the claimant having re-issued his CV on the website called Monster and asked why he had done that. The claimant explained that he was not looking to leave the respondent and that he had simply updated his CV on the website when he had nothing else to do and it was left at that.
15. On 12 April there was a sales strategy meeting. It was explained to the claimant that poor sales against targets were being achieved and this was all confirmed in a letter to the claimant (pp 44-45). The morale of the team was also discussed. Naturally, the claimant felt upset because his sales were down through having been off a number of weeks with his injured finger. However, he claimed he had not had any information about his targets. I find this strange because the information would have been available to him at any time and was in the sales order book where all sales and targets for the whole team were recorded and all sales persons had access to that. Nevertheless, the claimant replied to the letter on 26 May (p46). He was also annoyed that certain sales, for example to Kingfisher, had not been credited to his sales area and he was arguing that the Kingfisher sales should have been credited to his area, whereas, according to the respondents, the sales had been generated through London and so should have been excluded.
16. On 1 June, there was a further sales strategy meeting similar to before. In the meeting the claimant made clear again how he felt hard done by in not receiving a bonus for 2016. It was also explained to him again why he had not been credited with the Kingfisher sales. Team morale was raised again. It was mentioned about the claimant's attitude and negativity. He was encouraged to improve his overall performance and attitude and all this was again confirmed in a letter dated 1 June, given to the claimant on 20 June and signed off by him on 19 July (pp 47 to 48). This letter included his year to date figures and clearly showed he had not reached his target in any month from January up to May inclusive. When the claimant was handed the letter, he was also told he would need to attend weekly performance review meetings due to the concerns about the level of sales.
17. Soon after, on 2 August, the claimant was summoned by Mr Imlah to a meeting when it was put that serious allegations had been made by a company customer called Two Sisters that the claimant and Mr Regan had given a presentation to them based on their idea of setting up a fabrication arm within Two Sisters and that, if they agreed to that, Two Sisters would save a lot of

money. As a result of this serious allegation, which would have amounted to a breach of good faith on the part of the claimant and Mr Regan if it were true, they were suspended. Investigations were carried out, they were interviewed, and they strongly denied involvement in what had happened. Mr Imlah made a separate enquiry with Two Sisters. Whilst they maintained the presentation had been given, they had wanted nothing more to do with it, nor did they want to be involved in any disciplinary procedure of the respondents. Mr Imlah took the pragmatic view, presumably, supported by his board, that they would let matters lie there, particularly, in view of the reassurance by Two Sisters that they had not been impressed by the presentation and would not be taking it any further. Mr Regan was then swiftly reinstated and likewise that the claimant was offered immediate reinstatement with no repercussions, but by this point he was seriously upset by the whole business and was seeing his doctor and was about to be signed off with stress for a short period. During the course of those meetings regarding the allegations, the claimant mentioned again the fact that he had not had a bonus for 2016 and no review had been carried out in June as promised and he also mentioned that he should have received commission for jobs involving companies called Saladworks and Melton Foods. This was the first time the claimant had raised any issue over commission payments being due; over the years the claimant had received around 900 commission payments totalling in excess of £45,000 and there had never before been any issue over the calculations or payments due not being made. So, the respondent agreed to look into this for the claimant.

18. In November 2017, Mr Regan left the respondent and the claimant was asked to take over the sales to the Two Sisters Group. The claimant was not happy about that in view of the allegation that had been made by them in August, but I accept that, in terms, he was told he needed to get on with it. It was a very large connection with very significant sales and the respondents felt that, if the claimant was indeed innocent of the charges that had been made, they could see no reason why he should feel embarrassed about going there and it would give him an opportunity to improve his sales figures. Mr Imlah had meetings with the claimant about the Two Sisters connection. He was trying to encourage and motivate the claimant as evidenced by his letters of 15 and 18 January (pp 115-116). However, the claimant took it differently and felt he was being bullied and targeted. However, on reflection while giving his evidence, he did accept that the letters on their face represented a plan of action and were not critical.
19. The claimant received a letter dated 3 January 2018, which was later reissued on 24 January (pp 49 and 51) with his sales figures for 2017. These showed he had made sales of only £483,829 against a target of £720,000 representing 67 % of target. Unfortunately, the letter omitted to deal with the 2 queries that had been raised about the commission. The claimant became ever more disgruntled about the bonus issue and the commission queries and the way he perceived he was being treated by the respondent and, having discussed matters with his family, he decided to resign at the end of January. His letter is dated 31 January 2017, but this date was a typing error (pp 117- 118). This letter contained a schedule with some additional new commission claims and once again restated his claim for a bonus for the 2016 year. He gave notice to finish on 28 February 2018.

20. Arrangements were made for the claimant to serve his notice period whilst on paid garden leave. He was asked to return his car which was replaced for a car in worse condition, but that is beside the point. He returned his car on 8 February. Mr Hewines took delivery of it. Nothing was said at the time the car was handed over about its condition, but, two weeks later, the claimant received a claim in respect of damage to different parts of the bodywork on the car. He was sent a repair estimate dated 22 February, (p19) for £550 plus VAT. There was a requirement as part of the respondent's company vehicle policy for employees to pay for damage in certain circumstances (pp 20 - 23). The policy provided at paragraph 6 thereof for the vehicle to be assessed "at the point of return". The claimant disputes that the car was damaged when he handed it over and makes the point that he was only notified about this 2 weeks later. He took photographs of the car on the day he handed it over but, unfortunately, these do not show the relevant parts of the car that were alleged to have been damaged. He sent these straightaway on the day of the handover, 8 February 2018 with an e mail of the same date to the respondents in which he was complaining about the state of the replacement car in comparison (p68-76). Mr Hewines took some photographs (pp16-18) which, he says, were also taken on the day of return, but he cannot independently prove that, as the photographs are not dated and he is no longer in possession of the mobile phone on which he took them. So, the damage could have been done subsequently by somebody else. I am not satisfied the respondent has proved the damage was done before the handover. Had the car been so damaged while in the claimant's possession, I am sure Mr Hewines would have noticed (as it was very obvious in the photographs shown to me) and commented on it at the time of its return and made a record for the claimant to acknowledge. Also, it took the respondents until 23 February to notify the claimant of the alleged damage and the fact they would be deducting £550.00 from his final salary to pay for the repairs (p24). Even though his photographs do not show the parts of the car allegedly damaged, the claimant did take and submit them straightaway as part of his complaint about the replacement car's condition. I do not think he would have done that and made such an issue of it, had his car been so damaged as claimed by the respondents. The respondents went on to make a deduction of £550.00 from the claimant's final pay to cover the damage.

21. A deduction of £300.00 was also made. This related to commission due on a contract with Addo Foods and Tottle where a sum of £1,022.17 was accepted as due to the claimant, but only £722.17 was paid. The rest was deducted for the claimant failing to achieve the "March threshold" as explained in the e mail from the respondents dated 10 February 2018 (p53-54). The respondent accepted commission was due because the final payment was made in February 2018 before the claimant finished with them. However, they deducted the so-called March threshold in the sum of £300.00 (3% of £10,000) on the basis that the commission was not payable to the claimant until March and no sales were achieved by him in March. As for the various commission claims those were all responded to in the same e mail dated 10 February (pp 53-54) and were denied.

Submissions and the law

22. No substantive submissions were made to me by either party and no criticism is made of that.

23. As far as the law is concerned, there was an express clause in the employment contract dealing with a potential right to a discretionary commission and bonus; the question is whether the implied term of trust and confidence may override that. It has been held there are situations where a discretion within an express term may be fettered by an obligation to maintain trust and confidence in the exercise of that discretion; that is the case of United Bank v Akhtar [1989] IRLR 507. Whilst there is no obligation on an employer to exercise a discretion reasonably: White v Reflecting Road Studs Limited [1991] ICR 733, the discretion must not be exercised irrationally or perversely Clark v Nomura International [2000] IRLR 766. This means the court cannot substitute its own view as to the reasonableness of the exercise of discretion and can only interfere with it if no reasonable employer would have come to the conclusion that the respondents did about the commission and bonus payments.
24. The right not to suffer unlawful deductions from pay is dealt with under s13 ERA. This also includes a failure to pay wages. "Wages" include commissions and bonus payments due: s27 ERA. Complaints may be brought under s23 ERA and it is for the claimant to prove the claims are well-founded: s24 ERA.
25. As to the claim for constructive unfair dismissal the claimant has to establish the respondent breached the implied term of trust and confidence in order to establish there was in law a dismissal which might then be unfair under s98 Employment Rights Act 1996 ("ERA").

Conclusions

26. I come now to my decision on the various claims based on the above facts and applying the relevant law. For the sake of convenience, I have made some essential further findings of fact so they can be read alongside the conclusions in relation to the individual commission claims.
27. Regarding the bonus claimed of £4,500.00, this was clearly not due under the contract, and the claimant acknowledged this. The sales mix was way off the mark set by the respondents. Whether the respondents might have exercised a discretion to go beyond the term of the contract in view of the high sales achieved, is a matter for the respondents, but I find, however, that as a matter of contract and law it was not due and payable. There was clearly no irrationality or perversity on their part in making their decision.
28. As for the various commissions claimed as set out in the claimant's schedule with the e mail to the tribunal dated 2 July 2018, I find as follows based on the terms set out at paragraph 10 above. The JLR contract was split into two jobs; one would be credited to the respondents sales and the other credited to the Unitech Machinery sales and this was all agreed in the project meeting on 18 November 2016. The commission subsequently earned would then be shared between those involved in both companies. The claimant claimed commission of £9,899.20. He might have been entitled to some commission had he stayed with the respondents. However, the final payment by JLR for the contract was not made until December 2018 and so, on that basis, the claimant did not

qualify for a commission as he had already left the respondents before the entitlement to any commission had been earned.

29. On the Saladworks claim for £1,700.00 and Melton Foods claim for £2,060.00, the contracts were for washers and so in both cases these needed to achieve a gross profit margin of 30% or more to qualify for commission payments, and the claimant agreed with this. The figures produced show margins of 19.9% and 5.5%, so no commission was due. The claimant could have challenged the profit margin calculations whilst still at work but did not do so. It is highly unlikely in any event, in my judgment, that any challenge would have resulted in the costings being so reduced as to increase the profit margin to 30% or above.
30. On the Russell Hume contract for a washer, the supplier paid the 40% deposit, the work was then completed, but not finally commissioned as required and so the final payment was outstanding when Russell Hume went into administration. The administrator is claiming the money back and it remains a matter of dispute. However, as the final payment had not been made under the contract, again, no commission was due, not even on the deposit money, as has been claimed in the sum of £187.96.
31. With regard to Raygray Snacks there were 2 jobs: job number 133143 was an engineering job, but it had to be re-credited as it was not what the customer wanted and so no commission was payable and so the claim for £424.35 is rejected. Job 133477 was in respect of a bought-out canopy. Commission claimed of £447.75 was not initially paid as the respondents said the job had not been completed as at the date it wrote the letter in February 2018. It has now been confirmed that the final payment due under the contract was made on 12 April 2018 after the claimant left, so again no commission was due.
32. Accordingly, I find none of the commission claims are well-founded and they are dismissed. There was also no irrationality or perversity on the respondents' part in making their decision on each commission claim above.
33. The deduction of £300.00 for the "March threshold" relates to the Addo Foods and the Tottle contract the respondent accepted commission was due because the final payment was made in February 2018 before the claimant left their employment. Since no sales had been achieved in March, they felt they were entitled to deduct the threshold amount, namely 3% of £10,000.00. The agreement between the parties was not clear on this issue as already mentioned above at paragraph 11. It was clearly agreed that commission was earned from historical sales made, but only paid on completion of the contract and provided payment in full was received before the person left. The threshold stipulation was ambiguous. I find, however, it does not make sense and was unreasonable for the respondents to have interpreted it in the way they did. I find they did so to avoid paying the full commission due and only after they realised they would not be able to rely on the reason used in the other cases of not having been paid in full before the claimant's employment ended. I find the potential right to payment of commission was earned in the month when the sale was made and the right crystallized in February with the final payment due to the respondents having been made and, even though it was not payable to the claimant until March, there can be no case on my analysis of the documents

or the evidence for any deduction on the basis of a threshold for sales not having been met in a month when the claimant was no longer employed.

34. My interpretation of the agreement is that the sales threshold applied to the month in which the sale was made, so payment of commission would then only be contingent on the completion of the contract, payment in full and the employee still being in employment at that time. This seems to have been how all other commissions were calculated. In any month when sales of £10,000 were not made, then no commission would ever be payable on the contracts made in that month and both parties would know the position straightaway and it would be easy to monitor by both parties. This also makes sense in such a sales driven environment all about achieving monthly targets and earning the right to commission on a month by month basis. So, for those reasons, I find that the respondents wrongfully deducted £300.00 and the claim for that sum is well-founded and should be paid. It also avoids any questions arising at the end of an employment where notice may or may not be worked or the employee is put on garden leave for a period about whether the employee has been deprived of the right to work to avoid commission being payable.
35. Regarding the car damage I find it has not been proved to my satisfaction on the balance of probabilities that the claimant caused the damage or it was done while in his possession. Accordingly, I find the respondent was wrong to make the deduction for £550.00 and the claim for repayment of that sum is well-founded.
36. On the claim for constructive unfair dismissal, I find the claimant became disgruntled by the non-payment of his bonus for his 2016 sales performance and that coloured his whole approach to what followed and he misinterpreted certain events in 2017 as a result. In particular, there was the allegation regarding the Two Sisters, which he said particularly upset him, and then felt there was bad faith on the part of the respondents. I accept the respondent was contacted by Two Sisters with allegations against the claimant and Mr Regan and they would have been remiss not to investigate them because it was clearly a serious allegation amounting to serious bad faith on the part of two senior employees. They were entitled to suspend and the onus on them was then to investigate matters as quickly as possible. They did so remarkably quickly and made the decision the following day not to uphold the case and to restore both the claimant and Mr Regan to their positions with as little fuss as possible. Transferring the claimant to the Two Sisters account was a business decision the respondents were entitled to make and I find there was no bad faith in doing so, nor in the way Mr Imlah dealt with the claimant.
37. Further, the meetings about which the claimant complains concerning sales performance in March or April and June 2017 were no more than one would have expected of such a sales driven company, particularly, when the sales were behind and the particular sales managers were not achieving their targets. I am sure, in the past, the claimant had encountered similar meetings. Legitimate concerns were raised by the respondents and they are all set out and confirmed in a detailed and reasonable way in the letters that followed.

38. The claimant was aware of the grievance procedure, but did not exercise it, nor did he raise formally any serious concerns with the directors or the HR Manager.
39. Most of the commission claims were not made until the claimant resigned and the respondents had not had an opportunity to answer them, so he could not have been responding to the reasons for rejection when he decided to resign. As I have found, the respondents dealt properly with the claims for commissions and the bonus in accordance with the contract and there was no irrationality or perversity or bad faith that could give rise to a complaint of a breach of the implied term of trust and confidence.
40. I consider it has all been a case of misperception on the claimant's part sprung from his feeling of unfairness and internal grievance about the bonus. As a result, I believe he was looking for jobs because of this disgruntlement and eventually decided to leave the respondents when he was in a position to do so. I find there has been no breach of the implied term of trust and confidence on the part of the respondents and so there was no constructive dismissal. Accordingly, the claim of unfair dismissal claim must fail.
41. I find it all very unfortunate indeed and a shame for both parties when there has been absolutely no criticism in the past about the claimant's performance and he had done so well with his overall sales in 2016 as against target.
42. I conclude by confirming the total award ordered to be paid by the respondents is £850.00 for the reasons stated and that all the other claims fail and are dismissed.

Employment Judge Battsby

Date: 25 February 2019