



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Rahman

**Respondent:** GEC Solutions Limited t/a Green Energy Consulting

**Heard at:** Leeds

**On:** 26 March 2018

**Before:** Employment Judge D N Jones

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr P McGirr, company director

# JUDGMENT

1. The claim for unauthorised deduction of wages in respect of commission payments does not succeed and is dismissed.
2. The respondent was in breach of contract, in failing to pay to the claimant such notice pay as was due for the period he was ready, able and willing to work.
3. The respondent shall pay to the claimant damages in the sum of £192.30 which arose for the breach.

# REASONS

1. The respondent is a company which deals in energy supply. It has been operating for about five years from Gateshead, and latterly, Leeds. The claimant was employed by the respondent as a Business Development Manager from 30 May 2017 until 4 September 2017. His terms of engagement are set out in a letter of 27 April 2017. They provided that his gross cash salary during the probationary period of employment would be £25,000 basic per annum, plus 10% commission of the net contract value to the respondent or any business the claimant contracted, subject to statutory deductions, commission to be paid 30 days after the contract went 'live'.
2. This case concerns a dispute in respect of Mr Rahman's notice pay and in respect of commission he contends he is owed relating to an agreement he says he

negotiated with a client called HGS UK Limited t/a Harehills Maxi Foods which operates from 268-270 Harehills Lane, Leeds.

### **The Facts**

3. The claimant resigned on 31 August 2017. In his resignation letter, which was emailed to his line manager, Dale Jones, he said his last working day would be 6 September 2017. In response a letter was sent by Mr Baird, HR Director, on 4 September 2017 and he accepted the resignation and informed Mr Rahman that his entitlements to salary and any other payments would be calculated. There followed a series of correspondence in which these two issues were discussed but no agreement was ultimately reached.

4. Mr Rahman did have contact with HGS UK Limited. The customer's name was Dylon Safy. He represented HGS UK Ltd. Initially the claimant had made contact with another company, Maxifoods (Leeds) Limited. There is a letter of authority dated 29 June 2017 signed by a Mr Sabr Mohammed, who was apparently a director of that company, and the document is co-signed by the claimant. That company had been dissolved on 18 April 2017 so no longer existed when the letter of authority was signed. However, Mr Rahman attended the same address on or about 11 July 2017 and spoke to HGS UK Limited, in the form of Mr Safy. That company is trading as Maxifoods and one can infer it is continuing a business which the dissolved company had also been operating.

5. At all events, energy supplied to the address and the documentation which has now been produced, indicates a specific MPAN number for that address. According to a document subsequently created by the respondent for the client HGS UK Limited, British Gas had been the supplier. The MPAN number on the quotation document Mr Rahman subsequently took to that client is the same as one which is identified on a printout prepared by the respondent for this hearing pursuant to the order of Employment Judge O'Neill, being a ECOES record relating to the sales.

6. Mr Rahman, I accept, spoke to Mr Safy and discussed a number of potential alternative suppliers, including Haven Power. There is email traffic between Mr Rahman and a pricing consultant and his line manager which confirms that he was in discussions with this company; those documents being 11 and 12 July 2017. I am satisfied Mr Rahman returned on 13 July and had a further discussion with Mr Safy, and I am also satisfied that Mr Safy all signed a document, which comprised a series of quotations. Mr Safy's signature appears against one such quotation which is highlighted, a five year supply of electricity from Haven Power.

### **The Law**

7. By section 13 of the Employment Rights Act 1996 an employer shall not make a deduction from wages of a worker employed by him save in specific circumstances which do not apply here. Commission is specifically defined as wages for these purposes.

8. The Tribunal's breach of contract jurisdiction is derived from the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. By section 86 of the Employment Rights Act 1986 an employer shall provide an employee with one

week's notice of termination of his employment if he has completed one month's continuous employment.

## Conclusions

9. There was a dispute between Mr McGirr, who gave evidence as the Company Director and owner of the respondent, and Mr Rahman, and Mr Burman who also gave evidence on the claimant's behalf. Mr Burman had worked similarly as a business development employee for the respondent for a similar period of time to the claimant.

10. As to the notice issue, Mr Rahman informed me that after he had sent his email of resignation, within half an hour he was contacted and asked to return his laptop and his car which were property supplied by the respondent. He said he offered to do so but under certain conditions as to payment of expenses, if he delivered them to the respondent's premises. At all events he did return those items and no longer has access to the emails which were sent when he worked for the respondent. According to Mr McGirr, although he had no direct involvement in the discussions with the claimant when he resigned, the claimant did not surrender the company vehicle and did not make himself available for work. He said the police were involved in obtaining recovery of the vehicle.

11. I am satisfied, on balance, that the claimant was available to take instructions and to work if required by the respondent during his notice period, before taking up alternative work on 5 September 2017. It was the respondent which precluded him from working and chose not to require him to continue to contact clients. I accepted the claimant's account about the return of the vehicle and laptop having heard no direct evidence to the contrary from the respondent, the only evidence being hearsay, and there being no documentary record to confirm what was being said. Indeed the letter containing acceptance of the resignation made no reference whatsoever to any problem in respect of the respondent's property. That letter was dated 4 September 2017.

12. At the beginning of this hearing Mr McGirr said that the claimant went to work for a competitor, and he referred to a document dated 31 May 2017 which contained a restrictive covenant precluding an employee in the claimant's situation from working for a competitor for up to a year:

*"If the employment was terminated for any cause the employee should not for a period of one year after leaving the employment engage directly or indirectly as an employee of an energy consultant broker sales business within the North East."*

13. That covenant would be one which, in principle, would be void for being in restraint of trade. It is for an employer to establish that such a covenant is not in unlawful restraint of trade, and I heard no evidence, or argument, to that effect. I have therefore disregarded it for the purpose of considering the claimant's notice pay claim.

14. On the other hand, the claimant seeks one week's notice pay when he was not available to work for the whole week. His clients would ordinarily be only available to be contacted during the working week. He accepts he would only have

been available for work for part of the period, up until 5 September, when he took on his new job: he was available for two days out of five of the notice period. His salary entitlement was for £480.76 per week and two fifths of that would be £192.30.

15. The respondent did not pay to the claimant any notice pay. That was in breach of contract. The respondent shall pay him damages of £192.30 in respect of such breach.

16. Turning to the commission payment, as is apparent from my earlier findings I am satisfied that there was a discussion with Mr Safy and I am satisfied that those discussions extended to Mr Safy expressing an interest in an alternative electricity supplier in the form of Haven. Mr Rahman and Mr Burman tell me that the document containing the quotation of a variety of different suppliers which is co-signed by Mr Safy is a contract enforceable in law. I am not satisfied it is. This document may indicate an expression of interest in a potential supply from Haven for five years, but I am not satisfied it established any concluded enforceable agreement between HGS UK Limited and the respondent or, for that matter, HGS UK Limited and Haven. There is also, dated the same date, a direct debit in favour of Haven Power signed by Mr Safy with the details of a Barclays Bank account. I am not satisfied that document provides contractual effect to the agreement, which it is said the claimant negotiated, on behalf of not only the respondent but also Haven Power.

17. Having regard to the terms of the contract, the claimant is only entitled to commission at 10% not 20% as suggested to Employment Judge O'Neill. It becomes payable when such a contract goes live. That envisages a contract with a new supplier taking effect. For the reasons I have given, I do not regard the documents which were produced by Mr Rahman as establishing any such concluded enforceable agreement. He says the reason he has not got further confirmation of the agreement is because it is on the laptop which he returned to the respondent. He says it is contained in that email account. He says he was informed, in an email, that the deal was worth £18,000 in commission to the respondent. I have seen no such figure in any documentation but the claimant says that is because it has not been disclosed by the respondent.

18. I note that the respondent has disclosed emails of 11 and 12 July concerning the claimant's discussions in respect of this client. This supports the claimant's case, to the extent that he was dealing with a potential new client in the form of HGS UK Limited. I doubt the respondent would be so selective in its disclosure of documentation, by refusing to disclose information as to concluded deal worth 18,000, whilst at the same time providing these earlier emails concerning that client.

19. I have been provided with emails between the respondent and British Gas and Haven. They confirm that electricity supply to the MPAN number, which is identifiable by the address at 268 Harehills Lane, from British Gas and not Haven. Haven has confirmed that.

20. The ECOES document was a subject of dispute. Mr Rahman said that the MPAN number was an error, as the serial number of the meter he had read was different to that of the MPAN in respect of the address in that document. He told me in his evidence, although this was not his first account, that he had sent a photograph of the serial number to Mr Jones, of the respondent, together with the other documents signed by Mr Safy on 11 and 13 July. He said he could show me a

copy of the actual serial number of the meter as it was still on his telephone, but this had not been printed out or produced for this hearing. The respondent had, however, disclosed the ECOES document and it must have been apparent to Mr Rahman and Mr Burman that that MPAN number, on the claimant's case, was not an accurate reflection of the actual meter used by HGS UK Ltd. It would have been apparent that it would be necessary to disclose the photograph of the serial number which was said to be relevant to the respondent before this hearing commenced, to demonstrate that the ECOES document which had been produced related to a different meter at the relevant address.

21. It was not in the interests of justice to introduce a photograph which had not been disclosed at such a late stage. There had already been careful case management requiring disclosure of evidence. The respondent would have been prejudiced had the claimant been allowed to produce a photograph of a serial number during this hearing, not having the opportunity to clarify the details. This case has been adjourned once and any late admission of new evidence would have necessitated a further adjournment to allow the respondent to make enquiries. Such further delay and associated expense was not proportionate.

22. In any event the suggestion that the serial number was different to that on the ECOES document rests upon the premise that the MPAN number provided in the quotation given on 13 July 2017 itself was erroneous. This very quotation was provided by the claimant and, he says, comprises the concluded agreement with HGS UK Limited. It contains the same MPAN number to that on the ECOES document for the address of the same, named client, HGS UK Ltd. I discount the contention that this was an error.

23. In those circumstances the claim for unauthorised deductions for commission payments does not succeed and is dismissed.

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Employment Judge D N Jones

Date 5 April 2018

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