EMPLOYMENT TRIBUNALS

Claimant: Mr I McFarlane

Respondent: Utility Alliance Limited

Heard at: Teesside **On:** 31 August 2018

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: No Appearance
Respondent: Mr P Moore, Director

REMEDY JUDGMENT

The judgment of the Tribunal is that:

1. The claimant has not shown that he is entitled to the monies he has claimed by way of unauthorised deduction of wages or breach of contract so no award to him is made.

REASONS

Background

1. The claimant was employed as a field salesperson by the respondent from 5 March 2018 to 30 May 2018 when he was summarily dismissed for gross misconduct.

2. On 29 June 2018, the claimant submitted claims of unauthorised deduction of wage and breach of contract. He claims that he was owed commission on sales and reimbursement of £100 for his bus fare when he was dismissed.

3. The respondent's response was due by 2 August 2018. Employment Judge Buchanan made a default judgment on liability only in favour of the claimant on 8 August 2018.

4. The respondent filed a response to the claim on 21 August 2018, which was rejected.

5. The original hearing date for the claim was converted into today's remedy hearing.

6. On 29 August 2018, the claimant emailed the Tribunal to say that he did not have the funds to attend today's hearing. His email gave details of 8 accounts that he says he was owed commission on by the respondent totalling £5,000.00. No paperwork was filed by the claimant to substantiate the claim.

7. He also claimed £100.00, which he said he had to pay in bus fare to return home after his dismissal.

8. The Tribunal wrote to the claimant on 29 August directing him to send written representations to the Tribunal that clearly set out the method by which he calculated the commission he is due from each of the deals he negotiated. The claimant was advised that the Tribunal would have to see details of the contract the claimant had with the respondent and the method of calculating commission.

9. The letter also advised the claimant that if he required an adjournment of today's hearing, he should apply in writing or by email.

10. I was not shown any correspondence from the claimant before calling this case on.

Hearing and Evidence

11. Philip Moore attended for the respondent. He is one of the directors of the respondent. I considered whether I should allow him to participate in the hearing, given that a default judgment had been made against the respondent. The default judgment had said that the respondent would only be permitted to take part in the remedy hearing to the extent that I allowed.

12. I considered the recent decision of the Court of Appeal in **Office Equipment Systems Limited v Hughes [2018] EWCA Civ 1842** and decided that paragraphs 19 and 20 of the Judgment of Bean LJ were relevant to this case:

> 19. *"There is no absolute rule that a respondent who has been debarred from defending an employment tribunal claim on liability is always entitled to participate in the determination of remedy. At the lower end of the scale of cases employment tribunals routinely deal with claims for small liquidated sums, such as under Part 2 of the Employment Rights Act 1996 (still commonly called the "Wages Act" jurisdiction) where liability and remedy are dealt with in a single hearing. In such a case, a respondent who has been debarred from defending under Rule 21 could have no legitimate complaint if the employment tribunal proceeds to hear the case on the scheduled date, determines liability and makes an award. Even in that type of case it would generally be wrong for the tribunal to refuse to read any written*

representations or submissions as regards remedy sent to it by the defaulting respondent in good time, but proportionality and the overriding objective do not entitle the respondent to a further hearing.

20. *But in a case which is sufficiently substantial or complex to require the separate assessment of remedy after judgment has been given on liability, only an exceptional case would justify excluding the respondent from participating in any oral hearing; and it should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy."*

13. Although this case was not complex, the default judgment had advised the claimant to bring copies of any documents upon which he wished to rely to establish the terms of his contract and his entitlement to commission to the hearing. None had been received. I therefore decided that it was in the interests of the overriding objective to produce a just and fair hearing to hear from Mr Moore.

14. Mr Moore produced the claimant's Commission Agreement dated 5 March 2018, which appeared to be signed by the claimant. Clause 3.3 of the agreement set out the terms on which payment would be made. Clause 3.3.1 stated that no payment would be made if, when payment was due, the employee was either no longer in employment with the respondent or serving a period of notice.

15. Clause 3.3.5 stated that if the energy contract failed to go live, no payment of commission would be made.

16. Mr Moore also produced a note of the claimant's appeal hearing dated 29 May 2018 that recorded that he was offered a lift to the station and a train ticket home, but declined.

Decision

17. The claimant had a default judgment on liability only. He was told twice what evidence he should produce to substantiate the quantum of his claim. He produced only a list of customer names and an estimate that his entitlement was £5,000. He gave no details of when the contracts were made, when the contracts went live or how much each of the contracts was worth. He has therefore failed to set out to the required standard of proof that he was owed any commission at all.

18. Furthermore, the respondent provided a copy of the claimant's Commission Agreement that set out the terms upon which commission was payable. Mr Moore was able to provide details of the 8 accounts that the claimant claimed he was owed money on and said that none of them attracted commission because the contracts had not gone live by the time he was dismissed.

19. I therefore find that the claimant has not established that he is entitled to any commission under the Commission Agreement and that the respondent offered him a lift to the station and his train ticket home, so there was no loss arising from the breach of contract, as he had failed to mitigate his loss.

Employment Judge S A Shore

Date 31 August 2018

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