EMPLOYMENT TRIBUNALS

Claimant: Mr L Charlesworth

Respondent: Skinny Coffee Club

Heard at: Liverpool **On:** 1 April 2019
4 April 2019
(in Chambers)

Before: Employment Judge Barker

REPRESENTATION:

Claimant: In person
Respondent: Mrs R Mohammed, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant is entitled to recover unpaid contractual bonus monies outstanding on the termination of his employment of £1969.32. This sum is payable by the respondent to the claimant immediately.

REASONS

1. The issues for the Tribunal to decide are whether the respondent committed a breach of contract by failing to pay the claimant bonus monies he says were earned by him and were payable by the respondent during his employment. The claimant claims that the terms of the bonus agreed between him and the respondent was 2% of all sales generated by the claimant in carrying out his duties, whether from existing customers of the respondent or new customers.

2. The respondent's case was that there was no mutual contract and no agreement between the parties in relation to the claimant's bonus scheme. In the alternative, the respondent told the Tribunal that a reasonable salesperson in the claimant's position would have understood that any bonus payable would have been on the basis of "*new sales*", meaning sales generated from new customers to the respondent's business. The basic salary was offered to process sales from existing

customers as this was the basic role of a salesperson, and the bonus was for extra work achieved above that by generating sales from new customers.

3. The matter was listed for a hearing with a time estimate of one hour. The respondent's representative indicated to the Tribunal that her witness, Mr Sanders, who was the director of the respondent, was not present at the Tribunal and she was not able to contact him by telephone. After delaying the proceedings for 30 minutes contact was made and Mr Sanders arrived at the Tribunal an hour after the scheduled time for the start of the hearing. In the interim period the Tribunal made use of the time available by taking submissions and evidence from the claimant and then heard evidence from Mr Sanders on his arrival at the Tribunal.

Findings of Fact

4. The claimant was employed by the respondent as a sales manager. The claimant started work with the respondent on 4 April 2018 and was told that his basic salary was £30,000, which the claimant told the Tribunal was not a particularly high basic salary for roles of that nature in the area. His evidence was that the basic salary range for sales managers in the region was between £30,000 and £45,000. He told the Tribunal that the basic salary on offer from the respondent was less than he had been paid in his previous job, and that in his previous job he had also had use of a company car.

5. However, the claimant told the Tribunal that he had agreed to accept the job because he had been told by Mr Sanders that he would be paid a bonus of 2% on "all sales". Prior 4 April 2018, which was when the claimant commenced employment, Mr Sanderson wrote to the claimant in the following terms:

> *"Dear Lee*
>
> *We are delighted to extend this offer of employment for the position of Global Sales Manager with Skinny Coffee Club. Please review the attached summary of terms and conditions.*
>
> *The offer is for £30,000 basic wage per annum plus a 2% bonus of all sales revenue brought in by yourself during your tenure.*
>
> *If you accept this offer your start date will be confirmed."*

6. Attached to this letter was a summary of terms and conditions dated 4 April 2018, which state at clause 6:

> *"The salary is £30,000 per annum plus 2% bonus based on Wholesale Performance."*

7. When asked what "Wholesale Performance" was Mr Sanderson accepted that this was not a clear term. He told the Tribunal that he ought to have been clearer when recruiting Mr Charlesworth as to what the precise terms of the bonus were.

8. The claimant told the Tribunal that the phrase "wholesale performance" had been unclear to him and that he had assumed that the terms of the letter of "a 2% bonus of all sales" was the relevant term. The claimant told the Tribunal that he was acquainted with the respondent's previous sales manager, who had carried out his

induction and who had described the terms of the respondent's bonus scheme to him as 2% of all sales. Mr Sanderson told the Tribunal that the departing sales manager had been incorrect in describing the operation of the bonus scheme in this manner.

9. The claimant started work with the respondent and was employed for approximately six months before tendering his resignation.

10. In August 2018, prior to the claimant's resignation, the respondent instructed the services of an HR consultancy, and new statements of terms and conditions were issued to all members of staff, including the claimant. A statement of the new terms and conditions is contained in the bundle of documents that were before the Tribunal, and in the claimant's case are dated 6 August 2018. However, no further clarity is available from the revised statement, which states simply:

> *"Your salary will be paid at the rate of £30,000 per annum by BACS at monthly intervals in arrears on the last working day of the month.*
>
> *In addition you will be eligible for a commission payment based on achieving your individual sales targets. Further details will be given to you separately. The company reserves the right to change or withdraw this commission payment at any time by giving one month's notice."*

11. The claimant told the Tribunal that he took over from the existing global sales manager and took over a portfolio of existing clients. He told the Tribunal that he also succeeded in winning some new business. The extent of the new business won by the claimant was disputed by Mr Sanderson.

12. The claimant told the Tribunal that he was provided with invoices for sales from his portfolio of clients by the respondent's employee, Mr Craig Sanderson, Mr Sanderson's father, who passed invoices to him on a regular basis. The claimant told the Tribunal that he assumed that because he was being passed these invoices that these related to sales that had come in from his customers, and he therefore entered the total for these sales onto a spreadsheet.

13. On three separate occasions during the period of his employment with the respondent he forwarded the spreadsheet to Mr Sanderson and expected that he would be paid 2% of the total sales figures that those invoices represented for that particular period.

14. His expectation that this was in accordance with the terms of his contractual bonus scheme was confirmed when on the first occasion that he submitted his request for a bonus payment, which was in May 2018, it was paid in full on 15 June 2018.

15. He submitted a further claim for a bonus in August 2018 for £1,227.91. This was paid in part in the sum of £802.43 on 31 August 2018. He was told that the difference was because certain clients of the respondent were allowed a discount on orders placed by then and that his sales figures would reflect this discount and therefore correspondingly the bonus would be on the lower figure not the non-discounted sales figure. This accords with the respondent's description of "wholesale performance" as stated in his contract. However, the claimant told the Tribunal that

this had never been explained to him at the outset of his employment and that he did not accept the job on the basis of this lower bonus calculation.

16. The claimant resigned from his employment at the end of September 2018. In part he said that he did this because he had placed great importance on the bonuses that he was due to receive and it became clear that the bonus scheme would not be honoured on the terms that he had understood it would be at the outset of his employment.

17. However, he was told by Mr Sanderson to prepare his third bonus request before he left, and he duly submitted a request for a bonus payment in October 2018 of £1,769.65. This was paid on 2 October 2018 but only in the sum of £225.81.

18. Mr Sanderson told the claimant at the time that the decision only to pay £225.81 was because of the need to reflect the discount that certain customers receive on the actual sales price, and also additionally because some of them had extended payment terms of up to 90 days, and the claimant was not permitted to be paid his bonus on the basis of sums not received yet by the business. Again, the claimant told the Tribunal that this had never been made clear to him at the outset of his employment.

19. When giving evidence to the Tribunal under oath, Mr Sanderson was asked what he understood the terms of the claimant's bonus to be. He said that it should be on the basis of "new sales". When asked by the Tribunal Judge how this would be calculated, he clarified it to say that this "*clearly*" was meant to mean sales from new customers, and that he had explained to the claimant that his bonus would be on the basis of new sales brought in by him.

20. Mr Sanderson was asked whether he accepted that "new sales" could include new sales from existing customers, but Mr Sanderson told the Tribunal that this would be nonsensical because the employee, and in this case the claimant, would be receiving payment for simply doing his job and that any reasonable salesperson would have known that the purpose of the bonus was to encourage new customers, or as he originally put it before correcting himself "*new sales*". Mr Sanderson agreed with the claimant that the basic salary offered by the respondent was not particularly high. The Tribunal finds that this was reflected in Mr Sanderson's decision to pay the claimant some or all of his first few bonus claims whether or not Mr Sanderson was of the opinion that he would ordinarily be entitled to them. Mr Sanderson said that this had been done to keep the claimant motivated.

21. Mr Sanderson acknowledged that the terms of the bonus scheme were far from clear and that the respondent ought to have done better at providing clearer information to the claimant. Mr Sanderson was reminded by the Tribunal that the key question was what had been in the minds of the parties at the time when Mr Charlesworth accepted the job. It became apparent during Mr Sanderson's evidence that he had not particularly turned his mind to what the terms of the claimant's bonus would be during that time. This is evidenced by the way in which new conditions of the bonus scheme were drip-fed to the claimant during his employment. Firstly he was told that the bonus was payable on the discounted price of goods sold only, then he was told he would have to wait for the credit period to elapse on certain goods before receiving his bonus and finally he was told that the bonus was only payable on sales won from new customers.

22. Mr Sanderson disputed the accuracy of the information passed to the claimant by the previous incumbent of the global sales manager's job, and appeared to dispute his reliability. However, it was clear to the Tribunal from Mr Sanderson's comments that the terms of the respondent's sales manager's bonus scheme were also not clear to the previous global sales manager either.

23. He told the Tribunal that initially the payments that were made to the claimant were ex gratia payments because none of the new sales made by him would have come through at that early stage in his employment, and rather than have the claimant become demotivated he had decided to pay him a nominal sum. The Tribunal notes that this happened to correspond with the bonus claim submitted by the claimant. Mr Sanderson was asked when he envisaged that this ex gratia payment would stop and when would the actual bonus scheme would begin to operate, and he said "*approximately three or four months*". However, it was clear that there was no clarity or certainty to when this transition would have taken place, and that it was purely something that Mr Sanderson would have done at a time wholly of his choosing.

24. On the balance of probabilities, the Tribunal finds that the precise terms of the respondent's bonus scheme had not been clearly established by the respondent itself at the time of the claimant's employment, or by the time of the claimant's resignation. Mr Sanderson was not able to clearly explain the terms in a way consistent with the history of payments made to the claimant or in a way consistent with the written terms of the claimant's employment during his evidence to the Tribunal.

The Law

25. The rules applying to the construction of contracts include the principle that an express term of an employee's contract will generally only be overridden if it is contrary to statue or public policy.

26. However, it is permissible to use wording contained in external documents outside the terms and conditions of employment to interpret ambiguous terms in an employee's contract, as per *Pedersen v London Borough of Camden [1981] IRLR 173* and *Financial Techniques (Planning Services) Ltd v Hughes [1981] IRLR 32.*

27. The respondent's representative asked the Tribunal to take into account the following case law authorities: *Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] 1 All ER 1137* and *Investors Compensation Scheme v West Bromwich Building Society [1998] 1 All ER 98 HL*.

28. Finally, the "contra proferentem" rule means that any ambiguity in a contract is to be construed against the party seeking to rely on it.

Application of Law to Facts Found

29. In three separate documents, the respondent gave the claimant written terms of his employment relating to his bonus payment. The first occasion was in the written offer of employment, the second was in the statement of terms and conditions accompanying that letter and dated 4 April 2018. The third was the revised contract provided to the claimant in August 2018.

30. In addition, the Tribunal accepts the claimant's evidence that the previous incumbent of the global sales manager role had described the bonus scheme as operating on the basis of "all sales".

31. Mr Sanderson asks the Tribunal to disregard the contents of these documents in favour of his description of the bonus scheme. In part, the respondent seeks to argue that a "reasonable salesperson" in the claimant's position would have understood that the respondent could not possibly have intended to pay their sales manager 2% of all sales as a bonus.

32. The written terms accompanying this offer letter contain the phrase "wholesale performance" as being the basis of the bonus calculation. The claimant's evidence was that this was not a term that was clearly understood by him and that in any event, the information from the previous incumbent of the role confirmed to him during his handover that the bonus scheme was 2% of "all sales". This corresponded with the claimant's offer letter.

33. Tribunals are permitted to use external matters such as job advertisements and in this case, job offer letters, to construct a contract where ambiguity exists in the written terms. Here, the claimant's job offer letter contained the clearest and most unambiguous statement of the terms of his bonus scheme.

34. The respondent seeks to rely on the unclear phrase "wholesale performance" to reduce the sums payable to the claimant, and further on what it classifies as, in effect, commercial common-sense on the part of the claimant, to reduce the terms to 2% of sales from new customers. As there is a clear offer in the job offer letter of 2% of all sales, which was accepted by the claimant, and as the respondent seeks to rely on subsequent ambiguity to reduce this offer, any ambiguity is construed against the respondent under the "*contra proferentem*" rule. Therefore the ambiguity is resolved in the claimant's favour.

35. The respondent's representative asked the Tribunal to take into account the cases of *Rainy Sky SA v Kookmin Bank* and *Investors Compensation Scheme v West Bromwich Building Society*. Taking *Rainy Sky* first, this case held that where language in a contract was capable of two meanings, it was appropriate for the court to have regard for commercial common sense in interpreting which meaning was intended by the parties. In *Investors Compensation Scheme*, the court held that it was not obliged to attribute to the parties an intention which they plainly could not have had, simply because a badly drafted contract suggested that this was what had been agreed.

36. I find that neither of these cases assists the respondent. Applying the principles of contractual construction set out in *Pedersen* and *Financial Techniques* (above), a consideration of the contractual terms given to the claimant includes those set out in the job offer letter. This demonstrates that the contract was not one in which the language was capable of more than one meaning as per *Rainy Sky*. "2% of all sales" is a clear term which does not require further clarification and was not capable of having more than one meaning. The claimant was entitled to rely on this and to discard the unclear term "wholesale performance" in his contract.

37. In *Investors Compensation Scheme*, the court looked at what must have been the intention of all parties to the contract and concluded that it was able to ignore a

contractual term or terms which did not reflect this. Again, this does not assist the respondent here. The claimant's intention was to accept the job offer on the basis of a bonus of 2% of all sales. The respondent's intention was to offer less than this. It cannot be said that the parties shared a common intention at the time of the contract such that the contract can be interpreted to reflect this.

38. In conclusion, the finding of the Tribunal is that as the terms of the bonus scheme were not clearly established at the material time, it was not reasonable for the respondent to expect that the claimant would decipher them for himself and appreciate that they were not consistent with the written terms offered to him at the time of the job offer or not consistent with the bonus scheme as explained to him by the previous job holder. The claimant was entitled to assume on the basis of the job offer letter that the terms of his employment with the respondent included a more generous bonus offer ("*2% of all sales*") than intended by the respondent. Had the respondent wished to ensure that it was not obliged to pay 2% of all sales, it could have clearly set out the terms of the actual bonus scheme instead but it chose not to do so.

39. Furthermore, the fact that the claimant's first bonus payment was paid in full on the basis of "all sales" lends further weight to the Tribunal's findings that the claimant was entitled to rely on his understanding of the scheme, that is, that it was 2% of "all sales". The Tribunal finds that there was a contract between the parties as to the claimant's bonus scheme and that he was entitled to 2% of all sales made by him during his employment.

40. The claimant is therefore entitled to recover the sums requested, which are calculated as follows. The claimant claimed a bonus of £1227.91 in August 2018 and was only paid £802.43 on 31 August 2018. He is therefore entitled to recover the difference, which is £425.48.

41. He also claimed a bonus in October 2018 of £1769.65 and was only paid £225.81. He is entitled to recover the difference, which is £1543.84.

42. The respondent is therefore to pay the claimant the total sum of £1969.32 forthwith.

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Employment Judge Barker

Date__19 June 2019_____

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

27 June 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2417220/2018**

Name of case(s): **Mr L Charlesworth** v **Skinny Coffee Club**

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: 27 June 2019

"the calculation day" is: **28 June 2019**

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

MISS H KRUSZYNA
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/publications/employment-tribunal-hearings-judgment-guide-t426**

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.