



EMPLOYMENT TRIBUNALS

Claimant: Mr T Kelly
Respondent: Being Creative Limited
Heard at: Birmingham
On: 23 May 2019
Before: Employment Judge Flood (sitting alone)

Representation

Claimant: In person
Respondent: Ms Roberts (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of breach of contract against the first respondent relating to one month's notice pay is well founded and succeeds. The respondent is ordered to pay to the claimant the sum of **£1850**.
2. The claimant's complaint of accrued holiday pay is well founded and succeeds. The respondent is ordered to pay to the claimant the sum of **£939.18** in respect of 11 days accrued but untaken holiday pay.
3. The claimant's complaint of unlawful deduction of wages against the first respondent relating to unpaid Overtime Bonus Payment and Sales Commission is not well founded and is dismissed.
4. The sums at paragraphs 1 and 2 above are to be paid gross and the claimant is to be responsible for any tax and National Insurance Contributions due on these payments.

REASONS

The Complaints and preliminary matters

1. The claimant brought a claim alleging breach of contract in relation to unpaid notice; unlawful deduction of wages under **section 23 of the Employment Rights Act 1996 (“ERA)** claiming unpaid accrued but untaken holiday pay and unpaid bonuses and commission by presentation of a complaint on 8 January 2019, having entered into early conciliation between 26 November 2018 and 19 December 2018.
2. The claimant’s first complaint for breach of contract is in respect of one month’s contractual notice (that the claimant was entitled to one month’s notice of termination is agreed between the parties). The effective date of termination of employment is disputed between the parties. The claimant alleges that his employment ended on 28 October 2018. The respondent contends that it ended on 23 October 2018. The respondent accepts that it is liable for 22 days of notice pay having already paid the claimant in respect of 9 days notice (covering the 9 days from 24 to 31 October 2018 inclusive). The claimant’s position is that between 24 October and 31 October 2018 he was still employed by the respondent and not working a period of notice. He therefore alleges he is entitled to a payment in lieu of a full month’s notice or 31 days pay.
3. The claimant’s second claimant relate to an alleged failure to pay accrued but untaken holiday pay for holiday year commencing on 1 January 2018 and ending when the claimant’s employment terminated in October 2018. The parties agrees that the total holiday entitlement for this period amounts to 23.33 days and that the claimant is entitled to be paid in respect of any untaken element of this accrued entitlement. The respondent’s position is that the claimant took 19 days of this accrued holiday entitlement before his employment terminated and so was due to be paid for 4.33 days which has paid to him already. The claimant alleges that he only took 8 of these so was entitled to be paid for 15.33 days accrued but untaken holiday pay upon termination. Having been paid for 4.33 days by the claimant already, he is entitled to a further 11 days. The main area of dispute on this matter is the extent to which any time off taken by the claimant was taken as holiday or whether it was taken as time off in lieu of additional hours worked.
4. The claimant also claims that he is entitled to paid in respect of two sums which he says were promised to be paid to him:
 - 4.1. Overtime Bonus Payments – three separate payments of £1500 amounting to £4500 in total.
 - 4.2. Sales Commission Payment – one separate payment of £1500.

The respondent disputes that the claimant has any entitlement to any of the sums claimed.

5. The matter came before me on 23 May 2018. There was insufficient time after evidence and submissions had been completed in the afternoon so I adjourned the hearing for a reserved decision to be made.

The Issues

6. Breach of contract claim

6.1. Was the claimant paid in respect of his one month period of notice?

7. Unpaid Holiday pay claim – claim in contract

7.1. How much paid leave had the claimant taken in the 2018 year?

7.2. How many days remain unpaid?

7.3. How much pay is outstanding to be paid to the claimant?

8. Unauthorised deductions claim – bonus and commission

8.1. Was the claimant, on or about 23 October 2017, paid less in wages in carrying out his employment than he was entitled to be paid and if so, how much less? In particular:

- A) Was the claimant entitled to be paid Overtime Project Bonus?
- B) Was the claimant entitled to be paid a Sales Commission Bonus?
- C) What were the terms and conditions of the claimant with respect to any such bonuses?
- D) How much was paid to the claimant with respect to any such bonuses?
- E) How much pay (if any) is outstanding to be paid to the claimant?

Findings of Fact

9. The claimant gave evidence as did Mr Graham Hollamby (“GH”) and Mr James Hollamby (“GH”) of the respondent and I have considered the evidence those witnesses gave both in written statements and oral evidence in answer to cross examination and questioning from the Tribunal. I have considered the ET1 and the ET3 together with the Bundles produced by the claimant (C) and the respondent (R). I make the following findings of fact:

9.1. The respondent is a small family run business which started as a partnership and was incorporated in May 2016. The respondent initially focused on events management but from 2009 expanded into also providing services to theme parks and the like. The respondent employs two directors GH and his son JH who founded the business and a further one full time event technician and two part time trainee event technicians. The respondent employed the claimant from 16 January 2017.

9.2. GH focuses on the administration and management of the respondent whilst JH is an event technician. Both described the culture of the company as everyone mucking in everyone performing various roles during busy

periods where there are a number of events happening over a short period of time.

9.3. GH and JH met with the claimant on 4 November 2016 as they were looking to recruit an Events Manager who could help them grow the business. The meeting went well and both GH and JH were keen to bring the claimant into the business, but the respondent could not afford the level of salary that the claimant would command. JH wrote to the claimant by e mail on 17 November 2017 and a copy of this e mail was shown at page C32. The relevant extracts of this email are as follows:

“To be honest, there is no way we could afford the sort of salary that you would deserve and no doubt command and I feel as though what we could offer is likely to be an insult.” ...

“...what we can offer is based on a minimum wage Flat rate, with opportunities to earn more as we grow (perhaps Sales Bonuses, some light Crew and Driving extra hours etc) that sort of arrangement and see how we go.”

9.4. The claimant replied to this email on 18 November as follows:

*“For the record, I am, in no way insulted by your offer, I appreciate your being open and honest.
From my side I would need to earn £400 per week to cover basic living costs. I would be quite happy doing some crew and driving and I’m sure I can earn extra from the sales bonus’ you mentioned.”*

9.5. The claimant acknowledged that he was not suggesting that this email and his reply was part of his contract of employment or formed the basis of any contractual claim. He was issued with a contract of employment and role description on 4 January 2017 and this was shown at pages C18-C31. The claimant agreed that this was the contract he was working under, although he did not admit signing the contract. He commenced employment on 16 January 2017. Some relevant extracts of the contract which were drawn to my attention by the parties were:

HOURS OF WORK

Due to the nature of the industry, hours worked on some weeks may be more than 48 hours and may be daytimes, evenings, weekends and during unsocial hours.

It is a matter for each Employee to determine how many hours they actually need to work to fulfil the tasks. If you consider that you are working in excess of the Working Time Limit you should notify the Managing Director.

SALARY AND OTHER PAYMENTS

The Company shall pay the Employee a salary at the rate of £20,800 per annum (£1600 per month) payable monthly in arrears on the 28th day of each month by direct debit transfer to his/her bank, less deductions for PAYE, National Insurance contributions, late for work deductions and any other deductions which the Company is required to make.

HOLIDAY ENTITLEMENT

8.1 The Company's holiday year runs from 1 January to 31 December. In each holiday year employees are legally entitled to 28 working days paid holiday based on full time employment that consists of 37.5 hours per week.

8.2 Holidays are to be taken at such times as an Employee decides. If Employees are planning to take more than 2 weeks annual leave at any time or during peak season such as February, August October and November they should notify the company in plenty of time, ideally 3 months

8.3 In the respective holiday years in which your employment commences or terminates your entitlement to holiday shall accrue on a pro rata basis for each complete month of service during a relevant holiday year.

TERMINATION

The Employment may be terminated by the Company or the Employee giving the following periods of notice in writing:

By the Company:

- At least one month's notice.*

By the Employee

- At least one month's notice*

The Company reserves the right to pay salary only in lieu of notice or to require the Employee to remain away from work during the notice period, whichever may be appropriate. Any payment in lieu of notice will have PAYE, National insurance contributions, late for work deductions, any sums due under clauses 6 or 8 and any other sums which may be owed to the Company deducted at source.

18. COPYRIGHT, INVENTIONS AND INTELLECTUAL PROPERTY

18.1 All intellectual property rights (including patents, designs (both registered and unregistered) copyrights, technical information or know how and similar rights both

in the UK and abroad) created by the Employee in the course of his/her employment shall vest in and be owned by the Company.....”

and

18.3 The Company will pay a bonus payment to any Employee who develops a process, produces an idea or invention, that is used by the Company in any format.

24. ENTIRE AGREEMENT

This Agreement supersedes all prior agreements or arrangements, whether written or oral between the Employee and the Company relating to his/her employment or engagement with the Company and there are no written or oral terms or representations made by the Company except as contained or referred to in this agreement.

SCHEDULE 1

BONUS ARRANGEMENTS

On occasion the Company may set goals for the Employee in order to achieve the business goals this may be in the form of cash or other.

- 1. Payment of any cash bonus is subject to deduction for PAYE, National Insurances contributions and any other sums that may be due. The bonus payment will be paid with the monthly salary payment in the month following the incentive.*
- 2. In the event of notice being given by the Employee or the Company all right to bonus payments shall cease, except for monies owed from work already undertaken. In the event that Employment is terminated for gross misconduct or where after termination for any other reason the Company discovers that the Employment could have been terminated for gross misconduct, payment of any commission outstanding at the date of termination or which becomes due for payment after the date of termination will be subject to the absolute discretion of the Company.*

9.6. The claimant was issued with a job description at the same time as the contract (page C19). One of the day-to-day tasks highlighted here was “New Business Generation”. He was also expected to carry out Technical duties including installations, operation, planning and implementation and technical support for events. The claimant admitted in cross examination that there were no other contractual documents other than his contract and job description that set out provisions relating to the payment of bonus, commission or holiday and that nothing else was issued to him in writing around bonus terms.

- 9.7. The claimant started work on 16 January 2017. He was initially predominantly office based but a major part of his role was to develop the event side of the business. From about September 2017 onwards the claimant started to work more on the events themselves and on the "Theming" side of the business i.e theme parks, attractions and rides. He spent less time in the office and was out managing materials and staff on site and assisting with the build and construction. It is clear that it was busy and that the claimant was regularly called upon to work in excess of his contractual hours. The claimant was largely responsible for managing his own time.
- 9.8. The claimant alleges that from August 2017 as he was regularly working extra days and hours at weekends, he was permitted to take time off in lieu of these additional hours worked. He said this was agreed with JH during a conversation in the car coming back from an event. JH did not recall this conversation with the claimant but acknowledged in evidence that if employees worked additional hours, that they would then take an equivalent day off to make up for this and described this as "*give and take*" between the respondent and its employees. I accept that this was common practice within the respondent and the claimant was during this time permitted to take time off to make up for days he worked over and above normal working hours. This happened regularly and often during the claimant's employment. No records were kept by the respondent as to how these equivalent days would be treated. The claimant says that he and other employees kept their own records.
- 9.9. The claimant states that the process for taking holidays was more formal and he made an application for specific dates he wanted to take as holiday. He recalls making a request to take 2 days annual leave because he wanted to attend a specific event over a weekend so he made a request to also take the Friday before and Monday after as holiday. He also knew that he had been required to give longer notice if he wanted to take more than 2 weeks off as holiday. He said that if he was taking time off in lieu he would just inform either JH or GH that he was taking off particular days in lieu and no comment would be made. He did not regard informing GH or JH of these days as being a request for holiday to come out of his 28-day entitlement. JH said that there was no formal process for requesting and recording holidays but stated that holidays were recorded in the company diary. I was shown a copy from this diary at page 26. This showed a number of entries with different named employees' entered as "OFF". There were also some entries showing employees as sick. There were no entries in respect of anyone taking time off in lieu or indeed specifying what days any such OFF were in respect of (with the absence of one entry which noted "James Holiday 22nd-26th" in April). This calendar suggested that during 2018 the claimant was "OFF" for 13 days. The claimant accepts that this is correct in that he was not working on those 13 days.
- 9.10. This diary did not appear to be a complete and accurate record of employees' absences during the year. I note that JH in his witness

statement refers to the claimant being off sick for a week during March 2018 and from 1-3 August 2018 inclusive. There is no record of the claimant's sickness absence recorded in the calendar, although there is one entry regarding sickness noted as "Tom Sick" on 26 and 27 November 2018. I find that the claimant's evidence as to when he took holiday and how this was done more convincing and I accept that he made only one request for annual leave during 2018 for two days. I also find that these were the only two days the claimant took as annual leave during 2018.

9.11. In October 2017 and November 2017 the respondent, paid the claimant two payments of £1500 in addition to his monthly salary. I was shown payslips for the relevant months which both show a payment of £1500 being made and shown as "Overtime" (pages C37 and c38). The claimant alleges that these were Project Overtime Bonuses in respect of the additional hours worked and staying away from home specifically on the Chessington Project. The respondent contends that this was paid as an ex gratia payment to acknowledge the amount of extra time and effort the claimant was putting into the business at that time. I prefer the respondent's version of events. There is nothing to suggest that this was a bonus scheme linked to a Project. Indeed the claimant himself only suggests that discussions about project bonuses took place in January 2018 (see below), well after these sums were paid to him. Therefore I find that these two additional payments made to the claimant were ad hoc overtime to recognise additional time worked during two particularly busy months.

9.12. The claimant contends that he had a discussion with GH about his remuneration and package on 25 January 2018 which is key to his claim for unpaid bonuses. His version of events is wholly disputed by GH and the respondent. The claimant showed me a text message being sent by JH asking him to come into work for 10 a.m. (shown at page D6). He says he first had a discussion with JH about the project coming up at Drayton Manor. He says that GH joined the discussion at 11.30 a.m., and they all went to on to discuss plans for the future growth of the business. The claimant says he took rough notes of what was discussed and GH took this handwritten note away. The claimant says that JH then left, and he went on to have a further discussion with GH about his remuneration and package.

9.13. The claimant says he told GH that he had been dissatisfied with the long hours worked in 2017 and that after the Chessington Project, it had been agreed that he would be paid a Project Overtime Bonus of £3000 (paid over two months). The claimant states he asked GH whether the Project Bonus would continue and says that GH told him that £3000 was too much but that he would pay £1500 for currently booked project work (which the claimant identified as being the Drayton Manor Park; the Kingfisher Shopping Centre Escape Rooms and the Chessington Curse of the Lost Tomb project). The claimant says they went on to discuss the Kingfisher Escape Rooms project in Redditch and the possibility for it to be

extended in duration and possibly rolled out over seven sites belonging to the client. The claimant says he asked GH whether there would be any sales commission and that GH responded that he had reservations about escape rooms, but that he agreed to pay the claimant a Commission Bonus payment of £1500 if the project was extended and an additional £1500 commission for each new site it was rolled out within the client.

- 9.14. The claimant alleges that GH confirmed again verbally what had been discussed above and also that additional days/time worked would continue to be given as paid days off in lieu. The claimant says that GH told him that his salary review would now be considered with the above in mind. He also states that GH made reference to clauses 18.1-18.3 of his contract and said that any bonus payments made would be inclusive of any payments that may become due under these clauses and would be the total amount paid regardless of actual hours worked.
- 9.15. The claimant also contends in his claim form that such bonus payments were designed to address three aspects:
- A) To compensate him for working additional hours away from home for periods greater than three weeks;
 - B) To comply with 18.3 of his contract of employment;
 - C) To ensure that the company did not fail to pay him the national minimum wage during projects.
- 9.16. The claimant acknowledges that he did not get any of this discussion confirmed in writing and says this is because he never thought that GH and JH would not pay him the sums, even up to and after the point his employment had terminated. He said he did have some handwritten notes of what was discussed but that these were mislaid during a recent clear out at home.
- 9.17. GH and JH have a different recollection of the conversation that took place on 25 January 2018. Both GH and JH state that there was a conversation with the claimant on 25 January 2018 but that his was a conversation solely about business matters, sales planning and the future growth of the business. GH states that no such detailed conversation regarding bonus and commission payments took place with him as alleged on that day. GH acknowledged that they often had discussions about future plans of the business and that if the business had grown in the way that they anticipated, it may have been that the claimant would have been given some bonus entitlements. This had been the intention from the outset but that nothing was ever put into place and any discussions around future bonus payments/incentives were just possibilities that might apply in the future. The claimant also acknowledges that there had been a number of conversations with GH in the past about possible bonuses but none of them had come to fruition
- 9.18. I have weighed up the conflicting versions of events as to what took place on the 25 January 2018 and have found that the conversation this day did not take place the way that the claimant recollects. I accept that

there was a discussion between both GH and JH about the current business and that this went on to discuss how the business would grow in the future. I can also accept that some discussion took place between GH and the claimant about how any future growth might be linked to bonuses and other incentives for the claimant himself. However these discussions were aspirational and theoretical rather than concrete. I do not accept that any verbal agreement was reached between the claimant and GH that Project Overtime Bonuses and Sales Commission bonuses would be paid in the way the claimant contends. If such an agreement had been reached, I find it highly unlikely that the claimant would not have asked for this to be confirmed to him in writing or recorded in some way. By the same token, I am not persuaded that GH on behalf of the respondent would have agreed to such extensive and detailed bonus and commission arrangements without having these recorded in writing, not least to protect the respondent's position regarding how and when such sums would be paid. In addition the claimant did not make any reference to the dates this conversation was alleged to have taken place until he prepared his witness statement for this hearing. It was not specifically mentioned in his grievance in November, nor was it put in his claim form. I find that if the discussion had taken place to the level of detail alleged by the claimant that he would certainly have mentioned it earlier.

- 9.19. The claimant's salary increased to £22,000 which took effect from February 2018.
- 9.20. The claimant finished work on the Drayton Manor Project in May 2018 and started to prepare for the next project which was an Escape Room at the Kingfisher Shopping Centre in Redditch. There was much discussion at the hearing about this project and how it came about but much of this is not relevant to the matters I have to decide. The claimant alleges that he asked GH some time in June/July 2018 about the Drayton Manor project as he knew that there had been some technical difficulties. The claimant says that GH told him that things were not good. The claimant says he asked GH about the payment of bonuses during this conversation and was told by GH that no-one would be paid anything until Drayton pay in full.
- 9.21. The claimant alleges that he asked GH again at the beginning of September when he would receive his project bonus and commission for the Kingfisher project as had been told by GH that the extension to the project had been agreed. The claimant says that GH became annoyed at this and went on to tell him about difficulties with the Drayton Manor project and other projects. The claimant says that GH told him at this time that there was no money to make the payments to him at this time and that he would be paid but that he just needed to be patient.
- 9.22. The claimant says he asked again in or around 9 October 2018 whether he would be paid his Project Bonuses and Commission before Christmas and was told by GH that things were still tight, but starting to look

brighter as Fireworks and Christmas bookings had started to come in so he did not think it would be a problem.

- 9.23. GH denied that any of the conversations above whether the claimant asked about the payment of bonuses took place. He has no recollection of these specific discussions. He accepts that he spoke to the claimant regularly about how the business was performing. My finding is that the claimant did not ask specifically about the payment of these alleged Project Overtime Bonus and Commission payments during these conversations. However I do accept that the claimant did enquire regarding whether he would be paid bonuses on these and perhaps other occasions. The claimant was informed each time that bonuses would not be paid. However this was a general discussion about whether he should receive a bonus and not about specific payments under a particular scheme or entitlement.
- 9.24. At around this time, JH and GH had decided to terminate the claimant's employment in order to cut overheads. GH stated that neither he or JH had taken any salary in the two months previously and had tried to reduce employees' hours. They reached the conclusion that they could no longer continue to employ the claimant particularly as they felt that he had failed to generate the new business as had originally been envisaged.
- 9.25. GH informed the claimant on 23 October 2018 that his employment would be terminated. The content of the conversation between the claimant and GH that day is disputed. The claimant's version of events is set out in the grievance that he submitted on November 8 2018 (pages C1-C7). He says that there was a discussion about the Chessington job and the financial problems that the respondent was having. He then says he was told that his employment would need to be terminated in order to save on overheads. He says he asked when the changes would take place and was told by GH that it would be 28 October 2018. He says he asked whether other staff members were affected and was told by GH he was not sure yet. He also says he was told that he would be paid for this month together with any holiday not taken. He contends that he asked about bonus payments and was told that the company did not have the funds. He says that he asked when this would come into effect and was told he could go home immediately and that the rest of this week would not be deducted as holidays. He then states that he asked for a letter confirming all of this and that GH apologised that he had to take this action. He was not sure whether any discussion about pay in lieu of notice took place.
- 9.26. GH was not entirely clear in evidence how the conversation had progressed and when notice/termination was to take effect from, although he did admit that he thought it may have been the 28 October. However the respondent contends that termination took effect from 23 October 2018. The claimant's evidence on how this conversation took place was clearer (and was consistent with what he put in his grievance shortly after this) so I preferred his version of events. I find that the claimant was informed on 23 October 2018 that his employment would terminate on the 28 October

2018. The claimant did not raise any issues regarding any other outstanding payments at the time and just left the office.

9.27. The claimant received an email from GH on 25 October 2018 at 11.12am (shown at page C34) which provided certain information to the claimant. It stated:

"I have your P45 and wage slip for October 28th 2018.

As far as the holiday entitlement is concerned, the calculation comes back as £369.70 (4.33 days due).

28 days Holiday per annum due for the year 2018 from January 1st. $28/12 \times 10$ pro rata = 23.33 days due, less 13 days annual leave taken (and 6 days bank holiday taken) = 4.33 days due.

Salary £22,200/52 weeks/5 days =£85.38 per day x 4.33 days due =£369.70 holiday Pay.

I understand that you still have a Company phone issued and also "branded" work ware.

On return of these items, I will be able to release payment of the Salary due on 28/10/18 and Holiday Entitlement."

9.28. The claimant replied the same day at 12.21 (shown at C35) requesting a letter with the reason for termination and also stating:

"Could you please also forward the dates that have been calculated as having been taken as leave. The number of days taken I have recorded is different"

9.29. The claimant received an e mail from GH on October 26 at 8.30am (C16). This confirmed as follows:

"As discussed on Tuesday, I reluctantly have to advised you that your full time Employment with Being Creative Limited will cease from 28/10/2018."

It went on to state:

"Our out sourced PAYE company have raised thePp60 and calculated remaining holiday pay (which you are aware of as we supplied the figures the other day)."

9.30. I was shown an e mail from the respondent's accountants of 24 October 2018 which set out the calculation of the claimant's holiday entitlement. I was also shown a handwritten note which showed a list of 13 dates written under the heading "Tony Holiday" (page c36). This was prepared by JH

and he says he did this by writing down the days he had noted for the claimant's holiday in the company diary ner a copy of which was at page 26.

9.31. The claimant attended the office as instructed on 26 October to hand over his keys and office items. Nothing was discussed at this time re any outstanding sums. The claimant gave evidence that it was only when he received payment into his bank account after this meeting (£1850 Salary for October and £369.70 holiday pay) that he realised that something did not look right and he had not been not paid the sums he felt he was entitled to. He said he went to the Citizens Advice Bureau for some advice and sent an e mail on 5 November 2018 to JH asking for the grievance procedure (page C8). This was followed up on 7 November (page C9). He received a response later that day from GH (page C10) advising that a grievance should be raised in writing to GH and that although the company was not obliged to deal with a complaint it may decide to do so if appropriate. The clamant lodged a grievance on 8 November 2018 (shown at pages C1-C7).

9.32. The claimant's grievances set out the various complaints he was making, in respect of one month's notice pay, unpaid holiday pay and bonuses. In respect of his holiday pay, the claimant listed the days that he had worked "overtime" during 2018 that he had accrued time in lieu in respect of. This amounted to 11 days. He therefore claimed that of the 13 days he had not worked up to the point of termination of employment (which it appears had been agreed), only two were actually taken as annual leave and the remaining 11 had been actually taken off as time off in lieu. This meant that he was still entitled to be paid for the 11 days annual leave accrued that had not been taken as at the date of his employment. He also set out the basis upon which he claimed he was entitled to bonuses and sales commission.

9.33. This grievance was acknowledged on 8 November and a further e mail was sent by GH on 15 November (shown at page C13) requesting further information. The claimant replied to this on 20 November forwarding his grievance again. The respondent contends that as it did not included the further information requested by it, the grievance was not progressed further. The respondent did not hear anything further from the claimant until the ACAS conciliation officer got in touch in relation to the claimant issuing proceedings.

The Law

10. **Section 13 ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full below:

"13. Right not to suffer unauthorised deductions.

- (1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
 - (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*
 - (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*

- (2) *In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*
 - (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
 - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

- (3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion*

11. **Section 23 ERA** provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to **section 13**.

12. **Section 27 ERA** defines wages as follows:

Meaning of “wages” etc.

- (1) *In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—*
 - (a) *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,*
 - (b) *statutory sick pay under Part XI of the M1Social Security Contributions and Benefits Act 1992,*
 - (c) *statutory maternity pay under Part XII of that Act,*
 - (ca) *statutory paternity pay] under Part 12ZA of that Act,*
 - (cb) *statutory adoption pay under Part 12ZB of that Act,*
 - (cc) *statutory shared parental pay under Part 12ZC of that Act,*
 - (d) *a guarantee payment (under section 28 of this Act),*
 - (e) *any payment for time off under Part VI of this Act or section 169 of the M2Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),*

- (f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,
 - (fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act.]
 - (g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,
 - (h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and
 - (j) remuneration under a protective award under section 189 of that Act, but excluding any payments within subsection (2).
- (2) Those payments are—
- (a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),
 - (b) any payment in respect of expenses incurred by the worker in carrying out his employment,
 - (c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,
 - (d) any payment referable to the worker's redundancy, and
 - (e) any payment to the worker otherwise than in his capacity as a worker.
- (3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—
- (a) be treated as wages of the worker, and
 - (b) be treated as payable to him as such on the day on which the payment is made.

Conclusion

13. Dealing with each of the complaints made above by reference to the issued identified above, I conclude as follows:

Breach of contract claim

14. It is not disputed that the claimant was entitled to receive one month's notice of termination of employment or the equivalent sum as payment in lieu of notice under the relevant provisions of his contract of employment (see paragraph 9.5 above). The respondent also admits that it has not served or paid the claimant in respect of the full period of notice he is entitled to. The

only matter in dispute between the parties is the length of notice the claimant is still due to be paid in respect of. This depends on when the claimant's employment terminated, when he was paid up to and what any payments already made to the claimant were in respect of. The respondent contends that the claimant's employment terminated on 23 October 2018 when he was informed verbally by GH. It then says that he was paid for the remaining days in October and that this payment amounted to a part payment of salary in lieu of notice under his contract of employment. It therefore says that the claimant is entitled to a further 22 days pay, which amounts to $\text{£}1850/31 \times 22 = \text{£}1,312.90$ gross. The claimant contends that he is entitled to a full month's notice pay being $\text{£}1850$ as he was not paid any part of his period of notice. He contends that the sums already paid to him were payment up to and including the date of termination of his employment namely 28 October 2018.

15. I have already made a finding of fact above that the claimant's employment terminated on 28 October 2018 as set out in the e mail from GH of 26 October 2018. The claimant's contract of employment is clear that employment must be terminated by notice in writing. During the earlier conversation between the claimant and GH, he was also told by GH that his employment would terminate on 28 October 2018. I therefore conclude that the effective date of termination was 28 October 2018. The claimant was paid up to this date but was effectively paid for the whole of October 2018 up to and including 31 October 2018. Both the claimant and the respondent were operating under the assumption that the payment made for October 2018 on 28 October 2018 covered the whole of that month. There is no suggestion by GH that any part of the amount that was paid to the claimant on 28 October 2018 was made as part payment in lieu of notice nor that the claimant was working or serving a period of notice after being told his employment was to be terminated orally or by e mail. He was paid as full payment for a month worked or being asked to remain at home.

16. I conclude therefore that the claimant was not served with the period of notice as required under his contract, nor was he paid in respect of any of his period of notice under the relevant clause of his contract. The respondent is therefore in breach of contract and I award the sum of $\text{£}1850$ as damages for this breach.

Unpaid Holiday pay claim – claim in contract

17. It is agreed between the parties that as at the date of termination of his employment, the claimant had accrued 23.33 days including bank holidays. It is agreed that the claimant took the 6 bank holidays included up to this point. It also appears to be agreed that the 13 days identified by the respondent on handwritten note headed "Tony Holiday" (page c36) were days when the claimant was off work. The only matter that appears to be in dispute is what the status of these days off actually were. The respondent contends that all such days off were taken as annual leave. Thereby leaving the claimant with 4.33 days of annual leave accrued but untaken which it

has already made a payment in respect of in the sum of £369.70 The claimant however suggests that only 2 of these days were taken as booked annual leave and the remaining 11 days were days he took off in lieu of additional days worked for the respondent as part of its informal policy on this matter.

18. Mr Roberts for the respondent points out that the claimant appears to have presented his claim for holiday pay in two ways. In his grievance submitted in November 2018, he says the claimant alleges he is due an additional 11 days pay for working days over and above his contracted hours. He says that it is only later that he changes his complaint and positions it so as to say that the days he took off were not holidays but days taken off in lieu and that he remains entitled to his annual holiday entitlement. Mr Roberts states that the two are entirely inconsistent. He also contends that all these days were clearly holidays as they were recorded as such in the diary produced by the respondent. Any days in lieu that employees and the claimant took off were not recorded in this way it is said.
19. The claimant submits that if there is any inconsistency in the way he has presented his claim for holiday pay, it is due to a lack of understanding of the legal provisions on his part and says that the point taken by Mr Roberts is just a question of semantics.
20. I have already made a finding of fact that the respondent operated a policy of allowing its employees to take time off in lieu of any additional hours or days worked. This was operated informally and there was no process of recording which days were worked and which days were taken. This appears to have been a matter of trust between employee and employer rather than a formal process. I have also made a finding of fact that the claimant only made one formal request for annual leave during 2018 namely to take two days holiday and only took two days holiday.
21. I therefore conclude that the remaining days taken off by the claimant during 2018 were taken as time off in lieu and not holiday. The contractual clause on holiday states: "*Holidays are to be taken at such times as an Employee decides. If Employees are planning to take more than 2 weeks annual leave at any time or during peak season such as February, August October and November they should notify the company in plenty of time, ideally 3 months*". There is no process for requesting annual leave and having it approved by the company other than holiday during peak season or if it is for more than 2 weeks. The respondent does not have any records of holiday requests being received or granted. I have also made a finding of fact that there was a policy of employees having the ability to take time off in lieu if they worked additional days especially over weekends. The claimant kept a clear record of the number of such days he had accrued. He was not specifically challenged on any of these dates. Therefore I conclude that under the terms of the contract of employment and also the informal policy operated by the respondent, it was open for the claimant to

have taken days off during 2018 in lieu of such additional days that had accrued.

22. It may well be that JH recorded such days in the diary as and when he was informed by the claimant that he would not be working. However I conclude that these days were not requested as annual leave nor were they treated as such by the respondent.
23. I therefore conclude that 11 days accrued but untaken days annual leave remain unpaid to the claimant as at the termination of his employment and he is therefore due to be paid the sum of £939.18.

24. Unauthorised deductions of wages claim – bonus and commission

25. In order to determine whether the claimant, on or about 28 October, paid less in wages in carrying out his employment than he was entitled to be paid and if so, how much less, I first needed to determine whether the claimant was entitled an Overtime Project Bonus and/or a Sales Commission Bonus as alleged. If he has shown that he is so entitled, I can then go on to determine whether anything was due to be paid to the claimant by way of bonus or commission, how much, if any was paid and how much is outstanding.
26. The claimant relied on what he says was a verbal promise made to him on 25 January 2018. He contended that together with his contract of employment this proves that he was contractually entitled to receive Overtime Project Bonuses for 3 projects that had been completed to the client's satisfaction and also a separate amount of sales commission in relation to a third project that had been renewed. The claimant's contentions on the terms of such bonuses and evidence in support of these is set out at paragraphs 9.12 to 9.16 above. I made a finding of fact at paragraph 9.18 above that there was no such verbal agreement as was alleged reached between the claimant and the respondent on 23 January 2018 regarding the payment of Project Overtime Bonuses and Sales Commission. I can see no other basis for the claimant's claim to be entitled to be paid such sums. The only references to bonus in the claimant's contract of employment are firstly at clause 18.3 where it states that the company will pay a bonus payment to any Employee who develops a process, produces an idea or invention that is used by the Company in any format. This is a very vague provision and it is hard to see what entitlement could be deemed from it. It is not sufficiently certain for the claimant to allege that this would entitle him to the Project Overtime Bonuses and Sales Commission he now claims. There is no reference in the contract to how much would be paid to the claimant in respect of any such a process, idea and invention and it is not clear what process, idea or invention the claimant alleges he had developed.
27. The other reference to bonus is at schedule 1 which is set out at paragraph 9.5 above. This only makes reference to the possibility of a bonus being paid upon being set goals "on occasion". It is clear that any bonus that might

become payable under such provisions would require further detail to have been agreed between the parties as to goals must be achieved to be paid what bonuses. I have already found that no such agreement was in place. There is no reference anywhere in the contract to sales commission.

28. It is clearly the case that it was the intention of the parties when entering into this contract that if things went well for the claimant and if the business grew as hoped, there would be the potential for him to then participate in some sort of bonus arrangement. This may have been the long-term goal of not just the claimant but the respondent too. The parties may have gone so far to discuss what the terms of such an arrangement might look like and how it might operate. However this was never put into place. Therefore I can conclude that the claimant has not shown a contractual entitlement to be paid any sums by way of bonus from the respondent specifically there is no entitlement to a Project Overtime Bonus or Sales Commission. As there is no entitlement, there is no failure to pay on the respondent's behalf and no sums are outstanding to the claimant. This complaint is duly dismissed.

Employment Judge Flood

Date: 28 June 2019