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EMPLOYMENT TRIBUNALS

Claimant: Mr B Phillips
Respondent: Next Chapter Homes Limited
Heard at: East London Hearing Centre
On: Wednesday 5 June 2019
Before: Employment Judge Tobin

Representation
Claimant: In Person
Respondent: Mr A Rafiai (Director)
Mrs K Rafiai (Director)

RESERVED JUDGMENT ON RECONSIDERATION

1 The Judgment of the Employment Tribunal of 28 September 2018 is set aside in respect of the notice pay and the failure to pay commission/bonus and expenses. For the avoidance of doubt, the Judgment in respect of accrued an unpaid annual leave entitlement of £338.95, gym membership £70 and half of the costs of preparing the hearing bundles of £62.50 still stands. So the Respondent is ordered to pay the Claimant £471.45 from the Judgment of 28 September 2018.

2 The Claimant shall pay the Respondent as follows:

2.1	Notice pay -	£1,093.84*
2.2	Commission (and bonus) payments -	<u>£7,013.70*</u>
	Total	£8,107.54

*These figures are gross and may be paid with deduction for tax and national insurance, as appropriate.

REASONS

3 By email dated 27 October 2018, Mr Rafiai, on behalf of the respondent, sought clarification for the amounts in respect of the previous Judgment given. He contended that the Judgment was predicated of incorrect figures. Upon the Employment Judge's review, we were not able to ascertain the origin of figures that had been recorded as "agreed" calculations. The Judge re-examined the very large bundles of documents produced by the parties and it was not apparent the origin of such "agreed" figures. Accordingly, the Judge ordered that this matter be remitted to a further reconsideration hearing, pursuant to Rule 73 of The Employment Tribunal's Rules of Procedure, Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

4 The claimant objected to the partial review of figures as he contended (correctly) that the previous award in respect of the claimant's notice pay also included amounts for the commission payments.

5 The Tribunal had two large bundles documents at the commencement of this hearing. The Employment Judge instructed the parties to bring to his attention any matters that they sought to rely upon. It was agreed between the parties at the outset of the hearing that the review would only proceed in respect of notice pay and the failure to pay commission and bonus and expenses. The holiday pay previously awarded and withdrawn of the gym benefits figures stand as previously ordered.

6 The claimant had prepared a recent schedule of payments that he contended were owed and he provided a copy to Mr and Mrs Rafiai. The claimant gave evidence on the bible and he was cross-examined by Mr Rafiai. He was also asked questions for clarification by the Tribunal. Mr and Mrs Rafiai were invited to give evidence by the Employment Judge. The difference between evidence and submissions was explained by the Employment Judge. Neither respondent official chose to give evidence and Mr Rafiai said that the respondent would rely upon submissions; notwithstanding, it was explained to the respondent that evidence carried more weight than submissions.

Notice pay

7 The claimant's pay was as follows:

7.1 April 2017 - £1,948.72

7.2 May 2017 - £2,132.64

7.3 June 2017 - £2,575.25

7.4 July 2017 - £2,823.30

7.5 So the total for the quarter (i.e. 4 months) = £9,479.91.

= £28,439.73 as the equivalent pay per annum.

Divide by 52 and multiply by 2 to arrive at the claimant's 2 weeks' notice period. This gives a total of £1,093.84.

8 The above calculation was based on the respondent's figures.

Commission

9 In respect of commission we discussed, for example, King Georges Road, the respondent contended that there were two valuations on that property.

10 The claimant took the Tribunal through the schedule of the commission payments which is table 1 at pages 3-5 of the claimant's schedule. The claimant said that his figures had been updated a couple of weeks ago following the disclosure of further information that Mr Rafiai brought to the September 2019 hearing.

11 By way of background, the claimant clarified (and Mr Rafiai accepted) that the respondent's estate agent offered three distinct sales packages. This started with the bronze package at £2,500; the silver package was £3,500 and the gold package was £5,000. The sales packages differed in the type of service proffered and whether this was merely marketing the property or whether the service provided included viewings, etc.

12 These packages applied to sales although there was a rental agreement of 5% for the first four months. The claimant said that he had requested information in respect of his referrals, but these were not provided by the respondent and he had not included this in part of his claim.

13 The claimant said that he was entitled to 10% of the total fee charged by the respondent for any property that he had dealt with taking in account the adjustments for vat. He said that most of the properties that he claimed commission for were bronze packages, which was £3,500 plus vat. This meant that the fee charges was £2,800 minus £100 plus vat for photographs. So far as the photography was concerned, the claimant said that that related to £100 in all but this was not included in the documentation provided to him by the respondent.

14 The claimant had claimed commission in respect of 26 properties on the schedule on the basis that these were his instructions i.e. he was the initial handler who 'signed up' the seller/vendor. The claimant said that he had signed the appropriate contracts. He had made repeated requests to the respondent to provide the appropriate contract and/or documentation, but the respondent had not provided these. I accept the claimant's evidence and that he was truthful in advising me that he claimed commission only in respect of 26 properties from which sales fees were gained and that these were properties in which the claimant handled as part of his sales portfolio, i.e. that these were his clients. In contrast, Mr Rafiai said that he did not have any instructions documents (or other documents) to support the claimant's contention that the commission for the properties identified were not part of the claimant's sales leads.

15 We went through all of the relevant commission claimed in respect of the claimant's table 1. The claimant said that he had taken off the commission claimed if any property was sold by another agent, for example: 8 Tudor Court at page 3, 312 Mount Nessing Road, 168 Warley Hill Road, 103 Crescent Road, 8 Reed Pond Walk, 48 Kings Chase, 10 Graham Close on page 4 and on page 5, 2 Redcroth Cottages and 127 Kennleworth Gardens. These are matters that the claimant contended he was recorded as taking the initial instructions in signing up the client. The claimant's said that was where the commission arose. However, normally the agent who signs up the vendor/seller would get the sale but because the claimant did not introduce the buyer on these matters and close the sale, consequently the claimant did not claim commission in respect of these properties.

16 Mr Rafiai said in his submission that his bundle of 503 pages would disprove the claimant's claim. I advised Mr Rafiai that the Employment Tribunal service did not offer a payroll service so we would not be duplicating a proper payroll system. I asked Mr Rafiai to refer me to specific documents to counter the claimant's claim. Mr Rafiai then picked out a number of properties. The claimant question that if he did not sign up these properties, why has the respondent not produced the appropriate contract documents to dispute this. Mr Rafiai said that the respondents had not had those documents available, and that the documents had not been retained for data protection purposes. These documents were an obvious and essential part of the case and this documentation was essential and I would have expected the respondent to be able to produce such documentation. I do not accept the respondent's explanation for the non-production of this material. In respect of each instant that Mr Rafiai referred to, the claimant took him to the google map location contained within the bundle to corroborate his evidence that he was at the appropriate property and this was identified, for example, at pages 485-486 of the bundle. Property valuations and agreeing the initial instructions generally took 1-2½ hours. In respect of the document featured at page 212 and 230 of the bundle, the claimant confirmed that he was there with his google location indicator. We discussed the report at page 215 of the bundle.

17 Mr Rafiai contended that the spreadsheet was not correct but the claimant said, which I accept, the spreadsheet was created by the respondent originally (there is a copy on file) and it is only the claimant's modified version of the respondent's original document that appears in the final bundle. The claimant took me to previous documentation where it shows an earlier version of the spreadsheet.

18 Mr Rafiai said that there was an average completion time of 6-9 months for sales. The claimant contended that the average was 3-5 months and that Mr Rafiai evidence in this regard was merely aimed at denying him more properties than he had claimed for. The claimant contended that he had only claimed for properties that were completed while he was at work.

19 We went through all of the claims of the claimant which Mr Rafiai challenged and I am satisfied that the commissions are due.

20 Under the circumstances I accept the evidence of the claimant. He was subjected to cross-examination from Mr Rafiai and the claimant answered all appropriate questions clearly and, I determine, honestly with reference to the bundles of documents before us. I was satisfied that the claims in respect of commission were made out. Consequently, I

accept that the claimant is due £7,013.70 in respect of outstanding commission in respect of properties he had signed up and which were completed so as to give rise to the outstanding payments claimed.

Summary

21 In respect of notice pay, the Tribunal assesses that £1,093.84 is due.

22 Commission (or bonus) payment is outstanding which the Tribunal assesses at £7,013.70.

Employment Judge Tobin

21 August 2019