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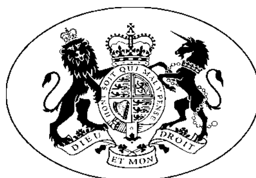

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Shah**

Respondent: **Cortel Telecom Limited**

Heard at: **East London Hearing Centre**

On: **Friday 1 November 2019**

Before: **Employment Judge Ross (sitting alone)**

Representation

Claimant: In person

Respondent: Mr T Perry (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The Respondent made an unlawful deduction from the Claimant's wages by non-payment of his car allowance for September 2017.**

2. **The Respondent shall pay the Claimant wages of £450.**

3. **The claim for breach of contract (for half the car allowance for October 2017) is dismissed.**

4. **The counterclaim is dismissed.**

REASONS

Procedural history

1. This Claim was first heard by the Employment Tribunal on 3 and 14 June 2018. By a Reserved Judgment, the Tribunal made awards for wrongful dismissal, unpaid wages, holiday pay, and car allowance. Mr. Sheen, MD of the Respondent, did not attend as a witness at that hearing.

2. In reaching its conclusions, the first Employment Tribunal held that the Respondent was not permitted to advance a Counterclaim.

Complaints and issues

3. The Respondent appealed. In a reserved decision handed down on 3 July 2019, the EAT (Naomi Ellenbogen QC Deputy Judge of the High Court sitting alone) allowed the appeal in respect of two matters and remitted the case for rehearing by a differently constituted Employment Tribunal. The EAT (at paragraph 27 of its judgment) explained two central legal issues which "*ought to have been addressed*" by the first ET:

> 3.1. whether clause 16 of the contract had been varied so as to remove the requirement that the Claimant's car be of the stipulated age (perhaps, but not necessarily, in accordance with clause 33 of the contract); alternatively;
>
> 3.2. whether expressly, or by its conduct over the course of the Claimant's employment, the Respondent had represented that compliance with that requirement was not required and, if so, whether the Claimant had relied on that representation so as to render it inequitable for the Respondent to enforce the requirement.

4. The EAT set out factual issues for determination. I note, for what it is worth, that the learned Judge did not seek to prevent the Tribunal from determining other relevant facts: see paragraph 28 of the EAT judgment ("…*in particular and at least as to*…").

5. The factual issues identified by the EAT were repeated in the Case Management Summary following the Preliminary Hearing held after the case was remitted.

6. The actual complaints were not, however, listed in the Summary produced following that Preliminary Hearing.

7. In the course of a discussion of the complaints at the start of the hearing before me, the Claimant explained that he had previously made an error in calculating the car allowance due to him, because car allowance was paid in arrears, the following month. He had not been paid the car allowance for September 2018. Therefore, he was claiming the whole car allowance for September 2018 (£450); he was claiming half the car allowance for October 2018 (£225) to reflect the notice period.

8. Mr. Perry, for the Respondent, accepted that the Claimant was not restricted by the EAT decision to claiming only £225, and could (if his case was proved) receive the £675 claimed; but Mr. Perry pointed out that the £225 for October 2018 could only be claimed as breach of contract, given that the Claimant's employment terminated on 2 October 2018 (after which he was entitled to damages for breach of contract not wages). He went on to argue that the October 2018 sum could not be recoverable in any event; the Claimant had done no work after the date of termination and therefore he could not be entitled to any reimbursement for the car allowance expense.

9. Therefore, the complaints for determination by me were as follows:

 9.1. A claim for unauthorised deduction of the Claimant's car allowance of £450 for September 2018;

 9.2. A claim for breach of contract in respect of Claimant's car allowance of £225 for October 2018;

 9.3. A counterclaim for breach of contract by the Respondent for the recovery of the car allowance paid over the course of the Claimant's employment.

The Evidence & the Hearing

10. The Respondent produced a bundle of documents (pp 1-167). Page references in this set of Reasons refer to pages in that Bundle.

11. The Claimant arrived shortly before 10am, with a bundle of his own, but insufficient complete bundles. There was a short delay whilst he assembled a bundle for the Tribunal. To save time and expense, I paginated my copy and directed the Tribunal to make copies as required.

12. Further, in order to further the overriding objective, I directed that paragraph numbers be added to the Claimant's witness statement.

13. Taken together with the time spent identifying the complaints, the Tribunal did not commence hearing the evidence until about 11.20am. This was the main reason that the evidence and submissions were not completed until 1700, so there was no time for consideration of the issues by me, nor for Judgment to be delivered, on the day.

14. I read witness statements for and heard oral evidence from the following witnesses:

 14.1. The Claimant;

 14.2. Neville Sheen,

15. I found that neither witness was wholly reliable. Their evidence was coloured by mutual dislike of each other, which appears to have arisen in the period leading up to termination of employment and was no doubt fuelled by this ongoing litigation. From the words and tone of his evidence, Mr. Sheen appeared to bear a grudge against the Claimant; he described himself as being furious with the Claimant in respect of his perceived sales performance.

Findings of Fact

16. Various findings of fact were made by Employment Judge Hallen in a Reserved Judgment promulgated on 20 June 2018 ("the first Judgment") after the first full merits hearing. The EAT judgment left undisturbed findings of fact in respect of the complaint

of Wrongful Dismissal, which was upheld by the EAT. Nothing in this set of facts should be interpreted as disputing any of those findings of fact.

17. By way of background facts, I incorporate into this set of Reasons paragraphs 5-8 of the first Judgment.

What was said by the Respondent to the Claimant regarding the significance of the age of any vehicle in respect of which car allowance would be claimed?

18. About 1-2 weeks prior to the letter of appointment, the Claimant and Mr. Sheen met at the Hoxton Hotel. Mr. Sheen stated in examination-in-chief that, at that meeting, he told the Claimant that the car allowance would be part of his minimum salary. I accepted that evidence.

19. However, in answers in cross-examination and in answer to my questions, Mr. Sheen was vague about whether he had told the Claimant about the stipulation that the car must be under 3 years old; he could not specifically remember, but thought that he had told the Claimant this at the meeting in the Hoxton Hotel. I did not accept that evidence.

20. I found that at that meeting, Mr. Sheen was selling the role of Business Development Manager ("BDM") to the Claimant (which is what the Claimant alleged in evidence); and I found that Mr. Sheen did not refer to any limitations to the minimum car allowance. Moreover, I found it inconsistent with the Respondent's case that, if the full terms of clause 16 were as important as the Respondent alleged:

20.1. Mr. Sheen could not recall specifically explaining them to the Claimant;

20.2. such explanation was not recorded in writing; and

20.3. such explanation did not form part of any induction.

21. Indeed, from Mr. Sheen's evidence, I found that the Respondent did not formally record the age or condition of any car of any member of the Sales team when they commenced employment. He said that this was because they mostly had leased cars; but I found that this was not the reason, not least because the Claimant and Mr. Leadbetter, and Mr.Rahman (at least from June 2017 until the Claimant resigned) did not have leased cars. I concluded that the lack of any formal record showed that Mr. Sheen had exaggerated the importance of the Claimant and other members of his team having a car that was less than 3 years old, because if this was so important, I could not understand why the age of the cars was not formally recorded.

22. A letter from Mr. Sheen, dated 28 September 2016 (p.59-60) stated that it contained the "*main points*" of the Respondent's offer. Under "Expenses", it stated that £450 per month was the minimum payment for the car allowance. The letter included: "*I will send a copy of the formal contract shortly*."

23. The Claimant relied on the oral and written statements that a minimum car allowance of £450 per month would be paid if he took the role. He entered into the contract partly in reliance on those representations.

24. The terms of the Claimant's written contract included, at clause 16:

> "*The Employer will reimburse you in respect of all reasonable expenses wholly, exclusively and necessarily incurred by you in the performance of your job provided that, if required, you provide evidence of expenditure in respect of which you claim reimbursement. There will be an allowance for the use of your own car of 45 pence per mile for the first 1,000 miles. You must keep and maintain a car for the use in conjunction with the employers business that is less than three years old and in good condition. The mileage allowance is averaged at 1000 miles per month at 45p. This is to cover all expenses incurred in the use of a vehicle up to 1000 miles. Above 1000 miles you can claim 25p per mile.*"

25. Clause 33 provides that the employer may change any term of the contract by consent or with notice.

26. The contract does not set out how expenses such as the car allowance should be claimed.

27. After the Claimant commenced work for the Respondent, he used his car to travel to visit clients and prospective clients, whether alone or with other members of the team. The car allowance paid for petrol, servicing and other associated costs of running the car, as well as other transport such as train tickets. The Claimant's car was a 2009 Mercedes Sport Coupe during his employment with the Respondent.

<u>*Whether other team members received a car allowance; and what if anything had been said to them about the age of their vehicle?*</u>

28. As for the other BDMs (who were the salesmen below Mr Abbas), Mr. Leadbetter drove a 2004 Astra, but received a car allowance. Mr. Sheen gave various explanations for the apparent inconsistency between the age of car requirement by the Respondent, which he claimed was very important from the perspective of impressing clients, and the age of Mr. Leadbetter's car.

29. Firstly, Mr. Sheen stated in cross-examination that Mr. Leadbetter was self-employed and that he did not know how old his car was when he was engaged because it was "*not relevant*". Again, if true, this pointed to the age of the car of each salesman or BDM being of relatively minor importance.

30. Secondly, Mr. Sheen said that he could not control Mr. Leadbetter as a sub-contractor. I found that this evidence was disingenuous; indeed, as Mr. Sheen agreed, it would have been possible to make clause 16 of the Claimant's contract a clause in the contract for services of Mr. Leadbetter.

31. Thirdly, Mr. Sheen's evidence in cross-examination was that Mr. Leadbetter visited clients in distant places, mostly by train. There was nothing to corroborate this, and given that Mr. Leadbetter lived in Taunton, I had some difficulty in accepting that train would be the most time-efficient means of travel to certain places.

32. Fourthly, by way of explanation for not enforcing the car policy, Mr. Sheen stated that Mr. Leadbetter brought in good clients. I found this contradicted Mr. Sheen's own evidence about why it was important for the Sales team to drive cars less than 3 years old.

33. Finally, Mr. Sheen admitted that Mr. Leadbetter had been an employee for a few months in 2014, and he had no idea if he had had the same car then. The inference I drew from all the evidence was that Mr. Leadbetter had the same car at that time. I inferred that the age of the cars for those in the Sales Team was less important than Mr. Sheen claimed.

34. The Claimant's evidence that Mr. Leadbetter received the car allowance was not disputed. Mr. Leadbetter stopped working for the Respondent in October 2017.

35. Mr. Rahman knew that Mr. Leadbetter and the Claimant received a car allowance. He wanted a car allowance. Mr. Sheen agreed that he could have a car allowance from June 2017.

36. Mr. Rahman's car was over 3 years old. In respect of the term as to the age of the car, Mr. Sheen took no step to enforce it in Mr. Rahman's case. Mr. Sheen stated that this was on the basis that Mr. Rahman had said that he would get a new car and he had hit his target. However, I found it to be inconsistent that he continued to drive a car older than three years and receive car allowance, evidenced by the expense forms from June to November 2017. I found that Mr. Sheen did not reach an "*exceptional agreement*" with Mr. Rahman as he claimed, not least because there was no written record of any such agreement, nor any particulars given in evidence as to when it was agreed that Mr. Rahman would buy a newer car.

37. In short, the three BDMs (the Claimant, Rahman and Leadbetter) in the Sales Team each had a car over three years of age in 2017. All were paid car allowance. There was no evidence of any step to enforce the three year rule in clause 16 of the contract of the Claimant or Mr. Rahman, nor of any three year rule in the contract of service of Mr. Leadbetter.

38. Mr. Abbas ran Sales. In his witness statement, Mr. Sheen described him as in a field sales position, which was an incomplete and not an accurate description; he was Head of Corporate Accounts and looked after larger corporate clients. His car was generally under three years of age, but for a short time had a car older than three years (March – May 2017).

Respondent's knowledge of the age of the Claimant's vehicle?

39. After the first month at work, in November 2016, the Claimant asked Mr. Sheen and Mr. Suleman how to claim expenses. This conversation took place at the Respondent's office in Shoreditch. The Claimant was shown the process for claiming car allowance by Mr. Suleman, Head of Finance. However, I did not accept the Claimant's evidence that he told them that his car was older than 3 years, nor that Mr. Sheen told him that the policy in respect of the age of the car was not enforced; this was not in the Claimant's witness statement nor is it referred to in the first Judgment (and from which I infer that it cannot have been mentioned in evidence in that hearing). Given the representations made to him before his employment

commenced, I found that the Claimant would not have realised that there was any need to raise the age of his car.

40. The Respondent had notice of the age of the Claimant's car from, at the latest, about 16 January 2017, when he claimed a parking expense; the parking receipts showed the registration plate: see p.96. The registration was referred to on a second receipt of 11 January 2017. The claim form is dated 16 January 2017.

41. It is important to record that the expense forms were processed by the Head of Finance, Mr. Suleman. He was the Respondent's corporate eye on matters of finance and he managed expense claims; he had the authority of Mr. Sheen to approve them, before they were sent through to Mr. Sheen, as managing director, to sign off. I am satisfied that the Respondent had notice of the age of the Claimant's car on or about 16 January 2017.

42. Moreover, I recognised that this was a small company in terms of Sales Team and office size. I found it likely that Mr. Sheen did know the car driven by the Claimant by some point in early 2017, and its age; I rejected Mr. Sheen's evidence that he did not know the age of the car until 2018 as unreliable. Quite apart from the evidence on the receipts, which provided direct notice to the Respondent, I found that there were at least two occasions when Mr. Sheen and the Claimant saw clients together (such as in Basildon on one occasion); I found it unlikely that he did not see the Claimant's car at any point during such visits or meetings. I found that Mr. Sheen's dislike of the Claimant had affected his ability to recall events with accuracy.

43. In addition, if the age or condition of the Claimant's car was of some importance for the business, having seen Mr. Sheen give evidence and having taken account of his experience running a business over many years, I was sure that he would have checked at a relatively early point in the Claimant's employment that the car was appropriate for driving to clients' offices.

44. Further, Mr. Abbas was someone who took an interest in cars. I inferred that, given his position, he would not want sales to be jeopardised. I found that he would have seen the Claimant's car at some point whilst going to meetings or visits with the Claimant. Given this, and the small size of the Sales Team, he was likely to have known the approximate age and make of the Claimant's car by early 2017.

45. For all the above reasons, the Respondent must have had knowledge of the age of the Claimant's car by January 2017. Mr. Sheen himself may only have had actual notice slightly later in 2017, when he saw the car, but, given that clause 16 was not enforced, he had no reason to recall when he had first seen it.

46. In any event from June 2017, the Respondent changed the format of the expense claim form, in order to include the car registration. The Claimant put his car registration on each form up to September 2017 (four forms), which provided notice to the Respondent on each occasion that the car was more than three years old. The Respondent continued to pay the car allowance.

47. The Respondent took no steps at all to enforce clause 16. My findings about the Respondent's knowledge of the age of the Claimant's car is corroborated by the

fact that, when it had express notice of the age of his car on the expense forms from June 2017, there was no disciplinary or recovery action taken against the Claimant.

48. I should add that Mr. Sheen alleged that the Claimant had made dishonest claims for expenses. This is a serious allegation which lacked a proper basis for it, let alone the cogent evidence required to prove such an allegation. Mr. Sheen relied on the monthly expense forms that the Claimant had submitted from October 2016 to May 2017, and alleged that the Claimant had failed to declare the age of his car on them. However, these forms do not ask for the age or registration number of the car (unlike the forms introduced in June 2017) and I heard no evidence that the Claimant was required to add this information when claiming expenses. Given the representations made to him before he started work with the Respondent, the Claimant would not have understood that such information was relevant. In any event, as I have found, the Claimant provided receipts showing the registration of his car as part of expenses claims in about January 2017, which demonstrates that he was not concealing the age of his car.

49. Subsequently, on 14 July 2017, the Respondent provided a reference to a potential lender when the Claimant was seeking a mortgage: see the letter attached to the Claimant's statement. This referred to him receiving a car allowance of £450, in addition to commission and salary. When this was sent, the Respondent had received one or more of the expense forms.

50. The Claimant carried out no work for the Respondent after 2 October 2017 when he resigned. I heard no evidence that he claimed expenses for the period of his notice, nor that he incurred any expenses, nor that he used his car during that period.

Submissions

51. The Respondent's case was set out in written submissions amplified orally at the hearing by Mr. Perry. He accepted that the counterclaim had evolved over time, but that the Claimant wrongly claimed car allowance during the course of his employment. He contended the Claimant had acted in breach of:

a. The implied term of trust and confidence;

b. An implied term in the Claimant's contract that he would not claim car expenses other than in accordance with the terms of his contract; and

c. An implied term that he would return any sums mistakenly paid to him other than in accordance with the terms of his contract.

52. Mr. Perry contended that b and c above were implied because of business efficacy, claiming that they were necessary for the contract to work; and that the Claimant had breached them, entitling the Respondent to recover all the car allowance paid to the Claimant since the commencement of his employment.

53. The Claimant made oral submissions taking me through the issues identified as relevant by the EAT.

54. I took all the submissions of both parties into account. It is neither necessary nor proportionate to deal with each and every submission in turn.

The law

55. In drawing up legal issue 1, the EAT was giving effect to its judgment: see paragraph 26, ruling out the possibility of any implied term which contradicted the express requirement that the car must be less than three years old.

56. Issue 2, in effect, is directed to the question of whether there has been waiver by estoppel or an equitable estoppel.

Conclusions

57. Applying the above findings of fact to the issues of law and the issues identified as relevant by the EAT, I have reached the following conclusions.

Issue 1: whether clause 16 of the contract had been varied?

58. From the evidence, I concluded that the contract had not been varied. There was no notice of variation and limited evidence of a consensual variation.

59. In many ways, I found this unsurprising and consistent with the Claimant's case. The Respondent had never raised with him the full terms of clause 16 or their meaning and alleged effect; it did not ask him for the age of his car prior to him commencing work; it took no action to enforce clause 16 when it learned of the age of the car in January 2017 (when the receipts were received); and it had never tried to stop his car allowance. Moreover, the three year age requirement for the cars used in their work was not applied to any of the three salesmen (the Claimant, Mr. Rahman, and Mr. Leadbetter) in the BDM positions. There was no reason for the Claimant to seek variation of a term which was never raised or enforced.

> *Issue 2: whether, expressly or by conduct over the course of the Claimant's employment, the Respondent had represented that compliance with clause 16 was not required, and whether the Claimant had relied on that representation so as to render it inequitable for the Respondent to enforce that requirement*

60. In my judgment, the Respondent unequivocally represented to the Claimant over the course of the Claimant's employment that full compliance with clause 16 was not required. My reasons are as follows:

> 60.1. In September 2016, Mr. Sheen expressly stated to the Claimant, both orally and by letter, that it was a main term of the contract that the Claimant would receive a minimum of £450 per month car allowance. There was no statement to the Claimant, after the contract was provided to him and entered into, to correct the impression created by that statement and which explained that it was a pre-condition of the car allowance that his car must be less than three years old nor which asked for the age of his car. The Claimant commenced work and began using his car for work.

60.2. The Respondent knew, or ought to have known, the age of the Claimant's car from about 16 January 2017; on that date, expenses for December 2017 were paid (see p112). The expense claim was presented on about that date, with receipts stating the registration, were provided as part of his expense claim (p95-97) and approved by the Finance Director and signed off by the Managing Director;

60.3. The Respondent knew the age of Mr. Leadbetter's car throughout the Claimant's employment and the age of Mr. Rahman's car from June 2017 (from which date the Respondent agreed to pay the car allowance to him).

60.4. The age requirement had been ignored in respect of the Claimant's car and Mr. Leadbetter's car. It was deliberately not enforced in respect of Mr. Rahman and his car.

60.5. There was no evidence that, in paying the car allowance to each of the three BDMs (the Claimant, Leadbetter and Rahman), the Respondent was doing this as a matter of discretion, whether expressly or impliedly. Permission was not sought for the exercise of a discretion each month.

60.6. The car allowance was paid to the Claimant without question and without any investigation about the age of the car from the commencement of his employment.

60.7. The Claimant relied on the representation by using his car for the benefit of the Respondent's business, by travelling to meet prospective and actual clients of the Respondent. In order to do so, he acted to his detriment by buying petrol, servicing and insuring the car as well as, where necessary, buying train tickets. Furthermore, the Claimant continued to act to his detriment in this way throughout the whole of his employment. It would be inequitable to permit the Respondent to go back on its representation now.

60.8. Moreover, as the Claimant explains in his statement, after the Claimant commenced employment, had the Respondent gone back on its initial oral and written representations and sought to rely on clause 16, the Claimant could have sought to negotiate some time and leased a newer car and continued to receive the car allowance. Clause 16 did not require a car with any particular specification; the Claimant did not need to lease a Mercedes Sport Coupe. It would be inequitable, after the end of the Claimant's employment, to let the Respondent go back on its representation formulated by its conduct over the course of the employment.

60.9. In addition, the letter of 14 July 2017 demonstrates that the Claimant used the car allowance as evidence of his income, with the assistance of the Respondent, to assist in applying for a mortgage. If he never had an

entitlement to the car allowance, any application was false or, at least, made with material non-disclosures.

Remedy

61. The Claimant is entitled to a declaration of unlawful deduction of wages in the amount of his car allowance for September 2018, in the sum of £450.

62. The Claimant has not proved his case for breach of contract in respect of the £225 car allowance claimed for the notice period. As I explain in the findings of fact, there was no evidence that his car was used in this period, nor that any expense claim was made.

Counterclaim

63. In the light of the above findings of fact and conclusions, I do not need to address Mr. Perry's submissions on the counterclaim. However, for the avoidance of doubt, I have decided to address the points raised.

64. From the findings of fact, I concluded that the Claimant did not breach the implied term of trust and confidence in respect of the car allowance expense claims. In any event, if he did so, the Respondent has proved no loss caused by this alleged breach, nor by any breach of contract.

65. It is not necessary, for this contract of employment to have business efficacy, to imply the two terms at 5a and 5b of Mr Perry's submissions.

66. However, if there is an implied term that the Claimant would not claim car expenses other than in accordance with the terms of his contract, there is no evidence that he breached it. The evidence is that he asked how to claim the car allowance, and was shown how to do so; no one mentioned to him that the age of the car had to be recorded as part of the expense claim form, and there was no box for the registration of the car until June 2017. In any event, as explained above, there was an unequivocal representation by conduct that clause 16 would not be enforced.

67. There was no breach of the alleged implied term that he would return any sums mistakenly paid to him other than in accordance with the terms of his contract; he was not mistakenly paid car allowance.

Employment Judge Ross
Date: 16 December 2019