EMPLOYMENT TRIBUNALS

Claimant: Mr A Peet-Harrison

Respondent: 64 Energy Limited (in Voluntary Members Liquidation)

Heard at: Manchester **On:** 12 July 2019

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Not in attendance

JUDGMENT having been sent to the parties on 19 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant, by a claim form dated 15 June 2018, brought a claim of unlawful deduction of wages and a failure to pay holiday pay against two respondents. The claimant has compromised his claim in respect of the second respondent and seeks now just to proceed against the first respondent. The first respondent did not submit a response form and therefore they are not allowed to take part in this hearing. In any event the respondent did not attend the hearing and did not supply any evidence by way of documentation or witness statements.

2. This matter had been listed, rather than being dealt with by a Default Judgment, because prior to this the second respondent had submitted a response form and was actively taking part, attending a case management discussion on 22 October 2018. At that point in time the issues centred around whether or not there was a transfer of the claimant's employment from the first respondent to the second respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 1 March 2018 or another date to be determined.

3. However, that issue has now fallen away as there is no argument from the first respondent regarding whether there was a transfer to the second respondent.

4. The issues now appear to be as follows:

   (1) Was the claimant's employment terminated, and how?

   (2) Was the claimant's employment terminated by the first respondent?

   (3) Was the claimant's employment not terminated but came to an end when he joined the British Army in July 2018?

   (4) Irrespective of the above, was the claimant owed the money claimed as follows:

      (a) Unpaid commission;

      (b) Unpaid holiday;

      (c) Unpaid wages?

   (5) If so, was the first respondent liable for these payments?

Witnesses

5. I heard evidence from the claimant himself.

Findings of Fact

6. The claimant had previously been in the Royal Marines but due to an injury had had to leave, but at the time of these events was intended to rejoin the Armed Services as a Medical Technician, however the process can take up to a year.

7. Up to May 2017 the claimant was employed full-time by EnergiSave Online Limited, a subsidiary of Inspired Energy PLC, as the New Business Manager at Kirkham in Lancashire. He had been previously employed by that company in Gym and Fitness Centres.

8. In or around April 2017 Chris Turnbull, Managing Director of 64 Energy Limited (the first respondent) approached the claimant. He was affiliated to Inspired Energy Limited and well-known to that company. Chris Turnbull enticed the claimant to go and work for his own company, the first respondent, with the promise of higher wages, better conditions, commission and prospects of promotion. The claimant agreed to a job offer with a monthly salary of £1,250 plus commission, holiday pay, sick pay and pension. Following this the claimant gave his notice to Inspired Energy PLC.

9. The claimant tried to speak to the CEO of Inspired Energy PLC, Janet Thornton, before giving in his notice to advise her of his plans but was unable to do so. On considering his resignation Janet Thornton came into the office where the claimant was working with about 50 other staff. She was angry and verbally abused

the claimant in front of other members of staff. The claimant asked to have the conversation privately, but she said:

> "If you go to 64 Energy Limited I will make sure you never work in the energy industry ever again."

10. Ms Thornton turned her back and walked out and everyone in the office had heard this. The claimant was very upset and was told by his manager, Andrew Nuttall, to go home and he was not required to work his notice. The claimant was only 19 years old and was very upset by this as he felt he had been a good employee. The claimant began working for the first respondent in June 2017.

11. In January 2018 Mark Dickinson, Chief Executive of Inspired Energy PLC, called a meeting at 64 Energy Limited's offices with Chris Turnbull, Mark Dickinson and all the staff. Mark Dickinson informed all of the first respondent's employees, including the claimant, that Inspired Energy PLC was taking over the 64 Energy business and all the employees were being transferred and would be employed by Inspired Energy PLC. The claimant assumed this was what was known as a TUPE transfer.

12. A few weeks later Mason Abbey, the claimant's manager, told all staff at the first respondent that their national insurance number, bank and personal details were needed for Inspired Energy PLC for the transfer, and the claimant provided those details.

13. The claimant at this stage was partway through the process of rejoining the army as a Combat Medical Technician, and the claimant had planned and did take five days' holiday starting 19 February to attend the British Army selection process in Scotland.

14. On 23 February 2018 the claimant was on a day off when a fellow member of staff advised the claimant he needed to attend an urgent meeting at the office because this was supposed to be the first scheduled payday from Inspired Energy Limited but not all the staff had been paid. Chris Turnbull was on holiday at the time and had left Mason Abbey, the manager, in charge. At the meeting the employees were concerned because they had not received their wages and their accounts were going overdrawn. A member of staff from Inspired PLC, Mark Argent, advised that the staff of 64 Energy Limited had been misinformed and that it was only the closers and management who were due payment from Inspired, but said that if the first respondent failed to pay the unpaid wages Inspired would pay them and deduct it from any money being paid to 64 Energy Limited for the transfer deal.

15. On 26 February 2018 the claimant turned up for work as normal and was told by Mason Abbey that he was not to be in the office that day and to go home on full pay until further notice and that Andrew Nuttall from Inspired would ring him later that day. The claimant learned from other employees that Mr Abbey was telling other first respondent staff that he [the claimant] had been sent home suspended. Subsequently the claimant emailed and phoned Mason Abbey to ask for clarification and Mr Abbey emailed the claimant to say he had been suspended because of the following:

(1) Attitude towards him was not acceptable when questioning him regarding pay;

(2) Entering the workplace whilst on annual leave and causing upset across the sales floor. This resulted in poor performance in the Sales Department.

16. This email was not available as the first respondent advised the claimant, and he has taken the matter up with the Information Commissioner, that all his data was destroyed following his departure from the organisation.

17. The claimant said that he had heard from other members of staff that Mason Abbey had complained that he was not paid enough "to deal with this shit" whilst Mr Turnbull was away.

18. There were further emails and Mr Abbey phoned the claimant on a withheld mobile number and was aggressive with the claimant until he told him that he was with his family and had put his call on speakerphone. At that point in time he ended the call. Had the matter been contested the claimant would have brought evidence of this.

19. The claimant was then advised that Chris Turnbull would sort him out when Chris Turnbull returned from his holiday and that he would be on full pay until this happened.

20. The claimant stated that he believed that the first respondent staff were encouraged to voluntarily terminate their employment and sign new contracts with Inspired Energy PLC. This in fact accords with Inspired Energy PLC's response to the claimant's claim. The claimant said he sent numerous emails but they were all ignored.

21. On 26 March 2018 the claimant had a meeting with Chris Turnbull (Managing Director) at the first respondent's office. The claimant advised Chris Turnbull he had been to the Citizen's Advice Bureau. Chris Turnbull said:

> "You're wasting your time. The only thing that will come from it is a Tribunal and that will not benefit you at all, they do not frighten me."

22. The claimant could see that the original first respondent staff were at their desks and were now employed by Inspired Energy PLC, and it was his view he was the only employee still with the first respondent. Some staff had also left.

23. Chris Turnbull advised the claimant he had not been suspended and that Mason Abbey had panicked when confronted with the wages problem. Chris Turnbull said he would contact Andrew Nuttall at Inspired Energy to sort out his employment and Inspired Energy would be in touch with him later that day, however they never did contact the claimant.

24. The claimant carried on corresponding with Inspired Energy and eventually emailed a recorded delivery complaint to the CEO and directors asking for their grievance procedures as his employment had not begun with them. He received a

reply that he was not employed by them and therefore he could not bring a grievance. Subsequently the claimant brought this claim after following the ACAS early conciliation procedure.

25. The claimant advised that ACAS had advised him that Inspired Energy PLC had told him it was not a TUPE transfer but a share acquisition, although he was not aware of that.

26. Inspired Energy's response form stated that on 15 February the first and second respondent entered into a Deed of Variation in relation to an introducer agreement which they had previously entered into. It sought to vary the terms of it and set out the terms on which the introducer agreement could be terminated. It was agreed that the second respondent had authority to offer positions of employment or engagement to the first respondent's employees, and a schedule of the first respondent's employees was annexed to the Deed of Variation, which included the claimant.

27. Mark Dickinson held a meeting with some of the first respondent's employees. It is denied that Mark Dickinson informed the first respondent's employees at this meeting that their existing terms and conditions could transfer to the second respondent under TUPE regulations. They denied there was any business transfer or service provision change. There was no job offer to the claimant. Mark Dickinson in fact stated that the second respondent had a number of job vacancies which the employees of the first respondent could apply for as per the terms of the Deed of Variation.

28. Following the meeting a number of the first respondent's employees applied for new job roles with the second respondent, which resulted in them resigning from their position with the first respondent and being employed under new terms and conditions with the second respondent. As this accords with the claimant's hearsay evidence from his previous colleagues, I accept that this was the situation.

29. The second respondent went on to say that they believed the claimant's employment was terminated by the first respondent. For the reasons set out in his claim form, namely the two issues raised with him by Mason Abbey.

30. In the absence of any evidence for the first respondent, I accept the claimant's evidence and on the basis that Mr Turnbull was treating the claimant as his employee on 26 March and seeking to try and arrange employment with the second respondent for the claimant (which never transpired), I find that the claimant was the first respondent's employee at this stage and that that employment has never been terminated, save that the claimant joined the British Army in July 2018 and makes no claim following that event.

31. The claimant gave oral evidence today as to his terms and conditions with the first respondent and the amounts he claimed were owed. The claimant's unchallenged evidence was that he was promised by Mr Turnbull a basic salary of £1,250 gross. His commission structure was if he got a new contract he got 5% increasing to 7%. He was also promised an increase to 10% for his commission from September. He gave unchallenged evidence that his commission should have

been should have been £564.75 per month plus his 10% increase which equates to £789 per month, and was not paid this from September 2017 to March 2018. Accordingly the claimant claimed for that period £5,523.

32. In respect of wages, the claimant claimed for the months he was not paid, receiving his last payment in March 2018, therefore that was his basic pay for April, May and June, plus notional commission which he would have earned had he still been employed in active employment of £789 a month. That was therefore 3 x the basic salary of £1,250 plus £789 per month, a total sum of £6,117.

33. In respect of holiday pay, the claimant had said he had not taken any in the period April to December save for the Bank Holidays. The claimant said he believed the holiday year was April to April. The claimant claimed that he was due 17 days' holiday and agreed that his daily rate averaged out would be £94. Again his evidence was unchallenged.

The Law

34. Section 27(1) of the Employment Rights Act 1996 defines wages as "any sums payable to the worker in connection with his employment". This includes "any fee, bonus, commission, holiday pay or other emolument referable to the employment" (section 27(1)(a)). Commission is included in those payments save that it will be a matter of contractual construction if there is a contract available or oral evidence as to the terms of any such orally agreed contract which makes the payment of commission contingent on any other events. In this case, however, this was not an issue as no such defence was forwarded by the first respondent nor evidence provided, and the claimant's evidence was that there were no such conditions applying.

Deductions

35. Under section 13(1) of the Employment Rights Act 1996 a worker has the right not to suffer an unauthorised "deduction". A deduction is defined as follows:

> "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…as a deduction made by the employer from the worker's wages on that occasion."

36. The reference to "(after deductions)" refers to statutory deductions such as tax, national insurance, attachment of earnings order, etc.

37. The Tribunal's first role is to establish what is properly payable by a construction of the contract. As referred to above, this may be a contract in writing or it may be an orally agreed contract in which case the Tribunal has to make a judgment based on the balance of probabilities as to what the terms of that oral contract are if the terms are disputed.

38. In respect of holiday pay, the worker may be entitled to contractual holiday pay, again based on a written contract or orally agreed terms, but will inevitably be

entitled to "Working Time Regulations" holidays, i.e. the amount of time adopted originally on the basis of European directive but subsequently amended by the Government. This provides a basic minimum of 20 days plus all Bank Holidays to all workers and/or employees. In order to calculate the holiday pay due to the worker the parameters of the holiday year must be identified i.e.

(1) Is it January to December or April to April?

(2) At what point during the holiday year did the worker resign or have the contract terminated?

(3) How many holidays had been taken at that point in time in the relevant holiday year?

(4) Had any holidays been transferred from one year to the other?

(5) If a previous holiday year is relied on, is the claim in time?

39. Once the number of days has been ascertained a daily rate can be ascertained from the worker's earnings, again in this case that was slightly more complicated because of the issues regarding commission.

Preparation Time Orders

40. A preparation time order can be made by a Tribunal in favour of a party which does not have legal representation. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1 rule 75(2) states that:

> "A preparation time order is an order that a party (the paying party) make a payment to another party (the receiving party) in respect of the receiving party's preparation time whilst not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case except for time spent at any final hearing."

41. Rule 76 states when a costs order or preparation time order may or shall be made. St rule 76(1) it states:

> "A Tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:
>
> (a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) or the way that proceedings (or part) have been conducted; or
>
> (b) Any claim or response has no reasonable prospect of success; or
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> (c) A hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins."

42. Such an order can be made on the application of a party or on the Tribunal's own initiative.

43. Rule 79(1) regarding the amount of a preparation time order states that:

> "The Tribunal shall decide the number of hours in respect of which a preparation time order should be made on the basis of:
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> (a) Information provided by the receiving party on time spent falling within rule 75(2) above; and
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> (b) The Tribunal's own assessment of what it considers to be a reasonable proportionate amount of time to spend on such preparatory work with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required."

Conclusions

44. I accepted the claimant's evidence, not only because it was unchallenged but because the claimant presented as a truthful witness and parts of his testimony were confirmed by the claim form submitted by the original second respondent.

45. Accordingly I find, as referred to above, the claimant was employed by the first respondent up to July 2018 when he intended and did join the British Army.

46. I also accepted the claimant's evidence regarding the sums he was entitled to. It was unchallenged and fitted in with the relevant documentation which was available. I also took into account the fact that the first respondent had destroyed all documentation relating to the claimant, which suggested to me that the first respondent was seeking to avoid any liability to the claimant, but in any event this also meant that had no documentation available to themselves to challenge the claimant's claims, albeit they made no effort to do so on any level.

47. Accordingly, I award the claimant as follows:

(1) For unlawful deduction of wages –

(i) Commission – seven months from September 2017 to March 2018 x £789, namely £5,523.

(ii) Unpaid wages for April, May and June 2018 comprising of £1,250 basic salary plus commission of £789 per month, namely £6,117.

(iii) Holiday pay – 17 days x £94 , a sum total of £1,599.

(2) I award the claimant in total, and order the respondent to pay, £13,239.

48. In addition, the claimant applied for a preparation time order. The claimant had clearly undertaken considerable preparation time and had spent considerable time communicating and attempting to communicate with the first respondent, which also involved communication with HMRC and the Information Commissioner's Office,

all of which I find was related to his preparation for this Tribunal case. I awarded the claimant a reasonable number of hours, which was less than he applied for, of 100 hours at the rate currently applying of £39 an hour. I made an award of costs of this nature on the basis that the first respondent had completely failed to defend this matter and to produce any evidence to contest the claimant's claims and put him to the trouble of this Tribunal hearing and the preparation. Accordingly, the claimant is awarded and the respondent ordered to pay £3,900.

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Employment Judge Feeney

Date: 19 May 2020

REASONS SENT TO THE PARTIES ON

22 May 2020

FOR THE TRIBUNAL OFFICE