



EMPLOYMENT TRIBUNALS

Claimant: Mr Gobbato

Respondent: Intelligent Business Transfer Ltd

Employment Judge: E P Morgan QC

Hearing: By CVP 26 March 2020

Representation:

Claimant: Mr Gordon (Counsel)
Respondent: Mr Lunat (Solicitor)

REMEDY JUDGMENT

1. The Respondent is ordered to pay to the Claimant the sum of **£35,414** by way of compensation in respect of the claim of unfair dismissal.
2. The Respondent is ordered to pay to the Claimant the sum of **£1834.10** by way of compensation in respect of the claim of unlawful deductions from wages.
3. The Respondent is ordered to pay to the Claimant the sum of **£944.66** in respect of accrued unpaid holiday entitlement under the Working Time Regulations 1998 (As Amended).
4. The Employment Protection (Recoupment of Benefit) Regulations 1996 apply to this judgment. It is recorded:
 - 4.1 The prescribed period is from 11 November 2019 to 26 March 2021; and
 - 4.2 The prescribed amount is **£24,322.83**.

REASONS

1. By its judgment promulgated to the parties on 2 December 2020, the Tribunal upheld the claims of unfair dismissal, unlawful deduction from wages and failure to make payment in respect of accrued holiday entitlement.
2. This hearing has been held to determine the issue of remedy. For this purpose, the Tribunal has been provided with: a bundle of additional documents from the Claimant [**330 pages**]; a bundle of documents from the Respondent [**7 pages**]; Schedules of Loss from the Claimant; Counter Schedule from the Respondent; and a short skeleton argument on behalf of the Claimant. The tribunal has also received additional oral evidence from the Claimant and Mr Fitzgerald-Cooke.
3. At the outset of the hearing, the parties confirmed that the documentation provided to the Tribunal was available to them. On behalf of the Claimant, Mr Gordon raised a number of preliminary matters. These related to evidence from the Respondent which, it was said, had been deployed too late in the day. Mr Gordon submitted that the late production of this material either placed the Claimant at a procedural disadvantage or was seeking to undermine or relitigate matters which had been the subject of findings upon the liability hearing. He further submitted that, as a consequence, the Respondent should be precluded from relying upon the material in question. The matters comprised:
 - 3.1 An assertion that the Respondent had conducted a redundancy exercise in March 2020; such material being intended to support the proposition that the Claimant would, if employed at that time by the Respondent, himself have been dismissed [The Redundancy Issue];
 - 3.2 An assertion that the Respondent had, by April 2020, ceased operating any form of commission based arrangements. This was said to have been achieved by means of contractual variation [The Commission Issue]; and
 - 3.3 Damage to Company Vehicle: an issue which, it was said had been the subject of determination in the liability judgment.
4. By way of response, Mr Lunat resisted any suggestion to the effect that the material had been served late or that the Respondent was precluded from raising these matters in relation to the losses claimed by the Claimant. Specifically, he submitted that the material had been disclosed appropriately and the Claimant could not contend that the matters had taken him by surprise or placed him at a disadvantage. He did, however, concede, that the issue of damage to the company vehicle had been determined and rejected in the liability judgment and given the Tribunal's previous findings could not be relitigated.
5. Having considered these submissions, the Tribunal gave a short ruling on Mr Gordon's objections. The effect of the ruling was to permit the Respondent to rely upon the material concerning the Redundancy and Commission Issues only.

The principal reasons for this conclusion were communicated to the parties as including:

- 5.1 The issue of *Polkey* had already been determined. However, that question concerned the prospect of a *fair* dismissal at or around the time of the dismissal which is the subject of the claim before the Tribunal;
- 5.2 By contrast, the Redundancy Issue now relied upon by the Respondent was concerned with how the relationship may have fared some time thereafter. The prospect or fact of redundancy following the effective date of termination was relevant to the Tribunal's own assessment of the viability or sustainability of the employment relationship and, therefore, the calculation and assessment of compensation;
- 5.3 Similarly, the Commission Issue was of direct relevance to the manner in which the losses claimed by the Claimant were to be calculated and for what period;
- 5.4 Neither the Redundancy Issue nor the Commission Issue could be viewed as an attempt to disturb any prior finding by the Tribunal;
- 5.5 Given the relevance of these matters, the material was clearly relevant and admissible and the Tribunal would have regard it. However, in the light of Mr Lunat's concession on the question of vehicle damage, it was not necessary to make any ruling on that aspect of the material; and
- 5.6 It was not suggested that the reception of the material would or could place the Claimant in a position where the prospect of a fair hearing was no longer possible.

Issues for Determination

6. Having addressed the preliminary issues, the Tribunal identified with the advocates the matters requiring determination. For this purpose, a short series of questions was identified and agreed. For ease of reference, those questions appear in italicised form in the course of this Judgment.

Further Findings of fact

7. Within the course of its earlier Judgment, the Tribunal detailed a number of principal findings of fact. Those findings ought to be considered as repeated and adopted within the course of this Judgment.
8. Having received the additional documentation and evidence, the Tribunal makes the following further findings upon the balance of probabilities:
 - 8.1 At the time of the Claimant's employment, he participated in both commission and basic pay. Commission was directly dependent upon a client entering into a contract for the provision of services from the Respondent;
 - 8.2 When employed by the Respondent, the Claimant was also entitled to a company car. The car was treated as a benefit in kind, but it was, in fact, a tool of the trade. For the Claimant and his colleagues, such vehicles served as a mobile office *and* were also available for private use;

- 8.3 Following his dismissal, the Claimant secured temporary employment which lasted until April 2020. Thereafter, he reverted to the employment market and pursued applications and interviews in relation to those posts he considered he was eligible by reason of his experience;
- 8.4 The Claimant did not at any time give consideration to obtaining any non-sales roles;
- 8.5 In March 2020, the Respondent was giving consideration to the possible reduction of its workforce. Mr Fitzgerald-Cooke indicated (and the Tribunal accepts) this was financially driven; prompted by the reduction in trading income and activity caused by the pandemic. Each of the candidates then employed by the Respondent was of lesser experience than the Claimant;
- 8.6 In April 2020, the Respondent reconsidered the issue of commission payments. As part of its business evaluation at that time, it is said that commission participation was removed by means of a consensual variation in contract terms. At paragraph 21 of his statement, Mr Fitzgerald-Cooke refers to a decision in April 2020 whereby commission was stopped in its entirety. Insofar as the Witness Statement and Mr Fitzgerald-Cooke's oral evidence was intended to convey the impression that there had been a permanent cessation of commission from that point, the Tribunal is unable to accept this as accurate. In the view of the Tribunal, this position is not readily reconcilable with the recruitment exercise promoted by the Respondent in September 2020; in which it sought to incentivise candidates by means of commission. The Tribunal is entitled to take judicial notice of the fact that by September 2020, the adverse trading conditions of the pandemic had not, of course, ceased; and
- 8.7 At the time of his dismissal, the Claimant had not utilised his accrued annual leave entitlement and had not, on this account, travelled home to Italy. He was, on this account, entitled to a payment in lieu of such leave at the time of his dismissal. No such payment was made to him.

Issues

9. The issues of *Polkey* and *contribution* reduction, and statutory uplift were determined in the course of the previous Judgment. As confirmed by the parties, in respect of the unfair dismissal claim, the primary issues requiring resolution by the Tribunal comprise: (i) the compensatory loss sustained by the Claimant; (ii) whether the claimant has failed to mitigate his losses; (iii) the duration for which the Claimant is to be compensated. In respect of the additional monetary claims, it was common ground that the burden of establishing the monetary value of those entitlements rested with the Claimant. The legal basis for the claims had previously been upheld in the course of the liability judgment.

Claimant's Submissions

Q1. Calculation of a week's pay

10. It was common ground that the Claimant had been paid by reference to both salary and commission. Mr Gordon submitted that this was an important aspect of the Claimant's remuneration arrangement and fell to be included, together with the employer's pension contribution, in the determination of the Claimant's weekly pay. In this respect, he invited the Tribunal to follow the guidance provided in *Weevsmay Ltd v King* and *University of Sunderland v Drossou*. This, he submitted would mean that the Claimant's weekly wage was, when subject to averaging, £871 gross and £663.08 net. He further submitted that the net figure should be adopted for the calculation of current and future loss.

Q2.1 Was the Respondent subjected to a redundancy exercise in March 2020? and Q2.1 Would such an exercise have resulted in the Claimant's dismissal at that time?

11. Mr Gordon's submission was simple and to the point. There was, he said, no redundancy exercise. In the alternative, if such an exercise had been conducted, there was no realistic prospect of the Claimant being selected in that process. In this respect, he pointed to the Tribunal's previous findings of fact concerning the Claimant's performance and standing within the Respondent's workforce. He also contended that the other employees identified were each less experienced than the Claimant. There was, he says, no realistic or credible basis to conclude that the Claimant would or could have been dismissed as a result of any objective selection process.

Q3. Was there in April 2020, a variation in contractual terms which had the effect of removing the potential for participation in, or entitlement to receive commission?

12. Mr Gordon invited the Tribunal to reject the suggestion that there was any such variation and/or that the Claimant would have provided his consent had he been employed by the Respondent at that time. In doing so, he pointed to the contractual nature of the regime *and* the absence of any documentary evidence corroborating its withdrawal. In this latter respect, he drew the attention of the Tribunal to the fact that the Respondent was, in September 2020, seeking to recruit personnel and doing so by means of a remuneration package which included the potential for commission. Upon this basis, he invited the Tribunal to disregard any contrary suggestion as being without merit.

Q4. Has the Claimant failed to mitigate his losses?

13. Mr Gordon reminded the Tribunal that in relation to this issue, the burden of proof was upon the Respondent. He invited the Tribunal to readily conclude that there was no basis to conclude that the Claimant had failed to mitigate his losses by looking for alternative employment outside of "sales" nor was there any evidence to suggest that, had the Claimant done so, he would have fared any better in the employment market.

14. Drawing upon each of these submissions, Mr Gordon invited the Tribunal to assess the question of compensatory loss by reference to the following matters:
 - 14.1 Compensation for loss of statutory rights £450;
 - 14.2 Compensation for loss of use of a company vehicle £5400; and
 - 14.3 Adoption of a period of finance loss of 62 weeks.
15. Mr Gordon indicated that the resultant loss figure would subject to value require consideration of both the statutory cap and the need for grossing up to reflect the incidence of taxation.

Additional Claims

16. With regard to the unlawful deduction of wages, Mr Gordon reminded the Tribunal of its previous findings and invited an award in the sum £1467.28 (subject to statutory uplift). On the question of the holiday pay claim, he conceded the Claimant's evidence was less than comprehensive; with the result that he left the matter for determination of the Tribunal.

Respondent's Submissions

Q1. Calculation of a week's pay

17. On this issue, Mr Lunat submitted that the position was quite simple: the weekly wage ought to be calculated by reference to basic pay only. In support of this submission, he contended that the commission scheme was, in any event, non-contractual in character and should be disregarded.

Q2.1 Was the Respondent subjected to a redundancy exercise in March 2020? and Q2.1 Would such an exercise have resulted in the Claimant's dismissal at that time?

18. Mr Lunat reminded the Tribunal that the business undertaking operated by the Respondent was sales based and, like all such sales operations, had been subjected to significant loss of activity as a result of the pandemic. This had, he said, generated the need for financial savings. These commercial factors prompted the redundancy exercise. This being so, there was, he submitted, no credible basis for the suggestion that it was any other than authentic. He submitted the exercise would have led to the Claimant's dismissal on ground of redundancy. In support of this last submission, he placed heavy reliance upon the scoring matrix applied to others; copies of which had been included in the Respondent's bundle.

Q3. Was there in April 2020, a variation in contractual terms which had the effect of removing the potential for participation in, or entitlement to receive commission?

19. In advancing these submissions, Mr Lunat relied upon much of the same groundwork which had been laid on the redundancy issue. He submitted that participation in commission was not a contractual right and, in reality, even if it

was, the Claimant would inevitably have consented to the change in any case. The alternative was, he submitted, dismissal on the grounds of redundancy.

Q4. Has the Claimant failed to mitigate his losses?

20. Mr Lunat acknowledged that the burden of proof was, on this issue, upon the Respondent. It was not any part of his submission that there were specific posts for which the Claimant could or should have applied. The Respondent has not gone so far as to identify any. Nonetheless, it was Mr Lunat's submission that the Claimant should be taken as having failed to mitigate his losses from June 2020. In support of this submission, it was said that— at that stage- it ought to have become apparent to the Claimant that there were no jobs in “sales” to be had as a result of the pandemic. In consequence, the Claimant should – he submitted- have looked for employment outside of the sales sector. The fact that the Claimant did not do so, evidences a failure to mitigate; with the result that any losses from June 2020 should not be laid at the door of the Respondent.

Additional Claims

21. As to the additional claims, Mr Lunat submitted that the Claimant had not made out any entitlement to holiday pay beyond the concession made by the Respondent (i.e. an entitlement to 8 days). He did not make any detailed submission on the unlawful deduction claims in the light of the Tribunal's previous findings.

Discussion and Conclusions

22. **Section 123 of the Employment Rights Act 1996** requires the Tribunal to determine the question of compensation having regard to what it considers to be “just and equitable”. The first step in the formulation of its response is to identify the losses actually sustained by the Claimant. The Tribunal's conclusions on Q1-4 above will necessarily inform this determination.

Q1. Calculation of a week's pay

23. The Tribunal accepts the submissions made by Mr Gordon as an accurate summary of the legal position. The contractual arrangements which subsisted as at the date of the Claimant's dismissal included participation in commission payments. Commission had been a significant component of the Claimant's remuneration package together with the employer's pension contribution. The Tribunal does not accept the submission that participation in commission was discretionary. Adopting the reasoning in the authorities cited by Mr Gordon, the Tribunal is satisfied that Claimant's gross weekly pay should be taken as £871 per week (£663.08 net); subject to the statutory cap of £538 for the purposes of the basic award. These figures represent an averaging of the Claimant's basic pay and commission which is reflective of the loss to which the Claimant has been exposed on account of the dismissal.

Q2.1 Was the Respondent subjected to a redundancy exercise in March 2020? and

Q2.1 Would such an exercise have resulted in the Claimant's dismissal at that time?

24. The Tribunal accepts that the Respondent adopted a redundancy type procedure in March 2020. However, the documentation evidencing both the resultant procedure and the manner in which individuals were identified as being at risk, and thereafter, scored is limited. This detail is given in the course of Mr Fitzgerald-Cooke's witness statement. At paragraph 17, he records where he considers the Claimant would have been placed in the scoring exercise. He has himself attributed to the Claimant a score of 7; two below the retained candidate identified as DS. It was the Claimant's evidence that he had considerably greater experience than DS. This was not meaningfully challenged. Further, the scoring matrix was said to be weighted (20%) in respect of attendance and disciplinary record. The Claimant's assertion that he had no sickness absence was not challenged. Furthermore, the reference to disciplinary record would, in the Claimant's case, have to accommodate the fact that the 'warning' issued to him previously had been improperly applied for the reasons detailed in the Tribunal's liability judgment. Given these matters, the Tribunal is unable to conclude that the Claimant would inevitably have been dismissed at that time or that the period of loss should be limited on account of the redundancy exercise.

Q3. Was there in April 2020, a variation in contractual terms which had the effect of removing the potential for participation in, or entitlement to receive commission?

25. The Tribunal is unable to accept that there was a variation in the terms and conditions of employment in April 2020 which had the effect of removing commission participation. At the very best, it might be said that – as a matter of commercial reality- participation *in commission* would have been heavily reduced and, by June 2020, potentially non-existent. However, it is clear from the matters accepted by Mr Fitzgerald-Cooke in cross-examination, that the Respondent was properly relying upon commission to induce applications and recruitment. In the view of the Tribunal, it is not possible to say when, or to what degree the commission would have tapered off, or resumed. With this in mind, the appropriate adjustment is not to artificially adjust the calculation of weekly loss, but to accommodate this factor in determining the period in respect of which loss is to be awarded.

Q4. Has the Claimant failed to mitigate his losses?

26. Where it is asserted that there has been a failure to mitigate, the burden of proof is upon the Respondent. The Tribunal is satisfied that the burden has not been discharged. This is not a case in which the Respondent has identified posts for which the Claimant could and should have applied. Rather, it was submitted that the Claimant ought to have looked for employment outside of the sector in which he had the greatest experience. Further, it is contended that he ought to have done so by June 2020. The Tribunal considers this submission to be unrealistic and in the context of both the measures adopted by the Claimant and market conditions, unfounded.

Calculation of Losses

27. In the circumstances of this case, the Tribunal has concluded:
- 27.1 The basic award (less 10% contribution) is assessed in the sum of £2178.90;
 - 27.2 For the purposes of calculating loss of earnings, the appropriate multiplicand is £663.08 net;
 - 27.3 The period of recoverable loss is set at 20 months from the date of dismissal;
 - 27.4 The sum is to be awarded in respect of loss of statutory rights is £450;
 - 27.5 It is appropriate to make an award of compensation in respect of loss of the company vehicle. The Tribunal assesses that loss for the 20 months in the sum of £4000;
 - 27.6 From the resultant figures fall to be deducted the sums earned by the Claimant and the appropriate reduction in respect of *Polkey* (50%); and
 - 27.7 Thereafter, adjustment is to be made in respect of statutory uplift (25%) and *contribution* (10%).

Additional Claims

28. The claim for unlawful deduction from wages has already been upheld as a result of the Tribunal's earlier findings. No challenge has been made to the sum claimed.
29. The Tribunal is satisfied that the Claimant was entitled to additional accrued holiday pay at the day of the dismissal. In line with the concession made by Mr Lunat, it has concluded that such entitlement was limited to the period of 8 days only. Any claim in excess of that amount is not well founded.
30. There is no award in respect of interest.

Award of Compensation

31. After being permitted a short adjournment to consider the calculation of the awards, the parties were able to submit the following sums as agreed:
- 31.1 Total compensation in respect of unfair dismissal (after discounts, uplift and grossing up): **£35,414;**
 - 31.2 The sum awarded for unlawful deduction from wages is: **£1834.10;**
 - 31.3 The Holiday Pay claim is assessed in the sum of: **£944.66;** and

31.4 For the purposes of the Recoupment Regulations and the prescribed amount of **£24,322.83**.

32. Judgment is entered accordingly.

Employment Judge Morgan

29th March 2021