



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

Claimant

Respondent

Mr Emilio Ascione

v

**Cavender Property Solutions Ltd
T/A Cavender Estate Agents**

Heard at: Watford (CVP & Telephone)

On: 6 May 2021

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr Ben Jones (Paralegal)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim is dismissed upon withdrawal.
2. The respondent's counter-claim is dismissed.
3. The claimant is ordered to pay the respondent costs assessed in the sum of £1,163.50.

REASONS

The claimant's participation in this hearing

1. On 4 May 2021 the claimant emailed the Tribunal stating as follows:-

“I am writing to confirm that I no longer wish for the Employment Tribunal to look into my concerns in relation to wrongful dismissal and I am therefore requesting you close this case with immediate effect.”

2. On 5 May 2021 the file was referred to Regional Employment Judge Foxwell who directed that a dismissal judgment for the claimant's claim should be prepared.
3. Accordingly the claimant's claim has been dismissed upon withdrawal.
4. This hearing was scheduled to take place by CVP. At 10 o'clock all parties had logged on, including the claimant. However the claimant appeared named under a camera logo indicating the camera was switched off and he could neither be seen nor heard and, it subsequently transpired, could not see or hear any part of the hearing. Accordingly the case was adjourned for the clerk to make contact with the claimant on his telephone to see if he could be helped to attend by CVP.
5. The clerk telephoned the claimant who replied and a number of efforts were made to see if the claimant could log on to the CVP hearing. Contact with my clerk included the claimant ringing him. Unfortunately, the claimant was unable to log on via CVP. It was reported to me by the clerk that other hearings were being affected by an inability to log on.
6. Having established how the claimant could attend by telephone, the clerk sought to contact the claimant both by phone and email to inform him what to do to telephone in. Unfortunately between about 10.20 and 11.15 the claimant did not answer his mobile or respond to the email prompts.
7. The counter-claim had been served on the claimant on 13 September 2020. His response was due on 11 October 2020. The claimant has never put in a response. Accordingly the claimant would only be entitled to participate in this hearing on the counter-claim to the extent permitted by myself.
8. Since there had been contact with the claimant by telephone after 10 and no explanation why he was not available thereafter, at 11.15 I decided to proceed with this hearing in the absence of the claimant.
9. During the course of the hearing the claimant did manage to connect by telephone. By then the respondent had largely developed its case on the counter-claim and I summarised to the claimant what had been said in argument already. I heard the claimant on the issues of whether the letter offering him employment formed part of his contract of employment, whether he had committed acts of gross misconduct and whether he stood to repay all or part of his guaranteed commission.
10. The claimant was able to participate fully as regards the respondent's application for costs.

The counter-claim

11. The claimant was employed by the respondent as an estate agent from 20 May 2019 until he was dismissed with immediate effect for gross misconduct on 30 March 2020.
12. By a claim form presented on 30 April 2020 the claimant brought a claim for wrongful dismissal – breach of contract.
13. On 9 June 2020 the respondent presented a response which included an employer's contract claim. In short, the respondent's case was that the claimant's original offer of employment on 15 May 2019 specified that he would be paid a guaranteed commission but with the proviso:

“Should you leave your employment with us within 12 months of your start date, you will be required to repay any guaranteed commission that has been paid to you.”

14. The claimant moved from the Guildford office to the Kingston office and again was offered guaranteed commission. The respondent's claim is for £1600 guaranteed commission from Guildford and £4,256 guaranteed commission paid whilst he worked at Kingston.
15. I have been provided with a bundle of documents running to 147 pages, a bundle of authorities running to 92 pages, a witness statement from Mr Matthew Cavender and the respondent's skeleton argument.
16. The claimant was offered employment in a letter dated 15 May 2019. This set out the essential elements of his contract of employment, including basic salary, commission rates, car allowance and annual holiday entitlement. Further, normal hours of work were set out. That document contains the following:-

“For the first two months of your employment with us, you will be paid a guaranteed commission of £800 a month (equivalent to £9,600 pa) to allow you the opportunity to build a pipeline of properties. Should you leave your employment with us within 12 months of your start date, you will be required to repay any guaranteed commission that has been paid to you.”

17. With effect from 1 October the claimant was transferred from Guildford to the Kingston office. A letter dated 22 August 2019 recorded the agreed terms and set out that the claimant's salary package included guaranteed commission of £12,768 pa. There is no reference in that letter to a term or requirement that the claimant should repay any guaranteed commission if he left the employment within 12 months. No other contract of employment was issued to the claimant until 17 March 2020. On that date the claimant was provided with a contract of employment. Quite why it was only provided to him shortly before his dismissal is not particularly relevant. The contract includes the following:-

“6. Salary and remuneration
...

- 6.4 For the period of 12 months from 1 October 2019, you will receive a guaranteed commission of £12,768 pa. This is to allow you the chance to build the portfolio and pipeline of properties.
...
- 6.7 We reserve the right in our absolute discretion to deduct from your pay (eg salary, commission, bonus) any money which you may owe to us including, without limitation, any overpayments or loans made to you or losses suffered by us as a result of your negligence or breach of contract.”
18. I note that there is nothing in this contract of employment about the repayment of the guaranteed commission in the event that the claimant left the respondent’s employment within 12 months.
19. The claimant was dismissed on 30 March 2020 for gross misconduct. The claimant has not taken the opportunity to put in any evidence concerning this. For the purposes of the counter-claim I accept that the claimant was guilty of gross misconduct and was dismissed for gross misconduct. In short, part of the claimant’s job involved him going out and knocking on property doors. The claimant was required to do a minimum number of properties per day. A review concluded that he was not doing his job properly and accordingly the claimant was given a warning on 24 February 2020. Despite this warning the claimant continued to disregard the instructions as to what he should do during his work and there were concerns that for 11 days he had done nothing. In addition, there were concerns over an expenses claim where the mileage claimed did not correlate with the odometer reading on the vehicle in question. At a meeting on 21 March 2020 the claimant was confronted about his lack of performance and when asked what he had been doing replied “nothing”. A disciplinary hearing was held which the claimant did not attend. I find that the respondent has established that the claimant was guilty of gross misconduct and that was the reason for his dismissal.
20. The issue that I have to consider is whether, having dismissed the claimant for gross misconduct, the respondent was entitled to recoup all or part of the guaranteed commission paid to the claimant.
21. I find that the offer letter dated 15 May 2019 formed part of the claimant’s contract of employment. As such, the clause relied upon is a contractual term.
22. It is a matter for myself to construe the meaning of the express term relied upon. This is a matter of law. The parole evidence rule is such that I cannot take into consideration the intention of the parties or pre-contract negotiations. Nevertheless, no contract is made in a vacuum and it is legitimate to draw upon the surrounding circumstances.
23. In his skeleton argument Mr Jones set out the following:-
- “The respondent accepts that the ordinary construction of such a clause as seen in the offer of commission would, ordinarily, be used upon resignation by the claimant.

However, the respondent contends that if the claimant commits a repudiatory breach of the terms of this contract so as to intentionally sever the relationship, such a clause shall have effect.”

24. As a subsidiary matter the respondent sought to rely on clause 6.7 of the contract of employment.
25. Mr Jones sought to rely on the implied terms of fidelity and/or mutual trust and confidence and argued that if an employee through deliberate conduct and dishonesty was in fundamental breach of those terms, so that employee could be said to be caught by the term relied upon in that he would have left his employment by giving the respondent no option other than to terminate the contract of employment.
26. I do not accept that an employer faced with a fundamental breach of the contract of employment has no option other than to terminate the contract. There are a range of other ways the matter could be dealt with.
27. In my judgment the clause relied upon is ambiguous. This appears to be accepted by the respondent in its ordinary construction. The words “should you leave your employment” could be read to be confined to circumstances where the employee was responsible for the termination of the contract of employment or could be read to include the termination of the contract of employment howsoever caused, including dismissal for gross misconduct.
28. In the absence of clear and unambiguous terms setting out that the guaranteed commission stood to be repaid upon the termination of the claimant’s contract for whatever reason, I am not prepared to resolve the ambiguity by finding that the respondent is able to recoup the guaranteed commission payments. I find that on its proper construction the clause relied upon permitted the recoupment of the guaranteed commission if the claimant chose to terminate his contract of employment but does not cover the situation where the claimant is dismissed, whether or not with notice and whether or not for gross misconduct or any other reason.
29. I do not find that the claimant by committing acts of gross misconduct can be characterised as causing himself to leave his employment so as to engage the term relied upon.
30. As to clause 6.7, I find that this does not entitle the respondent to recover the guaranteed commission. In any event, the respondent has never put its claim in this way before and there is no quantification of any loss that is said to have cause from the claimant’s breach of contract.
31. Further, the clause relied upon would, in my judgment, only relate to the claimant’s employment at Guildford. On moving to Kingston with effect from 1 October 2019 the claimant was issued with a new offer letter that did not include the clause and, when he was finally provided with a full written contract of employment, it did not contain the clause relied upon. As such I

find that the clause relied upon did not form part of the claimant's contract of employment from 1 October 2019 when he moved to Kingston.

32. Accordingly, the respondent's counter-claim is dismissed.

Costs

33. The respondent made an application for costs on the basis that the claimant had acted vexatiously, abusively or otherwise unreasonably in the bringing of the proceedings or the way that the proceedings had been conducted. Further, that his claim had no reasonable prospect of success.
34. I do not find that the bringing of the claim was unreasonable. The claimant was dismissed summarily for gross misconduct and sought to challenge that, claiming his notice pay. The claimant disputed the reasons for his dismissal and was entitled to bring his claim.
35. On 11 October 2020 the Tribunal issued directions for the procedural steps to be taken towards this hearing. The claimant was ordered to serve a schedule of loss by 8 November 2020, exchange a list of documents by 22 November and exchange witness statements by 4 January 2021. Despite prompts from the respondent, the claimant failed to comply with any of these orders. As already recorded, the claimant failed to provide a response to the respondent's counter-claim by 11 October 2020 or at all.
36. Against the background of non-compliance with the Tribunal orders and failure to present a response to the counter-claim the respondent made applications to the Tribunal for a strike out order and/or summary judgment.
37. The claimant was written to by the Tribunal on 28 January 2021 indicating that Employment Judge Anstis was thinking of striking out the claim due to non-compliance and the claimant was required to provide reasons or to request a hearing. The claimant responded by saying he was confused and ultimately requested a hearing.
38. The hearing was scheduled for 23 April 2021, albeit at relatively short notice. Prior to that, the claimant applied for a postponement on the basis that he was due to be on vacation. That was refused by Regional Employment Judge Foxwell and the hearing went ahead on 23 April 2021 by telephone before Employment Judge Warren. The preliminary hearing summary indicates that Employment Judge Warren telephoned the claimant twice but it was not picked up. The claimant was given a warning that his failure to comply with the Tribunal orders and his failure to attend on that day was contumelious on the face of it. The claimant was given a costs warning.
39. It was only on 4 May 2021 that the claimant decided to withdraw his claim.
40. Today the claimant provided a less than convincing explanation as to why he did not answer his telephone after 10.20 having previously both received

and made a call to the clerk. He told me that he was waiting for an email and that his mobile was on silent in his pocket. Be that as it may, dealing with the 23 April hearing, the claimant told me that contrary to his email that he was on vacation, he was actually at work. Either way, the claimant failed to communicate with the Tribunal to advance compelling reasons why he was unable to attend.

41. In my judgment, notwithstanding that the claimant is a litigant in person, it is incumbent upon the claimant to familiarise himself with the Tribunal procedures, read documents coming from the Tribunal and comply with the directions which are in plain English. This is especially so when prompted by the respondent. The claimant has always acted in person but has, on at least one occasion claimed to have solicitors acting for him.
42. In my judgment, to bring a claim, fail to comply with any of the directions, dismiss prompts from the respondent, cause a hearing to be held to explain why his case should not be struck out and then not attend and only withdrawing his claim two days before the final hearing constitutes acting unreasonably in the way the proceedings have been conducted. In the circumstances I am required to consider whether I should exercise my discretion to make a costs order. In my judgment, it would be just and equitable to make a costs order. The respondent has been put to unnecessary expense in preparing to meet the claimant's claim.
43. I have been provided with a costs schedule in the total sum of £1,602. With the exception of the ET3 response form I am told that all these costs were incurred after 19 April 2021 when the respondent's solicitors were formally instructed.
44. All the attendances on the client, the opponent and others (the Tribunal) were incurred in relation to the run-up to this hearing.
45. I have taken into account the fact that the counter-claim may well have been lodged as part of an aggressive defence. Nevertheless, it is a freestanding claim and the respondent has been unsuccessful.
46. Part of the preparation for this hearing has involved the counter-claim. Accordingly, items 2, 3 and 4 on the documents schedule will only be allowed at 50%. Further I deduct the ET3 form at item 1. I allow all the attendances. Consequently I make deductions of £438.50, leaving £1,163.50.
47. The claimant will be ordered to pay the respondent's costs assessed in the sum of £1,163.50.

Employment Judge Alliot

**Case Number: 3304283/2020(V)
3311576/2020**

Date: 21 May 21

Sent to the parties on: 17 June 21

For the Tribunal Office