



EMPLOYMENT TRIBUNALS

Claimant: Mr S Hussain
Respondent: Carbon Clean Ltd
Heard at: East London Hearing Centre
On: 3rd September 2021
Before: Employment Judge Reid

Representation

Claimant: in person
Respondent: Mr Rhys Johns, Counsel (instructed by DWF Law)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT (RESERVED)

The judgment of the Tribunal is that:-

1. The Claimant was not wrongfully constructively dismissed by the Respondent because the Respondent did not breach his contract of employment. The Claimant was also not wrongfully actually dismissed when the Respondent mischaracterised his resignation as being without notice, because the Respondent was entitled to dismiss him without notice for refusing to work out his notice. The claim for notice pay is therefore dismissed.
2. The Respondent paid the Claimant's November 2019 salary up to his last day at work at the correct agreed salary rate and his claim for unpaid wages is dismissed.
3. The Respondent paid the Claimant for his accrued holiday pay at the correct agreed salary rate and his claim for holiday pay is dismissed.

4. **The Respondent was not obliged to pay the Claimant the outstanding commission he claimed because there was no contractual agreement to the commission scheme the Claimant claimed existed and his breach of contract claim is therefore dismissed. If considered alternatively as an unlawful deductions claim, that claim is also dismissed.**

REASONS

Background and claim

1 In his claim form presented on 4th January 2020 the Claimant made the following claims: for notice pay, for holiday pay, for outstanding wages (salary) and for commission payments. The Claimant was employed between 5th April 2019 and 18th November 2019.

2 The Claimant's claim was as follows. He said he had agreed a commission arrangement of £150 per machine sold with Mr Chandarana (Managing Director) in a meeting held on 26th March 2019 when they were discussing the Claimant joining the Respondent as a Business Development Manager, and had never been paid this commission. He said that his salary of £30,000 pa had been reduced to £20,000 pa in October 2019 (and his role reduced) without his agreement; this meant that the final calculation of his salary for November 2019 up until his employment terminated and his outstanding holiday pay was wrongly calculated on the reduced salary meaning there was a shortfall. The Claimant said that he had been constructively dismissed by the Respondent when they reduced his salary and changed his role without his agreement and then when he resigned giving two weeks' notice on 18th November 2019 the Respondent then wrongly treated his notice as having immediate effect, meaning he lost notice pay.

3 The Respondent's case was as follows. The Respondent said that no £150 per machine sold commission had been agreed at the meeting with Mr Chandarana on 26th March 2019 and that what had been discussed was a commission scheme with targets (which was later documented), under which a higher rate of commission was payable on direct sales (ie sales done directly by the sales person with the customer) and a much lower commission where the sale was made with the customer by a distributor, but the sales person was involved in demonstrating the machines to the potential customer. The Respondent's case was that the Claimant had verbally agreed the reduction of his salary from £30,000 pa to £20,000 pa (and the reduction in his role) after his probation period had been extended and that his final November 2019 pay and holiday pay had been correctly calculated. The Respondent denied it had constructively dismissed the Claimant and said that when he resigned he did so without giving notice and that no notice pay was therefore due to him.

4 The Claimant confirmed at the hearing that the breach of contract relied on for his constructive dismissal claim was the reduction in his salary and change in his role without his agreement.

5 The Claimant accepted that if, contrary to his claim, the commission structure agreed was the Respondent's target-based one, he was not due any commission under that because he had not met the scheme's monthly threshold target of £15,000 direct sales on any of the months during his employment.

6 The issues had been identified at the preliminary hearing on 7th May 2020 (page 34). Because the Claimant was not represented I explained the procedure to him and, prior to submissions, recapped on what were the factual areas of dispute I had to decide (in essence this was a case about what had been agreed between the parties and a dispute about the circumstances of his resignation) so that he could address these matters in submissions. I identified that this was not a case where he had been actually dismissed for poor performance, it was not an unfair dismissal claim and that I was not going to decide whether the commission structure applied to him was fair or reasonable – the issue regarding any outstanding commission payments was what had been agreed between him and the Respondent.

7 The case had been listed for two days (and then changed to a 2pm start on the first day) but could not commence on the first day as I was hearing another case that morning which overran. There were three electronic bundles – the first of 157 pages, the second of 6 pages (the meeting notes, paginated from page 102.1 onwards) and the third containing witness statements of the Claimant (plus customer testimonial), Mr Chandarana and Mr Rudge. I heard oral evidence from the Claimant, from Mr Chandarana and from Mr Rudge, the Claimant's line manager. I heard oral submissions on both sides after a break so that the Claimant could put together his submissions.

8 An order had been made on 19th November 2020 regarding inclusion in the bundle of Mr Chandarana's handwritten meeting notes of his meeting with the Claimant on 26th March 2019 when commission was discussed and of a similar meeting with Matthew Poole another new recruit on 29th March 2019. These had not been part of the initial disclosure but provided by Mr Chandarana subsequently when he found his old meeting notebooks at his home.

Findings of fact

Commission structure agreed at the meeting on 26th March 2019

9 I find that Mr Chandarana's notes for the meeting with the Claimant (page 102.1) show that what was discussed was a target-based commission structure distinguishing between direct sales and distributor sales, with distributor sales attracting commission at a lower rate of £30 per demonstration. I note that there are two different colours of ink used and have considered whether the box on the bottom right was written later as a kind of recap/note to self after the meeting but even if that were the case it does not mean it had not been discussed; a target based commission scheme with a lower rate for demonstration sales was also discussed with Mr Poole only a few days later (page 102.2-102.3, although the demonstration rate for him was noted as £25). Mr Chandarana records the Claimant's current package at his then employer but there is no note of any discussion of a commission payment of £150 per machine sold ie in effect no note of what the Claimant was saying he was after commission-wise compared to his then job at Flexfuel. I also find the notes of the meeting with the Claimant to be contemporaneous (and not created at a later date to support the Respondent's defence of this claim) because there are also notes for a meeting with Mr Poole 3 days later (page 102.2) who was recruited at the same time, which start off in a similar way noting Mr Poole's current package with NCH Cleaning. The Claimant said that because he was the more experienced it was probable that he would have been offered a special different structure but I find based on Mr Rudge's oral evidence that the scheme discussed in both meetings was also in line with commission payments in other parts of the

business, consistent with that being what was actually discussed, rather than a separate much more advantageous commission arrangement without targets only for the Claimant. While the Claimant was experienced I do not find it likely that he would have been offered such a preferential scheme over and above what was being discussed with Mr Poole as they were both joining the team at the same time in order to grow the business, even though the Respondent was keen to employ him and had approached him about the role. Whilst £150 per machine may have been what the Claimant had in mind as what he wanted to achieve it was not what was agreed. Whilst it was unfortunate that Mr Chandarana only later found his notebooks at home he was obliged to disclose the notes as relevant to the matters in issue. The Claimant had some doubts about the notes, not recalling that Mr Chandarana made any but as he made similar notes for the meeting with Mr Poole I find that to have been Mr Chandarana's practice for this kind of meeting. Given such notes also exist for the meeting with Mr Poole and given the further findings of fact set out below, I do not find, as suggested by the Claimant, that the notes deliberately do not record a discussion and an agreement about a £150 commission and that this was a way to do the Claimant out of what was due to him.

10 That a £150 commission was not then recorded or mentioned in the documents subsequently issued to the Claimant, was consistent with it not having been agreed at the meeting. The offer letter (page 40) simply refers to salary plus commission and the contract says nothing at all about commission. Such a fixed commission without targets or a minimum threshold would have been a very unusual arrangement and thus in turn more likely to have been referred to in these documents. It was unfortunate that the commission structure was not more quickly and more clearly communicated in writing to the Claimant (he did not receive anything in writing until July 2019) and I accept he was chasing Mr Rudge for something in writing and for the commission to start being paid (it was normally paid quarterly, page 45) but the issue is what had been agreed at that meeting with Mr Chandarana. When he was issued with these documents the Claimant did not specifically flag up that there was something missing ie a contractual right to a commission per machine sold which was not based on targets which because so unusual and preferential he would have wanted recorded. I therefore find he did not in fact think at the end of the meeting that it had been agreed – it was possibly his ideal outcome in his head but it was not what was agreed.

11 The Claimant's failure to raise with the Respondent that he was owed £150 per machine sold continued, inconsistent with the Claimant really thinking that had been agreed. When he and Mr Poole were given information in writing about the commission scheme in July 2019 (page 111) (though to take effect from their respective start dates) the Claimant had by then sold nine machines; this was a golden opportunity to say that the scheme he was now being provided information about was not what he had agreed with Mr Chandarana but he did not do so and carried on working, selling a further nine machines up until his employment terminated. This was despite the scheme as set out by the Respondent now being paid monthly (page 111) and the Claimant saying (WS para 11) that he felt cheated and lied to after the team meeting on 25th July when it was discussed.

12 The first time the Claimant raised the issue of a claimed £150 commission per machine sold was when he resigned on 18th November 2019 (page 129). Whilst I find it likely that given the delay in being issued with written information about the scheme the Claimant was asking Mr Rudge and was anxious because he wanted to be clear in writing on what he would be paid, it was not in the context of thinking or claiming to either Mr Rudge

or Mr Chandarana he was entitled to £150 per machine sold and that no targets applied. I find the Claimant spoke regularly to Mr Rudge often many times a day and there were therefore multiple opportunities over several months to have raised a claimed commission payment of £150 per machine, particularly after receipt of the email dated 29th July 2019. The Claimant is an articulate individual and could equally have sent an email setting out this complaint (as he went on to do when he resigned) saying that he was not being paid his commission properly or that the information about the scheme he had been issued with in July 2019 was wrong taking into account it was now clear that commission would be payable monthly if due, and not quarterly; if the Claimant had been waiting for the first quarter to expire to receive payments it had by now expired and he was still not getting them.

13 Taking the above findings of fact into account I find that a commission payment of £150 per machine sold was not agreed between the Claimant and Mr Chandarana before the Claimant started employment with the Respondent, as claimed. It was not relevant to that issue whether the Claimant felt badly treated in the commission structure which was applied to him, thought he should have been remunerated better given his hard work and experience (given he had moved jobs to take this role following an approach from Mr Chandarana), the issue was whether the £150 per machine without a threshold target was agreed or not.

Meeting on 23rd October 2019 regarding role and salary

14 The Claimant's probation period had been extended to 5th December 2019 (page 122) .At the hearing he confirmed that this was not unusual in the sales environment and he did not make any complaint about that extension. The notice period therefore remained two weeks from the Claimant and one week from the Respondent (page 43). That extension was the context for the next discussions on 23rd October 2019 because the Claimant was aware his probation had been extended and that the Respondent had concerns about his level of sales; the next discussion did not therefore come entirely out of the blue even though only a few days later. It was however unfortunate that the Respondent did not deal with it all in one meeting.

15 Mr Chandarana and Mr Rudge asked the Claimant to meet with them on 23rd October 2019 as they were concerned that the Claimant's level of sales was consistently not high enough in terms of sales 'closed' and he was not meeting targets . I find based on the oral evidence of Mr Chandarana and Mr Rudge that when they went into that meeting the discussion was going to be one of having to 'let the Claimant go' and they did not prior to the meeting have any other option in mind to avoid that. The Claimant should have been notified in writing of that meeting and advised he could have a companion with him as the likely outcome when the meeting was organised was the termination of his employment, even if it was not a disciplinary issue and was a performance issue. However as he was ultimately not (actually) dismissed for poor performance and does not have sufficient service to bring an unfair dismissal claim, this failing is not material to the issues in his claim in terms of that being a procedural failure or an issue relevant to why a dismissal was unfair. The failure to let him be accompanied at that meeting was not a claim referred to in his claim form but was only raised by the Claimant at this hearing.

16 Unlike the meeting on 26th March 2019 there were no notes by Mr Chandarana and the Claimant did not take any notes. The only document was one produced after the meeting (page 123) recording what the Respondent said was the agreement they had reached to

reduce the Claimant's salary to £20,000 pa and reduce his role to be that of Technical Equipment Demonstrator ie to focus on only part of his previous role as Business Development Manager. I find taking into account Mr Chandarana's and Mr Rudge's oral evidence that the salary/change of role option, as an alternative to terminating the Claimant's employment, was something Mr Chandarana came up with during the meeting and not something in his mind before the meeting or something discussed with Mr Rudge before the meeting. I find that this option was raised because Mr Chandarana was trying to find a way to keep the Claimant and to focus him on the part of his role that he was particularly skilled at, namely demonstrations. The Claimant said that this was particularly unfair given the same day as this meeting a significant payment had come in for sales he had achieved, but the Respondent was looking at the entire period of his employment so far to see what he had achieved in sales.

17 I find that the outcome of the meeting was that the Claimant had agreed the reduction in his salary and role. That is consistent with the letter subsequently issued on 24th October 2019 which the Claimant did not dispute or raise any issue to say it was wrong, until he resigned some 3 weeks later and consistent with continuing to work despite the lower salary set out in the letter which took effect from 1st November 2019 (ie he had a clear week even before it took effect to say it was wrong if he had not agreed it). The letter had asked him to get in touch if he had any questions and he did not do so. He says he also tried to call Mr Chandarana on 7th November 2019 (WS para 41) but Mr Chandarana was away on business; given the significance of the issue I find that had he called Mr Chandarana and been unable to speak to him he would have instead sent him an email or spoken or emailed Mr Rudge (because it was an important issue according to the Claimant) but he did not do so from which I find he did not try to call him on 7th November 2019. He did not verbally to Mr Rudge (who he spoke with frequently) say that the letter was wrong and he had not agreed the change or send an email to either Mr Rudge or Mr Chandarana (who he saw much less frequently) saying that the letter was wrong and that it had not been agreed; he would have done this had it not been agreed even if it was a difficult time for him because it had a significant impact on him, taking into account he was able to set out quite clearly in his resignation email that it had not been agreed in his view (page 129 para 2). Whilst the Claimant argued that it was inherently unlikely that he would have agreed to the reduction in his situation with a family to support and bills to be paid, I find that the Claimant did agree it because he wanted to remain employed and knew his probation period had been extended but that the situation would be reviewed again in December 2019, only a few weeks away. I have taken into account the relative imbalance in the bargaining strength between the parties but I do not find that he was wrongly pressurised into agreeing by a threat of dismissal; although this was presented as a way to avoid dismissal it was not a planned 'accept or be dismissed' ultimatum but was Mr Chandarana without prior thought coming up in the meeting with a way to avoid dismissal ie reacting to the Claimant's situation including the personal issues he was raising as to why things were difficult for him. This was a stressful time for the Claimant as he was under pressure to make sales but that pressure to make sales is inherent in the role and I do not find that the Respondent pressurised him unreasonably given he was not meeting targets or pressurised him into agreeing this change. Whilst the Claimant may later have regretted agreeing to these changes and found (and still finds) the whole situation very unfair, I find he did agree them. The contract (page 50) did not provide that changes to terms had to be agreed in writing by both parties and specifically said that changes to terms would be notified within a month of the change (though in the slightly different context of a change of which the Respondent was giving notice rather than a change specifically agreed).

18 There was no provision in the contract that changes to terms had to be recorded in writing and signed by both parties to show that agreement. The Claimant argued that he should have been asked to sign and return the letter to confirm his agreement and whilst that would have been good practice it is not the case that a contractual variation to his terms could not be done verbally and then subsequently confirmed in writing.

19 In the alternative I find that even if the Claimant did not agree the changes at the meeting he waived any breach of contract by the Respondent in implementing the changes without agreement, by continuing to work without protest until 18th November 2019 (around 3 weeks) without objection, taking into account he knew on 24th October 2019 that the Respondent was saying he had agreed to a salary cut amounting to a third reduction in his salary, a change which would have an impact on him imminently because applying from 1st November 2019. I have again taken into account that the Claimant was in a period of stress at this time but he is an articulate individual and registering a protest to the changes would have involved a very short email of a few sentences to Mr Rudge or Mr Chandarana or a short discussion with either of them, particularly with Mr Rudge who he spoke to frequently most days.

The Claimant's resignation (page 129)

20 The Claimant sent his resignation email at 8.06am on Monday 18th November 2019, before the start of the working day at 8.30am. The Claimant said he did his admin work usually from home on a Monday so was not due in the office or on appointments that day; the Respondent did not dispute that was his practice and I therefore find that the next day the Claimant was due in was the following day, Tuesday. The Claimant accepted at the hearing that he could have expressed his resignation more clearly.

21 The Claimant's resignation email was a long and detailed one (written after a weekend) setting out his grievances in some detail. Although not crystal clear as to his intentions, it was not confused and did not appear to be a 'heat of the moment' reaction to something in particular but rather a litany of claimed ill-treatment concluding in his resignation, although to some extent letting off steam. I therefore find that this was not a situation where a reasonable employer would have been alerted to a need not to accept the resignation at all but instead to check what the employee's intentions were.

22 The email does not use the word notice at any stage or say anything about working out notice or going to work in the notice period. It does not give an end date for the end of the claimed notice (if that is what it was doing) but the end date is potentially capable of being ascertained by the reference to being paid to the end of the month.

23 Parts of the email expressing matters more consistent with an intention to resign immediately were saying that mental health issues were the Respondent's fault, the changes to his terms were a 'nail in the coffin', a reference to blackmail and extortion in the way the changes to terms had been handled, a statement that he could no longer continue working for the Respondent, a statement that he may not be able to work for a while, a statement that he was cheated out of hard earned money, a request for the payment of accrued holiday pay (which would normally be addressed when the employment reached its end, and not so usually when notice is given as further holiday might accrue in the notice period or some holiday taken). The email said nothing about attending for work in any notice period or any reference to a handover or reallocating work before he left including

appointments already booked in his diary. The Claimant said he would not speak to Mr Chandarana at all, inconsistent with intending to go in to work for the next two weeks as he could not necessarily avoid Mr Chandarana. The Claimant said he would speak to Mr Rudge about work related matters but that was not the same as saying he would be in work the next day and for the next two weeks and would work with Mr Rudge to reallocate his appointments and do a handover. The Claimant says in his witness statement (para 45) that he said at this point that he would liaise with Mr Rudge during these final two weeks but that is not what the email says. However these matters potentially consistent with an immediate resignation were also consistent with a resignation on notice but a refusal to attend for work or to do any work during the notice period.

24 Parts of the email expressing matters consistent with an intention to resign on notice were the Claimant saying he was happy to speak to Mr Rudge on work related matters (suggesting he would be working at least in some way) and saying he was owed salary to the end of the month. That reference to being paid to the end of the month was consistent with the two weeks' notice he was obliged to give under the probation arrangements.

25 Taking the above findings of fact into account and setting the email in its context of a probation extension and a salary and role reduction which the Claimant was by now very upset about (even if he had agreed it/waived any breach – see above) I find in particular that the inclusion of the reference to be paid to the end of the month and the fact that was two weeks away means, on balance, that the Claimant was giving notice, to expire at the end of the month, in line with the two weeks' notice he was obliged to give under the probation arrangements. He was not particularly clear but he referred to an end date of the end of the month which was in turn consistent with not intending to leave immediately due to the financial worries he had.

26 The Claimant was not however going to attend for work as normal and that was the clear message, even if there was an oblique reference to speaking to Mr Rudge on work matters. That refusal to work in the notice period was a repudiatory breach of contract by the Claimant which entitled the Respondent to terminate his employment without notice.

27 I find that the Claimant was not working as normal for the morning of 18th November 2019 (as claimed at the hearing) until he received the Respondent's acceptance of his resignation later that morning at 12.48 (page 131). He did not claim in his witness statement that he was working that morning or set out even in broad terms what he was doing. The tone of his resignation email is at odds with someone dutifully carrying on with work that morning whilst waiting to hear back from his employer. The Claimant therefore did no work for the Respondent that morning up until his resignation was accepted at 12.48 and, as already communicated to the Respondent, had not intended to do any. The Respondent's acceptance of his resignation (ie when his employment in practice ended and what is the effective date of termination) was not until the middle of that day but by then the Claimant had done no work for which to be paid and did not intend to do any. The last day for which he was owed pay was therefore the previous Friday 15th November 2019.

Relevant law

Constructive dismissal (notice pay claim)

28 A constructive dismissal (and thus a dismissal for unfair dismissal purposes) is

defined in s95(1)(c) Employment Rights Act 1996 as where the employee terminates the contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

29 In *Western Excavating v Sharp [1978] IRLR 27* it was identified that a constructive dismissal must involve a repudiatory breach of contract, going to the root of the contract or which shows the employer no longer intends to be bound by one or more of its essential terms. The burden of proof was on the Claimant to show that there was a fundamental breach of contract, it contributed to why he resigned and that he did not delay, thus affirming the contract. The breach of contract by the employer must be an effective cause but does not have to be the only cause or the principal cause of the employee resigning (*Wright v North Ayrshire Council [2014] IRLR 4*).

30 There is a right to terminate the employment without notice where an employee commits an act amounting to a repudiatory breach of contract or gross misconduct. The termination happens when the repudiatory breach of contract is accepted by the other party (*Geys v Société Générale, London Branch 2013 ICR 117*).

Unpaid wages claim (pay up to resignation – wrong salary rate used)

31 s13 Employment Rights Act 1996 provides that an employer cannot make an unlawful deduction from their wages. A deduction is made where the employer does not pay the employee at the correct contractual rate of pay.

Unpaid holiday claim (8 days – wrong salary rate used)

32 Regulation 14 Working Time Regulations 1998 provides for the payment of accrued but untaken holiday pay on termination. The holiday pay must be paid at the employee's correct contractual rate of pay.

Breach of contract (commission claim)

33 The relevant law is the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which provides that a breach of contract claim can be brought if it arises or is outstanding on the termination of employment. The amount which can be claimed is capped at £25,000.

34 The burden of proof was on the Claimant to show that the commission payment he claimed to exist was a term of his contract of employment.

35 The commission payment claim could also be brought alternatively as an unlawful deductions claim (see above). However the Claimant would still have to show that the commission terms he claimed to exist had been agreed.

Reasons

Constructive dismissal claim

36 Taking the above findings of fact into account the Respondent did not breach the

Claimant's contract of employment by imposing a change to his terms without his agreement. The Claimant accepted those new terms. When he resigned on 18th November 2019 his resignation therefore did not amount to a constructive dismissal (but was just an ordinary resignation, although accepting he was very upset and angry).

37 Taking the above findings of fact into account the Respondent wrongly interpreted the Claimant's resignation as being with immediate effect when it was a resignation on notice, that notice to expire at the end of November 2019. However when the Claimant resigned he was not prepared to work as normal during his notice period and the Respondent was entitled to treat that as a repudiatory breach of contract by the Claimant entitling it, in turn, to dismiss him without notice.

Unpaid salary claim (pay up to resignation – wrong salary rate used)

38 Taking the above findings of fact into account the Claimant was paid his salary up to the termination date at the correct contractual rate, being the reduced rate he had agreed.

Unpaid holiday claim (8 days – wrong salary rate used)

39 Taking the above findings of fact into account the Claimant was paid his accrued holiday pay on termination at the correct contractual salary rate, being the reduced rate he had agreed.

Breach of contract (commission claim)

40 Taking the above findings of fact into account the Claimant is not owed commission from the Respondent at £150 per machine sold because it was not contractually agreed. That claim also fails as an unlawful deductions claim for the same reason.

**Employment Judge Reid
Date: 12th September 2021**