Case number: 1406107/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr Stephen Royffe**

Respondent: **Goalshaper Innovation Limited**

Heard at: **Bristol Employment Tribunal**

On: **8 July 2021**

Before: **Employment Judge Lowe**

Representation-

Claimant: **In Person**
Respondent: **Stuart Sanders (Counsel)**

JUDGMENT

In a claim presented to the Employment Tribunal on 19 November 2020 the Claimant brings the following claims:

1. Unlawful deduction of wages in respect of non-payment of commission and director fees;
2. Breach of Contract.

With the agreement of the parties this hearing was conducted by CVP video platform and was a fully digital hearing.

The Tribunal received evidence from Mr Royffe, the Claimant and Miss Carr, CEO of the Respondent Company.

The Tribunal was provided a digital bundle comprising 202 pages. Further witness statements from the Claimant and Respondent have also been provided.

References in this judgment to the agreed hearing bundle are in the form **[B/page number]** and references to witness statements are in the form **[WS/surname/page number]**.

The issues for determination

Employment status – Was the Claimant either an employee or worker in the Respondent company?

Did the Claimant have a contractual entitlement to either introductory commission and/or director's fees?

Background

The Respondent Company (formerly known as Coaching Principles Limited) was incorporated on 31 July 2017. It is a start-up technology company that uses AI software to deliver services to small/medium size enterprises designed to assist in the achievement of strategic goals.

As a start up company, the Respondent needed assistance in raising Finance Capital. In pursuit of this, Miss Carr attended Venturefest South, an annual conference whose objective is to 'stimulate the South's Innovation ecosystem'. The event is an opportunity for innovators, entrepreneurs, investors and businesses to network and collaborate.

Dorset Business Angels (DBA) was a partner organisation at Venturefest South. DBA connects start-up businesses with wealthy individuals looking to invest in such start-ups as Angel investors. Mr Royffe is a Director at Dorset Business Angels and was on the panel of judges when Miss Carr pitched as an entrepreneur.

Following an initial conversation, the parties had an exploratory meeting at which the Claimant indicated he would be interested in helping raising Finance Capital for the Respondent.

The parties subsequently signed a Heads of Terms (HOT) agreement, dated 28 August 2019. The full Agreement is at [B/79], but the relevant parts state:

> *"Proposal:*
> *SR (Stephen Royffe) has valuable skills in business transformation and financial strategy and will join CP (Coaching Principles Ltd) to help develop the strategy for a fast exit following the* achievement of $1m in ARR. SR will be gifted 1% of the A shares and be paid the going rate for attending 4 Board meetings in his role as non-executive director (NED). In the event that SR agrees to extend his role there will be a further employment contract agreed with vested share Agreement.
>
> *Obligations of SR*
> - *SR agrees to join CP as NED in his role as Investment Director*
> - *SR agrees to help Tracey raise the capital needed*

- *SR agrees to help build $100M company exit within 5 years by giving strategic advice to (TC) Tracey Carr personally and also at 4 Advisory Board Meetings a year*

Obligations of TC and CP

- *TC agrees to issue share certificates to SR for 1% of the A shares*
- *TC to act in the best interests of the team, customers and the shareholders*
- *TC to simultaneously work on raising capital with SR*

Breach
In the event of a breach of the terms of this agreement, recourse will initially be sought between the parties in order to reach an amicable and mutually acceptable outcome, otherwise it will be deemed that they are in default and maybe forced to sell their shares, ultimate decision will be made by ACAS or a similar mediator who's decision will be final".

A Founding Partners Agreement was signed between the parties (and others) on 7 April 2020 [B/123], in which each of the Founding Partners were appointed as directors.

The Claimant was appointed as a non-executive director whole role is described as:

- Proactively help to raise capital
- Strategic advice on business transformation/financial strategy [B/140].

The Claimant was registered as a director of the Respondent at Companies House for the period 8 April 2020 until his resignation on 22 July 2020.

Employment status-

Claimant's position-
The Claimant states he was employed by the Respondent between 28 August 2019 (the date of the HOT) and 22 July 2020 (the date of resignation) as an Investment Director.

The Claimant avers that the HOT was a contract of employment. In return for his professional services, the Claimant would be rewarded by way of company shares, payments for non-executive director fees and commission payments.

The HOT agreement states:

"*In the event that SR agrees to extend his role further there will be a further employment contract agreed with vested share Agreement*".

As such, the Claimant asserts that the HOT agreement is clearly referenced as an employment contract as it refers to a 'further' employment contract.

Respondent's position-

The Respondent states that the Claimant was an office holder rather than an employee or worker. The Claimant undertook his duties as a non-executive director as part of his profession and therefore on a self-employed basis. As such, the Tribunal lacks jurisdiction to hear this matter.

The Respondent avers that the reference to 'future' employment contract in the HOT was a conscious decision by both parties not to set up an employment relationship at this time. It was a matter that would be considered in the future if the Claimant's role was expanded and the circumstances were right.

Director's fees-

Claimant's position-
The Claimant avers that the following establishes the basis for payment of director's fees:
1. HOT contract dated 28 August 2019;
2. Oral contract from a meeting held on 5 February 2020 at Guildford between the Claimant and Miss Carr;
3. Board minutes; and
4. Written communications between the parties.

Respondent's position-
The Respondent avers that the Claimant's fees for his duties as non-executive director were to be paid at the going rate for NEDs of the Company. There were 3 NEDs at that time, and the rate was, and still is, nil.

The Claimant and other NEDs were offered shares for their contribution. As such, they were forgoing cash renumeration in return for receiving shares in the Company; commonly described as 'sweat equity'. Other NEDs were similarly issued with sweat equity at the time. To have renumerated NEDs further would have meant that, in effect, they would have been paid twice for their services.

There was no verbal agreement on 5 February 2020, or at any other time, that the Claimant would be paid a fee as a NED.

Commission-

Claimant's position-
Contractual entitlement:
The Claimant avers that he is entitles to commission on any investment/s brought in, and relies on the following:

1. Correspondence with the Respondent [B/82]:

Email from Tracey Carr to the Claimant on 28 August 2019 at 12:51:

"I forgot to add that we can agrees 5% on Investments brought in which can be split anyhow that suits. This is also negotiable".

The Claimant responded to Tracey Carr at 13:57:

"Yes, happy to discuss any commission on investments. However, most angel/investment networks will charge 5/6% anyway, so you will only receive 94/95% of the money raised".

2. Written and oral correspondence/conversations;
3. Board Minutes of 22 June 2020.

Relevant Investment:
The Claimant's position is that he personally introduced Coaching Principles Ltd to SETsquared Partnership (Bristol) who subsequently arranged for the investment of £100,000 from the Regional Angel Investment Accelerator. This funding has triggered a contractual payment of £4,812.50, which has been acknowledged and confirmed by Coaching Principles Ltd in subsequent email correspondence.

Further, that the fee payable to Dorset Business Angels was for the introduction of one of their members to Coaching Principles Ltd. This was not a commission on the RAIA funds. Consequently, the Claimant's is entitled to commission is in respect of the RAIA grant of £100,000; calculated as follows:

RAIA Grant	£100,000
Less Dorset Business Angels fee (for the member introduction)	-£3,750
Net RAIA Investment	£96,250
Introductory commission due 5%	£4,812.50

The Claimant also claims for any further investments arranged by SETSquared Partnership (Bristol).

Respondent's position-
The Respondent avers that payment of commission was outside the scope of the Claimant's role as a NED.

It was Dorset Business Angels (DBA) who made the introduction to SETSquared Partnership (Bristol). DBA have been paid in full for the introduction to, and facilitation of, the RAIA scheme. Further, that the RAIA scheme was only available through an introduction from the UK Business Angels Association and was not open to the public or individual contractors. As a consequence, the Claimant would not have been entitled to make this introduction.

Jurisdiction Statutory Framework:-

The Tribunal's jurisdiction in relation to breach of contract is set out in The Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994, which provides:

> *3. Proceedings may be brought before an industrial tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
>
> *(b) the claim is not one to which article 5 applies; and*
>
> *(c) the claim arises or is outstanding on the termination of the employee's employment.*

The Tribunal's jurisdiction in relation to unlawful deductions from wages is set out in s.13 ERA, which materially provides:

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *…*

1. *(3) 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

The definitions of employee and worker are set out in s.230 Employment Rights Act 1996:

> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

Harvey on Industrial relations and Employment Law Division[1]

The well established starting point for considering whether an individual was working under a contract of service is articulated in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, *[1968] 1 All ER 433*, where McKenna J said as follows:

> *''A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …".*

"It must be remembered however that none of these is necessarily determinative—these are merely guides to the marshalling of the arguments in any given case. Eventually, a view must be taken by the deciding body on all of the facts. …this will normally be reached by balancing all the factors (the modern 'multiple test')".

"Starting with the old idea of set 'criteria' for employment, it has long been accepted that ultimately it is impossible to draw up a complete and immutable list of criteria to be considered when deciding whether a contract is one of employment or one for services: *Maurice Graham Ltd v Brunswick (1974) 16 KIR 158*, Div Ct; *Warner Holidays Ltd v Secretary of State for Social Services [1983] ICR 440*. Each case must be considered on its own facts".

Employment Status Findings:-

Personal performance/substitution:
It is accepted by both parties that the contract was one that required personal performance by the Claimant. It was in the Claimant's personal name and contained no substitution clause.

The fundamental question, in my view, is as outlined by Cooke, J at 184 and 185 in *Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173*:

[1] Division AI; Categories of workers; B Employees (1) Definition

"Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"

Control/mutuality of obligation and other relevant aspects:

I will consider the key elements in turn:-

1. What is the basis of the Claimant's participation in the business?

The Claimant is a qualified accountant (FCCA) and professional mentor. He has a prestigious career with particular expertise in relation to funding for start-up businesses.

The website of Dorset Business Angels, of which the Claimant is a Director, states that Mr Royffe:

- "Is a qualified accountant (FCCA) and professional business mentor (CMI);
- Has a distinguished international financial and business career spanning over three decades;
- Has extensive responsibility for delivering transformation and finance/change projects, acquisitions, integrations and trade sales;
- Now supports Directors and business owners of successful fast-growing scale-up companies delivering growth strategies and increasing shareholder value" [B/33].

The corporate event at which the parties were introduced was designed specifically as an opportunity to invigorate business innovation. DBA, as a partner at that event, is purposed to match Angel investors with early-stage businesses. This was the exact purpose of the event and the foundation of the relationship between the parties.

Following an initial meeting, the Claimant offered his professional services and expertise to the Respondent on his own account in order to help raise the finance capital required. The Claimant states "The Respondent was very young in its development and both parties agreed in August 2019 that I would join the Respondent and be working with the senior team to help develop the strategy based on high growth, for a fast exit. I would use my extensive network to bring investment into the company" [WS/Royffe/1].

I am entirely satisfied that the Claimant's initial involvement in the Respondent company was as a professional adviser on his own account.

2. Contractual terms of the HOT Agreement dated August 2019-

The terms of the HOT are described by the Respondent as:

> "a very loose and friendly HOT. This is what everybody has (with amends), and we will need a much tighter agreement going forward. Currently nobody is being paid for attending meetings but that will change when we get some funding.
> Please have a look and let me know what changes you want to make" [B/83].

The Claimant accepted this option to amend the terms, changing his name and role title. Further, the Claimant states that he:

> "accepted a contract in August 2019 with a lower amount of initial share capital than that negotiated by other Directors and Employees, plus the actual cash payments on offer for commission and Director's Fees as this would suit his specific financial position until post January 2020, rather than a higher amount of shares, where reward was more uncertain and of a less immediate nature" [B/36].

I am therefore satisfied that the Claimant had considerable input and influence into the terms of the HOT agreement, ensuring that these met with his individual objectives.

The specific terms of the HOT are extremely narrow. The obligation on the Claimant was simply to attend 4 Board meetings (and provide strategic advice) and help the Respondent raise the capital needed. In return, the Respondent was to gift 1% of A shares and be paid at the 'going rate' for attending the 4 Board meetings.

In view of the extremely limited obligations on the Claimant, I consider this is reflective of an advisory role, more akin to the provision of advice and mentoring.

3. What was the renumeration and how was it paid?

On 19 March 2020, the Claimant was issued with 1,320 ordinary A shares representing approximately 1% of the Company's total issued share capital, for nominal consideration (0.00001p). The price paid per share by other investors at that time was £15.

The Respondent Company was pre-funding, and as such, was not in a position to offer a wage or commit to a regular monetary sum. The gifting of shares reflects this.

4. Did the Claimant provide any capital or risk any loss?

No capital was provided by the Claimant and he was not exposed to any personal financial risk.

5. Was the Claimant tied to the Respondent company?

The Founding Partnership Agreement contains a Non-Competition Clause. This prohibits Founding Partners from:

> "Directly or indirectly carrying on or be engaged in any business which competes with the Business of the Company anywhere in the world" [B/133].

The Claimant was therefore unable to become engaged with a business that would have been in direct competition with the Respondent. It did not, though, restrict the Claimant in any other respect and he was free to carry on with his existing, and potential, business roles subject to this proviso.

As is common for non-executive director holders, the Claimant had other commercial commitments during this period. The evidence bundle contains references to 2 other Directorships that were used in correspondence with the Respondent:

Firstly, in an email from the Claimant to the Respondent on the same date as the HOT agreement was formalised, 28 August 2019, the Claimant signs the correspondence:
"Steve Royffe, Director
Amberley Project Management Limited
"Supporting CEO's and Company Owners" [B/83].

Secondly, in an email to Rosie Bennett at SETsquared dated 11 November 2019, the Claimant signs this email in his capacity of Director of Dorset Business Angels [B/84].

I conclude, therefore, that the restriction applicable to the Claimant was limited. The Claimant was not restricted from carrying out other commercial activities, and indeed continued to do so. As the restriction was only relevant to direct competitors of the Respondent, any restriction on the Claimant's commercial activities would, in my view, have been minimal.

6. How strong or otherwise was the obligation on the Claimant to work for the Respondent, if and when called to do so?

The claimant has fairly accepted in his evidence that following formal retirement in January 2020 [WS/Royffe/2] he actively increased his involvement in the business from February 2020. Understandably, he was keen to represent himself in a favourable light with a view to securing a further contract.

As such, he avers that the contract of employment has built up over time in accordance with the principle contained in *Carmichael V National Power plc [1991] ICR 1226* and *Brook Street Bureau (UK) Ltd v Dacas [2004] EWCA Civ 217*. Even if no mutual obligation existed at the outset of the relationship, that position changed once the Claimant increased his engagement with the Respondent from February 2020 onwards.

In addition, the Claimant avers that there was an over-arching contract, on the basis that there was an expectation that the Claimant would make himself available for a reasonable amount of work: *St Ives Plymouth Ltd v Haggerty [2008] UKEAT/0107/08*.

I note the following:

Following the appointment of James and Natasha as directors, weekly meeting were arranged. The Respondent emailed in February 2020:

> "Steve, there is no requirement for you to attend but it would be great if you could join the first so we can present financial plans we have been working on" [B/99].

The Claimant responds as follows:

> "I have accepted all of these meetings although I will not necessarily attend unless you specifically need me" [B/100].

On 8 April 2020, the Respondent sent a blanket invite stating:

> "We will send out the minutes tomorrow and meanwhile we agreed to create a couple of focus groups: Pricing model, Product and Financial model. Please can you email me separately and let me know which you want to be involved in?" [B/144].

The Claimant replied that he was "happy to be involved in the Financial model" [B/144].

Further emails from the Claimant provide further illustration of the discretion that the Claimant had in terms of which meetings he chose to attend:

> "I will be on the call this Monday 24/02/20, and can do 6.00pm/6.30pm, although I need to leave promptly for an evening meeting at 7pm" [B/103].
>
> "I have declined the blanked invite for the other meetings, but I am around mostly on Mondays and happy to attend any specific meetings" [B/103].

I therefore satisfied that the Claimant had a significant degree of discretion as to what work, if any, he chose to undertake. The increased participation in the business from February 2020 onwards was a conscious decision by the Claimant based on his wish to secure a new contract. There was no increased obligation by the Respondent on the Claimant during this period.

7. Integration into the Respondent Company

I remind myself that the business, at this stage, was in the early stages of development and planning. Company structures were being considered during the early part of 2020 [B/94].

This timeframe aligns with the Claimant's requests for a new contract/clarification of his role. In an email to Miss Carr on 25 January 2020, the Claimant states:

> "I am not sure where you would like me to fit in here, am happy to discuss further" [B/94].

Miss Carr responds 2 days later:

> "We have been super busy since the meeting. I have also been in a few meetings with Guy about company structure and hope to have an Agreement with him this week" [B/94].

In March 2020, Miss Carr reports that "there is a ton of work going on here" and requests a discussion with the Claimant about communication protocols. The Claimant responds:

> "I don't feel that I am being involved with the strategic decisions, but I am being invited to comment once the activity is underway" [B/113].

Clarification in relation to his role continues to be sought by the Claimant in April 2020:

> "At present, I am on the weekly management meetings, and quarterly NED meetings so we need to clarify my involvement" [B/154].

Miss Carr replies:

> "Do you want more meetings or different meetings?" [B/154]

The Claimant reponds:

> "Just making the point that GS has been quite time consuming for me, and not covered by the original HOT" [B/155].

The weight of evidence supports the position that the Claimant's role remained advisory in nature.

8. Income tax and national insurance arrangements

There is no reference to income tax or national insurance.
The renumeration paid to the Claimant was in the form of A shares, issued in March 2020. The mechanics of how these shares were issued, and any resulting tax implications, has been the source of some consternation between the parties. However, it is accepted that the Respondent did not submit a return to HMRC in accordance with the Employment Related Securities regime.

9. Annual leave/holiday pay arrangements

There is no reference to holiday pay/annual leave. Importantly, this issue was never raised by either party; there was no expectation by either that this was a relevant consideration.

Conclusions

A key purpose of a non-executive director is to provide an independent arms-length appraisal of the company and offer advice on this basis. The Claimant, with his extensive experience of advising and mentoring businesses and entrepreneurs, was ideally placed to provide this advice.

Despite the numerous requests from the Claimant, no further contract was agreed between the parties. The Claimant was aware that the existing HOT only made explicit provision for 4 board meetings.

The Claimant was contracted by the Respondent on the basis that he would provide his own skill and judgment carrying out the tasks. The Claimant was free to decide for himself how best he would carry out this task. There was no formal monitoring of performance or evaluation of any advice given.

There was considerable freedom for the Claimant to act outside the terms of the HOT, in effect, choosing to extend his participation in the business from February 2020 onwards.

Taking all factors into consideration, I am satisfied that the Claimant was supplying his services on his own account, in accordance with his role as a non-executive director.

I therefore conclude that the Tribunal does not have jurisdiction to hear either claim, the Claimant being neither an employee nor a worker.

Substantive merits:

If I had concluded otherwise, I would have determined as follows in respect of Director's Fees and payment of Commission:

Director's fees:
I remind my self of the relevant wording of the HOT:

> "SR will be gifted 1% of the A shares and be paid the going rate for attending 4 Board meetings in his role as NED".

The Claimant relies on discussions on 5 February 2020 as evidence of a further terms having been agreed; a handwritten note is written on a copy of the HOT recording "Pay £10k pa" [B/97]. The Respondent accepts that renumeration was discussed, but not that any agreement was reached.

The Claimant, however, acknowledges subsequent to this date that the HOT remained the only contractual agreement:

1. 27 March 2020 "I only have the HOT from August 2019 in place" [B/117];
2. 22 April 2020 "Just making the point that GS has been quite time consuming for me, and not covered by the original HOT" [B/151];
3. 19 June 2020 "Until a new contract is agreed, then I believe the existing T&Cs agreed last year still apply" [B/177].

I accept that there were discussions around new contract terms; the Claimant was understandably keen to secure a new contract. However, these conversations did not, in my view, reach the stage of a concluded agreement between the parties.
I am therefore satisfied that the only contractual term agreed between the parties is that of the HOT.

This leaves the issue of 'going rate' to be determined. To be anything other than the 'going rate' for non-executive directors within the Respondent company would leave the

parameters of such a determination too wide and numerous. To be enforceable, the terms must be clear and certain.

I therefore determine that the 'going rate' was that applicable to non-executive directors of the Respondent company during this period. The rate was and remains zero; with no monetary payments being paid to non-executive directors.

Commission:
The Claimant relies on an email exchange on 28 August 2019 in which the Respondent stated:

"I forgot to add that we can agrees 5% on Investments brought in which can be split anyhow that suits. This is also negotiable".

The Claimant replies:

"Yes, happy to discuss any commission on investments. However, most angel/investment networks will charge 5/6% anyway, so you will only receive 94/95% of the money raised" [B/82].

As with directors renumeration in the broader sense, there were a number of discussions and conversations between the parties in respect of commission. This included conversations at Board meetings. The question is whether any of these discussions amounted to a concluded agreement in clear and definable terms.

I find that the exchange of emails on 28 August 2019 does not amount to a contractual agreement in respect of commission. The Respondent makes a tentative offer as a starting point for discussion; the commission could be "split anyhow that suits. This is also negotiable". The response was also a clear indication of an intention to have further conversations about the matter: "happy to discuss any commissions on investments". The position had yet to be finalised.

The Board minutes reflect this position. I note their decision is that commission should be determined on a 'case by case' basis and whilst accepting that if it had entered into a contractual agreement that this should be honoured, the general view was that shareholders should not be rewarded additionally [B/166].

I would therefore have concluded that there was no clear and definable contractual agreement in respect of commission payments.

Final adjudication:
The claims for unlawful deduction of wages and breach of contract are dismissed.

Employment Judge Lowe
Date: 08 July 2021

Reasons sent to the parties: 16 August 2021

FOR THE TRIBUNAL OFFICE