



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4113492/2019

Held at Glasgow on 26 February and 6 October 2020

Employment Judge: R Gall

Mr J Coleman

**Claimant
In Person**

Hi Audio Visual Limited

**Respondent
Represented by:
Ms C Greig -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is unsuccessful.

REASONS

1. This case was heard in person. The first diet took place at Glasgow on 26 February 2020. The evidence was not concluded that day. A further day of hearing was set down for 23 March 2020. The coronavirus pandemic meant however that it was not practicable to proceed with that continued hearing.
2. Case management Preliminary Hearings in this case took place by telephone conference call during the pandemic. Those were arranged to discuss whether proceeding to conclusion of the case by use of video conferencing platform CVP was appropriate or not. The view of both parties was that with evidence having been taken in person from the claimant, it would be best that evidence was similarly taken in person from the respondents' owner and director. This was as credibility was of key significance in the case. Accordingly, when in-person hearings resumed, this case was set down for hearing on 6 October to complete evidence and for submissions. Those elements of the hearing took place that day, with the hearing therefore concluding on 6 October.

3. Throughout the case the claimant appeared on his own behalf. The respondents were represented throughout by Ms Greig. Evidence was given by the claimant and also by the respondents' owner and director, Mr Callen. Each party lodged a file of documents. Where those are mentioned in the Judgment, the relevant page number in those submitted by the claimant is preceded by the letter "C". The relevant page number in a document appearing in the file submitted by the respondents is preceded by the letter "R".
4. A supplementary file was submitted by the claimant at the start of the diet on 6 October. He explained that he wished to have its contents available for possible questions in cross examination. I explained to him the potential need for any document to have been spoken to by him in evidence in chief. That had not occurred as the documents were not present when he had given his evidence on 26 February. Potentially he could seek to be permitted to give further evidence relevant to those documents. He did not wish to do that however, being content to have the documents available for possible cross examination questions to the respondents' witness. The respondents opposed this supplementary file being accepted.
5. I decided that the supplementary file would be accepted as a further file of documents in the case. I explained that this would be subject to potential questions from me or objection from the respondents as to the relevancy of a question being asked or a document to which it was proposed that the respondents' witness be taken. As it transpired there was no controversy around the documents in this supplementary file. Where a document from that supplementary file submitted by the claimant is referred to in this Judgment, it is preceded by the letters "SC".
6. There was a large element of agreement as to the basic facts in this case. There were however key areas where parties gave diametrically opposed evidence. The case concerned commission which the claimant said was due to him by the respondents. The respondents denied that any commission was due to him. Whether there was or was not commission due turned upon whether there was a minimum target net profit "threshold" applicable for the first 6 months of the claimant's employment. The claimant argued that there was no such minimum

for those first 6 months, the threshold applying only after the 6-month period. The respondents maintained that the threshold applied from commencement of the claimant's employment.

Facts

7. The following were found to be the relevant and essential facts as admitted or proved.

Background

8. The respondents provide audio visual services to clients. They are a small entity, comprising Mr Callen and one other person, with a sales executive having been employed during part of the time Mr Coleman was an employee. Mr Coleman was an employee between October 2018 and end of August 2019, although there was an earlier period in which a consultancy relationship existed between the respondents and Mr Coleman as narrated below.
9. Mr Coleman's area of work is in sales and business development. The owner of the respondents is Mr Callen. Mr Coleman and Mr Callen have known each other for over 10 years prior to this case.
10. Mr Coleman formerly ran his own business in the audio-visual sector. He did this between 2009 and 2014. He then sold this business. He remained with that business for approximately one year in a handover phase. Before that he had sales experience with other organisations. He is familiar with the principal of remuneration by way of sales commission.
11. Between 2015 and 2016 Mr Coleman worked on the respondents' behalf as a consultant. His remuneration was solely on the basis of commission for business introduced, together with reimbursement of agreed expenses. Mr Coleman received 70% of net profit from business gained. That relationship between Mr Coleman and the respondents lasted some 18 months.
12. During the period of consultancy just mentioned, Mr Coleman had a business email address with the respondents. That was jim@hiav.co.uk. When he moved from the respondents, around the end of May 2016, it was to work for Highlands and Islands Enterprise ("HIE"). Mr Coleman retained his business email address

with the respondents, together with his consultancy position. There were clients of the respondents for whom Mr Coleman had been the main contact. Retaining his consultancy and email address enabled him to keep in touch with them and to engage with them as required. This assisted the respondents as well as maintaining the contact for Mr Coleman. Mr Coleman continued to earn commission on business from clients he brought to the respondents. That commission was much reduced however during his time with HIE as his time was focussed on his HIE post. Emails and purchase orders relative to this time appeared at R28, 29, 31 and 32. Those show access to and use by Mr Coleman of his hiav email account during the time of his employment with HIE.

13. The role which Mr Coleman took up with HIE was that of account manager. In that role he worked with a variety of companies providing business support to them, signposting funding for them and facilitating their growth. This move involved a relocation by Mr Coleman and his wife to Lochgilphead.
14. Mr Coleman and the respondents then formed an employer/employee relationship commencing in October 2018, as detailed below. That concluded at the end of August 2019. Mr Coleman resigned from employment with the respondents to take up a post as account manager with Scottish Enterprise. He became an account manager there. That role is very similar to the one which he held with HIE.
15. It is the norm in the respondents' and other industries for those engaged in sales or business development to operate on the basis of their remuneration being based in entire or in large measure upon sales achieved. Targets are regularly set, hitting the targets triggering entitlement to commission.

Lead up to employment of Mr Coleman by the respondents in October 2018.

16. The move by Mr Coleman and his wife to Lochgilphead was not entirely to the liking of Mr Coleman. On 10 June 2018 he used his hiav email account to email Mr Callen. A copy of this email appeared at R30. This email gave some background on Mr Coleman's situation. He said he was thinking of handing in his notice. He said:-

"I know you have said coming back to work for you might be an option, but I would only do this if you think there is something I can offer. Things are obviously different 2 years down the line, I don't have an active list of clients as I did before and I have been out of the industry so will be behind on a number of things so I wouldn't be hitting the ground running.

If you think there is something I can do for the business let me know and we can have a chat, I'm back in Glasgow on Wednesday pm before heading down south until Friday night".

17. The prospect of Mr Coleman returning to the respondents was of interest to Mr Callen. Mr Callen was looking to build up the team within the respondents. He regarded Mr Coleman as being very good in meetings and able to present well with a view to gaining business. Mr Callen therefore decided that it was worth exploring this possibility. The respondents had some existing work with which Mr Coleman would be able to assist. There were also tenders being prepared by them for other work. Mr Callen was attracted by the prospect of obtaining the services of Mr Coleman who he regarded as having business acumen and drive to find business. His opinion was that Mr Coleman was the type of person who might become a director and potentially a shareholder of the respondents. It was recognised however that Mr Coleman's wife was not as convinced about returning to Glasgow to live and work as was Mr Coleman.
18. Discussions as to a working relationship resuming took place between Mr Callen and Mr Coleman in early August 2018. This was on the basis on Mr Coleman becoming an employee of the respondents. Mr Coleman was prepared either to work on a self-employed basis or potentially to become an employee. Mr Callen however regarded full time employment as the route to be followed. This was as he was looking to the future. He wished to have a closer tie in between Mr Coleman and the respondents, particularly given the potential of directorship or even shareholding which might exist for Mr Coleman. If Mr Coleman was self-employed Mr Callen's concern was that he could leave at any point.
19. Texts between Mr Callen and Mr Coleman at R44 – 50 show the discussions as to meeting up, concerns as to Mrs Coleman's view on a move and with regard

to the possible terms for remuneration. Those include the following, JC being Mr Coleman and KC being Mr Callen:-

5 August 2018, JC to KC:-

"...I'm really positive about it and I know we can discuss a package at some stage that suits us both but any initial thoughts around that might help my discussions: negotiations. To be honest I'm quite flexible around options and would even consider putting some money in if that was ever appropriate at any stage.."

After some further texts, including "banter" as to levels of remuneration, on 7 August JC to KC:-

"If you want to let me know what you were possibly think, (sic) if anything, feel free to send it over to me. Keen for everyone's sake that I make a decision so you can at least have a plan going forward."

KC to JC

"No ideas at the moment."

Derek is on £20K with £5K profit target per month. Commission is 50% of everything over that accumulative quarterly to even out the good with the bad months."

JC to KC:-

"That's fine, whatever is going to work for you and not but (sic) unnecessary strain on cashflow, so something similar to Derek or the same as I had before. The only nervousness I have is those first few months as I and get up running again without any accounts especially as we will be heading towards a quiet time of year! I'm sure we will sort something out."

20. On 14 August Mr Coleman and Mr Callen met. Mr Callen explained tenders which were being submitted, on which Mr Coleman could work. Mr Coleman also had his connections from previous times. Although those had been continuing to provide some work to the respondents, Mr Coleman resuming responsibility for management of their accounts was anticipated as leading to

increased revenue for the respondents. At conclusion of the meeting Mr Coleman asked Mr Callen to send him a proposed contract with terms of employment set out.

21. A contract was sent by Mr Callen to Mr Coleman on 15 August 2018. It was sent to Mr Coleman's hiav email address. A copy of the email and contract attached appeared at R33-43. The subject heading in the email was "*Employment Contract*".
22. Mr Coleman did not ever comment upon the terms of the proposed contract. As the start date of employment for Mr Coleman with the respondents drew closer, texts were exchanged between Mr Coleman and Mr Callen. At R51 texts exchanged between on 31 August appeared. There was no reference made to the draft contract. There was reference to a laptop and to the claimant planning to leave HIE on 14 September.

Employment of Mr Coleman by the respondents

23. It transpired that Mr Coleman commenced employment with the respondents on 1 October 2018. Mr Callen was conscious that Mr Coleman had not responded to the contract sent to him in August. He produced and gave to Mr Coleman on 1 October a hard copy of the contract. Mr Coleman said he would consider the terms with his wife. He did not ever return to Mr Callen, verbally or in writing, to raise any points in relation to the terms of the document.
24. At the end of October 2018, as the end of the month and date for salary payment to the claimant approached, Mr Callen sent the contract by email to Mr Coleman once more. He also sought information as to Mr Coleman's details for payment and other relevant starter information. The covering email with documents, including the contract, sent to Mr Coleman appeared at R53-65. Although Mr Coleman and Mr Callen were in touch by text that day, the following day and also on 2 November, copies of those text appearing at R66 and 67, nothing was said in relation to the contract or its terms. Nothing was ever said by Mr Coleman, verbally or in writing, expressing concern or taking issue with this document or the commission arrangement detailed in it, until the email

exchange on 25 September 2019 detailed below, that being after Mr Coleman's employment with the respondents had ended.

25. This was the contract between Mr Coleman and the respondents. Its terms were made available to Mr Coleman before he commenced work. He was able to access them from 15 August 2018 onwards. He was aware of them from at latest the beginning of October and certainly from the end of October 2018. He worked for the respondents without raising any issue or dispute with those terms.

Remuneration of Mr Coleman by the respondents

26. Mr Callen gave thought as to remuneration to be offered to Mr Coleman. Mr Coleman was earning £40,000 while employed with HIE. Mr Callen was aware that a competitor to the respondents based its commission structure on a sales target of £20,00 per month. He did not regard that as being beyond Mr Coleman in his role with the respondents. He set out the payment structure for Mr Coleman in the draft contract. The same provisions appear in both the emailed copies in the respondents' productions. It was also in the hard copy given to Mr Coleman on 1 October 2018.
27. The sections headed "remuneration" and "Commission" appear at R36 and R56. Those state, insofar as relevant,:-

"Remuneration

Your salary will be paid monthly in arrears at the rate of £20,000 per annum on or before the last working day of each month by direct transfer to your bank/building society account....

Commission

You will be eligible to receive commission from the Company for profit achieved. The rate at which you will receive it will be calculated from Net Profit at the rate of 50% of Net Profit after £5,000 profit in any one month, and will be calculated and paid Quarterly. In addition, the profit target will continue from one quarter to the next should there be a deficit. This means that any negative balance will be carried forward to the following quarter...

28. Mr Callen's view was that Mr Coleman could potentially earn £110,000 per annum. This was predicated on there being a realistic net profit of £20,00 per month. In a 3 month period that would mean £60,000 of net profit. Deducting the £5,000 target for each of those 3 months would mean a figure of £45,000 resulted. Commission would be 50% of that, £22,500. Multiplying that quarterly amount to achieve an annual sum, would result in commission of £90,000 for the year. The basic salary of £20,000 would mean an annual income, in that scenario, of £110,000.
29. It was recognised by Mr Callen that these figures might not be immediately achievable. What he considered to be a very low "base point" for commission to be payable, net profit of £5,000 per month, made the proposal appealing and incentivising as he saw it. It reflected the comment made in the text detailed above as to the arrangement in place for "Derek".
30. In terms of the arrangement, if the monthly target of £5,000 net profit was not met, then no commission was to be paid to Mr Coleman. The "deficit" on target would also "roll over" to the subsequent month.
31. The provisions in respect of commission were to, and did, commence from start of the employment of Mr Coleman. There was no "6 month deferral" of the target of £5,000 net profit agreed or discussed. Although it was recognised that Mr Coleman was not arriving with any on-going work, he had clients from his earlier consultancy work with the respondents. He had maintained contact with them. There was also pipeline work of which Mr Callen was aware and which he regarded as being work which Mr Coleman could carry out or assist with. Mr Coleman could also work on tenders which were in hand and which were anticipated as leading to generation of work.

Performance during working

32. A probationary period of 6 months was specified in the contract between the respondents and Mr Coleman. Mr Callen was conscious of that 6 month period of probation. That led to Mr Callen considering the performance of Mr Coleman for the period to April 2019, the conclusion of the 6 month timeframe.

33. There was concern on the part of Mr Callen in that he had anticipated that Mr Coleman would be generating more sales and business than had actually occurred. He discussed the situation with Mr Coleman in the lead up to April. Ideas were explored as to how business might be gained. One option was to pay a marketing firm to carry out cold calls to arrange appointments to see potential clients. Mr Coleman knew of a woman with marketing expertise. It was considered that employing her would be more cost effective than paying the marketing firm. One of her areas of work was to be with Mr Coleman, looking to assist him obtain business for the respondents. She was employed from the beginning of April 2019. As result of the discussions Mr Callen decided to retain Mr Coleman as an employee beyond the probationary period.

Payment of £1,400 to Mr Coleman in July 2019

34. In June 2019 Mr Coleman approached Mr Callen. He discussed with Mr Callen various commitments he had coming up in July and August. Those were known to Mr Callen due to leave which Mr Coleman had organised. They involved a holiday organised by Mr Coleman for his wife and himself in the Maldives. They were to fly there and return business class. There was a family wedding taking place, a weekend city break to Berlin and he was going to a music festival in Perth, Scotland. Mr Coleman expressed concern at the level of expense he was undertaking. He highlighted to Mr Callen the business he had obtained in period April, May and June. He also drew his attention to the pipeline which meant that there was work to come in.
35. Mr Coleman sought a payment from the respondents in this discussion. Mr Callen viewed the request as being made by a friend, an employee with whom he had a good relationship and a work history. He wished to encourage him. He could see a degree of improvement in the figures Mr Coleman was achieving by this point. He therefore agreed that a payment would be made by the respondents to Mr Coleman. Mr Coleman proposed a payment of £2,000. Mr Callen countered with a figure of £1,000. The figure which Mr Callen ultimately offered was £1,400. This was agreed. It was to be paid in the payment run at the end of July. It was not a payment of commission. Although these words were not specifically said, it was a discretionary payment which would be taken into

account if and when any future payments of commission were payable to Mr Coleman. It was not a figure calculated with reference to the commission agreement, or any variation thereof, in the contract between Mr Coleman and the respondents. The payment was made to Mr Coleman at the end of July 2019. In fact, Mr Coleman's financial position was relatively strong at this point. He did not however discuss any detail of that or any personal financial figures with Mr Callen

36. At time of the discussion in June between Mr Coleman and Mr Callen, Mr Coleman had been interviewed by Scottish Enterprise for a post as account manager. He had been offered this position, subject to references. This had happened in early June. The text at SC5 confirms that. Mr Callen was unaware of this, however, when he agreed that the respondents would make the payment mentioned of £1,400 to Mr Coleman. Had Mr Callen been aware that Mr Coleman had been offered the role with Scottish Enterprise, he would not have agreed to the payment.
37. Mr Callen was then approached by Scottish Enterprise for a reference in relation to Mr Coleman. This was by email of 21 June 2019. A copy of that email appeared at R68. The email stated that the writer had "*interviewed Jim Coleman for the role of account manager with Scottish Enterprise. We are delighted to offer Jim the role and he put you down as one of his references...*"
38. Mr Coleman had spoken with Mr Callen to inform him of the situation and that he was to receive a request for a reference. This was done on 18 June 2019 or certainly before lunchtime on 20 June. This is confirmed by the emails at SC9 and 10.
39. Having agreed to make payment to Mr Coleman of £1,400, Mr Callen decided to honour his word. He was also hopeful that Mr Coleman might ultimately not submit his resignation and might remain an employee. An order which was significant in financial terms was obtained by Mr Coleman from Business Stream on 25 June 2019, as confirmed in the text at SC14. This would assist Mr Coleman in meeting targets.

40. The payment was made on 31 July. Later that day Mr Coleman submitted his resignation. I heard no evidence that he made any reference to the payment of £1400. He took up the post with Scottish Enterprise.

Events after resignation

41. Mr Coleman did not raise with Mr Callen any issue over payment of £1,400. He did not say that he thought the payment was to be commission at 50% on net profit, applying the £5,000 target threshold, for April May and June. The first time the payment of £1,400 was stated to have been a commission payment was in an email from Mr Coleman of 25 September 2019, C20. That email is part of a chain of emails which starts, chronologically, at C22, an email of 25 September, and runs to C17, an email of 8 October.
42. Those emails deal with holiday pay and expenses, matters which have since been resolved between the parties. In relation to the question of commission, Mr Coleman raises his position that some commission is due. This is in his email at C21, on 25 September. By reply of the same date, Mr Callen. Mr Callen replies that day, saying *"I didn't think anything was due but will look at the figures over the 11 months."*
43. In his email of 25 September, for the first time Mr Coleman said that the target of £5,000 per month was agreed as starting in April 2019, He referred to the sum of £1,400 as being commission paid. This email appeared at C20. He said:-
"...I have broken down the commission due from April which was the agreed start date for the purpose of targets (£25,000 target). Looking back at payslips I think the only commission that has been paid to date was £1400 in July."
44. Mr Callen replied that evening saying:-
"Tallied the sales invoices from 1 October 2018 to 31 August 2019 and the total profit is approximately £46,000.
The monthly profit target was £5,000 which means £55,000 should have been reached before any commission be paid (sic)
No further payments are due to you."

45. Mr Coleman emailed on 7 October. He said:-

“As per our agreement the targets and commission started from April 2019 not October 2018, if this wasn’t the case and I was underperforming then I wouldn’t have received any commission. The payment received in July matches the agreement we had in place.”

46. The final exchanges happened that day. Mr Callen replied saying:-

“That was not the agreement.

You received more money that you were due.

47. Mr Coleman responded. He said:-

“That’s fine. We both know that was the agreement and the commission payment shows that was the case.”

The issue

48. The issues for the Tribunal were:-

1. What was the agreement between the claimant and the respondents as to commission payable by the respondents to the claimant? Specifically, was a “threshold target” of £5,000 per month net profit applicable from commencement of employment or from April 2019? The nature and circumstances of the payment of £1,400 would require to be considered.
2. If any sum was due by the respondents to the claimant by way of commission what was that sum?

Applicable law

49. To assess whether a contract of employment exists, a Tribunal will require to consider if there was express or implied agreement, implied agreement being by conduct. Not replying to or not signing a contract of employment presented by an employer but appearing for and carrying out work constitutes acceptance of the terms of employment offered. This is confirmed in *Collymore v Capita Business Services Ltd* (“Collymore”) EAT 162/98A. This is, of course, provided

that there is certainty as to the terms of employment and that there is no illegality in the contract terms.

50. If it said that the written terms of a contract of employment say one thing but a different thing was agreed verbally, a Tribunal must consider and assess the evidence carefully. In the absence of some evidence which supports the verbal variation or contradiction argued for, a Tribunal is likely to be slow to find that variation or contradiction was in fact agreed. An example of a case of that type in that of *Prometric v Cunliffe* (“*Prometric*”) 2016 IRLR 776.

Submissions

Submissions for the claimant

51. Mr Coleman highlighted that he had had concerns about the first few months in the job with the respondents and the difficulty he would face in generating business. That was why, he said, the contract remained unsigned. He said that there was an agreement that for 6 months there would be no targets in place. The contract did not reflect that. That was why it was unsigned. One paragraph required to be changed.
52. As for the payment of £1,400, it was incorrect that he had financial issues at the time. There had been no description of the payment as being “discretionary”. That term had only been used when it became necessary, Mr Coleman submitted, to create a story around the payment.
53. In summary, said Mr Coleman, he and Mr Callen had worked well together, he had obtained good clients, there was an agreement in place in relation to commission. Mr Callen had not fulfilled that. Payment ought to be ordered as claimed.

Submissions for the respondents

54. Ms Greig reminded the Tribunal that for a contract to be formed there required to be an offer and acceptance. In addition, the contract required to sufficiently certain in its terms to enable what had been agreed to be identified.

55. In this case an offer had been made in August with the terms being set out. Those terms included rolling targets for commission. That offer had been accepted. There had been no counter-offer. The claimant had started work.
56. There were credibility issues for the Tribunal to determine, Ms Greig said.
57. In assessing those, the Tribunal should keep in mind the conflicts in the claimant's evidence and the discrepancies in it.
58. The claimant said he had not received the email of 15 August, or that he had not seen it. He appeared however to be saying that changes he had sought had not been made and this was why the contract had remained unsigned. He denied receiving a hard copy. On his evidence the first time he received a copy of the contract would have been 28 October. His evidence that he had not signed that document as changes required to be made to it, and had not been made, only made sense however if he had in fact earlier seen the document to enable him to request the changes.
59. The respondents' evidence was clear. The contract had been sent, given in hard copy and then sent again, all in the same terms. There was no issue taken by the claimant in response. The evidence from the respondents should be accepted.
60. The Tribunal should recall the emails at R3, 4 and 5. Those showed that the claimant regularly used his hiav work email whilst a consultant. He would have seen the email of mid-August with draft contract.
61. Further, if he had an issue with the target figure commencing at the start of his employment, it was strange that he did not raise this until September 2019.
62. The claimant was an experienced businessman. He was experienced in sales. He had run his own business, which he had sold. He advised businesses. He described himself in evidence at Tribunal as naive, when asked about not having raised his issue with targets starting from the beginning of his employment with the respondents. The Tribunal should not accept that.
63. It had been the claimant's evidence that on getting the contract on 28 October he had disputed the commission arrangement. Texts shortly afterwards were

friendly however, with no suggestion of disagreement. Nothing existed from the claimant saying something such as “hang on, this is not as we agreed” or “we need to change this, I don’t agree it”.

64. The position was, therefore, that the claimant had 3 copies of the contract, on the respondents’ evidence. He had started work without objection being intimated. Ms Grieg referred to the case of *Collymore*. The Tribunal should regard the principles set out in that case as being applicable to this case and should dismiss the claim.
65. The claimant’s position was that the written agreement was contradicted by a verbal one. The case of *Prometric* was of relevance, Ms Greig submitted. It confirmed that an oral agreement which differed from the written agreement would difficult to accept as being applicable when such a written agreement was available.
66. Here, the issue was the important one of commission. It was extremely unlikely that there was an agreement in the terms contended for by the claimant in circumstances where there were no texts or emails supporting that. In fact, what existed was written evidence in the contract which supported the respondents’ position.
67. Mr Callen had given evidence of the arrangement in this case being of a type normal in sales situations. Targets had to be there for a sales role. Otherwise a sales-person was simply a cost.
68. Although the claimant had referred to working with the respondents without a contract in the past, he had not been an employee at that point.
69. The claimant had also referred to the emails in September 2019 at C18 and 19. He said those supported his version of what had been agreed. That was not so, however. The payment of £1,400 did not reflect what he said had been agreed. It was not 50% of net profit if the rolling target was stripped out. These emails did not lend support to the claimant’s position. The payment at £1,400 should be found to have been a discretionary payment as the respondents said.

Note

70. Both parties made brief submissions on the sum due. They differed as to calculation of any sum which might be awarded. Their submissions are not recorded given the decision reached in the case.
71. Mr Coleman accepted that if the rolling target was found to have applied from commencement of his employment no sum was due to him.

Discussion and decision

72. This case boiled down to a dispute as to when the rolling target arrangement commenced. That rolling target required Mr Coleman to achieve sales yielding £5,000 net profit per month. That was the threshold above which commission was to be paid. The question was whether this arrangement applied from commencement of Mr Coleman's employment or from April 2019, 6 months after commencement of his employment.
73. In terms of the contract the rolling target applied from commencement. That was something known to Mr Coleman, on the facts I found, prior to commencement of his employment and certainly at latest at the very outset of his employment. There was no written documentation supporting the target being disappplied for a 6 month period. There was, during the 11 months of employment, no written documentation taking objection to application of the rolling target from commencement of employment. There was nothing in writing reflecting a request for a meeting to discuss this point or referencing a meeting which was said to have taken place to discuss the point.
74. I had to assess what I believed on the evidence I heard and on the documentation to which I was taken in evidence.
75. Mr Coleman's evidence was that he had not seen and possibly had deleted the email of 15 August from Mr Callen sending him on a draft contract containing the rolling target provisions. This explained why he had not challenged that term being effective from day one of his employment. He accepted that the email had been sent to him.

76. I did not accept that evidence. Mr Coleman used the hiav work email account during his period of working with HIE. He remained a consultant with the respondents. There was a need or a driver for him to maintain a watching brief on that email account.
77. The email followed texts and discussions as to Mr Coleman joining the respondents. It contained the heading "Employment Contract". In one of the texts, (R48) referring to the discussion as to remuneration, Mr Coleman had said that Mr Callen should "*feel free*" to send over to him what he was thinking. That was on 7 August. In circumstances where Mr Coleman had invited that a document of this type be sent to him, I did not find it credible that he had overlooked or deleted this email. It seemed to me to be likely on the balance of probabilities that he had opened it and read the contract. Had he not received it, it would be reasonable in my view to have expected him to press or chase Mr Callen to send such a document to him.
78. Having concluded that Mr Coleman was aware therefore of the terms on commission payment was proposed, I noted that he did not take issue with them. That was perhaps not entirely surprising as they are in line with the terms mentioned in the text exchange to which I referred. R49, also on 7 August, references the financial arrangement for someone called Derek. The agreement then detailed is exactly what applied for the claimant, £20,000 with £5,000 profit target per month. Commission is said to be paid at the rate of 50% on everything above that, cumulating quarterly to even out the good with the bad months.
79. The terms of the contract sent on 15 August would not therefore have been a surprise to Mr Coleman. Had they been, he surely would have said so.
80. I accept that Mr Coleman was returning to this sector and had expressed concern about the initial period and ability to generate sales at that point. That concern makes it all the more likely, in my view, that if this was a fundamental issue for Mr Coleman he would have at the very least registered concern and sought to have the agreement varied or that it be documented that he had a "lead in" period.

81. My conclusion was that, perhaps with returning to “pick up” connections with some clients with whom he had previously worked, Mr Coleman was prepared to proceed in terms of the agreement with rolling targets applying from commencement of his employment.
82. I bore in mind throughout my assessment of the evidence and documentation in this case that Mr Coleman is an experienced businessman who has set up, run and sold his own business. He has provided business advice to companies and is an experienced sales-person.
83. Looking at evidence as to what happened at the beginning of October when Mr Coleman joined the respondents, I concluded on balance of probabilities that Mr Callen had indeed handed a hard copy of the contract of employment to Mr Coleman.
84. Mr Coleman said this had not happened. Mr Callen, however, gave credible evidence of his discussion with the Mr Coleman at this point. He said that Mr Coleman had said that he still needed to go over the details with his wife. I pause to note that this evidence supported a finding that Mr Coleman did have a copy of the contract from the August email.
85. This evidence as to Mr Coleman still requiring to go over the contract with his wife was, in my view, not subjected to challenge to any significant extent. In so stating I keep in mind that Mr Coleman was acting on his behalf and is not legally qualified. The manner in which the evidence was given by Mr Callen, the reaction to it from Mr Coleman and the questions asked about it led me to conclude that Mr Callen's evidence on the point was credible. I also regarded it as reliable. I therefore found that a hard copy of the proposed contract of employment had been given to Mr Coleman by Mr Callen at the beginning of October 2018 when Mr Coleman commenced employment with the respondents.
86. I then turned to events on 28 October. Mr Coleman accepted he did receive a copy of the contract of employment that day, by email. Mr Coleman said he registered with Mr Callen that the document did not reflect the agreement on

rolling targets. He did this verbally he said. Mr Callen denied that this had happened.

87. It was notable that there was nothing in writing expressing disagreement with the provision in the contract. That was the case both at this point and in fact throughout the 11 months of employment. It is true that Mr Coleman did not sign the contract. He carried on working however, aware of its terms and without registering anything in writing by way of objection. He gave no evidence of following up any challenge to the terms.
88. On balance, on the evidence I heard I did not accept that there had been a challenge to the contract terms by Mr Coleman in relation to the rolling targets at the end of October or at any other time. There is a clear written provision. Mr Coleman was aware of it. He commenced and continued working in the knowledge of that clause.
89. On that basis, the term as to rolling targets being applicable from commencement of the contract, the claim fails. There is however the question of the payment of £1,400. Might the facts in relation to that alter the view just expressed?

Payment of £1,400

90. My view as to what had been agreed as commencement date for rolling targets might have been different had the payment made to Mr Coleman in July 2019 proceeded on the basis of it being 50% of net profit for April, May and June, without reference to "accumulated" target figures. It would have been highly persuasive of there being no rolling target for the first 6 months if the payment made in July had been labelled commission and, in particular, if it had been calculated on the basis of application of the target of £5,000 per month applying from April and not before that. That however was not the position.
91. The figure was what appeared to be an arbitrarily selected sum of £1,400. Mr Coleman argued that the payment comprised 20% of net profit figures in excess of £5,000 for those 3 months. The respondents disputed the arithmetic as being accurate, in that they said the net profit figure used by Mr Coleman to support his calculation included orders paid in July. Mr Coleman appeared to argue that

as the payment was made in July it should include orders paid in July. This seemed to have formed the basis of his view that there had been a percentage applied of 20%.

92. I struggled to see a reason why Mr Callen, assuming the claimant to be correct, would have decided to restrict commission due from 50% to 20%. The only material before me as to possible rationale was set out by Mr Coleman in cross examination of Mr Callen. That was that Mr Callen had agreed Mr Coleman would receive 50% as commission, but had then cut that back to 20% as a means of "*hedging his bets*". That was said to reflect the desire of Mr Callen not to upset Mr Coleman by paying him nothing (guaranteeing he would leave). Equally Mr Callen did not wish to pay the 50% agreed. This was said to be so as there was the risk that Mr Coleman might be leaving. Given that dilemma, Mr Callen had opted to make payment at 20%. That, however, would not be a particularly wise step to take if there was any desire on the part of Mr Callen to retain Mr Coleman as an employee. It was a thought process disputed by Mr Callen.
93. I did not see that theory of Mr Coleman advanced in cross examination as credible. If Mr Coleman had agreed with Mr Callen that commission would be paid at 50%, as he said had occurred at a meeting in June, he then received less than half of that when the sum of £1,400 was paid to him. He therefore received a payment in breach of Mr Callen's agreement with him, and in breach of the terms of his employment contract (as he regarded it). Payment was made on 31 July. Mr Coleman said in evidence in chief that, on noting the payment in his account, he "pushed back" but was told "it is what it is". That was the tipping point and caused him to resign, he said. His letter of resignation was not before me. There was no reference in evidence to it "taking Mr Callen to task" on, as Mr Coleman had it, breaching his word and the employment contract. On the documents and evidence before me, nothing was written by Mr Coleman, whether text, email or note, until the email of 25 September. That referred to 20% being a payment which "*matched the agreement in place*". That comment sits ill with there having been an agreement to make payment at the rate of 50%, that agreement then having been ignored with payment at 20% substituted.

94. I weighed the evidence from Mr Coleman and Mr Callen, including within that their evidence under cross examination. I did not find this passage of evidence from Mr Coleman credible or satisfactory. I accepted the evidence from Mr Callen that there had been a discussion between himself and Mr Coleman as to expenses which Mr Coleman had in the near future. Mr Callen had then agreed to pay Mr Coleman £1,400, not as payment of commission due at whatever percentage, but as a discretionary payment. I accept that that label was not attached to it, but that is, in my view on the evidence, what the nature of this payment was.
95. I accepted Mr Callen's evidence as to how the sum of £1,400 was arrived at. There had been proposal and counter proposal of £2,000 and £1,000, with the decision by Mr Callen being to go to a sum less than "*splitting the difference*", as Mr Coleman had proposed. That sum was £1,400. This evidence was clear and cogent. Mr Callen explained that he wished to encourage Mr Coleman, saw a future for Mr Coleman with the respondents, was aware that figures had improved to a degree and that the marketing executive had started, bringing assistance to obtaining of business.
96. By the time payment was due, it had become clear to Mr Callen that Mr Coleman was likely to move. Payment was made however as Mr Callen wished to keep his word. He also hoped Mr Coleman might yet stay with the respondents. Mr Coleman submitted his resignation shortly after the sum of £1,400 reached his bank account.
97. As mentioned, Mr Coleman said that payment at what he stated was the reduced level of 20% was what had finally caused him to resign. I also found this difficult to accept. All the texts exchanged between Mr Coleman and his new employers from June onwards proceeded on the basis of the job being offered to and accepted by Mr Coleman as far back as June, subject to references.
98. The assessment therefore of the evidence as to payment of £1,400 to Mr Coleman did not cause me to alter the view expressed above. I therefore confirm that in my judgment the agreement between Mr Coleman and the respondents was that the need to exceed £5,000 per month in net profit from

sales before commission was payable to Mr Coleman was in place and effective from commencement of Mr Coleman's employment with the respondents. That monthly figure accumulated insofar as not met in one month. The cumulative figure relative to the 11 month period of Mr Coleman's employment was not exceeded by net profit generated.

99. No commission is due to Mr Coleman and the claim is therefore unsuccessful.

Employment Judge: R Gall
Date of Judgment: 12 October 2020
Entered in register: 26 October 2020
and copied to parties