



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109814/2021

Held via Cloud Video Platform on 29 and 30 November 2021

Employment Judge M Brewer

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Mr K Stewart

**Claimant
Represented by
Mrs D Stewart**

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**Saint-Gobain Building
Distribution Limited
T/A Scotframe Timber**

**Respondent
Represented by
Mr O Lawrence, Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON REMEDY

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For the reasons given orally at the hearing on 30 November 2021 the claimant's claim for breach of contract succeeds and the respondent shall pay to the claimant the following agreed sum by way of compensation: £10,084.00.

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's claim for breach of contract succeeds.

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E.T. Z4 (WR)

REASONS

Introduction

5 1. This case came before me before a hearing over two days to consider the claimants claim for breach of contract. The claimant was represented by his wife Mrs D Stewart and the respondent was represented by Mr O Lawrence, Counsel. I heard evidence from the claimant and on his behalf from Mr W Johnstone who was, at the material time, the respondent's finance director, and from Mr M Thompson who was, at the material time, respondent's sales
10 director. I was also provided with a witness statement from Mr A Fraser but as he was not present to be cross examined, I have given that appropriate weight. For the respondent I heard from Mr I Winroth, who, at the material time, was the respondent's managing director and from Ms E Watson, who, at the material time, was the respondent's HR manager.

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2. I was provided with a bundle of productions the claimant also provided several more productions and I have taken those into account in reaching my judgment. Finally, I heard submissions from both representatives which I have also taken into account.

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Issues

3. The parties agreed that the sole issue before me was whether the respondent was in breach of contract in not paying commission to the claimant for the period from January 2020 until the termination of his employment in March
25 2021.

Relevant Law

4. The relevant law is contained in **The Industrial Tribunals Extension of Jurisdiction (Scotland) Order 1994.**

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5. The relevant Articles of the Order are as follows:

“Extension of jurisdiction

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 Scotland 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.

Manner in which proceedings may be brought

6. Proceedings on a contract claim may be brought before an industrial tribunal by presenting a complaint to an industrial tribunal.

Time within which proceedings may be brought

7. An industrial tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

Limit on payment to be ordered

10. An industrial tribunal shall not in proceedings in respect of a contract claim, or in respect of a number of contract claims relating to the same contract, order the payment of an amount exceeding £25,000.

6. I shall refer to case law in the discussion below.

Findings in fact

7. Given the limited scope of the issues in this claim I need to make only brief findings of fact.
- 5 8. The claimant began employment with what was then Scotframe Timber Limited on the 5 June 2017. He was employed as an estimator and in that role he was required to provide estimates for work to be undertaken by his employer.
- 10 9. In October 2018 Scotframe Timber Limited was acquired by the respondent and that acquisition was a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Thereafter Scotframe Timber became a trading name used by the respondent.
- 15 10. The claimant's employment throughout his period of employment was governed by a contract of employment which he signed on 5 June 2017, and which starts at page 34 of the bundle. There was an attempt by the respondent to give the claimant a new contract in 2019 but for various reasons the claimant did not accept the new terms and conditions and I find
20 as a fact that his original contract continued throughout his employment.
- 25 11. The claimant, as with all of the estimators employed by the respondent received a basic annual salary but was also eligible to participate in a commission scheme. The key features of the scheme were that an estimator would receive a percentage of an accepted estimate and a percentage of the job price if an estimate turned into work. Those percentages formed the commission payable under the scheme. Payments made under the scheme were made in July and December each year. Until 2020 payments had always been made under the scheme.
- 30 12. On 11 June 2020 Mr Winroth announced to employees of Scotframe Timber that because of the downturn in business as a result of the pandemic a number of actions were being taken which included redundancies and other

measures such as freezing recruitment and limiting the use of temporary labour. Mr Winroth's announcement also contained the following:

5 *"if you have bonus or Commission schemes that are based on criteria such as... productivity measures, sales targets... that are paid monthly, quarterly or some other frequency, then they will also cease. Anything earned in the period Jan-June will be held until year end for any possible payment though subject to overall profitability..."*

10 13. On 8 February 2021 Mr Winroth wrote to the claimant following the above announcement and amongst other things stated that:

15 *"I am writing to confirm the final decision in relation to the full period Jan to Dec 2020. As you know last year was an incredibly challenging year which had a severe impact on Saint-Gobain, on our Division and specifically on Scotframe... the final decision is that no commission or bonus payments will be made for the period Jan to Dec 2020..."*

20 14. The claimant gave notice of resignation from his employment with the respondent on 21 February 2021. His employment terminated on 19 March 2021.

25 15. The claimant commenced early conciliation on 22 March 2021 and received his early conciliation certificate on 3 May 2021. The claimant presented his claim to the Employment Tribunal on 28 May 2021.

Observations on the evidence

30 16. The evidence in this case was not really in dispute and I found all the witnesses to be credible. The claimant's case is simply that he was not paid the commission he earned during 2020 and early 2021, and he says that the non-payment amounted to a breach of contract. I do not doubt his sincerity. The evidence of Mr Johnstone and Mr Thompson was consistent about how the scheme operated and the fact that payments under the scheme had always been made irrespective of the performance of the respondent. The position of the claimant and his witnesses was that the commission was
35 based on individual performance not the performance of the respondent.

17. The respondent's case, as set out by Mr Winroth and Ms Watson that the wording of the claimant's employment contract entitled the respondent to vary the terms of the commission scheme provided three months' notice of the variation was given, and to decide, in the discretion of the respondent not to make any payment whatsoever under the scheme, without having to give notice, because not making a payment under the scheme did not amount to a variation of the scheme.

18. The burden of proof in a claim for breach of contract rests with the claimant and the claimant's evidence was that the non-payment was *per se* a breach of contract. The respondent takes the view that they were entitled to make no payment within the terms of the claimant's contract.

Respondent's submissions

19. Mr Lawrence's submissions were commendably short. In essence he relies on the wording of the contract which he says self-evidently entitled the respondent to determine at any point and for any reason not to make a payment of commission under the scheme. He submitted that the wording of the remuneration clause in the claimant's contract introduced necessary flexibility to account for the very circumstances which applied to the respondent as result of the fall in business in 2020 because of the lockdown which resulted from the pandemic.

Claimant's submissions

20. Mrs Stewart's submissions were that even if the claimant's contract contained the flexibility contended for by Mr Lawrence, the decision not to make a payment under the scheme amounted to a change or a variation and that required 3 months' notice to be given, and as no notice was given the change was ineffective. It follows that the failure to make a payment was a breach of contract.

Decision

21. The relevant part of the claimant's contract of employment is in the clause headed 'remuneration' [page 34 of the bundle]. So far as material this clause includes the following wording:

5 "*You will be eligible to participate in the Estimators Commission Scheme, full details of which will be provided by the Sales Director. At the absolute discretion of the Company the Estimators Commission Scheme can be amended at any time and payment of commission during one period will not imply payment in any future period. You will*
10 *be given three months notice of any change to the Estimators Commission Scheme*"

22. It falls upon me to construe what this clause means.

15 23. Some of the wording in the clause is of course uncontroversial. The claimant had a contractual right to participate in the Estimators Commission Scheme. The clause says that full details of the scheme would be provided and on the evidence I heard I am satisfied that the scheme operated as I have set out in my findings of fact which is to say that the estimators received a percentage
20 of their estimates and a percentage of estimates which turned into actual work. Commission was paid twice a year, in July and in December. The scheme was therefore entirely related to individual performance and not based upon the performance of the respondent.

25 24. It is also clear that the respondent retained an absolute discretion to amend the scheme.

25. There remain two outstanding questions. The first is whether the respondent retained an absolute discretion not to pay commission, and the second is
30 whether, if so, the respondent had to give three months' notice of its decision not to make a payment?

Did the respondent retain an absolute discretion not to pay commission?

35 26. The respondent contended that the words "*payment of commission during one period will not imply payment in any future period*" mean that the

respondent retained the discretion not to pay commission at any point. I have considered whether the words "*At the absolute discretion of the Company...*" relate only to the words "*the Estimators Commission Scheme can be amended at any time*" or whether they also relate to the words "*payment of commission during one period will not imply payment in any future period*".
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No evidence or submission was given or made on that point, and it was unclear to me whether Mr Lawrence was contending that the discretion to not make a payment was inherent in the words "*payment of commission during one period will not imply payment in any future period*" or whether he was
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relying on the words "*At the absolute discretion of the Company...*" as giving the respondent the discretion he contends for.

27. Having considered the drafting, relating the words concerning the absolute discretion with the wording relating to future payment would mean that the
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clause read as follows: "*At the absolute discretion of the Company... payment of commission during one period will not imply payment in any future period*". In my judgement that does not make sense because that would mean that it was at the respondent's discretion whether past payment did not imply future payment, but that is not what the latter wording suggests, and it seems to me
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that either the wording relating to future payment inherently contains the discretion contended for or it does not. Therefore, I conclude that it falls to me to determine whether the words "*payment of commission during one period will not imply payment in any future period*" in the claimant's contract of employment give the respondent the absolute discretion to make no payment
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of commission under the scheme.

28. Contractual terms relating to bonuses and commission should be interpreted in line with the meaning they would convey to 'a reasonable person having all the background knowledge which would reasonably have been available
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to the parties in the situation in which they were at the time of the contract' (see **Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)** 1998 1 WLR 896, HL). This means that if a term is badly drafted and its literal interpretation would lead to a result that had clearly

never been intended by the parties, it should be interpreted by taking into account the context and commercial background behind it (see **Chartbrook Ltd and anor v Persimmon Homes Ltd and anor 2009** 3 WLR 267, HL).

5 29. One difficulty with the respondent's case is that the wording relied upon does
not include the word 'discretion' nor any words which directly convey that
meaning. Mr Lawrence for the respondent says that the words themselves
mean that there is a discretion. In other words he says that telling an
employee with the relevant clause in their contract that the fact that they have
10 received payments of commission under the scheme in the past does not
imply that they will receive payment of commission earned under the scheme
in the future is, in and of itself, discretionary wording; that is to say the wording
should be read as meaning that at any time and for any reason the
respondent can in its absolute discretion determine not to pay commission
15 which has been earned.

30. Much of the case law dealing with discretion in contractual clauses is centred
around what particular wording means, but one thing which emerges from a
number of the leading cases is the need for clarity and certainty in drafting if
20 an employer is to have an untrammelled discretion to alter, amend or vary a
contractual right. For example, in **Horkulak v Cantor Fitzgerald
International 2005** ICR 402, CA, the Court of Appeal held that, although a
clause in the claimant's contract stated that the employer 'may in its
discretion' pay a bonus, Mr Horkulak was entitled to receive damages in
25 respect of the amount that, but for his dismissal, he would probably have
received. The Court of Appeal held that the clause was contained in a
contract relating to a high-earning and competitive activity in which the
payment of discretionary bonuses was part of the employer's remuneration
structure and was designed to motivate and reward the employee. In such a
30 case, the bonus clause is necessarily to be read as a contractual benefit to
the employee, as opposed to a mere declaration of the employer's right to
pay a bonus if it so wishes.

31. In my judgment, if an employer is contending that it has any discretion in a bonus or commission scheme, the wording of that discretion should be clear. It is not clear to me that the words "*payment of commission during one period will not imply payment in any future period*" do amount to a discretion to allow the respondent to make no payment under the scheme.

32. It must be remembered that the purpose of the scheme is clearly to incentivise estimators, because the payment under the scheme is based upon their individual performance and that performance is wholly financial. There is no element of subjectivity in the calculation of commission. It is calculated on a wholly objective basis. So, it follows that if there is a downturn in business such that no jobs are in the pipeline, the estimators' commission under the scheme will reduce, potentially to zero. It also follows that if commission is being earned then jobs have been obtained following estimations. One effect of this is that the need for the flexibility of the discretion not to make a payment which the respondent contended for, that is to say in circumstances where there is no work, simply holds no water, because if there is no work there is no, or there is at least limited, commission. As with the case of Mr Horkulak (above), the commission is a contractual benefit to the employee, it formed part of the respondent's remuneration structure and was designed to motivate and reward estimators. To allow for the respondent's construction of the clause would in effect be to give the respondent such wide discretion that the contractual right to benefit under the scheme would amount to no more than a declaration that notwithstanding that an estimator had earned commission under the scheme, the respondent may or may not pay it.

33. It was put to Mr Winroth that the nature of the discretion the respondent contended for meant that for no or no good reason, and at any time, without any prior notice or discussion with any employee who benefited from the scheme, and notwithstanding that commission could have already been earned under the scheme, the respondent could simply decide not to pay. His response was that as a reasonable employer the discretion would only be

exercised in extreme circumstances. That may be entirely laudable as a principle but that would not be the effect of the clause if I accepted the respondent's argument. The wording does not say the respondent may determine not to pay commission if, for example, profitability falls below a certain level. Moreover, and as I have set out above, the scheme is entirely individual and wholly unrelated to the respondent's economic performance.

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34. Whilst not wholly on the point, there are a number of cases dealing with an employer's discretion to withhold bonus payments upon termination of employment. For example, in *Peninsula Business Services Ltd v Sweeney* 2004 IRLR 49, EAT, a sales executive's written contract provided that, upon leaving employment, he forfeited any right to commission earned but not yet due for payment. The EAT upheld this term on the basis that, although it might be onerous, the language was clear, and the employee had signed the contract to indicate his consent. The employer did not need to show that the employee had actual knowledge of the full effect of what he was signing.

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35. However, in *Brand v Compro Computer Services Ltd* 2005 IRLR 196, CA, the Court of Appeal held that such clauses should be interpreted in accordance with business common sense. In so doing it queried whether an employee would be willing to accept that he or she would not be entitled to more than the modest basic salary for the final period of employment if the employee had worked hard in the month preceding the termination of the employment and achieved all sales targets. The Court went on to hold that the employee in the case before it, B, who had been summarily dismissed by his employer, remained contractually entitled to the payment of commission that he had earned prior to the termination of his employment, notwithstanding a contractual clause which stated that he would 'remain in full-time employment with [the employer] at all times in order to qualify for the commission payments'. The Court held that in the absence of clear words making it plain that any accrued entitlement to commission was dependent on the employee also being in employment at the date on which the

commission would be payable, it was not possible to accept that the parties had entered into a one-sided bargain that would have enabled the employer to avoid paying the employee commission that he had in fact earned merely by dismissing him before the date on which the commission fell to be paid.

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36. It seems to me that the proper construction of the words "*payment of commission during one period will not imply payment in any future period*" is, to put it in straightforward terms, something like "payment to you of commission in the past should not be taken to imply that you will receive commission in the future", and for the sake of clarity one could add the words "such commission has to be earned". In other words, the wording "*payment of commission during one period will not imply payment in any future period*" is defensive, its inclusion is not for the purpose of giving the respondent any discretion not to pay commission which has been earned, it is simply advising the employee and making it contractually clear that there is no implied right, for example through custom and practice, to receive any or any particular level of commission; commission under the scheme always has to be earned. To find in favour of the respondent's interpretation would be to conclude that a scheme designed to incentivise estimators to work hard, to earn income for the respondent and improve their own income by their own effort could be entirely undermined simply on the whim of the respondent (subject of course only to any implied limit on the ability to exercise a contractual discretion). It seems wholly unlikely that anyone would agree to such a provision.

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37. In this context I refer to **Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA** 2010 IRLR 715, CA in which the bank argued that the fact that it retained 'the right to review or remove this formula-linked bonus arrangement at any time' meant that the bonus was discretionary. But the Court of Appeal rejected this argument. In its view, the bonus clause reflected the language of entitlement, as seen from phrases such as 'you will... be eligible' and 'the above table is applicable to your 2008 bonus'. To suggest that all this entitlement was potentially removed by the words 'at any time' was not the most rational way to read the clause. If the bank had intended

that the 2008 bonus be discretionary, three short words at the end of a clause was not the way to convey that to the employee or the reasonable reader. Thus, the employee was contractually entitled to the performance-related bonus as the wording of the relevant contractual provision could not be interpreted as conferring a discretionary entitlement. The Court of Appeal stated that:

“if banks decide to reward their employees by means of purely discretionary bonuses then they should say so openly and not seek to dress up such a bonus with the language of entitlement qualified by a slight phrase which does not make it absolutely clear that there is in fact no entitlement at all”

38. In my judgment that is exactly the position the claimant would find himself in if I was to accept the respondent’s case, which I do not.

39. Note the respondent’s stated intention to replace the Estimator’s Commission Scheme, but in my judgment that never occurred, and I find that the Estimator’s Commission Scheme remained in place throughout the claimant’s employment. I also find, for the reasons set out above, that the respondent’s failure to pay to the claimant the commission he earned under the Estimator’s Commission Scheme for the period January to December 2020 and January to 19 March 2021 was a breach of contract.

40. It follows from the above findings that I am not required to answer the second question I set myself at the beginning of this judgment.

41. Given that the claimant was contractually entitled to commission, the claimant is entitled to receive as damages the commission he would have been paid under the scheme in the period referred to above (see **Addis v Gramophone Co Ltd** 1909 AC 488, HL).

Employment Judge

M Brewer

Date of Judgement

30 November 2021

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Date sent to parties

1 December 2021