



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Tinley

**Respondent:** Art Of Eco Ltd

**Heard at:** Cardiff

**On:** 24 February 2022

**Before:** Judge MM Thomas

## **Representation**

Claimant: Mr G Tinley, Litigant in Person

Respondent: Mr P Langston, Director of Respondent

**JUDGMENT** having been sent to the parties on 25 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## **Reasons**

### **Issues**

1. The Claimant's claim is for breach of contract. He asserts unauthorised deductions from wages in relation to arrears of pay, and inadequate notice as to the termination of his employment. In addition, he claims for the pension payment contributions that he asserts should have been made on his behalf by the Respondent during his employment.
2. The Respondent denies that there was a contract of employment, either verbal or written. It is the Respondent's case that no terms of contract were agreed. Alternatively, any agreement in place, was one dependent upon the Claimant's sales performance. In short, the Claimant's wages were based upon sales performance.

### **Proceedings to date**

3. The claim had previously been listed for final hearing on 23 July 2021. On that date the Respondent was represented by counsel, Mr Wincross. On the basis of what was set out in the Case Management Orders of that date, that

final hearing was adjourned and converted to a preliminary hearing as a result of the Respondent producing a large number of further documents. As a result, Case Management Orders were made which included orders pertaining to the filing with the Tribunal and serving on the Claimant/Respondent of (i) the Respondent's documents; (ii) any further documentation relied upon by the Claimant; and (iii) witness statement evidence. In addition, the issues for determination for this hearing were agreed. As such, I checked with both parties that what was set out therein was their understanding of the issues to be determined, which both parties affirmed.

### **Documents and Witnesses**

4. Neither party was legally represented. Mr Langston was one of two directors of the Respondent. The other director was his wife, Mrs Julie Langston. Mr Langston represented the Respondent at the hearing.
5. I took time to explain to both parties the format that would be adopted for the hearing and what would be required of them. I reiterated what my role was. I also explained to the Claimant that the burden of proof was upon him to prove his claim and losses.
6. The Respondent had provided a bundle of documents which ran to 77 pages ('Bundle A'). In addition, it relied upon the statements and documents provided when this matter was before the Tribunal on the 23 July 2021 ('Bundle B'). There were eight parts to Bundle B. I do not repeat what those parts included other than at the outset of this hearing I confirmed with Mr Langston that what was contained within Bundles A and B was the totality of the Respondent's documents.
7. The Claimant provided a bundle which ran to 37 pages. The bundle relied upon was exactly the same in form and content as that which had been before the Tribunal on 23 July 2021. When I checked the documentation with the parties Mr Langston was of the view that he had not received the Claimant's bundle. I referred him to the contents of the Case Management Orders made at the time of the Preliminary hearing on 23 July 2021. As previously stated, the Claimant's bundle remained exactly the same as the bundle that had been submitted for that hearing. The Respondent had had the benefit of legal representation at that time. No reference was made anywhere within the Case Management Orders that the Respondent was not in receipt of the Claimant's bundle. Paragraph 16 of the Case Management Orders directed for the Claimant to file '*any additional documents*' if he wished to do so, a direction which clearly implied that documents had already been provided. Further, although Mr Langston stated he had not received the Claimant's documents, he referred to the written contract of employment in his statement attached to an email to the Tribunal dated 20 January 2022. The contract of

employment was a document which had only been disclosed by the Claimant in his documents.

8. I was therefore entirely satisfied that despite Mr Langston's statement that he had not received the Claimant's bundle, that the Respondent had been sent it, and had been sent it some time ago. In any event, in order to ensure that Mr Langston had a copy of the Claimant's bundle before him for the purposes of this hearing I took a short break in the proceedings for the clerk to email the bundle to him.
9. I heard oral evidence from the both the Claimant and Mr Langston. No further witnesses were called. Both witnesses gave evidence under oath. The Claimant relied on the contents of his statement dated 26 February 2021. Mr Langston relied upon the contents of his statements (i) 'New Response to Graham Tinley's original claim' (page 4 – Bundle A); (ii) 'Events on the 10th November 2020' (page 8 Bundle A); (iii) 'How it all began' ( page 6 Bundle A); (iv) the ET3; (v) Response to the Claimant's email dated 12 December 2021; (vi) the contents of the document titled 'Fiat'; and (vii) the contents of the document regarding the contract of employment (Bundle B). Both witnesses amplified upon the contents of their statements/ written evidence in oral evidence.

### **Background**

10. The Claimant's case is that he was employed by the Respondent from 1 July 2020 in the role of sales director. The Claimant's appointment followed discussions with both Mr Langston and his wife, Mrs Langston, in early 2020. The plan was that he would start working for the Respondent from the 1 April 2020, but because of the impact of the COVID-19 pandemic, the Claimant's previous employer agreed to furlough him and as a result, he officially started working for the Respondent from 1 July 2020. In early 2020 when the parties had their discussions concerning the Claimant's appointment, the Respondent was engaged in negotiations with potentially three new customers, Brecon View, a Belgian company, and a contract under the Welsh government scheme. The Claimant's expertise was required to further these contracts and to play an integral role in bringing in further contracts for the Respondent. In short, the Claimant's role was to market and sell the Respondent's product.
11. The Claimant stated that it was agreed that as sales director he would be paid a yearly salary of £50,000, his expenses in connection with the role, and that the Respondent would pay a contribution towards his pension. In addition, he would be provided with a mobile phone and a company car. Further, in the event of termination of his employment, that he would be entitled to three months' notice. In summary, his terms of employment were the same as those of his previous job that he had left to come and work for the Respondent.

12. The Claimant stated that by a letter from the Respondent dated 21 February 2021, and received by the Claimant on 24 February 2021, his employment was terminated ('letter of termination'). No notice of termination was given by the Respondent.
13. At the date of termination, the Claimant stated that no wages have been paid to him other than the sum of £4650. Equally, no pension contributions had been made. Further, in that time, he did not receive a wage slip from the Respondent.
14. Mr Langston stated that the impact of the Covid 19 pandemic on the Respondent's business was significant. In short, there were constant cash flow problems. He described how effectively the company has been run on a month-to-month basis and instances where some creditors, for example, the supplier who provided the new mixer, agreed to forgo the £20,000-£30,000 that he was owed for it until the Respondent's business improved. Further, at the time, the Respondent had applied for various loans, '*bounce back loans*', to support it through the difficult financial period.
15. The Respondent's position was that there was either no contract of employment between the parties, or alternatively, if there was a contract, that any wages to be paid were based on the Claimant's sales performance. In short, if the Claimant made no sales, no wages were due.
16. The Respondent accepted that when the '*situation*' came to an end the Claimant had received in total £4650. Of that sum, £650 was paid before Christmas to the Claimant to help towards his rent, and the remaining £4000 paid when the '*bounce back loan*' was received. Of the £4000, £1700 was to recompense the Claimant for the expenses he had incurred, and £2300 represented his wages under the '*new*' terms from the start of January 2021.
17. In regard to the company car and mobile phone, it was accepted that it had been agreed that the Claimant would be provided with a car. The Respondent was not in a financial position to provide a company car of the type and standard that the Claimant wanted at the time of his appointment, however, by agreement, the Claimant was provided with Mrs Langston's car to use. It was the intention of the Respondent to provide the Claimant with a superior vehicle of his choice when the Respondent's financial circumstances improved. The Claimant was provided with a smartphone, a Samsung.

### **The Law**

18. There is a mistaken belief that for a person to be employed that the employment contract between the parties must be in writing, it does not have to be.

19. Section 230(1) of the Employments Rights Act 1996 defines an 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*'. S.230(2) provides that a contract of employment means '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*' ('s. 230 ERA 1996').
20. A contract of employment exists where an individual promises to perform tasks for another who in turn promises to pay that individual for the performance of those tasks. In short, a contract exists when there is
  - a. an offer;
  - b. an acceptance;
  - c. at least two parties;
  - d. an intention to create legal relations (by both parties);
  - e. certainty of terms; and
  - f. consideration.

### **The facts and my findings**

21. My starting point is the Claimant's employment status. It was not asserted by the Respondent that the Claimant was working for it on a self-employed basis. Mr Langston's argument at hearing was framed on the basis that the signature on the written contract of employment was not his signature and that the document had been, to use Mr Langston's terminology, '*doctored*'. On that basis, he asserted that there was no contract, and therefore there was nothing payable to the Claimant.
22. The factual evidence was that by mutual agreement the Claimant started to work for the Respondent on 1 July 2020 following discussions that took place earlier in the year. To undertake his role he was provided with a car and a mobile phone.
23. The Claimant was appointed to a specific role, sales director. Mr Langston's oral evidence was that in his role the Claimant was tasked to further the sales of the Respondent and bring in new clients. This role was accepted by the Claimant. I refer in particular to the letter of termination. In that letter it referred to what was said at the time that the parties entered into their agreement. Mr Langston wrote '*you said you would require £50K per annum, your previous jobs remuneration, a company car, of a certain standard, a mobile phone, and all the other trappings associated with your previous job.....*' thereafter the following paragraphs dealt with what Mr Langston asserted were the then agreed terms however, it finished with '*no contract, other than a verbal contract was in place, and we proceeded under the above conditions*'.

24. Equally, I refer to the minutes of the meeting of the 3 September 2020 ('September 2020 meeting'). The minutes were set out in the document dated 25 October 2021 and written by Mrs Langston ( page 12 Doc 11 Bundle A). In those minutes Mrs Langston referred to '*creating his employment on a.....*'.
25. That that was the position was also reflected in the documents submitted by the Claimant. In the business plan dated October 2020 (page 27 Claimant's bundle), which in oral evidence Mr Langston confirmed was completed by both himself and the Claimant, the Claimant was identified as the Respondent's sales director. In addition, the document within both parties' bundles, the document for submission to the Welsh government ('the Welsh Government document'), referred to the Claimant as the sales director.
26. Finally, it was not in issue that when the Claimant started with the Respondent on 1 July 2020 that the Claimant was provided with the '*tools*' to carry out his role namely, a car and mobile phone. Similarly, it was not in issue that the Respondent was prepared to pay to the Claimant all expenses associated with his role. The Respondent agreed that the Claimant could buy for himself a new chair and desk to perform his role. Similarly, that the Respondent would meet his expenses travelling to visit clients/customers, such as the trip to Yorkshire, or the hirer cost of a van to carry products, was not in issue.
27. A contract of employment was provided which the Claimant stated came into being on 10 November 2020 which was backdated to the 23/24 June 2020. The contract was signed by the Claimant, in addition, there was a signature on it on behalf of the Respondent however, Mr Langston vehemently denied having ever signed it. In short, he asserted that the document had been doctored.
28. Mr Langston had prepared an extensive statement dealing with this issue titled 'Events on the 10th November 2020' (page 8 Addition A). I accept on the signature comparisons that the signature on the signed contract is different to that of Mr Langston's signature on the other document he had adduced from 'Waterworks' (page 7 doc 6F Bundle A). Nevertheless, in his statement concerning this issue, he accepted, that the email sent from his email address dated 10 November 2020, with the subject line '*Graham Tinley contract of employment*', which stated '*yes looks okay to me*', was from him, however asserted he did not sign the contract (paragraph 12). To summarise, Mr Langston asserted that there was '*foul play*' on the Claimant's part, that he has constructed a '*false contract*' of employment and had managed to navigate the Respondent's computer systems to achieve this.
29. I find Mr Langston's evidence on this to be based entirely on supposition. I find it to be fanciful and one without any objective evidence to support it.

30. Further, I find the account he gives to be entirely inconsistent with the then continued relationship between parties. Mr Langston accepted that he had received from the Claimant on the 10 November 2020 the proposed draft of his contract of employment. He stated he was *'not pleased'* that the Claimant had undertaken to draft a contract for himself. He referred to his having been *'appalled by his audacity'* (paragraph 12) nevertheless, he thereafter took no action whatsoever in response. In short, no explanation was provided as to why then having had a *'few heated words'* and *'feeling extremely disappointed'* and feeling that the Claimant was *'trying this on'* that he took no action. Further and significantly, Mr Langston accepted that the terms set out in the contract of employment were the terms that had been verbally agreed other than, remuneration was dependent upon sales.
31. In any event as previously stated, the written contract of employment is not the only document which defines the terms of the employment relationship. A contract of employment may be written, oral or a mixture of both. Therefore, setting aside the issues identified pertaining to the asserted written contract, in short, even if I accepted Mr Langston's position that he never signed the contract, therefore, there was no written contract, this does not displace the existence of an agreement.
32. In short both Mr Langston's oral evidence, and the documentary evidence adduced entirely undermines the assertion that there was no agreement, that is, contract, in place. As set out in s. 230 ERA 1996, the fact that there was no written agreement does not mean that the Claimant was not employed.
33. The burden lies on the party claiming that no agreement was created to prove that no intent existed (**Edward v Skyways Ltd 1964 1 All ER 494**). I do not accept the Respondent's assertion that there was no agreement. I find that there was an offer and acceptance by both parties, a clear intention to create legal relationships, and terms were agreed. In summary, I find that there was an agreement for the Claimant to work for the Respondent from 1 July 2020 as its sales director and that a contract of employment was in existence.
34. As such, the issue is what was the *'consideration'*. In short, at the time, what were the terms agreed in regard the Claimant's remuneration. Are they as asserted by the Claimant? Or those as asserted by the Respondent in that the Claimant's wages were determinate upon his sales.
35. In oral evidence it was put to Mr Langston by the Claimant to explain what terms were agreed. Mr Langston did not dispute the terms were as identified by the Claimant; his oral evidence was *'you would be paid at the rate of 50K but as we had no money couldn't pay'*. Similarly, when Mr Langston was asked directly as to whether the Claimant had ever indicated he would be agreeable to work for no pay he replied, to summarise, that the arrangement was that the Claimant had agreed to work until the *'money grant/ loans'*

became available. In short, no reference was made to the payment of wages being subject to the Claimant's sales.

36. On the contrary, the Claimant stated that when he started work for the Respondent it was always on the basis that he would be paid. Nevertheless, he was aware that the Respondent was struggling financially and awaiting to receive a *'bounce back loan'* ('loan'). He referred to a conversation that he had with Mr Langston in July 2020 when his wages were first due. The Claimant was aware at the time that the Respondent's financial circumstances were poor. He therefore agreed that another colleague could be paid as opposed to him, and he would wait to when the loan came in to receive his wages. Nevertheless, there was never any suggestion that he agreed to waive payment of those wages. This conversation was not disputed by Mr Langston.
37. I do not intend to recite any further of the evidence, however, for the purposes of the decision I have taken into account all the evidence in the round.
38. Turning first to the annual salary. The Claimant stated that this was agreed at £50,000, the Respondent stated it was not.
39. I refer to the business plan document. Mr Langston did not provide an explanation as to why if this was not the agreed salary that in the cash flow projection section Mr Tinley's salary was identified as £4160 per month from October 2020 to March 2021 (page 34 Claimant's bundle).
40. Similarly, no adequate explanation was given as to why, if the Claimant was not entitled to any wages, Mr Langston sent the email on 6 November 2020 to the Claimant stating that he had been in contact with the accountant and he would check to see if the Claimant's wage slips could be backdated and that he be furloughed until March 2021 (page 17 Claimant's bundle).
41. Equally, no satisfactory explanation was provided as to why if no salary had been agreed, in the three meetings to which Mr Langston referred of 3 September 2020, 12 November 2020 and 11 December 2020 there was a requirement for a discussion in regard to the Claimant's salary. I refer to the September meeting and the reference in the minutes to *'we would look to creating his employment on a smaller wage but with a sales commission'*.
42. When I sought clarification from Mr Langston in regard the payment of the £4000 to the Claimant, he stated that it represented £1,700 for expenses owing, and £2,300 for wages. He referred to the discussions in the December 2020 meeting between Mrs Langston and the Claimant when it had been discussed and agreed, albeit the latter was not accepted by the Claimant, that the Claimant would take a smaller salary, a salary in line with that paid to another colleague, Mark Roberts, from 1 January 2021. In short, the



£2,300 represented the agreed net wages on 'new' terms from 1 January 2021.

43. I have found Mr Langston's evidence, both oral and written to be ambiguous and inconsistent. In short, I find the evidence in the main supports the Claimant's version of events.
44. In regard the date of termination of employment, Mr Langston asserted in both his statements 'New Response', and 'How it all began', that the letter of termination was one '*ending the situation*', as there was no contract. In oral evidence he put to the Claimant that he never asked him '*to finish*'.
45. On the basis of my finding that the Claimant was employed by the Respondent from the 1 July 2020 I find that the letter of termination was, and could only be interpreted by the Claimant, as one terminating his employment with immediate effect. I find that the statement within that letter '*your recent letter and actions have now cut off any further development going forward. Any support I would have offered, and my backing up of you and your goals with Art of Eco. Your letter of grievance has 'blasted out of the water' any idea of working together and going forward*' was definite and could only be interpreted as a termination of employment. I therefore find that the Claimant's employment was terminated by the Respondent on 24 February 2021.
46. In regard the amount of the salary, I am entirely satisfied and find on the basis of the evidence, that it was agreed at £50,000. That this was the position is supported by what was stated by Mr Langston in oral evidence and in the letter of termination, the business plan, and the minutes of the September meeting. I accept in the latter that no reference is made to the amount of the salary however, having considered the evidence collectively, the discussion centred upon the Claimant accepting a smaller wage, and potentially one which had an element of commission based on the sales made. Key however was the wording used. There was no indication that at the time there was any agreement to a change in the amount to be paid by way of salary which again is reflected in the business plan. I also found it of significance that the £2300 paid in January was from the Respondent's perspective a reduced salary.
47. In regard the meetings in September, November and December 2020 the Claimant did not accept that he agreed to any new terms in regard to his remuneration. The Respondent relied upon the minutes of the September 2020 meeting in respect of the same, and a handwritten diary entry (page 7 Doc 6A Bundle A). However, I find that what was written neither confirms nor denies any purported agreement. In short, it does not confirm any agreement to the 'new' terms by the Claimant.

48. In regard the assertion that the Claimant's wages were sales dependant again, other than Mr Langston's assertion that this was what was agreed, little evidence had been adduced in support of the same. The documentation that had been provided does not support Mr Langston's account. The only mention of '*sales commission*' is in the minutes of the September meeting.
49. Further, in regard as to why the Claimant did not chase his wages prior to when he did, I accept the truth of his evidence in regard to this. In short, he was waiting for the Respondent to be paid the monies from the loan. What became very evident in the course of the hearing was that Mr and Mrs Langston and the Claimant had been friends for many years. The Claimant had been privy to conversations pertaining to the financial difficulties that the Respondent was having during that time. I therefore accept the truth of his evidence that as a result, knowing the financial circumstances, despite his own dire financial difficulties, he did not press for his wages as he knew the loan would eventually come. In short, when it was paid in February 2021, and when he received only then the sum of £4000 from it despite the outstanding wages from July 2021, he chased what he was due.

### **Conclusion**

50. I find that the Claimant is entitled to his wages from the 1 July 2020 until the 24 February 2021 less the £2300 that he has already been paid.
51. The Claimant was entitled to a gross wage of £4,167 per month. From 1 July 2020 to the 31 January 2021 (7 months) his total gross wage was £29,169.
52. In February 2021 the Claimant did not work the full month. He received the letter of termination on the 24 February 2021. There were four working weeks in February. The Claimant did not work the remaining three days of the final week of February. The weekly wage was £961.54 deducted from which are the three days not worked (£961.54 divided by 5 and multiplied by 3 days). The total wage for February was £3541.95
53. The total wages due from 1 July 2020 to the 24 February 2021 totalled £32,711 from which must be deducted £2300, the wages paid, leaving the gross sum of wages outstanding at £30,411.
54. In regard to notice monies, the Claimant stated that his net salary would have been £3,041.71 per month. This was not challenged by the Respondent. Further, that he was entitled to three months' notice under the terms of his contract has neither been accepted or rejected by the Respondent.
55. I have preferred the evidence of the Claimant to that of Mr Langston. Mr Langston in the letter of termination when he set out what were the agreed terms of the Claimant's appointment indicated that the terms were to be

synonymous with those of his previous employ. His previous employment allowed him three months' notice of termination.

56. Although in evidence Mr Langston did not accept that he signed the contract of employment, in his statement, 'Events of the 10th November 2020' he accepted that the terms set out in it reflected what had been discussed, other than the wage was determined by sales. In the contract of employment, notice is dealt with. It provides for three months' notice on termination.
57. I refer to my previous finding, the Claimant's employment was terminated by the letter of termination received by the Claimant on 24 February 2021. His employment was terminated without notice. I therefore find that the Claimant is entitled to be paid three months' notice monies totalling £9125 as a result of the Respondent's breach.
58. A number of letters, albeit not directly referenced at the hearing, were relied upon by the Respondent in regard the Claimant's sales performance. I find this evidence immaterial to the issues under consideration and have attached no weight to it. In the main, the evidence appears to originate from persons who were in some way connected to the Respondent, in short it is very difficult to understand as to how they would have had any knowledge of the Claimant's performance in his role. In any event, not one of those persons attended at hearing in order that their evidence could be tested. Similarly, in regard Mr Langston's evidence on this, although he asserted that the Claimant failed to generate sales, nothing was done. In short, it is not consistent that if the Claimant was underperforming, or not performing that the Respondent would have tolerated that position.
59. Finally, the Claimant also claims for the pension contributions he believed that the Respondent should have made on his behalf. Albeit I accept that all employers are responsible for offering a pension scheme to employees nevertheless, a contribution is made by both the employer and the employee. The figure set out is one which has been provided by the Claimant but without any supportive evidence as to how it has been arrived at. In addition, it makes no allowance for the contribution that would be paid by the Claimant. The burden is upon the Claimant to not only prove his claim but also his loss, as this is a payment sought by the Claimant it is for the Claimant to evidence with the appropriate documentation. That had not been done. I therefore make no award on this element of claimed loss.

Employment Judge **MM Thomas**

Date 25 March 2022

**Case No: 1600269/2021**

REASONS SENT TO THE PARTIES ON 28 March 2022

FOR THE TRIBUNAL OFFICE Mr N Roche