



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MR C JOHNSON
MR C PENDER
MS S RADOVANOVIC

AND

Respondent
QERB ENERGY LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 2ND SEPTEMBER 2022
(VIA VHS
VIDEOHEARING)

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

MEMBERS:

APPEARANCES:-

FOR THE CLAIMANTS:- IN PERSON

FOR THE RESPONDENT:- MS S-J WOOD

JUDGMENT

The judgment of the tribunal is that:-

1400165/2022 - Mr C Johnson

1. Unpaid Commission – The claimant's claim is dismissed
2. Notice Pay – The claimant's claim for unpaid notice pay is well founded and upheld. The respondent is ordered to pay the sum of **£1848.00**

3. Redundancy – The respondent is ordered to pay the sum of **£1386.00**
4. Holiday Pay - The respondent is ordered to pay the sum of **£1524.60**

1400460/2022 - Mr C Pender

5. Unpaid Commission - The claimant's claim is dismissed
6. Notice Pay - The claimant's claim for unpaid notice pay is well founded and upheld.

The respondent is ordered to pay the sum of **£1750.00**

1401194/2022 - Ms S Radovanovic

Unpaid Commission – The claimant's claim is dismissed.

Reasons

1. By these claims the claimants bring a number of claims. The first is in relation to unpaid commission which is claimed by all three claimants.

Commission

2. The respondent company, which is no longer trading, is a green energy provider. The claimants were employed as sales advisors/surveyors. The claims relate to two schemes ECO3 and the Green Homes Grant (GHG) scheme. There was a standard 3.5% sales commission for the GHG campaign. It is not in dispute that until the last three months of their employment that the claimants had received commission payments arising out of the Green Homes Grant Scheme. The claimants' claim that these payments were contractual and that the failure to pay further commission is a breach of contract/ unlawful deduction from wages.
3. Included in the bundle is an email from Alex Mitchell dated 12th May 2022 which also asserts that the agreement was contractual. However Mr Mitchell has not been called to give evidence and the basis for that assertion is not at all clear. In addition there is an email from Mr Elsey setting out the "QERB Green Homes Grant Millionaire Club" which sets out benefits/rewards for achieving submitted sales of £1, £2, and £3 million; which are expressed to being addition to the commission which equates to 3.5 %. There is therefore no dispute that the commission scheme as asserted by the

- claimants existed. The dispute is whether any commission payment was contractual or discretionary. The claimants assert that it was contractual “by custom or practice”, the commission having been consistently paid prior to the last few months of their employment. There is no submission before me that if discretionary that the discretion was exercised irrationally or capriciously.
4. The basis of the respondent’s assertion that it was non-contractual is:
- i) The right to commission is not contained within any of their contracts of employment;
 - ii) There is no written commission agreement whether contractual or non-contractual;
 - iii) The payment was therefore discretionary;
 - iv) It depended upon the company itself being profitable;
 - v) That any commission was subject to clawback from earlier commission payments/schemes.
 - vi) The essence of the respondents position is that commissions were paid in advance of the company itself being paid which meant it was inevitable that there would be clawbacks if the company was not paid or had sums clawed back from previous payments. Whilst there is no formal agreement to this effect that reflects the fact that there was no formal or written agreement to any part of the scheme.
5. The test for whether a term can be implied by custom and practice is whether it was “reasonable, notorious and certain”. The claimants’ case essentially is that as it had always been paid that it met that test. The difficulty for the claimants is that there is no dispute that different commission payments related to the various different schemes and that there was no standard commission payment. The consequence is that in advance of any particular scheme there could no way of knowing if commission would be paid and if so how it would be calculated. The email from Mr Elsey referred to above was dated 21st January 2021 and the commission was therefore paid for something like six months before the respondent ceased to pay. In addition there is no suggestion that in relation to previous schemes that commission had been paid at a time when the company itself was not profitable. It follows that in my judgement, that in the absence of any express contractual entitlement that it could not be said that it was notorious or certain that commission would be paid in the circumstances the company found itself in the summer of 2021. Moreover (see *Duke v Reliance Systems Ltd 1982 ICR 449*) a benefit adopted unilaterally by a company will not necessarily become a contractual right even if granted for a number of years.
6. In the circumstances it is not necessary to set out the evidence in any detail but for the avoidance of doubt I accept Mr Elsy’s evidence that the respondent suffered a downturn in work, had very significant amounts owed to it, had significant sums

clawed back, and increasing debt leading to cease trading at the end of October 2021. It is likely to enter into compulsory liquidation very shortly.

7. It follows that in my judgement the right to commission as a contractual right cannot be implied by custom and practice; and as there is no express contractual term the respondent is not in breach of contract in failing to pay the commission and the claims for unpaid commission must be dismissed.

Notice Pay

8. Both Mr Johnson and Mr Pender bring claims for unpaid notice pay . Neither disputes that there was a redundancy consultation meeting at which they were informed that the GHGS was going to come to end on 31st October 2021 and understood that it was likely that the respondent would cease trading; and that there was a risk that they would be dismissed from that date. Both assert, however, that they received no formal notification of termination, and therefore have not received notice; and are therefore entitled to notice pay.
9. Mr Elsey's evidence is that letters giving notice were drafted and, as he understood it sent, although evidence he accepted that they had not been received. He contends that both must have known that their employment would terminate as they were on notice of potential redundancy and were not required to work from the date of the meeting.
10. Given that it is not in dispute that neither claimant received notice of termination prior to 31st October 2021 in my judgement they were entitled to notice at that point and their claims for unpaid notice pay are upheld.

Redundancy Pay/Holiday Pay

11. Mr Johnson has also brought claims for redundancy pay and holiday pay which are conceded by the respondent and judgment is entered by consent.

Employment Judge Cadney
Date: 15th September 2022

Judgment sent to the Parties on
21 September 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE