



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Kirby  
**Respondent:** Playfix Limited  
**Heard at:** East London Hearing Centre (via CVP)  
**On:** 21 September 2022  
**Before:** Employment Judge Dias-Patel  
**Representation:**  
**Claimant:** Mr Pickett (Counsel)  
**Respondent:** Ms Marsh

## RESERVED JUDGMENT

1. The judgment of the Tribunal is that the Claimant's claim for breach of contract by the following succeeds:
  - a. failing to pay the Claimant's work-related mileage expenses at the rate of 45p per mile for the first 10,000 miles then reducing to 25p per mile, for the following months in 2021: May and August to November;
  - b. failing to pay 5% of the value of all new business attributable to the Claimant during the course of his employment, including such business from existing and new clients.

## REASONS

### The Hearing

1. The issues to be determined by the Employment Tribunal were agreed at the start of the hearing as follows:

- a. What was the contractual agreement as to the calculation of the Claimant's mileage allowance?
  - b. What was the contractual agreement as to the operation of the commission policy set out in the contract of employment? In particular:
    - i. Did the agreement cover business arising from clients who were already such as at the date the Claimant commenced employment with the Respondent? (i.e. existing clients); and
    - ii. At what point, after the Claimant's employment contract was terminated, was commission no longer payable?
2. The Respondent confirmed that no counterclaim for breach of contract was being pursued.
  3. The Tribunal was provided with a bundle by the Claimant consisting of 212 pages, along with a witness statement from the Claimant and a witness statement from Ms Debra Randall, Finance Manager, on behalf of the Respondent.
  4. At the hearing, evidence was given by the Claimant and, for the Respondent, Ms Debra Randall.

## **Findings of fact**

5. The Claimant was employed by the Respondent as a Business Operations Manager from 1 October 2020 to 10 November 2021. By an ET1 received by the Tribunal Office on 17 February 2022, the Claimant commenced proceedings against the Respondent for breach of contract and unlawful deduction of wages for mileage expenses and commission. The Claimant had complied with the requirement under section 18A of the Employment Rights Act 1996 to contact ACAS before instituting proceedings on 7 December 2021 and ACAS issued a certificate to this effect on 17 January 2022. The Claimant therefore commenced proceedings within the required three-month time limit beginning with the effective date of termination of the contract of employment.

### *The relevant provisions in the contract*

6. The relevant express contractual provisions were not in dispute. They were as follows.
7. In relation to the commission scheme:

*You can earn commission under the commission scheme currently in operation. [Page 66 of the Bundle].*

*According to the policy on commission [Page 87 of the Bundle]:  
Commission available 5% of all new business attributable to you*

*Payment: personal commission is payable at the end of the month after payment received from the Client*

*Commission 'Claw-Back': PlayFix Ltd reserves the right to made [sic] adjustments to any future payments due*

*Amendments & Changes: Commission scheme terms may be changed giving not less than three months' notice.*

*You will only receive payment for any bonus or commission if payments are due under the term of the bonus or commission scheme [page 79 of the Bundle under "Pay in lieu of Notice"].*

8. In relation to being in receipt of a Company Car [Page 67 of the Bundle]:

*During your probationary period the Company will rent a car on your behalf.*

*Following the successful completion of your probationary period the Company will arrange for a lease vehicle on your behalf. Once you are provided with a Company Car in order for you to fulfil your job roles responsibilities you will be subject to the terms of the Company Cars as advised to you.*

*Fuel [mileage] Allowance which is calculated as per the current HMRC guidelines and is based on the type of fuel and engine size of the car.*

*For Guidance rates as of Sept 2020: 7.2.1 Petrol: up to 1400CC is 10p per mile, 1401 to 2000CC is 12p per mile, over 2000CC is 17p per mile*

*Diesel: up to 1600CC is 8p per mile, 1601 to 2000CC is 10p per mile, over 2000CC is 12p per mile*

*Up to date information can be found here: <https://www.gov.uk/guidance/advisory-fuel-rat>*

### **The mileage allowance**

9. As set out above, the contract of employment obliged the Respondent to provide Mr Kirby with a company car upon completion of his probationary period. It is not in dispute that such a car was not ever provided to Mr Kirby. Instead, Mr Kirby, at least from December 2021, used a privately bought car for business purposes. Mr Kirby's evidence was that, before starting to use his own car, he had a conversation with Mr Johnson, the Director of Playfix Ltd, to the effect that mileage costs were to be claimed at the rate of 45p per mile for the first 10,000 miles then reducing to 25p per mile in accordance with HMRC guidelines.
10. The Tribunal accepted Mr Kirby's evidence that this conversation took place and that the outcome of the conversation was that Mr Kirby and Mr Johnson agreed that mileage costs were to be reimbursed at the rate of 45p per mile for the first 10,000 miles then reducing to 25p per mile. This is because:
- a. this position is consistent with Mr Kirby submitting claims at the rate of 45 per mile from January 2021 to August 2021 and the fact that the claims were all paid at the rate of 45 per mile, until August 2021, apart from the claim made for May 2021;

- b. in relation to the claim made for May 2021 which was not paid, Ms Randell's evidence was that Mr Johnson wanted to query a specific journey included as part of the claim and that is why payment was not made; Ms Randell did not state that Mr Johnson specifically mentioned the *rate* of payment as being an issue;
- c. Mr Johnson, the only person with knowledge of the conversation that did (or did not) take place about the mileage rate did not give evidence to the Tribunal;
- d. at page 94 of the bundle, Mr Kirby explicitly set out his understanding that the 25p/45p mileage allowance rate applied, in an email to Adele Marsh (Managing Consultant) dated 6 April 2021 and this understanding was not questioned at all in Ms Marsh's response;
- e. the mileage claims from August onwards were not paid because it was from that point that Ms Randall was seeking more information about the agreement that had been reached; it is noteworthy, however, that Ms Randall was not employed by the company until 4 October 2021 and, as she stated in her evidence, had no personal knowledge of any agreement reached between Mr Kirby and Mr Johnson in relation to payments for expenses relating to a car.

### **Commission**

- 11. In his evidence Mr Kirby stated that during a face-to-face interview with Mr Johnson for the job he later secured, he informed Mr Johnson that he would be able to bring in new business to the value of £70,000 from The Great Outdoor Gym Company ("TGOGC") (Mr Kirby's previous employer). Mr Kirby stated that this was a key factor in Mr Johnson's decision to offer him a position with Playfix Ltd. Mr Kirby further stated that Mr Johnson attended Mr Kirby's home in September in order to sign the contract and that at that time he commented on how Mr Kirby had already reached his first quarter sales target.
- 12. The Tribunal accepted Mr Kirby's evidence on as set out above. It was not contested by the Respondent.

### **The law**

- 13. In relation to the claim for breach of contract arising from a failure to pay the appropriate rate of mileage allowance, the relevant legal principles do not need to be rehearsed. It is simply whether a contractual agreement was reached on this issue between the Claimant and the Respondent.
- 14. In relation to the interpretation of the express contractual provisions relating to the commission policy, the law relating to the interpretation of a written contract was succinctly stated by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 as follows (see paragraph 15):

*"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v*

*Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

## Discussion and conclusions

### *Mileage allowance*

15. It was apparent from the early on in the life of the contractual relationship between the parties that the contractual provisions relating to the provision of a car were not going to be respected. This was the reason that Mr Kirby used his own car for business purposes.
16. As set out above, the Tribunal has found that Mr Kirby reached an agreement with his employer about the appropriate rate of reimbursement for mileage once Mr Kirby started to use his own car. This was that mileage costs were to be claimed at the rate of 45p per mile for the first 10,000 miles then reducing to 25p per mile. This agreement became an express term of the contractual relationship.
17. In submissions, Mr Pickett conceded that any claims for mileage consisting solely of travel between Mr Kirby's home and his regular office at Playfix Ltd was not to be included in the calculation for loss incurred. Subject to this, Mr Kirby's claims for mileage are accepted.

*Commission – does it include new business from new clients only, or also include new business from existing clients?*

18. The Respondent's position was that the effect of the contractual provisions cited above was that the commission policy only applied to new business from new clients; the Claimant's position was that the commission policy extended to new business from existing clients.
19. In working out the position in law, applying the legal principles set out above, the Tribunal must ascertain what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood the parties' intention to be by reference to the language in the contract. Starting first with the language used, the Tribunal notes that the policy states that "commission [is] available [at the rate of] 5% of all new business attributable to [Mr Kirby]. There is no reference to the definition of "new business" being linked to "new clients" (unlike the "bonus policy" at page 88 of the bundle) – in the Tribunal's view, if the intention was that "new business" in the commission policy meant "new clients", it would have said so explicitly, just like the Bonus policy did. In other words, the "ordinary and natural" meaning of the words used in the commission policy does not have the restriction argued for by the Respondent.

20. In terms of the facts and circumstances known to the parties at the time, as found above, the Tribunal accepted that Mr Johnson stated to Mr Kirby that if he brought in £70,000 worth of business from TGOGC Mr Kirby would have already met his first quarter sales target. In the Tribunal's view, this comment from Mr Johnson must have been a reference to the £60,000 quarterly target in the *Bonus* policy, which is surprising since that policy seems to include only income from "new business" from "new clients" (TGOGC had been a client of Playfix Ltd since April 2020 according to Ms Randall's evidence). Nevertheless, Mr Johnson's comment shows that, at the very least, he understood any new contract with TGOGC to be "new business" within the meaning of the bonus policy, an interpretation which must sensibly follow through to the definition of "new business" in the Commission policy.
21. Finally, if "new business" did not include business secured from existing clients, Mr Kirby would have brought in significantly less than the target of £60,000 per quarter. If this was the case, it would have been expected that Mr Johnson or another senior employee would have challenged Mr Kirby about his sales target; this was not done (as per the evidence of Ms Randall).
22. In conclusion, in the Tribunal's view, the proper legal interpretation of the commission policy includes sums brought to Playfix Ltd due to business attributable to Mr Kirby from existing clients of Playfix Ltd, as well as new clients.

*Commission – from what point, after termination of the Claimant's contract, was commission no longer payable*

23. The Claimant relies upon the distinction in the contract between commission being "due" and commission being "payable". In the Claimant's submissions, what matters is when commission is "due" – that is the point at which entitlement to commission occurs; it follows, in the Claimant's submission, that commission may be "payable" (at the end of the month after payment has been received from the client) even after the employment contract has ended.
24. The Tribunal agrees with the Claimant, on the basis that this accords with the ordinary and natural meaning of the words "due" and "payable" and the distinction between these words. Furthermore, it accords with the purpose of the commission provisions, which is to reward employees for new business attributable to them during the course of their employment.

## **Remedy**

25. In terms of the calculation of the value of the mileage claim following the decision above, this is as set out by the Claimant in his Schedule of Loss minus the value of claims for journeys undertaken purely between the Claimant's home and usual office.
26. In terms of the calculation of the value of the commission following the decision above, this is as set out at pages 128 and 129 of the bundle minus any deductions agreed between the parties in respect of the entries marked in blue only (these were the only entries specifically queried by the Respondent in evidence).

27. In the event that agreement between the parties cannot be reached pursuant to the above, the matter is to be listed for a hearing upon application by either party.

**Employment Judge Dias-Patel  
Date: 21 September 2022**