



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Evie P Skentelbery

**Respondent:** Fresh Perspective Resourcing Ltd.

**Heard at:** Manchester

**On:** 4 October 2022 and  
17 October 2022

**Before:** Employment Judge Wheat

## Representation

**Claimant:** Mr. Andrew Warner, lay representative (4 October 2022 only)

**Respondent:** Mrs Rachel Saunders, HR representative

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that the respondent made unlawful deductions from wages in relation to her final salary payment in the sum of £1269.23, including two days accrued untaken holiday entitlement) was dismissed upon withdrawal on 4 October 2022.
2. The claimant's claim that the respondent made an unlawful deduction from wages in relation to payment in lieu of an 'early finish entitlement' in the sum of £50.77 was dismissed upon withdrawal on 4 October 2022.
3. The claimant's claim that the respondent made an unlawful deduction from wages in relation to a claim for mileage in the sum of £38.00 was dismissed upon withdrawal on 4 October 2022.
4. The claimant's claim that the respondent made an unlawful deduction from wages in relation to 3 days holiday pay ('The Ibiza trip') in the sum of £253.85 is not well founded and is dismissed.
5. The claimant's claim that the respondent made an unlawful deduction from wages in relation to commission earned during the claimant's notice period in the sum of £438.75 is not well founded and is dismissed.

6. In relation to an application for a Preparation Time Order (pursuant to Rules 75(2) and 76(1) of The Employment Tribunal Rules of Procedure 2013) made by the claimant and an application for a Preparation Time Order made on behalf of the respondent:

No awards were made for Preparation Time Orders against either the claimant or the respondent, or their representatives.

## **REASONS**

### **Background**

1. The respondent company is a recruitment consultancy based in Chorley. The claimant was employed by it as a Recruitment Brand Ambassador between 16 October 2017 and 19 November 2021. The dispute in this claim originally arose after the claimant resigned her employment giving 4 weeks' notice, on 4 October 2021, as she was required to do. The respondent asked her to extend her notice to 6 weeks, which she agreed to. During the notice period the respondent placed her on garden leave as a result of moving to new premises and the claimant taking a period of annual leave during the notice period. This was to avoid relocating the claimant to the new premises for what would have amounted to a short period of time. The respondent then asked the claimant to give up to it her access to and contents of a LinkedIn account in her name, but which the respondent says it arranged and paid for. Its position was that it was contractually entitled to do so. That matter was discussed between the parties, but it was not resolved, and the respondent then withheld final payments.

### **Claims and Issues**

2. The claims before the Tribunal arose in relation to the withholding of:
- (1) a final salary payment;
  - (2) two days accrued holiday pay;
  - (3) the monetary equivalent of an entitlement to late starts and early finishes;
  - (4) a mileage payment;
  - (5) three further days holiday entitlement previously used on a trip abroad paid for by the respondent; and
  - (6) two disputed commission payments.
3. These matters were discussed at a Case Management hearing on 6 June 2022, but it was not until the final hearing on 4 October 2022 that the claims were clarified. As set out above, some parts of the claim were dismissed upon

withdrawal on 4 October 2022. The remaining parts of the claim to be determined were as follows:

- (1) Whether or not commission payments in relation to two new business accounts – Online Mortgage Advisers (OMA) and Black Box Security Alarms Systems Ltd (BBS) – in the agreed total amount of £438.75 were payable to the claimant and had been withheld by the respondent.
- (2) Whether or not 3 days holiday pay in relation to 3 days holiday entitlement used by the claimant for a trip abroad to a yoga retreat in Ibiza with her colleagues and directors, paid for by the respondent – in the agreed amount of £253.85 was payable to the claimant and was withheld by the respondent.
- (3) With regard to the commission payments, the claimant said these were payable to her in accordance with the commission policy, as she had introduced the new businesses and the final sales in relation to both businesses 'landed' whilst she was still within her notice period.
- (4) The respondent, whilst acknowledging that commission payments properly due are part of notice pay, said that the commissions for these two new businesses were not payable, as they did not meet the criteria in the commission policy. In relation to OMA, the respondent agreed the initial contact was made by the claimant, but nothing further, and the sale landed for a different role, with the managing director, Laura Leyland completing the documents on 4 and 5 November 2021 whilst the claimant was on garden leave.
- (5) In relation to BBS, again the respondent accepted that the claimant made the initial introduction, in relation to a sales role. The respondent argued that it was Laura Leyland who continued contact and provided support for the company in relation to an engineer role, with the claimant having no involvement. She was still working for the company but she had nothing to do with the sale for the engineering role, and therefore no commission was payable.
- (6) In relation to the 3 days holiday pay, the claimant said that she was not informed that she had to sacrifice 3 days holiday and work whilst on the trip abroad. She stated that she did not raise the matter before, during or after the trip as there was a culture of not challenging management decisions and she did not know it was unlawful to ask employees to work on days taken as holiday until she had left her employment. She also argued that had she continued to work for the respondent, she would have asked or expected to use the 3 holiday days again.

- (7) The respondent said that the trip was arranged and paid for by the company as a thank you for their employees' hard work during the Covid19 pandemic. The claimant had accepted the terms of the trip, which were notified to her well in advance of the trip taking place. The trip was not mandatory. The claimant could have chosen to work in the office instead. The claimant did not raise she was unhappy, before, during or after the trip, nor when resigning, or during her notice period. The respondent further stated that the claimant did not state at any time that she expected to use the 3 days holidays again.

### **Procedure, documents and evidence heard**

4. On 4 October 2022, after clarifying the remaining disputed parts of the claimant's claim, the Tribunal heard oral evidence from the claimant and her witness Veronica Finney, a former employee of the respondent. For the respondent, the Tribunal heard oral evidence from Laura Leyland, a co-director of the respondent business and from Victoria Taylor, an employee of the respondent.

5. The Tribunal had regard to the bundles of evidence before it, although only those documents drawn to the Tribunal's attention by the parties were referred to, as the parties were unable to agree on one joint bundle. The Tribunal allowed the claimant to produce a supplementary bundle, after directing that all documentation subject to legal privilege be removed from it.

6. The Tribunal had regard to the closing submissions made, which were heard on 17 October 2022, the reconvened date. The claimant produced two cases on the 17 October 2022, for the Tribunal to consider:

**Ville De Nivelles v Matzak ECLI : EU: 2018 :82;** a preliminary ruling regarding working time regulations for firefighters on stand by and required to respond within 8 minutes, which the claimant said was in relation to the claim that 3 days holiday pay was payable to her and had been withheld.

**Kent Management Services Ltd v Butterfield [1990] UKEAT 407 90 1112,** was cited as relevant to the Tribunal's consideration of whether commission was payable and had been withheld.

7. The Tribunal allowed time for the respondent's representative to read the cases and to make closing submissions upon their relevance.

### **Fact Findings**

#### Commission

8. The respondent's policy entitled - 'Sales Policy Commission and Early Finishes' set out the percentage of commission payable in different circumstances and when that commission was payable. In the circumstances of this case, the following applied:

*'New client – sourced (brand spanking new sourced from any channel) o 5%'*

The starred section underneath that, sets out the circumstances in which commission will be paid and when:

***'\*\* Commission is paid on pay day the following month **after the sales is made/invoice is sent and only if the client has paid.***** (Emphasis added)

9. The claimant made initial contact with both new businesses; OMA and BBS.
10. During her notice period, the claimant was moved from a 'front-line' sales position by the respondent, as she was leaving the business.
11. The claimant was placed on garden leave after 27 October 2021, as the respondent was moving premises and had she continued to work her notice, it would have meant relocating the claimant for what amounted to a short period of time just prior to her leaving the business.
12. The claimant took no issue with being placed on garden leave after 27 October 2021, during her notice period.
13. The claimant did not make the sale in relation to OMA, the sale was completed by Laura Leyland, co-director, whilst the claimant was on garden leave.
14. The claimant did not make the sale in relation to BBS, the sale was completed by Laura Leyland, for a different role, (engineering) whilst the claimant was still working her notice period.
15. There was at least one occasion in the business where a sale was made by another employee than the one making the initial contact with a new business, and the other employee was paid commission.
16. There was at least one occasion in the business where an employee was paid commission for a sale where they had made initial contact with a new business, but had not made the sale. The Tribunal accepted the evidence of Laura Leyland that this was to incentivise the employee and allow them to develop their role within the business.

3 days holiday pay - 'The Ibiza trip'

17. The respondent booked and paid for a trip to a yoga retreat in Ibiza for employees (including the claimant) as a thank you for their hard work, dedication and commitment during the Covid 19 pandemic.

- (1) Attendance on the trip was voluntary.
- (2) Some employees chose not to attend.

- (3) The trip was originally to take place in summer 2020 (Sat 29 Aug to Weds 2 September)
- (4) The trip was postponed due to ongoing Covid 19 restrictions.
- (5) The trip eventually took place in September 2021, from Monday 6 to Sat 11 September 2021, those being the available dates.
- (6) Due to the re-arranged trip falling over 5 business days, employees were asked to contribute 3 days of annual leave if they chose to attend.

18. There was a dispute as to when the employees attending the trip were consulted as to the use of 3 days of annual leave entitlement. The claimant said they were informed at short notice 2-3 weeks before the trip. The respondent said there was a discussion months before, and all staff attending agreed to take the 3 days leave. The Tribunal preferred the evidence of Laura Leyland and Victoria Taylor (employee of respondent) to that of the claimant and her witness Veronica Finney. Victoria Taylor joined the business in early 2021. Her evidence was she that knew of the trip from the start of her employment, and, certainly by March of 2021, knew that 3 days leave would be taken by those choosing to go on the trip, which the Tribunal found to be compelling evidence. In the Tribunal's view, it was unlikely that the respondent would not address, with the participants, the issue of the re-arranged trip falling over 5 business days, until as late as 2-3 weeks before departure.

19. There was an expectation that, as the trip was over 5 business days, and an inexperienced member of staff would be running the office in the UK, employees would keep an eye on emails and make sure nothing critical was missed.

20. This expectation was clearly communicated to those attending the trip, including the claimant, and no objections were raised by her.

21. The itinerary for the yoga retreat, which was detailed, was circulated to participants in August 2021.

22. The claimant did not raise the issue of using 3 days holiday entitlement either before, during or after the trip.

23. There was a dispute as to how often and for how long meetings took place whilst at the yoga retreat. The Tribunal preferred the evidence of the respondent, that there was one initial meeting, over that of the claimant, who said there were regular, two-hour meetings. Having taken account of the yoga retreat itinerary, which was very structured, it was unlikely that a daily meeting of two hours could have been accommodated. The evidence of Veronica Finney (an ex-employee of the respondent) was not credible on this point, and she had difficulty in explaining when the daily meetings were 'fitted into' the schedule.

24. The claimant sent 11 emails in 5 days, not all of which were related to business activity. The emails supported the respondent's account of the trip. Two

emails were in the form of a 'blog' or 'post' and purported to indicate the claimant viewed the trip positively.

25. The claimant did not raise with the respondent at any time after the trip that she expected to be able to use the 3 leave days again.

## The Law

26. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996:

“An employer shall not make a deduction from wages of a worker employed by him unless —

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

27. Section 27(1) provides that “wages” means “any sums payable to the worker in connection with his employment” and then sets out a non-exhaustive list of what is included. Both commission and holiday pay fall within the definition of wages.

28. In relation to the claims for commission and 3 days holiday pay, the Tribunal must determine whether the commission and holiday pay were **payable** to the claimant and were withheld.

29. The Tribunal considered the case law it had been referred to by the claimant, as set out above.

## Conclusions

### Commission

30. The Tribunal had regard to the first paragraph of the policy governing commission payments headed 'Commission'. It sets out the Commission percentages payable in different circumstances:

**‘New client – sourced (brand spanking new sourced from any channel) 5%’**

The starred section underneath that, explains the circumstances in which commission will be paid and when:

**“\*\* Commission is paid on pay day the following month *after the sales is made/invoice is sent and only if the client has paid.*’ (Emphasis added)**

31. Although the Tribunal found that the claimant made initial contact with the two businesses, who were ‘new’ to the respondent, it did not find that the sale was made by her for either of the two new businesses.

32. With regard to BBS, the sale was made when the claimant was working her notice period and had been taken off front line sales.

33. With regard to OMA, the sale was made when the claimant was on garden leave. The notice period the claimant was required to work was agreed between the parties and the claimant did not object to being placed on garden leave.

34. In both cases the sale was made by Laura Leyland, who took over the contact with the businesses, and landed the sales for different roles than the roles initially sourced by the claimant.

35. The respondent exercised a level of discretion in the awarding of commission to current employees, beyond that which was stated in the policy. For example, Laura Leyland confirmed that on occasion, commission had been paid to an employee who made initial contact but did not go on to make the sale. This was to incentivize the employee and develop their role within the business. There was no evidence before the Tribunal that suggested employees who were leaving the business would be paid commission on sales which they didn’t make. There was precedent within the business for employees to make initial contact, with a sale being actually made by another employee, and it was the person making the sale who received the commission, in line with the policy.

36. In relation to the claim for commission, The Tribunal did not consider that the case of ***Kent Management Services Ltd v Butterfield [1990] UKEAT 407 90 1112*** was relevant to its consideration of whether commission was payable to the claimant under the terms of the relevant policy, as that case concerned a dispute as to whether discretionary commission was payable under the specific terms of a non-contractual arrangement.

37. The Tribunal therefore concluded that the commission in relation to OMA and BBS was not payable to the claimant. The claimant’s claim that there was an unauthorised deduction from wages in relation to commission is not well founded and is dismissed.

#### 3 days holiday pay- ‘The Ibiza Trip’

38. The Tribunal found that the claimant attended the yoga retreat, paid for by the respondent, voluntarily, and that she had adequate notice of the requirements to use 3 days holiday entitlement and to keep an eye on emails to ensure nothing business critical was missed. It found that the claimant was aware an



inexperienced member of staff would be in the office on her own during the trip, which was taking place over 5 business days.

39. At no point during her employment with the respondent did the claimant raise as an issue either the taking of her holidays or the level of business-related tasks she was required to undertake whilst on the yoga retreat. She did not raise the expectation, upon her return, that she should be able to take the three days leave again.

40. The Tribunal did not find the preliminary ruling in the case of **Ville De Nivelles v Matzak** to be relevant to its specific considerations regarding the arrangement for the voluntary use of leave days for an employer-organised trip abroad to a yoga retreat. That case was about working time, in relation to firefighters on stand-by, with the duty to respond to calls from their employer within 8 minutes, very significantly restricting the opportunities for other activities, rather than an agreement to use some annual leave on a trip organised and paid for by the employer.

41. The Tribunal concluded in all the circumstances that the claimant was not entitled to payment for the 3 days leave used, having voluntarily agreed to use the 3 leave days in the knowledge of what would be expected of her on the trip.

42. The claimant's claim that there was an unauthorised deduction for 3 days holiday pay is not well founded and is dismissed.

### **Costs/Preparation Time Orders**

#### **Introduction**

43. At the conclusion of the hearing dealing with the outstanding claims, on the 17 October 2022, both the claimant and respondent made applications to the Tribunal in relation to the behaviour of the other party/their representative. It was clarified, before hearing submissions, that the claimant was pursuing a Preparation Time Order in the sum of £840.00, (in relation to the part of the claim for withholding of final salary only) and not pursuing a previous written application for costs. The Respondent made an application for a Preparation Time Order in the sum of £1638.00.

44. In relation to the claimant's application, the Tribunal considered the claimant's document, received 1 August 2022, in relation to preparation time, the statement of Mr Andrew Warner and the statement of the claimant at paragraphs 21 to 26.

45. In relation to the respondent's application, the Tribunal had regard to the respondent's written application for costs and the schedule. In addition, the respondent provided a bundle, which contained correspondence in relation to offers made by the respondent to settle the claim.

46. The Tribunal also heard and had regard to the submissions and responses from the claimant and respondent on the issue of awarding preparation time orders.

### The Law

47. Rule 75(2) provides:

‘A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.’

48. The circumstances in which a preparation time order may be made are set out in Rule 76:

- (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that —
  - (a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
  - (b) any claim or response had no reasonable prospect of success.....

49. The procedure by which the application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

50. Rule 84 concerns ability to pay and reads as follows: “In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party’s (or where a wasted costs order is made the representative’s) ability to pay.”

51. It follows from these rules that the Tribunal must go through a three-stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs/preparation time has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

52. The case law on the awarding of costs/preparation time orders (and their

predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs/preparation time orders is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82. 8.**

53. Whilst acknowledging that the claimant was, for part of the proceedings, represented by a lay person with some knowledge of civil procedure, and the respondent was represented by a HR professional, the Tribunal had regard to the general principle that it is appropriate for those not legally represented to be judged less harshly in terms of their conduct than those represented by a legally qualified representative.

54. The Tribunal also had regard to the case of **Kopel v Safeway Stores plc 2003 IRLR 753, EAT**, in which the EAT held that the rule in 'Calderbank' (a civil case stating that a claimant will bear the costs incurred by the respondent from the date on which an offer was rejected) has no place in employment tribunal jurisdiction. In Kopel, a tribunals decision to award costs of £5,000 against the claimant had been influenced by the fact that she had earlier rejected a settlement offer made 'without prejudice save as to costs' (known as a 'Calderbank offer') during the proceedings. On appeal, the EAT clarified that a tribunal claimant will not necessarily be liable for costs where he or she rejects a Calderbank offer and is eventually awarded less than that offer, or even nothing at all. However, a claimant's refusal of such an offer was a factor that a tribunal could take into account in deciding whether to award costs.

## **Conclusion**

55. The Tribunal first considered whether the grounds for making an award had arisen in these proceedings. In determining this, the Tribunal reminded itself that any award for costs/preparation time was the exception not the rule.

56. It had regard to the fact that neither party was legally represented, and although it could be said that there were varying levels of professional expertise on both sides, the Tribunal concluded that neither party or their representatives ought to be held to the same standard that might be applied to experienced legally qualified representatives. It was a higher bar to reach to conclude that, for example, making points which were not objective or directly relevant, seeming to misunderstand the written intentions of the other party and finding themselves incapable of reaching a settlement, amounted to acting vexatiously, abusively, disruptively or otherwise unreasonably.

57. The Tribunal took account of the conduct of the parties and their representatives during the proceedings. It concluded that at times there was a level of acrimony which led to upset on both sides. It did not take account of issues arising outside of the proceedings, for example a police investigation or postings on social media.

58. The Tribunal considered the rejections of offers of settlement by the claimant as a factor that should be taken into account when deciding whether costs should be awarded against the claimant as a result. The highest offer made was

£2200.00, an amount higher than the total amount claimed for. The rejection of the settlement ultimately led to all claims being brought before the Tribunal, which were then defended by the respondent.

59. However, in the particular circumstances of this case, the Tribunal concluded that neither party or representative had acted in a way which, in the Tribunal's view, met the high bar to concluding that their actions were vexatious, abusive, disruptive or otherwise unreasonable. When taking into account all the factors set out above, the Tribunal concluded that no claim or response was without reasonable prospect of success.

60. Therefore, the power to make any award as set out in Rule 76 has not arisen.

61. The Tribunal is not required to move to the next stage of consideration.

62. No orders for preparation time are made against either party or their representatives.

Employment Judge Wheat

Date: 14 November 2022

JUDGMENT & REASONS SENT TO THE  
PARTIES ON

18 November 2022

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.