



EMPLOYMENT TRIBUNALS

Claimant: Mr S Lowe

Respondent: Motor 4 You Ltd

Heard at: Croydon Employment Tribunal **On:** 21 November 2022

Before: Employment Judge Nash

Representation

Claimant: In person

Respondent: Ms P Hassan, Transaction Manager

RESERVED JUDGMENT

1. The claims for wrongful dismissal and holiday pay are dismissed upon withdrawal.
2. The respondent made unauthorised deductions from the claimant's wages in the sum of £1,469.37 net.
3. The tribunal orders the respondent to pay the claimant the sum £2021.16 under section 38 Employment Act 2002.
4. Accordingly, the total payable by the respondent to the claimant under this judgement is £3,490.53.

REASONS

1. Following ACAS early conciliation from 3 May to 12 June 2022, the claimant presented his claim to the Employment Tribunal on 20 June 2022.
2. At the final merits hearing the tribunal heard from the claimant and from Mr Sheikh Hassan, the managing director of the respondent. Neither party provided a written witness statement, so the tribunal heard oral evidence. Following

questions from the tribunal, the tribunal offered the parties the opportunity to question each other's witness.

3. There was no bundle. The tribunal had sight of a number of documents provided by both parties. The tribunal verified that both parties had sight of all documents on which the other party relied, and which were before the tribunal.
4. The tribunal had issued limited directions with which the parties had significantly failed to comply. As a result, there was not sufficient time during the hearing for the tribunal to reach its decision and judgment was reserved.
5. At the end of the hearing, the tribunal directed the respondent to file a document setting out its case as to why the claimant was not entitled to commission on each of the cars for which he brought a claim. The tribunal gave the claimant permission to file a reply. In considering its reserved decision, the tribunal took into account both the respondent's and claimant's documents sent on 21 November 2022.

The claims

6. After discussion with the parties, it was ascertained that the claimant brought the following claims in his claim form: –
 - a. notice pay: wrongful dismissal
 - b. holiday pay
 - c. deduction from wages

The Issues

7. After discussion with the parties, the tribunal ascertained that the issues were as follows.
8. The claimant worked his notice but was not paid for the second week. This was considered as part of the unauthorised deduction from wages claim and the wrongful dismissal claim was dismissed upon withdrawal.
9. After discussion with the tribunal, the claimant agreed that there was no accrued but untaken annual leave due. Accordingly, this claim was dismissed upon withdrawal.
10. In respect of the claim for unlawful deduction from wages the issues were as follows: –
 - a. The parties agreed that the claimant was entitled to his wages from 1 to 8 April 2021 inclusive, being £511.54 net.
 - b. Did the respondent make unauthorised deductions from the claimant's wages in respect of pension deductions recorded on the claimant's January, February and March 2021 payslips?
 - c. Did the tribunal have jurisdiction to consider the claim in respect of the respondent's failure to make pension contributions in April 2021? If so, were any unlawful deductions made?
 - d. Did the respondent make unauthorised deductions in respect of a failure to pay commission on car sales after 14 March 2021?

The facts

11. The claimant worked for the respondent, which sells cars, as a car salesperson from 10 March 2021. He was paid basic salary plus commission on cars sold. He never received a written contract of employment.
12. In 2022 Mr Sheikh Hassan took over the respondent's business. He changed the business model to a higher turnover and higher volume of transactions. Both the claimant and Mr Sheikh made criticisms of each other and there were a number of conflicts, for instance over sick leave and paperwork. There was no dispute that their working relations were poor.
13. On or around 20 or 23 March 2021 the claimant returned from a short sick leave. Mr Hassan told the tribunal that he had informed the claimant that his duties would change, and he would from now on concentrate on vehicle photography rather than selling cars. The claimant said that he had not accepted any such change and continued to sell cars and therefore earn commission.
14. The claimant resigned and served his notice. His last working day was 8 April 2021.
15. The claimant provided a list of 17 cars which he said he had sold during after his return from sick leave in March and for which commission was outstanding from the respondent.
16. The claimant said that car sales were recorded on a large whiteboard in the respondent's office which recorded each car sale with details of the salesperson and the registration number. The claimant provided photographs of this whiteboard for March and April 2021. The tribunal was able to identify 11 of the 17 cars as recorded against the claimant's name on the whiteboard. (Some of the writing in the photograph was illegible.) The claimant said that a salesperson became entitled to commission once the sale was agreed.
17. The respondent gave a different account. The respondent said that a salesperson became entitled to commission not at the point of sale of the car but at the point of handover. This was to avoid staff being burdened by carrying out handovers on sales they had not made. Further, it incentivised salespeople to "close the deal". Accordingly, the claimant was not entitled to commission on sales if he had not carried out the handover, for instance if the handover happened after he had left the respondent's employment
18. Further the respondent stated that the claimant himself had not sold a number of the cars he was claiming. This was consistent with his duties having changed to that of vehicle photography. The respondent did not accept that the claimant's photographs of the whiteboard were accurate. Mr Hassan said that it was easy to rub out the correct salesperson's initials and replace these with the claimant's initials. The respondent's case was that it was unaware that the claimant had written his initials against the 17 cars on the whiteboard.

19. The respondent relied on unsigned invoices in respect of all but one car, being a Honda registration CRV GV07 for which the respondent could find no record on its system. A different salesperson than the claimant was recorded on each invoice. The invoices provided names and addresses and contact details for the purchasers as well as considerable details of the car. Mr Hassan said that he specifically recalled that he had sold 1 of the 17 cars and pointed to his name recorded on the invoice.
20. In its document submitted after the hearing, the respondent contended that the claimant had not sold 11 of the cars but did not deny in terms that the claimant had sold 6 of the disputed 17 cars which were handed over in April.
21. The claimant also made a claim in respect of pension deductions.
22. The tribunal had sight of the claimant's payslips for February, March and April 2021. The tribunal did not have sight of January 2021 payslips. The payslips for February and March showed deductions from the claimant's gross wage for contributions to his pension. There were no deductions made for contributions from the claimant's final April payslip.
23. The claimant relied on screenshots from September 2022 of his Nest pension account which showed that no money had been paid in for 2021, that is after Mr Hassan took over the respondent's business.
24. The respondent stated that it had deducted the money from the claimant's wages in respect of pension contributions and understood that its accountant had duly passed this money to the Nest pension provider. It provided no documentary evidence going to this specific point. However, Mr Hassan said if there had been an error, then the respondent accepted that the monies should be paid to Nest forthwith.

The Law

25. The law in respect of unlawful deductions from wages is found at section 13 Employment Rights Act 1996 as follows: –
 - (1) 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.
 - (2) In this section "*relevant provision*", in relation to a worker's contract, means a provision of the contract comprised—
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

...

Submissions

26. The parties both made very brief oral submissions.

Applying the Law to the Facts

27. There was no argument from the respondent the claimant was not contractually entitled to commission on cars sold. The respondent's defence was in effect that the claimant was not entitled to commission either because he did not sell the car or because he had not handed over the car.

28. The tribunal accepted that the claimant was contractually entitled to commission on the sales he made. This was because there was no denial of this by the respondent. Further, the tribunal as a specialist employment tribunal, took judicial notice that this is an extremely common compensation model in the sector.

29. The tribunal firstly considered whether the claimant became contractually entitled to commission at the point-of-sale or point of handover. On the balance of probabilities, the Tribunal preferred the claimant's account, that commission fell due on sale rather than handover. The reasons were as follows. There was no written or corroborating evidence from the respondent that salesperson was not entitled to commission on the sale they had made unless they carried out the handover. In the view of the tribunal this was a less practicable system and therefore a less plausible system. It put an extra burden on the respondent for the correct salesperson to be available for the handover and might inconvenience customers.

30. Accordingly, the Tribunal determined that the claimant was entitled to commission on cars he sold whether or not he had carried out the handover.

31. The Tribunal then considered whether the claimant had sold any of the 17 relevant cars. The tribunal noted that the respondent had provided invoices for all but one car. The claimant had provided an entry in the whiteboard for 11 of the cars.

32. The tribunal found the respondent's explanation-that the claimant had altered the whiteboard in some way by replacing the correct salesperson with his own initials-to be inherently unlikely. In the April whiteboard it appeared that blocks of transactions were written up at the same time using the same pen. There was, for instance, a block of entries in red seemingly using the same pen. Underneath that there was another block of entries in a different pen, coloured blue. The claimant's

entries were randomly scattered between blocks of red and blue entries. The tribunal determined that it was inherently unlikely that the claimant had gone to the trouble of altering entries of a public whiteboard using two separate pens in different colours. This would have been a fairly sophisticated deception carried out in public view.

33. The tribunal took into account that the respondent had provided invoices in respect of each car. However, in the view of the tribunal the probative value of these invoices was materially reduced by the fact that they were not signed either by the purchaser or by the salesperson. Further, the tribunal took into account the fact that the respondent had not provided the claimant with a written contract of employment and (see below) had determined that the respondent had failed to pass on deductions to the pensions provider. This conduct was not consistent with the respondent's carefully complying with employment law.
34. Accordingly, the Tribunal made a finding of fact that the claimant was responsible for sales of the 11 cars marked on the white boards. However, as there was no entry that could be identified on the whiteboard boards for the remaining six cars, the tribunal did not find that the claimant was responsible for those sales.
35. The tribunal accordingly found that the claimant was entitled to £600 commission made up as follows: –
 - BMW touring-£100
 - Ford focus-£25
 - Range Rover V U 67-£100
 - Mercedes a class-£100
 - Audi A5 DG 65-£25
 - Audi A6 all Road-£25
 - Range Rover evoc-£25
 - Mercedes a class YK66-£50
 - Mercedes a class GU 10-£25
 - Volkswagen ML14-£25
 - Mercedes S class-£100.
36. The tribunal went on to consider pension deductions.
37. The tribunal determined that it did not have jurisdiction under section 13 Employment Rights Act in respect of the April payslip. No deductions had been made from the claimant payslip in April.
38. However, the tribunal was satisfied that it had jurisdiction in respect of the deductions on the face of the February and March payslips. There was no dispute that these deductions were made. The tribunal could make no findings in respect of the January payslip as this was not before the tribunal.
39. The respondent's defence to this claim was that it believed that the deductions had been properly handed over to the pensions authority, although it was not certain. The tribunal made a finding of fact that the deductions had not been properly handed to the pensions authority because the claimant provided a

screenshot from the Nest app on his phone showing that no pension contributions had been made for him by the respondent.

40. The tribunal found that an employer which makes deductions from wages on the basis that the money will be provided to the pension provider but does not then go on to provide that money to the pension provider is making an unauthorised deduction. Such a deduction is not authorised by a relevant provision of the contract under section 13 (1) (a) because this claimant had no written contract. Further, the deduction is not authorised by virtue of a statutory provision under subsection (a). There was no argument that the claimant had signified his agreement to the deduction in writing pursuant to subsection (b). There was no suggestion that the deductions were made because of an error affecting computation of the gross amount of the wages pursuant to subsection (4).
41. Accordingly, the Tribunal found that the respondent had made unauthorised deductions from the claimant's wages in the sums deducted from his February and March 2021 payslips being a total of £357.83 made up as follows: –

February 2022-	£ 124.30
March 2022-	£233.53

42. The tribunal went on to consider whether there should be an award under schedule 5 Employment Act 2002 following a failure by the respondent to comply with section 1 of the Employment Rights Act to provide a written statement of terms and conditions of employment. There is no need for this to be pleaded by a claimant. An award under schedule 5 is a consequence of a tribunal judgement, rather than a cause of action.
43. There was no dispute that the claimant was not provided with a written contract of employment. Accordingly, the Tribunal determined that when these proceedings were begun, the respondent in breach of its duty to give the claimant a written statement of employment particulars.
44. The tribunal did not find that there were exceptional circumstances that would make it unjust or inequitable to make no award. Whilst the respondent's current owners were not responsible for the original failure to provide the claimant with a written contract of employment, the respondent had been under new ownership for over three months at the date of termination. This was sufficient time to remedy such inherited problems.
45. As the Tribunal had to award two weeks' pay and might award four weeks' pay, it went on to consider whether it would be just and equitable to award four weeks' pay.
46. The tribunal determined that it would be just and equitable to award 4 weeks' pay rather than the minimum award for the following reason. A Tribunal may award between 2 and 4 weeks' pay in circumstances including where a respondent has provided a statement of terms and particulars of employment but has failed to update it following a change. In contrast the failure by this respondent was complete, in that the claimant was provided with no written contract whatsoever.

Further, this failure had led to difficulties for the claimant in enforcing his employment rights. The claimant had been prejudiced by the respondent's failure to provide details of his compensation package (including provisions relating to the accrual of commission).

47. Accordingly, the tribunal awarded the claimant the maximum award under section 38, being 4 weeks' pay. A "week's pay" as calculated in accordance with sections 220-229 Employment Rights Act and is limited to the maximum under section 227 (gross pay of £544) - section 38 (6). Pursuant to section 38(6) the date of calculation is the effective date of termination of employment, being 8 April 2021.
48. According to *Weevs May Ltd v Kings* [1977] ICR 244 and *J and S Bickley Ltd v Washer* [1977] ICR 425) commission which is a regular part of an employee's earnings will amount to remuneration for the purposes of weeks' pay and may be apportioned as the tribunal deems appropriate.
49. The only evidence before the Tribunal as to the claimant's gross pay were the payslips for February and March. The claimant's gross pay including commission for February was £2,295.83. The claimant's gross pay including commission for March was £2,083.33. Accordingly, the claimant's average gross weekly pay including commission for February and March was £505.29.
50. Therefore, the award of 4 weeks gross pay under section 38 was £2021.16.

Employment Judge Nash

Date 22 November 2022