



**THE EMPLOYMENT TRIBUNAL**

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**SITTING AT:** LONDON SOUTH by CVP  
**BEFORE:** EMPLOYMENT JUDGE TRUSCOTT KC  
**BETWEEN:**

**Ms M Kumar** **Claimant**

AND

**Member Benefits Limited** **Respondent**

**ON:** 14 September 2023

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr D Morrison director

**JUDGMENT**

1. The claim is amended to be directed against Member Benefits Limited.
2. The claimant was a worker in terms of section 230(3)(b) of the Employment Rights Act 1996. She was not an employee.
3. The claimant is owed £1214.50 being unpaid commission. The respondent is ordered to pay £1214.50 to the claimant in respect thereof.
4. The claim of unfair dismissal is dismissed as the claimant was not an employee and does not have the requisite length of service to make such a claim.
5. The claim for travel expenses is dismissed.

**REASONS**

**Preliminary**

This case was listed for a 1 day hearing commencing at 10am. Neither party had complied with the case management Orders so there were no witness statements and documentary evidence was provided by way of email attachments throughout the

hearing. These are referred to where necessary. The claimant and Mr Morrison gave evidence in support of their respective cases.

## Findings of fact

1. The claimant had started a small online business and sought a means to earn additional funds. She saw an advertisement for a business development manager with the respondent and a job description on the “Indeed” jobs site [which was provided as a screenshot]. She applied for the position. She was aware that it was a commission-based role. The role was field-based signing up SME sized businesses to advertise their company in David Lloyds Clubs. In short, the claimant sold advertising space in a magazine which was distributed at the Club. She would seek either 100% of the payment from the customer in advance or 50% initially and 50% later. It was her responsibility to recover any later payments.

2. She trained with Derek Bowen on 18 May 2021 for four days at David Lloyds Clubs in Purley. On 24 May 2021, Mr Derek Bowen and the claimant signed the agreement which was similar in terms to the copy provided by email by the respondent. Payment to the claimant was addressed in Schedule 3 of the Agreement which provided:

### **Schedule 3: Compensation and Billing Procedures**

#### **I. Compensation**

- A. Client will pay 25 % commission in consideration of approved adverts or agreed content paid weekly or fortnightly in arrears on receipt of agreed invoice.
- B. The Client will then pay the Agency an agreed additional 5% commission of the total revenue of each publication issue on completion of each David Lloyd Clubs Member Benefits Programme completed by the Agency after first deducting all agreed cost associated with the production of the programme (including but not limited to design, artwork, print, images, video, publication transportation,
- C. Billing procedure: Invoices are to be sent to [admin@aspiredmarketing.co.uk](mailto:admin@aspiredmarketing.co.uk)  
The Client will from time to time pay reasonable travel expenses at its discretion to the Agency.

3. On 29 July 2021, the claimant contracted Covid 19 and said she would work from home. She did not contact her clients to collect any payments due thereafter.

4. The claimant invoiced the respondent in Invoices 1001-1005 Purley each of which was disputed to some extent, Invoice 1005 Kingston for £118.50 was not disputed. There is an invoice 1006 for travel expenses which was not in issue. The claimant received payments of £500 on 2 June 2021, £500 on 2 July 2021 and £481 on 12 July 2021. The claimant sought payment of Purley 2, 3 and 4 and Kingston.

## Law

5. Section 230 of the Employment Rights Act 1996 provides:
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

- (a) a contract of employment, or
  - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
- and any reference to a worker's contract shall be construed accordingly.

6. Section 27 provides:

- (1) In this Part “wages” , in relation to a worker, means any sums payable to the worker in connection with his employment, including—... but excluding any payments within subsection (2).
- (2) Those payments are—
  - (b) any payment in respect of expenses incurred by the worker in carrying out his employment,

7. Section 27(1)(a) refers to both bonuses and commission. In **New Century Cleaning Co Ltd v. Church** [2000] IRLR 27, the Court of Appeal held by a majority (Sedley LJ dissenting) that in order for a payment to fall within the statutory definition of wages, the worker had to show a legal entitlement to the payment (whether contractual or otherwise).

### Discussion and decision

8. The ET1 makes the claim against Derek Morrison Bowen whereas the contractual documentation identifies the other contracting party as Member Benefits Limited. The claim was amended accordingly.

9. The arrangement under which the claimant worked fell within the definition of a worker in section 230. She was not an employee and did not have the requisite length of service to claim unfair dismissal.

10. The claimant sought to recover what she claimed were outstanding travel expenses. The Tribunal did not entertain this claim as it was precluded by section 27(2)(b). The evidence in relation to travel expenses impacted on the evidence of what was outstanding on the invoices. The claimant texted Derek Bowen on 16 July 2021 for a reimbursement of £227.04 which is what she said she had spent on travel and entertainment from 1 July 2021. She said that on 19 July 2021, Derek Bowen agreed verbally in David Lloyds Club, Kingston that he would reimburse her travel money and pay what was remaining of her sales commission. However, he only agreed to pay her £200 for her expenses. On 26 July 2021, Mr Bowen sent a text message, “*I have sent you some dosh which you will receive in your account tomorrow*”. A stand off ensued whereby the claimant carried out no further work until her invoices were settled. Her outstanding invoices were not settled nor was she provided with a financial reconciliation of what was actually due to her.

11. The witnesses were in agreement about very little. The claimant gave evidence consistent with the narrative of her ET1. She had been paid for Invoice 1001 by two sums £500 on 5 July and £481 on 12 July 2021. She received £500 on 2 June 2021 which she said was for travel expenses. The respondent disputed this. The Tribunal

considered it unlikely that such a sum would be for that amount. No invoice was produced. To pay travel invoices without travel receipts seemed an unusual practice for an employer to adopt but it did at least so far as Invoice 1006 was concerned for July travel expenses totalling £200. The claimant lodged a copy of her Lloyds bank statement which seemed to support that invoice.

12. Invoice 1002 was issued to recover the 5% due when the magazine was produced. This amounted to £292.25. Invoice 1003 was issued to recover the second part of the commission due on certain identified sales totalling £235.50.

13. Invoice 1004 Purley is for the commission claimed for certain sales at 30% amounting to £1336.50 about which there was much dispute. Invoice 1005 Purley is a duplicate of Invoice 1004.

14. Certain of the transactions relied upon by the claimant were either cancelled or not paid. The respondent identified the following entries in this category: Invoice 1001 Twizzlers £595, Invoice 1002 Casa Lola Tapas £347.50, Aycorn Ltd £795 and Tranceformations £395. The Tribunal decided that no deduction should be made to the calculation of the amount of the claim in 1002 as 5% was being claimed for completion. If completion had not taken place, the claimant should have been told as indeed if the clients had cancelled. Similar reasoning applies to invoice 1003.

15. Invoice 1004 falls to be treated differently. Whilst the Tribunal did not understand the system whereby the respondent identified when clients cancelled or did not pay and if or how it adjusted the amounts due to persons such as the claimant, it accepted that not only did the claimant not collect the amounts due and this work was done by others, she was also contacting the clients to get them to cancel their orders as she was in dispute with the respondent. She also included the 5% additional commission for completion which was unlikely in the event of cancellation. The following clients cancelled, El Shams £595, The nail collection £495, Crystal Cuisine Persian £595 and Cash and Carry £495. It seemed to the Tribunal that the claimant was trying to approbate and reprobate the contact in that she was claiming under it whilst acting against its terms.

16. On 9 September 2021, Alex of the respondent's administration texted the claimant and said that the details for her invoice would be provided once they have tracked down the total payable commission. It is not known whether this relates to some form of internal financial reconciliation or payment of the invoices. The Tribunal really did not understand why a reconciliation had never been provided to the claimant and was even more concerned that a reconciliation had not been provided to the Tribunal.

17. The finding of the Tribunal is as follows: Invoice 1002 £292.25 due. Invoice 1003 £235 due. Invoice Kingston £118.50 due. Invoice 1004 undisputed items total £2275 of which 25% amounts to £568.75. The Tribunal declined to award the additional 5% as it was unlikely these clients were included in the magazine. These total £1214.50. The Tribunal considered whether to deduct the £500 paid on 2 June 2021 but decided it had not been provided with a basis for so doing by the respondent.

18. The respondent sought to make an employer's counterclaim in the ET3 under art 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 but was not permitted to do so as the ET3 contained a denial that the claimant was an employee. The claim must be one to which section 3(2) of the Employment Tribunals Act 1996 applies. This refers to the breach of (or a sum due under) 'a contract of employment or any other contract connected with employment'. The meaning of the latter part of this phrase is, to say the least, unclear. It does not include a self-employed person's contract because 'employment' is defined by section 42 of the ETA 1996 as 'employment under a contract of employment', and that section does not adopt the wider definition including certain self employment where the work is done personally in section 230 of the Employment Rights Act. This might have had unfortunate consequences for the respondent in the present case.

19. Mr Morrison said he had only received notification of this hearing the evening before and was unable to present all the material in support of his case. He only found the other relevant emails from the Tribunal when he checked another email address. He blamed the Tribunal administration. The Tribunal noted that at one stage the respondent had instructed a solicitor and that a hearing on 19 July 2023 had been postponed on 17 July 2023. The Tribunal was unwilling to delay matters further and sought to determine the issues on the material before it.

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**Employment Judge Truscott KC**

**Date: 17 October 2023**