

REASONS

Introduction

1. By a claim presented on 30 November 2022 the Claimant brought complaints of unfair dismissal, wrongful dismissal, unauthorised deduction from wages in relation to unpaid commission and holiday pay, and a failure to provide written particulars of employment.
2. On 18 January 2023, the unfair dismissal claim was struck out on the basis that the Claimant had less than two years' service. On 24 January 2023, a judgment was issued under rule 21 of the Employment Tribunal Rules of Procedure in relation to all remaining claims. This was reconsidered after a hearing on 16 June 2023 and the judgment revoked. At the same hearing, the holiday pay claim was dismissed on withdrawal.
3. The Respondent made a counterclaim, which was permitted since the Claimant had made a breach of contract claim.
4. The Tribunal heard oral witness evidence from the Claimant and Mr Alan Caswell for the Claimant, and Ms Katarzyna Stachowicz (Director) for the Respondent. The Tribunal also considered a hearing bundle of 179 pages, and 9 additional pages of evidence which the Respondent was permitted to rely on, despite having submitted them late the previous evening. The Respondent also submitted 4 video files.

The Issues

5. The issues were determined by Employment Judge Roper at the hearing on 16 June 2023, and were set out in the Case Management Order following that hearing. They are as follows:

1. Unauthorised Deductions (Part II Employment Rights Act 1996)

- 1.1. *Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? The claimant claims commission in the sum of £9,000, calculated as follows: (i) £2,000 on the sale of an Audi S3 (SW57 GFU); (ii) £1,500 on the sale of a blue VW golf (PN06 XDA); (iii) £500 on the sale of a Porsche 718 (FG69 ZDK); and (iv) £5,000 profit in respect of the part exchange of a white Ford Focus.*
- 1.2. *Was any deduction required or authorised by statute?*
- 1.3. *Was any deduction required or authorised by a written term of the contract?*
- 1.4. *Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?*
- 1.5. *Did the claimant agree in writing to the deduction before it was made?*
- 1.6. *How much is the claimant owed?*

2. Wrongful Dismissal – Claim for Notice Pay

- 2.1. *What was the claimant's notice period? The parties agree that the claimant's notice period was one month, quantified at £1,026.40, and that the claimant was not paid in respect of this notice period.*
- 2.2. *Was the claimant guilty of gross misconduct or did he do something so serious that the respondent was entitled to dismiss without notice?*

3. Written Statement of Terms of Employment (section 38 Employment Act 2002)

- 3.1. *When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?*
- 3.2. *The respondent asserts in paragraph 10 of its Particulars of Response that the respondent prepared a contract of employment for the claimant but that he repeatedly refused to sign it.*
- 3.3. *If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.*
- 3.4. *Would it be just and equitable to award four weeks' pay?*

4. Employer's Contract Claim

- 4.1. *The respondent counterclaims against the claimant for breach of contract (and/or relies on the defence of set-off) as explained in paragraphs 40 to 44 of its Particulars of Response.4*
- 4.2. *The respondent counterclaims the sum of £36,300, which it accepts is capped at a maximum of £25,000, in respect of payments received for the sale of vehicles and monies overpaid to the claimant as follows:*
 - (i) *£10,800 in relation to the Toyota Hilux (H11 LUX);*
 - (ii) *£22,000 in relation to the mis-sold Porsche 911 GTS (FG69 ZDK);*
 - (iii) *£1,500 in relation to the withheld monies received for the Audi S3 (SW57 GFU); and*
 - (iv) *£2,000 in relation to the withheld monies received for the blue Ford Recovery (GJZ B256).*
- 4.3. *Did the claimant act in breach of contract, and are the sums due and owing from the claimant to the respondent?*

6. At the beginning of the hearing I asked Mr Fakunle to clarify the contractual clause relied on. Mr Fakunle stated that the Respondent relied on the written terms of employment, which on its case were in place during the employment, and in particular on a clause headed "SALARY" at page 53 of the Hearing Bundle. He was unable to explain how the sums claimed related to a breach of that clause.

7. The Claimant indicated that he had withdrawn part (iii) of 1.1 (relating to a Porsche), as this pre-dated his employment. He agreed that the Respondent's dates of employment were correct, 1 October 2022 until 3 November 2022.

8. At the beginning of the hearing I explained to the parties that I would adhere to the timetable set out in the Case Management order, allowing each party an

hour to cross examine the other party's witness(es), and that I would be guillotining them.

Credibility

9. Overall I considered that the Claimant was a credible witness. He answered the questions asked of him frankly, making concessions or stating he could not recall where appropriate, even if this was not favourable to him. I considered in particular the Claimant's account to be more credible in relation the matter of whether an employment contract was in place or not. This was because it was consistent with two emails the Claimant sent shortly after the end of his employment in which he requested his contract stating he had not been able to obtain it from the Respondent despite asking several times verbally. These were the only documents available to the Tribunal on this topic and they supported the Claimant's account.
10. Mr Caswell was not cross examined as Mr Fakunle was guillotined, and as such his evidence stood unchallenged.
11. I found Ms Stachowicz less credible as a witness. She was evasive in answering certain questions. This did not give the impression of a witness seeking to assist the Tribunal. She did not make concessions where appropriate, such as denying thanking the Claimant for selling the Porsche sale, which was contradicted by contemporaneous WhatsApp messages at p155 of the Hearing Bundle. Her account that she had asked the Claimant numerous times to sign written terms of employment but that he had refused and that she had resorted to posting them to him, was not consistent with emails sent by the Claimant shortly after the relevant time (at page 162 of the Hearing Bundle). Whilst Ms Stachowicz stated that this was because she had referred the matter to her solicitors, there was also no correspondence produced from her solicitors to the Claimant. I would have expected that if numerous requests had been made of the Claimant to sign a contract of employment, this would be reflected in responding to an email in which the Claimant requests a copy of his contract saying he had not been given one.

Findings of Fact

12. Having met on Instagram, the Claimant attended the Respondent's showroom and met with Ms Stachowicz in person for the first time on 21 September 2022. At this meeting it was discussed that the Claimant would work for the Respondent as a Sales Manager and would receive a minimum wage salary as well as receiving 50% of the profit on each sale he made. There is no dispute about this between the parties. However, what is in dispute is whether payment of the business costs was discussed. Mrs Stachowicz's position is that it was also agreed that the Claimant would have to pay 50% of the Company's monthly bill's and expenses. However, I found the account of the Claimant more credible, given the comments I have made above about overall credibility. Whilst there is in evidence a screenshot of a WhatsApp message (pages 177 and 178 of the Hearing Bundle), which refers to the Claimant paying half of the business costs, the messages are undated, cut off the Claimant's reply, and were not put to the Claimant in cross examination. For those reasons, I have placed little weight on them. In my finding, based on the Claimant's witness

evidence, it was an informal conversation between the parties. During the conversation it was only discussed that the Claimant would receive 50% of profit on sales he made, without any reference being made to payment of any costs. The parties agreed that a contract would be drawn up at a later date.

13. The Claimant's position is that he did not receive any written terms of employment until after the claim had been submitted and the hearing bundle was being prepared. Ms Stachovicz's evidence was that he had been given this a number of times and refused to sign it, and that it was also sent to him by post. I find the Claimant's evidence more credible on this. It is consistent with the only document I do have. Two emails on 23 and 24 November 2022 requesting copies of the contract which he stated in those emails that he had never received. No substantive response was provided, and there is no documentary evidence to support the Respondent's position, such as proof of postage or a cover letter.
14. The Claimant's claim for £500 on the sale of a Porsche 718 (FG69 ZDK) was withdrawn by the Claimant on the basis that this sale pre-dated the Claimant's employment. The Respondent asserted that this was mis-sold by the Claimant and that he reduced the price without her consent, then selling it to a friend of his, Mr Caswell, who was also a witness for the Claimant. Ms Stachovicz claimed that she was not aware that Mr Caswell was a friend of the Claimant's before the sale. Ms Stachovicz stated in oral evidence that she was aware of the sale of the Porsche prior to the start of the Claimant's employment, and unhappy about the price. When asked why she had still gone on to employ the Claimant her explanation was that she had been persuaded by the Claimant that the part-exchanged Mini Cooper was going to sell for a good price. Given Ms Stachovicz's awareness of the sale of this vehicle and the price it had been sold for, going on to employ the Claimant was not consistent with her account that this was so serious that she considered it fraud and theft. She did not contact Mr Caswell to seek to reverse the sale until 2 months later on 23 November 2023. These events are more consistent with the Claimant's explanation that Ms Stachovicz's former partner came back into the business after the Claimant's departure and was unhappy with the deals that had been done in his absence. This is another matter which significantly affected Ms Stachovicz's overall credibility.
15. As stated above, I found the Claimant's evidence more credible overall, and consequently accept his account of there being a profit made on the vehicles he dealt with. I also accept his evidence that he gave all cash sums to Ms Stachovicz. However, the Claimant was not able to explain the basis for his calculations in relation to the Audi S3 and the VW Golf he made claims in relation to. The Claimant was frank in his evidence that he simply could not recall the basis for the calculations. This assisted the Claimant in his credibility.
16. In relation to the white Ford Focus, the Claimant gave clear evidence that he arranged an exchange of a Mark 3 Ford Focus for a Mark 2 Ford Focus, and that the Respondent sold this for a profit of £10,000. This was disputed by the Respondent. The documents provided by the Respondent were a handwritten note by Mrs Stachovicz relating to this sale, and some screenshots of bank transactions, with no clear link on their face to any particular vehicle. There was no contract or invoice provided by the Respondent in evidence clearly relating to the sale or part exchange of the vehicle. In the absence of clear documentary

evidence, it was a case of considering the witness evidence. I found the Claimant's evidence more credible, for the reasons set out above, and make a finding that a profit of £10,000 was made on the sale of the mark 3 Ford Focus, which was sold after 3 November 2022.

17. The Respondent's case was that Ms Stachovicz decided on 3 November 2022 that she had had enough of the Claimant and decided to terminate his employment. She says that she hand wrote a dismissal letter and posted it to the Claimant but that she did not save a copy or any proof of postage. On 3 November 2022, she says that the Claimant came to the show room and threw a "bag of stuff" at her, which she characterised as an assault. A video of this alleged incident and another of the Claimant throwing a key onto the floor was provided and said to have been on 3 November 2022. On Claimant's case, after "relentless" calls from Ms Stachovicz, being screamed at and an incident in which she was rude to someone whom the Claimant had arranged to install CCTV, he decided resign. He told the Tribunal that he resigned without notice without notice on 3 November 2023, i.e. his resignation took immediate effect. He says that throwing the bag was a joke and it was full of rags. I prefer the Claimant's account because I find the Claimant's evidence more credible overall for the reasons set out above. The Claimant's account of leaving the business himself consistent with page 94 of the Hearing Bundle, in a text message to a friend a week later, 10 November 2023. In contrast, Ms Stachovicz's is unable to produce a copy of the alleged dismissal letter despite the very serious allegations she makes of fraudulent conduct on the Claimant's part. In addition Ms Stachovicz's alleged timeline of making a decision to dismiss the Claimant on 3 November 2022, doing so by posting a letter to him, but him coming to the showroom following his termination on that same day, 3 November 2022, is inherently problematic given that it would usually take some time for a letter to arrive by post.

Discussion and conclusions

Commission

18. I have made a finding of fact that no written terms of employment were in place. The contractual agreement between the parties was a simple oral agreement that the Claimant would receive a minimum wage basic salary in addition to 50% of the profit from the sale of any vehicle negotiated by him. In relation to the Ford Focus, I have made a finding of fact that a £10,000 profit was made. It was submitted that the part exchanged vehicle was not sold until after the employment had ended, this was agreed by the Claimant. The Respondent's position was that this meant that he was not entitled to the relevant commission. However, there were no contractual terms agreed reflecting the concept that the profit had to be realised in cash during the Claimant's employment or that commission would not be paid after termination. Therefore, I make a finding that the Claimant is contractually entitled to £5,000 in respect of this part of his claim.
19. Section 23 of the Employment Rights Act 1996 gives workers the right to make a complaint to the Employment Tribunal where an employer has breached section 13 of the Employment Rights Act 1996, the right not to suffer unauthorised deductions. Section 13 sets out the following:
- (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.*

20. Section 27(1) of the Employment Rights Act 1996 defines 'wages' as 'any sums payable to the worker in connection with his employment'. This includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment'. Section 13 therefore applies to the commission payable by the Respondent to the Claimant under the contract between them.
21. The defence put forward by the Respondent was simply that no profit had been made. It was not argued in the alternative that there was a statutory or contractual right to make the deductions. In these circumstances, the non-payment of the £5,000 commission was an unauthorised deduction in breach of section 13 of the Employment Rights Act 1996. It should have been paid at the end of the month, on 3 November 2022, along with the Claimant's basic salary.
22. The Claimant has not proven any profits in relation to the Audi S3 and the VW Golf. He could not explain his calculations. Therefore, I dismiss the claim in relation to the commission relating to these vehicles.

Notice Pay

23. In circumstances where the Claimant resigned with immediate effect and was not willing to work during his notice period, he was not entitled to be paid for a notice period. In the absence of an allegation that there was a constructive dismissal, this would require him to have worked or been available to work his notice period. This claim is dismissed.

Written Particulars of Employment

24. Section 38 of the Employment Act 2002 states that a Tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under section 1 of the Employment Rights Act 1996.
25. The claims listed under Schedule 5 to the Employment Act 2002 include unauthorised deduction from wages claims made pursuant to section 23 of the Employment Rights Act 1996. The Claimant has therefore made a successful complaint which falls within Schedule 5. I have also made a finding of fact that there were no written particulars of employment in place before the claim was submitted.
26. Pursuant section 38 of the Employment Act 2002, I must award the minimum amount of two weeks' pay subject to exceptional circumstances which would make an award or increase unjust or inequitable. In my finding there are no such circumstances which would justify a reduction. I may, if I consider it just and equitable in the circumstances, award the higher amount of four weeks' pay. I consider it just and equitable to make an award of two weeks' pay. This is the standard award and I do not see that there is any reason to increase it, given the short employment and the fact that it had been agreed between the parties that the Claimant would start his employment before the written terms

had been produced by the Respondent. I have calculated two weeks' losses to be that to be £483.46 (gross). This is slightly different to the figure stated orally, because it should be a gross award. This has been calculated by the gross pay of £1,047.50 referenced in the payslip at page 128 of the Hearing Bundle. This has been multiplied by 12 and divided by 52 to get a weekly amount, then multiplied by two to reflect the two weeks' pay award ($(£1,047.50 \times 12) / 52 \times 2 = £483.46$).

Counterclaim

27. An employer's counterclaim must be a contractual claim related to employment. The clause relied on was the "salary" clause in the written terms at page 53 of the Hearing Bundle. There is no wording in that clause which is relevant to losses made on sales. In submissions, Mr Fakunle could not clarify the clause and the breach said to have taken place. It is rather academic in any case because my finding of fact was that there was only an oral contract between the parties and that these written terms were not in place. The oral terms gave no basis for the Respondent to make a counterclaim for losses made on sales. The Respondent's counterclaim is dismissed.

Employment Judge Volkmer

12 January 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

23rd January 2024

FOR THE TRIBUNAL OFFICE