



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr K Kirby**

**v**

**SY4Security Limited t/a Talion**

**Heard at:** Reading (by CVP)

**On:** 3 & 4 January 2024

**Before:** Employment Judge Manley

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr Knight, Chief Operating Officer

## **JUDGMENT**

1. There was no breach of contract by the respondent which entitled the claimant to resign and claim that he was unfairly dismissed. That claim fails.
2. The claimant has also not shown that there was a breach of contract by the respondent in relation to commission payments. He has been unable to show further sums are due and that claim also fails.

## **REASONS**

### **Introduction and issues**

1. This is a claim for constructive unfair dismissal and breach of contract in relation to commission payments.
2. In summary, the issues were as follows:
  - 2.1 Was there a contractual right to commission payments?
  - 2.2 If so, had that contractual right been breached?

- 2.3 In particular, but not exclusively, was there a breach of contract in quarter 1 of 2022 in relation to the base commission rate used; the accelerator and payments for renewals. If so, are further amounts due to the claimant?
  - 2.4 Has there been a fundamental breach of the employment contract by the respondent with respect to commission payments which amounted to an express term of the contract and/or its unprofessional attitude amounting to bullying, in particular in a meeting on 2 November 2022, which amounted to a breach of the implied term of mutual trust and confidence?
  - 2.5 Has the respondent behaved in such a way as to indicate its intention to no longer be bound by the employment contract with the claimant?
  - 2.6 If so, did the claimant resign in response to such a breach, if there was one, and did he do so without delay?
3. The hearing, as I have indicated, was by CVP and was recorded in the normal way. There were some initial problems ensuring all parties had the relevant documents and although these documents had been sent in by the respondent, much of it was in separate documents which can be hard to manage at a hearing. I am very grateful that the claimant was able to make a combined bundle which included the vast majority of the documents.
  4. It also contained three witness statements on behalf of the claimant from people not attending the hearing, and one, from a witness for the respondent, Mr Phillips, but there was no need for him to attend. I read those witness statements. On one or two occasions Mr Knight and Mr Kirby shared documents on their screens to illustrate points they were making.
  5. The claimant had sent in a witness statement and Mr Knight relied on the response to the employment tribunal claim which included a response both to the claim for constructive unfair dismissal as well as details of various applicable commission schemes which are called "*compensation plans*" by the respondent. After cross examination and questions from the judge both parties made short oral submissions
  6. Before I gave judgment the claimant sent two emails which provided further explanations from him as to why his case is that there are errors in the way his commission had been calculated. I read those emails and on the morning of the 4 January they were forwarded to Mr Knight.
  7. Mr Kirby wanted to make some other comments in relation to what he considered to be an error in his compensation plans and also the fact that Mr Brown had not given evidence as he was the person from whom those compensation plans originated. We discussed that and Mr Knight made some very short comments on what the claimant had said. I then reviewed the judgment which I had prepared earlier and gave judgment orally.

## The facts

8. The facts are briefly as follows:
9. The claimant started as a Sales Engineer in the respondent's relatively new cyber security business in October 2020. The business is co-owned by Mr Knight and the CEO, Mr Mike Brown. There are approximately 50 staff in the UK with some staff abroad. I was told there might have been some initial problems with cash flow because it is a new business and because it is common in this industry but that the respondent is now profitable and salaries have always been paid.
10. Commission arrangements are as set out in sales compensation plans and commission is paid when the respondent receives payment from the companies it does business with. The compensation plans are relatively complicated and it seems the claimant had several during his employment of a little over two years.
11. There does not appear to be a significant dispute about the 2021 sales compensation plan, in part because not much commission was being earned until 2022. I have seen sales compensation plans dated 23 June 2021, 2 July 2022 and 28 October 2022. These plans state that they include general terms and specific goals and the first paragraph ends with the words "*We reserve the right to change or amend any part of this sales agreement at Talion's sole discretion*".
12. Mr Brown, the CEO, was the claimant's line manager and responsible for sales from April 2021 with Mr Knight being responsible for the non-sales part of the business. I understand Mr Brown has long experience of sales and commission plans but he did not give evidence in the tribunal.
13. After the first paragraph on the plans there are four bullet points which are in bold. The first is the claimant's annual salary which, at October 2022, was £93,625 plus £5,000 car allowance. The claimant's on-target earnings ("OTE") was said to be £154,599 as of October 2022. Then there was a "*base commission rate*" of 1.03% for quarter 1 with quarters 2, 3 and 4 being at 1.44%. The claimant's case is that the 1.44% base commission rate is correct and that the 1.03% rate, which had appeared in previous sales commission compensation plans, was the result of a mathematical error. The quarterly base quota is recorded as £960,000 on the July 2022 sales compensation plan but only an annual quota is mentioned on the October document as being £3,840,000 (the same figure multiplied by 4).
14. My understanding is that the quota figure is used to apply the accelerator rate which varied according to whether over 100% sales were achieved or whether sales were over 150%. The claimant attempted to explain what he believes is a mathematical error by using the quota to show the base commission rate as being a little over 1.44%. In his further email sent on 3 and 4 January he provided more details on why he says the 1.03% figure is incorrect. He states:

*"The base commission rate is not what drives my commission calculation, it is the resultant figure written as a percentage of the*

*ratio between my sales target (annual quota £3,840,000) and the commission eligible portion of my salary £55,825. This can be shown by performing a division of £55,825 by £3,840,000 which is precisely 0.014537 or 1.45 as a percentage.”*

15. Mr Knight, who was responsible for processing commission payments, said he used the figures in the sales commission plans as sent to him by Mr Brown, and he understood the base commission rate to be 1.03% before it changed in quarter 2 of 2022 to 1.44%. He applied the acceleration rate when the sales were over quota which was 1.1% and 2% but changed in October 2022 to 20% and 50% of the base rate. That was the basis upon which the claimant was paid. The sales compensation plans always stated that service product renewals were not included unless agreed in writing.
16. The claimant was concerned about his commission and discussed it several times with Mr Brown. It may have been suggested that he speak to Mr Knight who was responsible for processing commission payments. Mr Knight was aware that there were concerns about the commission arrangements and that there had been a number of changes particularly when sales staff came and went. The claimant has said that the October 2022 version of the sales compensation plan is correct but he does not accept the 1.03% quarter 1 based commission rate or other aspects relating to acceleration.
17. Despite the claimant's best efforts, I have not been able to agree with him on the issue of the commission rate paid. The document is one prepared by Mr Brown and sent to the claimant and Mr Knight for him to carry out the necessary calculations. I appreciate I have not heard from Mr Brown, and I have seen some evidence from Ms Barry, on behalf of the claimant, the calculations had been carried out differently when she was there. However, I cannot find that the figure of 1.03%, which is clearly stated in more than one sales compensation plan, is an error as the claimant believes it to be. That is the figure written there and despite the claimant arguing in a grievance with the respondent, that it was an error, it was not found to be so.
18. A meeting was arranged which Mr Knight believed was in connection with the claimant being able to see sales opportunities on the sales system which is called *Salesforce*. This took place on 2 November 2022 by video. That original matter appears to have been dealt with relatively quickly and then the discussion turned to wider matters about the claimant's commission. In particular, he was concerned because he understood his commission might be affected by other members of the sales team omitting to fill out certain fields on *Salesforce* and he felt he could not be responsible for their actions or inactions. Mr Phillips, another senior manager, had joined the meeting to discuss issues of visibility of sales opportunities.
19. As the meeting moved on to other issues, Mr Phillips was aware that it became heated and that the claimant accused Mr Knight of bullying him. Mr Knight accepts that he muted the claimant's audio once or twice and said something to the effect that "*common sense should be used.*" He denies

telling the claimant to shut up or use his brain. They seem unlikely comments to have been made but it does seem that Mr Knight may have appeared abrupt. I do not accept there was bullying in that call. I accept the claimant was frustrated with the different compensation plans he had and what he considered to be inconsistencies in them. But I also accept that Mr Knight and Mr Phillips were trying to resolve the issues as they arose.

20. On around 11 November Mr Bristow, who had previously worked with the claimant at the respondent as his line manager, brought to the claimant's attention a LinkedIn advert for a post at the respondent which appeared to be very similar to the claimant's as South East Senior Sales Engineer. The claimant felt that it was a response to the difficult meeting that he had had with Mr Knight. The respondent's case is that the advert was first prepared in September 2022 and a date on the document suggests that; that it was for future planning and Mr Knight had no connection to it being placed. The number of sales engineers at the respondent was mostly fairly constant. There is insufficient evidence before me to show that it was a direct response by the respondent to the meeting on 2 November.
21. The claimant was concerned about that and other matters and he completed a grievance form on 28 November 2022 where he raised the issue of underpayment of commission; the meeting of 2 November, and the LinkedIn advert.
22. The respondent uses a third party HR company and has a three stage grievance process.
23. The claimant attended a grievance meeting on 6 December and an outcome to the first stage of the grievance on 21 December.
24. In the meantime, he had decided to resign giving his contractual one week's notice but, unusually, I have not seen any documents relating to this resignation. The claimant recalled that he spoke to Mr Brown around 10 or 11 December 2022 and said words to the effect that it was not working and too stressful, and this happened after he returned from a few days away for work related stress. He was asked to put his resignation in writing and says he did so, although I have not seen that document. He was put on some element of garden leave, although he also undertook some handover tasks. The claimant did not say in evidence that he had said directly in his resignation that the reason for it was the underpayment of commission or the meeting on 2 November or other concerns.
25. The outcome from the first stage grievance was that it was not upheld. Although it was found that some aspects of the meeting on 2 November were inappropriate, bullying was not found. It was determined that commission was correctly calculated and the LinkedIn advert was not for his post. Some recommendations were made with respect to the sales compensation plans.

26. The claimant appealed and the second stage outcome was that the grievance was still not upheld. The claimant did not appeal further. By then he had left to get other work.
27. The claimant gave evidence about that and said he had spoken to someone, through a contact, about other work in around mid-November. He attended a presentation type interview and started at that alternative work the day after his notice expired with the respondent.
28. Those are the basic facts upon which I base my judgment.

### **The law**

29. This is a claim for constructive unfair dismissal under section 95 (1) c) Employment Rights Act 1996. This can occur when the claimant is entitled to leave with or without notice and claim there was a dismissal because of the employer's conduct. Case law guides tribunals on situations where this would apply. The conduct complained of should be serious conduct which breaches the contract of employment and is such as to indicate the employer does not intend to be bound by the employment contract. It might include breaches of the express or implied terms of the contract, most usually the implied term of mutual trust and confidence.
30. As far as the breach of contract claim is concerned, this is a common law matter and my job is to look at what the contract actually says and, where there is a dispute, what it means. My task is to read the words and apply a plain meaning to those words where it is possible. Where there is ambiguity, I will consider oral evidence about what has happened in practice.
31. These then are my conclusions.

### **Conclusions**

32. I first considered the contractual position with respect to commission arrangements. I accept that it was far from ideal for the arrangements to be so complex and to keep changing. The wording on the contractual position is clear enough though. It gives the respondent a right to change or amend without seeking agreement. That makes it very hard for the claimant to seek to enforce the commission arrangements particularly where the wording is disputed. I entirely accept that the claimant believed the arrangements kept changing and were lacking in clarity but that, as I have indicated, makes it even harder for him to seek to rely upon them. I cannot say that there was a clear contractual right for the claimant to receive commission, particularly as calculated by him, not least because the respondent had reserved the right to change it at will.
33. Even if I am wrong about that, and the right to commission payments formed part of his employment contract, the claimant has failed to show that there has been a breach in the way in which the percentage of 1.03% has been calculated. A plain reading of the phrase "base commission rate"

indicates to me that the figure there of 1.03%, and later 1.44%, is the one that should be used on applicable sales. Likewise, the acceleration rate appears to reflect the rate in the plans. I accept that the claimant genuinely believed another calculation is the right one but that appears, at least to some extent, to take into account the quota which I believe relates to when that bonus through acceleration was paid. Whilst I am sympathetic to the claimant's difficulties with the compensation plans, I am unable to find further sums are due and his claim for breach of contract must therefore fail.

34. Turning then to constructive unfair dismissal. I must consider first whether there has been a breach of contract and then, if I find such a breach, whether it was a fundamental and serious breach going to the root of the contract. As indicated, I have found no breach of an express term in the commission arrangements so I therefore turn to the question of whether there has been a breach of the implied term of mutual trust and confidence.
35. Again, whilst I am sympathetic to the claimant's difficulties, and the many changes to commission, as well as his concerns about management style, these do not amount to a fundamental breach of contract.
36. Whilst the claimant did not get the outcome he desired, Mr Knight met with him and tried to resolve the issues. Although that discussion became heated, I do not find that it was at a level to be categorised as bullying.
37. The respondent followed a fair grievance process, investigated the claimant's concerns, and made recommendations for improvement to the compensation plans. This was not the attitude of a respondent which does not intend to be bound by the contract of employment with the claimant.
38. I can understand why the claimant's unhappiness with this respondent caused him to look elsewhere for employment but it does not mean that he has shown there was a fundamental breach of contract. I accept that this contributed to his reasons for leaving and that he did so relatively promptly but the claimant has not been able to show that he was dismissed by the employer's conduct and therefore cannot be an unfair dismissal. His claims must therefore fail.

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Employment Judge Manley

Date: 26 January 2024

Sent to the parties on: 6 February 2024

For the Tribunal Office