



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Jialing Shi

v

Aregroup Ltd

Heard at: London Central

On: 18 to 22 March 2023

Before: Employment Judge Heydon

Representation:

Claimant: Ms Sarah Forsyth (West London Law Centre)

Respondent: Ms Laura Yeap (William Kateny Legal)

JUDGMENT

1. The Claimant was unfairly dismissed.
2. The respondent was in breach of contract by dismissing the claimant without notice.
3. The Respondent made unlawful deductions from the Claimant's wages in respect of commission payments (including an introducer's fee).

4. The Respondent failed to pay the Claimant her full entitlement to holiday pay.
5. In consequence, the Respondent is ordered to pay the following sums to the Claimant (all sums are gross):

(a) Unfair dismissal

Basic award:

Number of qualifying weeks (2) x Gross weekly pay (492.31) = £984.62

Total basic award = **£984.62**

Compensatory award

Loss of earnings:

Loss of salary over 23.1 weeks x gross weekly pay (492.31) = £11,372.36

Loss of commission which was attributable to deals the Claimant did while working, had not yet completed at time of dismissal, but would have accrued to her over the 23.1 weeks = £13,635.42

Loss of statutory rights = £500

Total compensatory award before 25% ACAS uplift = £25,507.78

Total compensatory award with 25% ACAS uplift = **£31,884.73**

(b) Breach of contract

2 weeks' notice x gross weekly pay (492.31) = **£984.62**

(c) Unlawful deduction of wages

Unpaid commission (including an introduction fee) = £9,455.75

Total unlawfully deducted wages with 25% ACAS uplift = **£11,819.69**

(d) Holiday pay

Unpaid holiday pay = **£43.32**

TOTAL GROSS AMOUNT PAYABLE = £45,716.98

REASONS

Introduction

1. The Claimant is Jialing Shi. She was employed by Aregroup Ltd (the Respondent) as a Business Development Manager from 1 March 2021 until 14 March 2023.
2. The ET1 claim form was presented on 11 April 2023 and the ET3 response was filed on 4 May 2023.

Claims and issues

3. The Claimant brings claims for unfair dismissal, wrongful dismissal, unlawful deduction of wages and unpaid holiday pay. The Respondent asserts that the Claimant resigned and was not dismissed, although it says that it would have been

within its rights to dismiss the Claimant without notice owing to gross misconduct. The Respondent also asserts that it fully paid all of the Claimant's wages, including holiday pay. The Claimant's wages claim relates to commission and bonuses which she says were due to her. The Respondent says that no commission remains due; that all commission was discretionary; and that in any event, the commission was not payable in connection with the employment, and therefore does not constitute "wages" within the meaning of s27 of the Employment Rights Act 1996.

4. There was also originally a claim to redundancy pay, but this was dismissed upon its withdrawal at an earlier open case management hearing.

Procedure, documents and evidence heard

5. The case was originally listed for a full merits hearing on 4 August 2023 before EJ Hodgson. The respondent requested an adjournment as an interpreter was required. It was converted to a case management hearing.
6. The final hearing lasted 5 days. The tribunal heard oral evidence from the claimant herself. From the respondent we heard oral evidence from Ms Angela Li, Mr Xianjin Yu and Mr Dorian Carboni. All four witnesses also provided witness statements which were allowed to stand as their evidence in chief. Ms Li and Mr Yu gave their oral evidence via a Mandarin Chinese interpreter, Ms Anderson.
7. The Tribunal was provided with a bundle of documents containing approximately 249 pages. The claimant provided written closing submissions, and the respondent provided a written skeleton argument. Both parties also made oral submissions following the end of the oral evidence.
8. The bundle of documents contained written statements provided by the Respondent from several people: Ms Rachel Cao and Ms Annie Yang (both former employees), and a property developer named Elaine Zhao. I have read these statements, and they were referred to in evidence and in oral submissions. None of these statements contained a statement of truth, and none of these people were presented to the Tribunal as witnesses or made available for cross-examination. Therefore, while I have taken account of these statements, I can only give them limited weight.

Fact-findings

9. Ms Jialing Shi was employed by Aregroup Ltd as a Business Development Executive. She was also referred to during her employment as Carol Shi. The sole director of the company was Ms Angela Li. At times, Ms Shi was one of only two permanent members of staff, although the company also employed a series of temporary interns. Ms Shi

and Ms Li met on 30 December 2020. She was offered the job at that time, although she could not begin working for the respondent until her work permit came through. The employment began on 4 March 2023.

10. Ms Shi's primary role involved selling properties on behalf of property developer clients. Aregroup received a commission from property developers. In addition to her salary, Aregroup would also pay commission to the Claimant for properties that she sold. In addition to these main duties, Ms Shi was required to carry out a wide variety of other tasks for Ms Li as and when she required them.

11. The contract (signed by both parties) stated at paragraph 7.5:

"You will also be entitled to participate in the Company's commission plan (the "Plan") (as notified), subject to the Plan's terms and conditions from time to time in force. A written copy of the Plan will be supplied to you separately. The Company reserves the right to amend the terms of the Plan, or to terminate the Plan or substitute an alternative Plan."

12. For the purposes of this claim, the company has produced a copy of a typed document entitled "Commission Plan" dated 2019. There is space for signatures, but it is not signed by either party. Some parts of the document are incomplete which suggest it may be a draft. Ms Shi claims never to have seen this document. Instead, she points to a handwritten note, which is dated 30 December 2020, the date on which she first met Ms Li and was offered the job. The handwritten note was signed by the Claimant and another employee at the time, named Daniel. The Claimant says that Ms Li wrote the note, which set out commission arrangements. Ms Li says that she had never seen this document before. Ms Li said that she had sole discretion over whether commission would be paid and how much, depending upon how the company was doing at the time. In practice employees had to invoice the company for commission, but only with the prior agreement of Ms Li, who would inform employees of how much commission they could invoice for. Commission was then paid as an invoice and not via the payroll. The 2019 Commission Plan says that commission will be paid through the payroll.

13. The handwritten note set out the amount of commission that would be paid to the employee for the sale of a property. The amount was based on a percentage of the value of the deal. It provided for a sliding scale of commission of 10%, 15% or 20% depending on the number of deals done by the employee in the year. In addition, a bonus would be paid of £1,000 if 6 properties were sold with half a year; a bonus of £2,000 if 10 properties were paid within a year; and an extra £500 for each property

from the 11th property and upwards. Up to April 2022, the commission payments received by the claimant match this formula. It appears that the conduct of the parties was in line with the handwritten note, not the formal 2019 "Commission Plan". Taking all of these circumstances into account, I find that the handwritten note was in fact the contractual "Commission Plan" which was, in accordance with para 7.5 of the contract, "supplied to [the Claimant] separately".

14. In February 2022, the Claimant had several discussions with Rachel Cao (a new intern) about a potential deal to sell a property worth over £9million. What exactly was said in those conversations is in dispute and it is not necessary for me to determine what was said. The Claimant says that she was helping Rachel to understand how to pursue the deal, given that she had only been working in the role for one week. Ms Li says she discovered that the Claimant had been conspiring with Rachel to do the deal personally, independently from the Respondent so that they could pocket the full commission themselves. The Claimant strongly denies this. Ms Li instructed the Claimant to write a "self-reflection report" setting out what happened. Ms Li said this is evidence that the Claimant admitted her wrongdoing and showed remorse. However, there is nothing in the self-reflection report, or any of the other contemporaneous documents to show that the Claimant has ever admitted to this.
15. In the end, the deal never went through, but Ms Li believed that the Claimant had tried to steal a deal from the company, which she viewed as a very serious matter, and accused the Claimant of doing so. She gave the Claimant a verbal warning, but told her that she would "give her a second chance".
16. On or around April 2022, Ms Li told the claimant that the company was in financial difficulty and that from now on, all commission would be paid at the flat rate of 10% rather than the previously staggered rates of 10/15/20% depending on how many deals were done within the year. She also said that bonuses would no longer be paid. I find that this was a variation to the Commission plan.
17. Also in 2022, the claimant began preparing to make an application for permanent residence in the UK and she asked Ms Li for help. Ms Li referred her to a lawyer to assist, but the claimant would have to pay for their help personally. Eventually the claimant got the paperwork completed which costed her a significant sum of money, but she still needed Ms Li to endorse it. On a number of occasions she approached Ms Li for her endorsement. Ms Li never refused, but kept delaying. The claimant knew that in order to obtain permanent residency, she needed to remain employed by the respondent.

18. A year later, on 10 March 2023, Ms Li (who had recently been away from the country for some time) had a conversation with the Claimant in which she expressed her satisfaction with the Claimant's work, offered to increase her commission from 10% to 15% and to give her a shareholding in the company.
19. Later that day, Ms Li spoke to Annie Yang who was an intern at the company at the time. Ms Li had been unhappy with Annie Yang's attitude. During that conversation it appears that Annie Yang made various allegations about the claimant's conduct. It is unclear exactly what was said, but following that conversation Ms Li made a number of phone calls to ask clients and others about the claimant's conduct. As a result of this Ms Li believed that the claimant had made disparaging comments about Ms Li to Ms Yang and possibly to clients; had given her own private contact details to one of the company's introducers (Mr Yu) and had dinner with him on one occasion; and possibly also that the claimant had been trying to arrange private deals.
20. On Tuesday 14 March 2023, the Claimant arrived for work as usual at 10am. Ms Li immediately called her to have a meeting in the corridor, with Annie Yang. Exactly what was said during that conversation is heavily disputed by Ms Li and the Claimant. The Respondent has provided a statement from Anny Yang, but this is one of the statements which contains no statement of truth and Ms Yang was not called by the Respondent as a witness. I can therefore give this statement limited weight. There is also a transcript of an audio recording of the final two minutes of the conversation, recorded by the claimant, which the parties agree is an accurate transcription. At around 10:30am the Claimant left the building, having gathered her personal items and given her work phone and computer back to Ms Li. It is common ground that the employment was at an end. The claimant says that she was verbally dismissed during that conversation. The respondent says that the Claimant verbally, and by her conduct, resigned.
21. A series of email correspondence followed. Later on 14 March, Ms Li sent an email (which was actually drafted by Annie Yang) intended for the claimant. This email was initially sent to the wrong email address, and so the claimant did not receive it until 16 March. The email stated:

"Following this morning's meeting between yourself, Anny, and me, you have confessed to collaborating with former employee Rachel Cao to bypass the company and make deals privately, as well as spreading defamatory statements about the company and myself in front of Anny. We have ultimately reached a consensus that you have agreed to resign from your position, and your employment contract has been terminated with immediate effect."

I would like to request that you promptly submit any outstanding invoices. We will adhere to the terms and conditions of your contract to handle any holiday pay and annual leave entitlements, and proceed with the final settlement of your salary.”

22. In the meantime, on 15 March, the Claimant had sent an email to Ms Li stating that she could not understand why she had been “forced to resign”. Over the course of the following correspondence, at various times, the Claimant referred to herself as having been “asked to resign”, “dismissed”, “forced to resign” and “forcibly expelled”. Although she used slightly different language at different times, it is clear throughout that she believed that she had not left her job voluntarily and that Ms Li had dismissed her on 14 March.
23. During the following correspondence, the claimant submitted a spreadsheet setting out the deals which she had facilitated, the values of those deals and the commission due to her. None of these have been paid and the respondent disputes that they are due.

Conclusions

Was the claimant dismissed?

24. It is for the claimant to prove that she was dismissed. The employment ended in the meeting of 14 March, but there is evidence both ways about what happened in that meeting and whether it ended with dismissal (supported by the claimant’s evidence) or resignation (supported by Ms Li’s evidence).
25. I find that the Claimant was dismissed. In addition to the claimant’s evidence, this is supported by all of the following circumstantial evidence:
- Although the transcript does not record the dismissal as such, it shows Ms Li telling the claimant to get out, several times;
 - In the days immediately leading up to, and immediately after 14 March, the claimant was very preoccupied with her application for permanent residency, and needed her employer to sign a document to get it; she would have known it would be impossible to get if she resigned;
 - The claimant was keen to get her unpaid commission;
 - Ms Li felt very angry and aggrieved with the claimant on the morning of 14 March;
 - There are some inconsistencies in the respondent’s account of the 14 March meeting – for example, Annie Yang’s written account says nothing about allegations of making private deals, or of sharing her private mobile phone number

with clients, yet these are later given as the main grounds for her dismissal, and the respondent alleges that the claimant confessed to this in the same meeting;

- The Claimant has given a very consistent account of events, from her account of the conversations with Ms Cao in 2022, through to the events of 14 March 2023, both in her correspondence the day after and throughout her conduct of the case;
- The Claimant has provided the transcript and sought to obtain CCTV footage. In the event, she was not able to obtain CCTV footage, but this suggests that she was confident it would have supported her version of events
- The Respondent says that they would not have sacked the Claimant because they at least needed her to stay on to carry out a handover; why then did Ms Li tell the Claimant several times to get out; and in the email sent to the claimant later that day, it is clear that they regarded her as having been guilty of serious misconduct.

Unfair dismissal

26. Next, I must decide whether the dismissal was fair. Having denied that there was a dismissal, the respondent has not formally asserted its grounds for dismissal. However, it is clear that Ms Li believed that the claimant was guilty of misconduct, so I must treat this as a dismissal on conduct grounds, which is a potentially fair reason. Applying the test in *Burchell v BHS*, I must determine if (1) the employer genuinely believed that she was guilty of the misconduct alleged, (2) whether this was on reasonable grounds and (3) after carrying out as much investigation as was reasonable in all the circumstances.

27. I find that Ms Li did genuinely believe that the claimant was guilty of several types of misconduct – namely doing deals behind the company's back to obtain all of the commission; badmouthing the company and Ms Li personally to clients, and conducting private conversations with clients and introducers.

28. Was this on reasonable grounds, and was as much investigation carried out as was reasonable in the circumstances? The evidence is inconsistent on what investigation Ms Li did. She did speak to Ms Yang and several other people on 10 March about the Claimant's conduct. Until the morning of 14 March, the Claimant was unaware that anything might be wrong. Just 2 working days earlier she had been promised a pay-rise and a shareholding. Now, with no notice, at an impromptu meeting held in a corridor she was accused of serious allegations of misconduct, and dismissed in less than 30 minutes. She had no prior warning of the allegations and could not have had any possibility of seriously addressing them.

29. In her email of the following day, it was clear that she still did not fully understand the reasons for her dismissal. In the following days she asked to bring a grievance about

her treatment but this was ignored, and she was not allowed to appeal. It was therefore impossible for the respondent to determine with any real confidence whether there were reasonable grounds for the dismissal and there was insufficient investigation. I take into account that R is a very small company, with limited resources but nonetheless the investigation was not reasonable, and the procedure followed was far from fair.

30. I therefore find that the claimant was unfairly dismissed.

Wrongful dismissal

31. I have found that the claimant was dismissed without notice. Clause 22.1 provided for the claimant to be given 2 weeks' notice of termination, unless one of the provisions allowing for termination without notice applies. The Respondent relies on clause 27 of the contract of employment provided as follows:

“Termination without Notice

27.1 The Company may also terminate your employment with immediate effect without notice and with no liability to make any further payment to you (other than in respect of amounts accrued due at the date of Termination) if you:

23.1.1 are guilty of any gross misconduct affecting the business of the Company; [...]

32. The Respondent alleges that the principal misconduct is several instances of “client poaching”. It is said that the Claimant offered to introduce potential buyers to property developers personally in exchange for a commission from the developers (Elaine) and developers to clients (Mr Yu), thus taking all commission herself rather than benefiting her employer. It is also alleged that she failed to report any suspicious conduct by Rachel Cao, to ask her to contact the developer without the respondent’s knowledge. The only evidence of such conduct that I have before me is contained in the “statements” of Elaine and Rachel Cao. I have already explained why I can give very limited weight to these statements. Mr Yu was called to give evidence, but his statement contained evidence only of having been asked by the Claimant for his personal mobile phone number, and having dinner with the Claimant once. It is alleged that the Claimant’s so called “self-reflection report” amounted to a confession and expression of remorse, but it contains no admission at all.

33. The evidence before the tribunal of the alleged serious misconduct is therefore very limited indeed, and is not sufficient to support the allegations. The respondent

argues that it has reason to believe that the claimant has had many more other incidents which she has concealed from the respondent. But this is simply speculation, and there is no evidence before the tribunal to support this. The Claimant gave her phone number to Mr Yu, which was contrary to company policy, although she said that Mr Yu, who was one of the company's valuable clients, insisted and she felt unable to refuse. The Claimant had been complaining about the company, in particular about Ms Li, to Anny Yang and possibly to others. It is possible that these could have amounted to relatively minor conduct issues. But I find that there was no gross misconduct, and the Claimant was entitled to 2 weeks' notice. She was therefore wrongfully dismissed.

Wages

34. The claimant alleges non-payment of commission and bonuses and holiday pay. The respondent says that commission is not "wages" within the meaning of the ERA 1996, and that evidence for this is that the commission was not paid through the payroll; the Claimant always separately invoiced for it, with payment terms of 15 days. The respondent also says that if the Commission Plan was agreed on 30/12/2020, then that pre-dates the employment by over 3 months, and so is not "in connection with the employment".

35. The Employment Rights Act 1996 provides:

"27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise....

.....

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made."

36. There are exceptions, but none are relevant here.

37. If the commission and bonuses are “wages”, then the tribunal needs to decide whether they were properly payable. If necessary, the tribunal may construe the contract of employment where necessary to decide if a sum is properly payable (*Agarwal v Cardiff University and anor*, 2018 EWCA Civ 2084, CA).
38. In this case, a structure for commission was clearly provided for within the terms of the employment contract. Commission was payable for arranging the sale of properties which was the claimant’s key duty. The Commission Plan may have been given to the claimant before her employment began, but she could not begin earning commission until her employment began. Any commission earned was inextricably linked with her employment. I reject the respondent’s argument.
39. I must then turn to whether commission was properly payable. I have found that a commission plan (the handwritten note) was in place and incorporated into the contract. I have rejected Ms Li’s assertion that she had full discretion as to whether to pay commission and how much. Para 7.5 of the contract entitled her to vary or replace the Commission plan, but all the while the Commission Plan remained in place, she had no discretion to arbitrarily decide upon individual payments. I therefore find that any commission and bonus allowed for in the plan did constitute wages.
40. In April 2022, Ms Li did in fact amend the Plan. Although no document was provided, she made it clear that for sales in the 2022/23 year commission would be paid at a flat 10% rate rather than the staggered 10/15/20% commission set out in the original December 2022 handwritten note, and that bonuses would no longer be paid.
41. I therefore find that commission which had been accrued by deals made by the claimant in accordance with the commission plan is properly payable. To the extent that the claimant has not been paid commission for any properties, her complaint is upheld.

Holiday pay

42. At the hearing the only dispute was whether holiday pay had been correctly calculated and paid. I will deal with this in the section on compensation.

COMPENSATION

43. In the judgment, I have set out the compensation that I have awarded to the claimant, and the basis on which it is calculated. Below I set out some further information on which this is based.

Wages

44. At the hearing, the claimant put forward the transactions that she facilitated, and the values of those transactions. The fact that the transactions took place and that the Claimant facilitated them was not disputed. The amounts claimed by the claimant are therefore properly payable and due.

Holiday pay

45. On considering the amount of holiday pay due and paid, using a method agreed by the parties, I calculated that an additional amount of £43.32 is due.

Uplifts and deductions

46. The claimant argued that an uplift to the compensatory award and the wages claim should be made due to failure to comply with the ACAS code. I have found that the procedure used to dismiss the claimant was far from fair. I also find that the failure to pay any of the unpaid commission when there was no real dispute as to the underlying transactions was also unreasonable. I therefore determine that a 25% uplift should be applied to both these parts of the award.

47. The respondent did not argue that any deduction should be made on grounds of contributory fault or on *Polkey* grounds.

Information used

Date of birth of claimant: 21/02/1994

Date started employment: 01/03/2021

Effective Date of Termination: 14/03/2023

Period of continuous service (years) 2

Age at Effective Date of Termination 29

Date new equivalent job started or expected to start 06/09/2023

Remedy hearing date 22/03/2024

Date by which employer should no longer be liable 06/09/2023

Contractual notice period (weeks) 2

Statutory notice period (weeks) 2

Net weekly pay at EDT 410.33

Gross weekly pay at EDT 492.31

Gross annual pay at EDT 25,600.00

Employment Judge Heydon

Dated: 1 June 2024

Judgment and Reasons sent to the parties on:

5 June 2024

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For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.