



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss K Incze**

**v Brookwood Search & Selection Ltd**

**Heard at:** Reading Employment Tribunal  
**On:** 21 June 2024  
**Before:** Employment Judge George

## **Appearances**

**For the Claimant:** No attendance, no representation  
**For the Respondent:** Mr T Wainwright, director

## **JUDGMENT**

1. The claimant's application for a postponement of the final hearing is refused.
2. The respondent's name is changed to Brookwood Search & Selection Ltd.
3. The respondent is to pay to the claimant £162.50.

## **REASONS**

1. The case had been listed for a final hearing by video following a notice of hearing sent to the parties on 9 May 2024. There was a short delay in the start of the hearing because the incorrect PIN number had been given to the parties.
2. Additionally, at 09.10 on the morning of the hearing the claimant wrote to ask for a postponement on the grounds of unforeseen family issues. I dealt first with the postponement application - which was resisted by the respondent.
3. Rule 30A Employment Tribunals Rules of Procedure 2013 (hereafter the 2013 Rules) states at rule 30A(2) that, where a party makes an application for a postponement of a hearing less than seven days before the date on which the hearing begins, the tribunal may only order the postponement in certain circumstances. The first is that all other parties consent to the postponement; that qualified power to order such a postponement is inapplicable in this case because the respondent does not consent. The second is that the application was necessitated by an act or omission by

another party or the tribunal; that is not something that applies in the present case. The final situation is rule 30A(2)(c), where there are exceptional circumstances. So, when considering the claimant's application for a postponement I need to consider whether, by her email of 09.10 this morning, she has shown that there were exceptional circumstances. That email said:

“Just want to let you know that because of unforeseen family issues I won't be able to attend the hearing. Ideally I would like to postpone it. Not sure if this is possible. If not go ahead with the hearing.”

4. My clerk contacted the claimant by telephone this morning, presuming that her non-attendance was due to the access PIN difficulties, before the email had come to the tribunal's attention. She mentioned childcare issues. She was asked to log into her emails and wait for a communication. At 10.46 an email was sent from the tribunal asking her for further information about the reason why she was asking for a postponement and what she wished us to do. She did not respond to the tribunal's email and was thereafter not available to be contacted by phone.
5. In those circumstances I am not persuaded that there are exceptional circumstances that necessitate postponement of the hearing. The overriding objective to deal with cases fairly means that I must also balance the inconvenience to the respondent and to the tribunal of the loss of time and cost of having to reschedule the hearing. There is a disadvantage to the claimant in the hearing going ahead in her absence. She had sent documents and a witness statement to the tribunal for consideration as recently as Thursday of last week. That tends to suggest, to my mind, that she intended to pursue the case. However, the disadvantage to her were the claim to proceed in her absence is mitigated, to some extent, by me being able to give such weight to those I think fit in her absence.
6. What is more important is that I know very little about the alleged reasons why she is apparently unable to attend and have not been able to find out anything more. I therefore considered that, because no exceptional circumstances had been shown, I should refuse the postponement application.
7. I decided to proceed in the claimant's absence having considered the options under Rule 47 2013 Rules. This is partly because her email of 16 June suggests that she is pursuing the claim. Additionally, the dispute between the parties about what is owing to the claimant it is pretty clear on the face of the documents. It concerns the quantity of the work said to have been done by the claimant in respect of a particular client placement before the end of her employment and how that should feed into the exercise of Mr Wainwright's discretion about what post-termination commission is due.
8. The proceedings are a claim for unpaid commission arising out of a short employment of the claimant by the respondent between 6 March 2023 and 3 July 2023 as a Recruitment Consultant for the recruitment agency operated by the respondent. The claimant seems to be arguing that she is entitled to 100% of the commission payable in respect of a particular client placement, notwithstanding the termination of her employment. The placement was

made before her employment ended. She does not appear to disagree that her contract included a clause stating that, if commission is due to an employee whose employment has ended, that is payable at the discretion of the director.

9. It was clear from the face of the contract, that the name of the respondent needed to be changed to match the name of the employer and I have done so by my judgment today.
10. The circumstances in which the employment came to an end are not something that I need to make a finding about. It appears on the face of the documents that the parties do not necessarily agree on all of the reasons behind it although both mention the employment coming to an end by mutual agreement.
11. The commission was not payable until after the end of the rebate period. That is the period after the start of the client's employment with an employer within which, if the placement failed, the employer could reclaim some of the agency fee. The claimant contacted ACAS on 13 November 2023 and there is no suggestion that this was done more than three months after the date on which that commission would be payable. Indeed, contemporaneous correspondence by which the respondent suggested the amount that would be appropriate is dated 23 October 2023. I am satisfied that the claimant probably contacted ACAS within three months of the date on which any commission was payable.
12. The certificate of compliance with the obligation to conciliate is dated 28 November and the claim was presented the following day. The response was accepted on 7 March 2023.
13. I heard evidence from Mr Wainwright, who adopted the statement that he had sent to the tribunal as his evidence. He confirmed the correct identity of the company.
14. The clause that is relied on is at page 32 of the 50 page electronic file. Clause 6.5 reads, "In the event of dismissal or resignation any commission owed to the employee will be paid at the Directors [sic] discretion".
15. The commission is said to be due in respect of the placement of a client called Joshua. The claimant has produced some WhatsApp messages with the client to indicate that she carried out substantive work placing him in a position with an employer.
16. I give some weight to the claimant's statement that was sent in last week and documents that she has relied on. She says that her line manager had confirmed in his last meeting with her that commission would be payable. However, that does not go behind the contractual provision that the director's discretion is what is used to assess the amount of any commission. It therefore seems to me that the line manager's assurance that commission would be payable is not inconsistent with an assessment needing to be made of the amount of that commission which is payable on a fair exercise of discretion.

17. The claimant states that the candidate was found by her and outlined in her statement the work which she says she did in order to place them, to ensure that they accepted the position and that it was successful. She suggests that there was another placement which was 50% her work and 50% her line managers but that is not the subject of her claim. I do not find that evidence relevant to the decision that I have to make.
18. I do accept Mr Wainwright's evidence that what he regards as being 100% commission is where the individual has found the client and found the candidate and has done the work to place them. His belief is that the candidate was passed to the claimant; she sends in her statement that she found his name on one of the job boards used for candidate search. Therefore there is a contradiction between his evidence and what the claimant is saying in her written document; clearly, the claimant has not been asked questions about her account nor been present to cross-question Mr Wainwright.
19. In part because the claimant's evidence has not been tested, I give less weight to it and prefer Mr Wainwright's account. The text messages relied on by the claimant, if one reads the introductory ones, are actually neutral as to whether the candidate was passed to her or picked up from the job board. I do not think that her argument about having no separate log in to the client and customer details is not something that assists me in my decision.
20. I am satisfied that Mr Wainwright made an assessment in line with his usual practice on how to identify the commission fairly payable to a departing employee. He set out by email on 26 October 2023 he gives a consistent account of how he exercised of his discretion. Discretion can mean that nothing is payable under the strict terms of the contract. This is not how Mr Wainwright interpreted it and I am satisfied in the present case that there was an intention to create a legally enforceable right to a proportion of commission, the amount of which was to be calculated at the director's discretion in cases of leaving employees. There would probably be an implication that the exercise of discretion should not be completely unfettered in a contract of this kind; it has to be exercised reasonably and not capriciously. I am satisfied that that is the task that Mr Wainwright set out to do.
21. He accepts that that means that £162.50 is due to the claimant and that is the figure that will be awarded.

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Employment Judge George

Date: ...4 July 2024.....

Sent to the parties on: 14 August 2024..

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For the Tribunal Office

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