



EMPLOYMENT TRIBUNALS

Claimant
Mr P Anderson

v

Respondent
Tennals Group limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham

On: 20 February 2020

Before: Employment Judge Lloyd

Representation

For the Claimant:

Did not attend

For the Respondent:

Ms N Owen, Counsel

JUDGMENT

The tribunal's judgment is that the claimant's claims of breach of contract, and unlawful deduction of wages are unproven. I dismiss the claimant's claims in their entirety.

REASONS

Introduction and background

Introduction

- 1 I intend these reasons to present to the parties in a clear and uncomplicated manner the grounds for my coming to the decision to dismiss the case the claimant has presented to the tribunal. Furthermore, why I have heard the claims in his absence, pursuant to Rule 47 of the Employment Tribunals Rules of Procedure 2013.
- 2 The claim before this tribunal is one of breach of contract and of unlawful non-payment of sums contentedly due to the claimant under the terms of his contract of employment with the respondent as a sales executive. The terms arise from an offer letter dated 8 December 2017.
- 3 This tribunal has no jurisdiction to hear issues connected with the sale of a business by the claimant to the respondent.

Rule 47; the claimant's non-attendance

- 4 The claimant presented his claim on 18 April 2019. In the notice of claim to the parties, dated 7 May 2019 the case was listed for hearing on Friday, 6

September 2019. The respondent lodged its ET3 and grounds of resistance on 4 June 2019. On 17 June 2019 the respondent's solicitor wrote to the tribunal with the conclusion that the matter would rely heavily on witness evidence from both parties. The respondent would need to call three witnesses. It was anticipated that the claimant at least would give evidence at the final hearing. Accordingly, the case was likely to require a minimum of four witnesses to give evidence at the final hearing. In the respondent's view, the tribunal was unlikely to be able to hear all the evidence, provide a judgment and if necessary, deal with remedy in one day. On this basis, the respondent's solicitors requested that the final hearing listed for 6 September 2019 should be vacated and the case listed for at least a two-day hearing. This would allow both parties to have a proper and fair hearing of the matter. The respondent did not anticipate that such request or consequential delay would cause either party any prejudice; and it would be in line with the overriding objective.

- 5 On 31 July 2019 the tribunal issued a new notice of hearing. The claim would be heard at the Birmingham tribunal on Thursday, 20 February 2020 and Friday, 21 February 2020. It was not until 20th of November 2019 that the claimant wrote to the tribunal in the following terms

"I am unfortunately unable to make the scheduled date for the hearing on Thursday and Friday 20th and 21st of February 2020. I respectfully ask for this to please be rescheduled for a later date. Can I also please ask that the hearing be held nearer to where I live as I do not have transport and being retired with my only income the state pension, I cannot afford the travel and overnight expenses to journey to Birmingham."

- 6 The claimant gave no reason why he was unable to attend on the scheduled dates. The respondent opposed the claimant's application to postpone and relist the hearing. The respondent's reasons were these:
- a) The claim was filed by the claimant on 18 April 2019 and was initially scheduled for a hearing on 6 September 2019.
 - b) In the light of the issues raised within the claimant's claim and to allow the respondent to address these issues it was clear that the allocated hearing time would not be sufficient.
 - c) Respondent's application to allow for a two-day hearing was accepted by the tribunal.
 - d) The claimant's application to postpone the final hearing made no reference to the reason why such a postponement was sought. Nor had the claimant provided any evidence to support his application. The claimant had been aware of the final hearing since July 2019 and did not indicate to the tribunal that he was unable to attend the hearing at that time.
 - e) Any such application to relist the final hearing to another tribunal could have been made by the claimant prior to July 2019 when the final hearing was relisted. Further, the claimant had made his application to postpone the final hearing less than two months prior to the final hearing.
 - f) The respondent had arranged for three witnesses to attend and upon whom it sought to rely at the final hearing. The three witnesses were three senior employees within the respondent's business, and it would be extremely difficult and disruptive for the respondent to rearrange their

- attendance for an alternative time to enable them all to attend to give evidence.
- g) The respondent believed that the re-listing and relocation of the claim would cause further delays and would not be in line with the overriding objective.
 - h) The respondent requested that the final hearing listed for the 20 and 21 February 2020 be retained and not vacated. Neither should the matter be transferred to a different tribunal.
- 7 On 18 January 2020 Regional Employment Judge Monk considered the claimant's request to postpone the hearing. The request was refused. The reason for refusal was that no reason had been provided by the claimant for his unavailability and therefore the case remained listed for 20 and 21 February 2020. By letter of the same date Regional Judge Monk informed the claimant that his application to transfer the proceedings had also been considered. However, the application was refused because it had not been made in good time and it would cause significant delay to the hearing of the case which was first issued in April 2019.
- 8 On 24 January 2020 the claimant sent a further email to the tribunal. He said that he had written to the tribunal on 20 November 2019 to request a new date for the hearing "with my explanation of the reasons why I am unable to attend". In my conclusion he had not so explained. He went on to say in his email of 24 January that he had been invited to a holiday with friends and "I'm not going to be in the country on 20 February". Also, that the venue should be changed to one nearer his home address. He said that it was very important that he were present at the hearing as there were "far wider implications to my claim that involves a breach of contract by the respondent who purchased my company just over two years ago and hasn't paid me a single penny." He asked that the tribunal re-consider his request and schedule the hearing to a later date so that he was able to attend at a location near his home. On 7 February 2020 he wrote a further email to the tribunal stating that he was unable to attend the hearing scheduled for 20 and 21 February 2020 due to "previously arranged holiday obligations."
- 9 On 13 February 2020 the claimant wrote to the tribunal stating that he was trying to secure legal representation as he did not fully understand the correct process and felt that he was "being taken advantage of by the respondent's solicitor because of this". Also, he was unable to attend the scheduled hearing for 20 and 21 February. He asked that the hearing be reconvened as he had previously requested.
- 10 At 12:21pm on 19 February 2020, less than 24 hours before the scheduled hearing, the claimant sent a further email to the tribunal. It stated
- a) He was now away for the next two weeks with limited access to phone and broadband. He was unable to attend the scheduled hearing commencing the following day, 20 February, and he felt that his case may not be dealt with fairly in his absence.

- b) There were other elements in respect of which he had a claim against the respondent, which included the purchase of his company during November 2017 for an agreed sum of £100,000. He claimed he had “never been paid a single penny” moreover, that he was still owed £55,000 in respect of the purchase of his office building. He acknowledged that these matters did not form part of the employment tribunal hearing.
- c) He was hopeful of securing legal representation in the not too distant future and he stated “... That if you are unable to come to a fair decision in this matter that we can reschedule a further hearing at a later date where I can be properly represented.”

11 The claimant did not attend by 10 AM on Thursday, 20 February. I instructed the tribunal clerk to make a telephone call to the claimant’s mobile number as stated on his ET1. He answered the call. The claimant was advised that his hearing was scheduled for today and that the respondent and its witnesses were present. He was asked to give his reasons for not attending because his application to adjourn was previously refused.

12 The claimant responded as follows:

- a) He had written to the tribunal in November asking to postpone because he would not be able to attend today.
- b) He is currently in the north of Scotland and has no chance of attending the Birmingham tribunal. He is now away for two weeks with limited access to telephone and email.
- c) He has no one to present his case and is trying to find legal representation as he feels he is being tied in knots
- d) He has evidence, by way of signed documents to show that the respondent is in breach of agreements with him.
- e) He is hopeful that the Employment Judge will review the case and that he will have the opportunity to attend in the future.

13 Having regard to all the evidence before me I conclude that it is just and equitable to all parties that I proceed to hear the claimant’s claims in his absence in accordance with rule 47.

The issues

14 The claimant’s factual case is this.

- a) The respondent agreed to increase the claimant’s salary from £25,000 to £35,000 with effect from February 2018. That this was not paid.
- b) The respondent agreed a further increase in the claimant’s salary from £35,000-£55,000 with effect from August 2018 and this was not paid.
- c) He was entitled to a 10% commission on net sales achieved, no commission was ever paid to him.

15 The respondent's case is as follows:

- a) The claimant was awarded an increase in his salary from £25,000-£35,000 to take effect from 1 September 2018; though in fact the increase was backdated to cover August 2018 in addition.
- b) There was no other agreement to increase the claimant salary by any other amount at any other time.
- c) Commission would only be paid in line with the claimant's offer letter, namely, "commission at 10% for the first year's net value of any maintenance contract brought in (document A/38). The claimant did not bring in any maintenance contracts whilst employed by the respondent and no commission was due. The respondent operates two different types of contracts with its customers: maintenance contracts and reactive contracts. The former are for a fixed length of one – five years and attract guaranteed recurring revenue for the respondent. The latter are *ad hoc* arrangements and are for a specific piece of work, rather than a period of time. Counsel gives the example of replacing a faulty lock.

16 These legal issues arise:

- a) Was there a variation to the claimant's contract of employment, to the effect that from February 2018 his salary would be £35,000 per year? If so, was the respondent in breach of that term?
- b) Was there a variation to the claimant's contract of employment to the effect that, from August 2018, his salary would be £55,000? If so, is the respondent in breach of that term?
- c) Had the claimant completed work that would attract a commission payment under the terms of the offer letter? If so, was the respondent in breach of that term by not making a commission payment? If so, how much commission was due to the claimant?
- d) In respect of the alleged unlawful deductions from wages, what salary was properly payable to the claimant from February 2018 to the termination of his contract on 7 November 2018? Does the figure that was properly payable, in respect of the claimant's salary, differ from the salary that was in fact paid by the respondent? Was any commission properly payable to the claimant under the terms of the offer letter? If so, how much commission was properly payable?

Analysis of the evidence

17. The claimant was employed as a sales executive within the respondent's facilities management division, from 4 December 2017 (the start date in the offer letter) until his resignation with immediate effect on 7 November 2018.

19. The claimant had approached Richard Cullen, the respondent's chief executive in about November 2017 with regard to his buying the claimant's business, "Onecall Group". In or about December 2017 the respondent purchased, out of the liquidation of the business, a list of Onecall's customers. As an ancillary to the purchase agreement the claimant was

offered a contract of employment by the respondent. With effect from 4 December 2017, the claimant commenced employment with the respondent subject to a three-month probation period. In March 2018, the respondent extended the claimant's probation period for a further three months. On 1 September 2018, the claimant was awarded a salary increase from £25,000 per annum to £35,000 per annum. The increase was backdated to 1 August 2018. On 7 November 2018, the claimant attended a performance review meeting chaired by Ian Robinson the respondent's sales director. The respondent was dissatisfied with the claimant's performance in his employment. On the same date, the claimant resigned with immediate effect. The claimant's effective date of termination of employment was 7 November 2018.

20. The claimant presented his ET1 on 18 April 2019 having pursued ACAS early conciliation between 5 February 2019 and the 19 March 2019.
21. The only evidence of the claimant which I have before me is his written interpretation of the events surrounding his engagement as a sales executive on 4 December 2017 and the subsequent 11 months of his employment ending on 7 November 2018. The burden of proof must be on the claimant to show that the respondent is in breach of his contract and has made unauthorised deductions from his earnings. He has not attended at this tribunal to give evidence to seek to discharge the burden of proof, and on the written evidence alone before me I'm not satisfied that he has done anything to discharge that burden.
22. He has stated in his ET1 that he was awarded a pay increase of £10,000 per annum to commence in February 2018 but that he never received that increase and the salary continued at £25,000 per annum, or £2083.33 per month. He claims he was later awarded a further pay increase of £20,000 to make his basic pay £55,000 per annum, which increase was to commence in August 2018. He claims he never received that pay award and that no reasons were given why the award had not been paid.
23. Further, he claims that his letter of engagement, dated 8 December 2017, states that he will be paid 10% commission on net sales achieved and that despite winning just under £500,000 of new business he had never received any commission or bonus payments. Due to his persistence about his pay increases and commission payments, and whilst he was on annual leave from 29 October 2018 until 2 November 2018, he received an email summoning him to a performance review meeting. He claims that was a total surprise and a real shock because he had never had his performance question previously and based on his level of sales and new business which he had achieved since January 2018 he considered that his performance was more than satisfactory. At the performance review meeting held on 7 November, which was lengthy, he was confronted by his sales director (Ian Robinson) and the company's HR manager. He says that his role within the company was limited to sales and generating new business. His role was not one of project management he maintained and that the performance meeting strayed into territory outside his remit.
24. The claimant claims that in a telephone call during the meeting, Richard Cullen the chief executive spoke to him and encouraged him to resign. He

further claims that the HR manager handed him a letter for him to sign agreeing to his immediate termination. All payments promised and due to him remained outstanding he claimed.

Findings and conclusions

25. There is no written corroboration of the contended agreed variation of the claimant's contract, so as to increase his salary by £10,000 in February 2018 and by a further £20,000 in August 2018.
26. By contrast the written evidence before me is the offer letter which identifies the salary of £25,000 per annum (bundle/38), and the claimant's request for a salary increase in March 2018 which was rejected (bundle/49). Document 49 is headed "request for wage/salary increase and is dated 9 March 2018. The present salary of the claimant is shown as £25,000 and the proposed increased salary as £35,000. The document could not be clearer. In large letters, "NO" is written across the front of the pro forma with a further annotation "refused by R Cullen". The document is signed by Ian Robinson.
27. There are communications from the claimant querying an increase, but there is nothing in writing to corroborate any contractually binding agreement or a legal obligation under section 13 ERA to pay the increases contended by the claimant.
28. Ms Owen, counsel for the respondent, submits that the claimant's case is inherently implausible. I conclude that there are good grounds for her to make that assertion. It would indeed have been irrational for the respondent to have discussed pay increases of more than double the claimant's starting salary, prior to him having even commenced employment. It is improbable that the respondent agreed to any specific increase in or around December 2017 as the claimant would argue, since he had never actually worked for the respondent before and he was in any event subject to a three-month probation period.
29. Counsel has good grounds to argue that on the balance of probabilities, it is not credible that had such agreements been reached at the outset of the claimant's employment he would not have ensured that such understandings were recorded in the offer of employment.
30. The claimant claimed that he had pressed the respondent in relation to a salary increase in May 2018, referring to a supposed increase in salary from February 2018 (bundle/65). That is despite the unequivocal rejection of the claimant's request in March 2018.
31. Further, the respondent's evidence shows clearly that there were several performance and conduct issues in relation to the claimant's work. They came to a head in November 2018 when the performance review meeting was called. As counsel rightly submits it is inconceivable that such issues would be continuing at the same time as the respondents agreeing to more than double the claimant's starting salary – to £55,000.
32. The claimant has also made unpaid commission part of his claim. The basis of the claimant's commission entitlement was made clear in the offer letter at

page 38. Commission will only be paid on “*the first year’s net value of any maintenance contract brought in*”. The claimant had been working for the respondent for less than one year when he had resigned. Had he brought in any maintenance contracts – and there is no evidence that he did – he did not in any event survive the first 12 months of employment. On the basis of the commission agreement in his contract he would have attracted no payment at all.

33. Further, the respondent’s evidence laid before me at this hearing demonstrates that the accounts and work upon which the claimant seeks to be paid commission did not fulfil the criteria set out at, bundle/38. None of the work he relies upon at bundle/133 – 136 shows maintenance contracts which the claimant himself had secured. The commission clause is not activated.
34. Having regard to the findings I have set out, I have concluded that the respondent has not been shown by the claimant to be in breach of contract nor has it made any unlawful deductions from the claimant’s wages.
35. For all these reasons I dismiss the claimant’s claims in their entirety.

Signed by: Employment Judge Lloyd
Signed on: 25 February 2020