



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr J Church**

**v**

**RDKI Ltd**

**Heard at:** Cambridge ET (CVP)

**On:** 8 March 2021

**Before:** Employment Judge Hanning

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr Morrel (Company Director)

### **COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

## **JUDGMENT**

1. The respondent has made an unlawful deduction from the claimant's wages and is ordered to pay the claimant the gross sum of £9,033.05.

## **REASONS**

1. This is a claim originally for about £13,000 in unpaid commission which Mr Church said was due to him on the termination of his employment. That could be framed either as a contract claim, that is to say he was entitled to it under the terms of his employment contract, but it could also be framed as a claim for unlawful deduction from wages relying on provisions under the Employment Rights Act which I shall come back to shortly. It was not clear on the papers exactly which basis for the claim was being made and I am able to treat it as one or other or both.
2. Today I have had the benefit of hearing evidence from both Mr Church himself and also from Mr Morrel for the respondent. Contrary to the Tribunal's directions given at the start of the matter, no bundle was prepared nor any formal witness statements prepared.

3. The only documents which had been made available to me have been the ET1 and the ET3, plus a summary of the claimant's claim which is dated 21 November 2020 and a detailed response from the respondent dated 7 January 2021. That was accompanied by a statement of terms and conditions of employment which is unsigned but dated 27 December 2018.
4. Taking the points which are not controversial, it is acknowledged that in 2014 Mr Church began working for what was a predecessor company. In 2017 a new company was formed and his employment transferred to that company. Both companies were run by Mr Morrel and in his evidence Mr Morrel accepted that there was no written contract at all until about 2016 when some terms were issued to staff. Those terms were revised and different ones were sent out again in 2018 and those are the ones that we have. We do not have a copy of the 2016 version.
5. Mr Morrel accepted there was an oral agreement for payment of commission but that this was not reflected in the 2016 written terms. The agreement was reflected in writing only for the first time in the December 2018 terms. Those refer to a commission scheme and say "*Sales staff will be part of a commission scheme agreed separately. 15% of net profits agreed \*see terms/responsibilities*" but it is unclear on the document what that is supposed to be referring to. The more detail in respect of commission says that:

“The role of salesman pays commission on sales, commission of % there is no amount given. It is paid of the retained profit with a sale excluding VAT when the installation is complete and signed off. The employer retains the right to change the commission scheme at any time and will discuss potential changes beforehand. Excessive remedial costs (£250 per customer including fitting) can impact the commission payable and will be discussed with the manager at the time they become apparent. It is said on the basis that a 30% profit blending margin or more is achieved minimum.”
6. That is not particularly clear but for the purposes of today matters were made easier by the fact that, Mr Church's basic claim, was agreed between him and Mr Morrel through the exchange of correspondence in an amount of £9,033.05. The reductions from the original amount claimed in the ET1 reflect representations made by Mr Morrel as to the profitability of the various jobs in question which Mr Church has conceded and therefore agreed that his entitlement would be that lower amount.
7. However, there remains to be determined an additional claim of up to £14,129.84 which the respondent looks to, in its words, "contra-claim" against the claimant.
8. To be a legitimate counter-claim in contract under the rules, the respondent should have indicated it was bringing such a claim in its ET3. It did not do this and earlier this morning I rejected what I took to be an application to amend the ET3 out of time in order to bring a formal counter-claim.
9. However insofar as the claim is one in contract that does not prevent the respondent from offsetting amounts against the claim if it is legitimate to do so. On the other hand, if I find that the failure to pay the amount due was an

unlawful deduction from wages, then there is no entitlement to offset because the legislation prevents that.

10. The law as to an unlawful deduction is set out in the Employment Rights Act, and s.13(1) provides that “an employer shall not make a deduction from wages of a worker” unless either (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.”
11. So what fell to be determined today was whether there was any basis on which the respondent was entitled to offset or to make some sort of claim against Mr Church for the loss suffered as a result of errors or omissions or lost profits on contracts and even if that were the case, whether this was an unlawful deduction from wages in which case that offset was not allowed. To be a lawful deduction there would have to be a contractual provision authorising it or Mr Church would have to have agreed in writing for the deduction to be made.
12. I want to preface what follows by recording that I found both Mr Church and Mr Morrel to be unhesitatingly helpful to the Tribunal. I felt they were both giving evidence honestly and to the very best of their knowledge and recollection and I am grateful to them both for the candour with which they spoke and if I may say so, the constructive approach both took to helping the Tribunal reach the determination on these issues.
13. As we were essentially with the question of the offset I asked Mr Morrel to give his evidence first and he explained in detail the issues which had arisen on four particular contracts. I will summarise those very briefly.
14. In the case of a Mrs W, the sink that had been ordered had to be changed but the old one was not sent back. There was also a change in works in that what was thought to be a dry fit, that is to say coming on site and simply installing the new kitchen without having to take out an old one, proved to be wrong. In fact there was an old kitchen to be removed and some additional works and that led to a considerable amount of additional expense because it was unforeseen and had therefore not been included in the original quotation.
15. Mr Morrel’s position was that it was the responsibility of Mr Church to have returned the unused sink at which point a refund could have been obtained and that he also should have formally quoted for the additional works that came to light later and obtained sign off on those works. As he had not done so Mr Morrel did not feel he could legitimately charge the customer whom he was at pains to point out was an elderly lady.
16. In the case of a Mr L, the wrong hob had been ordered so that had to be changed and, again, the old hob was not sent back. Again, Mr Morrel’s evidence was that he considered that to be Mr Church’s responsibility.

17. In the case of a client called Mrs T, a kitchen was ordered but in the wrong colour so it could not be returned. A new kitchen had to be ordered and a temporary kitchen had to be installed so there was considerable expense incurred by the company and Mr Morrel's position was that that was Mr Church's fault.
18. In the case of another client, Mrs K, there were I think I can safely say a host of issues which she raised which led to remedial works being required and again at least some of those Mr Morrel felt were the fault of Mr Church and therefore the costs attributable ought to be met out of monies due by him.
19. In answer to that Mr Church explained that in his opinion it was not his job to deal with returns and to say that the respondent could and should have charged the customer for the additional work incurred in the case of Mrs W. In the case of T, in all fairness he acknowledged very fairly I thought, that the job had gone badly wrong and a lot of costs had been incurred and he seemed to acknowledge that that may well have been due to an error on his part but he pointed out that this had all taken place before he left and could and should have been discussed then rather than after the event.
20. In the case of Mrs K, he felt it was not his fault. He dealt with the matter on the instructions he had received and was in some doubt as to whether an email which the customer was said to have sent had actually got to him. He certainly appeared to be ignorant of that email.
21. Looking at matters across the board, I completely empathise with Mr Morrel's position. It seems to me that he deserves a good deal of credit for the fact that he consistently bent over backwards to look after his customers and to do right by them and as he himself accepts, focused on that rather than on paperwork.
22. An example of this is that on the question of the returns his evidence was that the responsibility for dealing with the returns was set out in the handbook, but he conceded that in fact there was no handbook in place at the time these matters arose but there is one now. Of course, it follows from that that Mr Church cannot reasonably have been expected to know that it was his responsibility if it was set out in a non-existent handbook.
23. The upshot is that in reality there is no written evidence at all which gives rise to any obligation on any employee to reimburse expenses incurred as a result of errors they might make.
24. There is nothing in the statement of terms issued in 2018 which says expenses could be reclaimed. Mr Morrel has acknowledged, and I believe Mr Church accepts as well, that fundamentally these issues have been dealt with on an ad hoc basis. It is clear that in practice commission was paid at the rate of 15% and I also find, that that commission might well be reduced sometimes to reflect loss of profits later in a job but only following some discussions and a consensus being reached. That is evidenced by Mr Church's acknowledgement of errors in various cases and his acceptance that as a result the commission he was originally claiming needed to be reduced.

25. But that is a very far cry from reclaiming expense, which is what the respondent appears to be seeking from its response to the claim. Moreover, there is nothing in the statement of terms, nor anywhere else in writing which has been shown to me, which either authorises specifically a deduction from wages or by which Mr Church has consented to any such deduction.
26. In conclusion I find on the evidence is that even treating this as contract claim there is no contractual basis on which the respondent is entitled to offset or reclaim expenses or lost profits incurred in a contract and offset that against the commission found to have been due based on the profit actually achieved.
27. In any event because there was no written authorisation for a deduction from wages nor any consent to such a deduction, I find that the failure to pay the commission which was acknowledged to have been due was an unlawful deduction from wages and as such there is no entitlement to offset in any event.
28. In my judgment therefore this was an unlawful deduction from wages within the statutory definition and Mr Church is entitled to the £9,033.05 which was acknowledged to be due as commission because there was no contractual or legal right to offset on the fact of this case.

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Employment Judge Hanning

Date: 12 May 21

Sent to the parties on: 20 May 21

For the Tribunal Office