



EMPLOYMENT TRIBUNALS

Claimant: Miss J Evans

Respondent: Moonforge Ltd t/a Mister Window Company

Heard at: Cardiff Employment Tribunal by video-link
On: 5 December 2022

Before: Employment Judge E Macdonald

Representation

Claimant: litigant in person

Respondent: Mr L Fakunle, Senior Litigation Consultant (Peninsula Group)

JUDGMENT

1. The Claimant's claim for arrears of pay is not well founded and is dismissed.

REASONS

Background

2. The hearing was listed for 10am 5 December 2022 with a time estimate of 1 hour. I received a bundle of documents running to 57 pages together with a spare page.
3. Mr Fakunle confirmed that the Respondent had entered administration on 11 November 2022 but that the administrators had left the matter in the hands of his client to deal with.
4. I noted that there was rather less evidence relevant to the Claimant's claims than might be expected, and asked the parties how they wished to proceed. Miss Evans indicated that she wished to continue and wished to pursue her claim for unpaid wages. Mr Fakunle remained neutral.
5. I clarified at the outset of the hearing that the issue to be determined was whether the amounts claimed by the Claimant were "wages", and that this issue required me to consider whether the sums claimed were "properly payable".
6. The parties clarified their positions as follows:
 - a. The Claimant said that the sums claimed consisted of commission

- relayed that arrangement to the Claimant.
17. When the Claimant joined the Respondent she was given a letter of employment, signed by Mr Cody, which stated insofar as is material “. . . for this role we offer you a weekly salary of £500 per week basic with addition (*sic*) bonus payments when sales targets achieved . . .”
 18. Mr Fussell and the Claimant were aware that the Respondent was a growing company and agreed to take their bonus payments on a bi-monthly basis. They were only paid on the net sales figures (i.e. net of cancellations and VAT).
 19. The Claimant relied on calculations set out in a Schedule of Loss prepared for this claim.
 20. In July and August 2021 a sum equivalent to 0.5% of the net sales figures was given to the office staff.
 21. In January 2022 there was also a bonus payment, which the Claimant explained as having been paid “because Mr Cody agreed with Mr Fussell to get our overrides up to date . . .”
 22. The Claimant sought on numerous occasions to discuss the unpaid bonus with “Steve” (Stephen Cody, one of the Respondent’s directors).
 23. Mr Cody in oral evidence stated that the offer had initially just been “. . . we will pay you 0.5%”.
 24. When asked to explain his reasoning behind describing the bonus as “discretionary”, Mr Cody stated as follows:

“. . . we weren’t making any money, why should we be paying a bonus?”

Decision

25. In closing submissions, Mr Fakunle accepted that if there had been a promise to pay 0.5% then the question whether the Respondent was in profit was irrelevant.
26. Miss Evans confirmed that she had nothing to add by way of closing submissions.
27. The focal issue in the case was whether there was a contractual entitlement to bonus payments. There was little in the way of evidence in the witness statement although the Schedule of Loss did assert an entitlement to a 0.5% payment.
28. Mr Cody in his evidence accepted the Claimant’s oral evidence in large part, albeit that he initially asserted that the payment was dependent on profit. He accepted that there had been an agreement to pay 0.5% of net sales, and that this was independent of who was responsible for the sales - in terms, it was a “team calculation”. His view was that the profitability or otherwise of the Respondent company was relevant because he did not expect a bonus to be payable if the company had not been running at a profit, although he accepted that this was not an express term of the arrangement. Rather, the Claimant had simply been told that she would be paid a sum equivalent to 0.5% of net sales. Mr Cody however disputed the accuracy of the Claimant’s figures.
29. I reminded myself of the wording of ss 13 and 23 Employment Rights Act 1996.
30. I found that there was a contractually-enforceable promise made by Mr Russell to the Claimant, and on the authority of Mr Cody, to the effect that she would receive a bonus payment of 0.5% net sales, and that this

- agreement supplemented the written document at p 58 of the Bundle (as cited at Paragraph 17 above).
31. The Claimant in her Schedule of Loss asserted that she was owed £7,659.82 by way of accrued but unpaid bonus. She sought to support this by reference to a document at p 42 of the Bundle. However, the Respondent challenged the accuracy of this document and said that the sales figures were inflated or inaccurate. Mr Cody was very clear in his witness statement that the Claimant's figures were not reliable, and he was not challenged on this point.
 32. Further, the profit/loss account sheet for 2021 made it clear that the net sales figures were in the region of £2M. That is a very different figure from the figure which Ms Evans put forward. The profit/loss account sheet has considerable probative value.
 33. I therefore concluded that Ms Evans' table, which set out the figures on which she relied, was unreliable and could not be accepted as being accurate.
 34. I found in contrast that the figures set out in the Bundle starting at p 45 (setting out net sales figures) were reliable.
 35. I therefore rejected the Claimant's calculations. The Claimant sought payments for September – December 2021 and February – March 2022. I could not see the basis of those calculations nor had I been provided with evidence sufficient to satisfy me, on the balance of probabilities, that the sums claimed by the Claimant reflected 0.5% of net sales.
 36. I reminded myself of the burden of proof. It is on the Claimant to bring and prove her claim. The Claimant had not discharged that burden. It would not be appropriate to alight on a figure without an evidential basis for doing so.
 37. The remaining element of the Claimant's claim was for unlawful deductions relating to hours worked at weekends. It was clear that this element of the claim must fail, because the Claimant accepted in her oral evidence that the nature of her work was to do "what was needed". Her contractual basic pay was £500 / week. There was no contractual offer of weekend work. I therefore dismissed that element of the claim.
 38. I gave my decision orally at the hearing and explained to the parties their right to ask for written reasons under r 62 Schedule 1 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The Respondent's representative asked for written reasons and the request was repeated by Miss Evans.
 39. I thank the parties for their patience in waiting for these Reasons. The delay was caused by serious ill health.

Employment Judge **E Macdonald**

Date 10 February 2023

JUDGMENT SENT TO THE PARTIES ON 14 February 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

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