**Case Number: 3200787/2016**

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# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss E Smith**

**Respondents:** **1. Red Recruit Ltd**
**2. Red Temps Ltd**
**3. Red Temps Sales Management Ltd**

**Heard at:** **East London Hearing Centre** **On: 31 March, 26-27 April & 17 May (in chambers)**

**Before:** **Employment Judge Prichard (sitting alone)**

**Representation**

Claimant: Mr C Vickers (Counsel, instructed by Mitchell Plamplin Partnership, Maldon)

Respondent: Ms Y Montaz (Consultant, Employment Legal Matters Ltd, Frittenden)

## RESERVED JUDGMENT

**The judgment of the Tribunal is that:-**

1. **The claimant's claims for wrongful dismissal and unpaid commission fail and are dismissed**
2. **The respondent's contractual counterclaim succeeds for:-**
   a) **£10,976.66 - balance of Reliance loan repayment.**
   b) **£1, 057.68 - agreed holiday pay overpayment**
   c) **£204.00 - agreed repayment for taxi fares on account**
   d) **£1,152.90 - overpayment of commission for Aldi**
3. **The respondent's claim for an unauthorised Freshpac credit note for £451.55 fails and is dismissed.**
4. **The claimant is ordered to pay the respondent a total of £13,391.24**

## REASONS

1 As I stated to the parties during the course of this long hearing, it is a ruinous and distressing litigation for all concerned.

2 Elizabeth Smith is currently 41 years of age and lives in Boreham, Essex. She has been working in recruitment for 18 years before taking up employment with the first respondent, Red Recruit Ltd on 4 July 2014. Prior to that she had been working for Reliance Employment a company owned and run by Mr Mike Holmes, also in Essex.

3 Recruitment agencies, whether for permanent or temporary, staff, guard their clients jealously. It is common to see extensive restrictive covenants in recruitment agents' contracts. This is directly relevant to the present set of proceedings. Shortly after the claimant commenced working for Red Recruit Ltd both she and Red Recruit Ltd were sued by Mr Holmes under the terms of the claimant's restrictive covenants with Reliance. There was also a claim for commission overpaid by Reliance to the claimant and outstanding monies owed on a company car there at Reliance.

4 Ms Caroline Seear is the Chief Executive Officer and majority shareholder in the Red group of companies. The respondent's other principal witness has been Mari Scholes the company secretary for the Red companies.

5 A sad aspect of this case that Ms Seear and the claimant were friends. The claimant's father used to walk Ms Seear's dogs.

6 At the time the claimant started, Red Recruit specialised in the recruitment of permanent staff to businesses. They were looking to branch out into supplying temporary staff. That was the claimant's speciality. It appears that the claimant was given a good deal of autonomy when she started working for Red Recruit. She brought with her a number of client contacts which she already had. (This was part of the Reliance court claim against them).

7 Part of the Reliance claim did not succeed because it was hard for Reliance to prove loss of the Aldi supermarket work. Aldi already had an agency relationship with Red Recruit.

8 The other part of the Reliance claim was £15,000 for overpaid commission and £3,000 for the outstanding payment on the company car. This was all settled by agreement. I have seen a consent order dated November 2014. As part of the agreement Red Recruit and the claimant had to meet their own solicitor's bill from Bright Solicitors as well as those for Wortley Byers Solicitors acting for Reliance. In her own right the claimant did not have the means to pay her share. The claimant's liability amounted to £32,000 plus a share of the other side's costs, which she had to repay to the respondent in instalments.

9 The claimant had also brought Employment Tribunal proceedings against Reliance which were current at the same time that she was being sued in the courts by Reliance. It was part of the settlement that she withdraw those proceedings, which did eventually happen.

10 I understand that the £32,000 "costs payable" to Wortley Byers was apportioned as to £18,000 for the debts owed by the claimant to Reliance and £14,000 for their legal costs. I queried why those legal costs could be half the size of Bright's final statement

plus payments on account totalled £28,041.30. The claimant ventured the explanation that Mike Holmes' wife runs a busy litigation practice and he might have had the services for less than arms length clients. I consider, they may have been assessed and possibly apportioned given Reliance was not agreed to be 100% successful in its claim.

11 The whole agreement between the claimant and the respondent concerning the liability in the Reliance litigation is, unlike other areas in this case, well documented and subject to a written agreement signed by both parties on 26 November 2014. The claimant undertook:

> "I hereby confirm I will pay 60% of the costs of the court case in regard to Reliance as stated on the Bright's final invoice and that Red Recruit Ltd will pay on my behalf. I will be wholly responsible for paying the £18,000 for the overpayment of commission and the car.
>
> This will be deducted monthly from commission at the rate of 50% per month."

That agreement was followed by letter of the following day from Ms Seear to the claimant:

> "Further to our meeting today and in regards to the solicitor's costs I would confirm that 60/40 split of the cost of legal case be split between you at 60% and Red at 40%. As there are many calls and emails made by yourself to Peter at Brights this is added to the cost substantially. I will also remind you that you gave an undertaking to me that you had no restrictions that would impede your work at Red when you took the offer of employment and indeed the offer letter states that too. Therefore the split is fair. You have an amount of £15,000 over-claimed commission and £3,000 for a car that was not returned to Reliance. This is not part of the legal fees and is separate and something you will have to pay yourself. This can go as a loan and Red to pay these amounts in the first instance. In regard to remaining sum your portion being £25,320.78 after taking off the over-claimed commission and the car. Red will pay these costs on your behalf and deduct the above costs at 50% of the commission to reduce this, plus the loan."

12 It is not clear how it is apportioned but if £25,320.78 is 60% of the total and Bright's bill was £28,041.30. Wortley Byers' legal bill must have been only £14,000 odd. The claimant's final total 60% portion of damages and costs in the litigation came to £42,201.30.

<u>The agreement over liability in the Reliance litigation</u>

13 Mr Vickers on behalf of the claimant has taken what I consider to be an extraordinary argument on the agreement between the parties. The agreement states literally: "I will pay 60% of the cost of the court case in regard to Reliance as stated on the Bright's final invoice". If one wants to be literal about this (a) it does not include Wortley Byers' costs of £14,000 odd nor does it include the statement of accounts because, as it happens, "Bright's final invoice" covering the period from 1 August to 30 October only came to £14,913.30 and did not include the £13,500 paid on account between 21 August and 9 October. The wording of the above agreement is clumsy so I cannot accept that the respondent should be bound by such an over-literal interpretation of the agreement nor do I accept as a matter of fact that the claimant ever considered that to be the deal. It would be an utterly random quantity based upon coincidental payment of approximately 50% of the bill on account. That reading of it also contradicts the letter written the following day in clear explanatory terms naming the claimant's portion of both solicitors'

costs as £25,320.78.

14 The claimant's proportion of the costs would need to have VAT added whereas the respondent would be able to claim input tax on its costs as a VAT registered company. The claimant was sued in her personal capacity as an ex-employee.

15 To the extent that it is relevant I was informed that the signed agreement of the apportionment of fees and schedule of repayments at 50% of commission was drafted by Caroline Seear without advice. That adds strength to the argument that she cannot conceivably have meant that that the claimant would get such a windfall. I also find that the claimant cannot conceivably have believed at the time that it was only the "final bill" she had to pay a share of. This seems to be an opportunistic claim made, after the event, in these tribunal proceedings.

16 I am reinforced in that belief by another letter written shortly afterwards by Caroline Seear to the claimant:

> "I would like to go over what we discussed today. When you came on board you gave me firm assurances that you had taken legal advice in regard to your restrictive covenant with your previous employer and that you were able to work at Red without legal restrictions. This was untrue. Reliance have charged £3,000 in the costs for a Range Rover which is effectively in your control. They have also claimed £15,000 for over claiming commission which is part of the settlement figure. As you will see from the solicitor's accounts you have called Bright on many occasions and this has increased the bill further. Red is prepared to pay 40% of the cost and as discussed you are to pay a 60% of that cost. This will be on a loan basis and will be deducted from your commission monthly. I believe that this is a more than fair offer in your favour."

17 The claimant never remonstrated over that at the time. One can understand why. Another factor is that the terms of her remuneration with Red appeared to be considerably more favourable than the terms she had with Reliance. Their letter before action enclosed a copy of the claimant's contract of employment with Reliance. Her basic salary was only £25,000 per annum although it does not outline the "strictly discretionary bonus system".

18 On the last day of the hearing I was shown the claimant's offer letter with the respondent which states:

> "We are please to offer you a position at Red Recruit of a salary of £50,000 per annum plus commission of 30% plus a company car… By accepting this offer you confirm that you are able to accept this job and carry out the work that it would involve without breaching any legal restrictions on your activities such as restrictions imposed by a current or former employee."

19 The commission the claimant had spent some time working out is based on 30% of the net profit to the company. The gross amount of revenue is taken and a fixed amount of 30% (running costs) is deducted from that to get a net profit. The commission is then worked out at 30% of that 70% amount. If the gross revenue was £1,000 the commission would be £210.

20 At that stage of the parties relationship, there was no mention of target or threshold to meet in order to be entitled to commission at all.

21 I cannot find that the claimant is owed anything on the Reliance litigation. She

has paid what was agreed in the agreements above. She still owes over £10,000 on the loan repayments (see below).

Wrongful Dismissal

22 There s a contractual dispute over the proper notice period for the claimant.

23 The claimant officially started employment with Red Recruit Ltd on 04 July 2014. Her employment then transferred to Red Temps Ltd in October 2015. According to the respondent she was there for only 6 months until 30 March 2016 when she was due to start trading in her own right in a new company in which she would be a 49% shareholder – Red Temps Sales Management Ltd. RTSM was incorporated on 18 February 2016. It was due to start trading with the claimant as an employee (salary £11,000), a director, and a shareholder (49%), on 6 April 2016, at the start of the new financial year.

24 The claimant's employment with RTL terminated on 24 March 2016, as confirmed in her P45. It was apparently agreed that she would receive 8 days notice pay from RTL. A formal letter of 6 April 2016 from Ms Seears to the claimant confirms her new start and her new role. She would have uncapped commission earnings above her minimal salary (£11,000) and was also to be freed of the management of staff at RTL. On a day to day basis she would report officially to Mr Simon Johns of Red Recruit Sales Management Ltd and Mari Scholes, the company accountant and company secretary (insofar as she needed to report to anyone). Caroline Seear was becoming the CEO of Red Build Ltd. Ms Seear ended:

> "On a personal level I consider you exceedingly capable as a Sales Director and with much drive and ambition. After consultation with other board members they too are of this view and that sales is your forte. It is our ambition to see you with high commission and focussed on sales."

The re-structure was promising well.

25 However, this is where it became complex. As at 6 April 2016, the claimant had failed to set up a company bank account for RTSM. Apparently money laundering information was still outstanding concerning verification of her personal postal address. Red Recruit Limited reluctantly had to pay the April 2016 proceeds of the commission sharing agreement (and salary) directly to the claimant in April (£4,063.83) because there was no way to get money to her through her new company RTSML. This has been relied upon by the claimant to support her contention that she was still employed by RTL till the end of her employment (after a 3-month contractual notice period).

26 The proper analysis seems to me that the claimant's employment with RTL ended in March 2016. She started working for RTSML on 6 April 2016. The written formalities were never put in place and the claimant's performance and sales figures then plummeted leading to the termination of her employment in May. She was with RTSML at the end. At least, she was clearly not employed by RTL at the end.

27 I cannot accept Mr Vickers' argument for the claimant that at the end RTSML was a plan and a discussion only. There had been discussions in February. Even if the mis-addressed letter from Ms Scholes to the claimant of 22 February did not reach the

claimant then, the important information was all there in her letter of 28 March, which did reach the claimant. The formal letter of 6 April from Ms Seear to the claimant, addressed to her at work, and the subsequent meeting made it clear this was a new beginning. The claimant's email of 7 April 2016 confirms she must have been aware that the restructure was already in place.

28 Ms Scholes told the claimant she would have to set up RTSML's company bank account as the payment on account from RRL to the claimant personally was the last such payment she would get. In the event no more commission was paid as the May commission was not payable, because the £85,000 monthly break even threshold was not reached.

29 This was clearly set out in a letter dated 22 February 2016 from Marie Scholes to the claimant. However, the claimant says she never received it. It is true, it was apparently sent to an out of date address in Maldon. It is surprising the claimant never queried its non-arrival, given the meetings and planning taking place in February, and that she was about to become a 49% shareholder in her own company. She needed more official information. In any event, I consider that the £85,000 threshold had been discussed between Ms Scholes and the claimant, and her letter of 22 February only confirmed the discussion. I consider the claimant had notice of the £85,000 breakeven commission threshold.

30 Mr Simon Johns provided a witness statement for this final hearing but did not attend. He stated that he had joked with the claimant in March 2016, about them both getting P45's but now being Directors of their own companies. I note the registered office of Mr John's parallel company Red Recruit Sales Management Limited (RRSML) has Ms Scholes address in Surrey as its registered office, as did the claimant's RTSML.

31 The claimant states in these proceedings that she never received the P45 now shown in the bundle. However on balance, I consider it likely she did, given the legal requirements of this restructure, and the thorough way in which Ms Scholes was coordinating it all. Mr John's evidence also has the ring of truth to it, even if he did not attend the hearing.

32 Further the details of the £85,000 monthly breakeven commission threshold and the P45 were both reiterated in the letter on 28 March 2016 from Mari Scholes to the claimant sent to her correct address in Boreham. The claimant states she did receive that. Even if she never got her copy of the P45, a P45 would have been needed. I am satisfied one was sent to HMRC to close the claimant's payroll PAYE account with RTL.

33 At the time it was set, the £85,000 threshold was originally forecast to be easily achievable. The commission would go to the company and the claimant could be given dividends throughout the year. Her PAYE salary of £11,000 could be paid with no deductions as it was below the income tax threshold and the NI LEL. That was the plan – highly tax efficient.

34 Despite the good promise for the future, as soon as 15 April 2016, Ms Seear had to write formally to the claimant to complain that she had once again reduced a member of staff to tears (which had apparently happened 3 times before). This had caused staff

to resign in the past. She also had to complain that the claimant was missing booked meetings with clients, which was unacceptable.

35 By 9 and 10 May 2016 Ms Seear was running out of patience with the claimant's lack of sales and her increasingly erratic attendance and behaviour in the office, and apparently ignoring requests from Ms Seear. She had not produced a 2016 sales strategy for RTSML.

36 Shortly after that on 13 May 2016, the claimant met Ms Scholes and Ms Seear and it was confirmed that her roles as Sales Director was redundant and she was dismissed with 12 days pay in lieu of notice, conditional upon the claimant signing a compromise agreement. Clearly that was not signed by her, as she has bought these claims to the tribunal.

37 Later, on 12 July 2016, the claimant changed the name of RTSML to ES Sales Management Ltd (Elizabeth Smith) as she could not carry on trading with the Red name which was for Ms Seear's companies. It does not appear the claimant has traded with the ESSML company anyway, since her termination in May 2016. The accounts etc are nw overdue. The claimant has another company with which she can trade. She incorporated Alive Recruit on 3 July 2015 which appears up to date.

38 There is no dispute that, whichever way you look at the claimant's continuous employment with 2, or 3, different companies, the claimant had less than 2 years service. There is no unfair dismissal claim.

Different contracts

39 When the claimant was first employed by Red Recruit Ltd on 04/07/15, her contract provided that she would be provided with 4 weeks' notice of termination after she had worked for 1 year. She transferred to Red Temps Ltd (RTL) in October 2015. Presumably she had 4 weeks' notice of that transfer.

40 There was then another contract made up with RTL. This contract was never signed. I have been shown 2 versions of it at pp 84 and 101 of the tribunal bundle. The later version seems to be at p 84, as it has more of the blanks filled in than 101. On studying both, I am quite certain that this is a draft contract, subject to negotiation, and work in progress, with much highlighting of passages which needed filling in, changing, or reconsidering in negotiation. There was never a final agreed copy, and certainly one was never signed.

41 On 14 September, Mr Allan Hunt of Mitchell Plamplin solicitors, who represent the claimant in these tribunal proceedings, wrote the claimant an email advising her on changes which needed to be made before the claimant should sign it. The claimant has waived privilege on it. One significant proposal was that there should not be a 6 month probation period as the claimant had already had a probation period in Red Recruit where she had proved herself, albeit in an associated company. This seems like a good point. However, the clause is still in the drafts available in the tribunal bundle. There were several other helpful (and sound) suggestions Mr Hunt made in that letter which

were not incorporated in the draft. That also indicates this was an early draft and work in progress. It seems the proposed meeting, to work out the detail, never occurred. Ms Scholes here commended Mr Hunt's letter as a good letter. It was.

42 Both those contract drafts state that the notice period, after the 6 months probation (clause still in there), will be 3 months by either party. This is the dispute over wrongful dismissal. There was no longer any controversy about the claimant's proposed job title. She was to be a Sales Director. (Her contract with Red Recruit Ltd was stated as "Customer Services Administrator" as a ploy to make her role appear more lowly and less influential than it was, in order to help with the Reliance litigation).

43 In order to support her contention the claimant contended that 3 months was a standard notice period in the Red Group. This was emphatically denied by the respondent. Ms Seear and Ms Scholes were quite clear that the Red companies had never had, and would never have had such a generous notice period for anyone (even family). They were clear the standard notice was 1 month. I accept that evidence. These witnesses were more likely to know. Apparently Simon Johns, who was in a parallel situation to the claimant, only had 1 month.

44 Contrary to Mr Vickers' submission, legally, just because this draft was originally provided by the respondent, the stage of contractual negotiation had not been reached where the *contra proferentem* rule of contractual construction could apply.

45 Mr Vickers described any possible decision by the tribunal that the claimant was employed by RTSML as "perverse". However, on balance, I must accept that the correct contractual notice period for the claimant was 4 weeks, and not 3 months. She was working under the RTL notice terms, which in turn were the RRL terms, until such time as any new notice provisions were agreed with RTL and then RTSML, but neither happened. This is the only contract the claimant ever agreed. The claimant stated in her tribunal witness statement that she had agreed and signed these terms.

46 The remuneration terms however were different from those in the original contract. We have all seen the April and May PAYE payslips for the claimant with RTSML which confirms a salary of £916.25 pm (=£10,995 pa) which is below the PAYE tax threshold and the NI LEL. The May slip confirms that the employer is RTSML. I am not persuaded by evidence of the claimant's bank statements that the source of payments is going to conclude who her employer was at any particular time. There could be third party payments.

<u>The Respondent's Contractual Counterclaim</u>

<u>Reliance litigation loan</u>

47 It is clear from the above narrative describing the correspondence and agreements between the parties that the claimant owed the respondent a total of £43,320.78 (18,000.00 + 25,320.78) for discharging her share of the liability in the Reliance litigation, by way of an interest free loan to her. I accept the respondent's figures which showed she had repaid a total of £34,344.12 out of her commissions at

the time of her termination in May 2016, apportioned first to the £18,000 compensation and then towards the £25,320.78 costs. The outstanding balance on the costs is now £10,976.66. She was given a 3-month repayment holiday from October to December 2015, otherwise the loan might have been fully paid by then. These figures had always been available to the claimant for her to check her progress against the loan.

48 There has been no challenge to these figures. In this tribunal hearing the claimant is disputing the agreement. Considering the logic of that, if the claimant was correct in her contention that she only had to pay a share of Brights' last solicitors bill (and none of Wortley Byers' £14,000 costs for Reliance and no £13,500 paid to Brights on account), she would already have overpaid by roughly £5,500. Given her financial situation, taking payment holidays, the claimant would never have done that. It clearly indicates that the argument is an opportunistic one after the event which does not, and never did, reflect the claimant's true belief. Copious correspondence shows she was aware of the arrangement for repaying her share of the Reliance case.

Holiday Pay

49 Without going into detail, the claimant accepts that she was overpaid £1,057.68 holiday pay, and the amount is agreed between the parties. The tribunal was taken through the calculations by reference to the respondent's holiday chart for the whole duration of employment.

Taxis

50 The claimant accepts that she owes the respondent £204 in taxi fares when she used a cab firm which the respondent had an account with, for personal and family airport runs, and that the respondent should not have to pay for these. She emailed at the time in April 2016 to ask for this to be deducted from her pay (although she had only accounted for 2 of the 3 fares by then).

Double payment of Aldi commission

51 Aldi was billed twice for the same temporary placements, once in November 2015, and then again in January 2016, as can happen. This resulted in overpayment of £1,152.90 commission to the claimant, which, in turn needs to be reimbursed. This aspect of the respondent's counterclaim also has to be allowed.

Unauthorised credit note

52 Freshpac was a good and regular client of the respondent. It was a potato farm – L Bartrupt & Son Ltd, Jeremy Freeman. They produce potatoes and potato products, mainly chips. The respondent supplied drivers for their vans to do their distribution rounds. In March 2016, one such driver Jacky Manette apparently managed to burn out a new clutch on the Freshpac van and had simply abandoned the round which Jeremy Freeman had to complete himself.

53 I had a good deal of sympathy with the claimant on this. The tone of the emails

from Freshpac was quite angry (justifiably so). It was obviously right to placate this client. Reading between the lines Freshpac might well have been contemplating changing to another temporary staff agency. There were other complaints too. The bill for the clutch was £951.55. The claimant immediately paid £500 of her own money into Freshpac's account and, for the balance of £451.55, she stated that Freshpac would be given a credit note (by the respondent). She did not obtain Caroline Seear's consent to this credit note.

54 On that basis, the respondent contends that the claimant is personally liable to the respondent for this unauthorised credit note. The respondent also contends that the claimant was generally mismanaging the account. Whether that was so, or not, it looked as if an immediate goodwill payment was in order and the claimant, in my view, reasonably considered she had implied authority to offer a credit note for the balance of the clutch repair on the respondent's behalf. To the extent that the faults in managing the accounts were hers she has paid £500 personally which she is not claiming back from the respondent. Wherever the faults may have lain in running the account it would have been extremely bad for the claimant and the respondent to have lost this client.

55 So, in my view, this loss should lie where it falls. This aspect of the respondent's counterclaim is not upheld.

56 For the reasons given above, the claimant's claims for wrongful dismissal and commission all fail and are dismissed.

57 The judge apologises for the delay there has been in promulgating this reserved judgment, which has been due to a backlog.

Employment Judge Prichard

26 July 2017