



# EMPLOYMENT TRIBUNALS

Claimant: Miss J Kopec

Respondent: Veritas Recruitment Services Limited

Heard at: Nottingham

On: Thursday 11 April 2019

Before: Employment Judge Legard (sitting alone)

## Representation

Claimant: In Person

Respondent: Mr Quaintance, Representative

# JUDGMENT

1. The claim for breach of contract (notice pay) is well founded and succeeds.
2. The claim for unlawful deduction from wages is well founded and succeeds.
3. The claim for unpaid holiday pay is not well founded and is dismissed.
4. The Claimant is awarded the sum of £2,332.72 made up as follows:

(i)	Breach of contract	:	£344.83
(ii)	Unpaid wages	:	£1,500
(ii)	Unpaid commission	:	£1,500
	less already paid		(£1,107.72)
			_____
			£2,237.11
	Plus interest	:	£95.61
			_____
<b>Total</b>		<b>:</b>	<b>£2332.72</b>

# **REASONS**

## **1. Background and Issues**

1.1 By a claim form received on 16 September 2018 the Claimant brings complaints alleging breach of contract (in respect of an alleged failure to pay notice pay) and unlawful deductions from wages in respect of alleged shortfall in wages and unpaid commission. She also originally claimed the sum of £5,000 for stress and anxiety but that claim was subsequently withdrawn. She also seeks a sum in respect of holiday untaken and unpaid at the date of termination.

1.2 The Claimant's claims were all robustly resisted by the Respondent. Their position, clearly stated, is that the Claimant was guilty of gross misconduct entitling them to terminate her contract without notice and that she was neither entitled to a shortfall in wages nor commission. In respect of the latter, the Respondent maintains that the same was payable at their sole discretion which, in this case, it was entitled to withhold. The position in respect of holiday pay is that the Claimant was remunerated in full for all accrued holiday entitlement at the date of termination.

## **2. Evidence**

2.1 I heard evidence from the Claimant and from Mr Mowbery, a witness called on her behalf. I have also heard from Mr Quaintance on the Respondent's behalf. Mrs Quaintance was not called as a witness. All witnesses were thoroughly cross-examined by the respective representatives. I have also been referred to a substantial bundle of documents prepared by the Respondent, paginated in a way that confused rather than assisted both the Tribunal and the witnesses. That said I acknowledge that preparation for a hearing is no easy task for those unused to doing so and I accept that the Respondents have done their best to comply with the Tribunal's directions.

3. Relevant Law

- 3.1 The legal framework governing cases of unlawful deductions and wrongful dismissal follows a well trodden path and can be briefly stated.

Wrongful dismissal

- 3.2 The question is simply whether the Respondent was entitled to terminate the Claimant's contract without notice on account of the latter's repudiatory breach of contract. The burden of proof is shouldered by the Respondent. The most frequent example of repudiatory breach of contract is misconduct sufficiently serious to be regarded as gross misconduct. There is no rigid definition as to what amounts to gross misconduct although, by way of example only, Tribunals would normally be expected to treat summary dismissal as justified in cases of dishonesty; cases of deliberate and inexcusable failure to comply with lawful instructions and in cases where the misconduct is repeated or otherwise particularly flagrant.

Unlawful deductions from wages (ss.13-27 ERA)

- 3.3 The general approach for a Tribunal is to determine whether the total amount of any wages that are paid on any occasion by an employer to any worker employed by him is less than the total amount of the wages 'properly payable' on that occasion. The amount of any deficiency counts as a deduction unless it has been lawfully deducted in accordance with the statutory provisions or is an error of computation as defined by s.13(4). The Tribunal's enquiry is often centred on what amount is 'properly payable' and this often necessitates an examination of the contractual position.
- 3.4 There is a broad statutory definition of 'wages' contained within s.27(1) of the Act. Amongst other things, bonuses and commission may amount to 'sums payable to a worker by the employer in connection with their employment.' See also *Farrell Matthews & Weir v Hanson [2005] IRLR 160* and *Tradition Securities v Mouradian [2009] EXCA Civ 60*, both of which are concerned with the non-payment of discretionary bonuses. Amongst other things, a Tribunal confronted with a claim in respect of

alleged non-payment of a discretionary bonus or commission (under the 'Wage Act' provisions as opposed to contractual jurisdiction) should consider whether the discretion was exercised and, if not, why not and whether the sums claimed are readily quantifiable – see, for example, *Adcock v Coors Brewers [2007] EXCA Civ 19*.

- 3.5 In so far as discretionary bonuses are concerned contracts often provide for an entitlement to a bonus or commission conferred by discretion. However there is a term generally implied into the worker's contract of employment that such a discretion will be exercised in good faith, for a proper purpose and rationally – see, for example, *Clark v Nomura International Plc [2000] IRLR 766*.

#### Holiday pay

- 3.6 The Claimant confirmed that her claim for alleged unpaid holiday pay was brought under the Working Time Regulations ('WTR') as opposed to her contract of employment. Regulation 14 WTR provides that a worker is entitled to be paid for any holiday accrued but untaken in the holiday year and further provides a pro rata formula for calculating the same. Such a claim is brought as an unlawful deduction from wages if brought under the WTR.

#### **4. Findings of Fact**

- 4.1 The Respondent is a small family owned recruitment business. It specialises in the placement of executives into various positions within the motor trade (for example a Sales Executive at a Skoda dealership). It operates principally in the North West and West Midlands area. Mr and Mrs Quaintance are the majority shareholders and are both Directors of the same.
- 4.2 On 4 January 2018 the Respondent recruited the Claimant into the role of Recruitment Consultant and in time she was tasked with the responsibility for the North West region. In March/April the Respondent introduced an IT software system called ZOHO which allowed the business to better track and administer dealings with both clients and candidates.

4.3 The Claimant's contract of employment is evidenced in part by a statement of terms and conditions. The relevant extracts of which are as follows:

- "(5) You will be subject to the terms and conditions as agreed and amended from time to time by the company as outlined in its policies, procedures handbooks and other relevant documents.*
- (6) The salary for the post is £16,000 per annum. This will be reviewed annually. You are also eligible for individual team performance bonuses as outlined in the company remuneration policy.*
- (10) You are obliged to give the company 4 weeks' notice to terminate your contract of employment. The company is obliged to give you the statutory minimum amount of notice before terminating your contract."*

Within that same terms and conditions the Claimant was entitled to 28 days holiday.

4.4 That document is supplemented by the company handbook/staff handbook. The handbook says amongst many other things as follows:

*"As an employee of Veritas you will have received a document setting out specific terms and conditions of service as they relate to your post and that the handbook summarises the main terms of employment.*

At 3(j) there is a paragraph concerning conflicts of interest which says as follows:

*"You should not directly or indirectly engage in or have any interest financial or otherwise in any other business enterprise which interferes or is likely to interfere with your independent exercise of judgment in Veritas Careers best interests."*

So far as notice periods are provided for within the handbook it says as follows:

*“Unless your employment is terminated by agreement **or specified otherwise in your principle statement of terms and conditions**<sup>1</sup> you or the company are required to give a period of notice in writing as follows:-*

*One week’s notice after one month’s employment; four weeks after six months.”*

- 4.5 The Claimant was in part recruited to fill the void created by Mrs Quaintance dedicating a greater proportion of her time to maternal duties. At first, and indeed for a large part of her relatively brief employment, Mr Quaintance and the Claimant appear to have enjoyed an extremely positive working relationship. Indeed Mr Quaintance speaks very highly of the Claimant’s work ethic, dedication and general performance. It is a very sad aspect of this case that the parties have fallen out so spectacularly in the space of what appears to be only a few days and that there appears to remain a significant degree of animosity between the two, self-evident before me today.
- 4.6 It’s common ground that the Claimant was permitted to work flexibly and, where necessary, from home so long as she performed to the satisfaction of Mr Quaintance. Performance of Recruitment Consultants was principally, albeit not exclusively, measured by reference to the number of candidate placements made in any one given month. The notional target set for the Claimant was 4 placements per month.
- 4.7 On or around 1 July the Claimant’s partner (known only to me as ‘Bartek’) began to trade a business known as Monkey Garage. Although the Claimant was both a shareholder and director of that business from it’s inception, in my judgment there is no question of that business interfering or being likely to interfere with the Claimant’s independent exercise of her judgment and/or with the Respondent’s best interests. There was no evidence to that effect.
- 4.8 During the same month July there was seven candidate placements completed in the North West region. That said, I accept Mr Quaintance’s

evidence that the bulk of the work in connection with those placements took place in the month or months before. The Respondent operates a commission scheme for recruitment consultants by which they are paid a set sum in relation to the number of candidates placed in any one given month. It provides for a upwards sliding scale of commission payments so that for one placement the commission earned is £75.00 but, if for example, seven candidates were placed in any one given month the consultant would earn £1500.00. The same document states unequivocally that the bonus structure is wholly discretionary and is subject to change without notice.

4.9 On the 23 July Mr Quaintance wrote to the Claimant as follows:

*“As discussed following on from your efforts in Q1/Q2 I am with effect from 1 July putting you onto the variable basic pay plan. This means that with effect from 1 July your basic will be £18,000 to reflect your average placements of 4 per month.*

*If during Q3 your average falls below 4 your basic will return to £16,000k. If as seems more likely given your efforts your average goes up to 5 your basic will increase to £20,000 to £22,000 etc to a maximum of £30,000k for the following quarter subject to a performance measure.”*

4.10 It is clear that through the course of July and into August the Claimant was coming under increasing pressure to help her partner run his business, specifically managing the administrative side of the same. She approached Mr Quaintance in the hope of securing part time work. At all times she was, in my judgment, open, honest and up front in her dealings with Mr Quaintance on this particular issue. At no time did she attempt to conceal the fact of either the business being established or the pressures being placed upon her to help her partner out. On 10 August she e-mailed Mr Quaintance saying, amongst other things, that she truly loved working for the Respondent, the job was amazing and so on but making clear that she was under significant pressure from her partner who was asking her to give him time to help him run the business and that he might struggle to keep the business afloat unless she could assist in accounts and

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<sup>1</sup> Bold marking by EJ

invoicing. She wanted to see if the Respondent could come up with a solution whereby they were both happy going forward. That would obviously mean part time working.

4.11 It was quite clear that the matter was causing her a real conflict. In evidence the Claimant candidly accepted that that the above e-mail was written with her tongue slightly in her cheek but she was doing her level best to safeguard and promote her position. In my judgment, there is nothing untoward about that.

4.12 From this point on the working relationship, hitherto positive, began to deteriorate. The Respondent refused to entertain the possibility of the Claimant working part time. The Respondent was perfectly entitled to hold that position. Towards the end of August there was a series of face to face meetings and the odd phone call but the parties had reached an impasse. Eventually the Claimant threatened to resign on the basis that she would find it impossible to maintain a full time position with the Respondent while also contributing to book keeping for her partner's fledgling business.

4.13 Ultimately matters came to ahead with, on 24<sup>th</sup> August, Mr Quaintance formally offering the Claimant three options:-

- Resign immediately;
- Return to work on the following Tuesday 28 August working full time hours;
- Agree a severance package, having had the weekend to consider the same

4.14 At this point in time the Respondent had raised no concerns about the Claimant's conduct be that (a) working for her partner's business or (b) the deletion of any passcode from her mobile phone. The weekend came and went. The Claimant arrived for work on the Tuesday. She did not resign. Further discussions ensued but no progress was made in relation to full time working or severance.



- 4.15 It was only following the break down of discussions concerning severance, full time working and/or resignation that the Respondent decided to conduct an investigation into allegations concerning her working for an alternative business and/or the deliberate deletion of a password or passcode from her mobile phone. In my judgment this investigation was cursory, wholly inadequate and motivated by animus as opposed to a genuine concern on their part that damage or potential damage had been done to their business.
- 4.16 The Claimant was dismissed on Thursday 30<sup>th</sup> August. Within the extremely detailed e-mail dated 3<sup>rd</sup> September that followed her dismissal (an email which contained, amongst other things, an ex-post facto record of what the Respondent says had taken place) the issue to do with working for her partner's business received only passing reference.
- 4.17 The Claimant was dismissed summarily without notice. The Respondent has subsequently sought to justify summary dismissal on the basis that the Claimant was working for an alternative business whilst being paid by them and on the basis that she deliberately deleted a passcode from her phone in clear breach of the data protection act and company policy.
- 4.18 On the same grounds the Respondent claims it is entitled to withhold all commission payments that would otherwise have been due to her. Finally the Respondent maintains that the Claimant was contractually entitled to be paid at a rate of £16,000 per annum as opposed to £18,000.

## **5. Conclusions**

### Breach of Contract/Notice Pay

- 5.1 In my judgment the Respondent has conspicuously failed to persuade me that the Claimant was guilty of gross misconduct entitling them to dismiss her without notice. There was no evidence supportive of an allegation that she was working for her partner's business during hours when she was being paid by the Respondent. The best that the Respondent could do was point to a moderate drop off in hours worked during the course of July. However, the Claimant's hours intriguingly went up again in August.

In my judgment the Respondent's case is one of mere supposition motivated in the main by the fact of the Claimant, a highly valued employee, threatening to resign in the face of being denied part time working hours. The Claimant was at all times thoroughly open and honest in relation to both the partner's business and the need for her to dedicate time to it in the future. At no point was there any suggestion that her ability to dedicate time to the Respondent was being in any way interfered with work undertaken for her partner. I also note the longstanding arrangement whereby the Claimant was permitted to work flexibly, hours to suit, weekends and so forth, clearly enabling her, if she so chose, to provide support to her partner's fledgling business at times of her choosing. That said, there is no doubt in my mind that on account of the pressures she was facing there was a strong likelihood of the Claimant resigning but for her dismissal.

- 5.2 Equally there is no evidence whatsoever to support an allegation that the Claimant deliberately erased a passcode from the phone. There are numerous explanations as to how this might have occurred (for example software updates) but more importantly no investigation was ever conducted. The Claimant has never been asked for an explanation. There is no evidence, contemporaneous or otherwise to support the Respondent's position. I have seen nothing whatsoever in documentary form to support the Respondent's position and once again I find it is pure supposition on their part. Accordingly I find there is no basis for dismissing the Claimant without notice. She was not guilty of gross misconduct and therefore is entitled to be paid notice.
- 5.3 The period of notice is, however, that for which the Respondent contends namely the statutory minimum of one week. I find that the contractual notice period is that which is unequivocally set out within her statement of main terms and conditions. It is clear that the provisions of the Company handbook are subject and subservient to those terms and, where conflict arises, the individual statement takes precedence. I therefore I award the sum of £344.83, being the sum agreed between the parties.

Unlawful Deduction from Wages

5.4 It is clear to me that the Claimant was contractually entitled to be paid at the rate of £18,000 per annum. The Claimant's pay rise to £18,000 was awarded and only conditional, if at all, on the measure of her performance at the end of quarter 3 and any other subsequent quarter. At the time of her dismissal that measurement had not only not been undertaken but had not yet arrived. The Respondent was not contractually entitled to effectively restore the Claimant to her previous salary. The sum 'properly payable' to the Claimant falls to be calculated by reference to an annual salary of £18,000. Therefore the Claimant is due the sum of £1,500. This I will award gross although noting that it may be paid subject to tax under s62 of the 2003 Act.

Commission

5.5 Whilst I acknowledge the reference to the bonus structure being "discretionary" the Respondent has failed to provide a satisfactory explanation as to why, in this particular instance, they refused not only to pay the Claimant all commission due to her but any part of it whatsoever. I accept the Claimant's evidence that all candidates placed within her region triggered an entitlement to a commission payment. At no point in the past had the Respondent refused to pay commission in accordance with this understanding. The Respondent provided a clear formula for calculating the same.

5.6 In my judgment the decision not to pay the Claimant's commission was irrational and unjustified. Applying the Respondent's formula, I find that the Claimant was due the sum of £1,500 in respect of seven candidate placements made in her region in that month. In doing so, I also note that the Claimant's draft payslip incorporated this very amount. This appears to have been altered to her detriment either shortly before or after her dismissal.

5.7 She is therefore entitled to the sum of £3,000 for unlawful deductions (including commission) from which I deduct what she has already been paid, namely £1,107.72.

Holiday Pay

5.8 The Claimant, upon whom the burden rests in terms of proving this particular head of damage, has failed to explain to me or indeed evidence the basis upon which she claims to be owed holiday pay. Indeed she reduced her claim to one for 1.5 days at the outset of the hearing. From the papers before me it appears that the Respondent has met her entitlement for holiday pay and therefore her claim must fail.

5.9 The Claimant is therefore awarded the sum of £2,237.11 to which I add interest of £95.61, giving a total of £2,332.72.

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Employment Judge Legard

Date 8<sup>th</sup> May 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE