



EMPLOYMENT TRIBUNALS

Claimant: J Allnat

Respondent: Heath Books Ltd

Heard at: London South **On:** 16 March 2022

Before: Employment Judge Atkins (sitting alone)

Representation

Claimant: Mr P Tomison, Counsel

Respondent: Mr T Hussain

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The Claimant's claim for unlawful deductions is well founded and succeeds.
2. The parties shall confirm to the Tribunal in writing within 4 weeks of the date of issue of this judgment whether they have agreed the sum that the Respondent will pay the Claimant in respect of unlawful deductions.
3. If the parties cannot agree a sum by that time, the matter will be decided at a 2 hour Remedy Hearing, to be listed thereafter.
4. The Respondent shall pay to the Claimant the sum of £2,176, in respect of the Respondent's failure to provide the Claimant with written particulars of employment.
5. The Claimant's application for costs is denied.

REASONS

Claims and Issues

1. The Claimant claims that unlawful deductions have been made from his pay since August 2020. He claims that he is entitled to payment of 1.25% commission, uncapped, on all (net) web sales made by or through the Respondent's identified websites. He claims that the Respondent has failed

to pay the full amount due.

2. The Respondent claims that they were entitled, under the Claimant's contract of employment, to reduce the Claimant's rate of commission from 1.25% to 1% in August 2020, and to impose a £1,000 monthly cap, and so the deductions were lawful.
3. The issues for me to decide were set out in a list by the Claimant, to which the Respondent offered little objection. Bearing in mind the Respondent's limited objections, I paraphrase them as follows:
 - (1) What were the terms of the Claimant's contract of employments, insofar as they related to the payment of commission on web sales?
 - (2) Did the contract of employment include a power for the Respondent to unilaterally change the rate of commission, and place a cap on the amount of commission payable per month?
 - (3) Was the variation made on 21 August 2020 validly made under such a power?
 - (4) Did the Claimant consent to that change, either expressly or by his conduct in continuing to work for the Respondent?
 - (5) Were there any unlawful deductions from the Claimant's pay?
 - (6) If so, what amount?
 - (7) Did they form a series of deductions?
 - (8) If not, was the claim presented in time?
 - (9) Is the Claimant entitled to an uplift to any award, due to the Respondent's conduct of his grievance and appeal?
 - (10) Was the Claimant sent written particulars of his employment?
 - (11) If not, is it just an equitable to award the Claimant more than two weeks pay (up to four) in respect of such a failure?

Procedure, documents, and evidence heard

4. I have seen an indexed bundle paginated to 320 pages. I have also seen:
 - (a) an additional 5 page document entitled "Answering questions from our last meeting";
 - (b) an additional email from the Claimant dated 1 April 2020, entitled 'Furlough letter and pay';
 - (c) the Claimant's List of Issues;
 - (d) the Claimant's witness statement dated 14 March 2022;
 - (e) the Claimant's Schedule of Loss;
 - (f) the Claimant's Skeleton Argument dated 15 March 2022;
 - (g) correspondence relating to the preparation of the bundle;

- (h) correspondence relating to the Claimant's application for costs (including the Respondent's objection);
 - (i) a witness statement from Richard Heath dated 10 March 2022;
 - (j) the Respondent's Skeleton Argument dated 15 March 2022; and
 - (k) the Respondent's suggested reading list.
5. The Claimant gave evidence on his own behalf.
 6. Mr Richard Heath, the Managing Director of the Respondent, gave evidence on behalf of the Respondent.
 7. At the end of the hearing, having heard oral evidence and submissions, I reserved judgment, and directed further information to be provided, namely:
 - (a) that the Respondent (having indicated that they wished to do so) make any application for costs, and the Claimant to reply to it;
 - (b) that the Respondent make any further reply to the Claimant's application for costs; and
 - (c) that the parties file an agreed Schedule of Loss.
 8. The parties have subsequently confirmed to me the extent to which they are agreed as to the Schedule of Loss. They have requested a judgment on liability. There has been no further correspondence on the subject of costs.
 9. In making this decision, I have taken account of all of the evidence before me, even if I have not mentioned any specific part of it.
 10. There is one more preliminary matter to be disposed of before I turn to the evidence. Mr Hussain, in his closing submissions, speculated that the Respondent had in fact dismissed the Claimant on 21 August 2020 and re-engaged him on new terms of employment. I reminded Mr Hussain that he would need permission to amend his grounds to rely upon this argument, it not being in the Respondent's response to the claim and it having been raised for the first time in closing submissions. Mr Hussain considered his position and confirmed that he did not in fact wish to rely on any such argument. I have accordingly not considered it.

Fact findings

11. It was common ground that the Claimant was employed by the Respondent. His employment began on 9 February 2016 and continues. His original job title was Assistant Showroom Manager. He was not issued a contract of employment at this time. To date, and in part for reasons set out below, he has not been provided with full written particulars of his employment.
12. The Respondent is a company whose business is the sale and supply of textbooks and library books to schools based in the UK and overseas. Mr Heath of the Respondent gave evidence that:
 - (a) Text books have a low margin and so need to be sold in bulk to be commercially viable
 - (b) Library books have a higher margin and so the Respondent is more keen to sell them.A portion of those sales are made through the Respondent's website. For convenience, I shall refer to these as 'web sales' in this judgment.

13. In or around 2017 the Claimant offered to create a new website for the Respondent. This was created and put in place on or around April 2019. At around the same time the Claimant, on his own initiative, was developing his own skills in ecommerce and digital marketing by way of his own research and by taking courses. The Claimant developed the new website/s and they came live in 2019. Mr Heath in his evidence accepted that, prior to 2019, the Respondent did not engage in significant web sales.
14. In October 2019 the Claimant approached Mr Heath (for the Respondent) and asked for changes to be made to his terms and conditions of employment. He did so on the basis of recognition for his work on web sales, and also that he considered he was underpaid in comparison to other workers with his skills and abilities. He said that he could potentially earn an annual salary of £40K or £50K were he to change employer. He asked for:
- (a) a pay rise to £30,000;
 - (b) a 4 day working week;
 - (c) commission on web sales (the Claimant initially proposed a commission at 1% which was backdated to cover sales since 2017, or in the alternative a commission at 1.5% going forward); and
 - (d) an annual review of the terms.
15. Mr Heath said that the Respondent could not afford the initial proposal and was unwilling to agree to it. The Claimant and Mr Heath (for the Respondent) discussed the proposal before coming to a compromise.
16. The compromise was recorded in a document dated 29 November 2019, drafted by the Claimant but accepted by the Respondent to be an accurate record of the compromise agreement, which reads (so far as is relevant):

“Basic salary

A basic annual salary of £30,000.00 for a 4-day working week will be paid monthly (+ employer pension attribution) starting from 01.12.2019.

Hours

I will work a flexible 4-day week.

...

Holiday

My overall holiday entitlement will be the same as previously: 20 days, plus bank holidays and the extra day off traditionally given at Christmas (if it is to be given off that year).

Commission from 01.01.209 – 29.11.2019

Will be paid at 1% of all website sales (NET) for the following websites ... will be paid in one sum of £3,343.81 in the month of December 2019.

Commission from 01.12.209 – ongoing

Will be paid at 1.25% for all website sales (NET) for the following websites...

Should [the Claimant] create more websites for the company, or start work on existing company websites not made by me to drive sales, they would be included in my commission too.

Commission will be paid each month (at the same time as my basic salary) based on the total NET sales of all the websites I am involved with as above.

Commission from 01.12.2019 – 31.05.2020 will be paid per month at 1.25%.

On 01.06.2020 commission will be reviewed.”

17. The Claimant has also said that his job title was also to be changed to Head of Ecommerce and Web Marketing. It is not clear whether any change to his job title was made at the time or subsequently, or indeed what it was (several different versions appear in the draft contracts that subsequently went back and forth). Any change of job title does not have any bearing on the issues which I have to decide, so it is not necessary for me to make any finding about it.
18. It has been put to me that the terms recorded in the 29 November 2019 document were not changes to the Claimant's terms of employment. That argument is unsustainable, for the following reasons:
 - (a) The evidence put forward on behalf of the Respondent concedes that these new terms and conditions were agreed to by both parties.
 - (b) Although the document recording the new terms was not signed by either party, this is not determinative. The key issue was that both parties agreed to it.
 - (c) The new terms then came into force. The Claimant worked from that date onwards under the new terms, in respect of both working time and remuneration.
 - (d) The Respondent did not question the new terms for several months, but instead simply affirmed them.
19. I accordingly find that the new terms made as a result of this agreement were incorporated into the Claimant's terms of employment, agreed and freely entered into by both Claimant and Respondent.
20. However, it is fair to record that the Claimant and Respondent have different views of what the text of the document actually meant.
21. The Claimant's view is that:
 - (a) There was no mention of a trial period, and the agreement was not subject to a trial period.
 - (b) He would not in any case have agreed to a trial period from December to May because that would have excluded the months in which the Respondent did the most of its business (September and October).
 - (c) There was no link between commission and the sales of library books.
 - (d) There was no provision in the terms for the rate to be reduced from 1.25%.
 - (e) There was equally no provision stating that the rate would be uplifted to

1.5%.

- (f) The purpose of the June 2020 review was to consider the performance of web sales since the agreement was made, with a view to uplifting the commission rate to 1.5%. The Claimant accepts that there was no entitlement to such an uplift, but rather that he had hoped that he could make a good case for one.
22. The Respondent's view is that:
- (a) The agreement was for a six month trial period only.
 - (b) The agreement to pay 1.25% commission was effective only from 1 December 2019 to 31 May 2020.
 - (c) The change of terms was entered into in order to encourage sales, particularly of library books.
 - (d) The review provision enabled the Respondent to vary the rate of commission by either increasing or decreasing it.
23. Mr Heath in his statement said that, while not recorded in the 29 November 2019 document, the context of the discussion was the online sales of library books.
24. The problem for the Respondent is that the new terms as set out in the 29 November 2019 document do not link the payment of commission to sales of library books. They restrict commission in two ways only, first that it is payable according to net sales, secondly that it is payable in respect of sales made by or through named websites. The Respondent had every opportunity to add a link to library book sales. They did not. I accordingly find that the new terms did not include a link to library book sales. While sales of library books may have been relevant to any review, the payable commission was not linked to those sales.
25. It is also not sustainable to say that this was for a 6 month trial period only. The document does not mention 'trial period' or any similar text. It reads "*Commission from 01.12.2019 – ongoing. Will be paid at 1.25%...*". That does not specify an end date. The further reference to 31 May 2020 has to be read in that context. It says that "*Commission from 01.12.2019 – 31.05.2020 will be paid per month at 1.25%. On 01.06.2020 commission will be reviewed.*" It seems clear to me that the reference to 31 May 2020 is made solely in respect of the 1 June 2020 review. This text sets out a chronology of what will happen up to a review. I also consider it unlikely that the Claimant would have agreed to a trial period which excluded the most profitable months of business. Mr Heath accepted that the alleged trial period excluded these profitable months. Finally, the payment of commission at 1.25% did not end on 31 May 2020. It was rolled over for a following two months. All of this is consistent with an agreement to pay commission at 1.25% from 1 December 2019 onwards, with no set end date, subject only to the review provision. I accordingly find that the new terms were not subject to a time limited trial period.
26. It follows from these findings that the key question is whether the review (which both parties anticipated, and which took place in August 2020), permitted the Respondent to reduce the rate at which commission was paid or place a cap on payment of commission.

27. On or around 16 March 2020, the Respondent sent a new draft of the Claimant's employment contract to him. It incorporated the terms of the 29 November 2019 document and made some other changes to terms and conditions. It said, so far as is relevant:

"Your salary will be paid at the rate of £30,000 per annum by BACS at monthly intervals in arrears on or around the 27th of each month.

Commission – as per the agreement of 29/11/2019 with Richard Heath commission will be paid from 01/12/2019 at the rate of 1.25% of all new website sales, to be reviewed 01/06/2020 – sites and conditions laid down in said agreement of 29/11/2019.

...

Your normal hours of work are Tuesday to Friday of each week...

...

Your annual holiday entitlement is 20 days plus 8 days bank/public holidays in the complete holiday year."

28. On 27 March 2020 the Claimant responded by email saying that he was seeking advice about the other proposed changes and should not be taken to have consented to (or affirmed) them until he expressly confirmed so.
29. On 3 April 2020 the Claimant was placed on furlough. He returned to work on 16 June 2020.
30. In a further email dated 14 April 2020 the Claimant (via his union representative) launched a grievance about the other proposed changes to his terms and conditions. That grievance, and the subsequent discussions about the other proposed changes, are not relevant to the issues that I have to consider, and so I do not consider them any further.
31. The proposed review of commission did not take place in June or July 2020. Mr Heath for the Respondent has explained that this was due to the fact that in June 2020 the Respondent had taken over the business of a (former) rival company, and so the Respondent's efforts were primarily focused on managing that takeover. Mr Heath accepts that the Claimant had asked, during this period, for the review to take place.
32. On 21 August 2020 Mr Heath called the Claimant on the telephone, and told him during the course of that conversation said that due to a lack of growth in library book sales the Claimant's commission on web sales would now be paid at the rate of 1%, and that it would be "limited". Mr Heath says that in the phone call he said that a £1,000 cap would be placed on the commission. The Claimant says that he did not, and he only found out that the level of the cap had been set £1,000 later. In my view, nothing turns on this point. The Claimant was well aware from that point onwards of the Respondent's proposal to reduce the rate and to limit payments in respect of commission. All witnesses agree that the Claimant said, in terms, that he did not consent to his commission being reduced.

33. There is a dispute about whether the Claimant used strong language or not. Mr Heath says that he did. The Claimant says that he did not. Whether or not strong language was used does not assist me to resolve the issues before me. It was clear from the evidence of both the Claimant and Mr Heath that the Claimant was aware of the proposals to change his remuneration, and the Respondent was left in no doubt that the Claimant did not consent to the proposed changes.
34. The Claimant also disputes that the phone call of 21 August 2020 could properly be called a 'review'. He says that a proper 'review' would have involved consultation or conversation with him before a decision was made. Although such a process would be ideal, the Claimant's difficulty is that the new terms do not specify what form the review is to take, or require the Claimant's involvement in it. They can be read consistently with the proposition that the Respondent was entitled to undertake a review unilaterally. I accordingly find that a review was carried out on 21 August 2020. That finding does not answer the key question of whether the Respondent was entitled, as a result of the review, to reduce the rate of commission or place a cap on it.
35. Payment on web sales to the Claimant was made at a rate of 1% commission, subject to a cap of £1,000, from 27 August 2020. As events unfolded, the Respondent agreed to pay commission on web sales at 1.25% for June and July 2020, on the basis that the review scheduled for 1 June 2020 had been delayed until August 2020.
36. The Claimant raised a grievance on 4 September 2020, on the basis of alleged unlawful deductions to his wages (namely, the funds he claimed were due to him from commission on web sales that was over and above the 1% commission rate and/or the £1,000 cap). This grievance was combined with his outstanding grievance of 14 April 2020, which I have already indicated covers areas that are not before me for decision.
37. On 27 October 2020 the Claimant attended a meeting to hear his grievance. This was rescheduled from 20 October 2020 after the Claimant complained that he had been given insufficient notice (4 days) to arrange representations.
38. On 18 November 2020 the Claimant received the result of his grievance. It concluded that the Claimant had not been subject to an unlawful deduction to his wages. It said that:
 - (a) The 29 November 2019 terms were not part of the Claimant's contract of employment.
 - (b) They confirmed that commission would be renewed, and that the Claimant was aware of this.
 - (c) There was no explicit promise that commission would remain at 1.25%.
 - (d) There was no explicit requirement for a consultation.
 - (e) The Respondent was entitled to decrease the level of commission on undertaking a review, and had done so on 21 August 2020.
39. On 23 November 2020 the Claimant appealed the result of his grievance.

40. The Respondent sent the claimant a new contract of employment on 2 December 2020. It included terms which set the commission on web sales at 1%, subject to a £1,000 cap. The Claimant refused to sign it.
41. The Claimant was placed on part time furlough on 25 January 2021. He worked 2 of his 4 contracted days per week.
42. On 14 February 2021 the Respondent sent the Claimant a further contract of employment. The Claimant again refused to sign it.
43. The Claimant's appeal hearing was set for 18 May 2021 (6 days' notice was given). The Claimant had previously requested leave for that day, which had been approved. The Claimant said that in any case he was unwilling to attend as the process was contributing to his ill health. He proposed to send written submissions instead, and did so.
44. On 1 June 2021 the appeal was decided against the Claimant. The decision maker upheld the earlier finding of the grievance that the commission structure was capable of being changed upon review, and had been lawfully changed on 21 August 2020. The appeal decision was sent to the Claimant on 17 June 2021.
45. The Claimant says that the grievance and the appeal were not dealt with fairly because of the delays in resolving it, and because (in respect of the appeal) the person who dealt with the appeal discussed the outcome with Mr Heath before making a final decision.
46. The Respondent's position is that these delays were not unreasonable, and can be attributed to COVID restrictions, furlough, illness, the substantial changes in business which resulted from the COVID pandemic and from acquiring the business of a former rival company, and that Mr Heath was side tracked by his involvement in a separate matter (relating to the proposed closure of a care home and not to any business of the Respondent). Mr Heath accepted that resolution of the grievance was 'tardy', and attributed some of the delay to the decision maker.
47. While I accept that there were severe disruptions to business as a result of the imposition of COVID restrictions, and that the acquisition of a (former) rival company must have generated a lot of work, I do not consider that the time taken to resolve the grievance was in any way reasonable. This is because:
 - (a) Despite initial disruptions, businesses rapidly changed their working practices thereafter. Working from home and online rapidly became the norm, and business could be carried out in line with these new ways of working.
 - (b) I do not accept that a grievance could not be progressed while the Claimant was on furlough. He was not ill or unable to participate in the process.
 - (c) In any case, the Claimant was not on full time furlough for large parts of this period.
 - (d) The decision maker in both the original grievance and the appeal was not an employee of the Respondent. There is no reason for them to have been impacted by any increase in the Respondent's workload or

business.

- (e) The Respondent was under a duty to ensure that the process took place within a reasonable time. The Respondent cannot avoid that duty by blaming the tardiness of others.
- (f) Instead, it took two months to resolve the grievance, and a further six months to resolve the appeal. Eight months is not a reasonable time period.

48. I accordingly find that there were unreasonable delays in resolving the grievance and subsequent appeal.

49. Following ACAS early conciliation between 4 and 11 June 2020, the Claimant then began these proceedings. The Employment Tribunal received his claim on 7 July 2021.

50. The Claimant returned to work full time on 27 July 2021.

51. Mr Heath in his evidence has said that his intention in both November 2019 and August 2020 was to give the Claimant a package that he considered was fair and reasonable. While I have no doubt about that, it is beside the point. The issue before me is the effect of the 29 November 2019 terms.

52. Mr Heath in his evidence has said that, even on the terms proposed in August 2020, the Claimant has secured a valuable package of remuneration, gaining approximately the level of salary he first asked for with the benefit of a 4 day working week. While that may be the case, it too is beside the point. The issue before me is the effect of the 29 November 2019 terms.

53. Mr Heath in his evidence has said that the Respondent's business in 2018 and 2019 was not in great financial health, and that as a result other employees of the Respondent had not been given pay rises in 2019, in contrast to the new terms agreed with the Claimant on 29 November 2019. Mr Heath did not feel that the Claimant should benefit from 'limitless' commission or an over-generous pay package whilst other employees, who were also working hard, went without reward. Again, while I have no reason to doubt Mr Heath took this view, it too is beside the point. The issue before me is the effect of the 29 November 2019 terms.

54. The Claimant's case stands or falls on whether the Respondent was entitled, under the new terms and as a result of the review of 21 August 2020, to reduce the Claimant's remuneration by reducing the percentage at which commission was paid and/or placing a cap on such payments.

The law

55. The parties are in agreement as to the legal principles that apply.

56. Section 13 of the Employment Rights Act 1996 states, so far as is relevant:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless—

- (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."*

57. The deduction is said to be that commission which would otherwise have been payable had the Claimant been paid 1.25% of net web sales, uncapped, since August 2002. It is not suggested that this deduction was authorised by a statutory provision, or that the Claimant had consented to it in writing prior to the deduction being made, or that the Claimant consented to the deduction at all. The Respondent's case is that any deduction was authorised by a 'relevant provision' of the contract, namely the term as to review.

58. The 29 November 2019 terms were given to the Claimant in writing prior to the said deduction being made, and so fall within the definition of 'relevant provision' in section 13(2).

59. In this case it is said that there are a series of deductions within the meaning of section 23(3) ERA. The Claimant alleges that he has not been paid the full amount of commission due to him since August 2020. Every month, when his salary is paid, there is a further deduction, and these deductions form a series which is unbroken to date. I agree. Each alleged monthly deduction is factually linked with the next in the same way as it is linked with its predecessor. There is accordingly a sufficient temporal link between them. They fall to be properly considered as a series: Bear Scotland Ltd v Fulton [2015] ICR 221. The series of deductions was continuing when the claim form was presented, and so there is no question as to whether or not the claim was brought in time.

60. The Respondent contends that the review term was a provision which allowed the Respondent to unilaterally vary the Claimant's entitlement to be paid commission for web sales. Unambiguous language is required for a provision allowing for unilateral variation of pay: Security and Facilities Division v Hayes [2001] IRLR 81. In Wandsworth London Borough Council v D'Silva [1998] IRLR 193, Lord Woolf said at [31]:

"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort."

61. The Respondent contends that the Claimant has affirmed the new arrangement by continuing to work for the Respondent. The EAT in Solectron Scotland Ltd v Roper and others (EAT/0305/03) (31 July 2013) said that it may be possible to infer acceptance where the employee continues to work without protest, but if the employee can reject the change by making it plain that by acceding to the change they are doing so without prejudice to their contractual rights. If the conduct of the employee in continuing to work is reasonably capable of a different explanation, it cannot

be treated as constituting acceptance of the new terms: Abrahall v Nottingham City Council [2018] EWCA Civ 796.

62. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that I can, if I consider it just and equitable, increase any award by up to 25% if I consider that the Respondent has unreasonably failed to comply with an ACAS Code of Practice.
63. Section 38 of the Employment Act 2002 provides that, if the Claimant is successful in the deductions claim, I can make an additional award of between two and four weeks pay in respect of any failure to supply written employment particulars. In this case the Claimant's weekly pay exceeds the statutory limit, and so the relevant weekly pay is £544.

Conclusions

64. The Respondent's ability to unilaterally alter the pay due to the Claimant must be founded on an unambiguous term of the contract if it is to exist at all.
65. The relevant part of the 29 November 2019 terms reads "*On 01.06.2020 commission will be reviewed*".
66. It is correct that a review can imply a consequent change. The result of a review may be that something changes. Equally, it may be that something remains the same.
67. A review, however, a precursor to any change that follows. It is not the change itself. A review is something that can happen, after which there may be a change. As such, I cannot accept that the simple statement that commission "*will be reviewed*" goes so far as to give the Respondent a power to unequivocally reduce the Claimant's pay. If the document had said commission "*will be reviewed and may be increased or decreased as a result of the review*", that might be different. But it does not. It amounts at best as an invitation to make a further, agreed, change.
68. There is no other provision in the 29 November 2019 document which could reasonably be said to confer such a unilateral power upon the Respondent.
69. It follows that there was no such unilateral power and the Respondent was entitled to neither reduce the level of commission from 1.25%, nor impose a monthly cap of £1,000.
70. The Claimant cannot be said to have accepted or affirmed that change. He objected to it immediately. He then pursued a grievance, and an appeal. Having been unsuccessful in obtaining what was he felt was due to him via that route, he brought a claim before this Tribunal. At no point was the Respondent in any way unaware that the Claimant was vigorously asserting his contractual rights.
71. It follows that unlawful deductions were made from the Claimant's pay and so his claim succeeds.

72. I requested the parties to calculate, as best they could, the difference between the payments received by the Claimant and the payments that were actually made to him.
73. During the hearing, it became apparent that the Claimant had not yet been paid the agreed rate of commission for July 2020. I have since been informed that payment of that commission has been made in the sum of £1,658.70. I have accordingly considered the period from August 2020 only.
74. I have been provided with the Schedule of Loss indicating that the difference between what the Claimant was paid, and what he should have been paid, were as follows:
- (a) In August 2020, £2,107.17.
 - (b) In September 2020, £4,856.78.
 - (c) In October 2020, £906.31.
 - (d) In November 2020, £905.51.
 - (e) In December 2020, £197.69.
 - (f) In January 2021, £161.96.
 - (g) In February 2021, £312.87.
 - (h) In March 2021, £711.82.
 - (i) In April 2021, £268.68.
 - (j) In May 2021, £858.89.
 - (k) In June 2021, £2,140.24.
 - (l) In July 2021, £2,760.34.
 - (m) In August 2021, £856.95.
 - (n) In September 2021, £2,758.77.
 - (o) In October 2021, £241.34.
 - (p) In November 2021, £254.41.
 - (q) In December 2021, £114.02.
 - (r) In January 2022, £262.56.
 - (s) In February 2022, £411.81.
75. The parties have said that they are in agreement with all of the listed figures except the ones for January 2021 to June 2021, while the Claimant was on furlough. The Respondent is unsure how these figures have been calculated. This means that the agreed shortfall for the period August 2020 to December 2020 is £8,973.46, and for the period July 2021 to February 2022 is £7,660.20. I do not have the figures for March and April 2022, and the figure for May 2022 cannot be calculated yet.
76. I hope that the findings made in this judgment should enable the parties to agree expeditiously what sums are payable for the months of January 2021 to June 2021, and for March 2022 going forward. But if they are not, these matters will need to be resolved at a Remedy Hearing.
77. I have found above that the Respondent failed to resolve the grievance and the appeal in a timely fashion, and therefore unreasonably failed to comply with the ACAS Code of Practice. I am therefore empowered to increase the award by up to 25%. However, I am mindful of the size and resources of the Respondent, the fact that they were coping with relatively untried new ways of working and unprecedented COVID restrictions, and a significant change in the nature of their business (namely, the acquisition of a former rival company). I therefore increase the award by 10% only.

78. The Claimant was not given written particulars of his employment for a significant time. He had been employed for over four years before an attempt was made to do so by the Respondent. I accept that it has been impossible to codify the Claimant's terms of employment since August 2020 due to the dispute over the terms relating to commission payments in respect of web sales. But four years is a wholly unreasonable time to fail to provide a written statement of particulars. This is a simple and basic right of employment. I therefore consider this it is just and equitable to award four weeks pay in respect of this failure. Applying the statutory cap of £544, I calculate that as £2,176.

Costs

79. The Claimant made an application for costs relating to the preparation of the bundle. It is claimed that the Respondent did not take sufficient care in preparing the draft bundle, so that the Claimant's representatives had to edit a 600page unindexed bundle to remove duplicates and irrelevant documents. The Claimant requests the costs of time spent perfecting the bundle. Those costs are not quantified.

80. The Respondent objected, on the basis that the request was vexatious and baseless, and was in fact prompted by a request for directions made by the Respondent.

81. Under rule 76 of the Employment Tribunal Rules of Procedure, a costs order maybe made where a party or representative has a party (or that party's representative) has acted "*vexatiously, abusively, disruptively or otherwise unreasonably*" in the way that the proceedings have been conducted.

82. I am not convinced that this high bar has been met. While preparation of the bundle may have taken some effort, the fact of the matter is that the Respondent provided disclosure of documents, the representatives were able to agree the contents of the bundle, it was before the Tribunal in sufficient time and the hearing proceeded without any delay being caused by this issue.

83. The Respondent indicated that they wished to make a counter-claim for costs, and I invited them to do so in writing. They have not done so, and so there is no such application for me to decide.

Employment Judge Atkins
27 May 2022

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