EMPLOYMENT TRIBUNALS

Claimant: **Mr D. Thomas**

Respondent: **Daniel Brewer Estate Agent**

Heard at: **East London Hearing Centre**

On: **Monday 24 August 2020**

Before: **Employment Judge Massarella**

Representation
Claimant: In person

Respondent: Mr A. Brewer (Director)

JUDGMENT

The judgment of the Tribunal is that: -

1. **the Respondent shall pay to the Claimant the sum of £922.40 gross in respect of accrued, but untaken holiday;**
2. **the Claimant shall be liable to account to HMRC for any tax and national insurance in respect of that sum;**
3. **the Claimant's claim of unauthorised deduction from wages in relation to commission is not well-founded and is dismissed.**

REASONS

1. Oral reasons having been given at the conclusion of the hearing, the Respondent asked for written reasons which are here provided, pursuant to rule 62(3), sch.1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

Background

2. By a claim form presented on 27 December 2019, after an ACAS early conciliation period between 20 November and 3 December 2019, the Claimant claimed sums in respect of accrued, but untaken, holiday pay, and unpaid commission.

3. The claim was originally listed for hearing on 1 May 2020. That hearing could not go ahead because of the Covid-19 pandemic. Instead a preliminary hearing took place before Employment Judge Moor.

The hearing

4. Employment Judge Moor summarised the issues, as they were identified by the parties at the preliminary hearing as being: ten days' accrued but untaken holiday pay, outstanding on termination, and one unpaid commission payment in the amount of £120 in relation to a property (The Old Schoolhouse). Employment Judge Moor also identified that there was an issue as to the rate of pay which should have been used to calculate any holiday pay due to the Claimant: was it gross pay of £2000 per month as the Claimant contended (he argued that his basic pay was varied by agreement to £24,000), or was it gross pay of £1000 per month as the Respondent contended? Employment Judge Moor also identified an issue as to whether holiday pay should have included the average commission payment paid to the Claimant over the last twelve weeks.

5. At the start of the hearing before me, the Claimant clarified that he was no longer pursuing the last point. He further clarified that that it remained his position (as set out at Box 15 of the ET1) that the terms of the written contract between him and the Respondent entitled him to 28 days' holiday plus bank holidays. He claimed eight days' accrued but untaken holiday, plus two days in respect of bank holidays worked, by reference to that contractual entitlement.

6. Mr Brewer, who is one of the Respondent's Directors, acknowledged that the contract states that the Claimant was entitled to 28 days plus bank holidays, but asserted that this was a mistake; the Claimant was only entitled to 20 days plus bank holidays. He accepted that the Claimant had not been paid by reference to the higher level of entitlement referred to in contract; moreover, he contended that the reference to leave in lieu of bank holidays worked did not apply in practice.

7. The dispute about the rate of pay which should be used to calculate any holiday pay remained in issue between the parties.

8. Although there was some reference in the Claimant's witness statement to properties other than The Old Schoolhouse, the Claimant confirmed that he was not pursuing a commission payment in relation to them.

Findings of fact and conclusions

9. The Claimant was employed from 1 February 2016 to 26 September 2019 as a senior sales negotiator.

10. Although the Respondent contended that the Claimant's original salary was £9600 gross, I was satisfied that the Claimant was paid £12,000 gross a year, plus commission and fuel, from at least 2016 onwards. That is consistent with the three payslips I was shown from 2016, in which the monthly gross figure is given as £1000. That was the position up to January 2019.

11. It is not in dispute that in January 2019 a verbal agreement was reached between Mr Brewer and the Claimant, the effect of which was that the Claimant would be guaranteed a minimum of £2000 per calendar month, if the sum of his commission and fuel for that month did not equate to, or exceed, £1000.

12. The Respondent sought to characterise this agreement as a 'gesture'. In support of that contention, Mr Brewer referred me to his email to the Claimant of 23 September 2019:

> 'To confirm your wages this month, the only exchange you had was Tye Cottage, Stebbing.
>
> Basic - £1000
>
> Commission - £535
>
> Fuel - £0.00
>
> Total - £2000.00 as agreed in January'

13. I do not accept Mr Brewer's characterisation of the agreement as a 'gesture'. I find that it was an agreed variation of the Claimant's contract of employment. I do not consider the fact that the Respondent continued to refer to the Claimant's 'basic' pay as £1000. The variation to the contract provided that he would be paid a minimum of £2000, irrespective of the results achieved by him. Indeed, Mr Brewer referred to it in the course of his oral evidence as a 'top-up wage'. I find that the effect of the agreement was that the Claimant's basic pay was increased to £2000.

14. If the Claimant earned more than £1000 in commission, he was also entitled to receive that additional commission, but that was a variable amount: according to the payslips, in July 2019 he received an additional hundred and £163.90 in commission, in August 2019 an additional £752.45, and nothing above the minimum in September 2019.

15. Turning then to the question of what the Claimant holiday pay entitlement was, the Claimant's contract of employment at paragraph 6.2 provides that the holiday year ran from 1 January to 31 December. Paragraph 6.2 then provides:

> 'You are entitled to 28 days' paid holiday during each holiday year or the pro rata equivalent if you work part-time. In addition you are entitled to take the usual public holidays in England and Wales or a day in you where we require you to work on a public holiday.'

16. Mr Brewer's evidence was that this was a mistake and that everyone within the organisation understood that they were only entitled to 20 days' paid holiday per year plus bank holidays. Mr Brewer's evidence was that the

Claimant (like all the Respondent's employees) occasionally worked bank holidays, but that when he did so, he was not entitled to a day in lieu.

17. I reject that evidence. There was no evidence before me, other than a bare assertion by Mr Brewer, that the contractual terms had arisen as a result of a mistake. If that were so, there had been ample time since the beginning of the Claimant's employment to rectify it, yet there was no evidence of that being done. Nor was there any evidence before me, other than a bare assertion by Mr Brewer, that the terms had subsequently been varied in relation to holiday entitlement. If there was any ambiguity as to how the contract should be interpreted (which I do not think there is), I had regard to the rule which states that it should be construed against the interests of the party which drafted it (the *contra proferentem* rule), which of course is the Respondent.

18. I am satisfied that the contractual entitlement was as set out in paragraph 6.2 of the contract.

19. It was not in dispute that the Claimant had taken 13 days' holiday in the relevant year. Because he resigned at the end of September 2019, his *pro rata* entitlement under the contract was 21 days. Consequently, I find that the Claimant was entitled to be paid in respect of the eight days' leave accrued, but not taken. Further, the Claimant's unchallenged evidence was that he had worked two bank holidays; the Respondent's evidence was that it did not give days in lieu of worked bank holidays. That is a breach of para 6.2 of the contract. Accordingly, the Claimant is entitled to be paid in respect of those days as well.

20. The question is then: at what rate was he entitled to be paid?

21. S.221 Employment Rights Act 1996 provides:

> **(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.**
>
> **(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.**
>
> **(3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—**
>
> > **(a) where the calculation date is the last day of a week, with that week, and**
> >
> > **(b) otherwise, with the last complete week before the calculation date.**
>
> **(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.**
>
> **(5) This section is subject to sections 227 and 228.**

22. By s221(4) ERA commission or similar payments which vary with the amount of work done are included in the calculation of a week's pay, but not if they depend on results rather than the amount of work done: see *Evans v The Malley Organisation t/a First Business Support* [2003] ICR 432.

23. The Claimant's remuneration in the amount of £2000 did not vary with the amount of work done. However it was described, it was remuneration to which he was entitled every month under the contract, as varied by agreement in January 2019, irrespective of his results. I consider that section 221(2) applies to that part of his remuneration.

24. Insofar as his remuneration sometimes included additional sums, in the form of commission, I conclude that those sums could not be taken into account, because they depended on results, not on the amount of work done. Indeed, as recorded above, the Claimant did not invite me to take them into account.

25. I therefore conclude that the Claimant's holiday pay should be calculated by reference to £2000 a month, not £1000 a month.

26. Consequently, the Claimant is entitled to the sum claimed by him of £922.40 (10 x £92.24).

27. Turning to the question of commission on 3, The Old Schoolhouse, both parties agreed that commission was earned by the person who booked the viewing. I found the Claimant's evidence on this issue to be unsatisfactory: at one point in his oral evidence he accepted that another employee, Mr Daniel Lodge, was recorded as having booked the viewing, but he continued to assert that it was he who was entitled to the commission. The property in question does not appear on the list of properties, which the Respondent has disclosed, and which I am satisfied, on the balance of probabilities, reflects the true position. I find that Mr Daniel Lodge booked the viewing and was entitled to the commission.

28. Even if I'm wrong about that, because the additional £120 commission claimed by him would not have taken him above the £2000 minimum remuneration in the month in question, which he received, he has suffered no loss.

29. The Claimant's claim for unauthorised deduction from wages in relation to commission is dismissed.

Employment Judge Massarella
Date: 11 September 2020