



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105742/2022

Held via Cloud Video Platform (CVP) on 25 January 2023

Employment Judge: M Sutherland

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Jessica Hardwick

Claimant
In person

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Acidmark Ltd

Respondent
Represented by
David Law, Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the complaint of breach of contract (including in respect of notice pay) does not succeed and is accordingly dismissed.

REASONS

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1. The claimant has lodged a complaint for breach of contract in respect of commission, crowdfunding bonus, notice pay and legal fees. The Claimant accepted that she had not lodged a complaint in respect of any equity ownership.
2. The Claimant appeared on her own behalf. David Law, Director appeared on behalf of the Respondent.
3. Parties lodged bundles of documents.
4. The Claimant sought to rely upon the terms of without prejudice discussions which the Respondent opposed. Following discussion the Claimant accepted that these discussions were privileged and could not therefore be relied upon.

5. The Claimant gave evidence on her own behalf. David Law gave evidence on behalf of the Respondent.

Findings of Fact

6. The Claimant was employment by the Respondent from 1 September 2020 until 31 May 2022 as Chief Marketing Officer reporting to David Law. She entered a contract of employment with the Respondent effective from 1 September 2020 which included the following terms -

“4.4 Commission

4.5 *Acidmark Ltd. to pay Jessica Hardwick a commission fee in addition to her base salary. To be paid on our around the last working day of each month.*

4.6 *The commission to start being paid once any of Acid mark Ltd.’s subsidiary brands or companies starts generating revenue from sales. The commission to be calculated of normal course of business sales and does not include crowdfunding income.*

(a) *Commission payments to be 3% of net income.*

(b) *Net income is the profit after all expenses have been deducted from revenues, including interest on loans, general and administrative costs, income taxes, depreciation, and operating expenses such as rent, utilities, and payroll expenditures.*

(c) *Limited to 12 months from first product sales or £100,000/yr total earning cap, whichever comes first.*

(d) *Paid out: Monthly, 30 days after last day of the preceding month.*

5. CROWDFUNDING BONUS

5.1 *In addition to the commission previously mentioned, Jessica Hardwick is also eligible for a performance based bonus on any income from crowdfunding activities that she is responsible for organizing. The bonus amount to be calculated from the amount of the raise minus the direct marketing costs associated with the raise. I.e. Crowdfunding Raise = Total Revenue from Crowdfunding activity - Marketing Costs directly attributable to raise.*

5.2 *The crowdfunding bonus percentage to be:*

(a) *Crowdfunding Raise < £100k; then bonus = 5% of Crowdfunding Raise*

(b) Crowdfunding Raise is £100k-£200k; then bonus = 6.5% of Crowdfunding Raise.

(c) Crowdfunding Raise > £200k; then bonus = 7.5% of Crowdfunding Raise.

5.3 To be paid out only after the products have been shipped to all backers

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9. TERMINATION AND NOTICE PERIOD

9.1 After successful completion of the probationary period referred to in clause 1.2, the prior written notice required from you or the Company to terminate your

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employment shall be as follows: (a) in the first five years of continuous employment: one calendar month's notice; and (b) after five complete years: one week for each complete year of continuous employment up to a maximum of 12 weeks' notice.

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9.2 We may at our discretion terminate your employment without notice and make a payment of basic salary in lieu of notice.

9.3 We shall be entitled to dismiss you at any time without notice or payment in lieu of notice if you commit a serious breach of your obligations as an employee, or if you cease to be entitled to work in the United Kingdom.

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13. CHANGES TO YOUR TERMS OF EMPLOYMENT

We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change."

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7. On or about 22 March 2022 the Claimant and David Law had a meeting where they discussed possible changes to her remuneration package including a change to the basis of commission from that of net income based to that of good sold less costs of sale. The Claimant was of the opinion that if this did not change her commission targets were unachievable. This discussion was followed up by email of 23 March 2022 where David Law stated: 'We discussed a straight commission on good sold, uncapped. Below is our original agreement as covered by your employment agreement from October 2020. I have copied the details here. The main difference is the cap and time limit. I am OK with removing the cap and time limit, which is captured as point

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- c. We can revisit if this is not working for either of us". Accordingly the email proposed to paragraph 4.6(c) of the contract (to remove of the time and financial cap) but not to paragraph 4.6(b) of the contract (commission based on net income). Changing the basis of commission to goods sold was still under discussion. The Claimant did not raise any issue with that proposal. There was no net income in the relevant period.
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8. There was a crowdfunding raise of £218k in July 2021. The marketing costs directly attributable to the raise were £110k. The Claimant was paid £12,500 crowdfunding bonus (which the Respondent transposed directly from US dollars in error to the Claimant's benefit).
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9. There is a dispute between the parties as to whether the Indiegogo InDemand sales amount to a crowdfunding raise or not. In any event the Indiegogo InDemand marketing costs would exceed any Indiegogo InDemand crowdfunding raise.
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10. On 23 May 2022 the Claimant emailed David Law raising issues with her working environment and stating: "I feel very uncomfortable continuing and am sure it will come as no surprise that I think it is best to end my employment with Acidmark. Given the strength of your feelings, I don't feel comfortable continuing to attend meetings and interacting with the team during my contractual notice... You can either choose to terminate my employment immediately or I can wrap up tasks in the back end to ensure a clean handoff".
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11. David Law replied immediately noting "I have received your resignation e-mail. Regarding the transition; as you suggest I would prefer for you to quickly wrap up tasks for a clean hand off rather than quitting this morning. I suggest the end of the week as a goal for this transition."
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12. The Claimant and David Law met to discuss her resignation. It was agreed between them that she would work behind the scenes on a handover of her work until the end of the week, that her employment would end on 31 May 2022, and that she would be paid up to this date.
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13. The Claimant engaged in a handover of her work in the period until 31 May 2022 and undertook no further work thereafter. She was paid her wages for the period until 31 May 2022. She was not paid any notice pay.

14. In June 2020 the Claimant and David Law commenced without prejudice discussions with a view to resolving a dispute between them regarding her options and commission.
15. On 6 June 2020 David Law wrote to the Claimant to propose a resolution to their dispute. He stated "From my lawyers (and I suggest that you talk to your own), I will need to draft an unapproved options agreement... We would also need a signed settlement agreement that absolves either of us from any further issues, which does not have any payment attached to it." On the back of this proposal the Claimant appointed a lawyer who advised that it was customary for the employer to meet the costs of a settlement agreement. The Claimant incurred increased legal fees totalling £1,352.40 as a result of protracted discussions which did not result in a settlement agreement. The Respondent did not meet these legal fees.

Observations on the evidence

16. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.
17. The Respondent witness David Law gave his evidence in an entirely credible manner which was consistent with the documentary evidence. The Claimant did not give her evidence in an entirely credible manner which was not entirely consistent with the documentary evidence as set out below. In the event of a dispute the evidence of Mr Law was preferred.
18. The Claimant asserted in evidence that they had verbally agreed on 23 May 2022 a change to the basis of commission from that of net income based to that of goods sold less costs of sale. This agreement was not captured in the follow up email. The Claimant did not raise any issue with the follow up email. In the circumstances it was considered likely that it was no verbal agreement between the parties to change the basis of commission from net income to goods sold, etc.
19. The Claimant asserted in evidence that she had offered to work her notice period without attending meetings. The Claimant's letter of resignation did not make any reference to her working her notice. She offered to "terminate my

employment immediately or I can wrap up tasks in the backend to ensure a clean handoff. I am potentially open to working with Noisy Clan as a consultant for a period of time if we can agree upon a set of goals and compensation for that time period.” Wrapping up tasks in the backend meant not attending meetings and interacting with the team which were part of the duties of her role. David Law reasonably understood that she was offering to leave immediately or effect a brief handover of her work behind the scenes and he articulated this in his written reply to her. In the circumstances it was considered likely that it was agreed between the parties that her employment would end on 31 May 2020 and that she would be paid up to this date.

Relevant Law

20. Article 8 of the Extension of Jurisdiction (Scotland) Order 1994 provides that an employee may bring a claim for breach of contract which is arising or outstanding on termination of employment.

Discussion and decision

Notice pay

21. The Claimant’s contract of employment terminated on 31 May 2022 by mutual agreement of the parties. The Claimant did not resign and nor was she dismissed. There was accordingly no entitlement to notice pay or a payment in lieu thereof.

Commission

22. There was no agreement to change the basis of commission from net income to goods sold. That proposal was still under discussion. There was no net income for the relevant period and accordingly no commission fell due. The Claimant accepted in submissions that no commission fell due unless agreement had been reached to change the basis of commission.

Bonus

23. There was a crowdfunding raise of £218k in July 2021. The marketing costs directly attributable to the raise were £97k. Under her contract the Claimant was due a crowdfunding bonus of £9.3k (7.5% of the net raise of £121k). The Claimant was paid a crowdfunding bonus of £12,500 and accordingly there was no failure to pay bonus. The Claimant accepted in submissions that no crowdfunding bonus fell due.

Legal fees

24. There was no express or implied agreement that the Respondent would meet the Claimant's fees if a settlement agreement was not reached.
25. The claim for breach of contract does not succeed and is accordingly dismissed.

Employment Judge: M Sutherland
Date of Judgment: 27 January 2023
Entered in register: 30 January 2023
and copied to parties