



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr. B. Gasanov

**Respondent**

Bravo London Limited

AND

**HEARD AT:**

Watford Tribunal

**ON:** 12 April 2023

**BEFORE:**

Employment Judge Douse (Sitting alone)

**Representation:**

**For Claimant:** In person

**For Respondent:** In person (Mr. A. Kushnir)

## RESERVED JUDGMENT

1. The Claimant's claim for notice pay, as a result of wrongful dismissal, fails and is dismissed
2. The Claimant's claim for unlawful deductions from wages succeeds
3. The Respondent is to pay the Claimant the gross sum of £2,494 for commissions previously paid and then deducted
4. The Respondent is to pay the Claimant the gross sum of £2,795 for withheld commissions

***In respect of any gross amount, the respondent can comply with this element of the award by deducting and paying any relevant tax and national insurance, and by providing evidence that this has been paid, before paying the net amount to the claimant. If this is not done, the gross amount is payable to the claimant.***

## **Claims and issues**

1. On 14 November 2022 following ACAS conciliation from 20 October 2022 to 11 November 2022 the Claimant brought claims for notice pay, unlawful deductions from wages, and unpaid commission.
2. The notice pay claim was a complaint of wrongful dismissal for summary dismissal for gross misconduct, rather than termination for misconduct with notice.
3. As the Claimant had not been employed for the minimum 2 years required for a claim of unfair dismissal, the reasonableness or otherwise of the Respondent's actions is not an issue for me to determine. What I have to consider is if the alleged conduct by the Claimant was so serious as to amount to a repudiatory breach of the contract of employment entitling the Respondent to summarily terminate the contract.
4. The wages claims related to:
  - 4.1 commission amounts previously paid to the Claimant, but deducted (recovered) from his final commission payments
  - 4.2 Commission amounts due to be paid, but withheld

## **Procedure, documents and evidence heard**

5. I was provided with a hard copy bundle of 302 pages. There was some discussion at the start of the hearing about a further document that the Claimant wanted to include. The Respondent described this a privileged (without prejudice) document. Having considered it, I determined that this document was not relevant to the issues in the case.
6. I refer to the bundle in this judgment by reference to the relevant page number within [ ]. Similarly, if quoting from a witness statement the initials of the witness, the prefix 'W/S' and a paragraph number will be in [ ].
7. I was also provided with a signed statement from the Claimant, and from Mr. Kushnir on behalf of the Respondent. Both gave sworn oral evidence.

8. There was insufficient time for oral submissions, so I invited the parties to provide written submissions by 18 May 2023, which both did. I have considered these in reaching my decision, but do not replicate them within this judgment.

## **Facts**

9. I set out the following findings of fact, which were relevant to determining whether or not the claims and issues identified above have been established. I have not determined all of the points of dispute between the parties, merely those that I regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where I consider this appropriate, I have set out why I have made these findings.
10. In assessing the evidence and making findings of fact, I placed particular reliance upon contemporaneous documents as an accurate version of events. I also place some emphasis (and drew appropriate inferences) on the absence of documents that I expected to see as a contemporaneous record of events and also on the absence of evidence which give an interpretation of what occurred. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, I regard them with a degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

## **General**

11. The Claimant was employed as a Sales Representative, by the Respondent from 1 December 2020 until summary dismissal on 23 September 2022.
12. Mr Kushnir and his mother, Mrs Katerina Kushnir, were Directors of the Respondent company at all relevant times.
13. The Claimant had signed two documents on 23 December 2021 – a “statement of main terms of employment” [25 – 34] which appears to be general contractual terms (I refer to this as the main contract), and a “contract” [150 – 151] which

appears to be specific to the sales representative role (I refer to this as the additional contract).

14. The Claimant had additionally signed a confidentiality agreement on 30 December 2020 [43 – 53]. This included an agreement not to [47]:

- a. *“undertake or join any planning for an organisation of any business activity competitive with the current or anticipated business activities of the Employer”*
- b. *“engage or participate in any other business activities which the Employer, in its reasonable discretion, determines to be in conflict with the best interests of the Employer”*

15. The Respondent had a staff handbook, which the Claimant says he had not seen prior to the date he was dismissed.

16. Only parts of the handbook are in the bundle provided to me 35 – 42]. These are primarily parts of the disciplinary procedure.

17. The Claimant received a basic salary of £2000 Net per month, plus commission. Commission is discussed in more detail below.

### Dismissal

18. In August and September 2022, the Claimant approached Mrs Kushnir with a proposition:

*“for me to open a separate company that could be referred to by the Respondent if they were unable to manufacture a project. In exchange, I offered to set a fixed price for each potential customer on the condition that they would place the order and repeat the payment on the first three orders by that client. This way, the Respondent could redirect potential customers to my company, and I would find a supplier who could manufacture it, oversee the project, and pay the fixed price to the Respondent in the end.” [BG W/S 8]*

19. The Claimant additionally proposed that he would ensure appropriate projects were dealt with solely through the Respondent in the normal way, and that he could continue to work part-time for the Respondent.
20. Mrs. Kushnir declined to enter into the proposed arrangement, stating she had a previous bad experience of a similar situation.
21. On 3 September 2022, the Claimant registered a company "House of Joinery Ltd" with Companies House. He says that this was simply to reserve the name, as he was concerned someone else might register it.
22. On 22 September, the Claimant says he approached Mrs Kushnir again about the proposal, and also advised her he had registered the company.
23. Mr Kushnir's evidence is that Mrs Kushnir told him about the conversation with the Claimant the same evening. He says this did not include the Claimant advising he had registered a company, but that the nature of the conversation led him to investigate, including searching Companies House.
24. Either way, on 22 September the Respondent found out about the registration of House of Joinery by the Claimant.
25. On 23 September 2022, Mr Kushnir asked the Claimant to meet with him. Mr Kushnir presented the information he had found and dismissed the Claimant for gross misconduct with immediate effect.
26. In a letter on the same day, Mr Kushnir set out that:

*"your conduct and intentions constituted gross misconduct and that your explanation about the logic and reasons behind your intentions were not acceptable because Bravo London Limited is your employer who is not interested in alleged business ventures you had in mind for the purpose of your financial gain. Furthermore, Bravo London Limited is a company that has the right to protect its intellectual property, customer databases, which is reflected in our Employment Contract which you have signed and confirmed as agreed upon. You have also signed a separate documents, the Non-disclosure Agreement, which also stated that no employee is to undertake competitive business ventures while employed by Bravo London Limited and for a certain period after the Employment.*

*Having taken all of the facts and circumstances into consideration, I have decided to summarily dismiss you from your employment with immediate effect.”*

27. The Claimant denies any intention to solicit customers from the Respondent, and relies on his company being registered under a different code with Companies House to demonstrate that the businesses would not be competing.

### Commission

#### *General*

28. At all relevant times the Claimant received commission of 15% of the order value.

29. Customers were required to pay a deposit equivalent to half of the order, and the remainder 7 days before installation. The Claimant's commission payments replicated this, with commission on the deposit amount paid at that time, and the remainder due when the balance was paid by the customer.

30. The specific clients/accounts that relate to claims in this case are discussed below.

31. In relation to commissions already paid, and then deducted, the Respondent seeks to justify the recovery by reliance on a clause within the additional contract that states:

*“Commissions on refunds or merchandise returned by the customer in which a commission has already been paid to the Representative shall be deducted from future commissions to be paid to the Representative by the Company.” [151]*

32. In relation to unpaid commissions, the Respondent seeks to justify non-payment to the Claimant by reliance on clauses within the main contract:

- a. Clause 5: *“We shall be entitled to deducted from your salary or other payment due to you any money which you may owe the Company at any time”*. [26]
- b. Clause 16: *“Deductions...*

*The organisation reserves the right to require you to repay to the organisation, either by deduction from salary or any other method acceptable to the organisation. Any losses sustained in relation to the property or monies of the organisation, client, customer, visitor or other employee of the organisation, during the course of your employment caused through your carelessness, negligence, recklessness or through your breach of the organisation's rules or any dishonesty on your part. Any damages, expenses or any other monies paid or payable by the organisation to any third party for any act or omission for which the organisation may be deemed vicariously liable on your behalf. Any amounts of remuneration, expenses or any other payments (statutory, discretionary, etc) which are overpaid to you whether made by mistake or through any misrepresentation or otherwise; (on termination of employment) any holiday pay paid to you in respect of holiday granted in excess of your accrued entitlement; and any other sums owed to the organisation by you, including, but not limited to, outstanding loans or advances, or relocation expenses.” [31]*

#### *Hillhouse*

33. The origin of this order appears to be the quote for £26,400 including VAT, generated on 11 June 2021 [175 – 178], with terms that 50% - £13,200 – was due as a deposit, and the balance 7 days before the installation. However, there is also an invoice dated 22 December 2021 for £12,072 [170].
34. In any event, the parties agree that the Claimant received £385 net commission in relation to the *relevant* Hillhouse order.
35. In December 2021, issues arose with the order, and the customer was notified that a refund would be issued [169].
36. £11,450 was refunded to the customer on 14 January 2022.

#### *Dariusz*

37. On 20 September 2021, the Claimant generated a quote for furniture items to the value of £28,152 including VAT. The following day, invoice for that amount was generated, with terms that 50% - £14,076 – was due as a deposit, and the balance 7 days before the installation.

38. The Claimant was paid £821 net commission.

39. On 10 November 2021, the customer notified Mr Kushnir that they were unhappy with the Claimant's work [208]. There was then email correspondence between the Respondent and the customer in November and December 2021 [214 – 219].

40. In January 2022, the customer cancelled the order and requested a refund [210 – 213].

41. On 3 March 2022, the customer was refunded £11,676 [220].

42. On 5 October 2022, the Respondent communicated to the Claimant [106]:

*“Customer was unhappy to work with you and the monies have been returned in full. However, you retained the commission. Business is not able to allow for a commission to be granted if no order has been made or produced.”*

#### *Jekaterina*

43. On 18 February 2022, the Claimant provided the customer with a quote and invoice for furniture items to the value of £3,516 including VAT [189]. The terms were that 50% - £1,758 – was due as a deposit, and the balance 7 days before the installation [190].

44. The Claimant was paid £219.75 (net) commission for this order.

45. It is unclear what happened in the intervening period, but there must have been some discussion regarding the order as on 19 July 2022 the customer emailed the Respondent [201] saying *“Thank you for getting back to me today. As discussed my bank details are as follows...”* and on 27 July emailed again [200 - 201] stating *“I haven't received my refund yet. Could you tell me when to expect it? From our conversation over the phone my understanding was the refund was due last Friday.”*

46. On 29 July 2022, the deposit amount was refunded to the customer [202], and Mr Kushnir emailed the customer to confirm this [198].

#### *Keating*

47. On 30 June 2022, the Claimant provided the customer with a quote for a kitchen, to the value of £10,800 including VAT [227].



48. On 1 July 2022, the customer was sent an invoice for that amount, with terms that 50% - £5,400 – was due as a deposit, and the balance 7 days before the installation [228].

49. The Claimant was paid £675 net commission on the deposit payment.

50. It is unclear exactly what happened in the intervening period, but on 5 October the Respondent informed the Claimant that [106]:

*“The kitchen is now on hold as the customer was unhappy with cooperation with you. Wants to cancel the kitchen and claim refund. As this is on hold and bleak, we will not agree for you to keep this commission.”*

51. On 21 November 2022, Mr. Kushnir emailed the customer referring to a previous WhatsApp discussion. I have not been provided with that exchange. He notified the customer that [233]:

*“We have decided as a company pricing up and looking at the rises recently in material costs, we are unfortunately unable to fulfil the order after it has been held off for some time now.*

*Unfortunately when originally priced this was done at a very low price, which originally we were happy to comply with.*

*Recently there has been huge increases in material costs, and this is limiting us with older projects.*

*For this reason, as a company we have decided to stop producing kitchens for the foreseeable future.*

*Sorry for any inconvenience caused.*

*We will process the refund for the amount of £5400...”*

52. The refund was processed by the Respondent’s bank on 2 December 2022 [235].

Gaysha

53. On 21 June 2022, the Claimant was liaising with the customer regarding doors on a potential project [275 – 277]. This included: *“please find the revised quote with Profile Handles as per the Client’s request. We can choose the colour and specific shape later as there are plenty of options similar to the ones he provided reference to.”*

54. On 27 June 2022, the Claimant provided the customer with a quote for furniture items to the value of £28,800 including VAT [252 – 255]. This included reference to *“(Profile Handles – TBC)”*.

55. On 1 September 2022, an invoice was generated for the same amount. The terms were that 50% - £14,400 – was due as a deposit, and the balance 7 days before the installation [262].

56. The Claimant was due to receive £1,800 net commission.

57. On 28 September 2022, Mr Kushnir emailed the customer:

*“I want to confirm that the final drawings we are working according to, do not show handles per se, so the default option is the push-to-open mechanism. Could you be as kind as to confirm if you have had any discussions relating to handles for the doors and their design/look.”*

58. There then followed exchanges between the customer and Mr Kushnir on 28 and 29 September. This included the 21 June email chain with the Claimant being forwarded to Mr Kushnir [275], who then provided photographs of the handles specified by the Claimant [270].

59. On 29 September, Mr Kushnir advised the customer [267]:

*“The handles for the project the we have ordered are in fact up to 3000mm in Satin Silver Matt finish. So that is a near match as to what Sean has specified and requested.”*

*However, the only issue is that the handles will be with us early next week Tuesday or Wednesday, as there was a slight delay from our designated supplier.”*

60. On 5 October 2022, the Respondent wrote to the Claimant [106]:

*“Due to various errors. Lots of additional expenses incurred by the Company. You have missed the handles which had to be procured instead of the push-to-open (evidence in emails of handles being specified). You have failed to prepare the documentation well in advance or warn about such: including RAMS and O&M. Company had to pay for those to be done urgently due to extremely short times and compliance to the Customer requirement for in site work.”*

61. I have been provided with an invoice dated 7 October 2022, addressed to the Respondent, for a total value of £731.72 (plus VAT). This includes 40 aluminum handles at a cost of £14.13 each, totaling £565.20 (plus VAT).

62. In relation to the ‘RAMS’, I have been provided with a ‘Risk Assessment & Method Statement’ which states that it was compiled by Artur Kushnir on 22 September 2022. In his oral evidence, Mr Kushnir stated that the costs he referred to in relation to the documentation completion was purchase of the form template itself.

63. The Claimant’s evidence is that he was going to complete the necessary paperwork on 23 September, but was unable to because he was dismissed.

### *Studio Blair*

64. On 11 August 2022, the Claimant generated a quote for furniture items to the value of £6,960 including VAT [279 – 280].

65. On 25 August 2022, an invoice was generated for the same amount. The terms were that 50% - £3,480 – was due as a deposit, and the balance 7 days before the installation [281].

66. The Claimant was due to receive £435 (net) commission on this.

67. On 5 October 2022, the Respondent informed the Claimant [106]:

*“You have missed one whole unit (your fault). The Customer is also not happy with material chosen due to errors in communication, so material change is in place.”*

68. The Claimant agrees that there had been a previous order [283 – 286] where colour of the units were an issue, but says the customer accepted the products. The Respondent says that the difference represents a different cost, which they have had to bear. The Claimant disagrees that there is any price difference in any event.

69. In relation to the missing unit, the Claimant agrees that he missed a unit, but says that he discussed it with Mrs. Kushnir who agreed that it could be provided at no extra cost due to the issue with the earlier order.

## Law

### Section 13 Employment Rights Act 1996

#### ***Right not to suffer unauthorised deductions.***

*(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.*

*(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

70. *Delaney v Staples (t/a De Montfort Recruitment) 1991 ICR 331, CA*, is binding authority that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under S.13 ERA is properly payable, including an issue as to the meaning of the contract of employment.

## **Conclusions**

### Dismissal

*Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?*

71. The business categories were similar enough to conclude that there may be some element of competition. The potential overlap is demonstrated by the referrals proposed between the Respondent and House of Joinery. I note that the NDA includes anticipated business, and it is not an impossibility that the Respondent would commence the specific joinery proposed by the Claimant.

72. It is not just the starting of the business itself, even if simply registration, that is relevant, but also the context in which that arose.

73. The Claimant put a proposal to the Respondent, who declined. It was very clear to him, prior to registration, that they did not want to take part in the arrangement. Mrs. Kushnir specifically referred to a previous negative experience in similar circumstances. That should have alerted the Claimant to the likelihood that the

Respondent would see his actions as not being in their best interests, as detailed in the NDA.

74. Despite this, the Claimant went against the Respondent's wishes and registered the company. Without their involvement, the intention can only have been for him to pursue this as an individual.

75. In these circumstances, the Respondent was entitled to find the contract had been breached by the Claimant, and in particular the implied term of mutual trust and confidence between employee and employer.

76. Summary dismissal was justified, and the Claimant is therefore not entitled to notice pay.

### Commission

#### *General*

77. Unless expressly stated (for example, a non-competition clause that specifies a period of application beyond the end of the contract), the provisions within the contract cease to apply upon termination. In this case 23 September 2022.

78. On the face of it, the clause in the additional contract - "Commissions on refunds or merchandise returned by the customer in which a commission has already been *paid to the Representative shall be deducted from future commissions to be paid to the Representative by the Company.*" - does permit commissions earned to be repaid in the event of a refund/return. However, this has to operate fairly.

79. I do not interpret "future commissions" as permitting a deduction at *any* time in the future. The deduction should be applied within a reasonable timeframe after the refund/return. A reasonable timeframe for doing that would be to withhold/deduct from the next monthly payment due to the Claimant. Thereafter, by failing to make a deduction in a timely manner, the inaction has created the legitimate expectation for the Claimant that no recovery would be sought.

80. This is particularly the case when deduction is only as a retaliatory act some time later.

81. I address the applicability of this interpretation in relation to the specific client accounts below.

82. In relation to clauses 5 and 16 in the main the contract, these following needs to be established for these to apply:

78.1 The money is owed to the Company, because

78.1.1 A financial loss has been sustained by the Company, and is quantified by the Respondent; and

78.1.2 That loss was as a result of the Claimant's carelessness, negligence, recklessness, breach of organisation rules, or dishonesty

*Jekaterina*

83. Any issues with the order, and the subsequent refund, took place prior to the Claimant's dismissal. The Respondent chose not to use the clawback clause at the time, giving the Claimant a legitimate expectation that the commission was retained.

84. It is not reasonable for the Respondent to invoke that clause so long after the events, simply because of the Claimant's subsequent conduct.

85. The Respondent was not entitled to claw back the commission already paid - the deduction was unlawful.

*Keating*

86. The decision to refund the order occurred after the Claimant was dismissed.

87. At the relevant time, the order was simply on hold.

88. The reasons for the refund were a business decision by the Respondent.

89. The Respondent was not entitled to claw back the commission already paid - the deduction was unlawful.

*Hillhouse*

90. Any issues with the order, and the subsequent refund, took place over 9 months before the Claimant's dismissal. The Respondent chose not to use the clawback clause at the time, giving the Claimant a legitimate expectation that the commission was retained.
91. It is not reasonable for the Respondent to invoke that clause so long after the events, simply because of the Claimant's subsequent conduct.
92. The Respondent was not entitled to claw back the commission already paid – the deduction was unlawful.

*Dariusz*

93. Any issues with the order, and the subsequent refund, took place a number of months before the Claimant's dismissal. The Respondent chose not to use the clawback clause at the time, giving the Claimant a legitimate expectation that the commission was retained by him.
94. It is not reasonable for the Respondent to invoke that clause so long after the events, simply because of the Claimant's subsequent conduct.
95. The Respondent was not entitled to claw back the commission already paid.

*Gaysha*

96. The Respondent seeks to rely on a clause in the contract which allows for monies to be recouped in relation to *losses* sustained by the company. However, rather than quantify the alleged losses, the Respondent has simply withheld the commission element.
97. The issue with the handles arose after the Claimant's dismissal. In particular, the costs incurred [236] in relation to this, were after the Claimant's September salary and commission was finalised.
98. In any event, the costs allegedly incurred do not match the amount of commission withheld from the Claimant.
99. The Respondent cannot recoup this amount by withholding the Claimant's commission. The commission was properly payable in the Claimant's final salary.



*Studio Blair*

100. The Respondent seeks to rely on a clause in the contract which allows for monies to be recouped in relation to losses sustained by the company. However, rather than quantify the alleged losses, the Respondent has simply withheld the entire commission element.
101. The Respondent cannot recoup this amount by withholding the Claimant's commission. The commission was properly payable in the Claimant's final salary.

**Remedy**

102. **I have sufficient information to determine remedy, so the provisional hearing on 4 July 2023 is not necessary and is therefore cancelled.**
103. The Respondent is to repay the Claimant £2030.92 net, in relation to recovered commissions calculated as followed:
- a. £675 in relation to Keating
  - b. £821.10 in relation to Dariusz
  - c. £219.75 in relation to Ekaterina
  - d. £385 in relation to Hillhouse
- = 2,100.75
- Less £69.83 commission paid in September 2022
- = **2030.92**
104. The Respondent is to repay the Claimant £2,235 net, in relation to withheld commissions calculated as followed:
- a. £1,800 in relation to Gaysha
  - b. £435 in relation to Studio Blair

*Interest accrues at a daily rate of 8% from the date of judgment, unless payment is made within 14 days.*

Employment Judge K Douse

Dated: 30 June 2023.....

Sent to the parties on: 30 June 2023

GDJ

For the Tribunal Office