



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4113568/2021**

5

**Held in Edinburgh on 6 June 2022**

**Employment Judge: M A Macleod**

10 **Luke McLeish**

**Claimant  
In Person**

**Spacekube Ltd**

**Respondent  
Represented by  
Ms D McGuire  
Solicitor**

15

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 **The Judgment of the Employment Tribunal is that the claimant's claims fail and are dismissed.**

#### **REASONS**

1. The claimant presented a claim to the Employment Tribunal on 2 December 2021 in which he complained that the respondent had unlawfully deprived  
25 him of pay in the form of commission payments, and travel expenses.
2. The respondent submitted an ET3 in which they resisted the claimant's claims.
3. A Hearing was listed to take place on 6 June 2022. The claimant appeared on his own behalf, and Ms McGuire represented the respondent.
- 30 4. The claimant gave evidence on his own account, and the respondent called Stewart Bruce, their Director, as a witness.
5. A joint bundle of documents was produced to the Tribunal and relied upon by the parties. In addition, the claimant had provided certain documents to

the Tribunal and sought to refer to them, though hard copies were not available. I determined that we should proceed by reviewing the documents on screen and in the Tribunal administration file so far as they were accessible and take an informal approach to their production. Ms McGuire confirmed that she had no objection to this approach.

6. Based on the evidence and the information presented, the Tribunal was able to find the following facts admitted or proved.

### Findings in Fact

7. The claimant, whose date of birth is 7 December 1997, commenced employment with the respondent on 1 March 2021 as an Architectural Technician. His employment ended on 9 July 2021.

8. The respondent is a limited company whose business is the construction of bespoke garden rooms for clients. The claimant's role was to make detailed plans and provide a drawing pack for the construction of dwellings, based on the specific instructions of clients. The company has two Directors, Stewart Bruce and Gordon Forsyth.

9. On commencement, the claimant was provided with a written statement of terms and conditions of employment (28ff). His hours of employment were normally Monday to Friday 8.30am until 5pm, and Saturday, on a rota basis, 10am to 5pm. At paragraph 4.1, the terms and conditions provided that *"You may be required to work additional hours as and when requested to do so by the Company or when the proper performance of your work so requires. There is no entitlement to be paid extra remuneration for any additional hours worked in excess of basic weekly hours, as this obligation has already been taken into consideration in the determination of your salary level."*

10. The claimant was contracted to work at the respondent's premises at 54 West Main Street, Uphall, but he may be required to work at other company premises within reasonable travelling distance of his home (he lived in Hamilton).

11. The provisions relating to remuneration, expenses and deductions were set out at paragraph 6 of the terms and conditions. His salary was £20,000 per annum, payable monthly in arrears by credit transfer on or around the last business day of each month.
- 5 12. It was provided that he would be paid or reimbursed *“for any prior approved reasonable expenses properly incurred by you while performing your duties on behalf of the Company, subject to your producing supporting receipts in respect of such expenses when requested by the Company.”*
- 10 13. Paragraph 6.4 stated: *“For the better performance of your duties the Company may provide you with a company vehicle, fuel card, iPad/pencil. Any such item must be returned to the Company on demand and you will be held personally liable for any loss of, or damage to, such items. Vehicle and Fuel card must only be used on the legitimate prior approved business of the Company.”* The respondent did not provide the claimant with a company vehicle or a fuel card.
- 15 14. Paragraph 6.6 provided that *“You will also be entitled to participate in the Company’s Commission structure. Details of the relevant Structure will be supplied to you separately. The Company reserves the right to amend the terms of any Structure, or terminate a Structure or to substitute an alternative Structure.”*
- 20 15. The company director, Mr Bruce, runs more than one company. Spacekub Ltd, the respondent in this case and the claimant’s employer, was one of those companies. He also runs Ecko Bi-Folding Doors Ltd and Ecko Edinburgh Kitchen Company Ltd.
- 25 16. Ecko Bi-Folding Doors Ltd (“EBD”) is a company operating out of the same premises as the respondent, designing and supplying glass extensions. Brian Kennedy is employed by EBD as a sales manager. Ecko Edinburgh Kitchen Company Ltd (“EKC”) designs and supplies kitchens and bathrooms to clients. Each company employs approximately 12 to 14 staff, including sales staff.
- 30

17. The respondent, at the material time, had one employee, namely the claimant.
18. When he was employed, the claimant was not required or expected to carry out any sales. On that basis, the respondent did not consider him entitled to receive any commission on sales.
19. Brian Kennedy was the lead for sales for the respondent as well as for EBD and EKC.
20. The claimant tendered his resignation from the respondent's employment as Architectural Technician on 2 July 2021 (42). He thanked the respondent for the opportunities presented to him in his time with them, but felt that in the best interests of his career, it was time for him to move on.
21. The claimant was paid no commission throughout his employment with the respondent.
22. Following his resignation, he wrote to Mr Bruce on 24 July 2021 (43/4):
- "Good afternoon Stewart,*
- I hope you're well?*
- I have attached below a list of the 6no. garden rooms/glass rooms that I sold whilst working at SpaceKube.*
- GC, SpaceKube - £21,000 + VAT (£25,200)*
- JF, SpaceKube - £28,840 + VAT (£34,250)*
- MF – SpaceKube - £26,408 + VAT (£31,690)*
- MT – Atrium + - £16,785 + VAT (£20,000)*
- SM – Atrium + - £18,347 + VAT (£22,000)*
- VH – Canopy Only - £32,065 + VAT (£38,480).*

*I hope you are willing to pay my 1% for each of these projects in my final weeks wage at the end of this month and I would really appreciate if this is the case.*

*Thanks.*

5 *Luke Mcleish”*

23. He wrote again to Mr Bruce on 19 August 2021, having received no reply to his earlier email (43):

*“Hi Stewart,*

*Following up my previous email on the 24<sup>th</sup> July,*

10 *My new employers have asked for my P45 to be sent over, if you can sort that for me I’d appreciate it.*

*Also I thought I’d let you know that since I have never received a response in regard to the commission I am due from when I was in your employment I have taken this now further and have started the process of a tribunal claim, I feel like I have been more than fair with the length of time I have waited and also as my commission was based of the 1% of the overall price of the structures and not 5% of the profits then the profits in each job shouldn’t matter in order for me to get paid.*

15

*If you would like to discuss anything please respond in writing and I will happily discuss this with you.*

20

*Cheers*

*Luke McLeish”*

24. The claimant gave evidence to the effect that he was invited, at some point (though he was unable to remember when) to take on the additional role of sales by Mr Bruce, and that he signed a document to the effect that he accepted that role. The document gave him the option of commission paid at 1% of the price of the sale, or 5% of the profit on the work, he said, and his evidence was that he chose 1% of the price.
- 25

25. Mr Bruce's evidence was that no such document exists, and that he never asked the claimant to carry out any sales on behalf of the respondent company.
26. No document to this effect was produced to the Tribunal. The claimant said that he was unaware of the Tribunal's power to order a party to produce documents, on the application of the other party, and that was why he did not seek an Order to require the respondent to produce the document.
27. Mr Bruce was adamant that the claimant was never employed as a sales person, but only as an Architectural Technician.
28. Taking the examples which the claimant had set out, Mr Bruce's position was that Brian Kennedy or Gordon Forsyth took the lead on obtaining the sales for the company, and therefore the claimant's role was simply that of support and information-gathering.
29. The claimant maintained that he was responsible for the sale to GC. The contract specification signed by GC was issued by SpaceKube on 29 April 2021. The letter was issued in the name of Gordon Forsyth. The client GC signed the acceptance and it was signed by the claimant on behalf of the respondent.
30. Mr Bruce said that the claimant was not responsible for the sale, but for the design of the SpaceKube for GC to the specifications set out in the letter.
31. JF was a customer who put in an order for a SpaceKube but ultimately withdrew her interest and her initial payment was refunded. No contractual documents were made available to the Tribunal. Commission would not normally be paid to the sales person responsible for a sale which subsequently fell through.
32. MF was a customer to whom a contract specification was sent on 1 June 2021, for a SpaceKube Arran Type Garden Room. Again, the letter was issued in the name of Gordon Forsyth, and signed on behalf of the respondent by the claimant.

33. Mr Bruce's position, again, was that the claimant accompanied Mr Forsyth to discuss and agree the specification with the client, but that he was not responsible for the sale and that no commission would therefore be due.
34. MT was sent a contract specification dated 15 June 2021 by Solarlux. The letter was issued in the name of the claimant, and counter-signed by the claimant. Solarlux appears to be either a separate company or part of EBD. The email correspondence indicates that the claimant was the primary contact for the works with MT, but that Brian Kennedy was the sales person involved. There is no indication that the respondent was responsible for this contract.
35. SM similarly was sent a contract specification dated 15 June 2021 under the heading Solarlux, in a letter issued in the claimant's name. No signatures appeared on the documents. In the order confirmation, Brian Kennedy was noted as the main contact. There is no indication that the respondent was in any way involved in this contract.
36. VH was issued with a contract specification under the heading of Solarlux on 15 June 2021, in a letter in the claimant's name, and countersigned by the claimant. Again, there is no indication that the respondent was in any way involved in this contract.
37. Mr Bruce's evidence was that the claimant was involved in the contract process but that he was not the sales person who procured the business for the company, and that in any event that was work for a different business, not the respondent.
38. The claimant maintained that he had driven a large number of miles in his own car to various sites, and that he wished to claim £350 for that mileage. He said that he put in his petrol receipts at the end of each month, and expected to be paid 45p per mile.
39. Mr Bruce said that he did not expect the claimant to claim for expenses for petrol as the respondent has vans available for staff to drive to site as required. He did not believe that receipts were handed in and could not

understand the basis of the claim. He maintained that the respondent does not pay mileage expenses to staff.

### Submissions

40. The parties made short submissions based on the evidence led and  
5 presented. They were taken into account in reaching the decision below.

### The Relevant Law

41. Section 13 of the Employment Rights Act 1996 provides:

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

10 *(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.*

15 *(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*

20 *(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.*

25 *(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."*

### **Discussion and Decision**

42. The claimant is essentially seeking two payments, in this case, as set out in  
5 his claim form.
43. Firstly, he claims that he was unlawfully deprived of commission payments, amounting to 1% of the cost of the work to be done, in respect of 6 jobs for which he claimed responsibility. He maintained in his claim form that the commission was 1% of £175,000.
- 10 44. The first issue to be raised here is whether the commission payment, which plainly falls within the definition of wages set out in section 27 of the Employment Rights Act 1996, is "properly payable" to the claimant under the contract of employment or otherwise.
45. The claimant's contract of employment, embodied in the statement of terms  
15 and conditions produced to the Tribunal, only made reference to the claimant's entitlement, under paragraph 6.6, to "*participate in the Company's Commission structure*". No copy of that Commission structure was produced. In any event, the claimant does not rely upon that structure.
46. The claimant points to a document which, he says, confirms that he was  
20 required by the respondent to carry out sales duties, in exchange for which he would receive 1% commission on the price of the work to be done, or 5% commission on the profit generated, of which he chose the former. However, no document was produced to the Tribunal to confirm this; the respondent denied its existence; further, the respondent denied that the claimant was  
25 asked to take on a sales role at all; and the claimant was unable to confirm in any detail what was contained within the document other than the commitment to pay him commission.
47. There is a further difficulty for the claimant, relating to the sums which he is  
30 now claiming from this Tribunal. He seeks 1% of £175,000. The total sums in the projects set out at 44 in the bundle of productions amount to

£171,620. His claim is therefore inaccurate on a simple calculation. Leaving that aside, however, the claimant appears to seek commission not only on the price to be paid to the respondent but also upon the VAT to be rendered to Her Majesty's Revenue and Customs. He was unable to explain why he thought that this would be so, in the face of the respondent's clear (and it has to be said logical) statement that no sales person would receive commission on the VAT element of any bill, since that element is not retained by the company but passed on to the Revenue.

5  
10  
48. As a result, his claim is excessive, even if it were to succeed. The true figure represented by the 6 contracts is, in my judgment, £143,445, of which 1% is £1,434.45.

15  
49. However, it is my view that the claimant is confronted, at that point, with further difficulties. JF's contract arrangement was withdrawn, and she was refunded all payments made to the company. It would seem extraordinary for a company to pay commission to a sales person in respect of a sale which did not in fact generate any income for the business. I return to the issue of clarity in relation to the contractual basis of the claim for commission below, but on this basis alone it seems unrealistic.

20  
25  
50. In addition, the claimant was employed by the respondent, and his claim is only directed against the respondent. However, it appears that three of the clients were clients of EBD, rather than the respondent, and that whether or not the claimant had any part in selling the work on EBD's behalf, they are not a party to these proceedings. It can hardly be claimed that the respondent is responsible for the actions of a different legal entity, when that entity is not a party which is being sued by the claimant.

51. As a result, it appears to me that the claims in relation to MT, SM and VH are, on any view, entirely irrelevant to these proceedings, as they were not SpaceKube clients.

30  
52. The claim must therefore be seen as restricted to commission in relation to the contracts of GC and MF.

53. In my judgment, the claimant has failed to prove, on the balance of probabilities, that he was contractually entitled to receive any commission on either or any of these contracts. The contract of employment does not make such a provision. The document which the claimant refers to is not produced before this Tribunal, and its existence was denied by the respondent. There is too much doubt about the existence of the document, and what it said, in precise terms, to be able to place any reliance upon the claimant's evidence about it before this Tribunal.
54. Accordingly, it is my judgment that the claimant has failed to prove that he was entitled to receive any commission from the respondent in respect of any of the 6 contracts referred to in this case. I should add that the evidence presented by both parties was unhelpfully vague and confusing, but that notwithstanding the Tribunal is unable to find any convincing evidence that such a document exists, and therefore that the claimant was engaged in the business of sales, or entitled to any commission from any sales. It is, apart from all else, quite unclear what part the claimant played in actually securing any of that business.
55. His claim in respect of the commission he seeks must therefore fail.
56. The second claim made by the claimant is equally confusing. In his claim form, he seeks £350 in respect of mileage expenses which have been claimed but unpaid by the respondent.
57. There is in fact no evidence to persuade me that the claimant actually did submit any form of claim or request to be paid mileage expenses, nor that he made any serious attempt to tell the respondent what mileage he had actually done. The figure he seeks represents a claim for 777 miles. In his evidence, he seemed to suggest that he had done 450 miles in the business but in his claim form the figure is 150 miles. The claim is hopelessly vague and confused.
58. In any event, the respondent seems to have no procedure for paying mileage expenses to any staff. The respondent operates a process whereby

they allow staff access to fuel cards or company vehicles, such as vans. The claimant used his own car.

59. It is a particularly odd feature of the claim for expenses that the claimant says that he drew this to the respondent's attention by submitting his "receipts". It is not known what the receipts were for, or how much was noted on those receipts, but on the assumption that they were receipts showing how much he spent on fuel on each occasion when he refilled his tank, they have nothing to tell the respondent or the Tribunal about how many business miles were being done. The claimant did not give evidence that his car was used exclusively for business purposes. On that basis, it must be the case that a proportion of his spending on fuel must have been for his own private use. The evidence simply tells us nothing about the proportions to be applied when considering what payments should be made to the claimant.
60. If the claimant wished to be paid for his mileage, he should have maintained a clear record of miles actually driven (or, equally usefully, journeys carried out), so that his claim of 45p per mile could be calculated accordingly.
61. As it is, the claim by the claimant is so confused and unclear that it lacks any merit, and cannot be upheld on the little evidence which was presented to me about this matter.
62. Since it is for the claimant to prove his case, and since he has completely failed to present logical or coherent arguments and evidence in support of that case, this claim is bound to fail.
63. The claimant's claim for expenses arising out of the mileage he drove for the respondent's business must therefore fail, and be dismissed.

Employment Judge: Murdo Macleod

Date of Judgment: 28 June 2022

Entered in register: 28 June 2022

and copied to parties