



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Respondent

(1) Mr G Burns - 2500762/2017
(2) Mr P Darling – 2500966/2017
(3) Mr S Flaherty – 2500970/2017
(4) Mrs P Roberts – 2501092/2017

AND

GEC Solutions Limited
t/a Green Energy Consulting

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 4 January 2018

Before: Employment Judge Speker OBE DL

Appearances

For Mr Burns:	In person
For Mr Darling:	Ms A Choudhry, Solicitor
For Mr Flaherty:	In person
For Mrs Roberts:	In person
For the Respondent:	Mr P McGirr, Managing Director

JUDGMENT

Glenn Burns

1 The respondent shall pay to the claimant:

1.1	Unauthorised deduction of wages	£1,320.00
1.2	Holiday pay	£ 461.53
1.3	Commission	£ 961.64
	TOTAL:	<u>£2,743.17</u>

Paul Darling

2 The respondent shall pay to the claimant:

2.1	Holiday pay	£ 376.71
2.2	Wages for 2 weeks lying on	£1,145.83
2.3	Unauthorised deduction of pay for 2 days	£ 147.96
2.4	Commission	<u>£3,750.00</u>
	TOTAL:	<u>£5,420.44</u>

Sean Flaherty

3 The respondent shall pay to the claimant:

3.1	Unauthorised deduction of wages	£ 276.92
3.2	Holiday pay	£ 120.00
3.3	Commission	£ 269.71
3.4	Pay in lieu of wages in respect of notice	<u>£ 461.53</u>
	TOTAL:	<u>£1,128.16</u>

Paula Roberts

4 The respondent shall pay to the claimant the sum of **£432.69** in respect of pay in lieu of notice.

REASONS

- 1 This case involved four separate claimants all making claims against the same employer, GEC Solutions Limited trading as Green Energy Consulting. All four of the claimants attended in person and Mr Paul Darling was represented by his solicitor Ms Azra Choudhry. The company was represented by its Managing Director Mr Peter McGirr and one of the other Directors of the company Mr Kevin Lumley was in attendance.
- 2 Mr McGirr outlined the brief history of the company which has been in existence for some five and a half years during which time Mr McGirr has been the Managing Director. The business operates from five sites including the head office in Gateshead and employs in the region of 165 employees, 120 of which operate from the Gateshead premises. Of the four claimants all were employed at the Gateshead premises and had all been on probation although in Mr Darling's case he had progressed to a permanent contract. The company is in the business of selling energy services, performing as well as negotiating contracts.
- 3 I was provided with various documents to assist in reaching a decision and in the case of Mr Darling a paginated bundle, a statement and a schedule of loss. There was also a statement by Mrs Roberts but with regard to the other claims there were no paginated bundles and the documents were not produced by either side in any formal or complete manner. It was unfortunate that the company did not provide a detailed bundle of documents although some papers were handed up during the course of the hearing. The Tribunal was not assisted by the lack of credible and crucial documentary evidence, some of which was clearly in the possession and control of the respondent and could and should have been produced. Mr McGirr gave as part of the explanation for its absence,

that there may be some issue with regard to the application of the Data Protection Act although he conceded that he had not taken any legal advice about that although clearly he could have done. The Tribunal found no substance in the suggestion that any of the documents necessary for the hearing could not have been produced.

- 4 It is implicit that in any claim brought to a Tribunal those who are seeking to substantiate claims should bring with them or obtain all of the necessary documentation and those who are seeking to defend an application should ensure that they have available at the hearing all of the necessary documents. It would have been open on both sides for applications to be made to the Tribunal in advance of the hearing for specific directions that parties should disclose identifiable documents which would be helpful in order to resolve the case and it is most unfortunate that that was not done. I did have available to me the claim forms which had been lodged, the forms of response, various e-mails which had been sent to the Tribunal by all of the parties, letters of acceptance signed by the claimants, the respondent's handbook and various other communications but these were not produced in any logical or paginated format. Detailed payroll and commission documentation was not produced.
- 5 The separate claims as they appear in the order of the judgment were disposed of as follows:

5.1 **Glenn Burns** – Mr Burns was on probation with the company and was employed from 1 March 2017 to 2 May 2017. He made claims under three heads:

- (a) outstanding wages;
- (b) holiday pay; and
- (c) commission.

As to unpaid wages he had put forward a calculation of £2,073.53 outstanding although he conceded that this could not be accurate as one of the figures used was gross and the other was net. As to holiday pay he was claiming the sum of £461.53. The commission claim was based upon a contract where he maintained that the value was £19,000 and he was entitled to 10% commission. There was a dispute with regard to the number of days involved with regard to holiday and sickness. As to the disputes in the evidence I accepted the evidence given by Mr Burns that he kept in regular contact with the company when he was absent by making contact with the receptionist and the HR Department and his manager. This was supported by e-mails produced. I did not accept the suggestion made on behalf of the company that there had been a failure by Mr Burns to do this or that there had been any of the type of difficulty in contacting him that was suggested.

I examined the entitlement to commission in detail. This arose out of the contract which stated that commission became due when a contract with the customer became live. It was suggested that the commission would be lost entirely if the employment came to an end on the basis that the company would no longer be able to recoup commission in the event that a contract where commission had

been paid subsequently failed. However the documentation which was produced by the respondent in relation to the commission claim was incomplete and unsatisfactory. Their documentation in relation to wages was also incomplete and was complicated by the fact that the company had transferred a sum of commission due to a different employee into the bank account of Mr Burns.

As to the wages claim and doing the best I can on the evidence available and taking into account that there were no accurate calculations with regard to deductions for tax and national insurance. I award to Mr Burns the sum of £1,320 for wages which had not been paid to him.

As to the holiday pay I award the sum of £461.53 based on his calculations.

In relation to commission I do have regard to the fact that there would be difficulties for the company in not being able to recoup subsequently commission which had been paid on a contract which eventually failed. There was some lack of clarity with regard to the name of the contract and this had not assisted. The relevant contract was said to have a value of £19,000 which would have produced £1,900 commission. However it is fair that I take into account the likely impact upon the company should anything go wrong with that contract subsequently and again endeavouring to do justice between the parties I feel the most appropriate course is to award the commission on that contract at £950 being 50% of the full commission and to add to that the small amount of admitted commission on a different Tribunal contract in the sum of £11.64 which Mr McGirr helpfully admitted to the Tribunal.

Therefore the total sums to be paid by the respondent to the claimant Glenn Burns are as follows:

Wages -	£1,320.00
Holiday pay -	£ 461.53
Commission -	£ <u>961.64</u>
TOTAL:	<u>£2,743.17</u>

5.2 **Paul Darling** – Three of the claims made by Mr Darling were conceded by the company and it was to the credit of the company that they did so. These were in the following sums:

Holiday pay -	£ 376.71
2 weeks lying on -	£1,145.83
2 days pay -	£ 147.96

The contentious issue with this claimant was the question of what commission he was entitled to receive. Mr Darling was employed by the company from 1 February 2017 to 2 June 2017 and it was acknowledged that he resigned from the company because he was very annoyed that he was not being paid commission to which he felt he was entitled and he decided that he would withdraw his labour completely and leave the employment.

Again the Tribunal was not provided with adequate information with regard to the claim. A table within Mr Darling's bundle of documents listed eight customers with the values estimated by the claimant and the more precise figures which were claimed by the respondent to be the actual values of the customers' contract in each case. The total in the column for Mr Darling was £59,000 and the company's column gave a figure of £20,302.99. That document included the words "Commission Due £2,030.30" which was clearly the figure which was being put forward by the respondent when the schedule was prepared as far as the company was concerned. However in the ET3 form filed by the respondent the concession made as to the amount of commission was £1,756.57. In any event Mr McGirr was arguing on behalf of the company that no commission at all was due because of the fact that Mr Darling has left his employment with the company.

I must make the best I can on the available oral and documentary evidence and to do justice to the parties in accordance with the overriding objective. Once again I give credit to the company for the fact that they would lose the ability to recoup commission on failed contracts or in those few cases where the contracts did not go live at all. The fair award for commission, taking all of these points into account is £3,750. This takes a broad but proportionate approach to the evidence. Therefore the total awards to be made to Mr Darling are as follows:

Holiday pay -	£ 376.71
2 weeks lying on -	£1,145.83
2 days pay -	£ 147.96
Commission -	<u>£3,750.00</u>
TOTAL:	<u>£5,420.44</u>

5.3 **Sean Flaherty** – Mr Flaherty was employed from 15 February 2017 to 24 April 2017 and was still in his probation period when his contract was brought to an end. He was informed that he was being dismissed for gross misconduct and that he would not be paid any wages for his notice period. The evidence showed that the company concluded that Mr Flaherty's performance was not up to the required standard because of very low sales figures. Mr McGirr made reference to section 86(6) of the Employment Rights Act 1996 and argued that the level of performance was so bad that it fell within the definition of gross misconduct and should be regarded as an additional example of gross misconduct bearing in mind that the handbook specifically stated that the examples of gross misconduct were not exhaustive. However legally the term gross misconduct relates to very serious instances of actual misconduct or negligence and that where an employee is not coming up to the adequate standard or is found to be incapable of doing so, that this falls within capability rather than conduct and is expressly not a basis for saying that such is gross misconduct and disentitles an employee from receiving any notice. I do not find that section 86(6) or the document signed by the employee operates to deprive the claimant of the minimum statutory notice to which Mr Flaherty was entitled by virtue of the time that he worked with the company. I therefore award to him his wages for one week's notice. I also award to him his outstanding wages of £276.92, holiday pay of £120.00 and commission which was agreed by the respondent at £269.71. The total award from the respondent to the claimant is as follows:

Unpaid wages -	£ 276.92
Holiday pay -	£ 120.00
Commission -	£ 269.71
Pay in lieu of notice	£ <u>461.53</u>
TOTAL:	<u>£1,128.16</u>

5.4 **Paula Roberts** – Mrs Roberts was employed from 3 April 2017 to 16 May 2017 and was in her probation period when she was dismissed for alleged gross misconduct. The circumstances are similar to those outlined with regard to Mr Flaherty in that the dissatisfaction with Mrs Roberts centred upon the fact that she had not produced any adequate sales and the only evidence which she gave about this was that she had verbally agreed a potential contract very shortly before termination of her employment and there was certainly no evidence to the effect that that contract had been formalised into an operational contract. However, Mrs Roberts conceded that she was not making a formal commission claim in any event. What she was seeking was her one week's notice in accordance with her contract. For the reasons already stated in the case of Mr Flaherty the Tribunal finds that the company is not entitled to withhold that pay on the basis of alleged gross misconduct and that it should be paid. Therefore the Tribunal awards to Mrs Roberts from the respondent company the sum of **£432.69**.

EMPLOYMENT JUDGE SPEKER OBE DL

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
17 January 2017**