



EMPLOYMENT TRIBUNALS

Claimant: Miss C Madden

Respondent: Static Solutions Ltd

HELD AT: Leeds

ON: 12 October 2017

BEFORE: Employment Judge J W Wade

REPRESENTATION:

Claimant: In person/Mr Madden (father)

Respondent: Mr B Hendley (consultant)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 12 October 2017, the written record of which was sent to the parties on 16 October 2017. A request for written reasons was received from the Respondent on 12 October 2017. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 12 October 2017 are repeated below:

JUDGMENT

- 1 The claimant's complaints of breach of contract and unlawful deductions from wages succeed. The respondent shall pay to the claimant the sum of £500, a gross sum and it shall be for the claimant to account for any tax or employee national insurance which may be payable.

REASONS

Introduction

1. The Claimant in her claim form is very clear that the correct Respondent is Static Solutions Ltd and Mr Glen Aaron is a director of that business. He is not a Respondent to this claim personally and the title to the originating application and proceedings is amended accordingly to Miss C Madden v Static Solutions Ltd.
2. This is a claim in breach of contract or deduction from wages. The issues involved in this case are in substance no different as between those two different legal frameworks. I have to decide in essence whether the sum of £500 was properly payable by way of commission to the Claimant in respect of two customers of the Respondent business – Central Accident Repair and Land Rover Cornwall.

Findings of Fact

3. The facts are very straightforward. The Claimant started working for the Respondent on 27 June 2016. She was interviewed for a sales post to cover UK sales and she would therefore spent a good deal of her time “on the road”. She was successful in achieving that post and the director, Mr Aaron, provided her with an offer letter confirming an offer of appointment as a sales executive. He wanted to confirm the principal terms of the discussions.
4. He confirmed the base at the company’s offices, a salary of £20,000 and holiday entitlement. He said that the other terms and conditions were set out in the terms of employment. Attached to his offer letter was a principal statement of terms and conditions of employment dealing with all the usual matters, job title, hours to be worked, place of work, holidays and so on. The Claimant signed that contract of employment on 27 June 2016. It was silent as to commission, despite this being a sales role.
5. Not unusually the Claimant was sent a commission structure document with the offer of employment. This was sent by a Miss Vicky Hirst, commercial director on 15 June 2016, before the role commenced and before the claimant accepted the offer. She said: here attached is the offer of employment, company handbook and the commissions that will be paid on sales made.
6. The commission document and I similarly record it in full, said this: minimum 5 sales per month. It then set out the length of contract hire of the Respondent’s equipment, which varied between three and 36 month contracts. The cost of those hire contracts for the customer was shown - £150 for the shortest contract and £90 per month for the longest contract; a commission structure of £50 for the shortest contract and £250 commission payable for the longest contract.
7. That was all that was said other than the following commentary –“ ideally 10 sales a month is required. However 5 is an absolute minimum we can accept to keep the position viable. There is no maximum of calls and the more you sign up the more commission you will earn. The position will be monitored after the three month probation to ensure the role remains cost effective within the business.”

8. The Claimant's line manager or boss on a day to day basis was Mrs Cleland. She did not have any discussions with the Claimant about that commission structure other than at some point to confirm that if customers bought equipment rather than renting it there would be a commission of £100 for outright sales. Mrs Cleland did not see the documents that were forwarded to the Claimant by the company's directors at or before the commencement of those contracts. Her own knowledge about the commission structure was very much based on discussions with the directors and the fact that she had occupied that same UK sales position herself and had been paid commission accordingly, albeit at a slightly lower rate for the longest of contracts.
9. The Claimant was paid monthly in arrears in respect of commission. Her basic salary was augmented considerably by her commission, which appeared separately on a pay slip every month. She routinely achieved sales in excess of the 5 per month minimum and on occasions she received commission in respect of customers who were existing customers of the Respondent business, Fix Auto Blackburn was one of them and C&C Vehicle Services was another.
10. The structure of the Respondent's business and terms with its customers was such that it had previously used an interim lease arrangement but had moved to direct rentals by the Respondent to customers. The consequence of this was that where direct rental agreements were in place and the term of the rental expired, direct debits were set up such that the customers continued to pay the monthly rental agreement and the contract just rolled over and payment would only come to an end if the customer was in contact or for some reason stopped the direct debit.
11. In the case of the Claimant's sales in May of 2017, there was a customer whose contract under a previous lease agreement had come to an end in October of 2016 as a third party was involved, and no revenue had been received from that customer in the months of November, December, January and so on. Mrs Cleland had picked this up. She had asked the Claimant to contact the customer with the result that the Claimant picked up the equipment in March, the Respondent having been out of revenue for six months by then, and she then had a conversation with the customer who decided to renew in May. That customer's commission formed part of her usual email on 12 June 2017 in respect of activity for the previous month, setting out the sales that she said she had made and the commissions that she was expecting.
12. That email also included the customer to which I have referred above - Central Accident Repair - and also Land Rover Cornwall, both of whom had been existing customers, where the Claimant had signed them up to new contracts either on a different basis for a different term or at different rates. The respondent indicated it would not pay commission for those two contracts.
13. There was an amount of correspondence between the parties about the Respondent's position. That didn't really take matters any further save that when Mrs Cleland had asked the Claimant to pick up the Central Accident matter, where the Respondent had been out of payment for some months, she said to the Claimant "we will have to hold as previous prices but for your commission we will treat it as a new contract if you can get it re-signed." That was the first occasion on which the issue of re-signs or renewal contracts had been raised

with the Claimant by Mrs Cleland, but it was not the first time the claimant had been paid for such a re-sign by an existing customer.

Discussion and conclusion: applying the law to the facts

14. The issue between the parties was that the Claimant was not paid her commission in respect of the two customers: Central Accident Repair and Land Rover Cornwall.
15. The Respondent's case is that albeit the contract was silent as to commission in respect of existing customers, not only was its practice to not pay for such renewals, but that it was necessary to imply into the contract a term that commission would not be paid in respect of re-signs or renewals of contracts with existing customers.
16. The reason that it was said it was necessary to imply such a term was for business efficacy purposes. The respondent's submission appeared to be two fold: that there was no activity required or effort required by the claimant (certainly this was put to the Claimant to justify the non-payment of commission where a customer was an existing customer), and secondly that the business could not afford to pay commission in respect of activity which was essentially maintaining its existing customer base.
17. The Claimant's position and submission that she made on her own behalf is that the contract was black and white. She had been paid in respect of existing customers where she'd arranged new contracts in the past, and there was no separate agreement either at the beginning of the contract or throughout the contract in relation to those matters. I accept her evidence about that, albeit Mrs Cleland did not agree with it. Mrs Cleland did not advance any evidence that in fact there had been discussions with the Claimant about that particular issue at the commencement of the contract, and it had always been well known or understood, nor evidence that she had not been paid for re-signs in the past (pay records, emails and the like).
18. Applying to the law in the facts in this matter, the law that I apply is simply the common law of contract and how to construe a contract. The contract of employment and the collateral contract as to commission were agreed between the parties at the start and before the employment commenced. It is drafted in lay terms. I have to look at the language (quoted above – page 21) and interpret that language as the ordinary person armed with the relevant knowledge in this case would interpret it. That is the lay person with some understanding of the respondent's business.
19. It is apparent from the nature of the Respondent's business, namely the selling of rentals of equipment rather than, in the main, outright sales that the concluding of viable contracts is at the heart of the business. There is no doubt that the written terms were silent as to existing customers who signed up to new contracts. The only basis on which the Respondent would be entitled not to pay commission in such circumstances, the express terms being silent, would be on the basis that it is necessary to imply such a term either by custom and practice or for business efficacy reasons.
20. Implication of such a term by way of custom and practice between two parties, namely Miss Madden and Static Solutions Ltd, such that either would say, of course there is such a term is not arguable on the facts I have found. The

employment was only for eleven months, there was no discussion of this matter prior to the eleventh month of the employment, and I have rejected the notion that the Claimant knew full well that she did not receive commission in respect of existing customers, and in fact she had done so.

21. As to whether it is necessary to imply such a term into this contract, I also reject that submission. The nature of the business was illustrated the example of "Central", where a customer, having used the equipment happily decided that perhaps they were not using it, or it was too expensive, or they might have a pause in that arrangement. As a result of the Respondent was out of money, in terms of lost rental income, for about eight months as it turned out. In those circumstances the Respondent cannot make good its submission that it was necessary to not pay commission for existing customer re-signs, because it is clearly in its interest that customers who do come to the end of their contract term do re-sign. The heart of this case, and the respondent's real resistance to payment, is its sense of the effort required by the claimant to conclude a rental contract and the balance between the effort required and the commission payable. The contract for payment for commission contained no such analysis or terms and I am not satisfied it is necessary to imply such a term to make the contract workable, not least because it had worked happily for eleven months which included payment for re-signs. The Respondent's case fails.
22. The result is that the respondent both breached the claimant's contract and unlawfully made deductions from her final wages because the commission sums were properly payable pursuant to the contract. The claimant is entitled to payment of those deductions, also properly described as damages, of £500. That is a gross sum and it shall be for the Claimant to account for any tax or national insurance that might arise as a result of that payment in the tax year in which they payment is made.

Employment Judge JM Wade

Dated: 24 October 2017