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THE EMPLOYMENT TRIBUNALS

Claimant: Mr Matthew Shaw

Respondent: Ascot Ltd (Trading as Morgan Randall)

Heard at: East London Hearing Centre **On:** 5 February 2018

Before: Employment Judge Burgher

Representation

Claimant: In person

Respondent: Ms S Bibi (Counsel)

JUDGMENT

The Claimant's claim for unlawful deduction of wages succeeds.

The Respondent is ordered to pay the Claimant the sum of £2701.11 in respect of his claim.

REASONS

Issues

- 1 At the outset of the hearing the issues were identified as follows.
- 2 The Claimant claims:
 - 2.1 £2750 unpaid commission in respect of property 1305, 26 Hertsmere.
 - 2.2 £500 unpaid commission in respect of property 408, 1 Tidal Basin.
 - 2.3 The Claimant accepts that he was paid £928.81 in respect of the outstanding commission entitlement and therefore claims the outstanding sum of £2321.11.

2.4 The Claimant also queried the lawfulness of the deduction made from his salary of £380 in respect of damage to the company car.

3 The Respondent denies that the Claimant is entitled to outstanding commission. It asserts that the Claimant was overpaid commission £1076.43 arising from the failure of some tenants to comply with the terms of the lease resulting in the Respondent refunding a portion of landlord commission fees.

4 The Respondent asserts it was entitled recover the overpayments as part of the contractual arrangements it had with the Claimant.

5 In addition to overpayment of commission the Respondent stated that the Claimant was required to repay £150 in respect of ARLA course fees due on his resignation and £380 in respect to damage to company car. The Respondent deducted these sums from the Claimant's final salary payment and claims that the Claimant still owes £676.62 to them. It has threatened to pursue the Claimant for this sum separately in County Court proceedings.

Evidence

6 The Claimant gave evidence on his own behalf. The Respondent called Mrs Ruftaj Uddin, accounts manager to give evidence on its behalf. I was also referred to relevant pages in a small bundle of documents consisting of over 60 pages.

Facts

7 I have found the following facts from the evidence.

8 The Claimant commenced employment with the Respondent on 23 May 2016 as a Lettings/ Sales Negotiator. He was employed on a relatively modest basic salary of £14,000 but it was anticipated that the commission structure would mean that his annual salary would be in excess of £22,000.

9 The Respondent's commission structure was discretionary and on employment the Claimant was informed that he would receive a commission of 10% of the monies the Respondent received from landlords in respect of lettings and sales fees. The Claimant was therefore incentivised to negotiate leases with tenants that maximised the fees the Respondent would receive.

10 The statement of particulars of employment state "*Commission will only be paid on banked monies. Any commission payments will be paid on a monthly basis. This will be calculated at 1 month in arrears*".

11 The Claimant's contract had a clause relating to deductions as follows:

Morgan Randall reserves the right to deduct any outstanding monies you owe to Morgan Randall from your pay or on termination of your employment from your final pay. This includes any previous error or overpayment, any guarantee payments paid in to you within the past 12 months of the date of notice of termination, holiday or time off in lieu taken but not yet accrued, the costs of

damages or losses attributable to your negligence or dishonesty, outstanding loans, cash shortages, motoring fines and the cost of personal calls on company telephones or mobile telephones.

Where you have entered into a training agreement with Morgan Randall, any outstanding costs detailed in the agreement will be deducted from your final pay.

12 The Claimant stated that he negotiated a contract where the Respondent generated and banked £27500 in fees from the landlord in respect of property 1305, 26 Hertsmere. The Landlord paid those fees in advance to the Respondent and the Claimant asserted that he was entitled to £2750.

13 The Claimant stated that he negotiated a contract where the Respondent generated and banked £5000 in fees from the landlord in respect of property 408, 1 Tidal Basin. The Landlord paid those fees in advance to the Respondent and the Claimant asserted that he was entitled to £500.

14 The Claimant accepts that he was paid £928.81 in respect of the outstanding commission entitlement and therefore claims the outstanding sum of £2321.11.

15 The Respondent denies that the Claimant is entitled to the commission claimed. It did not dispute that the landlords for the properties in question had paid the relevant sums to the Respondent in respect of contracts negotiated by the Claimant but it asserts that the Claimant is only entitled to 10% of "*banked monies less any credits granted to the landlord*". The reference to credits granted to the landlord does not form part of the Claimant's contractual documentation and the Claimant asserted, and I accept, that he was not aware of this limitation or qualification to his commission entitlement on appointment or subsequently.

16 The relevance of the phrase '*less any credits granted to the landlord*' became evident when the Respondent refunded landlord fees under the better tenant guarantee scheme in circumstances when the tenant had defaulted.

17 The Respondent referred to the contractual documentation it had with landlords to seek to establish that the Claimant was not entitled to commission in respect of sums that the Respondent decided to refund. The Respondent produced evidence that the tenant had defaulted in respect of property 1305, 26 Hertsmere and that it refunded an amount of the fees paid back to the landlord. However, no evidence was produced in respect of property 408, 1 Tidal Basin.

18 The Respondent's decision to refund payments to the landlord was made without consultation or discussion with the Claimant and I find there was no contractual basis for his commission entitlement to be retrospectively deducted by the Respondent. This refund was not indicated to the Claimant by his line managers on starting his employment and he was entitled to believe that he would qualify for commission once the landlord had settled the fees, which were payable on signing the deal regardless of how the deal operated.

19 In July 2017 the Respondent indicated that it sought to recoup £1076.43 from the Claimant in respect of overpaid commission. The Claimant disputed the Respondent's

entitlement to do this and he had several meetings about this with the Respondent's director, Mr Imran Khan, prior to eventually resigning on 6 September 2017.

20 On the commencement of his employment the Claimant signed the Training Agreement which stated amongst other things if the employee fails to complete a course paid for by the Respondent or if he leaves the service of the company either prior to the completion of the course or within six months of the date of completion of the course then 100% all the training costs would be paid back to the company in full by the employee.

21 The Claimant undertook an ARLA training course. Pursuant to the Training Agreement £150 of fees were due back to the Respondent on the Claimant's resignation on 6 September 2017. The Claimant accepts that these fees are properly deducted his final salary.

22 In respect of the company car, on appointment the Claimant signed the company car policy that stated, amongst other things that the employee would be required to repay up to £1000 in respect of damage caused to the vehicle by him on return of the car. The Claimant was provided with a Citroen DS on 25 May 2016 and he returned the car on 18 August 2017. He was not provided with any indication of the cost of repairs. His final payslip for month ending 30 September 2017 stated that there was to be a deduction of £530 for ARLA fees and car deduction.

23 The Claimant maintained before me that he was not responsible for damage and was unaware of what the costs could have related to. He was not given an opportunity to question or challenge this before the deduction was made from his final salary.

24 Mrs Uddin stated that the Respondent uses a trusted and good value garage that undertakes all repairs they provided a quote of £380 to do the repairs. No documentary evidence for the estimate of repairs or what the repairs were for was provided to me. There was no evidence before me that the Respondent had actually authorised and paid for the repairs to the vehicle. This was necessary for the Respondent to be able to establish that the deduction for car damage was properly made.

Law

25 Section 13 states

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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

26 Section 14 of the Employment Rights Act 1996 states:

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

27 I considered the case of Tyne and Wear Passenger Executive v Anderson UKEAT/0151/16 where after considering the authorities HHJ Hand QC concluded that the Tribunal is permitted to consider contractual terms when determining whether there is an unlawful deduction of wages.

28 The Respondent asserts that no payments are due in respect of the Claimant's commission claim as credits were made to landlords which revised his commission entitlement to the extent that the Claimant was overpaid commission. The Respondent contended that it was entitled to recover these overpayments pursuant to the contract.

29 I therefore considered whether the Claimant had been overpaid commission. I conclude that, under his contract, he has not been overpaid. His contract makes no reference to deductions being made for credits to the Landlord. This was not indicated to the Claimant by his line managers on starting his employment and he was entitled to believe that he would qualify for commission once the landlord had settled the fees, which were payable on signing the deal regardless of how the deal operated.

30 I therefore conclude that the Claimant is entitled to £2321.11 in respect of unpaid commission entitlement. This is £3250 less the £928.81 he has been paid.

31 I conclude that pursuant to the Training Agreement the Respondent was entitled to deduct £150 from the Claimant's final salary.

32 As far as the car repairs deduction is concerned, the Respondent has not satisfied me that the deduction of £380 was properly made. There was no evidence of actual payment of the repairs, no documentary evidence of the estimate for which the works referred to and no opportunity for the Claimant to consider the damage alleged. I therefore conclude that the Respondent has failed to establish to me that this deduction was properly made from the Claimant's final salary. Therefore, I conclude that the deduction of this sum was unlawful.

33 The Claimant's claim for unlawful deductions and failure to pay commission therefore succeeds.

34 The Respondent is ordered to pay the Claimant the total sum of £2701.11 in respect of his claim.

Employment Judge Burgher

15 February 2018