



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr James Alam  
**Respondent:** BEC Consultants  
**Heard at:** Leicester  
**On:** 23 June 2017  
**Before:** Employment Judge Ahmed (sitting alone)

## Representation

**Claimant:** In Person  
**Respondent:** Miss Rosa Dickinson of Counsel

# JUDGMENT

1. The Respondent is ordered to pay to the Claimant £4,100.00 net in respect of the unlawful deduction of wages. The Claimant shall be responsible for any tax and National Insurance liability thereon.
2. The Respondent is ordered to pay to the Claimant £390 in respect of the issue and hearing fees paid to HMCTS.

# REASONS

1. These reasons follow a request from the Respondent, the judgment being announced orally at the end of the case on 23 June 2017 and sent without reasons to the parties on 19 August 2017.
2. In these proceedings Mr James Alam, who was employed by the Respondent as a Business Energy Consultant from 11 April 2016 to 27 February 2017, brings a complaint of breach of contract/unlawful deduction of wages in respect of outstanding commission.
3. Although the Claimant in his ET1 states that his employment ended on 27 March, it is agreed that the effective date of termination was in fact 27 February 2017. However, this does not make any difference to the claim nor does it raise any jurisdictional issue, the claim having been presented on 27 April 2017 following an ACAS early conciliation certificate of 23 April 2017.
4. The facts of the matter are relatively straightforward and, save in respect of one issue, are not in dispute.

5. The Respondent is a relatively small employer providing business consultancy services predominantly within the energy and telecommunications sector. Mr Alam was employed in the capacity of Business Energy Sales Consultant. He signed a contract of employment on 18 April 2016 (the 'original contract'). There is a further contract (the 'second contract') and which contains a clause in respect of commission at clause 20.

6. Clause 20 of the second contract states:

*"The Company reserves in its absolute discretion the right to terminate or amend the commission arrangements applicable to you at any time and for any reason, however any changes made will be the subject of consultation with you and reasonable notice.*

*No commission will be payable after the termination of employment (howsoever arising), and there is no right to receive any commission after you have handed in your written notice to terminate your employment or after notice has been served by the Company."*

7. It is agreed that the Claimant was paid a basic salary of £17,000 per annum. In addition he was entitled to commission at 20% of the value of the sale to the Company. The commission was paid the month after the sale went live.

8. In September 2016, the Claimant made one particular sale with a total value of £21,604.00. This sale would have earned the Claimant commission of £4,320 less tax. The commission should have been paid in the Claimant's February wage packet.

9. On 27 February 2017, the Claimant handed in his notice to resign from his employment. After submitting his resignation, Mr Mitchell Wilkinson, the Managing Director of the Respondent told the Claimant that as he had handed in his notice, he would not be entitled to any outstanding commission payments. Mr Wilkinson's evidence was that the Claimant acknowledged this to be the case and simply said: *"I had to give it a go"*. It was Mr Wilkinson's evidence that no reference was made at this point to any discussion the Claimant had earlier with Mr Wilkinson's colleague, Mr Bennett, the Operations Director about commission being payable which had been earned prior to resignation. Whilst unchallenged I do not accept Mr Wilkinson's evidence on this point. The Claimant is a litigant and as such may not have understood the significance of challenging the evidence. The evidence need not be accepted merely it is not formally challenged particularly by a litigant in person unfamiliar with legal proceedings. The discussion is wholly inconsistent with the Claimant's position which has throughout been that he submitted his resignation after an assurance from Mr Bennett that he would still receive his commission earned up to that point. I have heard evidence from that Claimant about a discussion he had with Mr Bennett which is dealt with in more detail below. Ultimately, no payment of commission was made and hence these present proceedings.

10. The tribunal's jurisdiction to order payment of commission can arise either under the provisions of section 13 Employment Rights Act 1996, which in broad terms states that an employer shall not make a deduction of wages from a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction. Section 27 of the 1996 Act includes 'commission' within the definition of 'wages'.

Legally, non-payment is the same as a deduction.

11. Alternatively, and it matters not for the purposes of these proceedings, the tribunal has jurisdiction to deal with outstanding commission payments under Article 3 of the Extension of Jurisdiction (England and Wales) Order 1994. I shall deal with this as a complaint of an unlawful deduction of wages.

## **CONCLUSIONS**

12. I shall deal firstly with the dispute of fact. It is the Claimant's case that when he received the second contract in February 2017, and before he signed it, he approached Mr Bennett to ask about clause 20, which was new and which did not have an equivalent clause in the first contract. He asked Mr Bennett whether, if he handed in his notice he would still receive his commission. The Claimant's evidence is that Mr Bennett replied that he would. This conversation clearly arose in the light of the Claimant knowing he had a substantial commission due and payable to him very shortly.

13. The Respondent disputes that such a discussion ever took place. However it did not call Mr Bennett to give any evidence on this point even though it has been legally represented and Mr Bennett still works for the Respondent. The allegation was mentioned in the Claimant's ET1 and therefore it could not have been a matter of surprise to the Respondent that it would be an issue at the hearing. Indeed, Mr Wilkinson seeks to deal with it in his witness statement if only to rebut it but as he was not a party to the conversation his is not the best evidence on the point.

14. In the absence of Mr Bennett, and in the face of clear and convincing evidence to the contrary, I prefer the evidence of the Claimant that there was indeed such a discussion and that the Claimant was given the assurance that clause 20 would not affect his entitlement to commission already earned. I am therefore satisfied that when the Claimant signed the second contract it was after a material misrepresentation had been made by Mr Bennett as to his entitlement and as such it should not disentitle the Claimant to the commission claimed.

15. The Respondent denies liability for the commission payment on two grounds. Firstly, it argues that the Claimant had failed to achieve 50% of his target in February 2017 which was a precondition of a payment of any commission. Secondly, that the true interpretation of clause 20 is that the Claimant loses his entitlement to any commission after his notice.

16. In relation to the first of those reasons, it is agreed that the relevant sale on which commission was earned was September 2016. Payment of any commission is not made until the customer pays the Respondent on the sale. It is agreed that the Respondent received payment from the customer on 30 January 2017. The payroll for the month of January 2017 was completed the day on 29 January 2017 and payment was therefore due in the next month's payroll. In the February payroll, which was completed on 27 February, it was identified that the Claimant had failed to achieve the 50% target and was not eligible to be paid commission.

17. In support of this, the Respondent relies upon what it calls a "new policy" implemented apparently in February 2017 that employees would need to achieve 50% of their value target in order to be entitled to receive commission. The rationale for introducing this was that a number of sales agents had failed to

achieve their targets but were still being paid commission.

18. There is no evidence that the Claimant ever agreed to this “new policy” or that there was any of the required consultation under clause 20.. As such, it appears to have been a unilateral attempt to vary the contract which is ineffective. Clearly, custom and practice in the past had been that employees who had failed to reach their value target were still paid commission on sums owing to them even if they did not reach 50% of their target. There was no agreed requirement that at least 50% of the target should be achieved. Accordingly, I am not satisfied that the Respondent is entitled to withhold commission on the basis of its ‘new policy’.

19. The second reason for non-payment is upon reliance of the wording of clause 20 in particular that no commission is payable after termination ‘howsoever’.

20. Whilst that wording is superficially applicable, on closer consideration and having regard to legal authority, it is not necessarily so. In particular I take into account the decision in **Brand v Compro Computer Services Ltd [2004] EWCA Civ 204**. In that case, Mr Brand was employed as a sales consultant with an entitlement to commission. The facts are materially similar in that commission was said to be lost because of a later resignation.

21. Clause 6.1 of the agreement Mr Brand had with his employer stated:

*“The plan assumes that you remain in full-time employment with Compro at all times in order to qualify for the commission payments.”*

22. At paragraph 36 of his Judgment, Lord Justice Peter Gibson in that case said:

*“Miss Romney [Counsel for the Respondent] does not dispute the ET’s description of clause 6(1), if Compro is right on its construction, as onerous. A stronger term might be thought more apposite. Such a harsh result would be inconsistent with the avowed purpose of the plan, to give rewards for the achievement by Mr Brand of the targets set for him by Compro. **In my judgement, it would have needed clearer words to override the entitlement to the reward of commission on sales achieved before the employment ended.**”* [emphasis added]

24. In my judgement, clause 20 of the updated contract does not satisfy this test. The terms of clause 20 do not made it crystal clear that the entitlement of any commission earned will be lost. I did not say for example, that it included commission earned, payable and due to be paid by resignation, nevertheless will not be paid if resignation occurs at a time when payment has already become due. In that respect the provision is ambiguous. Any ambiguity must be construed against the parties relying upon it. Clearly, Mr Bennett thought it did not apply to commission which had already been earned and payable

25. The Respondent’s payroll was completed on 27 February 2017. That is the same date on which notice of resignation was given by the Claimant. That lends further support to the content of the discussion suggested by the Claimant because I infer that after the Claimant had received the assurance he sought he went ahead and gave in his notice. Otherwise he would no doubt have waited a day or so, collected his commission and then submitted his resignation. Given the amounts involved I am convinced that is what he would have done.

26. Accordingly, I am satisfied the Claimant is entitled to the commission sought and I shall make a declaration to that effect.

27. At the time that the judgment was given orally, there was no dispute as to the liability of the Respondent to pay the issue and hearing fees incurred by the Claimant. Since then the position has of course changed but I merely add that as a postscript rather than amend the judgment. The parties have liberty to apply on any issue as to the judgment relating to reimbursement of fees.

---

Employment Judge Ahmed

Date: 16 October 2017

REASONS SENT TO THE PARTIES ON

17 October 2017

.....  
FOR THE TRIBUNAL OFFICE