



EMPLOYMENT TRIBUNALS

Claimant: Mr J Ryan

Respondent: Fastline Pty Ltd

Heard at: Watford **On:** 24 January 2019

Before: Employment Judge Bartlett (sitting alone)

JUDGMENT

The claimant has suffered unlawful deductions from wages contrary to s13 of the Employment Rights Act 1996 in the amount of £2992.56.

The respondent failed to pay to the claimant a payment under regulation 16 of the Working Time Regulations 1998. The claimant is awarded compensation in the amount of £941.36.

REASONS

Background

1. The claimant was employed by the respondent from 1 July 2013 until 24 November 2017.
2. The claimant brought claims for unlawful deductions from wages.
3. The claimant's claims can be categorised into 4 groups:
 - 3.1. Double deductions affecting commission payments in respect of each month from February 2017 to October (payable in November) 2017;
 - 3.2. November 2017 commission payment not paid at all and October 2017 commission payment reduced due to sick leave;
 - 3.3. Failure to pay commission due to bad debt in respect of October 2017;
 - 3.4. Failure to pay commission in respect of deposits received from customers Steven Kiarie and Pioneer Valley in September 2017.

4. The respondent conceded that the claimant was owed holiday pay in the amount of £941.36.

The Law

5. S13 ERA 1996 sets out the following:

“13 Right not to suffer unauthorised deductions.

(1)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.”

S27 of the ERA sets out:

“27 Meaning of “wages” etc.

(1)In this Part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a)any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise...”

Jurisdiction

6. At the hearing the respondent raised a new issue which was an allegation that the claimant's claims were out of time in respect of claims to payments before 24 August 2017. This argument was made on the basis of the date of the ACAS certificate and with the argument that the deductions did not comprise a series of deductions.
7. This issue had not been raised prior to the hearing and neither was it included in the grounds of resistance. This therefore must be treated as an application to amend.
8. I refuse the application to amend the grounds of resistance. No reason has been provided as to why this ground was not set out in the grounds of resistance and in these circumstances there is no basis on which I should allow the amendment.
9. Even if I were wrong and the amendment had been allowed, this ground is doomed to failure as the claimant's claim is one of a series of deductions which commenced in January 2017 and continued every month thereafter. The claimant's case concerns the operation of the commission scheme that applied to the claimant every month from January 2017 onwards.

The Double Deductions

10. The employment contract between the parties was set out at page 30 of the bundle. It was signed by the parties on 31 May 2013. Section 6 sets out the terms relating to salary and commission. Section 6.1 sets out the following:

“Your basic salary will be £30,000 per annum. In addition, you will receive commission on personalised sales above a monthly base sales level of £10,000 (VAT exclusive and revenue received net of freight and credit/bank fees), with commission calculated at the rate of 6% for all monthly sales between £10,000-£25,000, 10% between £25,001-£35,000, 12.5% above £35,000, as well as 1% of team sales (group sales less your sales, less team monthly basis). Commissions are paid the month following and in the event of commission falling below £50 per month in the first 6 months we will guarantee the shortfall which will be advanced against future commissions...”

11. Mr Simon Heap's evidence was that this document was superseded by a commission sheet but it was conceded such a document was not included in

the bundle. Further, his evidence was that he could not say that such a document had been signed by all the parties. I asked when he said the employment contract had been superseded and he stated 6 years ago. I find that in the absence of a document setting out changes to the contractual commission scheme I do not accept that a "commission sheet" has changed the commission scheme terms from that set out in section 6.1 of the contract of employment.

12. Mr Simon Heap also made reference to a meeting that was held with the claimant, himself and Mr Terry Heap in January 2017. I asked what was said to the claimant in the January 2017 meeting to which Mr Simon Heap responded:

"discounting was a problem that needed to be addressed, the commission structure had been set up on the basis that full retail price was achieved and if discounting happened it was revenue lost and that would be further deducted from money received from customers. It was applied across all of January to July 2017 across the sales team and there were no complaints until the large discounting spree which took place in August 2017."

13. In cross-examination the claimant was asked if he had a meeting in January 2017 with Mr Terry and Mr Simon Heap in January 2017 about noting discounts on invoices. The claimant responded that he could not recall. The claimant was then asked if he had a meeting in January 2017 with Simon and Terry Heap to which he responded "most probably". He could recall no detail of the meeting.

14. The evidence relating to how the base sales level element of the claimant's commission calculations was calculated from January 2017 can be summarised as following this formula:

A = list price of products sold less 2 x amounts of discounts agreed by the claimant with the customer to the list price;

A minus freight costs and credit card charges = B

B = the reference figure to which the commission % were applied to obtain the final bonus amount payable to the claimant.

15. It was accepted in paragraph 19 of the grounds of resistance and in both the oral evidence of Mr Simon and Mr Terry Heap that the discounts to the list price of products sold was applied twice. In that it was applied once when it was recognised in the amount actually paid by the customer (rather than the list price) and then the amount of discounts was deducted.

16. The respondent's submission was that this was an agreed contractual term from January 2017 and therefore the claimant had no contractual entitlement to the payments claimed such that there was not a deduction from wages.

17. Section 6. of the contract of employment sets out that the base sales level is "VAT exclusive and revenue received net of freight and credit/bank fees". The manner in which the bonus scheme was operated from January 2017 did not calculate base sales at this level it in effect added extra words so that the base sales level was "VAT exclusive and revenue received net of freight, credit/bank fees and discounts to list price given to customers".

18. The respondent also submitted that the claimant had agreed to the calculation

of the commission payments, as he had received a detailed breakdown of how commission payments were calculated from January to August 2017. Pages 105 to 111 of the bundle were relied on as the claimant's written consent to the calculation of commission in this way, payment of the commission amounts he received and therefore his consent to the deduction under s13(1)(b) ERA.

19. The claimant's evidence was that he only became aware of the double deductions when the deductions reached a notable amount in August 2017. For the months preceding that the deduction had been so small that the claimant thought that there may have been a number of reasons for it, such as a refund to a customer.
20. The documents at pages 105 to 111 of the bundle were emails in which the claimant stated that "all looks correct, "all looks good" or other similar terms. The headings of the emails were "sales commission January 2017" "JR commission Feb 17" or similar for each month from January to July 2017. However the attachments to these emails were not disclosed in the bundle. The claimant thought it was possible that they could have referred to the team commission rather than his personal commission.
21. I find that the claimant did not agree to the variation of his commission structure to deviate from that set out in his employment contract signed in 2013. I do not accept that it was clearly put to the claimant in the meeting of January 2017 that the discount to list price would be applied on a double basis and I do not accept that he agreed to this. Such an arrangement creates a significant disincentive to the salesperson in giving a discount and as it could have a significant effect on commission I find that if this had been brought to the claimant's attention he would have remembered it. Further I find that if he was aware of the change to the calculation of his commission in this disadvantageous way he would have made his disagreement to this change clear. It was undisputed that the claimant raised considerable complaints about the August 2017 commission payment and from then onwards. The evidence of the respondent was that he sent emails, they had conversations all of which continued over a period of time and he raised a grievance. An individual who behaved in this way is unlikely to have accepted a potentially significantly negative effect on his commission structure without complaint in at least some form.
22. Further, I do not accept that the documents at pages 105 to 111 of the bundle comprise a consent from the claimant to the deductions. The attachments have not been provided to these emails and therefore it is unclear to what the claimant is agreeing. In these circumstances, it cannot be established that the claimant has given consent.
23. Therefore I find that the claimant has suffered unlawful deduction from wages claims in relation to the double deductions group. I accept the calculation set out in the claimant schedule of loss are accurate and the amount of the unlawful deduction is £2,273.06.

Non-payment of November 2017 commission and reduced October 017 commission

24. The claimant first took sick leave on 18 October 2017. His employment ended on 24 November 2017. During the month of November 2017 the claimant

worked for 3 days and the remaining days he was on sick leave.

25. The following facts were not disputed:

- 25.1. the claimant's work computer and telephone were taken off him when he was on sick leave and from on or around 18 October 2017 he was not permitted any contact with clients;
- 25.2. the claimant's clients were reallocated to other sales team members and any commission in respect of such clients was reallocated to other sales team members.

26. The claimant's claim for commission in respect of November 2017 was put on the following basis:

- 26.1. sales team members were individually allocated clients;
- 26.2. the sales team member received the commission in respect of his clients, regardless of whether other sales team members carried out work related to that client;
- 26.3. this had been the practice of the respondent when individuals were on sick leave or holiday.

27. The above was the claimant's oral evidence and it was also the evidence of his supporting witness, Mr Keefe whose witness statement stated "*when a colleague was on holiday or off sick, their clients were still theirs and they would pay commission on any orders that came in for them during their absence.*"

28. The respondent's case was that:

- 28.1. clients were not exclusively allocated to members of the sales team ;
- 28.2. the claimant had adopted a practice in June/July 2017 in respect of Mr Christopher, a member of the sales team who was the first individual at the respondent to go on extended sick leave. The practice was that Mr Christopher's sales commissions were shared out between members of the sales team who carried out work on his clients whilst Mr Christopher was on sick leave;
- 28.3. the respondent adopted the policy implemented by the claimant in June/July 2017 for Mr Christopher in respect of the claimant when he was on sick leave later in the year;
- 28.4. it was this policy which was the contractual term.

29. The evidence of Mr Terry and Mr Simon Heap was that the claimant had benefited in financial terms from the practice that he applied to Mr Christopher. However no documents or calculation of commissions in relation to Mr Christopher's clients was provided to support their oral evidence. This evidence was in their control and plainly fell under the duty of disclosure. It is their responsibility to comply with the duty of disclosure.

30. Section 6.1 of the employment contract is silent on what happens when an individual is on sick leave. The only reference to how sales revenue is calculated is to revenue received less the specified deductions. Commission schemes can operate in many different ways as to how clients and commission payments are allocated between sales employees. There was a direct conflict in the evidence before me. The claimant and Mr Keefe said that commission was paid to sales employees in respect of their clients even if they were off sick and Mr Terry and Mr Simon Heap said the opposite. It was not disputed that

periods of sick leave in excess of a few days had not been taken by sales team members until 2017. I consider the claimant's evidence and that of Mr Keefe related to short periods of sick leave and holiday.

31. In these circumstances I do not accept that custom and practice at the respondent establishes a contractual right to commission payments whilst an individual is on sick leave. I also do not accept that it is an implied term of the employment contract that commission would be paid when the claimant was on sick leave. At best I find that the respondent sometimes allocated commission to the individual who was off sick and sometimes did not. In the circumstances this does not create a contractual right. Therefore I find the appellant does not have a contractual entitlement to be paid commission in respect of a period of sick leave. Therefore there were no unlawful deductions of wages in respect of the respondent not paying him commission during his period of sick leave.
32. However the claimant was at work for 3 days in November. I find that he had no access to his work computer, his telephone and he was not permitted to speak to clients. I find that this was a breach of the general implied term that if an employee earns part of his remuneration by commission. The employer will not act in such a way as to deprive the employee of the opportunity of earning commission (**Rubel Bronze and Metal Co Ltd and Vos 1918 1 KB 315, KBD**).
33. Therefore I find that the claimant suffered an unlawful deduction of wages in that he was not paid his contractual commission which would have accrued if the respondent had not breached the above mentioned implied term. His average daily commission amount taken from the preceding 3 months is £74.69. When this is multiplied by 3 days it amounts to £224.07. I find that the claimant suffered an unlawful deduction of wages of £224.07.
34. In respect of commission accrued in respect of October 2017 payable in November 2017. I find that the claimant was paid commission of £734.57 in respect of October 2017 in the December 2017 payroll and therefore there were no unlawful deductions of wages. I do not accept that he suffered an unlawful deduction of wages in that he was entitled to payment of commission for the part of the month for which he was off sick for the reasons set out above in relation to November 2017.

Doubtful debt

35. The claimant claims that he suffered an unlawful deduction of wages in the amount of £295.43 (which was deducted from his commission payment) in respect of the month September 2017 on the basis that this revenue received from a customer was a "doubtful debt".
36. I find that the summary commission calculation for September 2017 was included in the bundle but the detailed commission calculation (such as that supplied for August 2017) was not. This describes the disputed amount as "*Potential unrecovered sales revenue – Kartworld Ireland.*"
37. The respondent's grounds of response set out that this was a doubtful debt at the end of October 2017 because the amount remained unpaid and debt recovery action had to be initiated. The debt was paid in December 2017 and the commission sales were included in the claimant's commission salary calculations in December 2017. I do not accept this because the December

2017 payslip sets out that commission was paid to the claimant in the amount of £734.57 which corresponds to the exact amount set out in the summary sales commission calculation breakdown of the commission in respect of October 2017.

38. In oral evidence Mr Terry Heap accepted that the doubtful debt had not been paid to the claimant. The reasons he gave for this were that the respondent had to constantly chase for the debt. The job of chasing the debt was given to another employee because the claimant was on sick leave and it was normal that whoever collected the bad debt got the commission.
39. The claimant's evidence was that deductions for bad debts had not been made before and this was an entirely new practice. Mr Keefe's evidence was that he could not recall commission being withheld or indeed cancelled because of a bad debt or late payment.
40. I prefer the claimant's evidence that deductions from commission had not been made in the past because of delayed payment or bad debts. None of the commission calculations before me included entries for deduction from commissions for bad debts or delayed payment whereas there were many examples of returns. Therefore I find that it was a contractual term through custom and practice that deductions were not made to revenue received for the purposes of calculating commission for the claimant. If this term was to be varied, then it needed to be agreed with the claimant and it had not been. Therefore I find that the claimant suffered the unlawful deduction of £295.43.

Deposits due in Sept 2017

41. The final group of unlawful deductions was the failure to pay commission on two deposits in September 2017. The 2 deposits were from Stephen Kiarie and Pioneer Valley. The claimant's case was that he was claiming commission on the deposits that had been paid rather than the entire client revenue. These were clients allocated to him and therefore he should have received commission in respect of the deposits.
42. The respondent's case was that commission was not due to the claimant because these two customers had been allocated to another salesperson in the claimant's absence.
43. I find that the allocation of clients to sales individuals was not governed by the employment contract. I do not accept that there was an established practice which could have founded a contractual right to allocation of clients and monies received by them for the purposes of an individual's commission. The evidence before me was that the sales team was extremely small ranging from 3 to 1 people. I find that these issues had rarely existed if at all before 2017 and no custom and practice had been adopted. When this is combined with the written terms not dealing with the situation I am not satisfied that there was a contractual term. Therefore I find that the claimant's claim for unlawful deduction of wages in the amount of £707.13 fails.

Employment Judge **Bartlett**
7 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE