



EMPLOYMENT TRIBUNALS

Claimant: Mr J McManus
Respondent: Reevo Limited
Heard at: London South **On:** 23/5/2019
Before: Employment Judge Wright

Representation:

Claimant: In person
Respondent: Mr G Baker of Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that the claimant's claim for unlawful deductions from wages fails and is dismissed.

REASONS

1. By a claim form presented on 28/7/2018 the claimant claims unlawful deductions from wages pursuant to s. 23 of the Employment Right Act 1996 ('ERA') by virtue of s. 13 ERA. S.13 ERA provides:

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. The Tribunal heard evidence from Mr Chris Musgrove the respondent's Finance Director and from the claimant. A bundle of approximately 80-pages was referred to. Mr Baker provided written submissions and supplemented them orally. The burden of proof applied is the civil burden of proof of the balance of probabilities.
3. In closing submissions, Mr Baker sought to rely upon the Supreme Court case of MWB Business Exchange Centres Ltd v Rock Advertising [2019] AC 119 (2018) by reference to a clause (32.4) in the contract of employment which required any variation to be in writing and to be signed by both parties. The Commission Scheme which the claimant relies upon was signed by the claimant on 14/8/2017 (page 52). Mr Baker contended that the Commission Scheme was not countersigned by the respondent and therefore it is of no binding effect. There are two problems with this submission. Firstly, this did not form part of the respondent's pleaded case and there was no application made to amend. This meant that the claimant was not alive to this argument prior to it being made at the hearing. Secondly, this overlooks the respondent's signed letter to the claimant dated 17/5/2017 offering him a new position with effect from 1/6/2017, it was accepted the Commission Scheme applied to the role which the claimant commenced on 1/6/2017 (page 45).
4. The claimant's employment commenced on 1/9/2015 and terminated on 30/6/2018.
5. The payments the claimant claims are due to him are commission payments in respect of three contracts: Mazda Canada; Kia Canada; and Honda (page 16-17). There is no dispute that commission payments qualify as wages under s.13 ERA.

Honda

6. In respect of the payment for Honda, it is the claimant's case (the claimant relied upon his 'written representations dated 24/10/2018) that this was a contract which was 'fully paid up front'. He says he is owed the balance of the commission payment of 50% or £600. The claimant did not however make a particularly strong case in respect of this payment.
7. The respondent says that the conditions set out in the Commission Scheme (pages 46-55) had not been met. It said that the order form signed on 29/12/2017 was not a Qualifying Order within the terms of the Commission Scheme. A Qualifying Order is defined as (page 48):

‘... means an order, which qualifies to be recognised as such under this Plan, and therefore counts towards the New Business Targets and/or Renewal Targets. For the avoidance of doubt, an order shall only be a Qualifying Order when it meets all of the criteria specified in Appendix 4 to this Agreement.’

8. Appendix 4 states that ‘ALL’ of the criteria contained therein need to be met. They included that:

‘A correctly completed customer order for services has been received...’

9. In the alternative, the respondent relies upon the clause giving it a general discretion in respect of payments under the Commission Scheme, accepting that it must exercise its discretion reasonably. It says that it is reasonable to exercise its discretion not to pay commission when an employee has resigned and is leaving.
10. An ‘order form’ for Honda is dated 29/12/2017 (pages 59-60). This records that the billing terms are annually in advance and the respondent will invoice Honda on 30/4/2018. The respondent says that it cannot invoice a client until the client produces a purchase order or a customer order. In the alternative, the respondent says there must be a clear commitment from the customer to commit to purchasing its product. In that case it will then send the customer an invoice.
11. In respect of Honda, there was no invoice issued on 30/4/2018 in accordance with the order form. A Honda purchase order was however produced on 29/10/2018 and the purchase order stated its status was ‘new’.
12. Mr Musgrove explained that therefore the remaining 50% of the commission payment did not fall due prior to the claimant’s employment terminating.
13. The Tribunal accepts the respondent’s evidence that it was not until Honda produced a purchase order, that the remaining 50% commission payment became due. It was clear, that Honda was not obligated to the respondent until it contracted with it via the purchase order. The Tribunal therefore finds that no commission is due in respect of Honda.

Kia

14. In respect of Kia, it is the claimant’s case that the order form is dated 19/10/2017 (signed by Kia on 18/10/2017) (pages 56-57). He therefore says the order form evidences a binding contract between Kia and the respondent and therefore, commission is due to him.

15. Mr Musgrove said Kia was given a three month free trial from 1/11/2017. Kia had to give 30 days' notice prior to the end of the free trial, otherwise the contract would automatically renew for 12-months. Kia did not give notice and although technically the respondent could have invoiced the client at that point (31/1/2018) it did not do so as it would not be good for customer relations.
16. The claimant says that as Kia had not given notice, that there was a binding contract.
17. The order form stated on it:

'This order form must have a valid purchase order number attached clearly stating the purchase order reference required by the Customer's procurement and finance functions to approve and pay invoices or alternatively be accompanied by written confirmation from the Customer that no purchase order is required.'
18. Mr Musgrove referred to an email from the Kia Web Development Manager dated 11/7/2018 in which there was reference to 'receiving the green light to move forward'. Mr Musgrove said this demonstrated that there was no purchase order from Kia prior to that and the email was in lieu of a purchase order. Clearly this email arrived after the claimant had left. Furthermore, the invoice to Kia was dated 5/10/2018.
19. In respect of Kia, the Tribunal accepts that the order form is a document evidencing the terms which have been agreed between the parties and no more. It is not a purchase order – it cannot be in view of the reference to a purchase order set out at paragraph 17 above. It cannot therefore be a Qualifying Order as per paragraph 7 above. The claimant's claim in respect of commission related to the Kia order therefore fails.

Mazda

20. The Mazda order form is dated 5/2/2018 (pages 61-63). The first six-months were free from 19/1/2018. Mazda needed to give 30-days' notice if it did not wish to renew the contract, so by 20/6/2018; otherwise the contract would automatically renew.
21. The claimant does not accept this is an automatically renewed contract. He again says as Mazda had not given 30 days' notice, there is a binding contract and therefore his commission is due. The claimant therefore says there is a valid and completed contract.
22. Mr Musgrove accepts there is a valid order form and that Mazda had not given notice. He says however that there was no purchase order from Mazda as it was still evaluating the service the respondent provided. As such, at the

time of the claimant's departure, the respondent had not received a valid purchase order from Mazda, which would trigger the commission payment to the claimant.

23. The Tribunal is prepared to accept Mr Musgrove's explanation and finds that there was no Qualifying Order from Mazda in accordance with paragraph 7 above.

General points

24. By reference to the Commission Plan, it also contains a clause which states (page 50):

'Commission entitlement will not accrue solely on the basis of the existence of the auto renew clause in the contractual terms.'

25. That clause, combined with the clauses set out at paragraphs 7 and 8 above would also defeat the claimant's argument. Although he does not accept the order forms are 'auto renew' clauses (whatever that term is supposed to mean as it is undefined), he refers himself to the Mazda contract 'renewing' as a result of Mazda not giving the respondent notice under to terminate the agreement. Mr Musgrove explained that if the customer did not give notice to terminate and did not send in a purchase order so that an invoice could be produced, then the position was the deal was left in 'limbo' until the customer took some action; or presumably the respondent did by means of getting the client to commit to the deal, as it did with Kia.
26. The respondent has really not helped this situation by having a very opaque commission scheme. For example, clause 5.1 says that commission will only be paid on Qualifying Orders. To find the definition of Qualifying Order, one must go to the definitions and is then referred to Appendix 4 and all of the criteria set out therein.
27. The respondent also, despite having a written commission scheme, sought to rely upon custom and practice that commission is only payable if the employee remains in employment (ET3§7 page 26). When the entitlement to commission ceases should be clearly set out in the written scheme.
28. Although the Tribunal was satisfied that commission was not payable on the basis of an order form, without more and therefore the matter could be determined based upon the written documentation; it is clear how and why the claimant had reached a conclusion commission was due. He said he had been paid commission in the past without a purchase order being produced. Mr Musgrove agreed this was correct as some customers do not need to produce a purchase order and on these occasions the claimant did receive commission when no purchase order was required.

29. What the respondent needs to make clear in any future commission scheme is that, as Mr Baker paraphrased Mr Musgrove: basically the respondent is not going to pay out commission until it has been paid by the customer. If that is what the respondent's commission scheme was intended to set out, then it has taken 10-pages of convoluted and unclear clauses to say-so. It is no surprise that the claimant applied his own interpretation to the scheme and concluded there was outstanding commission, to which he was entitled. It would have been far simpler for the respondent's scheme to simply say that once notice of termination had been given by either side, no further commission was payable (even if it were due). Also, the respondent needs to clarify that no commission is paid during any period where notice has not been given by the customer, but the contract has not been formally entered into. If it is common to have a limbo or lull period, then the scheme needs to make that clear (in plain English) and to state that commission only becomes payable, when the fees are paid to the respondent by the customer.
30. For those reasons, the claimant's claim is dismissed.

Employment Judge Wright
5 June 2019