



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122850/2018

5

Held in Glasgow on 30 January 2019 and 28 February 2019

Employment Judge: Robert King

10

Eurie Gittens

**Claimant
In Person**

Mesa Vista t/a Green Motion

**Respondent
Represented by:
Mr W Lane -
Solicitor**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20

The Judgment of the Tribunal is that the respondent made unauthorised deductions from the claimant's wages and is ordered to pay the claimant the sum of **£3,166.35**.

REASONS

25

1. The claimant originally presented claims in relation to alleged unauthorised deduction from wages and for unpaid holiday pay. During the proceedings, agreement was reached in relation to her claim for holiday pay and that claim was therefore withdrawn and dismissed.

30

2. The claimant's claims that the respondent had made unauthorised deductions from her wages were (firstly) that it had failed to pay her for six days salary during the first month of her employment and (secondly) that it had unlawfully withheld sales bonus payments that she was contractually entitled to have been paid for rental sales achieved in August and September 2018.

3. The claimant gave evidence on her own behalf and led evidence from one witness, Charlotte Massey (her former colleague). The respondent led

E.T. Z4 (WR)

evidence from Harnish Shergill (HR manager) and from Hassan Shah (assistant manager at its Glasgow Airport branch).

4. A joint bundle of documents was lodged and both parties made submissions at the conclusion of the hearing.

5 **Findings in fact**

5. Having heard evidence, the Tribunal considered the following facts to be admitted or proved.

Background

6. The respondent is a car rental business with its head office in Leicester. It operates at various sites locations throughout Britain, including a branch at Glasgow Airport.

7. The respondent employed the claimant between 15 December 2017 and 2 November 2018. Her job title was Rental Sales Agent and she worked at its Glasgow Airport branch at Unit 8, Airlink Industrial Estate, Inchinnan Road, Paisley, Renfrewshire PA3 2RS.

8. During her employment the claimant was one of three rental sales agents who worked at the Glasgow Airport branch. Within the respondent's business the role of rental sales agent typically involves dealing with customer telephone calls, meeting and greeting customers, obtaining their documents and payments, showing customers to their hire cars and carrying out damage checks when vehicles are returned. The role is a busy and often stressful one and dealing with customer complaints is a regular feature.

The claimant's first salary payment

9. The respondent's practice is to pay its employees by calendar month with payments made on the tenth day of the following month. The claimant began her employment on 15 December 2017. On 10 January 2018, the respondent paid her a net salary payment of £1,016.72. That payment represented her full salary entitlement for the period between 15 December and 31 December

2017. There were no days in December 2017 on which the claimant worked for the respondent but was not paid.

The claimant's contract of employment

10. The claimant had a written contract of employment dated 6 December 2017.
5 In relation to pay, her contract provided that her basic salary was £19,500 per annum and that: -

“BENEFITS

Your position has the benefit of a profit related bonus/commission and performance related bonus/commission, details of which are shown separately.”
10

11. The details of the bonus structure that the claimant was contractually entitled to participate in were set out in a separate document. The terms of the bonus structure for the Glasgow Airport branch would be updated from time to time depending on the time of the year, which impacted on the level of car hire
15 business the respondent would expect to achieve. As a result, the terms of the bonus structure were updated regularly.

12. Each successive version of the bonus structure document set out the targets that applied in relation to the various performance elements that attracted bonus payments, which were (1) rental sales, (2) managing the vehicle
20 damage process, and (3) customer service. It also set out the bonus applicable to each target, which was expressed either as a flat rate payment or a percentage payment, depending on the nature of the target.

13. Each successive version of the bonus structure document also provided that bonus payments were conditional not only on achieving targets but also on
25 maintaining acceptable standards of performance generally, having regard to attendance, time keeping, overall performance, customer service and complaint levels.

14. The respondent published the details of each new bonus structure on its notice board within the Glasgow Airport branch. It also informed all its

employees by WhatsApp message each time the bonus structure was updated. During her employment the claimant was always told when a new version of the bonus structure had been introduced and where it could be found.

5 **The claimant's first warning**

15. On 28 May 2018, the claimant received a first written warning from the respondent's HR manager, Jazsii Kaur, in the following terms: -

"Dear Eurie Gittens,

10 *This is a formal first warning that your performance does not reach the required standard this has been raised due to numbers of complaints received from customers.*

Hassan will sit with you to discuss this further.

15 *This first written warning will be placed on your personal file for a period of twelve months during which your performance will be monitored. If your performance reaches the required standard, this warning will be retained on file but normally not considered for disciplinary purposes after this period.*

Should there be no improvement, I will have no alternative but to proceed to further action which may result in termination of your contract. If you wish to appeal against this decision, you should inform me within five working days.

20 *Yours sincerely,*

Jazsii Kaur"

16. Prior to issuing this warning, the respondent had not spoken to the claimant at all about any concerns it had about her performance. Nor was the claimant aware of any customers having made complaints to the respondent about her.
25 The claimant was therefore surprised to receive this warning and asked her supervisor Hassan Shah for an explanation.

17. Mr Shah's response to the claimant's request for an explanation for the warning was -

“Fuck it, everybody gets complaints, customers are never happy.”

18. As a result of her supervisor’s reaction, the claimant felt entitled to ignore the warning.

19. Notwithstanding the terms of the respondent’s bonus scheme in force at that time, which stated that bonus payments were conditional on employees maintaining overall standards of performance and having satisfactory levels of customer complaints, the claimant subsequently received gross rental sales bonus payments of £3,057.72 for May 2018, £4,466.30 for June 2018 and £2,694.51 for July 2018.

10 **The relevant terms of the July and August 2018 bonus scheme**

20. In addition to setting out the targets applicable to rental sales, managing the damages process and customer service, the respondent’s July and August 2018 bonus structure document provided: -

15 **“Please remember to do the basics too – the qualifications are listed below – DO NOT IGNORE THIS OR YOU WILL NOT GET THE BONUS!!!**

Qualifications – all must be achieved to get the bonus: -

- **All overdue rental must be contacted and actioned accordingly. Available screen and key check to be done on a daily basis, Jakob please organise who will do which day.**
- 20 - **Banking to balance and batched every day, any queries must be raised with Management.**
- **When damages are charged, processes must be followed and Damage Notification Email as per usual protocol, and ERS form has to be attached and Hannah / Priya must be informed.**
- 25 - **Attendance and timekeeping must be 100% unless otherwise authorised by management.**
- **Overall Performance, Customer Service and Complaint level must be satisfactory.**

- **Combined total on Sales performance by end of the month must be a minimum of £10,000.00 and RPD of £12.00 minimum.**

21. The terms of this bonus structure document also remained in force throughout September 2018. The claimant did not read this document and claimed that the respondent had not brought its terms to her attention.

The claimant's August 2018 bonus

22. In early September 2018, the claimant received a draft payslip for the month of August 2018, which showed gross basic pay of £1,624.99, gross overtime pay of £158.33, a gross sales bonus payment of £3,738.32 and, ultimately, net pay of £3,666.70. However, when she received her August salary on 10 September 2018, her net pay for the month was only £1,833.35, which was 50% of the net pay shown in her draft payslip.

23. As a result, on 11 September 2018 the claimant contacted the respondent's HR manager Jazsii Kaur by email in the following terms: -

"Hi Jazsii,

I only got paid half of my wages yesterday. I called the office and they said you're working from home and to email you. Could you get back to me about this please?

Regards,

Eurie"

24. In reply, Jazsii Kaur emailed the claimant on 11 September 2018 as follows:-

"Dear Eurie,

Your bonus has been withheld due to

1. Customer Service issues

2. Attitude with fellow colleagues

3. Not following process.

You have already been given a warning however no improvement was shown”

25. On 12 September 2018 the respondent's Hassan Shah attended at the Glasgow Airport branch to meet with the claimant. He brought with him documents entitled 'Employee Review' and 'Employee Action Plan'.

26. The 'Employee Review' document had been typed up prior to the meeting and it stated as follows -

“DESIRED ACHIEVEMENT

1. Customer Services skills need drastic improvement

2. Working better with work colleagues

3. Check-in, check-out must be performed by rental staff and must be performed in the correct manner

4. Phone etiquette needs a drastic improvement

KNOWN PROBLEM AREAS

1. Customer service skills are poor

2. Receiving numerous complaints regarding the treatment given to customers face-to-face and over the phone

3. Failing to follow standard procedure such as helping customer in a breakdown situation or making a reservation

4. Mentioning deductions in salary and complaining in front of customers with other work colleagues

5. In certain situations force selling to customers – Most Recent – Customer Alessandro La Commare”

27. Although this document, on the face of it, set out a list of apparent concerns about the claimant's performance Mr Shah did not attempt to justify withholding her wages by providing her with details about the incidents or

alleged failings that had given rise to those concerns. There was no discussion about the contents of this document other than in relation to the fourth alleged 'known problem area', which the claimant disputed in part because while she admitted discussing her salary in the workplace she denied having done so in front of customers.

28. During this meeting Mr Shah noted on the 'Employee Action Plan' document several concerns the claimant raised with him as a result of regularly being left on her own in the Glasgow Airport branch because her male colleague Abbas repeatedly arrived late for work.

10 **The claimant's final warning**

29. On 13 September 2018, following the claimant's meeting with Mr Shah, the claimant received an email from the HR manager, Jazsii Kaur, in the following terms: -

*"*Final Warning**

15 *13/09/2018*

Dear Eurie Gittens

This is a formal last written warning that your performance does not reach the required standard this has been raised due to numbers of complaints received from customers as well failing to follow company procedure.

20 *You were issued with a first warning back in June, however we have not seen any improvements and therefore a last warning has now been issued.*

This last written warning will be placed on your personal file for a period of 1 month during which your performance will be monitored. If your performance reaches the required standard, this warning will be retained on file but normally not considered for disciplinary purposes after this period.

Should there be no improvement, I will have no alternative but to proceed to further action which will result in termination of your contract.

If you wish to appeal against this decision, you should inform me within 5 working days.

Yours sincerely,

Jazsii Kaur

5 *HR Manager”*

30. On 17 September 2018, the claimant emailed Jazsii Kaur in the following terms:-

“Jazsii

RE: Appeal notice against final warning

10 *Please consider this correspondence to constitute a formal appeal against the final warning issued on 13/09/2018.*

I would like to challenge the decision to issue me with a final warning as there was no disciplinary procedure followed correct to the Acas statutory code of practice. This was also the case in the written warning you mention given in
15 *June.*

I look forward to a response with details of an appeal hearing where we can hopefully resolve the situation internally. I will advise at the time of appeal if I will be accompanied by a trade union representation or green motion staff member of my choice.

20 *Regards*

Eurie Gittens”

31. The respondent did not acknowledge her appeal until 2 November 2018 when Mr Shah eventually did so by WhatsApp message. By then the claimant had already, on 10 October 2018, submitted her notice to terminate her
25 employment.

The claimant’s September 2018 bonus

32. In September 2018, the claimant made rental sales that would ordinarily have entitled her to a net bonus payment of £1,333. However, the respondent withheld her entire bonus from her September salary because of poor performance. Once again, the respondent failed to provide the claimant with any details of alleged failings in her performance that would justify that bonus payment being withheld.

Submissions

Submissions for the claimant

33. The claimant submitted that while working for the respondents, she had always given 100%. She had stuck to the respondent's policies. During her employment she had no one to one meeting with management or any feedback about her performance or any areas where she required to improve. She had worked hard in volatile and stressful situations.

34. She had been given no reasons for the warning that she had received in May 2018, but she had been reassured by Mr Shah effectively telling her not to worry about it and as a result she had not appealed.

35. When she submitted her appeal against the 13 September 2018 written warning, it had been brushed aside and she had not heard anything until 2 November 2018, by which time she had already resigned from her employment.

36. She believed that she was entitled to be paid for all the sales that she has made throughout her employment. She claimed she had been unaware of the terms of the bonus structure that the respondent had relied on when it refused to pay her bonus for August and September. In any event she had been paid sales bonuses in May, June and July 2018 even though she had received a performance warning in May 2018.

37. There was nothing about her performance that was different in May, June and July 2018 when compared to August and September 2018 when she had not received her bonus pay. It was suspicious that she had not received her final

warning until shortly after she had queried the respondent's failure to pay her August 2018 bonus.

Respondent's submissions

5 38. In the first place it was submitted that the evidence of Miss Shergill and from the relevant copy payslips provided enough proof that the claimant had been paid her full salary entitlement for December 2017.

10 39. The claimant had sought to rely on allegations of a toxic working environment at the Glasgow Airport branch. The claimant should not be permitted to bypass the two years' service requirement for an unfair constructive dismissal claim by, in effect, pursuing that under the guise of a claim for loss of wages.

15 40. In relation to the disputed payments, the terms of the claimant's contract of employment and the relevant bonus structure documents were clear, and they had been made available to all employees. While the claimant had denied seeing the bonus structure documents, her own witness had admitted that they were made available at the Glasgow Airport branch.

20 41. Even if the claimant had not read the written bonus structure that applied in July, August and September 2018, its terms had nevertheless been incorporated and were effective. She had accepted bonus payments based on that scheme and she could not therefore be exempt from its exclusions. If she had the benefit of the scheme without seeing it then she was bound by the exclusions without seeing them.

25 42. Having regard to the claimant's performance, the respondent had been entitled to apply the terms of its bonus structure and withhold her bonus payments for August 2018 and September 2018. The claimant's performance in relation to complaints and customer service had fallen below the required standards and the respondent had been entitled to withhold her bonus payments for that reason.

43. Even if the respondent had failed to provide the claimant with details of the customer complaints in question, that was not a relevant consideration

because the bonus terms did not provide the employee with a right to challenge the complaints.

44. While the respondent accepted that the claimant had received bonus payments after she had received the first warning in May 2018, a 'threshold' had subsequently been reached and it was entirely reasonable for the respondent to then say "enough is enough" and to withhold bonuses in August and September 2018.

Relevant law

45. Section 13 of the Employment Rights Act 1996 provides as follows:

"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 employee making the deduction in question, or

(b) in one or more terms of the contract (whether expressed or implied and, if expressed, 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."

46. Section 27(1) (a) of the 1996 Act provides that 'wages' includes -

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

Discussion and decision

47. In the first place, having regard to the evidence of Miss Shergill and the documentary evidence presented, the Tribunal was satisfied that the claimant had received her full salary for the month of December 2017. It was satisfied there was no basis upon which the claimant could legitimately claim she had not been paid for a six-day period during the first month of her employment.
48. In relation to the disputed bonus payments, the first issue to determine is whether the bonus structure applicable to the disputed payments was binding on the claimant in circumstances where she claimed that she had not read the relevant bonus structure document.
49. The law provides that where one contract refers to another contract or to standard terms, it is not necessary to incorporate those terms or that the terms are set out. It is enough if adequate notice is given which identifies the terms, for example, by reference to specific conditions that are available on request (*Circle Freight International Limited v Medeast Gulf Exports 1988 2 Lloyds Report 427*).
50. Furthermore, in a claim of this nature, the contractual provision must make it clear that the deduction may be made from the worker's wages (**Potter v Hunt Contracts Limited 1992 IRLR 108**). The employer must also be able to demonstrate that the event justifying the deduction has occurred.
51. The Tribunal is satisfied that even though the claimant maintained that she had not read the terms of the bonus structure that applied in July, August and September 2018 those terms had nevertheless been brought to her attention and were binding on her.
52. Specific provision was made in her contract of employment to the effect that there was a separate document setting out the bonus structure and the Tribunal is satisfied that the relevant version of that document was made available in the Glasgow site office and brought to her attention.

53. The fact that the claimant chose not to read it in circumstances where its existence had been drawn to her attention does not mean that the bonus terms were not effective and binding on her. The Tribunal was also satisfied that the terms of the bonus structure were clear about the circumstances in which bonus payments could be withheld. However, the Tribunal must also consider whether the terms of the bonus structure were applied in good faith.
54. In ***Mihlenstedt v Barclays Banks International Limited 1989 IRLR 522***, the Court of Appeal held that where an employer is required to form an opinion as part of a contractual obligation, it must do reasonably and in good faith. It follows therefore that where a bonus scheme provides for a bonus to be payable on the achievement of certain performance conditions the employer may have a certain amount of discretion to decide whether those performance conditions have been met but that discretion must be exercised reasonably and in a bona fide manner.
55. The Tribunal did not accept that the respondent acted in good faith when it withheld the claimant's bonus payments. In the first place, it did not at any time bring to her attention any specific examples of performance failings justifying the withholding of her bonus payments under the relevant contractual provisions. As a result, she had no opportunity to comment on or challenge the reasons the respondent was relying on. In circumstances where the respondent was relying in part on customer complaints to justify withholding her bonus payments it was entirely unreasonable not to share the details of those complaints with the claimant.
56. Furthermore, even after the respondent issued her with a written warning on 28 May 2018 to the effect that her *"performance does not reach the required standard this has been raised due to a number of complaints received from customers"*, Mr Shah effectively told the claimant she could ignore that warning and carry on as before and she was entitled to do just that.
57. As a result, the claimant did not change her ways, whether they were acceptable to customers or not. The clear indication from Mr Shah was that the claimant's performance was still acceptable to the respondent. Indeed,

that was confirmed by the fact the respondent continued to pay the claimant her bonus payments for May, June and July 2018.

58. Subsequently, the respondent gave the claimant no indication that her August 2018 bonus would not be paid in her salary on 10 September because of alleged poor performance. Indeed, in early September it issued her with a draft payslip, which included a figure for her bonus for August, and no indication was given to her that she would be paid any less than the total figure on that draft payslip.
59. Thereafter the claimant's final warning was only issued on 13 September 2018, after she had complained that her August bonus payment had not been paid. In common with the earlier warning, no specific examples were given to the claimant of any complaint or failing in her performance that justified this final warning.
60. It was clear to the Tribunal that the respondent only issued this final warning to justify its earlier decision not to pay the claimant her August 2018 bonus. The respondent's failure to deal with the claimant's appeal against that warning was further evidence of the respondent's bad faith in its handling of this matter.
61. The respondent also failed to provide the Tribunal with the necessary evidence to demonstrate that it was contractually entitled to make the deductions in question.
62. The Tribunal therefore finds that the respondent had no justification for withholding bonus payments from the claimant for August and September 2018.

63. In the circumstances, the Tribunal finds that the claimant was contractually entitled to receive her bonus payments for August 2018 in the sum of £1,833.35 and for September 2018 in the sum of £1,333 and that by its failure to pay them the respondent has made unauthorised deductions from her wages in those amounts. The claimant is therefore entitled to an award from the respondent in the total amount of £3,166.35.

10	Employment Judge	Robert King
	Date of Judgment	05 April 2019
15	Entered in register and copied to parties	09 April 2019