



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr J Chamberlain

v

**Respondent:**

Pike Smith & Kemp

**Heard at:**

Reading

**On: 20 August 2019**

**Before:**

Employment Judge Hawsworth (sitting alone)

**Appearances**

**For the Claimant:** In person

**For the Respondent:** In person

## RESERVED JUDGMENT

1. The claimant's complaints of unauthorised deductions from pay in June 2018, September 2018, December 2018 and January 2019 are well founded.
2. The respondent was authorised to make a deduction from the claimant's final pay in respect of replacement costs of a car provided by the respondent to the claimant.
3. The claimant is awarded the sum of £7,439.06.

## REASONS

### Claim, hearing and evidence

1. The respondent is an estate agent with a number of offices. The claimant worked for the respondent from 21 March 2016 as an office manager in the Marlow office. He gave notice of resignation on 7 December 2018.
2. By a claim form presented on 17 December 2018 after a period of ACAS early conciliation from 15 November 2018 to 12 December 2018, the claimant brought a claim for arrears of pay for June, July and August 2018.
3. On 11 January 2019 the claimant sent an email to the tribunal indicating that he wished to update his claim to include arrears of pay for October 2018 and commission payments for November 2018 and December 2018.

4. The respondent's ET3 was presented on 11 February 2019.
5. The hearing took place on 20 August 2019.
6. The parties brought along their documents to the hearing and small bundles were prepared with the assistance of the tribunal. There was a claimant's bundle with pages C1 to C20 and a respondent's bundle with pages R1 to R12. A further 5 pages of correspondence were produced during the hearing.
7. At the hearing I heard evidence from the claimant and from Mr McArdle, the managing director of the respondent. Both had exchanged written documents which I treated as their witness statements.

#### **Amendment to name of respondent**

8. The claimant had named Mr McArdle as the respondent in his ET1, but had named Pike Smith & Kemp on his Acas early conciliation notification form. The office address in Maidenhead was given on both the Acas certificate and the ET1.
9. The claimant's contract of employment said that his employer was Pike Smith & Kemp. I consider the inclusion of Mr McArdle's name on the ET1 was a minor error by the claimant in relation to a name, and that it would not be in the interests of justice to reject the claim because of this error.
10. I amended the name of the respondent to Pike Smith & Kemp, the claimant's employer under Rule 12(2A) of the Employment Tribunal Rules of Procedure 2013.

#### **Amendment to claim**

11. At the start of the hearing, I asked the claimant to clarify the payments he said were outstanding and owed to him. The claimant said that the outstanding amounts were as follows:
  - 11.1. Pay for June 2018 - £1504.30;
  - 11.2. Pay for September 2018 - £933.26;
  - 11.3. Pay for December 2018 - £5,151.55 (this includes commission earned in November); and
  - 11.4. Commission earned in December 2018 - £2,450
12. The complaint in relation to the amounts due in September and December 2018 were not included in the claimant's claim form. The claimant had applied on 11 January 2019 to amend his claim to include arrears of pay and commission payments for November 2018 and December 2018. He made an application at the hearing to amend the claim to include the September payment as well. Mr McArdle said that the respondent had understood the claim to include the September, November and December payments and had prepared the case on that basis.

13. I considered the Selkent factors, and weighed up the balance of prejudice between the parties in allowing the amendment. Having done so, I allowed an amendment to the claimant's claim to include the September and December payments (including the complaint about commission for November 2018).

#### **Issues to be determined**

14. The issues to be determined therefore are whether the respondent made unauthorised deductions from the claimant's pay in respect of the following:
  - 14.1. Pay for June 2018 - £1504.30;
  - 14.2. Pay for September 2018 - £933.26;
  - 14.3. Pay for December 2018 (including commission earned in November 2018) - £5,151.55 and
  - 14.4. Commission earned in December 2018 - £2,450.
15. This requires consideration of whether any deductions made by the respondent were authorised. The respondent says deductions in relation to replacement costs of a car were authorised.

#### **Findings of fact**

16. The claimant began working for the respondent on 21 March 2016 as the office manager for the respondent's Marlow office.

#### The claimant's terms and conditions

17. The claimant's statement of terms and conditions of service was signed and dated 17 March 2016 by the respondent, and signed by the claimant. The respondent sent the statement of terms and conditions to the claimant under cover a letter dated 17 March 2016.
18. The claimant's salary was £17,000 paid monthly in arrears. He was also entitled to commission on house sales. The statement of terms and conditions referred to the commission scheme and stated:

*"We operate a commission scheme for eligible employees. We issue full details separately. Please contact a director for further information."*
19. The claimant was initially entitled to commission of 7.5% of the total fee income of residential sales received by the respondent's Marlow office (as set out in the letter dated 17 March 2016). After the claimant had worked for the respondent for 6 months, the claimant's entitlement to commission was increased to 10% of the fee.
20. The respondent did not issue any other commission scheme document.

21. The claimant's statement of terms and conditions also included a provision headed 'Return of Our Property' which stated:

*"On the termination of your employment or at our earlier request, you must immediately return in good condition such property as is currently in your possession or under your control. We recover the cost of replacing equipment and/or property entrusted to you during employment which you fail to maintain in good condition and/or do not return prior to leaving our employment by deduction from final pay or by civil recovery."*

22. The claimant's statement of terms and conditions also included a clause headed 'Deductions from Salary/Wages'. It stated:

*"We can require you to repay to us, either by deduction from pay or any other method acceptable to us..."*

23. There then followed a list of authorised deductions which included

*"Any losses sustained in relation to our property or monies" and*

*"The cost of replacing equipment and/or property entrusted to you during employment which you fail to maintain in good condition or do not return prior to leaving our employment."*

24. The clause concluded by saying:

*"We will advise you in advance and in writing of any amount we intend to recover from monies owing to you."*

25. The terms and conditions required that, after the first three months of employment, the claimant was required to give one month's notice of termination.
26. When the claimant began working for the respondent, he did not have a car. His role required one. The respondent did not usually provide company cars. However, as a personal favour to the claimant, Mr McArdle on behalf of the respondent purchased a second hand car for use by the claimant. There was no written agreement or scheme regarding the car. The claimant agreed that he would be responsible for insurance, fuel and all the running costs including servicing.
27. During the claimant's employment, some of his salary payments were made late, for example his May 2018 salary was paid in August 2018. Mr McArdle prepared a schedule of payments to the claimant for the period from November 2017 to November 2018. This schedule was not disputed. It showed that the claimant was not paid his salary for June 2018 (£1,504.30) or September 2018 (£933.26).

The claimant's resignation

28. The respondent decided to close the Marlow office when its lease ended on 7 December 2018. Some of the staff from the Marlow office worked in the respondent's other offices after that date.
29. The claimant gave notice of resignation in writing on 7 December 2018. He gave 4 weeks' notice. He said:
- "I will continue to work for the company for the next 4 weeks, completing my employment on 4 January 2018."*
30. I find that the reference to 4 January 2018 was a typographical error and meant to refer to 4 January 2019.
31. On 11 December 2018 Mr McArdle sent an email to the claimant in which Mr McArdle said the claimant's resignation was accepted. He said:
- "Your final salary payment will be made to you at the end of December 2018."*
32. I find that the claimant's employment terminated on 4 January 2019.
33. In his email of 11 December 2018 Mr McArdle also set out details regarding leaving arrangements. In relation to the car, Mr McArdle said
- "I will be grateful if you confirm a convenient date for the return of the car and ask that you please make sure the car is in clean and tidy condition and all service information is left with the vehicle."*
34. The claimant returned the car a few days after this email. The car was not returned in clean and tidy condition. The claimant agreed that when he returned the car the gear box was broken and the car had not been cleaned. The respondent obtained estimates from a garage as to the work required to repair the car. These were £912 for mechanical repairs and £2003.61 for repairs to bodywork. The claimant did not dispute these estimates.
35. The claimant had driven the car for approximately two and a half years. He said that he had had the car serviced once during that time, and he thought he had left the receipt for the servicing in the glove box or the service manual. Mr McArdle said that there was no service history for the time the claimant had the car, and that the garage had not been able to find any receipt in the car either. I find that the claimant had the car serviced once, but did not leave the receipt in the car when he returned it. I find that the claimant had not maintained the care in good condition.
36. Mr McArdle decided to sell the car, given its condition and the costs of repair. The market value of the car was £5,700 to £6,000. This could not be achieved because of the car's condition and lack of service history. A sale was agreed at £3,250, representing a loss to the respondent of

£2,450 to £2,750. There was no dispute as to these figures. I accept that the mid-point of the range (£2,600) represents the likely replacement cost of the car to the respondent.

37. During the period from 7 December 2018 to 4 January 2019 the claimant did not work from the respondent's other offices, but he made himself available for work, handed out leaflets and carried out viewings at the request of his line manager Mr Jackson. Mr McArdle thought that the claimant had not made himself available for work, but he was not sure about this as it was not within his own knowledge. It was Mr Jackson who would have known. I accept the claimant's evidence on this.
38. The sale of a property which was handled by the respondent's Marlow office completed on 14 December 2018. The respondent received a fee of £24,500 in respect of this sale.
39. The claimant received a payslip at the end of December 2018. It said that his pay was £5,151.55 (net). This included £5,425 commission (gross) earned by the claimant. This commission arose from work done in November 2018, as commission was paid a month in arrears.
40. Mr McArdle accepted that the salary payments due to the claimant for June 2018 (£1,504.30) and September 2018 (£933.26) were not paid. He said that these sums were deducted in respect of the damage/service costs to the car used by the claimant.
41. Mr McArdle also accepted that the claimant was not paid the money shown on the payslip in December 2018 (£5,151.55) or the commission of £2,450 on the December house sale. He said this was because by this time the claimant no longer worked for the respondent.
42. I find that the deductions from the claimant's salary in June, September, December 2018 and January 2019 were a series of deductions. They were of a similar type, being either salary or commission. The time between each deduction was three months or less.

## The law

### Deductions from wages

43. Section 13 of the Employment Rights Act 1996 provides:
  - "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;...*
  - 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 term 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; ...*
- 3) *Where the total amount of wages paid on any occasion by the 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."*
44. A complaint of unauthorised deduction from wages must be presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made (section 23(2) Employment Rights Act 1996).
45. Where a complaint is made in respect of a series of deductions, the complaint must be presented before the end of the period of three months beginning with the date of the last deduction in the series. Whether there is a series of deductions is a question of fact, requiring a sufficient factual and temporal link between the deductions. It has been held that a gap of more than three months between any two deductions will 'break' a series of deductions (Bear Scotland Ltd v Fulton [2015] UKEATS/0047/13/BI).
46. The definition of wages for the purpose of section 13 includes commission referable to employment, whether payable under the contract of employment or otherwise (section 27(1)(a) of the Employment Rights Act 1996).

#### Commission

47. The starting point for determining whether commission is properly payable to an employee for the purposes of section 13 is to consider any documents setting out the terms of the scheme. The tribunal must consider the wording carefully.
48. In Peninsula Business Services Ltd v Sweeney 2004 IRLR 49, EAT, the Employment Appeal Tribunal considered the question of whether commission payments remained payable after the employment relationship had ended. In this case, the employee's contract provided that, upon leaving employment, the employee was not entitled to any commission earned but not yet due for payment. The EAT upheld this term, concluding that the language of the term was clear and the term had been accepted by the employee.
49. A different conclusion was reached in respect of a differently worded clause in Brand v Compro Computer Services Ltd 2005 IRLR 196, CA. In that case, the Court of Appeal held that the employee, who had been summarily dismissed by his employer, remained contractually entitled to the payment of commission that he had earned prior to the termination of his employment. A contractual clause stated that he must 'remain in full-

time employment with [the employer] at all times in order to qualify for the commission payments'. However, it was held that the clause did not state clearly that any accrued entitlement to commission was dependent on the employee also being in employment on the date on which the commission would be payable. The commission earned while he was employed therefore remained payable.

50. In a first instance decision, Gore v Muller International Ltd ET Case No.2200745/06, the employee was dismissed for gross misconduct. The employer withheld commission due to the employee following his breach of contract. The employment tribunal upheld the claim for unlawful deduction from wages, holding that, in the absence of any express agreement to the contrary, where commission is based upon work done before employment is terminated, it is an implied term of the contract of employment that commission should be paid after termination.

### **Conclusions**

51. I have applied these legal principles to my findings of fact in relation to each of the issues for determination. I have reached the following conclusions.

#### Pay for June 2018

52. The claimant worked for the respondent for the month of June 2018 and was entitled to be paid for that month.
53. Neither the Return of Our Property or the Deductions from Salary/Wages clauses in the claimant's contract permitted the respondent to make deductions from his June 2018 salary because:
  - 53.1. the Return of Our Property clause only permits deductions from final pay;
  - 53.2. the Deductions from Salary/Wages clause said the claimant would be advised in advance and in writing of any amount to be recovered under that clause. No such advance written notice was provided, because the damage sustained to and poor condition of the car was not known about by the respondent until December 2018. The June 2018 salary was payable at the end of June.
54. The amount of unpaid salary for June 2018 was £1504.30, as set out on the respondent's undisputed schedule. This was properly payable to the claimant and was therefore an unauthorised deduction.

#### Pay for September 2018

55. The claimant worked for the respondent for the month of September 2018 and was entitled to be paid for that month.



56. Neither the Return of Our Property or the Deductions from Salary/Wages clauses in the claimant's contract permitted the respondent to make deductions from his September 2018 salary for the same reasons set out above in relation to the June 2018 pay.
57. The amount of unpaid salary for September 2018 was £933.26 as set out on the respondent's undisputed schedule. Again, this was properly payable to the claimant and was therefore an unauthorised deduction.

Pay for December 2018 (including commission earned in November 2018)

58. On 7 December 2018 the claimant gave the respondent 4 weeks' notice of termination (the contract required one month's notice). The respondent accepted the claimant's resignation in the email of 11 December 2018. The claimant's resignation took effect on 4 January 2019.
59. I have found that the claimant made himself available for work during his notice period, and did some work for the respondent during his notice period, including handing out leaflets and viewings. As he was ready and willing to work, the claimant was entitled to be paid his normal salary during his notice period.
60. In relation to the commission which was payable as part of the claimant's pay in December 2018, I have found that this commission arose from work done in November 2018. The payments therefore related to work carried out before the claimant's employment was terminated. Payment of this commission was due to be made on 31 December 2018 when the claimant was still employed by the respondent.
61. There was no clause in the claimant's statement of terms and conditions, the letter of 17 March 2016 or in any other document which permitted the respondent to withhold commission payments if they fell due for payment after resignation by the employee.
62. I conclude that the claimant remained entitled to be paid the commission payments he earned in November 2018, despite these falling due for payment after he had given notice of resignation.
63. The amount of unpaid salary for December 2018 and commission for November 2018 was £5,151.55 as set out on the payslip for December 2018 which was sent to the claimant.
64. However, I conclude that the respondent was authorised to make a deduction from the claimant's December 2018 pay. The Return of Property clause in the claimant's statement of terms and conditions permitted the deduction from the claimant's final pay of the cost of replacing the respondent's equipment and/or property which was not maintained in good condition. The respondent was authorised to make a deduction from final pay in respect of the replacement costs arising from the damage to and poor condition of the respondent's car which the claimant had been using.

65. The Return of Property clause was contained in the claimant's statement of terms and conditions a copy of which was given to the claimant in March 2016 prior to the respondent making the deduction. This was a relevant provision for the purposes of section 13(2)(a).
66. I have found that the costs to replace the car were £2,600. The respondent's deduction of this sum from the claimant's December 2018 pay was authorised.
67. I conclude therefore that there was an unauthorised deduction of wages in respect of the claimant's December pay in the sum of £2,551.50 (£5,151.55 - £2,600).

#### Commission earned in December 2018

68. It was not disputed that the Marlow office completed a sale on 14 December 2018 in respect of which the respondent received a fee of £24,500. Under the commission scheme the claimant was entitled to commission of 10% of house sale fees. Payment of commission earned in December 2018 would be paid on 31 January 2019. The claimant was no longer employed by the respondent on this date.
69. There was no clause in the claimant's statement of terms and conditions, the letter of 17 March 2016 or in any other document which permitted the respondent to withhold commission payments if they fell due for payment after the termination of the employee's employment.
70. I conclude that, in the absence of an express term to the contrary, there was an implied term in the claimant's contract of employment that commission earned during employment should be paid even if the date for payment of the commission fell due after termination.
71. I conclude therefore that the claimant remained entitled to be paid the commission payment he earned in December 2018, despite this falling due for payment after his employment had terminated.
72. I conclude that there was an unauthorised deduction from the claimant's wages in respect of unpaid commission for December 2018 in the sum of £2,450.

#### Series of deductions

73. I have found that there was a series of deductions from 30 June 2018 to 30 January 2019.
74. The claimant's ET1 was presented on 17 December 2018 which was before the end of the period of three months beginning with the last of the deductions on 31 January 2019. The claimant's complaints were therefore presented in time.

Summary

75. The claimant was subject to a series of deductions from his pay as follows:

Pay June 2018	£1504.30
Pay September 2018	£933.26
Pay December (including commission for November 2018)	£2,551.50
Pay January 2019 (commission for December 2018)	£2,450.00
Total	£7,439.06

76. For these reasons, the claimant's complaints of unauthorised deduction are well-founded and the claimant is awarded the sum of £7,439.06.

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**Employment Judge Hawksworth**

Date: 10 September 2019

Sent to the parties on: .18.09.19.....

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For the Tribunals Office

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**Note:**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.