



EMPLOYMENT TRIBUNALS

Claimant
Mr A King

v

Respondent
Careshield Limited

Heard at: Bury St Edmunds

On: 13 August 2019

Before: Employment Judge M Warren

Appearances:

For the Claimant: In person.

For the Respondent: Mr Famotimi, Consultant.

JUDGMENT having been sent to the parties on [5 September 2019] and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Mr King brings a complaint for unpaid commission, which can be categorised either as a breach of contract claim or a wages claim, that is a claim for unpaid wages.

Preliminary issue

2. At the outset of the case, Mr Famotimi sought leave to refer to 10 additional documents in the bundle at pages 98-106. These were disclosed to Mr King on Sunday evening, today is Tuesday 13 August. Mr King objected that he had not had time to analyse the documents.
3. An order had been made for exchange of documents by 23 October 2018. In my view, exchanging documents with a litigant in person just a day or two before the hearing is unacceptable. Having regard to the overriding objective and the balance of prejudice to the parties, I refused Mr Famotimi's application and did not allow the respondent to make reference to those documents.

Evidence

4. In terms of evidence, I had before me a bundle of documents which ran to

page number 97. I had a witness statement from Miss Sweetlove for the respondent, (their general manager) and a witness statement from Mr King. I heard evidence from both Miss Sweetlove and Mr King.

Findings of Fact

5. The respondent offers training solutions in the health and social care sector.
6. Mr King was recruited as a Sales Manager. The offer of employment is contained in an email at page 25 dated 13 February 2018. The job title is Sales Manager (Interim). It states that his basic salary is to be £35,000 per annum. There is no reference to commission.
7. On 14 February 2018, Mr King emailed Miss Sweetlove to say that he would be accepting the offer of employment, to start on 5 March 2018 and that he would like to see the contract including the commissions, “sooner though”. Clearly, Mr King was expecting some sort of commission in addition to his basic salary. A minute or so later, Miss Sweetlove emailed Mr King back to say she could get the contract to him straight away, but she could not get the commission information to him because Mr Stuart Hales was away that day. A little bit later on 14 February at 17:08, Miss Sweetlove forwarded to Mr King the contract of employment which is at page 29. This refers to his start date as 5 March 2018 and is expressed to be for a fixed term of 3 months to end on 31 May 2018.
8. Mr King started on 5 March 2018 and on that day, he was presented with the commission structure which is at pages 37-40 of the bundle. Mr King rejected it.
9. With regard to the targets, the sales team is described in a schedule to include Mr Leon Rodgers, New Business Development Executive and Mr Lee Taylor, Account Manager. There are two vacant positions on tele-sales. These four posts together are the sales team as defined.
10. A revised commission structure as an appendix to the contract was sent by email to Mr King by Mr Hales on 13 March 2018, page 42:
 - 10.1 In terms of objectives, the bullet points make reference to:
 - Sales team targets;
 - To delivering to target on new business;
 - To delivering to target on monthly renewals and upselling to existing accounts;
 - Recruiting an internal tele-sales team;
 - Managing the sales team performance;
 - Coaching, training and building business development, and
 - Account management.

10.2 Targets were set for March, April and May separately in respect of new business and account management, with totals of £112,000, £72,000 and £98,000 for those three months respectively. The total target for those three months is therefore £282,000. Turning the page to 43, one sees that commission of £1,000 is to be paid on hitting 90% or over of the sales team target each month, £5,000 on hitting 100% of the quarterly team target, and then a further 3% commission is payable on exceeding target.

10.3 The document makes clear that payment of commission will be in the month following invoice and it also states:

“Should you leave the company for any reason during the contracted employment period all entitlement to commission or bonus payments will be withdrawn immediately.”

11. By letter from Miss Sweetlove dated 24 May 2018 (page 94), at the request of Mr King, the term of his contract was extended from 1 June to 31 August 2018. The letter stated, “all other terms and conditions of employment remain the same as your previous fixed term contract”. Mr King has signed to acknowledge and agree, his signature dated 25 May.

12. On 4 June 2018, Mr King emailed Mr Giles (page 48) in which he makes reference to the commission and the targets as I have described them from the appended contract. He sets out in a table, a set of figures which suggest that he has, as he acknowledges, missed targets for March and May. His figures for April, if one just included the work of Lee Taylor and Leon Rodgers, would miss target. However, he has included in his table, figures for client services, (£4,984) and, “others” of £86,000. The later represents a sale achieved by Mr Hales, (Mr King’s line manager) with a business called the National Pharmacy Association. In the concluding paragraph of his letter, Mr King refers to having earned zero commission and he says that he thinks that his achievement of £252,000 deserves something, suggesting 2%, which would be £5,000. Essentially, in this email Mr King is expressing disappointment that he has not achieved a commission on the basis of the respondent’s figures and structure.

13. On 4 July 2018, a month later and having continued to work in the meantime, Mr King tendered his resignation (page 50).

14. On 31 July 2018, Mr King submitted a grievance (page 56). This states that his original interim contract stated that he would be paid a bonus on sales. He proceeds to set out the bonus structure as contained in the appendix I have referred to. Using the figures that are in his earlier email to Mr Giles, he suggests that he is entitled to a small commission. He then goes on to suggest that these figures were reduced by £30,000 for the three month period and that new targets therefore apply, £30,000 less in each case. That is intriguing as it is not the basis upon which Mr King has advanced his case today.

15. The respondent provided two responses to that grievance.

15.1 The first from a management accountant, Mr William Masters, who

set out the figures as the respondent saw them; sales achieved in March £41,280; in April £31,574 and in May £39,316 none of which come anywhere close to the 90% of target requirement. The total for the 3 months is £112,170.

- 15.2 A further response is provided in a letter written by HR manager, Miss Angela Jacks, (page 61). She states that no commission is due in respect of June as Mr King was no longer employed by the respondent as at the end of July, when commission would have been payable. She goes on to say that all sales figures were below the 90% of target required.
16. At page 63 is a set of figures produced by the respondent for these proceedings from its Sage accounting system. They show total sales for March, April and May 2018 of £87,828. Miss Sweetlove says those figures are accurate and I accept her evidence.
17. Mr King refers me to figures in a document that runs from page 64-83, which he says are taken from the respondent's CRM system, (that means Customer Relationship Manager system), a software programme that businesses use for managing their relationships with their customers.
18. Miss Sweetlove explains that the figures on the CRM system are input by staff when the member of staff thinks that they have achieved a sale. From the respondent's perspective however, a sale arises when an invoice has been raised and has been input on their financial accounting system; a sale is not a sale until an invoice has been raised. That explanation makes perfect sense and I accept it.

Conclusions

19. The mistake Mr King has made is entering into employment without his terms and conditions having been finally agreed by him. An employment relationship is governed by a contract, that is a contract of employment. A contract is an agreement. It requires the two sides to agree on the terms. Having been presented with the respondent's proposed commission structure, he continued working for them. There is no written evidence of protest in respect of the revised commission structure. The renewal of his contract at page 94 dated 24 May is clearly ongoing acceptance of the respondent's terms. His letter of 4 June clearly acknowledges what the commission structure that he was working to consisted of and he expressed disappointment at it. He felt that he deserved more. It may well be that he did deserve more, but that does not mean he is entitled to more as a matter of contract. His resignation of 4 July says much the same and of course, he had continued working for the respondent for a further month before resigning, further acceptance of the respondent's terms.
20. In his grievance of 31 July, Mr King acknowledged what the contract had been to start with. Even on Mr King's own figures in the grievance letter, he is not entitled to a bonus, even with the National Pharmacy Association figure, unless one takes the set of figures reduced by £30,000 per month proposed by Mr King as a target. That is not what he has argued today. However, for the avoidance of doubt let me say, I accept that the National

Pharmacy Association figure was not something that was achieved by the sales team which Mr King was employed to manage, it was achieved by another team, Customer Service, managed by Mr King's line manager, Mr Hales.

21. In respect of June's commission, (I was never taken to what the target for June was) that was not payable until the end of July, so as a claim in breach of contract, the tribunal would not have jurisdiction to consider it because it is a breach of contract which has occurred, or allegedly occurred, after the termination of employment. Such a claim has to be made in the County Court. The tribunal does have jurisdiction to consider June's commission as a wages claim. However, the respondent's terms are clear as I have read out, the June commission is not payable until July and is not payable at all if the claimant's employment has already come to an end before the end of contracts fixed term, which was 31 August. Mr King had ended his employment before completion of the contract fixed term and so he lost the entitlement to any commission in June.
22. For these reasons, I am afraid Mr King's claims must fail.

Employment Judge M Warren

Date: 30 October 2019

Judgment sent to the parties on

5 November 2019

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For the Tribunal office