EMPLOYMENT TRIBUNALS

Claimant: Miss L Skipworth

Respondent: Greywolf Recruitment Limited

Heard at: Norwich **On:** 31 October 2019

Before: Employment Judge Brown (sitting alone)

Appearances

For the claimant: In person

For the respondent: Ms E Cotton, director

RESERVED JUDGMENT

(1) It is hereby declared that the respondent, in breach of contract, deducted the sum of £600, gross, from the claimant's pay in May 2019, that the said sum of £600 is due and owing to the claimant. The respondent is hereby ORDERED to pay to the claimant the sum of £600, subject to any deductions for tax and National Insurance required by law.

REASONS

1. Introduction

1.1. The claimant claims £600, which the respondent paid to her on about 18 March 2019, but then deducted from the wages paid on about 28 May 2019. The claimant says that this sum of £600 was properly due and owing as her commission on a fee charged by the respondent to a third party, FPM in respect of a placement made of an agency worker, GB, at FPM. The respondent says that it had no entitlement to charge the fee to FPM and therefore no commission was properly due to the claimant. It relies on a clause in the contract under which the claimant was employed, pursuant to which, it says, 'the company is authorised to deduct any sums due to it from your salary.'

1.2. The claim was started on 24 June 2019 following early conciliation between 6 June 2019 and 18 June 2019. The respondent resisted the claim by a response sent on 18 July 2019. The response attached 11 attachments to its response.

1.3. A standard form case management order was made in the notice of hearing, requiring the claimant to set out in writing what remedy the Tribunal was being asked to award (this was clear from the claim—£600), and include any evidence and documentation supporting documentation. The claimant was required to bring a copy of this 'evidence and documentation' to the hearing.

1.4. On the day of the hearing, the claimant handed up a folder of documents, in accordance with the case management order. The respondent—in respect of whom no case management orders had been made—did not produce any documents in addition to those sent with the response. The claimant had not brought an additional copy of the documentation for the respondent. I arranged for my clerk to make a copy, so that everyone had the documents relied on.

2. The hearing

2.1. I heard oral evidence from:

2.1.1. the claimant;
2.1.2. Mr Nick Skipworth, a former director of the respondent (called by the claimant); and
2.1.3. Ms Emma Cotton, a director of the respondent.

2.2. The claimant and Mr Skipworth were cross-examined.

2.3. Ms Cotton's evidence consisted of her declaring that the matters that she had put to the claimant, in questioning the claimant, were true. The claimant did not cross-examine Ms Cotton.

3. Findings of fact

3.1. The respondent was at all material times a recruitment business; it made its money by placing people with businesses.

3.2. Under its *Terms of business with a hirer for the supply of agency workers*, the respondent was entitled to charge a fee where, for example, a 'temp' was taken on permanently by a business. It was also entitled to charge a fee where one of its candidates who had been working for company A was introduced by company A to company B and started working for company B. The respondent said that in those circumstances, the fee would be chargeable to company A; the claimant did not dispute that this was the case. 'Introduction' for the purposes of the terms included 'the supply of the Agency worker'.

3.3. Clause 8 of the terms of business provided for transfer fees, payable by the hirer if it engaged an agency worker other than via the respondent or introduced the agency worker to a third party.

3.4. The claimant was employed by the respondent as an Executive Recruitment Consultant from 17 or 18 July 2018 (the difference does not matter) until 31 May 2019. The relationship was governed by a written contract. By clause 4.1, salary was payable monthly in arrears on around the 18th day of the month. Clause 4.2 of the contract allowed the respondent to deduct any sums due to it from the claimant's salary. Clause 5 provided for commission payments: clause 5.1 provided that the respondent 'shall pay you a commission'. By clause 5.2: 'Commission will normally be paid along with salary payment, at the end of the month following the commencement of date of the placement for which commission is due.' Clause 5.3 provided that the respondent might from time to time, and at its sole discretion, suspend, cancel or vary the above commission arrangements on one month's notice. A commission policy provided separately that monthly commission payments were calculated on profit generated in that calendar month. The respondent reserved the right to recover some or all commission payments where a placement was cancelled.

3.5. The parties agreed before me that it was the placing of a candidate which triggered the right under clause 5 to payment of commission; commission did not depend on invoicing or on payment of the invoice. The respondent might therefore go unpaid while remaining obliged to pay commission. The basis on which it could recover commission where was *a placement was cancelled*.

3.6. There was another agency, ARC. ARC had placed a worker, GB, with FPM, as a temp. FPM fell significantly behind in its payments to ARC under that agreement, and ARC decided that it would no longer supply GB to FPM. ARC began legal action against FPM to recover the sums owed to ARC by FPM. The claimant agreed with JG, an agent of ARC, that the respondent could take over the supply of GB to FPM. JG passed the claimant's details to an employee, LB, at FPM. The respondent's directors agreed to supply GB to FPM on 7-day payment terms because of concerns about FPM's payments history. Mr Skipworth's evidence, which I accept, was that there had been a considered discussion about whether to take on FPM as a client, given its poor payment history, and a decision had been reached to do so, in full knowledge of FPM's poor payment history.

3.7. The claimant knew GB professionally from her work before she joined the respondent.

3.8. An invoice dated 6 February 2019, from the respondent to FPM, charged £4,000 plus vat for the placement of GB, starting on 6 February 2019, payable within 7 days. It seems likely that the invoice was in fact presented later, in light of the following.

3.9. On 11 February 2019, the claimant write to LB at FPM, saying:

> […] With regards to [GB], as mentioned to you if [FPM] decide they wish to offer [GB] a permanent position with [FPM] then there will be a charge rate of 8% of the Annual salary and bonus offered to [GB]. We spoke based on

him getting a salary of £50,000 then a fee of 8% (£4000 + vat) would be due. Usually a permanent fee is 15% of the salary so I feel I am being only more than generous with this. I would also ask, because of the current financial situation with [FPM], that a fee would be payable upfront on top of clearing all the current monies owed before GB can begin his permanent working contact with [FPM]. I have previously let [FPM] take a temp from our books free of charge but I'm not going to be able to offer the service again. GB was a third-party introduction to [FPM] through Greywolf which is why I have reduced the fee from 15% to 8% which again I believe is more than fair under the current circumstance and in line with our terms of business which [FPM] have been privy [to]. Please, I would appreciate getting this matter resolved as soon as possible. If I could kindly ask that someone gets in touch with me to let me know what they decide to do.

3.10. LB replied to the claimant 42 minutes later, saying:

With regards to [GB] I will forward your email to [ME] to start things moving on this.

3.11. On 19 February 2019, ME of FPM wrote to the claimant, copying LB, saying:

After reviewing and considering this matter, we feel that no induction [*sic*] was made by you to [GB]. We feel that [GB] was introduced to your company by [FPM]. Therefore, we do not consider that we are liable for any further fees from [the respondent]. Obviously, if you would like to pursue this further we would ask you to provide evidence of the introduction to [GB] for our consideration.

3.12. It seems likely that the 6 February 2019 invoice was presented after these exchanges.

3.13. On 19 March 2019, at 11:42, ME wrote to the claimant saying:

Further to my previous email and our recent telephone conversation, my accounts department have made me aware of the attached invoice. As previously stated we feel the introduction was not made by [the respondent] and to this date you have not provided any evidence to prove otherwise, therefore this invoice will not be considered for payment.

3.14. At 13:03 the same day, Jane Harris emailed Nick Skipworth, saying:

FPM have been on the phone querying the perm fee. They are doing some investigation and coming back to us. We will not be able to pay commission on this until it's resolved.

3.15. Nick Skipworth replied to Jane Harris six minutes later, saying:

The GP is included in that month and I am completely satisfied that we are right to invoice, which is why I signed it off and happy for it to be paid.

3.16. Mr Skipworth's unchallenged evidence was that he knew about ME's resistance to paying a 'perm fee' at the time that he said that he was (nonetheless) happy for commission to be paid.

3.17. Mr Skipworth had signed off a 'temporary monthly commission' sheet, providing for the payment of £1,053.17 gross in commission to the claimant, of which £600 gross was 15% of the £4,000 commission on the placement of GB at FPM.

3.18. The respondent paid the claimant the net equivalent of £1,053.17 gross as commission via its payroll provider, Polkadotfrog Ltd, on about 28 March 2019.

3.19. For the purposes of clause 8 of the respondent's terms of business, FPM had not, by February or March 2019, engaged GB other than via the respondent (except in the period before the respondent's involvement), nor had FPM introduced GB to a third party resulting in the engagement of GB via that third party; to the contrary, GB remained engaged via the respondent. Accordingly, the requirements for liability to pay a transfer fee under clause 8 had not, in my judgment, arisen. ARC might under its own terms have had the right to charge a transfer fee if it had similar provisions, but in my judgment, the argument that FPM were liable to pay a transfer fee to the respondent was misplaced (and I accept the outcome of the respondent's arguments to that effect, though they were put on a somewhat different basis). In any event (unless and until GB became a permanent employee—this may have been under consideration, as the claimant's 11 February email shows, but it had yet to happen), if it was to be a condition of the agreement that such a fee was to be paid, then this required a contractual offer and acceptance as to such liability, and I have not been satisfied on the balance of probabilities that there was offer and acceptance in respect of such a fee: there is no evidence of agreement by FPM to the terms and condition in question (to the contrary), or even communication of the relevant terms and conditions to FPM, and, as a matter of law, silence does not constitute acceptance.

3.20. However, a decision was taken by Mr Skipworth by 19 March 2019 that the claimant should nonetheless be paid commission. Mr Skipworth reached this decision with, I find, a full awareness of the relevant facts, as set out above and, I find, an awareness that it might prove difficult in reality to recover this sum from FPM, because they were resistant to payment of such a fee (in fact, rightly resistant, on my findings). Mr Skipworth was a director of the respondent and had authority to act as its agent. I conclude that the decision that Mr Skipworth reached as to the payment of commission to the claimant bound the respondent, at least in the absence of any new facts (such as a misrepresentation by the claimant, of which, I am satisfied, there was none).

3.21. On 30 April 2019, the claimant forwarded to Emma Cotton ME's email to the claimant of 19 March 2019.

3.22. On 7 May 2019, Emma Cotton wrote to Nick Skipworth, forwarding on the email from ME of 19 March 2019, saying that she (Ms Cotton) could not see

that the claimant had ever replied, and that Ms Cotton really could not 'see how this was seen as a placement as they are correct in saying that they actually introduced the candidate to us'. Ms Cotton continued:

> I know Jane checked this with you before paying commission on this as [HS] had raised a query on it and Jane was assured that this was safe placement with no hesitations. Please let me know if I am misunderstanding something on this one as currently I don't see that we had any grounds to charge a fee for this and am a bit stuck now on what to say to client.

3.23. The papers before me do not include a record of Mr Skipworth's reply.

3.24. On 15 May 2019, Ms Cotton wrote again to Mr Skipworth saying:

> Following [the claimant's] email yesterday ref this invoice, I am afraid that we are going to have to do a credit as we have no grounds to take this further as they introduced the candidate to us originally. As you are aware, Jane checked this with you before we paid out commission to both yourself and [the claimant] as I believe the claimant had already raised a query on this and we were assured that this was a secure placement and this will now have to be rectified too.

3.25. It does not seem accurate to say that FPM had introduced the candidate to the respondent, where the introduction, such as it was, had come via ARC, but for the reasons which I have given above, a *transfer fee* was not properly chargeable under the respondent's terms of business on the facts as they stood at February/March 2019.

3.26. Mr Skipworth replied, saying:

> As far as [the claimant] and [I] were aware this was a secure placement and the client had agreed to pay it at one point. We discussed it all with you and you were also of the mind-set that this was a secure placement. We took on the Temp via an introduction from ARC because they wouldn't supply to them and [FPM] were desperate for the candidate to continue. The temp was our employee as per our terms. […] We were the end employer at the time of the candidate going perm and as such a placement fee was agreed. We offered a heavily reduced rate given the circumstances to be fair to the client. We have to fight this. [FPM] have given us the run around from day one on payments and this is just another example of payment avoidance.

3.27. No evidence has been produced of FPM's willingness to pay 'at one point'—the only documentary evidence before me points to the contrary. Notably, Mr Skipworth himself appears to have been set to benefit personally from charging FPM a fee (though, of course, so would the respondent).

3.28. Ms Cotton reiterated by email on 15 May 2019 at 11:07 that 'from a legal standpoint we did not "introduce" the candidate and therefore have no position to invoice for an introduction fee'

3.29. This is a different point: pursuant to the respondent's terms of business introduction included supply of an agency worker, and there was such a supply of GB. The charges due under clause 6 of the terms of business were therefore payable, and had there been a transfer of GB after the inception of the agreement between the respondent and FPM, a transfer fee would have been payable (since, I find, GB had been introduced to FPM by the respondent for these purposes). The approach of the respondent's directors to its own terms of business does not appear to have been very considered.

3.30. By a credit note, dated 1 April 2019 the respondent credited to FPM the £4,000 fee for the placement of GB.

3.31. On 20 May 2019, Jane Harris emailed the claimant, saying 'just to let you know that based on the non-placement of [GB] at [FPM] and given that you have already been paid commission on this fee of £4000, £600 will be deducted from your salary this month (15% of £4,000) as per section 4.2 of your contract of employment below and our Commission Scheme Policy attached.

3.32. The claimant appears to have objected to this in response, but I did not have a written record of that initial objection.

3.33. Jane Harris wrote to the claimant by email on 21 May 2019 at 11:14 saying that FPM was a cancelled placement as the respondent had not introduced GB to FPM. Ms Harris said that Ms Cotton and HS had been told that it was a third party introduction, but this was incorrect. Ms Harris expressed concern that this had not been understood. She said that the fee should never have been invoiced and so commission should not have been paid and therefore, she said, the money was owed to the respondent.

3.34. The claimant reiterated her objection to the deduction, and tendered her resignation from the respondent.

4. Conclusions

4.1. GB's placement was not cancelled. This was the circumstance which entitled the respondent, under the commission policy, to recover paid commission. It did not apply in respect of the commission payment in dispute in these proceedings.

4.2. I have concluded as a matter of fact, above, that Mr Skipworth, as a director of the respondent, authorised payment to the claimant of commission, in full knowledge of the facts that the proper recovery of that sum from FPM might be difficult if not impossible. If it were the case that Mr Skipworth's action were motivated in whole or in part by his own entitlement to commission, that might bear on his own entitlement to commission, but, in my judgment, the claimant's entitlement to retention of commission which had been authorised by a director of the company and duly paid to her was not affected by Mr Skipworth's state of mind, or by subsequent events. The claimant did not misrepresent the

position, and that position was known to Mr Skipworth when he reached his decision.

4.3. The fact that the £4,000 fee was not, objectively, as a matter of fact and law, owed by FPM to the respondent does not, in my judgment, affect the respondent's decision, through Mr Skipworth, with full knowledge of the material facts, to pay £600 in commission to the claimant. The respondent says that payment of commission is discretionary; that strengthens the claimant's position. There was no relevant change in circumstances after payment; the fact that the other directors of the respondent came to a different view as to whether the charging of a fee was proper did not affect the position, because a decision had been made on behalf of the respondent by Mr Skipworth to pay the claimant, as a result of the placement, and nothing which happened thereafter justified the respondent in seeking to recover the £600 sum which it had knowingly and deliberately paid to the claimant. In particular, there was no cancellation of the placement.

4.4. Accordingly, the £600 gross which had been paid to the claimant was not, pursuant to the claimant's contract or the respondent's commission policy, or otherwise, a sum that was *due to the respondent* for the purposes of clause 4.2. Therefore, the respondent had no right as a matter of contract to deduct that sum from the sums otherwise due and owing to the claimant in May 2019, and, in doing so, I conclude, the respondent acted in breach of contract.

4.5. That sum must, therefore, be repaid to the claimant and I enter judgment accordingly.

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Employment Judge Brown

Date: 31 October 2019

JUDGMENT SENT TO THE PARTIES ON

……
AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL OFFICE