



EMPLOYMENT TRIBUNALS

Claimant: Miss S Stevenson

Respondent: Orbit Energy Ltd

Heard at: London South Croydon

On: 24 October 2019

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: In person

Respondent: Mr B Randle, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

The claim of unauthorised deductions from wages is unsuccessful and is dismissed.

REASONS

Claims and issues

1. The claimant presented a claim to the employment tribunal on 4 July 2019 in which she raised complaints in respect of outstanding payments of wages due from her ex-employer, the respondent. The claim followed a process of early conciliation which commenced on 17 June and ended on 21 June 2019. In essence, the claimant alleges that she is entitled to outstanding payments of commission and an increase in her basic salary.
2. The respondent presented a response to the employment tribunal on 11 September 2019 in which it denied owing any wages or payments to the claimant.

3. The hearing had been listed for one hour but clearly was going to take longer and as far as possible I accommodated this within my list although it did mean having to reserve judgement.

Evidence

4. I was provided with a bundle of documents, a witness statement for Mr Justin Price and a skeleton argument by the respondent. I will refer to the respondent's bundle as R1 where necessary. I was also provided with a bundle of documents by the claimant. This included a schedule of loss and witness statement from Ms Jackie Brown at appendix B. I will refer to the claimant's bundle as C1 where necessary. The claimant did not have a witness statement as such, but she provided a document setting out a list of events at C1 appendix A and duplicated at R1 52-54.
5. I heard evidence from the claimant, Ms Brown and Mr Price.

Preliminary matters

6. At the start of the hearing, Mr Randle raised two preliminary matters.
7. The first of these was in respect of the claimant's complaint that she was entitled to a salary increase from £40,000-£45,000 per annum. He made the point that the claimant had a probationary period of six months and the contract of employment clearly states that any salary review is made on an annual basis. He referred to the offer letter of employment at R1 34 and clause 6.3 of the claimant's contract of employment at the C1 14.
8. The second matter was in respect of the claimant's complaint that she was entitled to outstanding sales commission. Mr Randle made the point that the claimant has provided no evidence of this entitlement, in particular which sales she relies upon for which she has not been paid. He referred to a breakdown of sales at R1 49-51 which does not assist the claimant in revealing any outstanding entitlement. The claimant said that she requested a full comprehensive breakdown from the respondent on two occasions in March and May 2019 but was never provided with it.
9. Having considered these matters, I indicated that I was not in a position to deal with them without hearing evidence and would then take them into account as part of my overall consideration of the claim.
10. I explained the procedure particularly for the benefit of the claimant, who was unrepresented. I also explained that the burden of proving entitlement to the various payments was upon her. I told the claimant that it was important when giving evidence that she kept to the point given the lack of a formal witness statement and that I would review the relevance of Ms Brown's evidence after reading the documents. I then adjourned for half an hour to consider the statements and the bundles.

Findings

11. I set out below the findings I considered relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to me, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.
12. The claimant was employed by the respondent as an Area Sales Manager from 29 October 2018 until her resignation by letter dated 18 March 2019. The respondent is an energy supplier providing the marketing and supply of energy to residential customers in Great Britain. It currently employs around 50 staff in the UK. The respondent's Chief Financial Officer is Mr Justin Price.
13. The claimant was employed to help the respondent's fledgling door-to-door sales team. The respondent company was established in 2017, with first trial sales at the start of 2018 and is still very much in a growth stage. The claimant's recruitment was intended to assist with that.
14. The claimant's offer of employment letter dated 18 September 2018 is at C1 14 and R1 34. This is signed by the claimant and dated 19 September 2018.
15. The letter sets out the claimant's entitlement to a basic salary of £40,000 per annum and further states:

"Your salary will be reviewed and increased to £45,000 British Pounds Sterling per annum upon the successful implementation of your Orbit Energy Office consisting of 20 sales agents, including ongoing and continued achievement of sales performance targets."
16. The letter also sets out entitlement to commission in addition to the basic salary and states as follows:

"You will earn £5 per fuel for each successful customer that commences supply of energy with Orbit Energy."
17. The claimant's employment contract is also at C1 14 and at clause 6.1. This repeats the entitlement to a salary review to £45,000 per annum in the same terms as the employment offer letter. However, at clause 6.3 the contract of employment states as follows:

"The salary paid to the Employee shall be reviewed by your supervisor annually, the first such review to take place on or around 1 July each year. The Company is under no obligation to award an increase following a salary review. There will be no review of the salary after notice has been given by either party to terminate the Appointment."
18. The claimant's first six months of employment was a probationary period during which her entitlement to give and receive notice of termination was one week. This is set out within the offer of employment letter and repeated at clause 2.2 of her Employment Contract. The claimant did not complete her probationary period by the date on which her employment ended.
19. I was also referred to the respondent's D2D Commission Policy at R1 37-41 and two and number of emails between the respondent and the claimant with regard to commission at R1 42-47.

20. The respondent pays commission to sales agents on their successful sales. Managers also receive a commission payment for successful sales achieved by sales agents within their team(s). Sales can be unsuccessful for a variety of reasons, including when incorrect customer information is recorded by a sales agent. When a sale is unsuccessful, no commission is paid.
21. Each door-to-door sales agent should record the customer details at the time of the initial contact. A third party engaged by the respondent subsequently contacts each new customer to verify key details including the new contract information and customer information. If this verification process fails, the sale is not successful at that time and cannot complete.
22. In order to “rescue” the sale, another person must obtain the correct information. This is additional work at a cost to the respondent and as a result the respondent does not make a commission payment to the original agent. Commission is only due on sales which successfully complete due to the original sales agent.
23. Whilst the D2D Commission Policy does not expressly deal with the position regarding commission payments to Sales Managers and only says “to be agreed”, by implication it must follow. Although I do note that within the offer letter to the claimant a commission payment is defined as being a payment for each successful customer that commences supply of energy with the respondent.
24. The claimant’s sales team consisted of employed and self-employed sales agents. The D2D Commission Policy covers the entitlement to commission by both employed and self-employed sales agents and managers. In respect of employed sales agents, it states that commission is payable on “fuels that have gone live (i.e. are being supplied energy by Orbit Energy)” (at R1 38). In respect of self-employed sales agents, it states that commission is only due on an “actual sales” and defines an actual sale as including one “with complete and correct data” (at R1. 40).
25. This process was made clear to the claimant and all sales staff both verbally and in writing. This included sales training. In addition, an email was always sent to the claimant to explain what commission have been generated a particular sale.
26. On 24 January 2019, an email was sent by CC33, the third party company used as part of the verification process, to a number of the respondent’s staff members including Ms Michelle Rodgers, who is the Director of Field Sales-UK, the claimant and Ms Jackie Brown, who was one of the claimant’s sales managers. The email explained how many new calls were made on that day and of those calls how many were successful. The email further detailed where amendments had been necessary due to incorrect data being collected. This email is at R1 46-47.
27. On 25 January 2019, Ms Rodgers emailed the claimant asking her to send an email to “reps” (sales agents) to outline that “TPV” (Third Party Verification) sales meant no commission will be generated and made clear that this would be enforced. This email is at R1 42-43.

28. At no time during the claimant's employment did her Orbit Energy Office, i.e. the sales team for which she was responsible, have 20 or more sales agents employed. The respondent assessed the total headcount on a monthly basis at the end of each month. The claimant hired around 42 agents during her employment. However not all of these agents actually commenced employment with the respondent. Further, of the agents who were hired and did commence employment, this was on an ongoing basis and sales agents also regularly left during this period. As a result, the claimant never had more than 15 sales agents active in a team at the end of any calendar month. I was referred to data collected by the company setting out the number of active sales agents within the claimant's sales team on a monthly basis between October 2018 March 2019 at R1 49. In oral evidence, Mr Price explained that these figures had been calculated by their Finance Manager taken from all of the agents at the end of each month and to the best of his knowledge it included all of the claimant's agents both in Newcastle and Huddersfield.
29. The respondent had agreed to review and increase the claimant's salary if she successfully implemented an Orbit Energy Office consisting of 20 sales agents and if there was ongoing and continued achievement of sales performance targets. Whilst the claimant had no sales targets each of her sales agents had a target of two successful sales per day. The respondent did not review and increase the claimant's salary because the claimant did not meet the first condition. In any event the respondent did not view the claimant as being employed long enough and her team's performance was not sustained enough to demonstrate that the second condition had been met. The claimant was not able to challenge whether the figure of targets had been met. Further, the Employment Contract states that any review would be carried out each July and the claimant's employment came to an end before reaching that month.
30. On 18 March 2019, the claimant resigned by way of a letter which is at R1 48. Whilst this letter mentions that this was by reason of untenable behaviour by Ms Rodgers, it makes no mention of any entitlement to commission or for that matter the increase in salary payments.
31. The letter refers to an allegation that Ms Rodgers blocked recruitment by the claimant to stop her growing her team. The respondent's position is that the company was experiencing a high turnover of staff and the sales performance of the existing headcount was well below average. For this reason, the respondent avers that it requested managers to concentrate on ensuring their existing headcount met their Key Performance Indicators before recruiting further. The claimant's document at R1 5 onwards goes into some detail as to these matters. However, this is not a claim of unfair or wrongful dismissal and is not relevant to the claim before me and so I make no findings beyond this.
32. The claimant's last day of employment was 18 March 2019 and she received a payment in lieu of her entitlement to notice of one week as well as outstanding holiday pay. I was referred to a letter from the respondent to the claimant dated 19 March 2019 confirming the amount of the final payments due to her. This is at C1 25.

33. The claimant's entitlement to basic salary and commission is set out in a spreadsheet at R1 50-51. I was also provided with a copy of the claimant's payslips at C1 11. This document also sets out a breakdown of the commission payments that were made to the claimant. Whilst the claimant disputes the figures of commission, she was not in a position to challenge the respondent's evidence. The figures that she had provided at C1 26 were by her own omission based on an average from the information that she had available. She was not able to access the respondent's computer system after her resignation and the respondent had not provided the information she had subsequently requested. I explained to her that I could only go on the basis of the evidence before me today.
34. I can see from the emails at R1 56-58 that there was some correspondence between Ms Brown and the respondent regarding her entitlement to commission payments. However, this is not relevant to the claim before me beyond supporting the respondent's position as to non-payment of commission in the face of irregularities in the information provided about each customer. This is amplified by Ms Brown within her witness statement although to a great extent her evidence deals with the claimant's concerns about Ms Rodgers blocking her from recruiting new staff.
35. I can see from the emails at R1 59 that there is some correspondence between the claimant and the respondent regarding her final commission payments. However, this does not advance the matter any further.
36. The claimant disputed the number of agents that she had recruited during her period of employment with the respondent in both Huddersfield and Newcastle. She said in oral evidence that she started with 15 sales agents in October 2018, that three left in November 2018 but she took on 10 sales agents in Newcastle. She referred to C1 12. She explained that the dashes next to the names on C1 12 were sales agents from a different team.
37. The claimant further explained that the next page set out the names of the Newcastle agents. She said that as a result she had 21 sales agents in November 2018 and her team continued to increase as set out in the further pages of the document.
38. However, the documents that she has provided only show the number of agents as at 21 November 2018 and not at the month end. In addition, the document dated 18 March 2019, at the last page, does not indicate whether the persons named were her agents and again is dated before the month ends. Whilst the claimant stated that she could contact those agents by telephone now to confirm the position, I explained to her that I was only able to go on what we have in front of us today.
39. I heard closing submissions from the claimant and Mr Randall. Mr Randall gave submissions by reference to his skeleton argument.

Relevant law

40. Section 13 of the Employment Rights Act 1996:

“(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 employer making the deduction in question, or

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

(3) Where the total amount of wages paid on any occasion by an 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...”

Conclusions

41. From my above findings the claimant has not successfully met the burden of proof in respect of her complaints as to whether she has been paid less than was properly payable to her by the respondent. As a result, she cannot show that any unauthorised deduction from wages has been made.
42. It is clear that commission is only payable to sales agents if fuels have gone live (for employed sales agents) and actual sales (for self-employed sales agents). Sales can fail on the basis that the sales agent has not obtained and/or provided the correct information to allow verification to be made by the respondent's third-party company. Whilst it is possible for the information to be subsequently obtained this is at additional expense to the respondent. It follows that a Sales Manager would not receive commission in respect of sales that did not meet the above requirements. In any event, the claimant was not able to advance evidence to meet the burden of proving her entitlement to any commission that had not been paid to her.
43. It is also clear that the claimant was only entitled to the salary increase if the two conditions had been met and further that any salary review took place each year in July. The claimant was not able to advance evidence to meet the burden of proving that her sales team reached the figure of 20 in any of the months during which she was employed. Further she was not able to meet the burden of proving that there was ongoing and continued achievement of sales performance targets, these being the targets required of the individual sales agents. In any event, her employment did not continue until July 2019.
44. Whilst the claimant maintained that the information which would prove her entitlement was in the hands of the respondent and had not been provided to her, the respondent denied that there was such evidence, and the claimant had not taken any steps to secure production of this alleged information for this hearing. As I explained to her during the hearing, I could only go on the evidence that was before me today.

45. The claim is therefore unsuccessful and is dismissed.

Employment Judge Tsamados
6 January 2020