



EMPLOYMENT TRIBUNALS

Claimant: Mr J Ejoh-Denny
Respondent: Capital Staffing Services Ltd

Heard at: Croydon **On: 29 January 2020**

Before: Employment Judge Wright

Representation

Claimant: Mrs B Oyedeji - solicitor
Respondent: Miss E Moore – counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is:

The claim in respect of the unauthorised deduction from wages fails and is dismissed.

The breach of contract claim is dismissed as it was not advanced by the claimant.

REASONS

1. This was a final hearing to determine the claimant's claim for authorised deductions from wages under s.13 Employment Rights Act 1996 and for breach of contract.
2. The unauthorised deduction claim is in respect of commission payments.

3. The case was listed for a three-hour hearing. The hearing concluded in three hours and judgment was reserved.
4. The Tribunal heard from the claimant, his line manager at the respondent (who left in April 2019). For the respondent it heard from the CEO, Mr Rivera. It had before it bundle of approximately 85-pages.
5. The claimant worked for the respondent from 19/3/2018. He had attended the same school as and was friends with his line manager, Mr McKenzie.
6. On 1/10/2018 the claimant was promoted and his commission package provided:

‘... bonuses of 5% for new care packages you bring into the business and travel expenses paid, detail of which are available from [the CEO] and [the claimant’s line manager], along with further information relating to your KPI’s.’

7. In October 2018 the claimant was paid gross commission of £197.07, in November 2018 £141.54 and in December 2018 £200.00. Commission was paid a month in arrears.
8. During December 2018 the claimant and his line manager negotiated a contract with a local authority. The details were not expressly set out in the pleadings or witness statements, but it appears a local authority had a patient with nursing needs, who was in a hospice which was closing down. No provision had been made for the patient. This caused the local authority to approach the respondent to provide (at very short notice, within 24-hours, rather than a usual much longer period) a care package (known as the ‘F’ care package – FCP) for a four-week period. This was an exceptional contract; the profit margin was in the region of £70 per hour, rather than the usual £3-10 per hour.
9. This caused Mr McKenzie to approach the CEO on 13/12/2018 and to propose (page 78):

‘The Average Margin is £73.29 per hour x 168 hours = £12,312.72
Margin over a 4 week period = £49,250.88 which almost equates to A
80% increase from previous month for the total [gross margin] of the
month.’

I would like to put across a proposal for this package to receive 40% of the margin can go to homecare bonuses which I can distribute amongst my team.’

10. A meeting then followed on the 14/12/2018 and Mr McKenzie chased the CEO on 2/1/2019 and he referred to:

‘... an agreement of 40% of the [gross margin] for this package will be given in commission which I can delegate how I see fit based upon the support my team has given to this plan.’

11. The CEO confirmed via email on 2/1/2019 that he had agreed this at the meeting on 14/12/2018 (page 77).

12. Mr McKenzie said the reason for the initial four-week period was that the local authority would want to negotiate the rate it was being charged. Presumably, it also hoped that it would be able to place the patient into more suitable and less expensive care. In any event, the four-week period was rolled-over until the end of March 2019.

13. When Mr McKenzie was distributing the 40% ‘pot’ ‘as he saw fit’, he allocated 10% to the claimant. That resulted in a gross commission payment of £4795.02 in January 2019, which the Tribunal was told was 10% of the margins on the FCP.

14. There was no commission paid by the respondent in February 2019 due to a ‘delay’. It is not disputed the payment was made in March 2019.

15. The crux of this case is whether or not the 10% sum Mr McKenzie awarded to the claimant in respect of the FCP rolled-over as per the agreement reached on 14/12/2018; which is the claimant’s case. Although, the claimant contends for the sum of 15% in February, not 10%. Or, as per the respondent’s case, the 10% commission payment paid to the claimant in January 2019 was a ‘one-off’ and a single payment in respect of that four-week period.

16. Mr McKenzie had produced a spreadsheet for the claimant in respect of contracts he worked on in January 2019 (which was due to be paid in February 2019). It showed the commission on the FCP at 15%, with the remainder at 5% (page 62). For work done in February 2019, the commission on the FCP is shown at 10%, with the remainder at 5% (page 73).

17. From the payroll spreadsheet the CEO produced, under January 2019 commission payment of £4,795.03 (gross), there is a note:

‘Exceptional commission due to [FCP] and margins as per [the CEO]’

18. In respect of the March 2019 payroll spreadsheet, the CEO has noted against the commission sum of £5881.20:

‘Feb 3240.54 5% coms

Jan 2640.66 5% coms'

19. That corresponds to the March 2019 commission payment showing on the payslip of £5881.20.
20. It also corresponds to the spreadsheets which Mr McKenzie had produced, save that the commission on the FCP was calculated at 5%, rather than 15% in January and 10% in February 2019.
21. On 19/3/2019 the claimant emailed Mr McKenzie setting out his understanding of the commission. In respect of the FCP he contended for commission of 10% with an uplift of 5%. This email was forwarded onto the CEO and he responded:

'I don't have any communications on the below¹ (I am aware of the 10%, but not the 5% uplift)'

22. The claimant asked Mr McKenzie to discuss what he had 'agreed'. Mr McKenzie said on 21/3/2019 (page 65):

'As discussed in the January GM Report for February pay should have been 15% for [the claimant] which is a 5% uplift for prior month.'

23. The CEO was then asked by the claimant on 21/3/2019 when could he expect to receive payment for the February commission and had 'this' been confirmed. In response the CEO said:

'I will get back to you with payment date no later than tomorrow 1pm.'

24. He did not comment upon the commission claimed by the claimant (page 65).

25. The claimant then resigned on 26/3/2019 (page 72). On 29/3/2019 the claimant asked for his commission breakdown that he was expecting to be paid that day. Mr McKenzie replied and attached a spreadsheet. It is not clear from the bundle which spreadsheet was attached to that email. Mr McKenzie said:

'Please note the break downs as agreed 10% for FCP, 5% for packages you have brought on and 2% pre existing W packages.'

26. The payslip is dated 29/3/2019 and therefore it is accepted that the payroll would have been processed prior to the claimant's resignation and that fact cannot have influenced any decisions taken in March 2019 in respect of the commission payment to the claimant.

¹ 'the below' read: For [FCP] commission percentage agreed between myself and [Mr McKenzie] was 10%. with an 5% uplift for commission owed at the end of Feb.'

27. The claimant contends he should have been paid £7,059.95 for February with the FCP commission at 15%. He claims a shortfall of £51.02 in March and £2,627.92 in April.
28. The respondent contended that the April deduction was not expressly pleaded. The claimant says that it is a loss arising from the submitted claim. The Tribunal accepts that as the commission was paid in arrears, any commission earned in March would have been paid in April and so, any shortfall from March would have only come to light in April. The claimant may therefore, advance this claim.
29. It is not clear why the claimant contends commission of 15% was due on the FCP in February and then 10% in March. He was paid 10% in January in respect of the contract entered into in December 2018. He appears to be claiming 10% and then the contractual 5% for February only.
30. There is no evidence to suggest that Mr McKenzie approached the CEO again in January to request a further 'pot' from which he could distribute bonuses. This is first mentioned by him on 21/3/2019, when he references the matter being discussed in January (page 66).
31. It is not accepted this discussion took place in January as there is no reference to it, unlike on 2/1/2019 when Mr McKenzie chased up the CEO further to their discussion on 14/12/2018 (page 77). Furthermore, there is no explanation as to why the figure, according to the claimant, became 15%, rather than the 10% paid for December and the 10% contended for in March.
32. It also appears the respondent was struggling financially at this time. Commission was not paid in February and on 4/2/2019 and 6/2/2019 the claimant was chasing payment of his expenses. On 21/2/2019 the CEO sent an email regarding the staff payroll and he referred to a 'new factoring facility' and to having 'no choice' but to make changes to the payment date and moving it at 'short notice' to the 28th of that month. It is unlikely against this background that the CEO would have authorised a further bonus payment; particularly one which was so much higher than the previous payments.
33. The Tribunal finds that the 40% bonus payment of the gross margin on the FCP was agreed by the CEO in December 2018.
34. There was then no further agreement in respect of the FCP, despite the fact the contract rolled-over. Mr McKenzie did not make any further request of the CEO in respect of that contract and the CEO did not agree to any further bonus payments from that contract, save for the 5% commission, which the contract provided for and which was paid.

35. For those reasons, the claim fails and is dismissed.

Employment Judge Wright

Dated: 31 January 2020

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