



EMPLOYMENT TRIBUNALS

Claimant: Mr M Anderson

Respondent: Digital Allies Limited

Heard at: Newcastle Upon Tyne

On: 23 January 2020

Before: Employment Judge O'Dempsey

Representation:

Claimant: self

Respondent: Ms J Dalzell (Solicitor)

REASONS

1. Judgment (and oral reasons) having been given on 23 January 2020, the following reasons are given for the dismissal of the claimant's claims.
2. The claimant claims breach of contract and unlawful deductions from his wages. He says that his former employer refused to pay commission payable to him and which he earned whilst employed by the respondent. The respondent argues that the tribunal does not have jurisdiction because the sums were not outstanding as at the date of the termination of the contract of employment. The terms of section 13, they argue, do not apply to the payments as at the date of the issue of these proceedings.
3. Although today's hearing was listed as the final hearing of the case, neither party attended having drawn up witness statements of the evidence on which either of them wished to rely. Mr Anderson is of course representing himself.
4. In order to achieve the overriding objective, I allowed the case to run on considerably longer than the 1 hour which had been allocated to it, and I allowed the parties to call witnesses without witness statements. I note that no direction had been given for witness statements in this case. I also note that a direction had been given that written representations should be exchanged if they were to be relied upon at the hearing, 7 days before the hearing. This did not happen.

The law

5. In respect of claims for breaches of contract the jurisdiction of the tribunal is governed by Section 3 of the Employment Tribunals Act 1996 (ETA 1996) and The Employment Tribunals Extension of Jurisdiction (England and

Wales) Order 1994 (SI 1994/1623) (Extension of Jurisdiction Order 1994).

6. So far as relevant these provisions require that the claim for breach of contract should arise or be outstanding on the termination of the employment of the employee. The claim must be for one of the following:
 - damages for breach of a contract of employment or any other contract connected with employment; or
 - the recovery of a sum due under such a contract(Section 3(2), ETA 1996 and Article 3, Extension of Jurisdiction Order 1994.)
7. A claim is outstanding in this sense if it is in existence on the termination of the employee's employment, regardless of whether the employee has taken steps before the termination to resolve the claim (**Mitie Lindsay Ltd v Lynch** UKEAT/0224/03).
8. Otherwise it must be a type of a claim which, as at the termination date, was immediately enforceable but remained unsatisfied (see **Peninsula Business Services Ltd v Sweeney** [2004] IRLR 49). Where the agreement between the parties is that the commission becomes payable in the month after a customer pays the fee (or in Sweeney's case 25% of it) provided that the employee is still in the employment of the employer, then the tribunal will have no jurisdiction to consider payment of commission if it had been achieved during employment but, at the date of termination of employment, had not fallen due for payment. Such a claim would only be for a prospective right. Sweeney does not stand for any general proposition but turns on establishing the scope of the particular contractual agreement, as does the present case.
9. In respect of the claim for unlawful deductions from wages the law is set out in Sections 13 to 27 of the Employment Rights Act 1996 (ERA 1996).
10. In summary it is unlawful for an employer to make a deduction from a worker's wages unless, either the deduction is required or authorised by statute or a provision in the worker's contract; or the worker has given their prior written consent to the deduction. (Section 13, ERA 1996.) However for there to be a deduction there must be wages from which the deduction can be made. Commission payments can form part of a worker's wages for these purposes.
11. So far as relevant for the purposes of this case wages are defined by section 27 of the ERA 1996 which provides that "wages" means "any sums payable to the worker in connection with his employment". The concept includes any commission referable to the worker's employment, whether payable under their contract or otherwise (section 27(1)(a), ERA 1996).
12. There cannot be a deduction unless the wages claimed are properly payable (section 13(3), ERA 1996). I have to consider all relevant circumstances when determining whether a sum is properly payable and this requires assessment of the contractual position.

The facts

13. The claimant was employed as a business development manager, from 1

August 2017, until he was made redundant on 31 October 2019.

14. It was common ground that there was a letter of appointment which stated that the claimant would be entitled to a 10% commission on sales. There was also an employment contract dated 1 August 2017 which adds little to that picture.
15. After hearing the evidence from Mr Parker from the Respondent and from the claimant, it seems to me that there was an agreement that the claimant would be paid commission provided he achieved minimum target (£15,000 of new sales per month).
16. I accept the claimant's evidence which it transpired appeared to be a matter of agreement, that commission became payable after the sale had been made. Mr Parker stated in evidence that his view of the contract was that this meant that a sales representative, and in particular the claimant, became entitled to the commission payment at the point of the sale. I also accept the evidence which appears again to have been a matter of common ground in the end, that the agreement between the parties was that the employee would wait until the respondent was paid before getting payment of his commission.
17. The logical consequence of that is that there would be no breach of contract if a payment was not made before the point in time at which the respondent had been paid by the client.
18. There was a conflict of evidence between Mr Parker and the claimant as to whether the claimant was ever told that he would not be entitled to commission payments after the end of his employment. I accept the claimant's evidence in this respect for the following reasons: it is highly unusual that there is no documentation at all surrounding this issue between the parties, and it strikes me that this is a draconian term to be included in a contract. I found the evidence of the claimant to be compelling and indeed he appeared to be very ready to make concessions as to what had happened when the terms of the respondent's submission as to the fact was put to him by me, when he was giving his evidence in chief.
19. Mr Parker gave evidence that a Mr Woodhouse, another (then) employee of the respondents, and the then proposed line manager for the claimant, had explained the terms of the commission scheme to the claimant before the contract had started. However I was not told by anyone, and Mr Parker very fairly said that he could not say whether (before he entered into the contract) the claimant had been told that commission payment would not be paid to him once his employment ended.
20. It strikes me that there was no agreement by the claimant to this unusual term, by which I mean a draconian term which would cut off his access to a benefit which most reasonable employees would consider they had earned.
21. I add to that the following: if there was, as I have found, no express term to this effect, I have also considered whether it can be argued that there was an implied term to this effect. I have concluded that there was not. The

respondent did not argue this point before me, but I have considered whether any such term that commission should not be payable once the customer has paid and all other commission related terms have been fulfilled because the employee has ceased to be in the respondent's employment. It is not necessary for business efficacy, and there was no evidence suggesting that such a term should be implied in any other way before me. It was not the type of term which is so obvious that it does not need to be stated expressly (in fact quite the reverse).

22. So I do not accept that the claimant ever agreed to a contract in those terms. The logical conclusion from that is that the claimant's contract appears to entitle him to payments after the termination of his employment. I make it clear that I find as a fact that the claimant was not told that he was not going to be able to receive payments after the termination of his employment, simply because he had ceased to be an employee.

23. I have taken into account the suggestion that was made at various points in cross examination of the claimant, that in some way he knew that he was not entitled to payment after the termination of employment because he had received a 5% payment in respect of some business which Mr Woodhouse had obtained before Mr Woodhouse left the business. It emerged in evidence that the reason the claimant received the payment of 5% and not 10% as a commission payment would normally be, was because he was going to be handling the business which Mr Woodhouse had obtained. There was a, perhaps rather dry, semantic difference between the witnesses over whether what was paid to the claimant was commission or a recompense for handling the business. In any event it seems to me that this tells me nothing about whether or not Mr Woodhouse received commission payments where the other terms for commission were only fulfilled after termination of his employment. Even if Mr Woodhouse did not receive such payments, I am not told (and there was no evidence to the effect) that all the employees were on the same terms and conditions. The claimant was unable to help, because he did not know, what payments were made to Mr Woodhouse, and the respondent did not produce any documentation to show what payments were or were not made to Mr Woodhouse (or what the terms of his commission scheme were). In those circumstances I was not assisted by the evidence relating to Mr Woodhouse or the evidence relating to the 5% payment made to the claimant.

24. I was also referred (in cross examination of the claimant only) to a payment relating to a particular client. Here it appeared that there was a difference between the amount of commission to which the claimant thought he was entitled, in relation to a client who used purchase orders. The claimant accepted, and asserted, that he would become entitled to payment only after a purchase order came through from a client who used purchase orders. It appears that the claimant believed that he had obtained a sale to this client around about 23 May (perhaps 21 May, it does not matter) for a sum that amounted to £14,000, whereas the only purchase order that existed amounted to £6,000. This does not assist me in respect of whether the claimant knew that he was not entitled to payment after the termination of his employment.

25. In the respondent's written submission it was put that the respondent

suspects that the claimant put through the figure for May knowing that the sale was not confirmed, in order to hit the sales target for the month. I do not think that the point was put to the claimant in those terms, and I do not consider, having heard the claimant's explanation, that any imputation of dishonesty can be made against the claimant in this respect. It is not even clear to me that this was the intention of the submission so made (para 14 of the respondent's submissions).

Discussion and conclusions

26. The terms of the law are very straightforward in this area and are set out above. I have to consider whether at the relevant time there was a breach of contract and/or whether the sums were at the relevant time properly payable.
27. I have found that as at the date of termination of employment there was no breach of contract in respect of the commission, as it only becomes payable at a later date as of contractual right. So no breach of contract claim can be brought before the tribunals for these sums, without prejudice to the ability of the employee to bring a claim before another court in relation to any breach of contract which may have occurred at a later date.
28. I have also concluded that as at the date of the presentation of the ET1 there were no sums properly payable which were not paid. Hence there was no unlawful deduction from wages for the purposes of that legislation.
29. The payments sought do not arise out of a breach of contract which was outstanding as at the date of termination. I say nothing as to whether a breach of contract has arisen since then, as this is not part of my jurisdiction. However I have also concluded that as at the date of presentation of these proceedings, the payments claimed were not properly payable, because all of the payments which are sought by the claimant are dated (in terms of payment by the client) after these proceedings were issued.
30. There would of course be nothing to stop the claimant from issuing further proceedings in respect of this series of deductions, but that is a matter for the claimant.
31. My jurisdiction being confined in the way that it is I am compelled to dismiss the claimant's claim. I should like to thank the claimant and Ms Dalzel for their submissions and for attempting at any rate to try to keep proceedings within reasonable bounds given the brevity of the time allocation that was given.

Employment Judge O'Dempsey

Date 12 February 2020

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