EMPLOYMENT TRIBUNALS

Claimant: Miss C Nuttall

Respondent: Prosurance Solutions Ltd

Heard at: Manchester **On:** 11 August 2020

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr L Arevalo, Director

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent has made an unauthorised deduction from the claimant's wages of the gross sum of £1,500.

2. The claimant was dismissed in breach of contract in respect of notice and the claimant is entitled to damages in the gross sum of £750.

3. The respondent has also made an unauthorised deduction from the claimant's wages of the gross sum of £75 in respect of one day's annual leave.

4. The claimant's claim in respect of commission/bonus does not succeed.

5. The claimant has already been paid by the respondent the net sum of £1,794.24 which the respondent can set off against the amounts due under this Judgment. The outstanding amount due in respect of the total award of **£2,325**, after deductions for income tax and national insurance, must be paid within 14 days of the date of this Judgment.

REASONS

Introduction

1. The claimant was employed by the respondent from 14 October 2019 until 4 January 2020 as a telesales agent. She was dismissed by WhatsApp message sent by the respondent. The claimant brought claims for: the pay which she alleged was outstanding; holiday pay; notice pay; and pay in relation to commission/bonus.

Claims and issues

2. The parties attended a preliminary hearing on 2 April 2020 before Employment Judge Leach. The Order made following that hearing clarified the claims being brought by the claimant. The claimant was also ordered to provide some further particulars of her claim, which she provided on 22 April 2020. The respondent was required to provide confirmation of what was agreed and/or in dispute, which it did (at least to some extent) on 11 May 2020.

3. The claimant's claims as they were to be determined were as follows:

   (1) A claim for unlawful deduction from wages, for the wages due but not paid for December 2019;

   (2) A claim for breach of contract for failure by the respondent to give the required notice. The claimant claimed that she was entitled to four weeks' notice. It was highlighted at the preliminary hearing that, as the claimant had obtained alternative employment within that four week period, her earnings in her new employment would need to be taken into account in identifying the loss arising from the breach. As a result, the claimant claimed £750, representing the losses in the two-week period which would have been notice when she was out of work (prior to her commencing new employment);

   (3) A claim which was described as being for outstanding holiday payments, but which was in fact confirmed as being a claim for payment of £75 for one day's holiday taken on 1 January 2020, being a Bank Holiday. Accordingly, this was a claim for unlawful deduction from wages as the unpaid holiday pre-dated the termination of the claimant's employment; and

   (4) A claim for commission/bonus; that is, the claimant alleged that she did not receive commission/bonus payments that she said were due. The claimant received no such payments during her employment.

4. On 27th July 2020 the respondent paid the claimant £1,794.24. It contended that this satisfied the claimant's claims. The respondent asserted that this was based upon a gross a sum of £2,192.30 from which it said income tax and national insurance had been deducted (or was to be deducted). The claimant did not accept

this amount and it was not paid as part of any agreement or settlement terms. The claimant did not agree that this satisfied her claims.

Procedure and evidence heard

5. The claimant appeared in person at the hearing. The respondent was represented by Mr Arevalo, a director.

6. Following the case management hearing, standard orders were made which included that the respondent should provide all documents upon which it wished to rely by 15 May 2020. The respondent did not provide the documents required by the date ordered.

7. At the start of the hearing, the issue of documents was specifically addressed with the parties and there was an adjournment to ensure that all documents were provided. The claimant had sent some documents to the Employment Tribunal in advance of the hearing by email. Following a request from the Employment Judge, the claimant also provided copies of her full contract of employment with the respondent and of the WhatsApp messages to which she had previously referred. The respondent's representative produced a small file of documents for the hearing which he said contained everything relevant to the case. The Tribunal read these documents before the hearing commenced.

8. The claimant gave evidence and was cross examined. Mr Arevalo gave evidence for the respondent and was also cross examined. Neither party had prepared any witness statements.

9. Each party was given the opportunity to make submissions and did so, albeit that the submissions were relatively limited. Neither party made reference to any law.

10. At the end of the hearing the respondent's representative expressed a preference for judgment to be reserved as he did not wish to remain to await the decision. As a result, judgment was reserved and accordingly the Tribunal provides the judgment and reasons in this document.

Facts

11. The claimant was employed by the respondent under the terms of an employment contract dated 1 November 2019, signed by both the claimant and Mr Arevalo. The pertinent terms of that contract were as follows:

(1) At clause 6 in relation to holidays the contract says:

"The holiday year commences on 1st January and ends on 31st December. Holiday entitlement shall be 28 working days or pro rata for part of that year… The Employee is also entitled to all public and bank holidays…In the event of the employment being terminated other that at 31st December, the Company reserves the right to recover by deduction any holiday pay which represents holidays taken in excess of entitlement

to the date of termination. Unused holiday may not be carried forward without the written consent of the Company. 7 days holiday entitlement will be held to cover the Christmas Period."

(2) Clause 8 in respect of termination said that, where an employee had less than a year's service (as was the case for the claimant), the employee was entitled to four weeks' notice.

(3) The contract contained a statement that the claimant was entitled to a specific salary, but contained no reference whatsoever to bonus or commission.

12. It was Mr Arevalo's evidence that, at the start of the claimant's employment, the terms which applied in respect of bonus and commission were explained to her verbally. His evidence was that it would usually be two or three months before any payments were made. Payments were dependent upon the processes which needed to be followed for claims to be registered. Employees were paid £10 per claim. It was his evidence that it was explained that such payments were only due once the company received payment.

13. The claimant, in her evidence, accepted that she had understood that commission/bonus payments would be delayed. She could not recall the respondent stating that payments were only paid if income was received by the company. She was unable to provide any evidence whatsoever about what amount she was entitled to and/or why (in respect of bonus or commission).

14. It was not in dispute that the claimant worked each week Monday to Friday from the start of her employment and did not take any annual leave prior to 21 December 2019. The claimant worked the full three weeks for which the respondent's office was open in December 2019. The respondent's office was closed for seven week-days in December 2019, being 23-27, 30 and 31 December, when the claimant did not work. The 25 and 26 December were Bank Holidays. The parties agreed that the claimant had accrued entitlement to five days paid annual leave in the 2019 annual leave year. The dispute was whether or not the additional two days during which the office was closed in December 2019 were payable as a result of being Bank Holidays.

15. The 1 January was also a Bank Holiday. The claimant did not work on 2 or 3 January. It appears that the respondent's office was also closed on these days.

16. On 4 January the claimant was dismissed by WhatsApp message sent by Mr Arevalo. In the same WhatsApp message, he also told the claimant that she would not be paid sums due to her (at that time). In the exchange of WhatsApp messages, Mr Arevalo told the claimant that in respect of commission/bonuses she would be paid, saying *"yes as soon as I get paid … I will pay bonuses".*

17. The respondent produced a payslip for the claimant on 5 January 2020. This described the claimant as receiving £1,500 as gross basic pay from which income tax of £91.60 and employee national insurance of £93.72 had been deducted,

resulting in a net payment of £1,314.68. No such sum was actually paid to the claimant, nor does it appear that any payment was made to HMRC. The payslip made no reference to any deductions for annual leave or absence for which there was no entitlement, it recorded the claimant as being paid what was her full basic pay for December 2019.

18. Mr Arevalo's evidence was that the payslip of 5 January 2020 was not the right payslip. He stated that there was a correct payslip which, at the point he said this when he was being questioned by the Tribunal, he offered to try to obtain. The Tribunal determined that it was too late in the proceedings for further documentation to be provided even were that to be possible, in the light of the order made and the efforts at the start of the hearing to ensure that all documents had been provided. The Tribunal does not accept Mr Arevalo's evidence that this payslip was incorrect because: the payslip was provided by Mr Arevalo as one of the respondent's documents; there is no reference in any email or other document of a corrected or alternative payslip; and the Tribunal did not find Mr Arevalo to be a credible witness (at least in terms of his evidence about deductions and details of pay) for the reasons explained below.

19. The claimant received no further payments whatsoever. She commenced new employment on 20 January 2020, having been out of work for two weeks.

20. Mr Arevalo provided the Tribunal with a pre-action protocol letter which had been sent by the respondent to a business called Prosurance Ltd following non-payment by it of sums the respondent says were due. Mr Arevalo's evidence was that no payments were ever received. Mr Arevalo also provided correspondence with the liquidator appointed on behalf of Prosurance Ltd; his evidence was that he did not expect to receive any payments. These were the payments in respect of which the claimant would have received commission/bonus.

21. The Tribunal was also provided with emails exchanged between the claimant and the respondent prior to the hearing. In these emails, the respondent stated the £2,192 paid in July 2020 was calculated by reference to the claimant's entitlement to pay in December 2019 plus two weeks' notice, and that £398.06 had been deducted from that amount in terms of income tax and national insurance.

22. An email from the respondent's accountant dated 3rd June 2020 was provided to the Tribunal providing the breakdown for the figures possibly deducted (£229.98 income tax deducted and £168.08 NI). The breakdown only provided an income tax total and a national insurance total for the entire sum, and provided no calculation for the amounts. Whilst it is not for the Employment Tribunal to assess the income tax or national insurance liability, it was noted that the income tax figure included in the accountant's email was more than twice the amount of income tax supposedly deducted (or to be deducted) from the December pay, even though the total sum now paid was less than one and half times the amount. It was therefore unsurprising that the claimant did not accept the respondent's figures (without any explanation). It was also impossible for the Tribunal to know whether the correct net figure had been

paid (at least with regard to the sums the respondent accepted were due), as Mr Arevalo was not able to add any explanation to the accountant's email.

23. With regard to the deductions for tax and national insurance, Mr Arevalo's evidence to the Tribunal was inconsistent, confusing and led the Tribunal to find that he was not a credible witness on issues of pay and tax. Mr Arevalo initially stated that the amount of income tax and national insurance which had been deducted from the payment made to the claimant on 27 July 2020 had been paid to HMRC. He subsequently said that the company was waiting for the claimant to accept the payment, before making such payments to HMRC or accounting for the deductions made. When this inconsistency was highlighted to him, Mr Arevalo said that he did not deal with details of tax and national insurance and did not know whether the sums had actually been paid to HMRC, explaining that he left these matters to his accountant and/or to a director who was currently self-isolating.

24. The claimant's evidence was that she had contacted HMRC and had been informed that no such payments had been made by the respondent.

25. The respondent has never provided the claimant with a P45 following the end of her employment and no explanation whatsoever was provided for the failure to do so, save for Mr Arevalo saying that this was his accountant's responsibility.

The Law

26. The claim in relation to December's pay is made by the claimant under section 13 of the Employment Rights Act 1996. That section provides that an employer shall not make a deduction from the wages of a worker employed by him, unless certain provisions apply. The Tribunal is required to identify what sum was due to the claimant and whether that sum had been paid. If not, there has been an unlawful deduction from wages.

27. The respondent did not in fact dispute that there had been an unlawful deduction from wages, but rather it contended that its failure to pay wages due on 4 January 2020 had been rectified by the payment made on 27 July 2020.

28. In relation to the breach of contract claim for notice, the question for the Tribunal is whether the terms of the contract regarding notice were breached, what notice the claimant was contractually entitled to, and what were her losses arising from the breach.

29. The respondent did not appear to be disputing that the contract had been breached. It argued that only one or two weeks notice was due and that, in any event, the losses had been accounted for by the payment made on 27 July 2020.

30. The Tribunal also needed to determine how the terms of the claimant's contract of employment in relation to holiday applied to leave and, in particular, bank holidays. This was necessary to determine the claimant's entitlement when considering the unlawful deduction from wages claim in respect of December's pay. It also was necessary to consider this when determining whether the claimant was

entitled to pay for 1st January 2020. As identified in the hearing, this claim was also one to which section 13 of the Employment Rights Act 1996 also applied as it was a claim for a day of leave which had been taken during the term of the employment, and for which the claimant had not been paid.

31. Similar issues of law apply in relation to the claim for commission/bonus.

Conclusions – Applying the Law to the Facts

32. There is no dispute that the respondent made an unlawful deduction from the claimant's wages.

33. The only evidence available to the Employment Tribunal of the sum due for December is the payslip which was provided by both parties. That records the claimant as being entitled to the gross sum of £1,500. The Tribunal finds that there has been an unlawful deduction from wages of this amount.

34. Tax and national insurance will need to be deducted from that payment and accounted for by the respondent. It is not for the Employment Tribunal to determine the correct amount of tax and national insurance to be deducted, but the respondent should confirm to the claimant exactly what has been deducted and how that has been calculated. It is not clear to the Tribunal why the deductions to be made should differ from the deductions recorded on the payslip of 5 January 2020.

35. With regard to notice, the employment contract clearly provides that the claimant was entitled to four weeks' notice. She was given no notice of termination. The respondent therefore breached the claimant's contract of employment.

36. In the further and better particulars provided by the respondent in its email of 11 May 2020, it appears to contend that the inclusion of this provision in the contract was a mistake and it should not have been in the contract to begin with. Such an argument provides no meritorious defence to the claim. There was no evidence provided in the Tribunal hearing to support any argument that the contract document did not genuinely record the agreement reached with the claimant.

37. The claimant's employment was terminated with immediate effect by WhatsApp message on 4 January 2020. The claimant was contractually entitled to remain in employment for a further four weeks. As the claimant successfully mitigated some of her potential loss by obtaining new employment after two weeks, her losses are limited to two weeks pay. The amount claimed is £750 gross. The Employment Tribunal finds that to be the claimant's loss and accordingly the claimant is awarded £750 as damages for breach of contract.

38. As with the payment to be made for unlawful deduction from wages, deductions will need to be made for income tax and national insurance, which should be explained to the claimant when those deductions are made.

39. With regard to holiday and holiday pay, the Tribunal considered the terms of the employment contract as they are recorded above. The respondent's position was

that the contractual provision provided the claimant with the entitlement to 28 working days paid holiday each leave year, inclusive of Bank Holidays. In his submissions, Mr Arevalo stated that the second sentence of the contract on holiday pay made this clear. The claimant relied upon the subsequent sentence, that is (with the Tribunal's emphasis added): *"The Employee is **also** entitled to all public and Bank Holidays".* Her case was that the claimant was entitled under the terms of the contract to 28 days paid annual leave each year, plus payment and leave for bank holidays (in addition).

40. The Employment Tribunal finds that there is genuinely only one way in which the terms of the claimant's contract can be interpreted, and that is the interpretation upon which the claimant relies. The sentence quoted in the previous paragraph, particularly with the inclusion of the word *"also"*, can only mean that paid bank holidays are an entitlement in addition to the 28 days recorded earlier in the provision.

41. As a result of that finding, the Tribunal finds that the respondent was not able to make any deduction from the pay due for December in relation to annual leave. Mr Arevalo relied on his interpretation of this provision to say that the claimant was not entitled to two days pay for December 2019 and therefore was not entitled to the full amount recorded in the payslip. As a result of the Tribunal's interpretation of the contract, the claimant was entitled to full salary for December 2019 and no reduction should be made to the £1,500 awarded (as recorded on the payslip prepared by the respondent).

42. With regard to 2020, the Tribunal's finding also means that the claimant was entitled to be paid salary for 1 January, which was a Bank Holiday, as that is what is recorded in the contract. Accordingly the claimant was entitled to an additional £75 pay for 1st January, being the sum which the parties agreed was a day's pay and being an amount which the claimant was due and was not paid by the respondent. The Tribunal also finds that this sum was unlawfully deducted from the claimant's pay. As with the other sums, deductions for tax and national insurance will need to be made and the amounts deducted (and the calculation for doing so) will need to be confirmed to the claimant.

43. The sums awarded differ from those which the respondent used in making its payment in July 2020 and therefore the claimant must be entitled to some further payment in addition to that previously made. However, as was explained to the claimant at the hearing and accepted by her, she is not able to double-recover what has been awarded. She is entitled to retain the payment already made and will be entitled to a further amount. The respondent is entitled to offset the amount actually paid on 27 July 2020 against the awards made. However, as the Employment Tribunal is not able to understand the amount of the deductions apparently made, or indeed to understand whether any such deductions have genuinely been made by the respondent and accounted for to HMRC, the Tribunal has made the findings and awards outlined, with an offset to be made for the amount paid.

44. In relation to commissions and bonus, the claimant accepted in her submissions that the Tribunal did not have sufficient evidence available to make any award, as she was unable to explain what was due to her. Accordingly, this part of the claimant's claim does not succeed.

45. Even had the claimant not accepted this difficulty, the Tribunal would have found that there was a term of the claimant's contract that the respondent was only contractually required to make payment to her if it had itself received payment for the specific claim. The Tribunal does not accept the position stated in the respondent's pleadings, namely that any such payment was entirely discretionary, as this was not in fact what was evidenced by Mr Arevalo. Mr Arevalo was clear in his evidence that commission was payable on a particular basis and his WhatsApp message makes clear that commission/bonus would have been paid on that basis, had payment been received. However, Mr Arevalo's evidence in relation to what the claimant was told about bonus/commission is accepted as it is consistent with the Whatsapp message which says that payment will be made when the respondent gets paid. As the respondent has not been paid for such claims, no sum is due to the claimant.

Conclusions

46. As outlined above, and for the reasons given, the respondent did make unlawful deductions from the claimant's wages and did breach her contract. The claimant is entitled to wages due and damages for breach, totalling **£2,325**. The **£1,794.24** already paid by the respondent can be offset against the sum due.

Employment Judge Phil Allen

Date: 13 August 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 August 2020

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2400881/2020**

Name of case: **Miss C Nuttall** v **Prosurance Solutions Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **19 August 2020**

"the calculation day" is: **20 August 2020**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office