



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr S Locker-Townsend

v

Technology Sourcing Limited

Heard at: London Central

On: 21 September 2020

Before: Employment Judge Brown

Representation

For the Claimant: In person

For the Respondent: Ms F Mewies, Solicitor

JUDGMENT

The judgment of the Employment Tribunal is that:-

- 1 The Respondent failed to pay the Claimant 4.5 days' holiday pay accrued on termination of his contract. The Respondent shall pay the Claimant £510.53 gross for accrued holiday pay.**
- 2 The Claimant's claims for breach of contract and unlawful deductions from wages fail and are dismissed.**

REASONS

- 1. The Claimant brings complaints of unlawful deductions from wages, failure to pay holiday pay and breach of contract by failure to pay notice pay and failure to pay commission payments.**
- 2. I heard evidence from the Claimant and from Mr Farrar, the Respondent's Operations Manager responsible for HR including managing and administering**

the Respondent's commission scheme and the payment of commission to employees. There was a Bundle of documents. Both parties made submissions.

3. The parties agreed that Respondent had failed to pay the Claimant 4.5 days' holiday pay accrued on termination of his contract. They agreed that the Respondent should pay the Claimant £510.53 gross for this accrued holiday pay.

4. The Claimant claimed that the Respondent had failed to pay him commission which he was due during his employment.

5. Clause 10.2 of the Claimant's Employment Contract (Bundle page39) provided: "In addition to your basic salary, you may also be entitled to receive commission(s) on a monthly basis to be calculated in accordance with the Company's commission policy as amended from time to time details of which will be provided to you by the Company. For the avoidance of doubt it is agreed that you shall have no contractual right to any commission payment under this clause".

6. It was therefore an express term of the Claimant's employment that the Claimant had no contractual right to a commission payment.

7. However, if he did have a contractual right, it was to commission calculated in accordance with the Respondent's commission policy which was expressly incorporated into the contract of employment.

8. I accepted Mr Farrar's evidence that the relevant policy was available on the Respondent's HR portal. The Claimant agreed that he had access to the portal. In any event, he signed a contract saying that any commission payment would be calculated in accordance with the commission policy.

9. The policy contained provisions regarding eligibility for commission payments. Its clause "**Eligibility**" provided,

" 1. The scheme applies to employees of Technology Sourcing Ltd employed in the UK.

2. This scheme applies to permanent and contractor placements.

3. To be eligible for payment an employee should be in the Company's employment and not under notice of termination (whether served by the employee through resignation or by the Company)." (Bundle page 32).

10. The policy also contains provisions regarding payment of commission, "**Payment**. Any commission due is paid in arrears in the payroll two months after the candidate placement starts providing that the placement invoice has been paid by the Client to the Company. For the avoidance of doubt, the trigger for commission payment entitlement is the candidate start date and is only eligible for payment when the invoice for the placement has been paid." (Bundle page 32).

11. It was not in dispute that, the Claimant was given notice of termination of contract orally on 18 March 2020 and by letter of 19 March 2020.

12. The Claimant said that he was claiming commission in respect of 2 candidate placements namely: a candidate to client Itelligence AG; and a candidate to client Heidelberg Cement.

13. The Claimant alleged that he should have been paid commission in respect of both placements in his March 2020 pay. For example, in paragraph 6 of his witness statement, he said that he should have received both bonus commission payments in March 2020.

14. The Respondent disputed that the commission payments would both have been due to be paid in March 2020.

15. Nevertheless, it was not in dispute that the Claimant was under notice of termination of his contract at the time of his March 2020 payroll pay.

16. Under the eligibility terms of the commission policy, the Claimant was not eligible to receive payment of commission in his payroll pay in March 2020; he was under notice of termination at that time.

17. I was satisfied that there was no custom or practice which implied any different interpretation regarding payment of commission during notice period. Mr Farrar said that the Respondent's practice was not to pay commission to employees during their notice period. The Claimant did not contradict this. I heard no evidence of industry custom and practice on the payment of commission during notice periods.

18. I therefore decided that the Claimant did not have a contractual right to be paid commission under his contract of employment. Even if he did have such a right, it was expressly subject to the terms of the Respondent's commission policy which provided that the Claimant was not eligible to receive commission payments when under notice.

19. The Respondent did not breach its contract when it failed to pay the Claimant the commission he claims.

20. Further, insofar as the Claimant brings a claim for unlawful deductions from wages, "wages" are defined in s27 *ERA 1996* as "sum payable to the worker in connection with his employment including – (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise." By s13(3) *ERA 1996*, "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 ... the amount of the deficiency shall be treated ... as a deduction made by the employer..".

21. As commission was not "properly payable" to the Claimant under the terms of his contract, the Respondent did not make any deduction from the Claimant's wages when it failed to pay him his commission.

22. The Claimant confirmed at the start of the hearing that he was not bringing a claim for notice pay.

23. The Respondent did not breach the Claimant's contract, nor did it make unlawful deductions from his wages.

Costs application

24. At the end of the hearing, the Respondent sought to make an oral application for costs against the Claimant. The Respondent was seeking some £6,000 in costs.

25. The Claimant said that he was not in a position to respond to the costs application today. The Claimant is a litigant in person.

26. I considered that it was fair to the Claimant to require the Respondent to put its application in writing, on proper notice to him, so that he could have time to consider his response and to take advice.

27. I did not hear the Respondent's costs application today. If it wishes to proceed with it, it shall make a written application.

Employment Judge Brown

Dated: ...21 September 2020.....

Judgment and Reasons sent to the parties on:

22/09/2020

For the Tribunal Office