EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Mr J Crauford-Taylor	**AND**	**LEMA UK Ltd**

Heard at: London Central **On**: 12 November 2020

Before: Employment Judge Brown

Representation

For the Claimant: **Mr D Brown, Counsel**
For the Respondent: **Mr G Burgess, Solicitor**

JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. **The Respondent did not make unlawful deductions from wages, nor did it breach the Claimant's contract, when it failed to pay him 1% commission on shop sales after 1 June 2018.**

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REASONS

The Complaints

1. The Claimant brings complaints of unlawful deductions from wages and breach of contract in relation to unpaid commission. The Respondent's case is that the contract term as to commission was varied by agreement.

2. The amount in dispute was agreed as £12,783.61. The commission relates to 1% of shop sales, excluding the Claimant's personal sales.

3. The parties agreed that the Claimant's complaints of unlawful deductions from wages and breach of contract should be determined at this Open Preliminary Hearing. The Claimant has brought other claims of unfair dismissal and disability

discrimination, which will be determined at a Final Hearing on 24 – 26 February 2021.

4. The parties agreed that, in respect of a claim in contract, time runs from the date of termination. It was also agreed that the claim for unlawful deductions related to a series of deductions, during which there was no break of more than 3 months. The series of deductions claimed was also for a period of less than 2 years. Accordingly, there were no issues of time limits in this claim.

This Hearing

5. I heard evidence from the Claimant and from Mr Salon. I had the following documents: Witness statements of Claimant (and exhibit) and Mr Salon, the pleadings, contract and commission documents, financial information documents as follows: "April v Budget", "2018 commission", "2019 commission", "Sales 2016 to April 2018", "June 2018 letter showing properties", and the Claimant's schedule of loss.

The Facts

6. I found the following facts.

7. Mr Salon is the Managing Director of the Respondent Company, LEMA UK Ltd. LEMA UK Ltd is the UK subsidiary of an Italian furniture manufacturing business. Mr Salon reports into the President of the Italian parent company, Angelo Meroni.

8. The Respondent Company was established in the UK in 2015 and has a flagship store in the Kings Road in London, selling to the domestic retail market, which the Respondent called the "Home Division".

9. The Claimant was employed by the Respondent from 15 November 2016 as the General Manager of the Kings Road store. The terms of his employment were set out in a letter dated 16 September 2016. The letter stated that the Claimant was employed on a basic salary of £50,000 per year. He was also entitled to 2% commission on his own shop net sales and 1% commission on all shop net sales in the Home Division, excluding his own sales. Both sets of commission were payable on a monthly basis, in arrears.

10. I accepted Mr Salon's evidence that the store needed to turn over £2 million a year to cover its overhead costs. For business premises in a premier retail location, that appeared to be a realistic necessary turnover figure.

11. From spreadsheets produced to the Tribunal, in the year to December 2016 the Respondent's Home Division had sales of £884,000. A projected sales budget of £1.5 million was set for the calendar year 2017. The sales figures for 2017 were £889,000, which was 42% below budget.

12. In late 2017 the Claimant asked Mr Salon for a pay rise, because the Claimant considered that he was undertaking more work than the parties had originally

envisaged. He also told Mr Salon that he had had an offer of work from another company.

13. Mr Salon agreed to increase the Claimant's salary with effect from 1 January 2018 to £60,000 per annum.

14. There was a dispute of fact as to what was said during this conversation about commission.

15. The Claimant told me that he had offered to forego his 2% personal commission if the Claimant did not increase sales, but that Mr Salon had agreed to give the Claimant his pay rise without any reductions in commission. They agreed that this would be reviewed in 6 months. The Claimant told me that nothing was mentioned about budget as part of this agreement.

16. Mr Salon told me that the Claimant, entirely without prompting, had said that, because he understood the challenges for the Company, he would give up the 1% commission on shop sales from 1 January 2018. Mr Salon told me that, as a gesture of goodwill, Mr Salon said that the Claimant could retain the shop sales commission but said that, if things were not going well, he would review this.

17. Mr Salon wrote to the Claimant on 18 December 2017 and set out what had been agreed, including the £10,000 annual salary uplift. The commission terms set out in that letter were cut and pasted from the Claimant's original offer letter, so it was clear that no change had been agreed at that point. At the end of the letter, it was stated, "As discussed, we will review the above terms after six months (in July 2018) to make sure that the targets agreed for the year 2018 are achieved."

18. Regarding the dispute of fact regarding the precontractual negotiations, it seemed to me that was possible that the 2 men were talking at cross purposes about which commission the Claimant might forego.

19. However, the 18 December 2017 letter said, at its end, that there would be a review of the terms after six months to make sure that the "targets agreed for the year 2018" are achieved. It seemed to me that this was more likely to refer to the agreed sales target/budget for 2018, rather than a generalized agreement that sales needed to increase by an unspecified amount.

20. It was not in dispute that target sales for 2018 were set at £1.8M. The Claimant told me that this figure was completely unrealistic and had been imposed on him by Mr Salon. Mr Salon said that it was not unrealistic to expect a rapid expansion ins sales as the company was new to the UK and that other similar shops on the Kings Road had similar turnovers. Whatever the Claimant's feelings about the £1.8M target, he did agree to it.

21. The Claimant continued to work for the Respondent and received his increased salary.

22. Sales figures in the early part of 2018 increased compared to 2017, but were well short of the sales required to meet a £1.8M budget for the year. In January - April

2018 the Home Division had sales of £288,000. In the period January - April 2016 sales had amounted to £328,000. In January – April 2017 sales had been £270,000.

23. Mr Salon decided that it was not sustainable for the Claimant to continue at the increased salary, but also retain the commissions for both his own sales and the shops sales.

24. The parties agreed that Mr Salon had a meeting with the Claimant on about 15 May 2018 and that Mr Salon told the Claimant, in that meeting, that the Claimant would need to give up his 1% commission on all shop sales going forward.

25. Mr Salon told me that the Claimant was in full agreement to this and said it was fine.

26. The Claimant's evidence was very different. He told me that Mr Salon called him into the office and told him that sales were down against the budget, so he was going to take away the 1% commission the Claimant received from all Home Division sales; he had a letter ready, which he gave the Claimant. The Claimant responded that the sales were actually up. The Claimant told me that Mr Salon then responded that the sales were down on the budget. Mr Salon said that the Claimant had agreed to losing the 1% store sales commission in December 2017 if there was a fall in sales as against the budget. The Claimant disagreed - and said that he had agreed to give up his 2% personal commission. Mr Salon said that the Claimant had remembered it wrongly.

27. The Claimant told me that he was upset and questioned Mr Salon again the next day. Mr Salon insisted that the Claimant had remembered the agreement wrongly. The Claimant told me that later that day the secretary, Margaret, had a quiet word with the Claimant and told him that, when she had first seen the May 2018 letter, before it was given to the Claimant, the letter had just said that "sales" were down. Margaret had reminded Mr Salon that sales were up and Mr Salon then changed the letter to say that sales were down "against the budget".

28. Mr Salon gave evidence that Margaret was not his secretary and would never have seen the relevant letter. He said that Margaret was the Finance Manager.

29. On 20 June 2018 at 3.34PM Mr Salon emailed the Claimant. He said, "Further to our meetings, please find attached confirmation of our gentleman agreement."

30. The Claimant accepted that that email was sent to him and that, attached to that email, was a letter dated 15 May 2018. The letter stated, "Following our recent meetings it has been agreed from both parties that due to the poor sales performance of the Home Division during the first part of the year 2018 in comparison with the budget, from 1st June 2018 the 1% commission on all shop sales will not be paid to you. The 2% commission will remain under the terms as per previous letter dated 18th December 2017".

31. The Claimant did not reply to that email, whether in writing or verbally.

32. He did not object to the letter in June 2018, then, or afterwards. He did not say that he disputed the terms under which he was working. He did not say that there had been no agreement to remove the commission.

33. The Claimant told me that he felt intimidated by Mr Salon and that, because of his dyslexia, he felt unable to argue his case.

34. I had to decide whose evidence to accept regarding what was said between the Claimant and Mr Salon in May 2018.

35. On the balance of probabilities, I preferred Mr Salon's evidence.

36. I did so for a number of reasons. Despite receiving the email of 20 June 2018, and the letter attached to it, saying that it had been agreed by both parties that from 1st June 2018 the 1% commission on all shop sales would not be paid to the Claimant, the Claimant never contradicted that email in writing or verbally. If he had not agreed this, it would have been a natural step to reply, stating this.

37. I did not accept that the Claimant was actually intimidated by Mr Salon; the Claimant had negotiated and received a substantial £10,000 salary increase in December 2018. He had told Mr Salon that he had had an offer of work from another company and had used this to achieve his pay rise. That indicated to me that the Claimant was able to be assertive in his dealings with Mr Salon.

38. While I took into account that the Claimant is dyslexic and was, perhaps, less confident than other people in argument, I considered that, given the Claimant's negotiation capabilities as demonstrated in December 2018, he would have been able to send a brief email, stating that there had not been an agreement.

39. I considered that the Claimant's failure to contradict the letter sent to him on 20 June 2018, at any time thereafter, was strong evidence that the contents of the letter were correct – that the Claimant had agreed to forego his1% shop sales commission from June 2018.

40. The Claimant was employed for a further 15 months and never contradicted the email sent on 20 June 2018.

41. Furthermore, I considered that an agreement to forego his 1 % shop sales commission was consistent with the fact that Mr Salon's letter of 18 December 2017 stated that there would be a review of the Claimant's pay terms "to make sure the targets agreed for the year 2018 are achieved". It seemed to me that the review in relation to "targets" was more likely to have referred to the 2018 agreed budget. It was not in dispute that the 2018 sales were, in fact, well behind budget, so the Claimant must have expected a review of his pay terms.

42. I also preferred Mr Salon's evidence regarding Margaret – that she is a Finance Manager and not his secretary. I considered that Mr Salon, as Managing Director, was likely to know the capacities in which employees were employed. I decided, on the balance of probabilities, that Margaret had not seen a letter in May 2018 and had not contradicted it. From the Claimant's evidence, Margaret and he were

on good terms and he may well have had some discussion with her about his commission and sales, which he now misremembers.

43. I accepted that the Claimant was unhappy about the removal of his commission, and he may have discussed this with other staff, but I concluded on the evidence that he did agree to forego his commission orally on 15 May 2018, and that the agreement was confirmed in writing on 20 June 2018.

44. The Claimant continued to work for the Respondent until September 2019. Throughout the period from the commission change coming into effect in June 2018 and his employment terminating in September 2019, the Claimant continued to receive his base salary of £60,000 plus 2% commission on his own sales. There was never any discussion after May 2018 of the Claimant having the 1% commission on Home Division sales reinstated.

Relevant Law

45. By *s13 Employment Rights Act 1996* a worker has the right not to suffer unauthorized deductions from wages. By *s27 ERA 1996* "wages" is defined. By *s27(1),* "In this Part "wages", in relation to a worker, means any sums 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. …" .

46. By *Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994* the Employment Tribunal has jurisdiction with regard to contractual claims arising or outstanding at the termination of the employment of an employee.

47. Variation of a contract of employment can be expressly agreed between the parties. In some circumstances, agreement to vary can be implied.

48. Where an employer proposes new terms, putting the onus on to the employee to object, failure to do so can amount to acceptance by acquiescence in certain circumstances.

49. In *Solectron Scotland Ltd v Roper* [2004] IRLR 4 EAT, Elias P said,

'`The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the

new terms. Accordingly, he cannot be taken to have accepted the variation by conduct."

50. In *Abrahall v Nottinghamshire County Council* [2018] EWCA Civ 796, [2018] IRLR 628, Underhill LJ reviewed the case law and at [87]–[89] said that:

(1) An inference of acquiescence must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in *Solectron* used the phrase '*only* referable to'. That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt.

(2) Protest at a collective level may be sufficient to negative the inference that by continuing to work individual employees have accepted the changed terms, especially where that is the normal means of negotiating terms, and so individual objection is not always required.

(3) The reference in *Selectron* to acceptance possibly arising 'after a period of time' may cause problems of definition, but such difficulty may have to be faced.

51. In deciding that there had not been acceptance in that case, Underhill LJ at [102]–[104] identified 3 relevant factors:

(4) The changes had been wholly disadvantageous to the employees; in such a case it would be inherently more difficult for an employer to establish acceptance than in a 'mixed' case of compensating advantages in an overall deal.

(5) The fact of no individual objection had to be seen in the light that it had never been put to the employees that their agreement was actually needed - the change had simply been imposed.

(6) A Union's decision not to hold the industrial action ballot was not to be construed as positive evidence of acceptance in that case.

Discussion and Decision

52. I have decided, on the facts, that the parties orally agreed to vary the Claimant's contract terms on 15 May 2018, to remove his entitlement to 1% commission on shop sales.

53. Accordingly, there was no breach of contract, nor was there an unlawful deduction from his wages when the Respondent did not pay him such commission on sales after 1 June 2018.

54. Even if there was not an express contractual variation on 15 May 2018, I considered, applying In *Abrahall v Nottinghamshire County Council* [2018] EWCA

Civ 796, [2018] IRLR 628, that the Claimant agreed to his commission being reduced in this way, when he failed to object to a letter setting out the reduction on 20 June 2018. I considered that his conduct, viewed objectively, clearly evinced an intention to accept the altered terms. I did not consider that there was any (reasonable) doubt in the matter. The change was specifically set out in writing to the Claimant and he did not, at any time thereafter, indicate any objection to it. Furthermore, I considered that, considering the 18 December 2017 letter together with the June 2018 email, the changes were not wholly disadvantageous to the Claimant; he had received a £10,000 salary increase from January 2018, but had agreed to a review of his contractual terms in relation to sales performance. Sales were substantially below budget and a review must have been anticipated. The Claimant continued to receive the increased salary throughout his employment.

55. The Claimant's claims for unlawful deductions from wages, and breach of contract, fail.

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Employment Judge **Brown**

Date: 11 November 2020

SENT to the PARTIES ON

13/11/2020..

FOR THE TRIBUNAL OFFICE