



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Jackson

**Respondent:** Harrods Limited

**Heard at:** London Central Employment Tribunal **On:** 4<sup>th</sup> February at 10am

**Before:** Employment Judge Hopton

**Appearances (by video):**

**For the Claimant:** In person

**For the Respondent:** Ms Greenley (Counsel)

## RESERVED JUDGMENT

The judgement of the tribunal is that:

1. The respondent's application to extend time to file a response is allowed.
2. The claimant's application to amend his claim to include breach of contract is allowed.
3. The claimant's claims for breach of contract and unlawful deductions from wages do not succeed and are dismissed.

## REASONS

1. This was a remote hearing to which the parties did not object. The form of remote hearing was V, video, by Cloud Video Platform. A face to face hearing was not held because it was not practicable due to the coronavirus pandemic and the temporary closure of Victory House.

**Preliminary matters**

2. It was unclear if the ET3 had been accepted by the tribunal. This had been submitted late, along with an application to extend time.

3. The claimant made an application to include breach of contract in his claim.
4. The ET3 was accepted and the claimant's application was allowed. Reasons for these decisions were given orally at the hearing and the parties are entitled to ask for written reasons within 14 days.

### Claims and issues

5. The claimant was employed by the respondent as a Senior Account Executive from 04/11/2019 to 07/02/2020. Part of his remuneration included a commission/bonus scheme (I was told that commission and bonus were used interchangeably and had the same meaning). The claimant brings claims for breach of contract and unfair deduction from wages on the basis that he was underpaid commission.
6. The percentage rate of commission is not contested. The issue is whether the claimant had a contractual right to a commission payment, or whether the payment was discretionary. The claimant says he was owed commission based on his annual salary. The respondent says the commission payments were discretionary and that the discretionary payments were based on his monthly salary. The parties agree that the amount of commission the claimant actually received was based on his monthly salary.

### Procedure, documents and evidence heard

7. I was referred to an agreed bundle of 136 pages, and witness statements from the Claimant and from Ms John, the Respondent's Resourcing Manager, both numbering 42 paragraphs.
8. I heard oral evidence from the claimant and from Ms John.

### The facts

9. These findings are confined to the facts relevant to the legal issues.
10. Before accepting a role with the respondent, the claimant had discussed the potential role with Ms Atherton, Resourcing Specialist. Ms Atherton wrote to the claimant on 16 September 2019 (p80) to confirm that there would be a bonus scheme and that the salary on offer was in line with the claimant's expectations. The claimant asked for further information about the commission and bonus relating to his role and Ms Atherton provided a document on 24<sup>th</sup> September which set out details of bonuses available in a table (the 'Table'). The claimant queried the Table on 30<sup>th</sup> September. He said "*I'm a bit confused, which column am I looking at? I'm just trying to work it out so I have an idea of commission/bonus*" (p93). Ms Atherton replied on the same day to say "*re the bonus it's the right-hand column. Just a note, the director is currently reviewing the commission structures for 2020 with a view to delivering a higher financial reward for top performance.*"
11. I reproduce the Table below:

---

**From:** Elliot Jackson [<mailto:elliottlej@icloud.com>]

**Sent:** 30 September 2019 11:40

**To:** Atherton, Olivia

**Subject:** Re: Your Offer From Harrods

**CAUTION:** This email originated from outside Harrods. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Hi Olivia,

Thanks very much for your email, this all looks very good - I just have a few quick questions if that's ok?

With the season ticket loan, is this the scheme where it's paid for upfront by

12. The claimant says he understood the Table to mean that he would be entitled to a percentage of his annual salary each month. He says that he accepted the role on that basis.
13. Following his correspondence with Ms Atherton on 30<sup>th</sup> September the claimant had a further email from her on 1st October which attached a contract of employment (p52-62).
14. The contract confirms his gross basic salary and states "*during your employment, you will have the opportunity to participate in a discretionary commission or bonus scheme – as detailed in the attached terms and conditions of employment.*"
15. There is more detailed information in the terms and conditions of employment. Amongst other things, they state: "*you should ask your line manager for details of the commission or bonus scheme as it applies to you and your division*", and "*whether you qualify or not for payment of commission or bonus will be determined by the company in its absolute discretion... Your participation in and the benefit of the commission or bonus scheme in a particular Financial Year does not give you a contractual entitlement to commission or bonus, which is payable solely at the Company's discretion from time to time.*"
16. The claimant contends that the Table was implied into his contract of employment.
17. The respondent says that "*Paid Monthly*" in the Table above means that the percentage payable is a percentage of the monthly salary rather than the annual salary. The respondent refers to the contract of employment which the claimant signed after his correspondence with Ms Atherton. Ms John referred to the terms and conditions of employment at p55-62 which state at p.57: "*this agreement replaces any previous agreement or arrangement between you and the Company.*" She pointed out that the offer letter states it should be read "*in conjunction with the full Terms and Conditions of Employment*" (p.53).

18. The respondent also referred to a document entitled Bonus Guidelines 2019 at pages 74-77. This contains full details of the bonus scheme. It states: *“the exact amount of monthly bonus payment for 2019 will be based on your actual base monthly earnings each month excluding overtime and any extraordinary payments.”* The claimant said that he was not aware of this document until these tribunal proceedings, and that it had not been provided to him before or during his employment. He said he had asked his line manager about the scheme and she had not directed him to this document. Ms John gave evidence that the Bonus Guidelines 2019 was on the respondent’s intranet, known as Omnia, and that it was normal practice for a line manager to go through this document with a member of staff who earned commission. The claimant accepted that he was familiar with Omnia and used it in his day to day work.
19. Ms John also referred to a letter with the title ‘Your bonus scheme’ at page 110. This was a letter sent to all staff in January, before the claimant started working at the respondent. This reproduces the Table and includes some further explanatory text which refers to the Bonus scheme terms and conditions being available on Omnia. The respondent and claimant agree that the claimant was not provided with a copy of this letter.
20. I was also referred to three documents (p103, 105, 109) which showed the commission paid to the claimant and the other members of his team. Apart from one higher payment to one individual, most of the team were paid comparable bonus amounts to the claimant.

## **Law**

21. The claimant claims breach of contract under article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and unfair deductions from wages under s.13(1) Employment Rights Act 1996.
22. Whether the policy document is by implication part of a contract has been the subject of much litigation. In order for the Table to be implied into the contract, it must have been the intention of the parties to include the Table as a term at the time the agreement was made. The inclusion of the Table must be: (a) necessary in order to give the contract business efficacy; (b) normal custom and practice to include it; (c) so obvious the parties must have intended it. (d) The intention to imply the term must be demonstrated by the performance of the contract.

## **Conclusions**

23. There were a number of contested factual disputes in this case. However, the only relevant issue is whether or not the Table formed part of the claimant’s contract of employment.
24. The Table did not form part of the claimant’s contract of employment. The claimant was sent a contract of employment on 1 October, which he signed on 3<sup>rd</sup> October. The contract does not include the Table, and makes it clear that it replaces any previous agreement between the parties and that the bonus scheme was discretionary. It directs employees to contact their line manager for details of the relevant bonus scheme.

25. There was no intention from the respondent for the Table to be part of the contract – there was expressly the opposite intention. The Table was not necessary in order to give the contract business efficacy – the contract of employment made it clear the bonus scheme was discretionary. The Table was therefore not a term that the parties had obviously intended to include.
26. The Table was not included by custom and practice. The respondent’s normal practice was to pay employees in the claimant’s team with reference to the Bonus Guidelines, and based on their monthly salary. There was also therefore no demonstration that the Table was intended to be implied into the contract, quite the opposite.
27. Whether the Table was misleading, the claimant was aware of the Bonus Guidelines on Omnia, or the claimant’s expectations of the bonus amount were reasonable, are therefore not relevant to the conclusions in this case.
28. The failure to pay the claimant bonus payments based on his annual rather than his monthly wage is not therefore a breach of his contract.
29. It also follows that the respondent did not make a deduction from the wages of the claimant, as there was no agreement between the parties that the claimant should be paid bonus based on his annual salary and he was paid commission in accordance with the discretionary guidance in the ‘Your Bonus Scheme’ letter and the Bonus Guidelines 2019.

---

**Employment Judge Hopton**

8<sup>th</sup> February 2021

**Date**

JUDGMENT & REASONS SENT TO THE PARTIES ON  
16 February 2021

.....

.....

FOR THE TRIBUNAL OFFICE