



EMPLOYMENT TRIBUNALS

Claimant

Mr G Sullivan

AND

Respondent

Tony McDonagh & Co Ltd

HEARD AT:

Watford Tribunal Centre

ON:

27 January 2021

BEFORE:

Employment Judge Douse (Sitting alone)

Representation:

For Claimant: In person

For Respondent: Mr G. Hine, Solicitor

RESERVED JUDGMENT

1. The claim for unlawful deduction of wages partially succeeds.
2. The claim for breach of contract partially succeeds.
3. The respondent is ordered to pay the claimant the gross sum of £31.06 in respect of his claims. If the respondent pays the tax and national insurance due to HMRC on this payment, payment of the net amount will meet the judgment debt.

REASONS

Claims and issues

1. In a claim form dated 24 September 2020, after a period of Acas early conciliation from 8 September 2020 to 24 September 2020, the claimant brought claims for unlawful deduction of wages (unpaid commission) totaling £3,881.97, and breach of contract. The respondent defended the claims in a response dated 5 November 2020.
2. The claim for breach of contract appeared to have been pleaded as constructive dismissal, with the claimant claiming for compensation in relation to reduced salary and commission. I explained to the claimant that as he had been employed by the respondent for less than 2 years, he did not have the required length of service for a constructive dismissal claim. The claimant understood that he could not claim for those elements as part of his breach of contract claim, and that these would not be considered in the hearing.
3. The respondent had prepared a list of issues which were sent directly to me by email at the start of the hearing. These were:
4. Unpaid commission
 - 4.1 the interpretation of the contractual provision (33).
 - 4.2 Whether the items claimed represent new business
 - 4.3. Whether they were introduced and placed by the Claimant
 - 4.4. Whether the company earned commission on the business, in which the Claimant is entitled to share (for Alarm Communications only)
5. As detailed below, the Respondent conceded that the Claimant was involved with the placement of all of the items, so satisfied that aspect for each item claimed.
6. What then remains is whether or not each item was new business, and if the claimant introduced that business.

Procedure, documents, and evidence heard

7. The case was listed for a 2-hour hearing, and was converted to a hearing via CVP due to the current pandemic.
8. Just before the hearing, the claimant notified the respondent that there were still a number of documents that had not been disclosed to him.
9. The claimant confirmed to me that the majority of the missing documents related to placement of the products.

10. I asked the respondent what their position was in relation to 'placement' of the items - they conceded that the claimant had been sufficiently involved with placement of all the claimed items that this was no longer an issue.
11. I therefore decided that those documents were not necessary for the claimant to have for the hearing.
12. The claimant maintained that there were still some other documents that related to the issues for the introduction aspect of some of the items. The respondent submitted that the absence of these could negatively affect the respondent's case as much as support the claimant's, and would go to the weight placed on the respondent's account. The respondent was happy to go ahead on this basis.
13. I explained this to the claimant, and asked if he was happy to go ahead on that basis or want me to consider an application to adjourn the hearing to another date so that the missing documents could be provided. The claimant confirmed he was happy to go ahead.
14. There was an agreed bundle of 147 pages. Page references in this judgment are to the agreed bundle.
15. The tribunal heard evidence from the claimant on his own behalf, and from Mr Sean McDonagh – Managing Director - and Mr James McDonagh - Director - of the respondent company.
16. There was a signed witness statement on behalf of the claimant from Mr Greg Garner, dated 13 January 2021, but Mr Garner did not attend the hearing.

Findings of facts

17. The respondent is an insurance brokerage.
18. The claimant was employed by the respondent from 14 January 2020, as a Commercial Account Executive. His employment ended by resignation on 31 August 2020.
19. During interviews for the position in October 2019, there were discussions about the claimant bringing business from clients of his previous employer once the restriction on this ended. There were also conversations about the nature of the work, including cross-selling new products to existing clients of the respondent.
20. The claimant signed a contract of employment on 14 January 2020.
21. The claimant's contract, at clause 8.1, provides for a basic salary, plus:

“50% of earned commission on new business with an annual term, you introduce and place...” (33)

Commission

22. The claimant says that 'earned commission' means *earned income*, so includes fees earned by the respondent in the course of a transaction.
23. The respondent says this is not the case, and that if a share of fees was also to be paid to the claimant, the contract would specify this.
24. I consider this aspect in more detail, and make relevant findings of fact, in relation to the client Alarm Communications below.

New business

25. 'New business' is not defined in the contract. The claimant says it includes a contract for a new product with an existing client – this is based on pre-employment discussions regarding cross-selling of products to current clients being capable of generating commission for the claimant.
26. The respondent accepts that there may have been conversations about cross-selling during interviews, but submits that the provision in the contract, which the claimant signed, is what is relevant. They say new business means an entirely new client to the company, and that if it had meant to include a new product the contract would have used this term.
27. I find, as a matter of fact, that 'new business' is a broad term that is not limited to a new client.

Introduce

28. 'Introduce' is not defined in the contract. The usual meaning of 'introduce' is to bring something new into operation or use.
29. The claimant says that where he was in correspondence with a customer, and working to secure quotes, then he is responsible for introducing that business.
30. The respondent says that the claimant is paid a salary to do work at the instruction of others, and that only business that flows solely from the claimant's contacts is capable of attracting commission.
31. The claimant created spreadsheets of work, which included a column headed 'source' (60 – 71). In this column, the claimant distinguishes between 'Own', 'Cold Calling', and 'T McDonagh (existing client cross-sell)'.
32. Where a source is identified as 'Own' there is often an accompanying entry in the 'Notes' column that refers to 'Ex-client'.
33. I find, as a matter of fact, that 'introduce' in this context refers to the source of the new business being from the claimant.

Place

34. 'Place' is not defined in the contract. However, the respondent agrees that the claimant was involved in the placement of all of the items claimed, so I make no further findings in relation to this.
35. The contract states that salary and commission will be paid in arrears on the 24th of each month. The claimant therefore expected to be paid commission automatically.
36. The respondent says that the claimant's entries on their system were incomplete, preventing any commission payments that may have met the criteria being generated anyway.
37. The claimant says that when he did not receive expected commission payments, he raised these at meetings with his line manager Penny Malloura, who told the claimant she would raise the issues with Sean McDonagh. No records or notes of the meetings with Penny Malloura are in the hearing bundle, however I find it highly likely that the claimant did raise non-payment of commission with his line manager during his employment.
38. Sean McDonagh says this was never brought to his attention. In his witness statement he refers to discussions with Penny Malloura in which she denies the claimant raising issues with commission during his employment. However, we have no direct evidence from Penny Malloura.
39. In any event, the claimant did not raise the issues with commission outside of the one-to-one meetings with Penny Malloura. He did not make a formal complaint, or raise a grievance through the respondent's grievance procedures.
40. The claimant says he resigned because of the issues with commission. Unfortunately, the resignation email itself is not reproduced in the hearing bundle.
41. In a later email communication on 1 September 2020, with Caroline Mooney, the claimant says he is *"sorry that the role was not in line with what was discussed at interview stage or post acceptance."*
42. In relation to the specific items claimed:

Alarm communications

43. The client was known to the respondent following a previous quote in 2019.
44. The respondent's financial controller, Roger Marvin, has a family link to the client and provided contact details to the respondent.
45. The respondent provided the claimant with the client's contact details, and requested that he make contact.
46. The claimant made initial contact via email on 5 February 2020, where he referenced being passed the contact details.

47. It is common ground that during negotiations, it was agreed that a fee would be charged in lieu of commission. This approach was suggested by James McDonagh (49-51).
48. The policy was incepted on 20 April 2020.
49. A fee of £7000 was earned by the respondent.
50. The claimant's spreadsheet identifies this client as 'Own' source (63).
51. The claimant expected to be paid commission of £3500 in May 2020.
52. The claimant says that it is common practice in the insurance industry to charge fees in lieu of commission in order to win business, but as the respondent is still earning *income* from the transaction, he is entitled to his share of this.
53. The respondent says that fees and commission are completely different. 'Fees' are flat amounts charged for work, administration and advice provided to customers prior to a policy being secured, whereas 'commission' is an amount paid to brokers by insurance companies for policies secured. The respondent relies on the contract of employment, saying it clearly states the claimant will earn a share of earned commission – there is no reference to fees.
54. 'In lieu' means 'instead of' - there is no ambiguity in this term. I therefore find, as a matter of fact, that 'fees' are completely distinct from 'commission'.

Ceren Construction

55. On or before 22 January 2020 Greg Garner was dealing with the quotations for this client (109-100).
56. On 4 February 2020 the claimant contacted the client by email (111).
57. The policy was incepted on 7 April 2020.
58. The respondent earned £197.88 in commission.
59. The claimant has two entries for this client on his spreadsheets – one identified as 'T McDonagh (existing client cross sell)' (63), and the other as 'Own' (62). The amount claimed by the claimant is the same as the amount linked to the entry for 'T McDonagh (existing client cross sell)' (63).
60. The claimant expected to be paid commission of £98.94 in May 2020.

Sanjay Karia

61. This client has been a friend of the claimant for over 20 years.
62. There is no information on the respondent's system to suggest that this client was previously known to the respondent
63. The claimant emailed the client on 18 February regarding the relevant policy – it appears from the contents and tone of the email that there had been a conversation before this.

64. The client responded by email on the same day.
65. The policy was also incepted on 18 February 2020.
66. There is no information on the respondent's system to suggest that anyone else was involved in the introduction or placement of this policy.
67. The respondent earned £16.67 in commission.
68. The claimant expected to be paid commission of £8.33 in March 2020.

LJO Construction

69. The client had existing business with the respondent.
70. On 14 May 2020 the client emailed Sean McDonagh (130).
71. On 14 May 2020 Sean McDonagh emailed Greg Garner, asking him to provide quotes for this client (133).
72. On 19 May 2020 Sean McDonagh forwarded client documents to the claimant by email (132).
73. On 20 May 2020 the client confirmed to the claimant that he wanted to go ahead with the policy (136).
74. The claimant's spreadsheet records the source as 'T McDonagh (existing client cross sell)' (64).
75. The respondent earned £406.95 in commission.
76. The claimant expected to be paid commission of £203.47 in June 2020.

Esembe

77. The client contacted the respondent, following a recommendation by their financial adviser, Jackie Doherty.
78. On 21 May 2020, Penny Malloura emailed the claimant with the details from the client's telephone call and asked him to contact the client.
79. The policy was incepted on 2 July 2020.
80. The claimant's spreadsheet records the source as 'Own' (65).
81. The respondent earned £49.20 in commission.
82. The claimant expected to be paid commission of £24.60 in August 2020.

Jon Bird

83. This was an existing client of the respondent.
84. On 2 April 2020, the client's policy was due for renewal, but it lapsed as the client did not need cover at that point.
85. The client was advised to contact the claimant if he needed cover in future (147).

86. When he needed cover, the client contacted the claimant to begin a policy.
87. The policy was incepted on 3 June 2020.
88. The respondent earned £47.76 in commission.
89. The claimant expected to be paid commission of £23.88 in July 2020.

Frontline Hygiene

90. There is no information on the respondent's system to suggest that this client was previously known to the respondent.
91. The claimant provided the client with a quote by email on 28 May 2020.
92. The policy was incepted on 29 May 2020.
93. The claimant's spreadsheet records the source as 'Own' (64).
94. There is no information on the respondent's system to suggest that anyone else was involved in the introduction or placement of this policy.
95. The respondent earned £45.47 in commission.
96. The claimant expected to be paid commission of £22.73 in July 2020.

The law

97. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996:

"An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

98. Section 13(3) ERA provides:

"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 (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

Conclusions

99. Following my findings of fact in relation to interpretation of the contract terms, I make the following general conclusions:
100. The claimant was paid a basic salary for his day-to-day work with the respondent. This included sales that were completed at the instruction, direction, or request of the respondent.
101. In addition to the salary, the claimant to be paid commission where a number of pre-requisites were met.

Commission

102. In order for the claimant to receive a share of commission, this has to first be earned by the respondent.
103. The respondent does not earn commission where they charge a fee in lieu (instead) of commission.
104. I accept the claimant's description of the practice of charging fees instead of commission as being used to win business, and therefore the respondent may still earn income on a transaction on this way.
105. However, the claimant's contract is clear that he is entitled to a share of earned commission.
106. Commission' is an unambiguous term, therefore any reference to 'earned commission' relates only to transactions that include an element of commission.
107. An entitlement to a share of fees is not specified in the contract, therefore a share of fees is not properly payable to the claimant.

New business

108. I found that the term 'new business' was broad.
109. I reject the respondent's assertion that this is limited to a new client, because they would have used the term new product or policy if they had intended for the definition to be wide. The reverse is also true – if the respondent had intended for this to be limited to a new client they could have used that word.
110. 'New business' therefore includes a policy that was new to the respondent, if this is as a result of cross-selling to an existing client of the respondent.

Introduce

111. This requirement reflects the purpose of commission, which is to incentivise someone to generate work using their own initiative.

112. I found that in order to be deemed as introducing the new business, the claimant had to be source of that business.
113. The claimant's own spreadsheets demonstrate that he appreciates there are a number of different sources of new business.
114. The claimant introduces the new business if the client was entirely new to the respondent. This is obviously the case where the claimant had a previous working relationship with the client, but also includes circumstances where the claimant 'cold-called' a new client.
115. The claimant introduces the new business if he initiates the sale of a new product or policy to an existing client of the respondent – cross-selling.
116. The claimant does not introduce new business if he is requested or directed to initiate contact with a client (new or existing) by the respondent, even where this results in a sale. Work of this nature is covered by the claimant's salary.

117. In relation to the specific items claimed, I make the following conclusions:

Alarm Communications

118. There was no commission earned by the respondent because fees were charged instead of commission.
119. The claimant was not entitled to a share of the fees charged by the respondent.
120. Although there was no commission earned and payable, for completeness I have gone on to consider the other issues relating to new business and introduction.
121. This was new business to the respondent because they had not previously secured a policy for this client.
122. The claimant did not introduce the business as contact with the client was made at the request of the respondent.
123. The claimant is not owed any commission in relation to this policy.
124. The claimant's claim for unlawful deduction of wages fails.

Ceren

125. This policy was new business, because it was a new type of policy sold to an existing client.
126. Another member of staff was already working on the quote for this client before the claimant became involved with the work. Therefore, the claimant did not introduce the business to the respondent.

- 127. The claimant is not owed any commission in relation to this policy.
- 128. The claimant's claim for unlawful deduction of wages fails.

Sanjay Karia

- 129. This was new business as the client was entirely new to the respondent.
- 130. The claimant introduced the policy (and client), and placed the policy.
- 131. The claimant is owed commission in the sum of £8.33.
- 132. The claimant's claim for unlawful deduction of wages therefore succeeds.

LJO

- 133. This policy was new business, because it was a new type of policy for an existing client.
- 134. The claimant did not introduce the business as his work for this client started at the instruction of the respondent.
- 135. The claimant is not owed any commission in relation to this policy.
- 136. The claimant's claim for unlawful deduction of wages fails.

Esembe

- 137. This was new business as the client was entirely new to the respondent.
- 138. The client initiated contact with the respondent, following recommendation by a financial adviser.
- 139. The claimant contacted the client at the request of the respondent. Therefore, the claimant did not introduce this policy.
- 140. The claimant is not owed any commission in relation to this policy.
- 141. The claimant's claim for unlawful deduction of wages fails.

Jon Bird

- 142. This was an existing client of the respondent, with a policy that they chose not to renew when it came to an end, but later bought a policy of the same type as the previous policy. Therefore, this was not new business.
- 143. Additionally, because the client initiated contact with the claimant to repurchase, when they were ready, the claimant did not introduce this business.
- 144. The position is the same as it would be if the client had simply renewed the previous policy – the gap between policies changes nothing.

145. The claimant is not owed any commission in relation to this policy.
 146. The claimant's claim for unlawful deduction of wages fails.

Frontline Hygiene

147. This is new business because the client was entirely new to the respondent.
 148. The claimant introduced the policy (and client), and placed the policy.
 149. The claimant is owed commission in the sum of £22.73.
 150. The claimant's claim for unlawful deduction of wages succeeds.

151. For ease, I have summarised the conclusions for each item claimed in the table below. Where the answer to all questions is 'Yes', the claimant is owed commission.

Client	Commission earned by R?	New business?	Introduced by C?	Placed by C?
<i>Alarm Communications</i>	No	Yes	No	Yes
<i>Ceren Construction</i>	Yes	Yes	No	Yes
<i>Sanjay Karia</i>	<u>Yes</u>	<u>Yes</u>	<u>Yes</u>	<u>Yes</u>
<i>LJO Construction</i>	Yes	Yes	No	Yes
<i>Esembe</i>	Yes	Yes	No	Yes
<i>Jon Bird</i>	Yes	No	No	Yes
<i>Frontline Hygiene</i>	<u>Yes</u>	<u>Yes</u>	<u>Yes</u>	<u>Yes</u>

Deduction of wages

152. The respondent has made an unlawful deduction from the claimant's wages and is ordered to pay to the claimant the gross sum of £31.06, in respect of the amount unlawfully deducted.

Breach of contract

153. Where I have concluded that the claimant is owed commission, I went on to consider whether failure to pay that commission was a breach of contract.
 154. As the claimant's entitlement to commission was a contractual term, I must conclude not making the payments in relation to Sanjay Karia and Frontline Hygiene were breaches of contract by the respondent.
 155.
 156. The facts of the breaches are entirely the same as for the deduction of wages claims.
 157. The purpose of damages for breach of contract is to put the claimant in the position they would have been in if the breach had not occurred.
 158. The claimant has not claimed for any additional loss attributable to the breaches.

159. As I have already ordered the respondent to pay the deducted wages, I make no separate award in relation to the breach of contract claims.

Tribunal Judge K Douse

Dated: 19 March 2021

Sent to the parties on:

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For the Tribunal Office