



EMPLOYMENT TRIBUNALS

Claimant: Olivia Manuel

Respondent: 3D Lipo Limited

Heard at: Birmingham via CVP **On:** 11/3/2021

Before: Employment Judge Beck

Representation:

Claimant: In Person assisted by Mr Davis

Respondent: Represented by Mrs Winstone (Counsel)

RESERVED JUDGMENT

1. The claimant's complaints of unlawful deductions from wages in respect of unpaid commission and / or breach of contract in respect of the same unpaid commission are dismissed as having been presented out of time. That time limit cannot be extended because it was reasonably practicable for the claimant to present her claim within the time limit.

REASONS

Introduction

1. By a claim form submitted on the 21/9/20, the claimant brought claims of unpaid commission payments as either unpaid wages under **Section 23(1)(a) Employment Rights Act (1996)**, or as a breach of contract claim under **Article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order (1994)**.
2. The respondent returned the ET3 form on the 9/11/2020 indicating the claims were opposed.
3. The claimant undertook early conciliation with ACAS under certificate number 189848/20/20, the application being received by ACAS on the 8/9/20, and issued on the 21/9/20.

4. On the 19/10/20 the Tribunal listed a final hearing to be heard on the 26/1/21. On the 25/1/21 the Tribunal postponed the hearing date to the 11/3/21. The claimant was directed to comply with the direction made on the 19/10/20 to provide copies of all supporting documents and evidence within 14 days, and the parties were ordered to exchange witness statements within 28 days.
5. 2 agreed bundles have been provided for the hearing by the respondent, the main bundle from page 1 –130, and a witness statements bundle from pages 1 –17.
6. The claimant has attended the hearing supported by Mr. Davis. She indicated her witness Scott Julian was ill, and would not be able to attend the hearing.
7. The respondent's witnesses were Simon Marsh, Operations Director and Roy Cowley, Operations Director.
8. I raised with the parties initially an issue as to whether the claims were out of time. The parties were not in agreement as to the effective date of termination of the contract. The claimant in her ET1 form stated it was the 28/2/20. The respondent in the ET3 form stated it was the 31/1/20. It was not clear from the claimant's evidence in the bundle whether she was claiming she was due commission payments which were payable after the date of termination, and if so when those payments were due. In light of the potential impact of this on the submission of the claim within time, I decided to hear all the evidence in the case, to enable a determination on (1) whether the claim was out of time and (2) if not then whether it succeeded or failed.
9. The parties accepted that the claimant's contract of employment set out the rates for payment of commission in different circumstances (page 38 of the bundle). The claimant was entitled to a flat rate of 2% commission on sales which had been passed to her by Head Office and Trade shows referrals. Commission payments for sales generated by the claimant attracted between 1% and 10% of the sale value. It was accepted by the parties that the contract did not provide for when the commission became payable.

10. The claimant's case was that there were 3 amounts of commission which she was owed. The first related to a £60,000 sale to Dr Abbas, her claim for £1,200 being based on the fact that she states she sold the machinery, not Scott Julian, the National Sales Manager, and therefore she was entitled to 2%, it being a Head Office referral. The second claim related to a sale to Dr Patel of £34,000, the claim being for £680, based on 2%, again on the basis she sold the machinery not Scott Julian, it being a Head Office referral. The third claim related to a customer 'Expressions', the claimant stated this sale was £64,000. The claimant stated this was a sale she made, and she received £218.33 in her final wage in February 2020, which represented 1%. Her claim in relation to this customer was £1,861.67, (£20,000 at 1% = £200, £20,000 at 3% = £600, £20,000 at 5% = £1,000, and £4,000 at 7% = £280). This was in accordance with the commission structure outlined in her contract. Her total claim for all 3 customers being in the sum of £3,741.67.
11. The respondent sought permission to adduce an e mail dated 10/3/21 written by a Business Development Manager regarding one of the client's the claimant claimed she was still owed commission in relation to. The claimant did not oppose this application.
12. The claimant, Simon Marsh, and Roy Cowley gave evidence, and were cross examined before the tribunal.

Law

Deduction from Wages

Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

Breach of contract

Article 3 [Employment Tribunals] Extension of Jurisdiction (England and Wales) Order (1994) provides that proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
- (b) the claim is not one to which article 5 applies; and
- (c) the claim arises or is outstanding on the termination of the employee's employment.

In accordance with **Porter v Bandridge Ltd 1978 ICR 943** the onus is on the claimant to show that presentation of the claim within time was not reasonably practicable. The claimant is required to show precisely why it was that he did not present his complaint.

The case of **Wall's Meat Co Ltd v Khan 1979 ICR 52 CA** sets out that what is reasonably practicable is a question of fact for the tribunal to decide, the test being empirical and involving no legal concept.

If a tribunal finds that it was not reasonably practicable to present the claim within the 3 months' time limit, it then goes on to consider whether the claim was presented within such further time period as the tribunal considered reasonable. The tribunal has to decide whether the period between the expiry of the time limit, and the eventual presentation of the claim was reasonable in the circumstances.

In **University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12**, the Employment Appeal Tribunal emphasized that what amounts to a further 'reasonable period' is a matter of fact from the employment tribunal to decide on the particular circumstances of the case. The assessment should be made against the general background of the primary time limit, and the strong public interest in claims being brought promptly.

Evidence and Findings

1. The claimant's contract is at pages 38 – 45 of the bundle. Paragraph 13 states the notice period is 1 calendar month, in the first 2 years of employment. The contract states the claimant was employed from the 21/7/19. The claimant in her ET1 stated she was employed from 18/7/19, the respondent in the ET3 claims the start of employment was the 8/7/19. I accept the written contract of employment, and find the claimant commenced employment on the 21/7/19. The contract does not provide a clause for payment in lieu of notice.

2. I find the effective date of termination of the employment contract was the 31/1/20. This was the date on which the claimant tendered her resignation to the company. (page 78). She received a 1-month payment in lieu of notice in accordance with her contract. There was no suggestion she was required to work for this period of time. I do not accept that the retaining of company car / mobile phone and any other company equipment affects this date, as the claimant suggested.

3. For the purposes of bringing this claim as a breach of contract, the claim was required to be presented within 3 months of the effective date of termination of the contract. On the basis I have found the 31/1/20 to be the effective date of termination, the claim would need to have been submitted by the 30/4/20.

4. In relation to the Wages Act claim in the alternative, the claimant accepts in the ET1 form, that her position was the respondent had failed to pay her commission in her final salary in February 2020. The claimant accepted in evidence that she did not expect to be paid commission after she had left the role, and that the February salary did not include the commission she claims was owed to her. The respondents agreed with the position that commission was payable until the claimant left the company.

5. The respondents evidence disputes that the 2% sales commission on the Dr Abbas and Dr Patel contracts were payable to the claimant at all. Both witnesses state that Scott Julian, National Sales Manager was responsible for the sales, and they point to wages slips for Scott Julian to show he was paid commission on the Dr Patel sale in February 2020. In relation to Expressions, the respondent's evidence is that the value of the contract had to be renegotiated due to financial difficulties Expressions was experiencing, and full commission was paid to the claimant on the re negotiated figures in her January 2020 pay slip. (page 82)

6. For the purposes of the Wages Act claim, I accept the relevant date for when the deduction from wages is alleged to have been made is the 29/2/20 (page 88), which is the claimants final pay slip. Therefore the 3-month statutory time limit in **section 23 (1) (a) of the Employment Rights Act (1996)**, within which to make a claim runs from this date until the 28/5/20. The ACAS certificate issued in September does not impact on the extension of the 3 months' timescale.

7. The claimant submitted a County Court claim (page 49) on the 13/3/20, which was issued on the 16/3/20, and listed for trial on the 11/1/21. Subsequent to that, the claimant issued a N244 notice cancelling the 11/1/21 hearing, and on the 29/1/21 issued a notice of discontinuance of those proceedings.

8. In the claimant's evidence, she states that due to coronavirus restrictions and the national lock down, she did not undertake mediation on the County Court claim until September 2020. She states the mediator advised her to contact ACAS in relation to obtaining advice. In cross examination she confirmed she had been advised by someone to lodge a County Court claim, she did not disclose who that person was, but they were not a solicitor. The claimant confirmed she completed the on-line County Court form herself, after looking it up on line. She confirmed she did then speak to a solicitor and paralegal, who advised an Employment Tribunal claim would be easier to make than a County Court claim. She states she was subsequently advised to withdraw the County Court claim. The claimant advised she had started a new role working in the NHS in March 2020, and was very busy in that role, and didn't have a lot of time to research matters.

Conclusions

1. In submissions the claimant said the coronavirus restrictions had delayed matters, she had received poor advice from a solicitor, and was busy in her new role which impacted on her ability to pursue an employment tribunal claim. These were the grounds on which she stated that it was not reasonably practicable for her to have submitted her claim in time.

2. In submissions Mrs Winstone put forward that the tribunal claim was grossly out of time. The claimant had put forward in evidence that she was a qualified nurse, intelligent and well able to deal with matter herself. The fact she had put forward a County Court claim within 2 weeks of handing in her resignation, and was able to deal with this matter on line herself, was not consistent with someone who was unable to look up the timescales for employment tribunal claims. On the claimants' timescales, the claim should have been submitted by the 23/5/20, and that would be the end of the first limitation period. The further period the tribunal would then have to consider was between the 23/5/20 and the 8/9/20. Mrs Winstone referred to the case of **Walls Meat Company and Khan 1979 ICR 53 CA**, indicating in her view the claimant had been tardy in her approach to commencing proceedings, and had not demonstrated that it was not reasonably practicable to present her claim within the 3-month time limit. Mrs. Winstone submitted that even if the tribunal found it was not reasonably practicable to have submitted the claim within 3 months, it should dismiss the claim on the basis the further delay in issuing the claim until September, was not within such further period as the tribunal should consider reasonable.

3. I find that it was reasonably practicable for the claimant to bring her claim within the 3-month time limit, whether as a Wages Act claim, or a Breach of Contract claim. Within 2 weeks of resigning from the company, the claimant was able to initiate a County Court claim herself, by completing an on-line application. Initially the claimant sought advice from someone who wasn't a solicitor, but had legal knowledge. I accept that she has sought advice from a Solicitor subsequently, who advised the tribunal route was easier. However, she could have made enquiry herself concerning the time limits for tribunal claims, considering how swiftly she initiated a County Court claim. The claimant described herself as a qualified nurse, and more highly qualified than most of the staff, which leads to me to the conclusion that she was more than capable of making enquiries to establish the time limit for a tribunal claim. I do not accept it as an adequate explanation for the delay in initiating proceedings, that the claimant was busy undertaking a new role, or any delay caused by coronavirus restrictions. She was clearly considering her options in March 2020, when she initiated County Court proceedings.

4. Therefore I find that it was reasonably practicable for the claim to be submitted within the 3-month time limit, and the claims are dismissed as out of time.

I confirm that this judgement has been electronically signed.

Employment Judge **Beck**

Date 30/3/2021