



# EMPLOYMENT TRIBUNALS

## JUDGMENT

### BETWEEN

#### CLAIMANT

MISS B ALBAY

V

#### RESPONDENT

ICE DATA SERVICES  
EUROPE LIMITED

HELD AT: LONDON CENTRAL

ON: 14 – 15 DECEMBER 2020

EMPLOYMENT JUDGE: MR M EMERY

#### REPRESENTATION:

FOR THE CLAIMANT

In person

FOR THE RESPONDENT

Ms A Carse (Counsel)

## JUDGMENT

The claims of unlawful deduction from wages and breach of contract fail and are dismissed.

## REASONS

1. Judgment was given at the Tribunal and written reasons were requested.

## The Issues

2. The claimant was employed as an Account Director for the respondent. She was contractually entitled to a base salary plus commission. Her concerns, articulated during her employment and on her resignation, are about the calculation of her commission – “revenue incentive” and “overachievement” commission - in 2017 and 2018. She argues that her accounts had retained over 100% of her sales revenue in both years and that she was therefore entitled to a commission payments which were not made. She argues that the respondent never provided accurate figures and “*a clear calculation of such target was never adopted*” by the respondent. The respondent argues the claimant’s accounts did not achieve 100% of target revenue, but in any event she was paid in both 2017 and 2018 commission calculated on 100% of revenue. It says that the claimant had no entitlement to overachievement payments in either 2017 or 2018. The respondent argues that the claimant was therefore paid all of her commission entitlement.

3. The factual issues to be determined to assess the legal claims are:

### 2017

1. Did C have a contractual entitlement to commission calculated on the basis of comparison between 2017 and 2016 revenue, such that 100% commission would be achieved if 2017 revenue matched 2016 revenue on C’s accounts?
2. Was C entitled to additional commission if she achieved over 100% revenue retention on her accounts? If so, what additional commission was C entitled to, i.e. how was that commission to be calculated?
3. What revenue was attributable to accounts inherited by C in 2016? What is C’s revenue in 2017?
4. Are any deductions a series of deductions? What are the gaps between deductions? Are there time issues in relation to Wages Act claim?

### 2018

5. What is the extent of C’s revenue achieved over 100%-110%? Was the method of calculation issued to C?
6. Should revenue target be US\$10.5m or US\$15.6m?
7. How should revenue attributable to C be attributed on accounts?

## The Law

4. Employment Rights Act 1996

s. 13 Right not to suffer unauthorised deductions.

- (1) 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.

s. 23 Complaints to employment tribunals.

- (1) A worker may present a complaint to an employment tribunal
  - (a) that his employer has made a deduction from his wages in contravention of section 13 ...
- (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
  - (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made...
- (3) Where a complaint is brought under this section in respect of—
  - (a) a series of deductions or payments, or
  - (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

### **Witnesses**

- 5. I heard evidence from the claimant and from the respondent Mr Kevin Hay, the Head of Relationship Management. Because of the nature of the evidence, which at times involved drilling down into data within spreadsheets, after his evidence Mr Hay undertook additional calculations on the figures. I allowed him to present further evidence on these figures and he repeated his affirmation before doing so and was asked questions by the claimant and the Tribunal.
- 6. The Tribunal spent the first ½ day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence heard, instead it confines its findings to the evidence relevant to the issues in this case. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

### **The relevant facts**

- 7. The claimant commenced employment on 19 June 2017; her employment contract states she will be allowed to participate in the company's Commission Plan, which is "*subject to plan rules...*" (106). Commission is calculated on annual revenue, calculated over the calendar year.
- 8. The claimant's "*Sales Incentive Plan and Goals*" for 2017 states that the claimant's entitlement is as follows:

- a. The revenue incentive target (pro-rated) is £17,500
  - b. Revenue goal and overachievement rates will be based on all her accounts, the “*revenue incentive*” will start funding at 80% performance against target.
9. The claimant signed and returned this plan on 14 September 2017 (142). There was dispute as to whether the claimant had sight of the Sales Incentive Plan Terms and Conditions (15a-e). I noted that the claimant acknowledged by signing the Plan that she had received the “*accompanying ... Terms and Conditions...*”. I also accepted that the Terms and Conditions were readily available on the company intranet.

## 2017

10. The claimant’s case is that she achieved 102% of revenue target in 2017. One issue arising is whether, if this is correct, she was accordingly entitled to an “*over-achievement*” payment in 2017. I accepted the claimant’s account that this was referenced as an entitlement by her first manager on joining the respondent. However this was not specified in any of the commission/revenue incentive documentation given to her. For example it is not referenced on page 142; this contrasts to the similar document provided to her in 2018, which does specify her entitlement to an over achievement payment (120). I accepted Mr Hay’s reasoning for why the claimant was not entitled to an overachievement payment in 2017. The claimant was a new joiner part-way through the year, she was assigned to a market and clients where it would be difficult to differentiate her work and that of former colleagues on these accounts, it would therefore be difficult to allocate ‘overachievement’ to her. I also noted that the only reference in the Terms and Conditions to overachievement rates refers to new business, and states that the overachievement rate will be specified within the Plan. In 2017, there was no overachievement rate specified in the claimant’s plan. I therefore concluded that the claimant was not entitled to an overachievement payment in 2017.
11. The second issue is whether or not the claimant achieved 100% of the revenue target for 2017. As stated above, the claimant’s case is that she achieved 102% of target, the respondent’s case is that she achieved 98.4% of revenue target. There were significant delays in calculating accurate 2017 revenue achieved figures, the main reason being that the respondent was migrating its accounting systems at this time – a huge job which took months to achieve. As Mr Frenkel of the respondent put it in an email to the claimant on 5 February 2018, she should “*ignore the numbers for now as we are still working on cleaning them. We are also considering alternatives to measure ... instead of the revenue numbers.*” (119); on 23 March Mr Frenkel emailed all of Sales team stating “*please ignore any email you receive from commissions .... These numbers are incorrect...*” (129). As the claimant put it in her evidence, there were “*constantly incorrect numbers, accounts, nothing was complete. So this is another email saying ignore the numbers*”.

12. The respondent's final calculation of the claimant's revenue target for 2017, made in April 2018, was that she achieved 98.4% of revenue. This remains disputed by the claimant, who references the confusion in the figures, as demonstrated by the respondent's February and March emails.
13. However, in fact, a decision was taken in April 2018 by the respondent to ignore the figures, and pay Account Managers as if they had achieved 100% of revenue. The claimant accepted in her evidence that she had received the revenue target incentive of £17,500: in October 2017 she received a "*Revenue Bonus*" of £8,749.00 (624) and in April 2018 a "*revenue*" payment of £8,750 (413). The claimant accepted that these payments were the 2017 bonus. Because the claimant had no entitlement to an overachievement bonus in 2017, the claimant has suffered no loss of commission in 2017.
14. I accepted that the claimant remained genuinely very concerned that the figures being provided to her were not reliable, however, for the reasons set out above she in fact suffered no loss of commission due to her in 2017.

## 2018

15. The claimant's revenue target incentive for 2018 set out in her 2018 sales plan was £35,000 made up of new revenue target incentive (£28,000) and sales incentives (£7,000). An achievement and overachievement figure was specified – 1.6% of the revenue target incentive for each 1% over target. The claimant signed and returned this document on 13 March 2018 (120). I again accepted that this Plan's Terms and Conditions (121-125) was readily available for the claimant to consider. The claimant was not given a revenue target at the beginning of the year, this was given to the claimant and all sales staff in September 2018.
16. Commission payments were paid at the end of each quarter. Early in 2018 because of the ongoing accounting issues Account Managers were given the option to take 75% of anticipated revenue target bonus, or 100% on the basis that if overpaid it would be clawed back; the claimant chose the latter. The claimant accepted in her evidence that her April payslip showed her receiving the correct 100% bonus (413).
17. A significant issue in evidence throughout the case was the accuracy of the sales figures within the respondent's sales system (SalesForce). The claimant accepted that she was provided with reminders of how performance is measured for the revenue plan; she was also asked to update the actual account and sales data within SalesForce (155), and was asked to correct and review accounts (166); she accepted in her evidence that this was done by her, that it was "*for me to do ... all the time*".
18. At year-end 2018 the respondent calculated the claimant as achieving 99% of revenue target. As in 2017, a decision was made to pay Account Managers on the basis of 100% of target and the claimant was in fact paid 100% of target for 2018 (242).

19. However an actual achievement of 99% of target meant that the claimant did not have an entitlement to overachievement commission. There was email correspondence between the claimant and the respondent about what she considered was the incorrect calculation of her figures prior to and post her resignation (she worked one month's notice). The respondent (Mr Hay and Ms Klara Ploski, Director Sales Operations) provided to the claimant her client portfolio and the sales revenue (183-218) plus a summary which states that the states that the claimant achieved 99% of target (180-182) based on the sales revenue set out in the figures within the portfolio document.
20. The claimant's evidence at tribunal was that she was clear the 99% figure was incorrect – she pointed to what she considered to be discrepancies within the spreadsheets which showed companies on list which should not have been and vice versa and inaccurate figures. As well as these inaccuracies, the claimant pointed to the fact she had very few cancellations, and existing business revenue of £680k – that there was no way she could be under target with revenue achieved. *“I kept repeating I know the account values, I have no cancellations and £680k existing business, how can I be under 100%?”*
21. Because of the significant concerns the claimant was raising about the accuracy of the sales revenue figures used to calculate her end of 2018 sales revenues, and because of the significant amount of raw spreadsheet data buried within Excel spreadsheets within the electronic bundle, I asked the claimant on several occasions during the case, including after her evidence had ended and during closing submissions, to give examples she could point to within the data where the sales data was incorrect. A lot of time was spent in evidence and submissions considering what the claimant considered to be data inaccuracies.
22. As one example, we considered an Excel spreadsheet given by the respondent to the claimant during her employment containing raw data; we spent some time on this clicking through to the raw data. The claimant's position on the data was that it was inaccurate. As one example we considered “ADVFN – 38” - the total value in column G = £1,537,656 - Jan - Dec 2018. The claimant argued that as account manager she knew that the invoice value from Jan- Dec 2018 was £558,072 – this was a standard monthly fee which did not vary; the claimant's case is that this inaccuracy decreased her base commission and is an example of why the calculation of her revenue was incorrect. The claimant referenced Rows 891 - 1133 and totals of £5.9m. In fact she says that the total value of contracts was \$10.6m with no cancellations; plus 'added revenue' from contract extras. Also, the claimant argued, that the target figure on this account was inflated. (NB: the use of £ and \$ is deliberate as this is how the figures are presented).
23. The respondent's evidence on this, following an adjournment and instructions, was that the contract values (in £) on the ADVFN data shows “duplicate” entries – the Account Manager and the Sales Global Team entries show that the data (including sales figures) is duplicated between the teams; these were say the respondent amongst some of the analysis errors by the claimant.

24. In her detailed questing of Mr Hays on the spreadsheets (App 38 Sheet 1 line 891 and page 573) there was further consideration of the Schroeder's account – the claimant was arguing that there was a \$200k shortfall, that one of the quarterly invoices was missing and that this is why there is a lesser sum (£360k) at 573. Mr Hays point was that the total revenue from the group was £3.8m; that the contract value was not linked to one account as there may be multiple services under this agreement. He pointed out that a deal may run from July (say) meaning only 50% of revenue would be attributable to that year. He stated that *“my understanding is that the contract starts in the middle of year, and the revenue attributable to you is £3.79m, and you showed 21% growth rate on this account.”* The claimant argued that row 891 showed a sum of US\$5.9m; Mr Hays argument was that this was only achieved by adding the revenue for 2017-2019, and not the required 2018 revenue. He demonstrated this by going to the 9<sup>th</sup> tab and changing the setting to “oldest to newest”; then scrolling to first line of 1/1/18. He stated that the US\$5.9m came from adding all figures from 2017-19.
25. The Tribunal and the parties spent some time working through the spreadsheets and calculating the Schroeder's figures for 2018. On all spreadsheet calculations I undertook, the figure came to £3.79m – i.e. the sum the respondent considered accurate. Mr Hays made clear that his figure was not based on contract values or sums invoiced, but on revenue received for the account over the period in question. This, he argued, meant that the numbers within the dashboard on commission may not align with invoices, because of increased usage, that there was a failsafe in that income received and finance must align because of the errors can occur in invoicing.
26. The claimant met with management on 10 April 2019 and she sent an email shortly after with her queries and attaching a zip file of evidence including links and notes. She gave examples of ‘cancellations/negative numbers’, that *“the numbers provided do not have full transparency as to where these numbers are from...”* and other significant inconsistencies (250-251). Internal emails state the following: Mr Hay provided a detailed written comments on this document, including the following:
- a. Revenue is calculating using actual invoiced values including usage and not contract values
  - b. Accepting the claimant had ‘overachieved’ on the Schroeder's account
  - c. Some revaluations were undertaken *“this makes no difference to the final result”*
  - d. *“All calculations and corrections for 2018 were made and the missing accounts have been included ... If the individual is unable to point out where the issues is. Then the assumption is that the calculations are correct...”*
  - e. *“Based on the above and my review of all this data, the pay-out is correct...”*
27. In his covering email to colleagues he stated *“...unless [the claimant] can produce additional supporting evidence to justify changing her commission, then we should consider this matter closed. The below email is inconsistent, factually*

*incorrect and relies way too much on opinion rather than fact.*”; in response a Senior Director stated he *“re-did the attainment calculated on these numbers: 99.53%. the numbers are what they are...”* (278-9)

### **Closing submissions**

28. The claimant detailed further objections to the respondent’s calculations. She stated that she was entitled to overachievement commission for 2017 and 2018 (page 78). It may not be in writing, but this was intention and what I relied on – what I was promised as per the commission plan *“there was no differentiation in 2017 and 2018”*.
29. While the claimant accepted that she was paid on the basis the revenue target was met, *“the commission numbers are not accurate and devalues are actual reflection of my performance based on my calculations and knowing my accounts value”*. She asked me to consider again documents - 129, 132, 130, 134, 135, 147-7, 153, 156-8, 159-166. 169, 228 21-232; 235; 241; 242; 446 and 472.
30. The claimant argued that *“commission issues continued throughout 2019”*, that she had *“not benefitted from additional incentives - because of the inability of R to get accurate total revenue numbers.”*
31. The claimant argued that she *“does not agree”* that the commission issue was related to the accounts migration; the issue is that *“we cannot track or compare the data. There is no central location to track the evidence of this data.”* On this issue she asked me to consider pages 573-6; 577-9; 580-582; 583-601. She argued that total revenue allocated to accounts does not match. On Schroeder’s *“we could not match with invoices - none of figures were traceable”* (pages 598 and 594) *“So the system does not provide evidence or accurate results”*. She argued that when the filter of 2018 is undertaken differently it produces different results; *“I believe I overachieved”*.
32. Ms Carse started with a consideration of client names and issues of confidentiality; that she was seeking an Order under Rule 50 with the names of clients replaced by a letter. She argued that the paramount concern is fair hearing - and this rule does no more than balance the rights of parties under Rule 50(3)(b).
33. Under the law on unlawful deductions from wages, Ms Carse argued that there is a need to work out what the entitlement is. There is also a time limit issue – is there a series of decisions.
34. 2017 entitlement: Ms Carse referred to the respondent’s case set out in Mr Hay’s witness statement paragraph 40. The claimant signed the sales incentive plan and she received 100% payment of revenue target incentive and the claimant accepted she had received this for 2017 (413 and payslips 624 – 630).
35. A 2017 overachievement payment was not paid, but in the contract (page 106 clause 5.4) there is a *“discretion to amend remuneration”* which includes commission. The 2017 sales plan does not include an overachievement plan for



2017 – *“but we had a discretion to remove this when we gave an individualised sales plan”*. It was not irrational to do this – as there were two reasons not to – accounts moving between managers and the difficulty of identifying this.

36. On the 2018 sales incentive plan; the claimant accepts that the method of calculation as set out at page 150 *“...the issue is whether the respondent departs from this method”*. The evidence shows that the detailed review by Mr Hays at page 280 onwards is accurate; that contract values are not used to calculate figures as suggested by the claimant, but revenue achieved. She stated that there were two fail-safes in the system, that the respondent is a regulated company and it uses these figures in its financial reporting *“So it’s difficult to manipulate and it’s subjected to a lot of scrutiny.”*
37. Ms Carse argued that the burden is on the claimant to prove she has suffered an unlawful deduction – she has not proven there was an issue with invoices, or there was an incorrect revenue calculation; the claimant has not proven in law she has suffered a deduction.
38. In response, the claimant argued that the *“methodology”* for calculating revenue *“... is based on invoicing, so if there are issues within invoices, this will affect achievement. ... So I do not trust the numbers, and I am basing by calculation on actual numbers – a combination of invoice and contracts. Invoicing cannot be done without the contract.”* The claimant stated she *“does not accept the methodology is producing accurate numbers based on invoicing”*. She argued that the 99% figure *“varied”*, that on her analysis she could not be at a loss *“so the methodology is producing wrong values and performance”*. She argued that she was *“one of the top performers.”*

## **Conclusions on the evidence and law**

### **2017**

39. The first issue is whether the claimant’s contractual entitlement to commission was based on a comparison between 2017 and 2016 revenue. The only evidence I heard on this point was that the claimant was taking over accounts in Turkey and London, there was new work and that the commission targets could not properly be set based on 2016 revenue. I found that the claimant was aware of what her revenue target was for 2017, that the method of calculation was as set out in *“Methodology”* section at page 150, that this was known to her. As already stated, the claimant did achieve 100% commission notwithstanding the respondent’s calculation that she had not achieved 100% of target.
40. The claimant did not have an entitlement to an overachievement bonus in 2017, as it was not stated in her 2017 plan; she did not query the Plan or the plan rules at the time.
41. The question of revenue attributable to accounts inherited by the claimant in 2016 was not relevant to the issue to be determined. As the claimant’s actual 2017 revenue was not taken into account when determining to pay all Account Managers 100% commission, the actual revenue achieved by the claimant is

irrelevant to the question as to whether there was an unlawful deduction from the claimant's wages in 2017.

42. The question on 'series of deductions' is also not relevant, given the findings above.

## 2018

43. I concluded that based on the respondent's calculations the claimant had not achieved revenue over 100%. She was paid revenue commission based on 100% achievement, which in fact she had not achieved. The method of calculation was known to the claimant. We spent considerable time going through the figures, and the claimant was unable to provide evidence they were inaccurate. I accepted that actual revenue received may not reflect invoices/contract value. I also accepted Mr Hay's analysis that the claimant was inaccurately calculating figures within the spreadsheets we analysed.
44. The revenue target was not provided to the claimant (or other Account Managers) until significantly into 2018. The claimant's revenue target was set at US\$15.6m.
45. The question of how revenue attributable to the claimant should be attributed to the different accounts was beyond the remit of this Tribunal. This is a technical question for the respondent, based on its accounting processes and its regulatory requirements, and this Tribunal has no knowledge of how this should be done. Also, the claimant was unable to show that the respondent had attributed revenue incorrectly by the time it had "cleaned" the figures. There was no evidence that the claimant had achieved over 100% target and I accepted the respondent's evidence that the claimant had achieved under target but had been paid commission based on achieving target.
46. For these reasons the claims of unlawful deduction of wages and breach of contract fail and are dismissed.
47. On the evidence I heard, I did not accept that it was appropriate to redact the names of any clients of the respondent; the information contained in the evidence was not commercially sensitive as it did not detail any data apart from revenue received – it did not for example detail what this revenue related to, contractual specifications or other potentially commercially sensitive material. Accordingly the application under Rule 50 was dismissed.

**EMPLOYMENT JUDGE M EMERY**

**Dated: 3 April 2021**

Judgment sent to the parties  
On: 09/04/2021

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For the staff of the Tribunal office

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Notes

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