EMPLOYMENT TRIBUNALS

Claimants: Mr P Brierley
Mr N Porley

Respondent: Mitie Limited

Heard at: Manchester (remotely, by CVP) **On:** 26 April 2021

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimants: In person
Respondent: Mr S Proffitt, counsel

JUDGMENT OF A PRELIMINARY ISSUE

The judgment of the Tribunal is that:

1. When determining the claimants' claims for unlawful deduction from wages, the correct interpretation of the respondent's commission scheme is that commission was payable after all costs for the contracts had been accounted for, including the indirect costs relied upon by the respondent in their calculation of commission due.

REASONS

Introduction

1. Mr Brierley has been employed by the respondent since 1 June 2000 as a Business Development Manager, and Mr Porley has been employed since 9

February 2005 in a similar role. Both claimants have previous continuity of employment which predates their start date as they transferred to the respondent (Mr Porley dating his start date back to 1985).

2. On 9 November 2020 both claimants moved to undertake the role of Estimator with the respondent.

3. The claimants contend that there have been unlawful deductions made from their wages in August, September and October 2020. The respondent denies that there have been any such unlawful deductions.

Claims and Issues

4. In the statements which they had prepared and in their documents for this hearing, both of the claimants were seeking not only to recover deductions made from their wages in August, September and October 2020, but were also seeking to establish their entitlement to: payments made after those dates; and commission generally.

5. It was highlighted to the claimants at the start of the hearing that the Tribunal did not have jurisdiction to consider a breach of contract claim as the claimants remain in employment. The claim which the Tribunal was able to determine was one for unlawful deduction from wages, which by the nature of the complaint focussed upon wages paid to the claimants in the relevant months and whether they had been paid everything to which they were entitled and/or whether any unlawful deductions had been made.

6. At the start of the hearing there was also some discussion about the time available. The respondent applied for the hearing to be converted to a preliminary hearing and/or for the hearing to be postponed. The respondent's view was that at least two days were required for the claims to be heard in full. As an alternative, the respondent's representative suggested that the central dispute between the parties was an issue which could be determined in principle without the Tribunal determining the issue of the precise sums due to the claimants (if any).

7. After a brief adjournment, the claimants agreed that it would be sensible to determine the issue in principle as a preliminary issue. They also agreed that the question of whether in fact there had been a deduction made from the claimants' wages on the relevant dates should be determined at a final hearing. It was the claimants' position that unlawful deductions had been made, even if the respondent's position on the principal issue was right.

8. What was agreed was that the hearing would be limited to dealing with the principle on which the payments for commission to the claimants should have been paid. For the precise amounts due to the claimants in each month, a future hearing will be required. For the purposes of these claims, the principle will only apply to the claim pursued of unlawful deduction from wages and will only need to be determined for the payments made in August, September and October 2020.

9. Whilst raising questions about the conduct of the hearing the respondent's representative also stated:

(1) that there were three witness statements included in the bundle which were effectively statements on behalf of the claimants, and that those individuals would not be attending the hearing and therefore the respondent would contend that they should be given no weight; and

(2) if the claimants were seeking leave to amend the claim to include subsequent payments which they say should have been made to them, the respondent would certainly be seeking a postponement.

10. The claimants emphasised their wish that the hearing proceed on the day to determine the principal issue. They did not make an application to amend the claim. They also accepted that the three people for whom statements had been obtained would not be attending in person to give evidence (after the issue of the respondent's contention about the weight that should be given to those statements had been explained to them).

11. In summary, the issue to be determined at this hearing was the question of how the respondent's commission scheme should have applied to the claimants in the period from August to October 2020.

12. The claimants contended that the commission scheme should have paid commission based on the actual gross margin made on the contracts after deduction of costs for materials, labour and plant only (as recorded on the contract set up form), but not other indirect costs.

13. The respondent's contention was that the commission scheme provided that commission was payable only after all costs for the contract had been accounted for, which included indirect costs attributable to the contract. The respondent accepted that the commission scheme had not operated throughout the claimants' employment in the way that it contended, but nonetheless argued that the rules of the scheme were clear.

Procedure

14. The hearing was conducted by CVP remote video technology with all parties and witnesses attending remotely.

15. Each of the claimants represented themselves at the hearing. They each gave evidence by reference to a witness statement and were cross examined. Mr Brierley cross examined each of the respondent's witnesses first, but Mr Porley was also given the opportunity to cross examine them as well (whilst it was made clear that he did not need to repeat the questions that Mr Brierley had asked). Each of them was given the opportunity to make submissions.

16. The respondent was represented by Mr Proffitt, counsel.

17. An agreed bundle of documents which ran to 360 pages was provided electronically in advance of the hearing (and in this Judgment where numbers are included in brackets that is a reference to the page number in the bundle provided). The Tribunal was also provided with witness statements from each of the claimants and from the respondent's three witnesses. The Tribunal read all of the witness statements and the documents referred to prior to the hearing commencing.

18. The Tribunal heard from the following three witnesses called on behalf of the respondent: Ms K Fontana, the Managing Director of the respondent's Technical Services Projects Division; Mr S Twohig, the Finance Director for the respondent's Projects Division; and Ms N Shales, the Commercial Manager for the respondent's Projects Division. Each of the respondent's witnesses gave their evidence under oath and were cross examined by the claimants.

19. After the evidence was heard, the Tribunal adjourned briefly to read the respondent's skeleton argument and to refer to the authorities provided. The respondent's representative then presented his submissions orally. The claimants were then each given the opportunity to make oral submissions.

20. Judgment was reserved, and accordingly the Tribunal provides the Judgment and Reasons contained in this document.

21. It was agreed that, irrespective of the outcome of this hearing, a further hearing would be required to determine whether or not there had actually been any unlawful deductions from the claimants' wages. However, the determination of the principal issue would assist in identifying the length of hearing required and the issues which remained in dispute.

22. The Tribunal was grateful to all of the parties for the manner in which the hearing was conducted.

Facts

23. The Tribunal was provided with a document which outlined the terms of what was described as the "Mitie Tilley Roofing Limited Commission Scheme" (34). There was no dispute that this document outlined the terms of the scheme as they applied to the claimants. Whilst both claimants had worked for the respondent for a very long time and had received commission for their sales achieved for longer than the document had been in existence, neither claimant argued that the document did not contain the contractual terms which applied to them personally.

24. The commission scheme contained a number of provisions and examples of how commission was to be calculated. However, the material elements of the agreement said the following:

> *"Commission is calculated and payable on the sales order value and gross margin quoted. Should the actual contracted margin reduce commission will be reduced to reflect the actual margin."*

> *"The margin Commission will only be paid on contracts that return a minimum of 18% margin."*
>
> *"Commission is payable after all costs for the contract have been accounted for and the actual gross margin is known…In addition no commission payment will be paid until all payments to MTR have been received."*

25. The commission scheme also included a paragraph which reserved the right for the scheme to be withdrawn or amended and notice to be given. There was no evidence presented at the hearing that the scheme had ever been so modified or amended or withdrawn in accordance with that provision.

26. As a business, the respondent ceased paying commission in or around April 2020 for reasons related to the COVID pandemic. The claimants raised a complaint about this. The claimants were ultimately paid their commission due for the period April to July 2020, in the salary payment for August 2020. This was confirmed to the claimants by email. Those commission payments did not form part of the claim being determined by the Tribunal.

27. In September 2020, Mr Porley's manager confirmed by email that he authorised payment for certain commission to the claimant (68). In fact, neither of the claimants was paid any commission in the period between August and October 2020 at that time. The claimants raised a grievance. A grievance hearing was held on 30 March 2021 and a written decision provided on 14 April 2021 (255N and 255Q). The grievances were not upheld.

28. Both claimants moved to a new role as part of a restructure with effect from 9 November 2020. There was no dispute that neither claimant is entitled to commission in their new role. However, as commission is only paid when a contract is completed, both claimants contend that they are/will remain entitled to commission due under the previous scheme for the contracts brought in prior to 9 November 2020, when they complete.

29. On 22 December 2020 Ms Fontana wrote to each of the claimants (190 & 193) informing them that they had been overpaid historic commission and that they would not be paid the commission they claimed based upon their methodology for the period to 31 October 2020. What she said was the following:

> *"Whilst calculating the commission payments due to you under the Scheme, it has come to light that your commission payments have been calculated incorrectly. It is clear from the terms of the Scheme (paragraph 3) that commission is payable 'after all costs for the contract have been accounted for and the actual gross margin is known'. However, we have established that the commission that has been paid to you to date under the Scheme has been based on <u>gross margin only</u> and has not factored in the required deduction of indirect cost of sales."*

30. In April 2021 each of the claimants was paid the amount for commission which the respondent accepted was due to the relevant claimant for the period up to

31 October 2020, calculated on the basis which the respondent contends was correct. Mr Brierley was paid £10,140 (256) and Mr Porley was paid £17,443 (257). The claimants do not accept that those are the correct sums due to them, based either on: the respondent's interpretation of the scheme; or their own view of the scheme (being the way in which it has always historically been calculated).

31. In the course of the respondent's grievance process, the claimants produced statements from a Mr Tilley (197), (previously Managing Director of D W Tilley Limited until it was sold to Mitie in 2008, and thereafter Managing Director of Mitie Tilley Roofing Limited until 2014), and Mr Brown (198) (Financial Controller of D W Tilley Limited and then Mitie Tilley Roofing Limited from 2004 until 2015). In the Tribunal's bundle was also a letter/statement from Mr Slawson (296) dated 13 April 2021: he was the Managing Director of the respondent's southern roofing business from 1995, and nationally from April 2013 to December 2015.

32. At the start of the hearing the respondent contended that these three statements were effectively witness statements and should be given no weight as the witnesses had not attended the hearing. Following cross examination of the claimants, the respondent's position on the statements changed. It was put to the claimants that the statements showed that the way the claimants' contended the commission should be paid was the way it had always been done, but did not demonstrate that it was right to do it that way. The claimants accepted that position. In his submissions, the respondent's representative confirmed that the respondent had no objection to the statements being accepted to the extent that they showed that what the claimants' contended was the way commission had always been calculated. I therefore accept the statements as demonstrating the claimants' case (which was in any event as confirmed in the claimants' evidence): that the way in which the claimants contended the scheme should operate was the way it always had. I did not draw from those statements any evidence about whether that was the correct interpretation of the commission scheme.

33. Ms Fontana's evidence was that indirect costs and other overheads on a project were not directly calculated when the claimants would initially look at a contract's cost, but they would still need to be included when commission was calculated as they would affect the profitability of all contracts. Her evidence was that these included administrative wages, vehicle costs, holiday pay costs and mobile phone costs. In answer to questions, she distinguished between indirect costs that were attributable to the contract, and indirect costs (such as property costs) which were not attributable. Her evidence was that, to her knowledge, only the claimants had been paid under their exact scheme and all other schemes included the indirect costs she described before commission was calculated.

34. Mr Twohig's evidence corroborated this. He gave evidence very much from an accountancy and financial audit point of view. His evidence was that, in his experience, "all costs" would include indirect costs such as those already described, but would not include indirect costs which did not vary whether or not contracts were obtained, such as his own salary or that of an HR person.

35. Ms Shales had considered the claimant's grievances and had concluded that the respondent's method of calculation was correct.

36. Each of the claimants gave evidence that they each believed they knew of one other person who had been paid commission on the same basis that they were. They accepted in cross examination that they did not know whether the way that they said commission should be calculated was used throughout the rest of the respondent's business. They both contended that the way that they believed commission was calculated was common to, or standard in, the roofing industry.

The Law

37. As explained in the claims and issues section, the claimants' claims were being considered under section 13 of the Employment Rights Act 1996, that is that they had the right not to suffer unauthorised deductions from their wages. In order to make that determination, the Tribunal did need to establish what sums were due to the claimants. Wages do include any commission due (see section 27(1)(a) of the Employment Rights Act 1996).

38. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 contains the provisions that extend the Tribunal's jurisdiction to determine breach of contract claims. Such claims can only be determined where the claim arises, or is outstanding, on the termination of the employment of the employee. As neither of the claimants' employment had terminated, they were not able to proceed with a claim for breach of contract.

39. In summary, the claimants' position was that as they had always been paid in the way that they contended, they were entitled to such sums and should be paid on that basis as they always had been.

40. The respondent's skeleton argument relied upon seven legal points for which authority was drawn. The Tribunal will not repeat in this Judgment all of those points which are recorded in the skeleton argument, but it has considered them all.

41. The respondent emphasised that the claimants had the burden of proof to show that there had been unlawful deductions made. In terms of whether discretion had been exercised reasonably, the respondent emphasised the test that applied and contended that the burden of proof to show unreasonableness, once grounds for unreasonableness were identified, reverted to the respondent (but it was on the claimants first to demonstrate unreasonableness).

42. The respondent relied upon the case of **Patel v De Vere Group Limited [2013] 4 WLUK 621** as authority for the fact that it would be difficult, if not impossible, for a term to be implied by reason of subsequent custom and practice where the proposed term would be inconsistent with the express provisions of the original contract.

43. The Judgment in that case (at paragraph 37) itself cites Chitty on contracts, which said:

> *"Express terms prevail. A custom or usage can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion, and it can only be incorporated if it is not inconsistent with the tenor of the contract as a whole."*

44. The respondent also relied upon the case of **Park Cakes Ltd v Shumba [2013] IRLR 800** for the contention that: in order for an implied term to become incorporated, the crucial question was whether the employer's conduct, objectively evinced, shows that it intended to be contractually bound.

45. In relation to what is said in the express contract, that Judgment said (at paragraph 36(e):

> *"As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least until an intention to vary can be understood."*

46. The Tribunal also took into account paragraphs 35 and 36 of that Judgment in which a list of relevant factors is included. When considering what, objectively, employees should reasonably have understood about whether a particular benefit was conferred as of right, the factors to be taken into account included:

- on how many occasions and over how long a period, the benefit in question had been paid;
- whether the benefits were always the same;
- the extent to which the enhanced benefits were publicised generally;
- how the terms were described;
- what is said in the express contract; and
- equivocalness.

47. The respondent's representative, quite fairly, raised the issue of contra proferentem in his submissions. That is, the rule that where there is doubt about the meaning of a contract, the words relied upon should be construed against the person who put them forward. He contended that the rule did not apply to the facts of this case, because there was, in his contention, no ambiguity about the meaning of the contract or what was said in the contract itself. Without any such ambiguity, the rule did not apply.

Conclusions – applying the Law to the Facts

48. I find that what was actually said in the terms of the commission scheme (34), was clear on the key point in dispute. The document said that commission was only payable after *"all costs"* of the contract had been accounted for. The definition did not distinguish between direct and indirect costs, it recorded only that all costs must be accounted for before commission was payable. I find, that on a reading of the

document, it was clear that the respondent was able to deduct all costs for the contract before the actual gross margin was calculated, because that is exactly what it said. That is, I agree that the way that the respondent contended the contract should be read, is what the commission document actually said.

49. The key question raised by the claimants' arguments, was what impact the respondent's practice had upon the claimants' contractual entitlements? There was no dispute that the respondent had always operated the commission scheme in practice for the two claimants on the basis that only direct costs were deducted before the commission was calculated, without indirect costs also being deducted. It was not in dispute that this difference between what had happened and what the respondent said should happen, was only identified in December 2020. There was a paucity of evidence before the Tribunal about why the respondent had not operated the scheme in accordance with its terms in the past. The respondent contended it was error. There was certainly no evidence before the Tribunal which suggested or demonstrated that the scheme had been varied or any agreement reached to vary the scheme. The evidence at the hearing was simply that it had always been the case that the claimants had been paid in the way that they contended: there was no evidence that there had been any variation of the commission scheme.

50. I can entirely understand why the claimants contended that commission should be paid for the months of August to October 2020 on the same basis that it has always been paid. However, the fundamental problem that the claimants had was that passage of time alone cannot vary the express terms of a contract.

51. The respondent's representative's submission was entirely correct, that an implied term of a contract (being implied by custom and practice) could not vary an express provision with which it was inconsistent. What the claimants contended would effectively change the word "*all*" in the commission scheme to another word, or one which had a more restrictive meaning. In practice, what the claimants' position would mean would be that the contract would be varied by custom and practice to change the express word "*all*" (in the sentence "*Commission is payable after all costs for the contract have been accounted for and the actual gross margin is known"*) to instead be replaced by a term implied by custom and practice which says "*once all direct costs but not any indirect costs were accounted for*". As I have explained in the legal section above, and as is clearly recorded in **Park Cakes v Shumba** and **Patel v De Vere Group**, an implied term cannot prevail over an express term. The express term states that all costs are to be deducted before commission is paid. That cannot be varied by an implied term, contended to be incorporated by custom and practice.

52. I also find that the respondent's representative's submissions on the contra proferentem rule are correct. The clause in the contract is not ambiguous, and therefore the rule cannot assist in interpreting how it should apply. Ambiguity has been created by past practice, it is not present when the document itself is read.

53. As a result, the claimants' contention cannot succeed. The contract is not varied by a term implied by custom and practice, which conflicts with what it expressly provides. However, had that not been the case, I accept that the claimants

otherwise did have a strong argument that based upon the employer's conduct, objectively evinced, it did show an intent to be contractually bound by a scheme operated in the way they suggested. Looking at the list of factors in **Park Cakes** which I have cited above: the commission scheme had been operated as contended invariably on every occasion for many years without equivocation. The way in which the scheme had been operated was certain and known by the parties, albeit not necessarily notorious in terms of being known by others. The length of time over which it had been operated was strong evidence. However, what was said in the express contract, that is in the terms of the scheme, was clear. An express provision cannot be varied by an implied term incorporated by custom and practice.

54. In his submissions, the respondent's representative raised arguments around discretion. That is, if the Tribunal found that the phrase "all costs" indicated a contractual discretion, he contended that the respondent was able to exercise its discretion in the way that it had. As a result of my finding on the primary issue, I do not need to determine that argument.

55. I do understand the claimants' contention that the length of time during which they had always been paid commission calculated in exactly the same way, provided them with a practical expectation that the way in which the commission for August to October 2020 was calculated would be the same as it always had been. Nonetheless based upon the precise terms of the commission scheme and for the reasons I have explained, I find that the claimants were not entitled to commission calculated on the basis that only the direct costs (as recorded on the contract set up form) were entitled to be taken into account. The respondent was able to take into account all costs of the contract before calculating commission, including indirect costs.

Summary

56. For the reasons explained above, I find that the commission scheme contractually operated on the basis contended for by the respondent and not the way contended by the claimants. That is, that the respondent was able to take into account all costs for the contract (including indirect costs) when calculating the commission payable. That was what the scheme said.

57. Having determined this principle, the parties may be able to resolve between themselves whether or not the claimants have been paid the sums which they were due in August, September and October 2020. If the parties are not able to do so, the case will need to be listed for a final hearing to determine whether any actual unlawful deductions were made, looking in detail at the payments due and the amounts paid.

58. I would also add that I have not needed to address the issue of estoppel when reaching this Judgment and I have not heard argument on it. That is, whether the respondent would be estopped from recovering previous commission payments paid to the claimants. Whilst the possibility of reclaiming previous commission payments appeared to have been raised in the correspondence at one point, from the payments made to the claimants in April 2021 it does not appear that it was being

pursued. In any event, this Judgment has not addressed that issue and I have heard no submissions on it.

Employment Judge Phil Allen

4 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 May 2021

FOR THE TRIBUNAL OFFICE