



EMPLOYMENT TRIBUNALS

Claimant: Ms C Evans

Respondent: Ingenio Recruitment Limited

Heard at: London South Employment Tribunal
On: 4 and 5 May 2021

Before: Employment Judge Keogh

Representation

Claimant: In person

Respondent: Mr Chehal (Consultant)

JUDGMENT having been sent to the parties on 7 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim for automatic unfair dismissal under section 104 Employment Rights Act 1996, unlawful deduction from wages and wrongful dismissal brought by Ms Chloe Evans against Ingenio Recruitment Ltd.
2. I received a bundle of documents which had been prepared by the Respondent, and a witness statement from the Claimant and three witness statements from the Respondent. I heard oral evidence from the Claimant, and from Ms Gemma Goodacre, Ms Sophie Rason. The Claimant represented herself, and the Respondent was represented by Mr Chehal (Consultant).
3. At the outset of the hearing Ms Evans pursued an application to strike out the Response on the grounds that the Respondent had breached the Tribunal's orders and had not exchanged witness statements. These had been provided to Ms Evans just over a day before the hearing and on a bank holiday weekend. Mr Chehal confirmed that his firm had been instructed very late and everything had been done to exchange statements as soon as possible. While the Respondent was in clear breach of case management directions Ms Evans confirmed that she was able to proceed

with the hearing and had had the opportunity to review the statements. She had prepared some questions for Ms Goodacre. I considered that with additional time taken to read Ms Evans could also prepare questions for the other two witnesses, whose statements are quite short. In the circumstances a fair trial was possible and striking out the Response was not a proportionate sanction. The application was therefore refused.

Facts

4. The Respondent is a company specialising in recruitment. Ms Evans was employed by the Respondent from 7 August 2018 to 29 March 2019 as a senior consultant.
5. The Claimant's letter of appointment is dated 3 July 2018. It refers to a commission structure of 30% on billings generated from net new clients and 20% from any clients or jobs handed to the Claimant, with a monthly target of £20,000 in permanent revenue. The Claimant's contract of employment was signed on 3 July 2018. Although a fresh contract was issued in February 2019 it appears the Claimant did not receive it. I have not been taken to any material differences in the two contracts. The contract dated 3 July 2018 contains the following relevant provisions:
6. In relation to commission it is confirmed that the Claimant was eligible to earn commission based on her monthly closed revenue, subject to the terms and conditions of the relevant commission plan provided to her. The operation of the commission plan was to be determined by the company at its absolute discretion. Eligibility to receive commission under the relevant commission plan would be based on achievement of monthly targets.
7. In relation to probation, the contract confirmed that the Claimant's employment would be subject to a trial period during which her performance and conduct would be monitored. During the trial period the company was entitled to terminate the contract with one week's notice. The length of the trial period was 6 months, with discretion for the company to extend the trial period for such further period it thought fit.
8. The notice period outside of probation was one month.
9. The contract contains a general provision entitling the company to make deductions of any sums owed to the company from salary.
10. The contract confirmed that the holiday year ran from 1 January to 31 December each year and that the Claimant was entitled to 24 days leave plus a day off for her birthday. If employment were to finish part way through a holiday year entitlement would be calculated on a pro rata basis. A right was reserved to deduct any payments received in excess of entitlement from final salary.
11. The Respondent also operated a non-contractual incentive and perks scheme. This included a lunch club which rewarded employees meeting a

set quarterly target. The Claimant's quarterly target was set at £45,000, which was lower than her revenue target.

12. On 6 December 2018 the Claimant received an email confirming that her target for the lunch club was at 107% and she was therefore entitled to that reward. This did not mean that she was at 107% of her revenue targets.
13. On the same date Ms Goodacre emailed the Claimant to raise concerns she had with the Claimant's performance and conduct. She stated that she expected to see a higher output from the Claimant.
14. On 15 November 2018 the Claimant asked to take holiday over the Christmas period. Ms Goodacre emailed the Claimant to say that the dates provisionally worked for her but she would need to bring in £20,000 for November and £20,000 for December.
15. The Claimant reached her target in November 2018 but did not reach it in December 2018.
16. On 21 December 2018 Ms Goodacre sent a Whatsapp message to the Claimant to tell her that she could have leave until 7 January 2019 if three particular deals came in. In the same message Ms Goodacre notes that the Claimant's performance had really increased in the past two weeks and they needed to keep it at that level.
17. The Claimant replied by email that her flights were already booked as she thought she was going to hit a £40,000 target originally set for her to take the leave. The three deals would put her £10,000 over target. Ms Goodacre replied that she was not sure when she said about the £40,000, and perhaps she meant that was to qualify for the ski trip not a three week holiday. It was in the contract that one could not take more than 2 weeks holiday at one time but she would be flexible as long as the Claimant was on track. She stated that the Claimant needed to be on target to take a holiday, let alone a three week one. She raised concerns about the amount of time the Claimant spent on the phone and turning up late.
18. In a series of Whatsapp messages on 24 December Ms Goodacre says that annual leave is granted upon being on target, the target was £40,000 and the Claimant finished on £24,000. There had been discussion that if that didn't happen the Claimant would need to be back in on 2 January to ensure she reached her target. It would not help the business for the Claimant to miss half a month. She extended the Claimant's cut off date to 3 January and stated that if deals did not come in she would need to be back in on the 7th.
19. The Claimant did not return to the office on the 7th but completed her holiday. She was due back into the office on 14 January 2019 but her flight was delayed so she did not in fact return until 15 January 2019.

20. On 15 January 2019 Ms Goodacre had a meeting with the Claimant to discuss her performance, her general attitude and her taking unauthorised leave. I prefer Ms Goodacre's account to that of the Claimant in relation to this meeting.
21. In January 2019 the Claimant brought in £17,751 in relation to a client, Mr Aucoin. She fell below her £20,000 target.
22. On 6 February 2019 the Claimant received an incentive tracker showing she was at 104% of target. I find that as before this related to the Respondent's incentive scheme and not to revenue targets.
23. On 13 February 2019 an email was sent by Mr Sam Dyer to employees announcing a change to the Respondent's policies and procedures. In relation to sick leave, this would be five days of full paid leave per year, prorated.
24. On 22 February 2019 the Claimant had her probation review meeting with Ms Goodacre. I prefer Ms Goodacre's account of this meeting and find that the Claimant was told that her probation would be extended by two months. While this was not confirmed in writing at the time, neither was it confirmed that the Claimant had passed her probation. This was around 5 weeks after the Claimant had been pulled up again for her performance and attitude, and I find it unlikely in the circumstances that Ms Goodacre would have said that her probation was 'obviously passed'.
25. On 26 February 2019 Ms Goodacre emailed the Claimant again raising the issue of there being high phone use while at her desk. She was asked to keep phone for personal use to a minimum.
26. In February 2019 the Claimant brought in £30,275 in respect of two clients. She therefore hit her £20,000 target for the month. However, her overall target since the start of her employment had not been met.
27. In around February to March 2019 Ms Goodacre took a holiday in Thailand. On 28 February 2019 the Claimant emailed her to ask why she had not been paid commission. Ms Goodacre replied that she had emailed the accountants to find out, and she was not sure what had happened. On 1 March 2019 the Claimant emailed to find out if Ms Goodacre had heard back from the accountants. Sam (Dyer) had said all the information had been sent to them so she should have been paid. Ms Goodacre replied that the accountant had just rung and had made an error. The wrong amount had been paid for one client and the accountant thought he was to hold the commission until it was resolved. He apologised and would ensure it was processed correctly at the end of March. The Claimant replied asking if she would not be paid commission until her next pay day, she had been counting on commission that month as she had to pay out a lot for her flat and Mr Dyer had told her it would be coming that pay day. Ms Goodacre replied that she had asked if he could do it as a one off payment but Mr Dyer was

on holiday and there was no one else to run payroll. Ms Goodacre said there was not a lot she could do as she was stuck in Thailand, and apologised.

28. While Ms Goodacre was on leave an issue arose where another employee, Claire Smith, had passed to the Claimant the names of some people to reach out to along with their contact details and a commitment that someone from the company would be in touch with them that day. The Claimant did not make contact therefore Ms Smith received Ms Goodacre's consent to reach out directly. The Claimant accepted in evidence that she was annoyed by this. Ms Smith states that the Claimant loudly and aggressively questioned her about this, intimating that Ms Smith was stealing her work. She asked to speak to the Claimant outside, during which conversation the Claimant continued to shout accusations at her. I did not hear evidence from Ms Smith, but her account is broadly supported by Ms Rason, who did give oral evidence. Ms Rason stated that the Claimant was physically aggressive during this conversation. She pushed her chair back, leaned over Ms Smith's desk and flailed her arms around while speaking to Ms Smith in a raised voice. Ms Rason states that she had to speak with Ms Goodacre about the incident. She also spoke with the Claimant about it, at which point the Claimant was rude and aggressive. I find Ms Rason's account to be persuasive. I do not consider it likely that she has lied about this incident to support Ms Goodacre.
29. On 20 March 2021 the Claimant emailed Ms Goodacre to ask for an update on her commission.
30. On 21 March 2021 Ms Goodacre had a telephone conversation with the Claimant to discuss the issues which had arisen while she was on holiday. The Claimant swore at her and hung up. Ms Goodacre then emailed her issuing a final written warning. The Claimant was at this point well below target. There had been multiple discussions around her performance and Ms Goodacre could not see an improvement in effort. There were also conduct issues such as constant lateness, sickness and aggressive behaviour towards the team. Ms Goodacre told her that when an employee leaves the company then no commission will be payable, but she was willing to work with the Claimant to get her performance to where it needed to be. She offered £2,000 payable at the end of March with the rest withheld for the time being. The remaining amount would be paid at the end of April if the Claimant created £40,000 in revenue in April. If the £40,000 was not achieved her employment would be terminated and the commission forfeited to contribute to losses from non-performance. If she accepted the offer but resigned in April then £2,000 would be deducted from her final pay.
31. The Claimant went back to her desk, sent some emails to her personal account (which now appear in evidence) and emailed Ms Goodacre to say that she was not well and needed to leave for the day, and would come back to her when she had sought advice, by which she meant legal advice.
32. The following day the Claimant reported sick first thing in the morning, as she was required to do by company procedures. Ms Goodacre messaged

asking for a handover of all her jobs by 9am. The message was read at 7.23am however the Claimant did not respond until 10am, by which time Ms Goodacre had taken over the Claimant's email account so that she could conduct business for the day. There followed a series of messages where Ms Goodacre sought information from the Claimant and the Claimant was asking for access to her email in order to find the information. Ms Goodacre eventually resolved these issues on her own.

33. On Sunday 24 March Ms Goodacre sent a message to the Claimant inviting her to a meeting the following Tuesday and asking her to confirm receipt. The Claimant responded she was still not well and they would have to meet when she was better. Ms Goodacre reminded her that the following day was her 5th day of sickness and she would need a doctor's note. She said that if the Claimant was unable to attend the meeting she would have something to send recorded delivery. The Claimant said she did not appreciate being contacted on a Sunday. Ms Goodacre responded that she needed to contact the Claimant to inform her not to come in the following day. However she had been informed the Claimant was sick so would take it as a sick day, which was fine. At this point the Claimant accused Ms Goodacre of bullying and harassment. Ms Goodacre responded with a long message, which ended by saying that her offer of improvement performance was withdrawn and she was serving the Claimant her one week notice to cease her employment with the Respondent.

34. Ms Goodacre sent the Claimant a letter dated 25 March 2019 confirming the Claimant's dismissal. In this letter it is noted that her probation period had been extended by two months. She was told that after a discussion on 21 March 2019 she was notified in writing of the outcome of a further review, and after that discussion the Claimant had chosen to become absent, which the company deemed to be an indication that she did not intend making any commitment on improving. During her absence the Claimant had been disparaging to the company. Therefore the company was of the view that she had not attained the standard expected and in accordance with the company's probationary policy her employment would be terminated on grounds of under performance and failure to meet revenue targets, persistent lateness daily, unacceptable behaviour towards other staff and management and failure to commit to performance improvement despite multiple discussions.

35. There was no further correspondence directly between the Claimant and Ms Goodacre. Both the Claimant and Respondent instructed solicitors who corresponded on their behalf.

Issues and law

36. The issues were set out in a list of issues prepared by the Claimant and agreed by the Respondent. They are as follows:

Automatic Unfair Dismissal

- (i) Did the Claimant make a relevant assertion of a statutory right within the meaning of section 104 Employment Rights Act 1996? The

Claimant relies on the following four matters as individually or cumulatively amounting to an assertion of the statutory right not to suffer an unlawful deduction from her wages:

- (a) Email 28 February at 14:32 from the Claimant to Ms Goodacre in which the Claimant said “Do you know why I haven’t been paid any commission this month?”
- (b) Email 1 March 2019 at 10:03 from the Claimant to Ms Goodacre in which the Claimant said: “Was just wondering if you heard back from the accountants on this? Sam said all the info was sent to them so I should have been paid it.”
- (c) Telephone call 20 March 2020 from the Claimant to Ms Goodacre in which the Claimant asked when she would receive her commission payments.
- (d) Email 20 March 2019 at 14:11 from the Claimant to Ms Goodacre, in particular the following extracts: “Please could you give me an update on my commission...”; “I really need to know what I am expecting at the end of the month...”; “I was due the commission for Tufin (Ricky Egge) in my February pay check, and I know the invoice was paid in time...”; and “There should also be commission for Blue Prism (Patrick Aucoin) and Procore (Rebekah Walker). I assume we have been paid on both of these now, as they were January starts, due in February.”

- (ii) What was the sole or principal reason for the Claimant’s dismissal?
 - (a) The Claimant’s case is that the reason is that she asserted her right not to suffer an unlawful deduction from her wages as set out above.
 - (b) The Respondent’s case is that the reason is performance related.

Unlawful deduction from wages

- (iii) Did the Respondent make an unlawful deduction from the amount properly payable to the Claimant on or around 28 February 2019 (her February pay) by not paying her the following commission payments?
 - (a) £7,500 in relation to Tufin;
 - (b) £3,500 in relation to Blue Prism; and
 - (c) £1,250 in relation to Procore.
- (iv) Did the Respondent make an unlawful deduction from the amount properly payable to the Claimant on around 31 March 2019 (her March pay) by deducting the sum of £562.42 from her pay?

Wrongful dismissal

- (v) Did the Respondent fail to give the Claimant the correct amount of notice by only giving her one week’s notice?
 - (a) The Claimant’s case is that she was told orally by Ms Goodacre that she had passed her probation and that she therefore was contractually entitled to one month’s notice

- (b) The Respondent's case is that the Claimant's probation had been extended and she was therefore contractually entitled to one week's notice.

37. Section 104(1) ERA 1996 provides that an employee shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for dismissal is that the employee brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or alleged that the employer had infringed a right of his which is a relevant statutory right. Section 104(2) provides that it is immaterial for the purposes of subsection (1) whether or not the employee has the right or whether or not the right has been infringed, provided the claim to the right and that it has been infringed is made in good faith. Section 104(3) provides that it is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was. By virtue of section 104(4)(a) an unlawful deduction from wages is a relevant statutory right.

38. I was taken to decision of the Supreme Court in the case of *Abu Dhabi National Tanker v Product Star Shipping Ltd* [1993] 1 Lloyd's Rep 397. It was held in that case in relation to discretion:

"In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application."

39. This principle has been approved in an employment context in the Supreme Court decision of *Braganza v BP Shipping Ltd* [2015] ICR 449, in which it was held that the decision of a contractual fact-finder had to be rational in the *Wednesbury* sense.

Conclusions

40. The first issue for me to consider is whether the Claimant made an assertion of a statutory right within the meaning of section 104 Employment Rights Act 1996. I consider that her emails in February and March 2020 clearly raised a complaint that she had not been paid commission which she considered to be due. Whether or not the commission was actually due, I find that the Claimant raised this issue in good faith. She was clearly concerned about the financial repercussions of not being paid. In the circumstances I find that she made an assertion of a relevant statutory right.

41. The next question is whether this assertion was the sole or principal reason for the Claimant's dismissal. I find that it was not. The Respondent repeatedly raised concerns relating to the Claimant's performance and conduct over the course of her employment. The incident which took place

between the Claimant and Ms Smith while Ms Goodacre was in Thailand was a serious one which needed to be addressed on her return. I have found that shortly after her return Ms Goodacre had a conversation with the Claimant in which this issue, along with concerns about her performance, were raised. Ms Goodacre gave clear and persuasive evidence in relation to the issues she had with the Claimant's performance. This was not just related to her achieving targets but was also related to the Claimant's activity and limited pipeline of work. On the Claimant's own case she had four clients in her pipeline at the time of her dismissal, whereas Ms Goodacre suggested one would expect around twenty five in order to achieve targets down the line. There were also significant concerns about the Claimant's conduct following the incident which had occurred. The Claimant was not responsive to this feedback and swore at Ms Goodacre and hung up on her. It was in response to all of this that Ms Goodacre put in place a final written warning with a stringent improvement plan.

42. When asked in evidence about the dismissal itself, Ms Goodacre was clear that this was not to do with the payment of commission. She had put a revised commission structure in place with the final written warning in order to incentivise the Claimant. However she took great offense at the suggestion that she had bullied or harassed the Claimant. This was effectively the last straw for her and she decided to dismiss the Claimant rather than see the improvement plan through. I find that her evidence was genuine and that this was the real reason for dismissal. The concerns the Claimant raised about her commission were not the sole or the principal reason for dismissal, therefore her claim for automatic unfair dismissal fails.
43. I turn next to consider whether commission was properly payable to the Claimant. I find that the Claimant's commission structure was as set out in her offer letter and contract of employment, namely that she would receive 30% commission on clients she brought in and 20% commission on clients that were given to her. However, as specified in the contract she would only be eligible to commission each month if she reached her monthly target of £20,000.
44. While the contract states that the commission scheme is at the absolute discretion of the company, such discretion must be exercised rationally in accordance with the principles set out in *Braganza*.
45. The commission sought is broken down into three clients: Blue Prism; Tufin and Procore. The Claimant accepted in evidence that the invoice for Blue Prism was paid in January 2019. She did not reach her target of £20,000 for January 2019. In the circumstances I find that in accordance with her contract she was not eligible to be paid commission on this sum.
46. In relation to the other two clients, I find that both payments were made in February 2019 and that this brought the Claimant over her £20,000 target for the month. Therefore on the face of it the Claimant was eligible for the commission of 30% on the Tufin client and 20% on the Procore client.

47. The Respondent contends that this was not paid because discretion was exercised not to.
48. I note that in February and early March 2019 there was no dispute that some commission was owing. The email chain between the Claimant and Ms Goodacre suggests that sums would have been paid were it not for an error made by the accountant. The only reason it was not paid on time was that the only person who could deal with a one off payment was on holiday, and Ms Goodacre herself was in Thailand. In the circumstances the sums fell due to be paid at the end of February and had not been paid due to an error which could not be rectified in time.
49. The only time discretion was exercised not to pay the sums due was on 21 March 2019 when a final written warning was put in place. This was several weeks after the sums had become due and payable under the Respondent's published commission scheme. I find that having promised the Claimant that she would receive payment for these sums, it was irrational for Ms Goodacre to seek to change her mind some weeks later and suggest that commission would only be payable if a significantly higher target was met. In the circumstances I find that the commission for the Tufin and Procore clients was due to be paid in February 2019 and there was an unlawful deduction in this regard.
50. The next matter to be considered is the deduction made from the Claimant's final salary of £526.42. This is broken down into £280.76 in respect of overpayment of holiday and £245.66 in respect of overpayment of sick leave.
51. The Claimant accepted in evidence that she had taken 8 days of leave in January 2019. Her employment terminated on 29 March 2019 so she was entitled to almost 6 days of leave (allowing 2 days per month, plus a birthday). She had therefore taken just over 2 days of leave in excess of her pro rata entitlement. It was not disputed that the Respondent deducted two days of overpaid leave. There was therefore no unlawful deduction in respect of annual leave.
52. The Claimant was entitled to five sick days prorated over the year. Up to her dismissal on 29 March 2019 would be 88 days. $5 \times 88 / 365 = 1.20$ days entitlement.
53. According to Ms Goodacre's evidence, which I accept, the Claimant was off sick on 8 February 2019 for half a day, 25 February 2019 for a day, 21 March 2019 for half a day and 22 March 2019 for a day, a total of 3 days. She was therefore paid for 1.8 days over her entitlement. It is not disputed that the Respondent made a deduction in respect of 1.75 days, therefore there was no unlawful deduction in respect of sick leave.
54. The final issue is whether the Claimant ought to have been given one month's notice instead of one week's notice. I have found that the Claimant's probation was extended by two months on 22 February 2019.

She was therefore subject to the terms and conditions of the trial period as set out in the contract of employment when she was dismissed. In the circumstances she was only entitled to one week's notice and the claim for wrongful dismissal fails.

55. In summary, the Claimant's claims for unfair dismissal and wrongful dismissal are unsuccessful and are dismissed. The Claimant's claim for unlawful deductions from wages succeeds in relation to the commission payments for the Tufin and Procore clients only.

Remedy

56. The commission payable in respect of the Procore client is agreed in the sum of £1,382.40. The commission payable in respect of the Tufin client is agreed in the sum of £7009.06. This is a total of £8,391.46. This is a gross sum, such that the Respondent is entitled to deduct tax and national insurance from it.

1. The Claimant additionally sought a 25% uplift for failure to comply with an ACAS Code of Conduct. This may have applied to her unfair dismissal claim, however there was no grievance raised in relation to the unlawful deduction from wages claim and therefore no ACAS Code of Conduct applied to the claim. No uplift is therefore available. The Claimant contended that she ought to be given an uplift because of the Respondent's conduct in these proceedings. That is not how the ACAS uplift applies and this was therefore refused.

Employment Judge Keogh

Dated: 11 May 2021