



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Austen  
**Respondent:** Taylor Made Holdings Ltd  
**Heard at:** Bristol **On:** 15 January 2021  
**Before:** Employment Judge P Cadney  
**Representation:**  
**Claimant:** In Person  
**Respondent:** Mr D MacAskill

## Reconsideration Judgment

The judgment of the tribunal is that-

- i) The claimant's claim of breach of contract and/or the unlawful deduction from wages is not well found and is dismissed.

## Reasons

1. The claimant's claim is for unpaid commission and came before me on 15<sup>th</sup> January 2021. On that day I heard oral evidence from both parties. Each asserted a different method of calculating commission. For the reasons set out below each party asserted that the written pay records would support its interpretation of the method of calculation of commission payments, and agreed that after those records had been received and the parties had been given the opportunity to make further comment that I would give a written judgment.
2. The claimant was employed by the respondent as a Kitchen Sales Designer from 1<sup>st</sup> April 2019 to the 22<sup>nd</sup> December 2019. The claimant was paid partly on a commission basis and the dispute before me is whether there is any outstanding commission. The claimant's case is that commission is payable in two tranches; the first when the contract is entered into and the second one week before the work begins. Commission is payable on any job in respect of which there is a twenty percent mark-up, which generates 1% commission. The claimant's case is that applying that methodology he is owed £474.90 in Part 1 payments and £662.92 in Part 2 payments giving a total of £1137.82.
3. There is no dispute as to the claimant's calculations. However the respondent contends that the commission scheme operates differently. Whilst the claimant's description is correct it is not complete in that if when the work is carried out the actual profit is less than the projected profit and results in a mark up of less than 20% any commission paid will be recouped. The amounts claimed by the claimant are works which did not in the end meet the 20% mar-up and accordingly did not meet the threshold to generate commission payments. The claimant contended that the pay records would demonstrate that there had never previously been any recoupment and that this interpretation of the commission scheme was not borne out by the evidence of how it operated in practice. The respondent contended that they would show recoupment deductions and would support its interpretation.
4. The significance of this is that the written commission scheme is silent as this point and accordingly the tribunal will have interpret it. Both the claimant's interpretation and respondents are on the face of it consistent with the written document. Viewed from the claimant's point of view if commission is dependent on the ultimate level of profit, why is it paid entirely in advance? On the other hand viewed from the respondent's point of view why would they have a commission structure that pays commission on a 20%

mark-up but then pay commission in respect of works where that was not achieved? It follows that evidence as to how the system operated in practice will clearly be critical in determining which interpretation is correct.

5. The respondent has supplied the October payslip showing £81.68 being reclaimed as previously paid commission and an email from the Accounts Manager explaining the October deduction. In addition it has produced a document relating to December commission which shows £236.82 as owing and a document from March 2020 which shows a net sum of £434.73 owed to the company. In addition it has sent an email from the claimant relating to November commission which refers to jobs he will be “..losing his commission on.” The respondent submits that the commission scheme was therefore operated as it asserts I that there is demonstrable proof both of reclaimed commission and of the fact that the claimant understood this.
6. The claimant submits that he October deduction was a gesture of goodwill on his part and points to the fact that in the November commission document there are two jobs (Harris and Wilsher) in which the margin was 4% in each case but in respect of which here has been no clawback. He therefore contends that this either demonstrates that there was no system for any clawback, or that at very least it was never applied consistently, and that the respondent is retrospectively attempting to apply rigorously a system that in practice was as much honoured in the breach as the observance.
7. I have not found his an easy case to resolve as there is evidence which supports both party’s interpretation. However in my judgement the two most significant documents are the October payslip and the email sent by the claimant himself. They do appear to support the respondent and its interpretation of how the commission scheme worked in practice.
8. The burden of proof lies on the claimant to demonstrate that the respondent is in breach of contract and/or that sums have been unlawfully deducted from wages properly payable I have concluded that on the balance of probabilities I am not persuaded that the scheme operated as alleged by the claimant but that commission was only payable where the profit margin exceed 20% once the work was carried out rather than simply on the basis of a pre-estimate of the cost of doing the work. It follows that on the balance of probabilities the I am not persuaded that the sums clamed are owing and the claimant’s case must, therefore be dismissed.

**Employment Judge P Cadney**  
**Date: 25 July 2021**

Sent to the Parties: 16 August 2021

FOR THE TRIBUNAL OFFICE