



EMPLOYMENT TRIBUNALS

Claimant: Mark Purtow

Respondent: Accountancy Action Ltd

Heard at: Watford

On: 01 October 2021

Before: Employment Judge Housego

Representation

Claimant: Jamie Morgan of Counsel

Respondent: Marc Hirsh of the Respondent

JUDGMENT having been sent to the parties on 21 June 2021, following a hearing on 27 May 2021 at which a full extempore judgment was given, 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. I gave a full ex tempore judgment at the hearing. The Respondent asked for full reasons within the time permitted, but that request was not sent on to me until 25 September 2021. The Respondent was concerned at the reasons for the decision on the claim for commission, as it might have wider ramifications for them. They were the successful party in the unfair dismissal claim. I have given only a synopsis of the extempore decision about the dismissal, but expanded that about the commission claim.
2. I decided that the Secretary of State was to be removed as 2nd Respondent. There was no reason for the Secretary of State to be a party. The Respondent is not insolvent.
3. The holiday pay claim was part withdrawn, and the remainder dismissed, the Claimant not contesting the submissions of the Respondent.

4. I gave judgment for the Claimant in the claim for commission of £496.50. It was agreed that the sum was due and payable to the Claimant. However, the Respondent's account with the Client was not paid, and the amount was deducted from the Claimant's final salary payment.
5. The contract between the parties, dated 07 January 2019, provided for a salary of £50,000 a year. In addition, the contract stated, at 7.3 and 7.4:

"7.3. The Company is authorised to deduct any sums due to it from your salary. These deductions may include those pursuant to the Company's Commission Plan in force at the relevant time, including repayment of commission that is affected by rebate/ refund clauses in the Company's Terms of Business with its Clients or non-payment by a Client(s)."

"7.4. You will be entitled to commission on temporary/ permanent placements which you arrange in accordance with the commission arrangements set out in the Commission Plan to this Contract. The Company reserves the right to review any commission and/ or bonus scheme. In particular but without limitation change may be made to the rate of the commission, commission periods and to the basis on which commission and any bonuses are calculated."

6. The commission plan applicable starts:

"The employee is entitled to receive commission in respect of temporary/ permanent placements arranged by him/ her on behalf of the Company."

The key word is "entitled". This is not a discretionary scheme. It continues:

"The commission will be 10% of the net fee (after the deduction of VAT) payable to the Company by the Client in respect of personal placements and 2.4% of the Borehamwood Office billings (after the deduction of VAT)."

The key words are "will be" – that is again a contractual right. There is no qualification about the commission being due.

7. Clause 4 of the commission scheme states:

"4. The Company is authorised to deduct any sums due to it from your salary. These deductions may include those made pursuant to the Company's Commission Plan in force at the relevant time, including repayment of commission that is affected by rebate/ refund clauses in the Company's Terms of Business with its clients or non-payment by a client(s)."

8. In my extempore judgment I decided that the contract between the Claimant and the Respondent required commission to be paid on the conclusion of the

placement. There was provision for the commission to be reclaimed if the placement failed. This was not why commission was reclaimed. It was because the client failed to pay the invoice (it went into administration).

9. I decided that commission paid could be reclaimed from the salesman. This was, in effect: "The placement you arranged and for which you have been paid commission hasn't worked and therefore we can reclaim the commission we paid to you for arranging it". That is because commission is paid for successful placements, and not for those which fail, so that the Respondent has to repay the client. It was about reclaiming commission paid where the client is entitled to a rebate or refund.
10. I decided that it is a different scenario where the placement is successful but – for whatever reason - the client does not pay the Respondent what is owed for that placement. That is the commercial risk of being in business. The credit terms the Respondent offered to its clients are a matter for them, and I did not see that the contract between Respondent and Claimant passed that commercial risk from Respondent to Claimant.
11. The Respondent paid the salespeople who placed the candidates so earning the Respondent income. That commission was due to the salesman at that point. The client was given credit terms. I decided that was a business decision of the Respondent.
12. I said that if there is an ambiguity in the terms and conditions: that is that it states that there is a discretion about whether to pay commission in some circumstances. That is discretion about whether or not to pay, but this was about recovering money that had already been paid. I said that there is no provision in the contract to recover commission paid if the client fails to pay the Respondent's invoice (which might be a breach of contract rather than insolvency).
13. Where there is ambiguity in a scheme like this the Latin phrase is that it is construed *contra proferentem*: in other words, if a document is not entirely clear it is construed against the person who drafted it.
14. On reviewing all the documentation all these months later, I see that clause 7.3 provides for deduction from salary where the client does not pay the account. While I should have noted this, my record of proceedings does not indicate that it was drawn to my attention. Also, clause 4 of the commission scheme contains similar wording. The same applies.
15. In hindsight, had I considered these clauses, I may well have come to the conclusion that the claim for deduction from wages should have been dismissed. However, there was no request for a reconsideration, and no appeal, and it is now too late for me to do so of my own volition.

16. As to the much larger claim of unfair dismissal there is no request for full reasons, and so I do not provide them.
17. The essence of the decision was that it was indisputable that recruitment effectively ceased on 23 March 2020. There would be some work superintending temps, and in nursing placements made through to completion, but nothing to justify a salary of £1,000 a week. The CJRS was to avoid redundancies. It is not disputed that Covid-19 reduced the need for employees to do what the Claimant did – there was a redundancy situation. The Claimant declined to be furloughed, as he was entitled to do (£2,500 a month was far below his usual earnings). The dismissal for redundancy was therefore fair. Everyone else took redundancy, so there was no one else in consideration.
18. It was not rendered unfair by the Respondent offering a much lower salary and much higher commission so that the Claimant could work if he wanted to do so, and see if he could earn as he said he would. There was no reason why the Respondent should take the risk. In short, this was not a repudiatory breach of contract, but an offer to avoid redundancy as the Claimant refused furlough.

Employment Judge Housego

Date 01 October 2021

REASONS SENT TO THE PARTIES ON
22nd October 2021

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THY
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FOR THE TRIBUNAL OFFICE