



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr S McLaughlin

AND

Respondent

Cefetra Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP)

ON

4 January 2022

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: In person

For the Respondent: Mr A Sutherland (Solicitor)

RESERVED JUDGMENT

The judgment of the tribunal is that the Claimant fails in his claim for unauthorised deduction from wages in respect of unpaid commission, but succeeds in his claim for holiday pay where the tribunal has jurisdiction and the Respondent is ordered to pay the Claimant the gross sum of £675.60 (based on 8 days multiplied by a shortfall of £84.45 per day).

REASONS

Background and this Hearing

1. In this case the Claimant continues to pursue monetary claims for unauthorised deductions from wages (commission pay) and for unpaid holiday pay.
2. The Respondent denies the claims, save for the amount of £1,642.26 by way of extra payment for the holiday days the Respondent says the

Claimant took during his whole employment, albeit it submits that part of that amount which it says is owed is time barred to the Claimant.

3. For reference at this hearing I was provided from the Respondent:
 - a. A PDF Bundle of 98 pages (with index)
 - b. Witness statements of:
 - i. Susan McKie, the current HR/Office Manager for the Respondent; and
 - ii. Colin Cufley, the current Financial Controller for Premium Crops, a division of the Respondent.
4. From the Claimant I was provided with:
 - a. His witness statement; and
 - b. Six supporting documents, which the Respondent objected to the inclusion of as a matter of principal (it did not assert prejudice), as they were submitted late, and additionally against the inclusion of the third document of the six on the basis it related to WOP ACAS correspondence. After hearing submissions from the parties, it was confirmed that the ACAS correspondence (the third document) would not be considered, but the others could be if relevant.
5. This hearing was listed for 3 hours (so 10am to 1pm) by video (CVP). The Claimant was unable to connect via a device with video (despite efforts to do so) so could only join with audio. The parties agreed that the hearing could proceed on this basis.
6. At the start of the hearing time was taken to confirm what was being claimed with reference to the case management order of Regional Employment Judge Pirani from the hearing on the 16 September 2021, in that:
 - a. The Claimant confirmed that his claim for unauthorised deductions of wages relates to deductions from his commission. The Claimant says he is owed £4,852.11.
 - b. The claim for outstanding holiday pay relates to 46 days of unpaid holiday taken from 8 October 2019 until 1 July 2020.
7. In respect of the commission pay the Claimant asserted at this hearing that he was wrongly deducted from his commission the salary he was paid in the first six months of his employment, when he was supposed to be

building up his commission pipeline. He asserts that it was verbally agreed he would not have to repay this from commission subsequently earned. He relies on the schedule at page 87 of the bundle, saying that when the figures in column O (the 20% retention column) are added up they equate to a total of £4,852.11 which he says he should not have been deducted.

8. The Respondent's position on this is that the Claimant was only entitled to be paid earned commission as per clause 3.1 of the employment contract (page 41 of the bundle):

“

3. Remuneration

- 3.1. Your salary will be based on earned commission but underwritten to a minimum of £30,000 per annum payable monthly (net of deductions) in arrears on the 28th of each month to the credit of a bank nominated by you.

“

9. The Respondent asserts that the Claimant was in fact overpaid as he received the minimum of £30,000 per annum and also the earned commission on top of that.
10. The Respondent asserts (based on page 88) that this consists of £62,076.92 (based on the £30,000 minimum per annum and including one month in lieu of notice) and net commission of £24,859.42 to give a total of £86,936.34.
11. The Claimant's commission earned total the Respondent asserts was £70,493.89. This resulted, the Respondent asserts, in an overpayment of £16,442.45.
12. As to holiday pay the Claimant says there is no clarity that he has been paid holiday pay. He accepts that he took his holiday but asserts that he should have been given credit for what was taken as holiday to reduce the 20% retention / reconciliation amount he owes. So, for example in a month where he was just on basic pay in the first six months of employment (potentially being paid £2,500 a month not from commission), the time he took holiday should not count as money owed against the commission he subsequently earns. For example, with a day rate of £115.38, 1 day of holiday would mean a credit of £115.38. The day rate would be higher when he does earn commission of more than £2,500 a month.
13. It is the Respondent's position that the Claimant was paid holiday (save for the amount it identifies), because he is always paid at least £2,500 a month (to give the minimum per annum of £30,000) independent of commission earned.

14. I heard evidence from the Claimant and then from Colin Cufley and Susan McKie for the Respondent.
15. I then heard the parties' submissions. During submissions the Respondent accepted that in relation to the holiday pay it says it owes the Claimant that the time bar argument did not apply to the September 2020 holiday or the accrued but untaken holiday. Further, the Claimant accepted based on the evidence heard that he had not been underpaid commission, and that his argument was he had been paid correctly so does not owe the Respondent any overpayments.
16. Evidence and submissions were concluded just after 13:21 so it was necessary to reserve the decision.

The Facts

17. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
18. The Respondent is a business that supplies agricultural raw materials for the feed, food and fuel industry.
19. The Claimant was employed from the 8 October 2018 as a Telesales Executive (see page 41). His employment is recorded as ending on the 24 September 2020 (see page 84) and he was paid one month in lieu of notice (see page 56).
20. The Claimant signed a contract of employment with the Respondent around the start of his employment (see pages 41 to 49).
21. Clause 3.1 of the employment contract (page 41 of the bundle) states:
“
3. Remuneration
3.1. Your salary will be based on earned commission but underwritten to a minimum of £30,000 per annum payable monthly (net of deductions) in arrears on the 28th of each month to the credit of a bank nominated by you.
“
22. Mr Cufley confirmed in oral evidence that it had been verbally agreed with the Claimant that he would not be expected to repay all of the first six months of the underwritten minimum from earned commissions. This was an

amount of £8,420.92 after credit was given for commissions earned in that period (see pages 87 and 88).

23. Mr Cufley also accepted that the Claimant had been paid £2,500 in lieu of notice (see page 88).

24. For the period of employment it is not in dispute that the Claimant was paid a total of £87,628.67 (£15,246.92 plus £47,600.54 plus £24,781.21, see pages 82 to 84).

25. This (based on page 88 and the evidence of Mr Cufley) consists of £62,076.92 (based on the £30,000 minimum per annum and including one month in lieu of notice) and net commission of £24,859.42 to give a total of £86,936.34.

26. The difference of £692.33 from this calculation and what the Claimant was actually paid was confirmed in the oral evidence of Ms McKie as relating to the payment for accrued but untaken holiday at the end of employment.

27. The commission earned by the Claimant for the duration of employment was £70,493.89 (see page 88).

28. The Respondent had asserted that this resulted in an overpayment of £16,442.45. However, this cannot be right on the basis that it was verbally agreed that the amount of £8,420.92 would not be recouped, and £2,500 of the amount paid relates to pay in lieu of notice. At most therefore any potential overpayment would be £5,521.53 (£86,936.34 less £81,414.81 (which is made up of £70,493.89 plus £8,420.92 plus £2,500)).

29. There is a contractual provision to recoup owed payments in the contract of employment see clauses 3.2.1 and 3.2.4:

“

3.2. The Company is entitled to deduct from your salary or request payment of any sums which you may owe including but not limited to;

3.2.1 Loans including advances of salary and any sums that may be paid to you from time to time as a discretionary bonus.

...

3.2.4 Excess of any other payment made to you by the Company.

“

30. The Respondent did not exercise this provision while the contract of employment subsisted between the parties.

31. From these facts the Claimant has not proven on the balance of probability that he has been subjected to an unauthorised deduction from wage in respect of commission pay.
32. As to the complaint for holiday pay. It is not in dispute that the Claimant booked and took holiday, nor that the holiday year ran from 1 July to 30 June. The Claimant also accepted that he did not book holiday between the 5 December 2019 and the 21 September 2020.
33. It is not in dispute that the Claimant was never paid less than the equivalent of the minimum of £30,000 per annum, £2,500 a month.
34. The evidence of Ms McKie is the Respondent did not though give credit for periods when the Claimant, with commission, earned on average more than the minimum of £30,000 per annum, so as to in effect “top up” the annual minimum holiday pay rate.
35. From the calculations at page 92 and the evidence of Ms McKie (at paragraph 6 of her witness statement), the Respondent asserts that this resulted in an underpayment of £1,642.26. The way this figure was calculated was not challenged by the Claimant.
36. The claim was presented on the 4 February 2021 (see page 6). The ACAS certificate is dated from the 24 November 2020 to the 6 January 2021 (see page 1). A complaint about matters on or after the 25 August 2020 would be in time. A complaint about an underpayment of holiday up to the 28 December 2019 would be out of time, with more than three months to the next alleged underpayment on the 28 September 2020, which would be in time.
37. The Claimant has not presented any evidence why it was not reasonably practicable to present a claim before he did. The potential issues concerning the calculation of holiday pay based on commission earnings were known to him before he commenced his employment with the Respondent as he details in paragraph 21 of his witness statement.

The Law

38. Having established the above facts, I now apply the law.
39. The Employment Rights Act 1996 provides so far as relevant:

Section 13 (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.

Section 13 (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Section 27 (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including –

(a) any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under his contract or otherwise...

40. The Respondent accepts that the commission in this claim amounts to "wages". The definition of "wages" also includes holiday pay.
41. Regulation 16(1) of the Working Time Regulations 1998 provides that a worker is entitled to be paid at the rate of a week's pay in respect of each week of annual leave to which he is entitled under Regulation 13 (basic leave) or Regulation 13A (additional leave). Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of his leave year, and as at the date of termination of employment the amount of leave which he has taken is different from the amount of leave to which he is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the employer is required to make a payment in lieu of leave in accordance with Regulation 14(3).
42. A 'week's pay' is calculated in accordance with Sections 221 to 224 Employment Rights Act 1996, with slight modifications: references to 'employee' in those sections are to be read as references to 'worker'; there is no statutory maximum on a week's pay; the 'calculation date' is the first day of the period of leave in question. Another important modification introduced with effect from 6 April 2020 was that the 12-week reference period normally used for calculating a week's pay under the Employment Rights Act was extended to 52 weeks for the purposes of calculating statutory holiday pay under Regulation 16.
43. Time limits - In respect of claims for unauthorised deductions of wage and holiday pay, pursuant to subsections 23(2) and 23(4) of the Employment Rights Act 1996 and similar provisions under Regulation 30(2) of the

Working Time Regulations 1998, there is a three-month time limit for presenting a complaint to an employment tribunal. If the complaint relates to a deduction by the employer, the operative date from which time starts to run is 'the date of payment of the wages from which the deduction was made', Section 23(2)(a). If the complaint is about a series of deductions or payments, the three-month time limit starts to run from the date of the last deduction or payment in the series, Section 23(3).

44. In **Bear Scotland Ltd and ors v Fulton and ors and other cases 2015 ICR 221**, EAT, it was held that a gap of more than three months between any two deductions in a chain breaks the series of deductions.
45. If the tribunal is satisfied that it was not reasonably practicable to present a complaint within three months, it may be presented within such further time as the tribunal considers reasonable, section 23(4).
46. The onus of proving that presentation in time was not reasonably practicable rests on the Claimant.
47. Even if the Claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.

The Decision

48. The Claimant has not proven on the balance of probability that he has been subjected to an unauthorised deduction from wage in respect of commission pay.
49. As to the complaint for holiday pay. It is not in dispute that the Claimant booked and took holiday, nor that the holiday year ran from 1 July to 30 June. The Claimant also accepted that he did not book holiday between the 5 December 2019 and the 21 September 2020.
50. It is not in dispute that the Claimant was never paid less than the equivalent of the minimum of £30,000 per annum, £2,500 a month.
51. The evidence of Ms McKie is the Respondent did not though give credit for periods when the Claimant, with commission, earned on average more than the minimum of £30,000 per annum.
52. The claim was presented on the 4 February 2021 (see page 6). The ACAS certificate is dated from the 24 November 2020 to the 6 January 2021 (see page 1). A complaint about matters on or after the 25 August 2020 would be in time. A complaint about an underpayment of holiday up to the 28

December 2019 would be out of time, with more than three months to the next alleged underpayment on the 28 September 2020, which would be in time.

53. The Claimant has not presented any evidence why it was not reasonably practicable to present a claim before he did. The potential issues concerning the calculation of holiday pay based on commission earnings were known to him before he commenced his employment with the Respondent.
54. Based on these findings the Claimant is awarded the short fall in holiday pay for the period that would be in time for this claim, being the holiday taken on the 21 and 22 September 2020 (2 days) and the accrued but untaken holiday (of 6 days). The Respondent's calculations are accepted which gives a daily rate of £199.83 (see page 92) and which means a shortfall of £84.45 per day (£199.83 less the £115.38 paid) so totalling £675.60.

Employment Judge Gray
Dated: 5 January 2022

Judgment sent to parties: 14 January 2022

FOR THE TRIBUNAL OFFICE