



EMPLOYMENT TRIBUNALS

Claimant:
Mr G Jones

v

Respondent:
Capita Resourcing Limited

Heard at: Manchester (via CVP)

On: 6 January 2022

Before: Employment Judge Fredericks

Appearances

For the claimant: Mr I Ahmed (Counsel)

For the respondent: Mr R Kohanzad (Counsel)

RESERVED JUDGMENT

1. The respondent made an unlawful deduction from the claimant's wages for work done in February, March and April 2021 and the respondent is ordered to pay the claimant the sum of **£12,150**.
2. The deduction of wages set out above also constituted a breach of contract by the respondent, although no award is made for breach of contract to avoid double recovery.
3. There is no uplift applied in relation to any failure to follow ACAS codes of practice.
4. The respondent's counterclaim in relation to the alleged failure of the claimant to perform his employment duties is dismissed upon withdrawal.
5. By consent, the respondent's counterclaim in relation to tickets purchased by the claimant for personal use succeeds and the claimant is ordered to pay the respondent the sum of **£861.20**.

REASONS

Background and preliminary matters

1. The claimant was employed by the respondent as a Sales Director from 7 March 2017 to 21 April 2021, when he resigned with immediate effect. The claimant brings a claim for unlawful deduction from wages and breach of contract following the respondent removing a £4,500 per month uplift to his salary in February, March and April 2021.
2. The respondent denies that the salary uplift was a contractual entitlement and asserts that it was authorised to withdraw the payment at the end of the relevant financial year for the claimant's performance based commission scheme. The respondent also initiated two counterclaims:
 - a. to recover the claimant's salary in the sum of £10,769.23 for an alleged failure to perform his role ("**Salary Counterclaim**"); and
 - b. to recover £861.20 for train tickets procured by the claimant for personal use on the respondent's travel account ("**Tickets Counterclaim**").
3. The Salary Counterclaim was withdrawn by the respondent prior to the hearing following a request for specific disclosure from the claimant, and following the claimant producing evidence of work done over the period covered by this counterclaim.
4. The claimant initially put the respondent to proof in relation to the Tickets Counterclaim and said that he had no recollection of the matters in question. He then agreed to pay the sums claims just prior to the hearing and when questioned in the hearing. Counsel for the claimant volunteered that judgment should be entered against the claimant at the outset of the hearing, but noted that the respondent had not consented to payment being made prior to the hearing.
5. Each party brought separate costs applications ahead of the final hearing. The claimant claims for the costs incurred dealing with the Salary Counterclaim which was ultimately withdrawn. The respondent claims for the costs incurred dealing with the Tickets Counterclaim which was ultimately admitted. It was agreed that any costs applications could be dealt with following promulgation of this judgment.

Issues to be decided

6. Each party produced separate lists of issues reflecting a different analysis of the facts of the case, though there was some degree of overlap between them. There was no need to decide any issues with either counterclaim after the preliminary discussion. It was agreed that the costs applications should be heard separately.
7. It was agreed that the respondent had paid the claimant £4,500 per month in addition to basic salary from March 2020 until February 2021, when the respondent stopped paying that additional sum. The key difference between the parties was, naturally, about whether the respondent was entitled to stop the payments.
8. The issues to be decided were, therefore:

- a. was the claimant contractually entitled to be paid £4,500 in 'guaranteed commission' from March 2020 onwards? In particular, was there an agreement to this made between the claimant and his line manager in March 2020?
- b. were the monthly £4,500 payments able to be withdrawn by the respondent because they were part of a commission scheme which ended in March 2021?
- c. were the £4,500 payments able to be withdrawn by the respondent for any other reason?
- d. If the £4,500 payments could be withdrawn at the end of a commission scheme in March 2021, then what if anything should replace them?
- e. Did the respondent unreasonably fail to follow any ACAS codes of practice when dealing with the claimant's claims? If so, what is the appropriate uplift up to 25% of any award?

Facts

9. I find the relevant facts to be as set out below. Where I have had to resolve a conflict of fact, I do so at the relevant point and explain why I reach the conclusion drawn. I was assisted in finding facts by hearing sworn evidence from the claimant in support of his own case and, for the respondent:
 - a. Rachel Dolan, HR Business Partner;
 - b. Adam Blake, Pillar Finance Director; and
 - c. James Turpin, Financial Crime Investigations Manager.

10. I also had sight of an agreed bundle of documents which runs to 520 pages. References to page numbers in this judgment refer to the corresponding pages in that bundle.

Claimant's remuneration package from March 2017 to March 2020

11. The claimant was experienced in the recruitment industry at a senior at the time of his employment. In late 2016, he was approached to launch the respondent's IT resourcing business unit in Manchester. He was keen to join the respondent but the salary offered to him was significantly less than his earnings at that time. He turned down the initial approach because it was not in line with the usual rate for his level of seniority.
12. After negotiation with his line manager at the respondent, he agreed to join with an improved remuneration package consisting of three elements: (a) basic salary, (b) a long-term incentive plan, and (c) commission payments linked to an agreed business plan which ran to March 2020. This package was designed so that the claimant would at least match the salary he had earned previously.

13. To ensure that the claimant's monthly income remained in line with his previous role, the claimant would be paid £4,500 per month in addition to his basic salary for the first six months of his employment. This was expressed as a 'guaranteed' commission payment and was not capable of being withdrawn or adjusted downwards (page 500).
14. Thereafter, the claimant would be paid £4,500 as an advance on his quarterly commission earnings for the first two months of each quarter with the advance then netted off from the full quarterly commission payment in the final month of each quarter. The rules of the commission scheme (pages 502 to 509) show it was possible, under this system, for overpaid commission to be reclaimed or withheld by the respondent. The schedule of commission payments made from the respondent to the claimant (page 160) shows that the claimant was never paid an advance of commission that he did need to return.
15. In practice, at the time that this payment scheme expired, the claimant was never paid less than basic salary plus £4,500 in a month during this period.

Claimant's remuneration package from March 2020 to March 2021

16. The claimant's remuneration scheme expired in March 2020. The claimant was aware of this and began discussions with his line manager about it. The claimant says that he had a telephone conversation with his line manager in March 2020 about his remuneration. The respondent and the claimant diverge significantly about the nature of any agreement reached.
17. The claimant says that he spoke to his line manager on the telephone to find out what commission scheme might run in the year 2020-2021. He was told that there would be no commission scheme in 2020 due to the pandemic and because it would be impossible to set and measure performance targets. This meant that the claimant would only be paid his basic salary during that period. In reply, the claimant says he told his line manager that he could not continue to work on such a reduced salary. He says that his line manager did not want him to leave, and so his line manager agreed to pay him £4,500 each month as a guaranteed commission bonus in addition to his basic salary. There was, he says, to be no performance based mechanism to the payment. The measure was to be reviewed once the pandemic had passed. The claimant did not deviate from the matters set out in his witness statement in relation to this discussion when cross examined.
18. The respondent did not advance directly contradictory witness evidence to the claimant's version of events. Instead, I was invited to find that the claimant's account was unlikely and unreliable. The account was said to be unlikely because it was outside of the respondent's usual practices and because there was no record of the agreement found when the respondent investigated the claimant's claim. It was said to be unreliable because the claimant had demonstrated an alleged willingness to misrepresent information when dealing with the Tickets Counterclaim. The respondent argued that the £4,500 payments were to be treated as an ordinary commission, subject to withdrawal at the end of the commission year and subject to reduction if the respondent thought fit.

19. It seems to me that the claimant's line manager could have settled the facts about the agreement in question had he given evidence. Neither party called the claimant's line manager as a witness, and so there is only the claimant's account of the conversation before the tribunal. The fact that neither party called such a key witness is treated neutrally; I draw no adverse evidential conclusion in either instance despite each party inviting me to. I am hesitant to accept the claimant's word alone in relation to the matters he says were agreed. There is, though, other evidence which supports the claimant's account of the agreement reached in the conversation with his line manager. Notably:

- a. the respondent paid the £4,500 monthly payments without fail until the claimant's line manager left the business;
- b. no targets were set for the claimant during this period and he was not given financial performance information as was required when a performance based commission scheme was in place;
- c. the claimant's line manager described the payments as a "guarantee not an advance" in an internal e-mail about the claimant's payroll information (page 85);
- d. the claimant's line manager envisaged that the payments would continue even after a new commission scheme was in place (page 85);
- e. Mr Blake described the payment as "guaranteed commission" in an internal e-mail, confirming also that it would remain in place even after a new commission scheme was introduced (page 90); and
- f. the respondent has produced no contradictory evidence showing any other form of agreement despite searching for it during these proceedings.

20. Consequently, I find on the balance of probabilities that the claimant and his line manager agreed that the claimant would be paid his basic salary plus guaranteed monthly payments of £4,500 on an on-going basis until the claimant and the respondent had agreed an alternative remuneration package, but even then it was envisaged that the £4,500 effective commission 'floor' would remain in place. I also find that the claimant's line manager told him that the agreement was effectively protected by being linked to his contract of employment; this is the practical consequence of such an agreement.

Claimant's resignation

21. The claimant resigned with immediate effect by e-mail on 21 April 2021 for several reasons including the non-payment of commission payments which became the subject of this claim.

Withdrawal of the £4,500 monthly payments – respondent's reasoning

22. The respondent made the £4,500 payments in addition to basic salary from March 2020 to March 2021. Just prior to the respondent stopping those payments, the claimant's line manager left the respondent's business. It appears that some

problems have been discovered which has led the respondent to recalculate the profit attributed to the business unit the claimant worked in and which may affect the commission paid to employees within that unit. I was told by Ms Dolan that this issue is not part of these proceedings. Mr Blake states that investigations remain on-going. It is difficult to make any factual findings in such circumstances but, as detailed below, in the end I consider that I do not need to make any.

Relevant law

23. An employment contract is a binding agreement, but one which can be varied by mutual agreement or consent. Where the parties to the contract are in agreement and especially when they signify that agreement by beginning to perform the variation, then they shall be bound by that variation. Failure by one party or the other to perform in accordance with the variation will amount to a breach of that contract, and damages may be awarded to address the harm arising from the breach.
24. Under section 13 Employer Rights Act 2006, an employee is entitled to be paid wages without deduction from their wages unless the deduction is authorised by statute, the worker's contract, or through signed agreement from the worker. Commission is defined as 'wages' by section 27 Employer Rights Act 1996.

Conclusions

25. The claimant was entitled to the £4,500 commission payments under his employment contract, following a variation of the contract caused by the agreement between the claimant and his line manager in March 2020. I have determined that the agreement in March 2020 was a variation to the claimant's employment contract because there was an agreement in relation to the claimant's remuneration which the parties then adhered to. I have found above that the £4,500 commission payments were introduced as a guaranteed commission. These were wages which were deducted from the claimant's pay.
26. The question then is whether the deduction of wages by the respondent were authorised? The respondent has asserted that it was entitled to withhold commission payments at its absolute discretion if it is overpaid under the rules of the various commission schemes in place prior to March 2020 (para 17.2.4 and 17.2.5 grounds of resistance). However, the detail of this was not discussed at the hearing for the reasons outlined above. It strikes me as a difficult position to say that the deductions were authorised on the one hand, but then say that the matters which gave light to that authorisation were on-going, separate and not detailed in these proceedings.
27. In any case, the fatal issue with the respondent's position is that, as I have found, the schemes which contained those rules had ended and the claimant and respondent had agreed that the commission from March 2020 were to be guaranteed monthly payments. I have also been shown no clause of the claimant's employment contract which may withhold wages for any other reason. It follows that the respondent was not authorised to withhold the commission payments as the claimant claims.

28. The failure to pay the guaranteed commission was also a breach of the claimant's contract, as the respondent was bound to make those payments following the variation.
29. The claimant's claim contains a claim for interest on the withheld sums at 8%. The basis upon which such interest could be awarded is not pleaded, and the point was not advanced at the hearing. There is to be no order for interest except for any interest which is applied should the amount awarded not fall due.
30. The claimant also claimed an uplift in award for the respondent's failure to follow ACAS codes of practice in dealing with his grievance about the withheld pay. Whilst it is true that the complaint was not dealt with immediately or in apparent accordance with the respondent's policy, it is relevant that the issue was raised at the point of resignation with immediate effect and that the matter was escalated to this litigation shortly thereafter. Consequently, there is no uplift for failure to follow ACAS codes of practice as I do not consider it just and equitable to do so.
31. Should either party wish to pursue an application for costs as intended at the hearing, then they are invited to do so in the usual way.

23 January 2022
Sent to the parties on:

18 February 2022
For the Tribunal Office:



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2408398/2021**

Name of case: **Mr G Jones** v **Capita Resourcing Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 18 February 2022

"the calculation day" is: 19 February 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".
3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.
4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).
5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.
6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.