



EMPLOYMENT TRIBUNALS

Claimant: Mr M Murrin

Respondent: Telecom Service Centre Ltd t/a Webhelp UK

On: 19 April 2022
25 May 2022 (in Chambers)

Before: Employment Judge McAvoy News

Heard at: Leeds Employment Tribunal

Appearances:

For the Claimant: In person

For the Respondent: Miss D Rookes, Solicitor

RESERVED JUDGMENT

1. The Claimant's claim for breach of contract pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 is not well-founded and is dismissed.
2. The Claimant's claim for unauthorised deductions from wages pursuant to section 13 of the Employment Rights Act 1996 (the "ERA") is not well-founded and is dismissed.
3. A decision regarding the Claimant's claim for unauthorised deductions from wages, in respect to the December 2021 deduction, will be made following the parties' compliance with the case management orders sent alongside this Reserved Judgment (or lack thereof). A revised Judgment will be sent to the parties thereafter.

REASONS

Preliminary

1. At the outset of the hearing, it was agreed that the correct identity of the Respondent was Telecom Service Centre Ltd t/a Webhelp UK. The name of the Respondent has been substituted accordingly.
2. Neither party had provided or exchanged witness statements. The Respondent had mistakenly expected to be able to adopt the procedure adopted in the Scottish Employment Tribunals. It was agreed that the factual aspects of the parties' pleadings would form their evidence and each party would be permitted to cross examine such evidence.

Issues

3. The Claimant's claim is that he is owed:
 - a. around £600 for a bonus which ought to have been paid to him in October 2021. The Claimant said he was unable to particularise the exact figure due as he requires further disclosure from the Respondent in order to do so; and
 - b. the sum of £271.06 which was allegedly deducted from his wages in December 2021. Subsequent to this hearing, a payment has been made to the Claimant and this is considered later in these Reasons.

Findings of fact

Background

4. The Claimant commenced employment with the Respondent on 19 July 2021 as a Contact Centre Associate, which was a sales role. His employment ended on 3 February 2022 following his resignation.
5. The Respondent's business is the provision of outsourced services to major businesses at various locations throughout Great Britain.
6. It was accepted between the parties that the Claimant was employed on the Vodafone campaign, which involved calling opted in existing Vodafone customers, to promote and sell Vodafone products to them.

Relevant contractual documents

7. It was also accepted between the parties that the Claimant was issued with a statement of terms and conditions of employment and the Claimant agreed to these terms and conditions on 9 July 2021. The Claimant acknowledged that these terms and conditions did not refer to an entitlement to a bonus.
8. At this point it is worth observing that these terms and conditions of employment state: "The laws of Scotland govern this contract of employment. The parties to this

contract submit to the non-exclusive jurisdiction of the Scottish Courts in relation to any claim, dispute or matter arising out of or relating to this contract". This was not brought to my attention during the hearing. In particular, the Respondent did not assert that I did not have jurisdiction to determine the Claimant's complaints. As a result of this and the fact that the Claimant was based in England throughout the entirety of his employment, I have concluded that the Respondent does not take issue with the fact that the Claimant's claim was brought in England rather than Scotland.

Bonus schemes

9. The Claimant's evidence was that, at the outset of his employment, he was informed that his remuneration would comprise a basic wage and a bonus. He says he was disappointed with the basic salary being offered and was persuaded by the level of bonus which he could earn. He says he was provided with the bonus structure during his training and at no point was he told that the bonus scheme would be discretionary or that it could change on a monthly and/or quarterly basis.
10. The Respondent's evidence was that it operates a number of non-contractual, discretionary bonus schemes, which vary depending on the client and campaign. It said that the Claimant was on the Vodafone campaign and participated in the bonus schemes applicable to such campaign.
11. The Respondent explained how its bonus schemes changed periodically, often on a monthly basis. Changes to the 'gateways', which are at the heart of this claim, and are considered in more detail later in these Reasons, were made on a quarterly basis.
12. In July 2021, when the Claimant commenced his employment with the Respondent, the main gateway to unlocking a bonus was based on the employee achieving a certain daily net revenue figure. Although there is a dispute between the parties as to when this happened (the Respondent says it happened in October 2021, the Claimant says it happened earlier) this gateway was changed such that the employee needed to complete a minimum of one Vodafone broadband sales per month, in order to 'unlock' their entitlement to a bonus, even if a bonus would have been due on other sales that they made.
13. The Respondent explained that the relevant target was to make four Vodafone broadband sales per month and, therefore, on that basis, it was considered that the sale of one per month in order to 'unlock' the bonus was achievable. The Respondent's unchallenged evidence was that some employees sell one of these each day.
14. The Claimant put to the Respondent that it was communicated to him and his colleagues that the above mentioned gateway would not be applied if there were 'exceptional circumstances'. The Respondent's witness did not recall saying this but did not deny doing so either. He said that if there were exceptional circumstances these would be reviewed by the Commission Board (considered later).

15. In answer to questions from me, the Respondent said that common exceptional circumstances are e.g. a complete loss of system access making employees unable to undertake the basic requirements of their roles. This could be where the employee hasn't been able to take any calls for three weeks or longer and therefore not been able to speak to many customers for most of the month.

16. The Claimant drew my attention to the following particular parts of the Commission Notes:

a. 2.0: All sales employees and Team Leaders will be aligned to a commission scheme relevant to their role. Only employees in roles that exhibit some or all of the below criteria will be considered eligible for commission:

- i. You must be in a sales channel
- ii. You must have personal contact with the customer
- iii. You must be directly accountable for specific sales by carrying individual or team revenue or financial responsibility
- iv. You must provide key input into the sales process with respect to:
 1. Access to the customer
 2. Fulfilment of customer expectations

Employees are eligible to earn commission subject to certain conditions, including but not limited to:

- i. Achieving their targets
- ii. Compliance with the Company's defined processes and Business Ethics Policy
- iii. Following fundamental sales disciplines as defined below:
 - a. Following the appropriate sales governance
 - b. Training adherence
 - c. Compliance to Commercial Rules

b. 6.5: In the event an employee is having an issue outside of their control which is impacting commission earnings, the Commission Governance Review Board will consider any adjustments. Adjustments will be made post month if correct process has been followed and an INC reference has been obtained. In the event of an estate wide or channel outage, the Commission Governance Review Board will decide and communicate any adjustments to the scheme or targeting.

17. The Respondent directed me to the following part of the Commission Notes: Vodafone reserves the right to amend, change or cancel this Commission Scheme solely at its discretion and without prior notice. This may be necessary for various reasons including, but not limited to reflecting a change in business focus or to address issues with the Scheme. The Commission Governance Review Board will carefully consider all appropriate factors. Any changes will take effect on the date notified by Vodafone.

18. The crux of this case concerns the events of October 2021. It was accepted that the Claimant managed to sell Vodafone broadband to a customer on 7 October 2021. However, as a result of a technical issue, for which neither the Claimant nor the customer were at all blameworthy, the sale did not proceed. The Claimant attempted to assure the customer that the technical issue would be fixed, to no avail. The sale did not go ahead.
19. Following the above, the Claimant queried whether his bonus for October 2021 would still be payable. He raised various concerns alleging that he was being financially penalised for matters outside his control. There is evidence of these concerns being considered seriously by the Respondent as the Respondent liaised with its client, Vodafone, to see whether a resolution was possible. However, on 1 February 2022, the Claimant was told that his bonus would not be unlocked because the order was not completed and, therefore, no bonus for October 2021 would be paid.
20. The Respondent's evidence was that the Claimant's case was reviewed by the Commission Governance Review Board who decided that no adjustments should be made. This was not necessarily done for the Claimant on an individual basis, but alongside other queries which were discussed during a call. The Claimant did not believe it had been reviewed. There was no documentation regarding this and the Respondent's legal representative assured me that, if such documentation existed, it would have been disclosed. This suggests that, if it was carried out, the review was either an oral one or the relevant documents were not in the Respondent's possession or control.
21. During the hearing the Claimant accepted that, if a customer had failed a credit check after submitting an order, the sale would not be recorded against the Claimant's target, effecting his bonus entitlement. He felt the difference between this scenario and the circumstances he was faced with was the fact that, in his situation, other people employed by the Respondent (e.g. the IT team) were at fault and he felt the decision to not give him a bonus was effectively punishing him for mistakes made by other employees.
22. The Respondent accepted during the hearing that the circumstances facing the Claimant were 'exceptional' however did not consider them to be 'exceptional' in the sense of removing the gateway for the payment of the October 2021 bonus. This was because it was felt that the Claimant had the chance to make another Vodafone broadband sale, given that the target was one per week.

December 2021 deduction

23. It was originally alleged that the sum of £342.68 had been deducted from the Claimant's wages in December 2021. During this hearing the Claimant confirmed that the sum of £271.06 remained due. The Respondent agreed and it was hoped that the payment would be received during the course of the hearing, however it was not. As this was a contractual payment for lost wages, it would have been subject to deductions for income tax and national insurance contributions. Subsequent to the hearing, the Claimant has confirmed that he has received £216.86. Although I have not calculated this myself, I expect this will be the net pay

due on the gross sum of £271.06. However, as I understand the Claimant has not received a wage slip or confirmation as to how this sum has been calculated, he is not able to confirm this. Some case management orders regarding this have been sent to the parties alongside this Judgment.

The Law

Breach of contract

24. Pursuant to Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 ("Order"):

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
- (b) the claim is not one to which article 5 applies;*
- (c) the claim arises or is outstanding on the termination of the employee's employment; and*
- (d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.*

Unauthorised deductions from wages

25. Pursuant to section 13 of the Employment Rights Act 1996 (ERA):

"(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."

(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.

26. Pursuant to section 27(1)(a) of the ERA, wages includes bonuses and commissions.

Submissions

27. Both parties gave oral submissions. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

28. Considering 2.0 of the Commission Notes, the Claimant was eligible for commission. This has not been disputed. The commission which the Claimant is entitled to, pursuant to these Notes, has been referred to during these proceedings as 'bonuses'. I have adopted the use of the word 'bonus' in this section, for this purpose, to avoid confusion.

29. This is not a case concerning the unlawful removal of a bonus scheme. Both parties acknowledged that a bonus scheme was in place in October 2021. The Respondent has not said that this bonus scheme was removed in e.g. September 2021 and it was entitled to do so.

30. The Claimant acknowledged that, in order to earn a bonus, there were a number of conditions. One of such conditions was the achievement of targets. This is set out at 2.0 of the Commission Notes.

31. As of October 2021, in order for the Claimant to 'unlock' his entitlement to the bonus, which is the subject of this claim, he was required to complete at least one Vodafone broadband sale during that month. That was the applicable 'target' for achieving the bonus.

32. The Claimant raised a concern during this hearing about the fact that the Respondent had adjusted the parameters of its bonus scheme subsequent to him commencing employment. In this regard it seems that the Claimant is saying he preferred the gateway which was in place at the time his employment commenced, namely the gateway concerning daily net revenues, and it was unlawful for the Respondent to vary it. My conclusions regarding this are as follows:

- a. The Respondent had a right under its Commission Notes to amend its bonus scheme. Based on the unchallenged evidence presented to me during this hearing, I find that it did so frequently;
- b. Whilst the Claimant disputed ever being told that the bonus scheme was variable, the fact this is the case is clear from the Commission Notes. The Claimant must have been aware of the existence of such Commission Notes, or had access to them, as he has relied upon them when presenting his claim during this hearing; and
- c. There is no evidence of the Claimant protesting to the change in gateway at the time. Indeed, in asserting that he ought to receive a bonus for October 2021 because he believed he had done whatever he could to complete a sale of Vodafone broadband, he must have

accepted that the gateway had changed from a gateway concerning daily net revenues, to this.

33. Although it is not clearly documented in the Commission Notes, and the Respondent's evidence in this regard was not certain, I have concluded that one caveat to the requirement for the employee to make at least one Vodafone broadband sale per month concerned the existence of 'exceptional circumstances'. If there were such circumstances, this requirement would be waived for that particular month. I have concluded this because:

- a. the Claimant says this was communicated to him in October 2021;
- b. the Respondent's witness did not deny saying this, only that he did not remember doing so; and
- c. there appears to be provision for this eventuality at 6.5 of the Commission Notes.

34. The central question in this case is, therefore, whether such exceptional circumstances existed.

35. The Respondent's evidence was that exceptional circumstances may arise where there is a complete loss of system access making employees unable to undertake the basic requirements of their roles. This is akin to a 'system outage'.

36. Under the heading 'system outages', at 6.5, the Commission Notes state:

"In the event an employee is having an issue outside of their control which is impacting commission earnings, the Commission Governance Review Board will consider any adjustments. Adjustments will be made post month if correct process has been followed and an INC reference has been obtained. In the event of an estate wide or channel outage, the Commission Governance Review Board will decide and communicate any adjustments to the scheme or targeting".

37. Applying this to this case, the Claimant's failure to finalise the one sale that he had made in October 2021 was outside of his control. The Claimant's bonus for that month was impacted as this issue contributed to the fact that the gateway remained locked. The Respondent accepted it was 'exceptional' and was akin to a customer failing a credit check, which would have also been outside of the employee's control. The Respondent's acceptance that the matter was referred to Commission Governance Review Board (considered further below) suggests it agreed at the time that the issue was outside of the Claimant's control.

38. There was a dispute between the parties as to whether the matter was referred to the Commission Governance Review Board. The Claimant does not believe it was and there is no documentary evidence before me of the Respondent having done so. The Respondent's representative confirmed that documentation regarding such review had been sought but not received.

39. During evidence, the Respondent's witness confirmed that he believed that this was done and it was decided that an adjustment should not be made. This was because, in summary:
- a. The Claimant had ample time to make another sale in October 2021. In this regard, the performance target (not the bonus target) was to achieve one of such sales per week and some employees achieved one per day; and
 - b. The circumstances facing the Claimant were not analogous to a typical system outage, where employees are prevented from being able to make contact with customers for the vast majority of the month.
40. On a balance of probabilities, I have concluded that a referral to the Commission Governance Review Board was made. This is because:
- a. The Respondent's witness gave honest and credible evidence during this hearing. Where he did not know the answer to something, he candidly accepted that, rather than attempting to fabricate an answer. He appeared confident that such a referral was made;
 - b. I expect the Respondent's witness' knowledge of this would have been more reliable than the Claimant's, who may not have been involved in the process; and
 - c. It is feasible that this review was undertaken yet no documentary evidence was prepared in regard to it. This may have been the case if, as the Respondent's witness said, it was undertaken during a telephone call during which the Board were discussing multiple cases.
41. Whilst I have found that the Claimant did have an issue outside of his control which was impacting his bonus payment for October 2021, this does not necessarily mean that the bonus gateway target ought to have been waived. There was no contractual obligation on the Respondent to do so. All the Respondent was obliged to do was to refer the matter to the Commission Governance Review Board, which the Respondent did. As such Board concluded, the Claimant could have made another sale that month and, bearing in mind his performance targets, ought to have been able to do so.
42. In failing to complete a Vodafone broadband sale for October 2021, the Claimant did not meet the requirements of the bonus scheme applicable at the time. This was a target which was in place at the time which he did not meet. As the Respondent considered 6.5 of the Commission Notes to apply, it referred the matter to the Commission Governance Review Board. They decided that the targets applicable to the Claimant's bonus scheme should not be varied. The Claimant therefore had no entitlement to a bonus in October 2021.
43. Pursuant to section 13(3) of the ERA, this bonus or commission was not properly payable to the Claimant in October 2021. Therefore, there has been no unauthorised deduction from the Claimant's wages. Additionally, this sum did not

form part of the sums which were due to the Claimant and therefore outstanding on the termination of his employment.

44. Consequently, the Claimant's claims fail and are dismissed.

Employment Judge McAvoy Newns

30 May 2022