



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103617/2022

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Hearing held in Glasgow by Cloud Video Platform (CVP) on 14 September 2022

Employment Judge: R Sorrell

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Mr C McDaid

**Claimant
In Person**

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Xeretec Office Systems Ltd

**Respondent
Represented, by:
Mr R Wilson -
Respondent Paralegal**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim for notice pay is not well founded and is dismissed.

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REASONS

Introduction

1 The claimant lodged a claim for notice pay and sought the amount of £4,347.84 by way of remedy.

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The burden of proof is on the claimant and the standard of proof is on the balance of probabilities.

3 This hearing was scheduled to determine the claim. It was a virtual hearing held by way of the Cloud Video Platform.

4 As the claimant was a party litigant, I explained the purpose and procedure for the hearing and that I was required to adhere to the Overriding Objective

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of dealing with cases justly and fairly and to ensure that parties were on an equal footing.

5 A joint bundle of productions was lodged prior to the hearing. A further
document was lodged by the claimant during the course of the hearing. The
5 importance of referring to the relevant documents when giving evidence was
explained to the claimant.

6 The claimant gave evidence. The respondent called one witness, Mrs G
Bennett, Head of Human Resources for the respondent company.

Findings in Fact

10 The following facts are found to be proven or admitted;

7 The claimant's date of birth is 23 February 1980.

8 The respondent is a provider of office solutions.

9 On 30 September 2021, Mrs Bennett sent the claimant an 'Offer of
Employment' letter which enclosed a summary of the principal terms of the
15 offer. In the cover letter, Mrs Bennett referred to the commission guarantee:
*"For the first 3 months of your employment you will receive a commission
guarantee; the exact amount of this guarantee will be agreed on
commencement of employment. Commission earned from business signed
during this 3 month period will be deducted from the guarantee. "* (D25-26)

20 10 On 4 October 2021, the claimant sent Mrs Bennett an email accepting the
offer to join the respondent company. (D37)

11 Prior to the commencement of his employment, a verbal agreement was
made by Mr P Connolly, Regional Director with the claimant that he would be
paid a commission guarantee payment of £2,000 per month for three months
25 in November 2021, December 2021 and January 2022. This was reiterated
by Mr Connolly when the claimant commenced employment, but not
confirmed in writing. Other than what was stated in the 'Offer of Employment'
letter about commission being deducted from the commission guarantee

payment, no further details were provided to the claimant about that and the claimant did not seek any additional information.

12 The claimant commenced full-time employment with the respondent as a Senior Sales Specialist on 1 November 2021 .

5 13 The claimant was paid a gross basic salary of £40,000 per annum This was paid around the 22nd of each month, together with any commission due.

14 Commission was paid monthly in arrears based on a monthly figure once payment was made by the customer. There was a time lag between business being 'signed' and 'paid' by the customer. The date on which business was
10 'signed' was the relevant date in respect to any deduction being made from the commission guarantee payment as a result of a commission payment being made.

15 The claimant was provided with a contract of employment by the respondent which he signed on 3 November 2021. (D29-35) Clause 19 of the contract concerned deduction of remuneration: *"The Company reserves the right at any time during or in any event on termination to deduct from your remuneration any monies owed to the Company by you including but not limited to any missing property including petty cash that was in your control or was your responsibility, excess holiday, outstanding loans, advances and the
20 cost of repairing any damage or loss to the Company's property caused by you. In the event of shortages arising of cash or of stock the Company reserves the right to recover an equitable amount from any payments due to any employee concerned. By accepting and agreeing to the terms of this contract, you hereby agree to the lawful deduction of monies owed to the
25 Company in respect of, but not limited to, the above."* (D34)

16 In February 2022 the claimant was paid his basic pay and a commission payment of £150.00. (D48)

17 In March 2022 the claimant was paid his basic pay and a commission payment of £4,494.87. The majority of the commission payment was for a
30 contract that was signed by the customer on 31 January 2022.

- 18 On 13 April 2022 tendered his resignation by email to Mr Connolly and Mrs
Bennett and gave one month's notice effective from that date. (D40)
- 19 On 21 April, Mr J Sheran, respondent Group Operations & Service Director,
asked the claimant to meet with him to discuss the reasons for his resignation.
5 At that meeting, Mr Sheran informed the claimant that he would not be due
any wages on 22 April 2022 because the respondent had made an error in
paying him the commission payments of £150 and £4,494.87 in February and
March 2022 respectively, which should have been deducted from the
cumulative commission guarantee payment he had received between 1
10 November 2021 and 31 January 2022 as the business had been signed
during that period.
- 20 The claimant questioned this with Mr Sheran as he thought the £2,000
commission guarantee payments made to him in respect of each of these
three months were individual payments relating to the particular month in
15 which they were paid and were not therefore cumulative. Mr Sheran did not
accept that this was the agreement made.
- 21 On 21 April 2022, Mrs Bennett wrote to the claimant as follows: *"Thank you
for your email resignation dated 13 April 2022 in which you advised of your
intention to leave our employment. I can confirm the Company's acceptance
20 of your resignation and that your final date of employment with Xeretec will be
Friday 13 May 2022. You can now spend the remainder of your notice period
on garden leave. Your access to all company systems has been removed.
Please note that the Company will make adjustments to your commission
earnings associated with the period during which you had a commission
25 guarantee in line with the terms of your contract of employment. This may
result in monies being deducted from your basic salary in April and May. As
you have taken in excess of your accrued annual leave by 2 days, this will be
deducted from your final pay which will be processed in May and sent to you
along with your P45. I can confirm that all items of property have been
30 returned."* (D41)

22 On 26 April 2022, Mr Sheran emailed the claimant and attached the claimant's final pay slip dated 31 May 2022. (D50) In his email Mr Sheran stated: *"It isn't the outcome you are looking for but we have applied what was detailed on your offer letter."* (D43)

5 23 This pay slip shows that the claimant was paid his basic gross pay of £4,871.73 for the period from 1 April to 13 May 2022, in accordance with the date of termination of employment. This included the notice period of 13 April to 13 May 2022. From that basic gross pay, there was a deduction made of a commission overpayment of £4,347.85, which took account of commission
10 that remained payable of £297.02 to the claimant for April and May 2022. There was also a deduction made of £307.68 for two days annual leave the claimant had taken in excess of his accrued annual leave. The net payment made to the claimant after deductions was £216.20. (D50)

Respondent's Submissions

15 24 The respondent submitted that the claimant was paid his notice pay for April and May 2022. There is no doubt within the offer letter that commission relating to contracts signed within that 3 month period is deducted from the guarantee sum or that the sum is to be looked at as a whole amount of £6,000.00. If the respondent had wanted to express it in a different way such
20 as £2000.00 per month rolling, then that is what the offer letter would have said.

25 The contract giving rise to the commission in question was signed on 31 January 2022. It is the respondent's practice that contracts are signed as soon as possible and the claimant was urged to do this with the client in this
25 instance. There is usually a lag between contract signing and invoice paying by the customer and it is the latter that triggers the time the commission payment is made to the sales person. In this case the commission pay related to a contract signed within the guarantee period but it was paid to the claimant in error. When the final totalling up was done that was due to the claimant, the
30 error was spotted and the deduction was made. The result being that the claimant was paid his full notice pay and salary for April and May, but the

deduction reduced the balance payable to him. The deduction was made in accordance with clause 19 of the claimant's contract and the offer of employment.

Claimants Submissions

5 26 The claimant submitted that the deduction is wrong. It is his understanding that a guarantee commission payment is to ensure an employee is not penalised for moving to a new role and that it is paid one month in arrears. In his previous job, he gave one month's notice and was put on garden leave. This affected his ability to make commission in October before he began
10 employment with the respondent, so this guarantee payment was in place to support new staff joining the respondent company.

27 He was put under a little pressure to have the main contract concerning the
• commission guarantee payment signed in January. This was done on the understanding that he would be paid his commission for that contract once
15 the invoice was paid. His commission payment for this contract was correctly paid. It was agreed by three senior members of staff, Mr Connolly, Mr Sheran and Mr C Hamilton, respondent General Manager, who have many years of experience behind them, so he finds it very strange that they did not notice this was incorrect at the time. It was never said to him or clarified in his
20 contract that the commission guarantee payment was based on a quarter figure. This never happens in other work places. There were no clear details given to him about it. There was nothing in writing to confirm the details or amount of the commission guarantee payments at the start of his employment and this should have been signed off at the highest level in order to avoid any
25 misunderstanding.

Relevant Law

Definition of Wages

28 Section 27(1) Employment Rights Act 1996 ('ERA') defines 'wages' as any sums payable to the worker in connection with his employment. This includes
30 any fee, bonus, commission, holiday pay or other emolument referable to the

employment.

Payment in lieu of Notice

29 In **Delaney v Staples (t/a De Montfort Recruitment) 1992 ICR 483, HL**, four
principal categories of pay in lieu of notice were identified. One of these
5 categories is where a worker is given notice but told not to come into work
and given an 'advance' of wages for the notice period, the effective date of
termination being at the end of that period which is commonly known as
'garden leave.' It was further held it was only this category which constituted
wages for the purposes of the protection of wages provisions.

10 *Unlawful deductions from wages*

30 The law relating to unlawful deductions from wages is contained in section 13
of the ERA which provides that an employer shall not make a deduction from
wages of a worker employed by him unless the deductions are authorised by
statute or contract, or where the worker has previously agreed in writing to the
15 making of the deduction. A deduction is defined as 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 wages properly payable by him to the worker on
that occasion after deductions.

31 Section 14 of the ERA excludes certain kinds of deductions from a worker's
20 wages. It states that section 13 of the ERA does not apply where the purpose
of the deduction is the reimbursement of the employer in respect of an
overpayment of wages, or in respect of expenses incurred by the worker in
carrying out his or her employment made (for any reason) by the employer to
the worker. In such circumstances, an employer may simply deduct the sum
25 overpaid from a subsequent wage. Although the deduction will not fall within
the scope of the protection of wages provisions, the common law rules on the
right to recover overpayments will still apply.

Issues to be Determined by the Tribunal

32 The Tribunal identified the following issues require to be determined:-

- (i) Did the respondent make an overpayment to the claimant?
- (ii) If so, is the respondent entitled to recover the overpayment?
- (iii) If not, has the respondent made unlawful deductions from the claimant's wages?
- 5 (iv) If so, how much is the claimant to be awarded?

Conclusion

- 33 Overall, I considered that the claimant and the respondent witness, Mrs Bennett gave their evidence in a clear way giving an honest account of events as they remembered them.
- 10 34 The material issue in dispute concerned the three commission guarantee payments of £2,000 made to the claimant in November 2021, December 2021 and January 2022 and whether these amounted to a cumulative payment of £6,000 over the three month period for which any commission earned as a result of business 'signed' during that three month period could be deducted
15 from the cumulative total of the payments to date, or that these were three separate monthly payments for which any commission earned as a result of business 'signed' in respect of one of these months could only be deducted from that particular months commission guarantee payment. In considering this issue, I have also noted the claimant's evidence that he considered the
20 term 'business signed' to be vague and open to interpretation, but accepted that commission was only payable to him once payment was made by the customer.
- 35 Having carefully considered all the evidence in the round, I found that there was an overpayment of commission made to the claimant in his pay of
25 £150.00 in February 2022 and of £4,494.87 in March 2022. This is because I was satisfied it was reasonably clear in the 'Offer of Employment' letter that the commission guarantee payment was a three month cumulative payment from which commission earned from business signed during those three months would be deducted.

36 In reaching this view, I considered that the claimant did appreciate the
difference between business 'signed' and business 'paid' by the customer
because in his evidence he accepted that commission only became payable
once payment was made by the customer which was always after the
5 business was signed. I further noted that the wording of the relevant term in
the 'Offer of Employment' letter simply referred to 'a' commission guarantee
for the first three months of employment from which business signed during
that period would be deducted and there was no indication that commission
earned would only be deducted from the commission guarantee payment
10 made in the month in which the business was signed.

37 As such, I found these commission payments were made to the claimant in
error as they were signed during the three month period in which the
commission guarantee payment was made and should therefore have been
deducted from the cumulative total of that payment.

15 38 Notwithstanding this finding, I considered this could have been better
explained by the respondent to the claimant prior to the commencement of
his employment which may have avoided any possible misunderstanding by
both the claimant and the respondent staff who actioned these payments to
be made to the claimant in March 2022. This was particularly in view of the
20 claimant's credible evidence that he has worked in the industry for 17 years
and his previous experience is that any monthly commission due is deducted
from commission guarantee payments made on a monthly not cumulative
basis, which was supported by the evidence he lodged of another company's
practice in this field. (D70)

25 39 On the basis that there was an overpayment of commission to the claimant, I
found that the respondent was entitled to recover that overpayment from the
claimant's final pay which included the notice period. This is because on these
facts the claimant was not protected by section 13 of the ERA. Although
commission is defined as wages under section 27 (1) of the ERA and that in
30 terms of **Delaney** ("supra"), garden leave constitutes wages for the purposes
of the protection of wages provisions, section 14 of the ERA is clear that
section 13 of the ERA does not apply where the purpose of the deduction is

the reimbursement of the employer in respect of an overpayment of wages made for any reason by the employer to the worker.

40 I further considered that in any event, the respondent would have been
entitled to recover the overpayment in accordance with section 19 of the
5 claimant's contract of employment.

41 For these reasons the claim for notice pay is not well founded and is
. dismissed.

Employment Judge: R Sorrell
Date of Judgment: 11 October 2022
Entered in register: 12 October 2022
to **and copied to parties**

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