



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Dees

**Respondent:** Shaping Cloud Ltd

**HELD AT:** Manchester (by Cloud Video Platform)      **ON:** 14 September 2022

**BEFORE:** Employment Judge Fearon

## REPRESENTATION:

**Claimant:** Mr Richard McLean (counsel)

**Respondent:** Miss Lauren Wilson (solicitor)

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's complaint of unauthorised deductions from wages is not well-founded and is dismissed.

# REASONS

## Introduction

1. The claimant was employed by the respondent from 5 October 2020 until 31 January 2022, following her resignation. The claimant presented a claim on 25

May 2022 for unauthorised deductions from wages on the basis that she was not paid the correct amount of commission due to her which she says totalled £28,476.14.

2. The respondent disputes the claim on the basis that the claimant agreed to the terms of their commission scheme shortly after the commencement of her employment and that the Claimant was paid all the commission due to her in accordance with her contract and the commission scheme.

### **The Issues for the Tribunal to decide**

3. The issues to be determined were agreed as follows:

- 3.1 What sum was properly payable?

- 3.1.1 What terms were agreed and when by the claimant and respondent in relation to the commission scheme?

- 3.1.2 Were the terms of the commission scheme or the claimant's contract varied in relation to the claimant's commission either by express or implied agreement?

- 3.2 Was there a deduction from the claimant's wages and if yes how much?

4. Prior to the hearing, the parties had agreed facts in relation to the amounts of commission payments made by the respondent to the claimant (bundle pages 32 to 34). In relation to each client contract in respect of which commission was payable, the agreed issues were:

- 4.1 Is the Claimant entitled to any further payments of commission in respect of the Regatta Managed Services Contract?

- 4.2 If yes, is the Claimant entitled to a further £1,120 of commission or some other figure?

- 4.3 If some other figure, what is that figure and how is it calculated?

- 4.4 Is the Claimant entitled to any further payments of commission in respect of the GMCA Managed Services Contract?

- 4.5 If yes, is the Claimant entitled to a further £19,588.90 of commission or some other figure?

4.6 If some other figure, what is that figure and how is it calculated?

4.7 Is the Claimant entitled to any further payments of commission in respect of the Irwin Mitchell DevOps Migration Team deal?

4.8 If yes, is the Claimant entitled to a further £4,810.80 of commission or some other figure?

4.9 If some other figure, what is that figure and how is it calculated?

4.10 Is the Claimant entitled to any payments of commission in respect of the Regatta Dev Draw Down Days?

4.11 If yes, is the Claimant entitled to £343.68 of commission or some other figure?

4.12 If some other figure, what is that figure and how is it calculated?

4.13 Is the Claimant entitled to any payments of commission in respect of the Irwin Mitchell Additional Consultancy Days?

4.14 If yes, is the Claimant entitled to £3,322.80 of commission or some other figure?

4.15 If some other figure, what is that figure and how is it calculated?

## **Evidence**

5. I considered the agreed bundle of evidence provided by the parties comprising 174 pages (including the Index) as well as the statement of the claimant and the statements of Helen Gerling and Emma Trevor-Jones. The claimant gave sworn evidence. I heard sworn evidence on behalf of the respondent from Helen Girling, Chief Executive Officer, and from Emma Trevor-Jones, Finance Director.

## **Findings of Fact**

6. On 05/10/2020 the claimant commenced employment with the respondent. The respondent provides cloud computing services. The claimant was initially employed as a Client Relationship Manager and in January 2021, was promoted to Sales and Marketing Manager. The claimant's line manager was Helen Gerling.
7. The claimant was issued with a contract of employment on around 7 October 2020, a copy of which is in the bundle from page 50. Section 7 sets out the agreed terms as to salary and section 7.5.1 (bundle page 54) deals with commission. This section states as follows:

### 7.5.1 Commission

*a) You shall be entitled to receive commission in accordance with the terms of any commission scheme that may be operated by us from time to time provided that we have invited you to participate in such plan in writing and you have accepted in accordance with the terms of the scheme.*

8. By email dated 24 December 2021, Helen Gerling provided to the claimant a copy of the claimant's FY21 commission structure and FY21 personal commission plan. She apologised for the late provision of the structure and personal plan, explaining that the delay was due to a new scheme having been devised which required board approval in addition to approval of the remuneration committee, but that going forward commission and bonus structures would only require the approval of the remuneration committee. Ms Gerling asked the claimant to sign and return the documents if she was happy with them.
9. A copy of the commission scheme applicable to the claimant commences at bundle page 67; a signed copy commences on page 73. The scheme is stated to be effective from 1 November 2020 to 31 October 2021. The Claimant signed this commission scheme document on 5 January 2021 (bundle page 76).
10. Section 1 of this document confirms that the claimant's sales target is set out in her Personal Sales Commission Plan at Schedule 1 to the scheme document.
11. Section 3 sets out the General Policy including that:

*"This document sets out the Company's current commission scheme (the Scheme) and explains how you can qualify for the payments set out in this document. The Scheme applies for the period stated at the outset of this document only."*

It further states:

*"The Company in its sole and absolute discretion further reserves the right to withdraw, vary or amend the Scheme (including the level of commission payment payable) at any time on reasonable notice to you.*

12. Eligibility criteria for the scheme are clearly set out within section 3 and are as follows (bundle page 69):

*"Eligibility to participate in the Scheme is subject to the agreement of the Board of Directors and is confined to such members of staff who are invited to participate in the Scheme from time to time.*

*If you are entitled to participate in the Scheme, as amended from time to time, this will be expressly stated in your contract of employment or otherwise confirmed to you in writing.*

*To be eligible to receive any payment under the Scheme, you must be employed on the date when the commission payment is due to be paid (the Payment Date).*

*Commission payments will not be awarded to those who are no longer in employment with the Company on the Payment Date, or who have already given or received notice of termination on the Payment Date.”*

13. In relation to commission payments the scheme includes the following:

*“The Board of Directors will only approve any commission payments where, in their reasonable opinion, you have met the set targets outlined in your Personal Sales Commission Plan. The level of commission payment to be paid will then be decided by the Company. If you are found to be eligible to receive a commission payment, you shall receive a commission payment of such an amount as the Board of Directors in their absolute discretion may determine. The commission payments payable under the Scheme shall be calculated and paid quarterly in line with Sales Revenue, subject to the other terms of the Scheme.”*

14. The claimant's personal plan at Schedule 1 is stated to apply for the period November 2020 to October 2021. The plan then sets out targets for each month starting with November 2020 and ending in October 2021.

15. In January 2021, Helen Gerling proposed to the claimant that the commission structure should apply to the claimant from January 2021 to December 2021 because up to January 2021 the claimant had not brought in any sales and this proposed change would allow the claimant opportunity to start achieving her targets for the year and therefore better opportunity to earn commission.

16. By email dated Monday 11 January 2021, Helen Gerling sent to the claimant copies of her personal sales commission plan by way of confirmation of discussions between them on Friday 8 January 2021. The attached Schedule 1 still refers to the applicable scheme period as November 2020 to October 2021 but the monthly targets set out in the table below now apply to start from January 2021 and each monthly sales target is set out up to December 2021. There is a factual dispute as to whether there was agreement to change the scheme dates which I shall return to in my discussions and conclusion below.

17. The claimant worked towards the monthly targets set out in that Schedule commencing in January 2021 and the last quarter ending in December 2021. The Claimant did not query the dates in that document and prepared her own spreadsheets thereafter tracking sales revenue and commission, based on the revised dates of January 2021 to December 2021. The claimant's spreadsheets were considered in her one to one meetings with Helen Gerling.

18. In July 2021 a meeting took place between the claimant, Helen Gerling and Emma Trevor-Jones.

19. The Respondent says the meeting was held to discuss how commission would apply to the variable element in the GMCA contract. The claimant says the meeting was held to discuss the vague language of the commission structure. Despite the disagreement as to the reason for the meeting being called it is agreed between the parties that the commission structure was discussed during that meeting.

There were factual disputes about what exactly was discussed during this meeting about the commission structure and commission payments and I will return to those in my conclusions.

20. The GMCA contract which was discussed in the July 2021 meeting had a core contract value and a variable element. The core contract included a provision whereby the client could give the respondent 30 days' notice to terminate the contract at any time, with or without cause. As a result of that clause the level of commission the claimant may have received under that contract was not guaranteed even had she remained in the respondent's employment after 31 January 2022.
21. During this meeting, the Claimant queried whether any commission would be paid in relation to this account if she left employment before the commission fell due and Helen Gerling confirmed under the current structure it would not.
22. The claimant raised the concern that if employees could not benefit from commission on longer-term and variable contracts if they left the business, this might disincentivise them from trying to secure such contracts. Helen Gerling acknowledged this issue and said when considering and drafting the terms of any new commission scheme applying for FY 2022, she would consider the issue as to how the commission structure could be changed to incentivise employees to secure longer-term contracts.
23. Helen Gerling asked Emma Trevor-Jones to consider this issue when considering any possible new commission structure for FY22. Ms Trevor-Jones confirms that following the meeting she did some research in to what the new structure could look like for consideration when the structure was reviewed at the end of the year for the following financial year.
24. The FY21 scheme applicable to the claimant was not amended in writing at the time of the July 2021 meeting nor thereafter.
25. There was no written follow up to this meeting and the claimant was not provided with any amended written commission structure following the meeting.
26. By email dated 11 October 2021, the claimant sent to Helen Gerling and Emma Trevor-Jones a proposed personal sales commission plan for herself for FY2022, stated to commence from January 2022.
27. On 12 October 2021, the claimant, Helen Gerling and Emma Trevor-Jones met to discuss sales targets and forecasting for FY2022. The Claimant's own commission structure was not specifically discussed.
28. The Claimant submitted her written resignation on 18 November 2021.
29. On 14 December 2021 Emma Trevore-Jones confirmed to the claimant that she would not receive any commission for the period after 18 November 2021, in accordance with the terms of her contract and agreed commission structure.
30. The claimant's last day of working for the respondent was 14 January 2022 and she was then on garden leave until her employment ended on 31 January 2022.

31. The right not to suffer an unauthorised deduction is contained in section 13(1) of the ERA: "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."
32. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.
33. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by him. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1) or exempt under section 14.
34. The principles by which a contractual term should be interpreted were set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 as follows:

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words

or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945)

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had...."

35. That approach was restated by the Supreme Court in Wood v Capita Insurance Services Ltd [2017] UKSC 24 in paragraphs 10-13 of the judgment of Lord Hodge.

### **Discussion and conclusions**

36. The claimant signed her contract of employment. She then subsequently signed the Commission Scheme document on 5 January 2021, to confirm her agreement to its terms.

37. The claimant denies that she agreed to changes to the commission scheme dates during discussions with Helen Gerling on 8 January 2021. She contends that the scheme dates remained the same as set out in the document she signed on 5 January 2021, with the commission scheme applicable to her running from 1 November 2020 to 31 October 2021. She contends the change to the months set out for each quarter of the plan in the schedule provided to her on 11 January 2021 and in the spreadsheets she prepared subsequently, was simply for business reporting purposes and did not reflect an agreed change to the scheme dates. She accepted in evidence that she did not query with the respondent the change to the months for the applicable quarters. I find that the effective period of the Commission Scheme was amended verbally by agreement between the claimant and Helen Gerling on 8 January 2021 and the agreement reached was confirmed in writing on 11 January 2021, albeit with a clerical error in the heading of schedule 1 which still referred to the original scheme dates of November 2020 to October 2021 rather than the new agreed dates of January to December 2021 as reflected in the body of the schedule setting out the relevant quarters and the claimant's targets for each month.

38. On 11 October 2021 the claimant submitted to Helen Gerling and Emma Trevor-Jones a draft personal sales commission plan for FY2022 to cover the period January to December 2022, further confirmation that she was working on the basis that her current scheme ended on 31 December 2021.

39. The claimant did not have any automatic entitlement to commission as is clear from section 7.5.1 of her contract and the terms of the scheme structure; nor was she not automatically entitled to join the commission scheme and in evidence she agreed this was the case. I find that based on section 7.5.1 of the claimant's



contract, she was only entitled to be part of the commission scheme if she was invited in writing and had accepted in accordance with the terms of the scheme. If, as the claimant contends, her commission structure ended on 31 October 2021, then in November and December 2021 she was not part of any commission scheme as she had not been invited in writing to join any new scheme after 31 October 2021. I find that the commission scheme applicable to her ended on 31 December 2021 and given she was at that date in her notice period she was not invited to join the FY2022 scheme.

40. The parties dispute the nature of discussions during the meeting between the claimant, Helen Gerling and Emma Trevor-Jones in July 2021. The claimant contends that she requested the meeting due to the vague language within her commission structure. She says during that meeting in response to her query about whether commission would be paid on certain long term and variable contracts if an employee ceased working for the respondent, Helen Gerling said "if an employee left with this kind of sales commission being owed, all employees would be paid as the employee had earned the money". The claimant contends that as a result of this conversation her contractual terms were varied and she therefore believed she would be paid commission even after her employment had ended.
41. Helen Gerling denies giving any such assurance to the claimant and denies that the claimant's contractual terms were varied or that the commission scheme terms applying to the claimant were varied as from July 2021. She denies any alteration to the FY21 commission structure at all and says she merely confirmed to the claimant that she would consider the issue for any potential future commission scheme.
42. In evidence the claimant accepted that Helen Gerling did not specifically say she would be paid commission in full on such a contract if she left the respondent's employment and she accepted that any statement made by Helen Gerling was in relation to employees generally. The claimant also accepted that there was no subsequent written confirmation of any change to her employment contract nor to the commission structure.
43. I find that during the July 2021 meeting the claimant, Helen Gerling and Emma Trevor-Jones discussed the issues of the commission scheme failing to incentivise sales employees on certain long-term variable contracts. I find that Helen Gerling clarified to the claimant that under the current commission scheme leavers would not be paid full commission on such long term or variable contracts; she confirmed she understood the claimant's frustrations and concerns around that and agreed to look in to the issues for future commission structures.
44. I find that during discussions at the July 2021 meeting, the claimant's contract was not varied orally and no oral variation was made to the commission structure which applied to her. I find that comments were made by Helen Gerling relating to the commission structure for the sales team generally but terms specific to the claimant's contract and bonus plan were not discussed. No change was made to the FY2021 scheme either for the claimant specifically or the sales team generally.

45. Under the terms of the commission scheme applicable to the claimant for the period January to December 2021 the claimant ceased to be eligible for commission payments from the date of her resignation on 18 November 2021.
46. I find that the total amount of wages paid by the respondent to the claimant were the amounts properly payable by the respondent to the claimant and I therefore find no unauthorised deductions were made to the claimant's wages. As a result of this finding the issues at paragraph 4 above fell away and did not need to be decided.
47. The claimant's claim is not well founded and is dismissed.

Employment Judge Fearon

Dated 14 October 2022

JUDGMENT SENT TO THE PARTIES ON

28 October 2022

FOR THE TRIBUNAL OFFICE

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