



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103884/22

**Final Hearing heard on the CVP/Kinly platform on the 27 September and the
1 and 2 November 2022**

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Employment Judge Porter

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Mr C Geddes

**Claimant
Represented by:
Mr Byrom, solicitor**

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Kea Promotions Ltd

**Respondents
Represented by:
Mr Milne, advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal to dismiss the claimant's claim of unpaid wages.

Introduction

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1. The claimant was employed by the respondents between the 5 February 2018 and the 15 July 2021 as a Sales Manager. In his ET1 the claimant claimed unpaid wages, being commission due to him and holiday pay. The claimant's claims were raised firstly against SRJ (Scotland) Ltd and secondly against Kea Promotions Ltd. The claimant's claims were resisted, the first
35 respondents stating that the claimant was never an employee of theirs and

the second respondents stating that any commission payments due to the claimant were offset by a contractual clawback provision.

2. There was a final hearing listed for the 27 September 2022. At the hearing the claimant was represented by Mr Byrom, solicitor and the respondents by Mr Milne, advocate. The parties produced a Joint Bundle of Documentation, which is numbered **1-419**. At the outset of the hearing and having heard from the parties, the Tribunal dismissed the claimant's claims against SRJ (Scotland) Ltd and dismissed the claimant's claims of holiday pay.
3. The evidence of the claimant commenced on the 27 September 2022; however, during cross examination the respondents moved to amend their case to include a line of argument that as the claimant's commission payments were paid by dividend the Tribunal has no jurisdiction to hear this claim. The Tribunal allowed the amendment, having heard from both parties on the same. Reasons were then given orally. The case was thereafter postponed on joint motion of the parties.
4. The case was relisted for the 1 and 2 November 2022 and the evidence of the claimant recommenced on the 1 November. The Tribunal then heard evidence from the respondents' main witness Sarah Purcell who is the PA to the managing director of SRJ (Scotland) Ltd. In the morning of 2 November 2022 the respondents submitted a Minute of Amendment as objection had been taken to a line of argument put to Sarah Purcell in cross examination. The line of argument was that the respondents had no contractual right to offset the claimant's commission payments using the clawback provision relied upon by them.
5. After hearing parties the Tribunal refused the amendment. Reasons were then given orally. The evidence of Sarah Purcell was completed. The Tribunal then heard evidence from Derek Seath, a director of the respondents who works in sales. Finally, William Stickler, a former employee of the respondents was interposed as a witness for the claimant.
6. Following the Hearing on the Merits the Tribunal raised the issue of the legality of the payment structure with the parties. The respondents' response contained a letter from Curle and Co, Chartered Accountants to the

respondents which contained assurances on the legality of the arrangements in place. The Tribunal accepted such assurances, provided as they were by a firm of solicitors acting as officers of the court.

7. A considerable body of evidence was heard in the course of this Hearing, particularly on the minutiae of the contracts in respect of which commission is claimed. In their determination of this case, the Tribunal did not consider it necessary to make findings on the detail of such contracts. Having reflected on the totality of the evidence before them, the Tribunal made the undernoted essential Findings in Fact.

Findings in Fact

8. On the 30 January 2018 claimant was offered a contract of employment with SRJ (Scotland) Ltd which he accepted **(72,73)**. Notwithstanding this, the claimant signed a contract with the respondents on the 4 June 2018 **(54-56)**. That contract provided: *“DEDUCTIONS Kea Promotions Ltd has the right to deduct from your pay any sums that you owe. For the purpose of the Employment Rights Act 1996 and any other relevant legislation you hereby authorise the company to deduct from your salary any sum due in relation to: ... Any monies due to KEA Promotions from you....Excess of any other payment made to you by KEA Promotions Ltd Losses suffered by the company as a result of your negligence or breach of KEA Promotions rules.”* **(54)**.

9. The contract was supplemented by the document to be found at **76**. It is not in dispute that that document states, insofar as conservatory sales are concerned: *“If there is a pricing error or changes required to the design, the salesman will be required to resolve this. If there is a monetary cost that we are unable to charge the customer, this may result in the contract becoming non-commissionable. If the cost is more than the commission value the company has the right to clawback the difference and this will be deducted from the salesman’s monthly commission. The same applies if an issue arises during the build which is a direct result of the salesman’s error/calculation.”* There was a dispute on the evidence as to whether this

document had been received by the claimant. The Tribunal preferred the evidence of Sarah Purcell on this issue. Her evidence was that **76** was a standard contractual document which was in force since 1st October 2016 and that the claimant would have had sight of the same.

- 5 10. The Tribunal accepted the evidence of Sarah Purcell when she explained some situations where clawback operated, being cancellations; errors in pricing; the wrong pricing; incorrect completion of paperwork and other problems on sale.
11. The claimant's contract of employment with the respondents (**54**) provided:
10 *"REMUNERATION You will be paid a salary on the last day of the month. Commission will be paid out on 15th of the month as detailed on your pay statement."*
12. It was not in dispute that the claimant was paid commission in two parts. The first part of commission due from a sale was paid at the start of the sale and
15 the second part was paid once the sale was completed. The Tribunal accepted the evidence of the claimant that there was no set rule whether the full commission would be payable or not; and that Keith McIntosh, the Managing Director of SRJ Windows would deal with the issue of what commission was payable on a case by case basis. This process would
20 involve discussion with the salesman concerned.
13. The Tribunal accepted the evidence of Sarah Purcell that the first (or 'advance') payment of commission was made in good faith and was subject to the customer cancelling the job. Sarah Purcell's evidence was accepted to the effect that there could be many reasons why the second payment of
25 commission for the same job was not made such as cancellations, discrepancies shown in a late survey of the job in question, or a change to the cost of materials in the job resulting in incorrect prices and incorrect paperwork. In all of these circumstances the 'clawback' provisions would be engaged.
- 30 14. On the 10 of March 2020 an entry was filed in Companies House showing that the claimant had become a director of the respondents (**68-69**). The claimant became a £1 shareholder of the respondents on the same day (**70**).

15. It was not in dispute that the claimant's commission payments and a proportion of his basic salary were paid by share dividend **(57-63)**. The claimant admitted in evidence that payment of his salary and commission by share dividend resulted in a payment of less tax by him. The Tribunal
5 accepted the evidence of the respondents and found from that evidence that this was the reason why the claimant elected to be an employee of the respondents in circumstances where an offer of employment had been made to him by SRJ (Scotland) Ltd. In particular, the Tribunal accepted the evidence of Sarah Purcell that it would have been explained to the claimant
10 that he had an option to be a director of the respondents rather than an employee of SRJ (Scotland) Ltd and that this would result in the claimant paying less tax.
16. The claimant left the employment of the respondents on the 15 July 2021. After leaving the employment of the respondents he claimed commission
15 from them in the sum of £14,279.18 which was calculated by him in terms of document **84**.
17. Sarah Purcell was authorised to respond to document **84** and did so in terms of document **85**. She referred a number of spreadsheets **(77-81)** on the issue of conservatory sales. In evidence, she also referred to **99-101** being a
20 summary of conservatory/sunroom clawbacks that was offset against the commission claimed by the claimant for the sales in question. She carried out a final calculation which is to be found at **82**. This calculation demonstrated that £11,933.37 was due to the claimant as commission for sales; however, the total clawback from those sales was £15,290.58 leaving a £3,357.21
25 deficit.
18. The Tribunal accepted the evidence of Sarah Purcell that her calculations were based on meticulous examination of all the relevant records and as such accepted them as accurate. The Tribunal accepted the evidence of the claimant that, since he left the employment of the respondents, he was
30 unable to contact the clients listed in his document **84**. The claimant was accordingly unable to refute the assertions made in the document prepared by Sarah Purcell to be found at **82** as he could not say with certainty what happened to the jobs in question.

Observations on the Evidence

19. Firstly, the Tribunal considered the evidence of the claimant himself. The Tribunal considered that, overall, the claimant was honest and truthful in his evidence. However, he was unable to give a satisfactory explanation on the inconsistencies between his evidence that he did not have a choice in being paid commission by dividends and the fact that he was initially offered a contract with SRJ (Scotland) Ltd which he accepted (72, 73). In response to a question from the Employment Judge, the claimant conceded that there were tax advantages to being an employee of the respondents and receiving part of his salary and all of his commission in dividends. The Tribunal noted that this evidence would appear to confirm the evidence of Sarah Purcell that for tax reasons the claimant made a choice to be an employee and shareholder of the respondents. To this extent the Tribunal found therefore that the claimant had not been truthful in his evidence to the Tribunal.
20. The Tribunal noted that in asserting that commission was due from the respondents reliance was made upon the fact that if one commission payment was paid then it should follow that the other was due. However, the claimant's own evidence was that there was no set rule as to when and what commission was payable, and that the commission due was fixed on a case by case basis with Keith McIntosh being involved in discussions as to what was payable.
21. The Tribunal observed that the claimant was not in a position refute the calculations and spreadsheets prepared by Sarah Purcell on the basis of customer information; his evidence was that since leaving the employment of the respondents he was unable to contact the customers in question to verify what happened with the various jobs.
22. The Tribunal noted that there was some evidence on whether the claimant had ever contractually agreed to the deductions forming the clawback provisions. However, the Tribunal noted that this was not part of the claimant's case as pled, the Minute of Amendment for the claimant having been refused. Notwithstanding the refusal of the Minute of Amendment the

Tribunal observed that the respondents' submissions still relied upon the fact that there was no contractual agreement for the clawback to take place as the document to be found at **76** was not part of the parties' contractual agreement. The Tribunal did not determine this issue as it was not part of the claimant's case as pled.

23. The Tribunal noted that the respondents had brought to their attention the fact that the claimant had sent a WhatsApp message to the witness Derek Seath in advance of his evidence. In the message the claimant asked Derek Seath if he was going to lie under oath. The matter was discussed and the Tribunal noted that the claimant undertook not to send any more messages to witnesses.

24. There was some evidence on the competence of the claimant overall; however, as this was not foreshadowed in the ET3 the Tribunal made no findings on this issue.

25. The Tribunal found Sarah Purcell to be an inherently truthful witness. The Tribunal found that the calculations and spreadsheets she referred to in evidence were prepared meticulously and found there to be no reason established as to why she would fabricate the same. The Tribunal observed that this was particularly so as Sarah Purcell is an employee of SRJ (Scotland) Ltd and would not gain financially from a failure to make payment to the claimant of commission due to him.

26. The Tribunal observed that although Sarah Purcell is an employee of SRJ (Scotland) Ltd no issue was taken by the claimant's representative on the question of her title and competence to speak to the application of the clawback provisions applicable to directors/employees of the respondents.

27. As regards the respondents' evidence overall, the Tribunal considered that it might have been helpful to hear further evidence on the company structure and relationship between SRJ (Scotland) Ltd and the respondents. Aside from general evidence that the two companies worked closely together, there was no explanation given as to how these two separate legal entities were intertwined to the extent that they shared administrative functions and

employees such as the claimant could be offered employment in both companies.

The Law

5 28. S27 of the Employment Rights Act 1996 provides:

“27 Meaning of ‘wages’ etc

(1) In this Part ‘wages’ in respect of a worker, means any sums payable to the worker in connection with his employment, including -

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

S13 of the Employment Rights Act 1996 provides:

“Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

15 *(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. “

20 29. S23 of the Employment Rights Act 1996 provides:

“Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal -

(a) that his employer has made a deduction from his wages in contravention of section 13 ...”

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30. On the issue of whether or not dividends constitute wages under the Employment Rights Act 1996, the claimant made reference to the House of Lords authority of **Delaney v Staples (1992) IRLR 193** and to paragraph 11

thereof where Lord Browne-Wilkinson defined 'wages' thus: "*the essential consideration of wages is that they are consideration for work done or to be done under a contract of employment.*" For his part, the claimant made reference to the decision of the Employment Tribunal in **Sheridan v GTEQ Solutions Ltd 2400314/14** and in particular to paragraph 44 where Employment Judge Slater found that a week's pay did not include dividend payments, which were payable by reason of the claimant's status as shareholder.

10 **Submissions**

The undernoted are summaries of the parties' submissions provided by the parties themselves

31. **Submissions for the claimant**

The claimant seeks an award from the tribunal for unlawful deductions in relation to the claimant's commission that had been made by the respondent. On the point of jurisdiction, relying on section 13 and 27 of the Employment Rights Act 1996 it is clear that commission falls within the remit of wages. The commission payments were consideration for work done under the claimant's contract of employment, relying on *Delaney v Staples* 1992 IRLR 191, para 11. Commission payments are also classed as earnings under ITEPA 2003, section 62. The claimant had no choice in the manner in which the payment was made to him. The form of the payment should not detract from the underlying right to the wages due for work done under the contract of employment.

The claimant evidenced sales, which were not in dispute, amounting to total outstanding commission of £14,179.18. There is no right to make deductions from commission in accordance with the deductions permissible under the contract of employment dated 4 June 2018. The respondent therefore can only make deductions from commissions on the basis of the clawback provision on the commissions document, page 76.

30 Suggestions that the respondent could make deductions if it was entitled to do so appears to be based on disputed evidence; the claimant asserts that this, or parts

of it are fabricated and has consistently maintained this position. That the claimant consistently received payments for commission on a monthly basis prior to the end of his employment does not support the position of an employee who creates multiple pricing errors or is negligent to the extent that no commission is due on
5 such a large number of sales as are claimed for.

32. Submissions for the respondents

10 MOTION

The tribunal ought to dismiss the claimant's claim for unlawful deduction of wages.

SUMMARY

The claim concerns one of unlawful deduction of wages. The claimant contends a
15 series of deductions were made from his commission payments. The claim ought not to succeed for three reasons: (1) the tribunal does not have jurisdiction to hear the claim, the commission payments are not wages in terms of section 27 ERA 1996; (2) if the tribunal determines it has jurisdiction, the claimant was paid what was properly payable to him under the employment contract; and (3) the claimant
20 consented to the deductions as he had been negligent in carrying out his job.

THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE CLAIM

Wages are payable by an employer in connection with his employment. The employment tribunal has considered that dividends do not constitute wages in
25 terms of section 27. Dividends flow from an employee's status as a shareholder, not their status as an employee: *Sheridan v GTEQ Solutions Ltd* ET Case No.2400314/14 per EJ Slater at [44].

The sums payable flow from the claimant's status as a shareholder, not from his
30 status as an employee. The tribunal heard extensive evidence on the structure the claimant signed up to. The commission payments were reflected in the claimant's

payslips. That came as no surprise to him. Therefore, the tribunal does not have jurisdiction to decide on any non-payment of dividends. This is a case which does not get off the ground.

5 THE CLAIMANT WAS PAID WHAT WAS PROPERLY PAYABLE TO HIM

The Commission Structure [JB76], forming part of the claimant's employment contract, allowed for monetary costs incurred by the respondent to be passed onto the claimant in a number of circumstances. These took the form of clawbacks. The reasons for the clawbacks at [JB99] were permitted in terms of the employment
10 contract. Ms Purcell provided very credible and reliable evidence that she referred to the relevant documents, prepared by a number of different parties, in assessing whether the claimant was due any commission. It was not suggested to her she ought to have looked elsewhere. The claimant relies on the mere assertion that because he had been paid advance payments in some circumstances, he ought to
15 have been paid the balance. The tribunal ought to attach little weight to mere assertion. In any case, there was discretion as to whether commission was payable.

20 THE CLAIMANT CONSENTED TO DEDUCTIONS WHERE HE WAS NEGLIGENT

If the tribunal decides there were deductions to his wages, they were lawful in any event. All of the deductions related to Mr Geddes' error or omission under exception of the Richardson and Feeney contracts.

25 CONCLUSION

For the reasons set out above, the tribunal ought to dismiss the claimant's claim for unlawful deduction of wages.

Discussion and Decision

30 33. At the outset of their deliberations the Tribunal noted that the parties produced a List of Issues in this case. This document was not referred to in

the Tribunal's decision making process as, firstly, by the time of the commencement of evidence, several of the issues there identified were no longer live issues and secondly, the List of Issues was only agreed in part.

34. The Tribunal considered the starting point for their deliberations to be the fact that the onus of proof is on the claimant to establish that the sums claimed by him are due to him by the respondents and constitute 'wages' under the Employment Rights Act 1996.
35. The Tribunal noted firstly that on their Findings in Fact the claimant's contract of employment incorporated the document to be found at **76**. Accordingly the respondents were authorised to make 'clawback' deductions in terms of the claimant's contract of employment.
36. In determining that the sums are not due, the Tribunal had regard to the facts as found by them and in particular the Finding in Fact based on the claimant's own evidence that there were no set rules on whether a job would end up being commissionable or not, and that Keith McIntosh, the Managing Director of SRJ (Scotland) Ltd would often determine the commission payable on a case by case basis through discussion with the salesman involved. The Tribunal also accepted the evidence of Sarah Purcell that even if one commission payment were paid it did not automatically follow that the second commission payment would be due to the employee. The Tribunal accepted the evidence of Sarah Purcell that 'clawback' could be for a number of reasons including cancellations, errors in pricing, the wrong pricing, incorrect completion of paperwork and other problems on sale.
37. Further, the claimant by his own evidence was not able to refute the calculations and conclusions reached by Sarah Purcell to be found at **85** and **82**. To this end he explained that since he left the employment of the respondents he had not had access to the customers named in his document **84** and therefore could not say with certainty what had happened to the jobs in question.
38. For all these reasons it is the decision of the Tribunal that the claimant has not proved that any sums are due to him by the respondents in terms of commission payments.

39. Having reached this conclusion, it is not necessary for the Tribunal to determine the issue of whether dividend payments fall within the definition of 'wages' under s27 of the Employment Rights Act 1996. However, for the sake of completeness it is the judgment of the Tribunal that they do not. In reaching this conclusion the Tribunal had regard to the facts that the claimant elected to become a director and shareholder of the respondents and have his commission payments paid by dividend for tax efficient purposes. To this end, the Tribunal agrees with the reasoning of EJ Slater at para **44** of the case of **Sheridan**. As there is no alternative claim for breach of contract, this Tribunal therefore has no jurisdiction to hear the claimant's claim of unpaid wages.

40. It is for all of these reasons that the claimant's remaining claim of unpaid wages is dismissed.

15 Employment Judge: Jane Porter
Date of Judgment: 09 November 2022
Entered in register: 11 November 2022
and copied to parties

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