



EMPLOYMENT TRIBUNALS

Claimant

Mrs. L Doe

v

Respondent

Wrights Flooring & Carpets Limited

Heard: via Cloud Video Platform in the Midlands (East) region

On: 5 December 2022

Before: Employment Judge Ayre (sitting alone)

Representatives:

Claimant: In person

Respondent: Mr T Goldrup, solicitor

JUDGMENT

The claim for unlawful deduction from wages fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent from 20 September 2021 until 12 July 2022 when she was dismissed.
2. On 15 September 2022 the claimant issued a claim for arrears of pay in the Employment Tribunal, following a period of early conciliation that started on 18 July 2022 and finished on 25 August 2022.
3. The claim is for commission that the claimant claims to be entitled to in respect of sales that she generated whilst employed by the respondent. The respondent filed a response to the claim in which it

denied that the claimant was entitled to any commission payments. A few days before the hearing however the respondent admitted that the claimant was entitled to commission of £624.34 gross and £453.66 net. That sum has been paid to the claimant.

The Proceedings

4. There was an agreed bundle of documents running to 90 pages.
5. I heard evidence from the claimant and, for the respondent, from Lisa Barton, Office Manager. The claimant also produced a witness statement for a Lauren Scutts. Ms Scutts was not present however to give evidence. I have read her statement but have not placed any weight on it in reaching my decision.
6. I also heard submissions from both parties.

The Issues

7. The issue to be decided at today's hearing was whether the respondent made an unlawful deduction from the claimant's wages by failing to pay her sales commission of £7,272.42.
8. The amount of commission that the claimant claims to be entitled to is the gross sum she claims to be entitled to after the deduction of the £624.34 gross commission paid by the respondent and which the claimant admits receiving.
9. Although there was mention of unfair selection for redundancy and of discrimination in the claimant's witness statement, the claimant confirmed at the start of the hearing that she is not bringing complaints of unfair dismissal or of discrimination.

Findings of Fact

10. The claimant was employed by the respondent as the manager of the respondent's flooring and carpet shop in Spalding.
11. At the start of her employment the claimant was provided with a contract of employment which she signed.
12. The claimant's contract of employment contained the following clause, headed "Commission":

"After the successful completion of your probationary period whether 3 months, or an extended period, you will be eligible for commission, based on 5 per cent of the completed sales that you generate. Commission payments will be calculated once final settlement of the account has been completed. Commission will be paid to you monthly, identified separately on your statement of pay and paid into your nominated bank or building society account.

On termination of employment, any completed sales where final settlement has been received, commission will be calculated, itemised and paid with your final salary.”

13. The claimant completed her probationary period successfully in December 2021 and on 20 December 2021 a performance review meeting took place. Present at that meeting were the claimant, Lisa Barton, Debbie Bourne and Jack Bagley. Notes of that meeting were taken by Debbie Bourne.
14. The notes of the meeting record a discussion about commission, which was prompted by the claimant asking to discuss the commission structure in her contract. It is recorded that: *“It has been discussed and agreed that commission is based on the generation of new sales which lead to an upturn in business profits. Commission will not be payable until the business begins to see an increase in profitability, and at that point the generation of new sales will be deemed as the reason for this, therefore allowing you to claim the level of commission discussed, and agreed, previously. Commission is excluded for any long-standing customers of the company, as these do not class as newly generated sales. Any commission claimed must be done so using the Commission Request Form, which has been made available, and should be submitted weekly with the above-mentioned Weekly Takings Logs and Timesheets.”*
15. The claimant denied that this conversation had taken place and suggested that the notes of the meeting were a fabrication. Mrs Barton was adamant that the meeting had taken place, and her signature appears on the bottom of the document, with the date 20 December 2021. Mrs Barton thought that the claimant had been given a copy of the notes but was not sure.
16. I find that the meeting did take place as described in the notes and that the notes are not a fabrication. I accept however the claimant’s evidence that the notes were not sent to her.
17. The comments that were made at that meeting were consistent with the respondent’s Sales Commission Policy, a copy of which was given to the claimant along with her contract of employment. The Sales Commission Policy states that:
- “...sales representatives...will receive a share of 5% of the invoice total for newly generated sales which lead to an increase in company profitability...”*
- The Company must ensure the issuance of claimed commission pay to its sales representatives on a weekly basis. The commission total is based on the number of newly generated sales which lead to an increase in company profitability during that period. It remains the responsibility of the sales representative to issue the Company with Commission Claim Sheets on a weekly basis, sent to Head Office with the Weekly Takings Log on a Saturday...”*

18. The claimant was one of four employees working in the Spalding store. The other employees were MK and CN, who were sales estimators, and JH, who was the former owner of the business. The claimant was not the only member of staff generating sales within the store. All four employees were responsible for sales and did in fact generate sales. This is evidenced by the fact that many of the invoices generated in the store had their initials against them.

19. Since the claimant has left the business she has not been replaced. There are currently three employees working in the store : MK, JH and CN. They continue to generate sales for the respondent. This is further evidence that, contrary to what the claimant said in her evidence, those three individuals were also responsible for generating sales.

20. Whilst she worked for the respondent the claimant made a number of sales. Some of those sales were for repeat corporate customers of the respondent. Sales for repeat corporate customers were not considered to be sales generated by the claimant for the purposes of the respondent's commission scheme.

21. Some of the sales that the claimant made were for what the respondent called walk in customers, who saw something in the respondent's shop window and came in to buy it. This type of sale was recorded separately on the respondent's systems and was also excluded from the commission scheme.

22. On 18 June 2022 the claimant wrote to the respondent asking for payment of commission that was owed to her. The respondent replied to her email on 24 June indicating that they were taking her allegations of underpayment very seriously and were conducting an investigation.

23. The respondent wrote again to the claimant on 1 July 2022 and stated that their investigation had concluded that no commission was payable because the income of the business had decreased by a considerable amount over the last six months.

24. On 5 July the claimant was given notice of termination of her employment by reason of redundancy. She worked one week's notice and her employment terminated on 12 July 2022.

25. The respondent subsequently reviewed the claim for commission that had been submitted by the claimant as part of these proceedings. It took the view that because the claimant's contract of employment did not specifically state that payment of commission was conditional upon an increase in company profitability, the claimant should be paid for sales that she had generated, other than those to existing commercial clients and walk-in sales.

26. On 25 November 2022 the respondent paid the claimant the sum of £624.34 gross, £453.66 net.

27. The claimant did not submit any Commission Request Forms or Commission Claim Sheets whilst employed by the respondent. In preparation for this claim she produced a Schedule of Sales which included a list of invoices that she claimed she should be paid commission for.
28. Many of the invoices contained in the claimant's Schedule of Sales had the initials of other members of staff against them. The claimant said that this was because they had prepared estimates or quotes for the customer, and that it was she who had generated the sales. Mrs Barton's evidence was that the member of staff who generates the sale puts their initials on the invoice and on the system. I prefer Mrs Barton's evidence on this issue.
29. Other of the invoices contained in the Schedule of Sales were to commercial customers who had relationships with the respondent's sister company but came into the respondent's shop for samples and to place business.
30. Some of the invoices also related to walk in sales, and others had been voided because the sale had not been completed.
31. Once these invoices had been removed from the Schedule of Sales produced by the claimant, the total value of sales generated by the claimant was £12,486.76. The claimant was entitled to 5% commission on those sales (£624.34) and was paid that commission on 25 November 2022.

The Law

Unlawful deduction from wages

32. Section 13 of the Employment Rights Act 1996 ("the ERA") states that:

"(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."

33. Section 23 of the Employment Rights Act 1996 gives workers the right to bring complaints of unlawful deduction from wages to the

Employment Tribunal.

Conclusions

34. There is a clear conflict of evidence between the parties in this case. On balance I prefer the respondent's evidence. I accept that the claimant was telling me what she believed to be the truth, and that she was not seeking to deliberately mislead the Tribunal, but I find that her recollection of events was not always accurate.
35. The respondent's version of events is backed up by the documentary evidence before me, such as the contemporaneous notes of the meeting on 20 December 2021 and the Sales Commission Policy.
36. The claimant's suggestion that she was entitled to commission on sales which had other members of staff's initials on the invoice because they were not salespeople, is inconsistent with the fact that those members of staff are currently the only ones working in the shop and are responsible for generating all of the sales within the shop.
37. In addition, the claimant made a serious allegation that a document had been fabricated by the respondent. There was no evidence before me to support this allegation, and I accept Mrs Barton's evidence that the notes of the meeting on 20 December 2021 were produced and signed by her at the time.
38. I find that the claimant is entitled to 5% commission on sales that she generated in the shop, and that the total commission to which she is entitled is £624.34 gross. The respondent made an unlawful deduction by not paying that sum to the claimant but has now remedied the position and made the payment.
39. The claimant was not entitled to commission in respect of sales to commercial customers. Such sales are not considered by the respondent to be 'newly generated' and are excluded from the commission scheme. The claimant was told this on 20 December 2021 during the discussion about the commission scheme. There was no evidence before me to suggest that the claimant had ever been told she was entitled to commission on sales to commercial clients.
40. I also find that the claimant was not entitled to commission on sales which had the initials of other members of staff against them. I accept the respondent's evidence that such sales were generated by the other members of staff rather than the claimant.
41. Finally, I conclude that the claimant was not entitled to commission on walk-in sales. Those sales were recorded separately on the respondent's system for a reason – namely that they fell outside of the commission scheme.
42. I find that the claimant generated total sales of £12,486.76 during the period between the end of her probationary period and the termination of her employment. She was entitled to commission of 5% on those sales and has now been paid that commission.

43. The claimant is not entitled to additional commission of £7,272.42 as she alleges, because the sales that she relies upon in support of that claim to commission were not 'newly generated' by her.

44. It cannot be said therefore that the respondent has made an unlawful deduction from wages by not paying the additional commission of £12,486.76 to the claimant.

45. The claim for unlawful deduction from wages fails and is dismissed.

Employment Judge Ayre

5 December 2022
