Neutral Citation Number: [2023] EAT 15

Case No: EA-2021-SCO-000041-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 20 February 2023

Before :

THE HONOURABLE LORD FAIRLEY

- -

Between :

MR DANIEL JOHNSTON	**Appellant**
- and -	
VERITAS TECHNOLOGIES (UK) LIMITED	**Respondent**

- -
- -

Mr Kenneth McGuire, (instructed by Ergo Law Limited) for the **Appellant**
Mr Hugh Olson, (instructed by Osborne Clarke LLP) for the **Respondent**

Hearing dates: 23 March 2022 and 6 December 2022

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JUDGMENT

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SUMMARY

Unlawful deduction from wages

The appellant's contract of employment entitled him to earn commission in addition to his basic salary. In respect of the period to 28 February 2020, the appellant maintained that he was entitled to receive an aggregate payment of commission of £505,564.78 of which only £232,015.95 had been paid to him. He presented a claim to the Employment Tribunal under sections 13 and 23 of the Employment Rights Act, 1996 in which he claimed that the sum of £273,548.83 had been unlawfully deducted from his wages. The respondent resisted that claim, contending that the commission of £232,015.95 which had been paid to the appellant was all that due to him. The Employment Tribunal concluded that the appellant had been paid all that was properly due to him and accordingly found that his claim in respect of unlawful deduction from wages did not succeed.

The appellant submitted that the Employment Tribunal had erred in concluding that there had not been an unlawful deduction from his wages. The respondent resisted that appeal and cross-appealed, submitting that the Employment Tribunal had erred in its reasoning to the extent that it had concluded that any of the sums claimed had ever been properly payable to the appellant such that deductions required to be made.

Held: In a claim under section 13 of the **Employment Rights Act, 1996** ("**ERA**"), the first question is always whether any sum is legally due. Only if the answer to that first question is in the affirmative does consideration then require to be given to whether or not there has been a deduction from that sum. On a proper construction of the terms of the contract, and on the findings in fact made by the Employment Tribunal, the sum claimed by the appellant never become payable to him.

The appeal was refused and the cross appeal was dismissed as being unnecessary.

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Introduction

1. The respondent is a data management company. It formerly employed the appellant as an "Enterprise Customer Success Manager 4 Grade SO6". In that role he was responsible for the European elements of the accounts of the respondent's clients HSBC and Bank of America.

2. The appellant's basic salary was £125,758 per annum. He was also contractually entitled to participate in the respondent's commission programme. The commission programme provided him with the potential to earn additional remuneration on accounts for which he was responsible.

3. This appeal and the respondent's related cross-appeal concern the amount of commission payable to the appellant at the end of February 2020. The appellant maintains that he was entitled to receive an aggregate amount of commission of £505,564.78 of which only £232,015.95 was paid. He presented a claim to the Employment Tribunal under sections 13 and 23 of the **Employment Rights Act, 1996** in which he claimed that a balance of £273,548.83 was due and had been unlawfully deducted from his wages. The respondent resisted that claim, contending that the commission amount of £232,015.95 already paid to the appellant was all that was due.

4. The Tribunal heard evidence and submissions over four days in November 2020. It concluded that the claimant had received all that was properly due to him when he received payment of his wages on 28 February 2020.

5. In this appeal, the appellant submits that the Tribunal erred in concluding that the respondent had not made an unlawful deduction from his wages. The respondent resists that appeal and cross-appeals, contending that the Tribunal erred to the extent that its reasons suggested that that any part of the sum claimed was ever due to the appellant such that the issue of authorised deductions even arose for consideration.

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The Tribunal's findings in fact

6. The appellant's entitlement to commission for the financial year 30 March 2019 to 3 April 2020 arose from (i) the respondent's FY20 Incentive Compensation General Terms and Conditions (including relevant Policies); and (ii) an individualised compensation plan document (together, "the Plan"). The appellant's "On Target Commission" (OTC) was £83,839. The appellant's "On Target Earnings" (OTE) were £209,597.00, being the aggregate of his basic salary of £125,758 and his OTC of £83,839.

7. One of the conditions of entitlement to commission was that the appellant required to achieve or exceed two performance measures, known as "Measure 1" and "Measure 2". The Measures each related to different types of business. The FY20 sales target (or "quota") to be reached by the appellant was $4,445,412 on Measure 1 and $9,667,767 on Measure 2. Those sales / quota targets were agreed between the appellant and the respondent in April 2019. If the appellant attained those targets, he would receive OTC. If he exceeded the targets, additional commission would be payable on a sliding scale. The proportion of the appellant's FY20 Measure 1 sales target attributable to HSBC business was set at $2.9 million by reference to HSCB business in the two preceding years, FY18 and FY19.

8. In 2017, HSBC had signed an Enterprise License Agreement of three years duration with the respondent. That agreement was due to expire in 2020. The value of any new agreement entered into by HSBC in 2020 would count towards the appellant's Measure 1 sales target in FY20.

9. In December 2019 the respondent concluded a new contract with HSBC for a further three year period. The value of that contract that was attributed to the UK element of the HSBC business was $12.6 million. The effect of that was that, on the face of matters, the appellant's commission, based on the Measure 1 quota previously set, would exceed 600% of his OTC.

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10. Recognising that commission in excess of 600% of OTC was an unexpected outcome, the respondent carried out a review of the appellant's commission entitlement. It concluded that an error had been made in setting his Measure 1 quota level for FY20. In particular, it was concluded that the element of his FY20 quota attributable to HSBC business ($2.9 million) had been set far too low because it was based only on HSBC sales figures in FY18 and FY19 and failed to take account of the HSBC contract from FY17 which was due to expire. Instead, the FY20 figure should have been set in such a way as to reflect the expiry of the 2017 contract and its potential replacement with a new contract in 2020.

11. The conclusion of the review was, accordingly, that the quota for Measure 1 applicable to HSBC business should actually have been set at $8.1m and that amount of commission payable to the appellant should be re-calculated on that basis. The appellant raised a grievance challenging the outcome of the review. The grievance did not succeed. The appellant then raised an appeal against the final grievance decision. The appeal was not successful.

12. The appellant resigned from his employment with the respondent with effect from 11 September 2020.

The relevant terms of the plan

13. So far this appeal is concerned, the relevant terms of the Plan were as follows:

> "Interpretation of the Plan/Changes to the Plan
>
> …
>
> To the extent permitted by applicable local laws, the Company has complete authority and sole discretion to determine the appropriate resolution of any alleged or actual inconsistencies, issues (administrative or otherwise) or ambiguities arising under the Plan. Furthermore, the Company reserves the right in its sole discretion to modify all aspect of the Plan, including but not limited to these FY20 Incentive Compensation General Terms and Conditions, Individualized Compensation Plans (as well specific Plan elements), individual Goal Sheets, Plan assignments, territories and accounts

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and territory/account assignments, Sales quotas the Sales Compensation Policy and FY20 Sales Compensation Governance Approval Matrix (the 'Approval Matrix'). No modification will be effective unless in writing and approved in accordance with the published FY20 Sales Compensation Governance Approval Matrix and/or the terms of this Plan. The approval process need not be complete before a modification becomes effective - approval can be given retroactively.

As set forth above, the Company reserves the right in its sole discretion to modify and or all aspects of the Plan in accordance with local legal requirements.

…

Some of the circumstances in which various aspects of the Plan and/or Plan Participant's credit or compensation may be modified include, but are not limited to the following:

1. **Quotas -** may be increased or decreased prospectively in situations, including but not limited to, where quotas were not set to reflect sales not anticipated or where sales were not reasonably certain at the time Sales Quotas are established or where errors are made in quota setting. Retroactive changes to Sales Quotas will be reviewed on a case by case basis and determinations will be made subject to applicable local law. The Company reserves the right to adjust quotas at any time (prospectively or retroactively) at the Company's sole discretion with or without prior written notice, subject to applicable local law. Such changes may be in consideration of, among other things, changes in market conditions, in response to currency movements and in response to a Plan Participant's request for quota reduction. An adjustment to the exchange rate, if deemed appropriate, will result in a respective adjustment of the quota. In the event the Participant requests and obtains approval for a quota reduction, and subsequently overachieves by more than 130% of the revised quota and the quota reduction is not a result of an error in quota setting, the Participant may be subject to a revision of Plan back to original quota assigned. This stipulation is to be communicated to the Participant/s when the reduction is communicated. Changes to quotas will require review and approval by Sales Management (refer to FY20 Sales Compensation Governance Approval Matrix), EVP of WW Field Operations and/or his/her designee(s) and/or EVP Customer Success.

2. **End of life of product/s without replacement -** may result in a quota reduction if Plan Participants' quota is documented to align to a product that is end of life without replacement. It may also result in a quota reduction if a Plan Participant has documented opportunity in Odyssey aligned to a territory and the opportunity (with EOL product) is forecasted at 40% or greater at the time of end of life notification date. Any changes to the Plan Participant's quota will be made subject to applicable local law.

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3. **Systems Errors -** resulting in incorrect incentive compensation calculation will be corrected.

4. **Credit Errors -** errors in credit will be corrected.

5. **Cancelled or de-booked orders (current or past fiscal year) -** will result in reversal of credit and associated incentive compensation paid, if any upon reconciliation.

6. **Payment of Incentive Compensation and Bonuses -** payment of Incentive Compensation and/or bonuses may be delayed, adjusted or modified in circumstances where transactions affecting payment are under review or determined to be inaccurate or inappropriately assigned.

7. **Pricing error -** will result in adjustment of credit and associated incentive compensation paid, if any upon reconciliation.

8. **Carve Outs -** partial removal of credit from the value of the deal value resulting in adjustment of credit and associated incentive compensation paid, if any, upon reconciliation. Carve Outs may be adjusted for compensation purposes only, with no impact to Management Bookings.

9. **'Windfall' provisions -** Subject to applicable local law, the Company reserves the right to manage a Plan Participant's commission earnings where a 'windfall' occurs. A 'windfall' is defined as a situation where a Participant's earnings far exceeds the Participant's annual On-Target Commission (OTC) due to unanticipated large transaction(s) not included in quota setting, or a large transaction(s) during a plan year which requires unusual or significant management involvement. These are some examples (but not an exclusive list) of 'windfalls' where Credit, Sales Goal/Quota Retirement, and/or incentive compensation will often be modified subject always to applicable local law.

When a Plan Participant's commission earnings exceed 250% of his or her OTC, the EVP of WW Field Operations and/or his/her designee(s) and the EVP, Customer Success will review the Plan Participant's attainment to determine whether a windfall has occurred. If a windfall occurs, the Company reserves the right to limit a Plan Participant's commission earnings based on the EVP of WW Field Operations and/or his/her designee(s) and the EVP, Customer Success evaluation of the Plan Participant's efforts towards exceeding the target or quota. In the case of a windfall, a Plan Participant may earn a lower commission than the amount provided for in the Plan Participant's Plan Acknowledgment Form, subject to applicable local law. Earnings above 250% threshold will require approval of the EVP, Worldwide Field Operations and/or his/her designee(s), EVP, Customer Success, VP of Worldwide Field Finance and/or his/her designee(s), VP Human Resources and/or his/her designee(s).

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> The above are only examples of some of the circumstances in which modifications to aspects of the Plan may be made by the Company. The Company will attempt to inform a Plan Participant of modifications prior to carrying them out but cannot guarantee that it will do so in every instance, subject to applicable local law.
>
> Due to the nature of the Company's sales, sales process, technologies and incentive compensation administration, any modifications undertaken in this section are likely not to be made until after the transaction has been booked and sometimes not until after the end of the fiscal year as that is when the Company is likely to become aware of the extent of the windfall. Accordingly, the Company retains the right, subject to applicable local law, to make appropriate modifications at any time during the fiscal year and until final year-end closing and reconciliation of Plan Participant's Individualized Compensation Plan/s.
>
> The Sales Finance Team may, at any time, undertake an audit to ensure all payments under the Plan are made in accordance with the same Plan. They may also identify payments that may be the result of administrative errors and/or unanticipated circumstances including payments which fail to reflect a reasonable evaluation of the Plan Participants' contribution toward any transaction and earnings potential which is beyond that reasonably contemplated by the Company."

The Tribunal's reasons

14. The Tribunal found, on the evidence it heard, that an error had been made by the respondent in setting the appellant's FY20 Measure 1 quota. That finding is not challenged in this appeal. The Tribunal also found that when the respondent realised that an error had been made, it purported to apply the "windfall" provisions of the Plan. The Tribunal noted that whilst an error in fixing a quota level did not make the new HSBC contract either an "unanticipated large transaction" or one that had required "unusual or significant management involvement", such an error could nevertheless give rise to a windfall in accordance with the broader terms of the definition of "windfall". In the appellant's case, however, the respondent had failed to follow the correct process for review of windfall. In particular, it had failed to make any evaluation of the appellant's own efforts towards exceeding the target or quota. At paras [137] and [140] the Tribunal stated:

> "Even if there was a 'windfall' the respondent had not operated the provision for resolution in terms of the [Plan]. That would mean there was no lawful

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> deduction and so the wages properly payable would be the full amount of the commission…
>
> The respondent…determined a windfall had occurred; but did not then follow their own provisions in resolving the matter; and so were not entitled to make the deduction. Not being entitled to make the deduction means that the wages properly payable include the commission claimed."

15. The Tribunal went on to note, however that that the respondent's failure to operate the windfall review process did not prevent it from relying upon other terms of the Plan that permitted alterations to be made to commission entitlement. The Tribunal accepted a submission for the respondent that it was able to place reliance upon two other provisions of the Plan, and had effectively done so during the grievance and appeal processes. Specifically, the Tribunal accepted that the respondent was entitled to rely upon either or both of the following sections of the Plan, *viz*:

> "**Quotas -** …Retroactive changes to Sales Quotas will be reviewed on a case by case basis and determinations will be made subject to applicable local law. The Company reserves the right to adjust quotas at any time (prospectively or retroactively) at the Company's sole discretion with or without prior written notice, subject to applicable local law….
>
> …Changes to quotas will require review and approval by Sales Management (refer to <u>FY20 Sales Compensation Governance Approval Matrix)</u>, EVP of WW Field Operations and/or his/her designee(s) and/or EVP Customer Success"

and / or

> "The Sales Finance Team may, at any time, undertake an audit to… identify payments that may be the result of administrative errors and/or unanticipated circumstances including payments which fail to reflect a reasonable evaluation of the Plan Participants' contribution toward any transaction and earnings potential which is beyond that reasonably contemplated by the Company."

16. The Tribunal concluded, in summary, that the respondent had brought itself within either or both of those provisions during the grievance and appeal process and had accordingly been authorised by the Plan to re-adjust the quota level such as to adjust the commission payable to the appellant.

17. In these circumstances, the Judgment of the Employment Tribunal was that:

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> "…the claimant received the wages properly payable to him from the respondent when he received payment of wages on 28 February 2020 and there was no deduction from the wages of the claimant under s 13 of the Employment Rights Act; and the claim does not succeed"

Burns / Barke Order

18. On 25 April 2022, a **Burns / Barke** order was sent to the Tribunal in relation to the following section of the Plan:

> "Earnings above 250% threshold will require approval of the EVP, Worldwide Field Operations and/or his/her designee(s), EVP, Customer Success, VP of Worldwide Field Finance and/or his/her designee(s), VP Human Resources and/or his/her designee(s)."

19. I will refer to that section of the Plan, for ease of reference, as "the approval condition". The Tribunal was asked if it had found the approval condition to have been met and, if it had not, on what basis it had concluded that commission earnings in excess of 250% of OTC had become "properly payable" for the purposes of section 13(3) **ERA**.

20. The Tribunal responded to the **Burns / Barke** questions on 16 May 2022. It explained that it did not find the approval condition to have been met, but did not consider that to be relevant to the issue of what was properly payable under the Plan. It was of the view that the approval condition related only to the situation where a windfall arose. It also took the view that the approval condition was engaged only where the respondent had undertaken a review in accordance with the procedure for review of windfall described in the Plan.

Summary of submissions

Appellant

21. In line with his Grounds of Appeal and Skeleton Argument, Mr McGuire submitted that the Tribunal had erred in law in placing reliance upon those parts of the Plan which it concluded had justified alteration of the entitlement to commission. In relation to the "Quota" clause, the respondent

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had never produced the FY20 Sales Compensation Governance Approval Matrix and had failed to prove that all of the conditions for retroactive variation of quota had been met. Alternatively, the Tribunal had failed properly to explain why, on the findings in fact made by it, the conditions for variation of quota had been met under that provision. In relation to the "audit" clause, it was an error of law to view what had happened in setting the appellant's quota as either an "administrative error" or as an "unanticipated circumstance". Alternatively, the Tribunal's judgment was not **Meek** compliant because it did not identify which of those positions it considered had applied. The Tribunal had further erred in concluding that the audit provision was not linked to the windfall provisions and in implying a separate rectification procedure into the audit clause where none was set out in the Plan other than in relation to windfall.

22. In relation to the cross- appeal, the appellant adopted the reasoning of the Tribunal in the **Burns / Barke** response.

Respondent

23. Mr Olson submitted, in terms of his cross-appeal, that if the Tribunal had correctly construed the approval condition it would have come to the view that no entitlement had been established to anything beyond the sum of £232,015.95 that had been paid. The effect of that would have been that the issue of authorised deductions would not have arisen for consideration at all.

24. If that was wrong, the Tribunal was, in any event, correct – for the reasons given by it – to conclude that the terms of the Plan permitted adjustment of the FY20 Measure 1 quota and thus the level of commission payable.

Relevant legal principles

25. Section 13 of the **Employment Rights Act, 1996** ("**ERA**") states *inter alia*:

> "(1) An employer shall not make a deduction from wages of a worker

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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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion."

26. The words "properly payable" in sub-section 13(3) denote a legal – though not necessarily contractual – entitlement on the part of the worker to the payment in question (**New Century Cleaning Co Ltd v. Church** [2000] IRLR 27). The first question is always whether any sum is legally due. Only if the answer to that first question is in the affirmative does consideration then require to be given to whether or not there has been a deduction from that sum (**Hellewell v. Axa Services** [2011] ICR D29; UKEAT/0084/11/CEA) and, if there has, whether such deduction was authorised in terms of sub-sections 13(1) and (2).

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Decision and reasons

27. It was common ground that the Plan was contractual. The first question that the Tribunal had to consider was what (if anything) was "properly payable" to the appellant by way of commission under the Plan. One part of the Plan which regulated that issue was the approval condition.

28. As noted above, the Tribunal found (per its **Burns / Barke** response) that the approval condition had not been met. The Tribunal did not, however, consider that to be relevant to the issue of what was "properly payable" under the Plan because it construed the approval condition as relating only to the situation where a windfall arose, and considered that the approval condition was engaged only once the respondent had properly undertaken a review in accordance with the procedure for review of windfall described in the Plan.

29. The Tribunal was in error in limiting the approval condition in that way. On a correct construction of the Plan, the approval condition is of wider application. It applies to all situations (including but not limited to windfall) where calculated commission earnings have exceed 250% of OTC. One situation in which that might arose would be "errors…made in quota setting" (example 1). Others could include "systems errors" (example 3) or "credit errors" (example 4). There is no obvious reason why the requirement for express approval of commission earnings in excess of 250% of OTC should be limited only to windfall. There are, however, very obvious reasons for an express approval requirement in any situation where commission appears *ex facie* to have been earned at a level of 250% or more of OTC. One such reason would be to maintain a level of senior management scrutiny and control over unexpectedly high commission earnings, including those arising from errors made in quota setting.

30. In any event, even on the hypothesis that the approval condition relates only to the windfall provisions, there is no reason to limit its applicability to situations where a windfall review process has been properly completed. The windfall review process and the approval condition are separate.

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The approval condition required input from two parties – the VP of Worldwide Field Finance and/or designee(s) and the VP Human Resources and/or designee(s) – who had no role at all in the windfall review process. The approval condition arose as soon as commission earnings exceeded 250% of OTC. That was so whatever the outcome of any windfall review or, indeed, even if no such review took place at all.

31. Whatever other remedies the appellant might have for an alleged failure by the respondent properly to operate a windfall review process, a claim for unlawful deduction from wages cannot be made for a sum that has not become properly payable under the Plan. Commission at a level of more than 250% of OTC did not become properly payable under the Plan unless the approval condition was satisfied. On the factual findings made by the Tribunal, the approval condition was not so satisfied. It follows that no sum in excess of 250% of OTC ever became due.

Disposal

32. For these reasons – being essentially those advanced by the respondent – the appeal fails and is refused. The cross-appeal challenges the Employment Tribunal's reasoning but not its conclusion as reflected in its Judgment. I will accordingly dismiss the cross-appeal as being unnecessary.

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