



EMPLOYMENT TRIBUNALS

Claimant: Ms N Hardy

Respondent: Peter Alan Ltd

Heard at: Cardiff (CVP) On: 6 April 2023

Before: Employment Judge R Brace
Members:

Representation

Claimant: Mr Hardy (Claimant's father)

Respondent: Mr L Welsh (Legal Consultant)

RESERVED JUDGMENT

The claims of breach of contract, or in the alternative, unlawful deduction from wages are not well-founded and are dismissed.

Written Reasons

Introduction

1. This hearing was conducted wholly remotely by video (CVP) and at the outset of this hearing, further case management was undertaken as this case had originally been listed for 2 hours only and no direction had been given for an agreed bundle or exchange of witness statements. Despite this, both parties had sent electronic copies of the documents they sought to rely on and witness statements. Both parties agreed that it was in the interests of justice for the hearing to proceed and no request for a postponement was made.
2. I therefore had before me:
 - a. A witness statement for the Claimant with accompanying documents labelled Extract A-Extract M together with a copy of the Claimant's payslip dated 23 September 2022; and

- b. A witness statement for Judith Hazell, Business Support Director, for and on behalf of the Respondent, together with a 90 page bundle of documents (“Bundle”).
3. The witnesses relied upon those witness statements, which were taken as read, and both were subject to cross-examination, the Tribunal’s questions and re-examination. The Tribunal was referred selectively to the Claimant’s documents and the Respondent’s Bundle. Documents referred to within the Bundle are denoted by [] in this Reserved Judgment and Written Reasons.
4. Whilst accepting that this was an unusual step, I allowed the Claimant to be recalled after the Respondent’s submissions as the Claimant’s father, an unqualified representative, within his submissions sought to adduce new evidence relating to a £250 incentive that had been paid to the Claimant within her September pay. It was agreed that it was in accordance with the overriding objective for the Claimant to be recalled and for the Respondent’s representative to cross-examine her on the incentive payment. This was undertaken and submissions then resumed before adjourning for a reserved judgment to be given.

Claim and List of Issues

5. The Claimant was employed by the Respondent from 6 August 2018 until 23 September 2022, when her employment ended by reason of her resignation. On 6 November 2022, the Claimant entered into ACAS Early Conciliation which ended on 24 November 2022 [2] and on 6 December 2022, the Claimant filed her ET1 [3] claim form complaining of breach of contract and unlawful deduction from wages in respect of:
 - a. monthly commission/bonus for August 2022; and
 - b. quarterly monthly commission/bonus for Q3 period 1 July -30 September 2022.
6. Indicative figures were provided within the ET1 claim for of £600 for the August commission and £1400 for the Q3 quarterly commission/bonus.
7. The Claimant had resigned to take up alternative employment and this was not a claim whereby the Claimant was seeking damages in a case of wrongful dismissal. Rather, the Claimant was seeking damages (and in the alternative, a claim for unlawful deduction from wages) in respect of the commission/ bonus she asserts she should have been paid for August and the third quarter.

8. She claims that as her overall salary package was based on basic salary plus additional performance based commission and she had never been denied these commissions if targets had been achieved, that any claim that the commissions were non-contractual was in breach of an implied term through custom and practice. She considered that any term that an employee must be employed on the last working day of the following month to receive commissions already earned was unjust and unlawful and that there was no provision in the Employment Rights Act 1996 for an employer to withhold monies earned in this way.
9. The Respondent did not dispute that had the Claimant continued in employment she would have been paid August commission, and if targets had been achieved, would have been paid a Q3 bonus/commission, but relied on a provision in both the Claimant's contract of employment and March 2022 Remuneration Scheme which provided that

"All bonus/commission/incentive arrangements are non contractual and can be varied, amended or discontinued at the discretion of the Company. These bonus/commission/incentive arrangements will be reviewed on an annual basis with the company reserving its right to make any necessary amendments to meet the needs of the business.

Payment of any commission & bonus payments will only be made if you are employed by the Company on the last working day of the month in which the commission is to be paid.

Any staff members who have tendered resignation or are under notice of dismissal for any reason other than redundancy, the ending of a fixed term contract or ill health before or on the date the variable pay is to be paid will not be entitled to receive any variable pay."

10. The claims and issues arising from those claims were discussed and a list of issues was prepared by me and emailed to the parties after that discussion again during the course of the morning of the hearing. This list of issues was agreed by the parties to be the issues arising from the breach of contract and/or unlawful deduction from wages claim as follows:

Un-authorized deduction – s.13 Employment Rights Act 1996

1. *Did the Respondent make un-authorized deductions from the Claimant's wages and if so how much was deducted?*
 - a. *Were the wages paid to the Claimant:*

- i. on 23 September 2022 in respect of monthly commission for August 2022 less than the wages she should have been paid in respect of:
 1. 1.38% of branch income (based on management fees received from landlords for August 2022) **[£TBC]**; and
 2. The agreed % of August move-in target **[£TBC]**; and
- ii. on 25 October 2022 less than the wages she should have been paid in respect of the quarterly commission/bonus for the period from 1 July – 31 September 2022 **[£TBC]**?

- b. Was any deduction required or authorised by statute?
- c. Was any deduction required or authorised by a written term of the contract?
- d. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- e. Did the Claimant agree in writing to the deduction before it was made?
- f. How much is the Claimant owed?

Or, in the alternative

Breach of Contract

2. Did this claim arise or was it outstanding when the Claimant's employment ended?
3. Did the Respondent do the following:
 - a. Not pay the Claimant on 23 September 2022 monthly commission for August 2022 of:
 - i. 1.38% of branch income (based on management fees received from landlords for August 2022) in the sum of **[£TBC]**; and
 - ii. The agreed % of August move-in target in the sum of **[£TBC]**; and
 - b. Not pay the Claimant on 25 October 2022 the quarterly commission/bonus for the period from 1 July – 31 September 2022 in the sum of **[£TBC]**
4. Was that a breach of contract?
5. How much should the Claimant be awarded as damages?

11. Both the Claimant and the Respondent used the terms 'commission' and 'bonus' interchangeably and nothing turned on this issue. The Claimant was unable to particularise the exact amounts sought as the Respondent had not provided documents relevant to remedy. The Respondent also provided further documentation, relevant to the calculation of the respective monthly and/or quarterly payments, over the course of the morning of the final hearing but these were not added to the evidence before this tribunal, being relevant to remedy only and the decision having been made that this hearing would deal with liability only.

The Law

12. The Claimant has the burden of demonstrating on balance of probabilities that the Respondent had breached a term of the contract of employment by failing to fulfil an obligation imposed by the terms of the contract or indicated, by words or conduct, that it did not intend to honour an essential term of the contract when the time for performance arose. A breach of contract gives rise to a right to financial compensation for losses flowing from the breach with the general principle being that the damages should return the innocent party to the position that they would have occupied but for the breach.

13. Prior to the commencement of evidence, the following authorities on bonuses were referred to the parties as *potentially* relevant and of assistance to them:

- a. **Peninsula Business Services Ltd v Sweeney** 2004 IRLR 49, EAT, in which the EAT upheld a term in a sales executive's contract which provided that on leaving employment he forfeited any right to omission earned but not yet due for payment, on the basis that although it might be onerous, the language was clear and the employee had signed the contract to indicate consent and the employer did not need to show that the employee had actual knowledge of the full effect of what they were signing;
- b. In relation to the distinction between contractual and non contractual bonuses:
 - i. **Clark v BET plc and anor** 1997 IRLR 348, QBD in which the High Court found that despite the contract referring to a bonus as discretionary, the employer was under an obligation to exercise that discretion in good faith and as a result the claimant was contractually entitled to participate in a bonus scheme;

- ii. **Clark v Nomura International plc** 2000 IRLR 766, QBD, where regarding a discretionary bonus scheme which stated that bonuses were not guaranteed and depended on performance, the High Court rejected the argument that performance was just a trigger condition which gave the employer the right to look at other factors in determining the bonus, but was the criterion for awarding the bonus and in light of the employee's performance, it had been irrational and perverse not to have awarded the bonus; and
- iii. **Horkulak v Cantor Fitzgerald International** 2005 ICR 402, CA, a constructive and wrongful dismissal claim in which the Court of Appeal held that although the clause in the employee's contract stated that the employer 'may in its discretion' pay a bonus, he was entitled to receive damages in respect of the amount that, but for his dismissal, he would probably have received, the bonus being part of the employer's remuneration structure and was designed to motivate and reward the employee.

14. In addition and in particular, the parties' attention was drawn to the two Court of Appeal cases of:

- a. **Brand v Compro Computer Services Ltd** 2005 IRLR 196, CA, in which the Court of Appeal held that clauses containing restrictions that apply on payment of commission in the event that the employment is terminated; and
- b. **Keen v Commerzbank AG** 2007 ICR 623, CA where, when the terms of the bonus scheme provided that the decision as to whether or not to award a bonus was at the discretion of the bank but also provided that an employee who was no longer employed, or who was subject to notice, on the date on which the bonus became payable would not be entitled to a bonus payment, the Court of Appeal held that where the claimant had not alleged that the employment had been terminated in order to prevent a bonus being payable, it followed that there was no obligation to pay the employee a bonus for that year.

15. Section 13 Employment Rights Act 1996 states that:

'An employer shall not make a deduction from wages of a worker employed by him.'

16. This prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (s13(1)(a) and (b) ERA 1996).

Findings of Fact

17. The Respondent is an estate and letting agent specialising in sales and rentals across Wales. The Claimant was employed by the Respondent from 6 August 2018 until 23 September 2022, when her employment ended by reason of her resignation. The Claimant had on 26 August 2022, given written notice of her resignation [55].
18. Whilst the Claimant was initially employed by the Respondent as a Lettings Negotiator, by the date of her resignation she was employed as Letting Manager at the Swansea Marina branch, a position she had held since 1 August 2021.
19. The terms and conditions of the Claimant's employment were set out in a contract of employment [32], which had been signed and dated by the Claimant on 31 July 2018 [Appendix 1] Within those terms, under the heading 'Remuneration', the following was included

'You may, at the Company's discretion, be allowed to participate in a Bonus Scheme in place from time to time, and subject to the rules of the schemes.'

For the avoidance of doubt, you do not have a contractual entitlement to such a bonus award and any such award is entirely discretionary. No such award is payable to you if you are not employed by the Company at the date of payment of bonus or if you have tendered a resignation or under notice for termination for any other reason other than redundancy, the ending of a fixed term contract or ill health at the time of the bonus payment.'

20. The bonus/commission remuneration scheme ("Lettings Remuneration Scheme") that was in place varied from year to year with the most recent and relevant iteration being sent to staff on 23 March 22 [52]. Previous iterations of the Lettings Remuneration Scheme (from 2019 [63], January 2021 [69], October 2021 [76]) all contained similar but not same provisions indicating that to receive commission the employee had to be employed by the Respondent on the due date. All sales staff, including managers, were included in the Lettings Remuneration Scheme, around 70% of the Respondent's employed

staff and it was agreed that this was an essential element of the employees' remuneration scheme which ensured business efficacy within the sector and for this particular employer.

21. The March 2022 Lettings Remuneration Scheme, being the remuneration scheme in place at the date of termination [83], provided as follows, that:
- a. the monthly scheme comprised of two elements:
 - i. A percentage of monthly branch lettings income, paid one month in arrears, which the parties agreed was set at 1.35%; and
 - ii. Income based on monthly performance of move ins, again paid one month in arrears; and
 - b. The quarterly scheme, where portfolio growth was paid, would be paid at £75 per unit .

22. There was also an annual bonus which is not relevant for the purposes of this claim.

23. The March 2022 Lettings Remuneration Scheme also included separate provision for treatment of such variable pay on cessation of employment, which provided that the employee's entitled to an incentive scheme would cease on the last day of employment and included the following wording [86]:

Payment of any commission & bonus payments will only be made if you are employed by the Company on the last working day of the month in which the commission is to be paid.

Any staff members who have tendered resignation or are under notice of dismissal for any reason other than redundancy, the ending of a fixed term contract or ill health before or on the date the variable pay is to be paid will not be entitled to receive any variable pay.

24. The Claimant was familiar with the terms of the March 2022 Lettings Remuneration Scheme and was aware that it provided that she was not entitled to be paid commission if she had tendered resignation and was not in employment on the last working day of the month in which the commission was to be paid.

25. Following her resignation on 26 August 2022 [55], the Claimant emailed her line manager asking what she needed to do to secure her Q3 quarterly bonus. He responded later that day confirming that for her to be eligible for the bonus and the September commission she would need to be working on the last day of the month that it was paid, 31 October [52]. The Claimant was provided with an opportunity to withdraw her resignation, which she declined.

26. It was an agreed fact between the parties and I found, that the August monthly commission was due to be paid on 23 September 2022 and the Q3 commission was due to be paid on 25 October 2022. It was also an agreed fact that the Claimant had already achieved her August monthly target by the date that she had handed in her notice on 26 August 2022.
27. The Claimant's employment ended by reason of her notice on 24 September 2022 and, on 3 October 2022, the Claimant emailed Judith Layzell indicating that she was surprised that she had not received commission for August as she had achieved her 100% target and was estimating this to be £600 [59].
28. Judith Layzell's response referred the Claimant to the terms and conditions, that that payment would only be made if she was employed on the last working day of the month in which commission was to be paid and that she needed to be employed on 30 September to have received the August commission.
29. On 17 October 2022, the Claimant emailed again indicating that as she had fulfilled all requirements for August, and had achieved 100% of target, she considered the non-payment of the August commission to be an unlawful deduction from wages and breach of contract, indicating that she would submit an employment tribunal claim. On 24 October 2022, Judith Layzell responded again drawing her attention to the March 2022 Letting Remuneration Scheme [61].
30. Within the Claimant's last pay payment, she received the sum of £250, in respect of a separate incentivisation scheme which involved quality of calls made through RightMove, but was not paid an amount for either the August or September monthly commission and did not receive payment for Q3 commission (on a pro-rata basis or otherwise). This was reflected in the payslip relied on by the Claimant.
31. Judith Layzell gave evidence that this payment fell outside the Lettings Remuneration Scheme policy and was payable despite the resignation from the Claimant, unlike the monthly and quarterly commission. She also gave evidence that the rules of the remuneration scheme as applying in each year had always been applied to all leaving employees and no discretion applied to ensure that any were paid commission in circumstances where, because they were leaving, the scheme provided that they would not receive such amounts and that otherwise there would be '*..one rule for one and one rule for another*'.

32. I accepted that evidence and found that £250 was payable despite resignation and that the Respondent had applied the terms of the remuneration scheme to all staff and no element of discretion had been applied to the provision that payment of any commission/bonus payments would only be made if the employee was employed on the last working day of the month in which commission is to be paid and/or that any employee, who had resigned or on the date the variable pay was to be paid would not be entitled to any variable pay i.e. commission/bonus.

Submissions

33. The Respondent accepted that bonus and commission as part of remuneration packages was common in the sales and letting industry, in order to enhance sales, to reward and incentivise good performance and to attract potential employees, but stressed that the monthly commission for August would have fallen to be payable in September payroll and quarterly payments in the October payroll; that the Claimant resigned on 26 August and her employment ended on 23 September 2022. He submitted that the key clause in the Remuneration Scheme was, that regardless of whether the Claimant had achieved target in monthly or quarterly, as she had tendered resignation and was not in employment on last working day she was not entitled to be paid it.

34. He reminded me that on cross-examination the Claimant had accepted that understood the Remuneration Scheme and was aware of the clause. Whilst he accepted that the retention of the commission within the March 2022 Lettings Remuneration Scheme had changed this slightly from earlier iterations, to 'last working day' not 'pay day', because the Claimant had tendered resignation on 26 August 2022, regardless of which version applied, she would not have been eligible for either the monthly quarterly payment.

35. He also reminded me of the evidence of Judith Layzell which was that all staff member who had tendered resignation and/or left in Respondent's employment in the period of the Claimant's employment had been subject to terms of the remuneration schemes that had applied from time to time and no discretion or no additional discretion as to whether to pay or not had been applied.

36. In terms of relevant case law, he submitted that in both **Peninsular** and **Brand v Compro Computer Services**, the schemes were not clear and that in the

latter case the commission scheme did not make plain that it was a condition of payment of being in employment when the commission payment was made, that this case differed in that the terms agreed could be no clearer and that it was clear and unequivocal that there must be no notice of termination and the employee must be still employed for the commission to be paid. He also submitted that the evidence on the application of Scheme had been consistent by the Respondent. He submitted that **Keen v Commertzban** had similar hallmarks to the Claimant's case, where the Court of Appeal upheld the Respondent's ability to withhold commission as clearly defined in that scheme; that it was the Respondent's position that its remuneration scheme and the contract of employment had been clear and concise and applied uniformly and that to eligible the employee had to be employed on date of payment of payment and could not be under notice.

37. In relation to the cases of **Clark v BET**, **Horkulak v Cantour Fitzgerald** and **Clark v Novocold**, he submitted that the Respondent had not applied its scheme in a capricious way, that it had been applied thoroughly to all and there was a clear intention not to pay where the Claimant is under notice and no longer employed; that this is something that the Claimant was fully aware of. He submitted that the application of the scheme to the Claimant was not irrational or perverse and that the Respondent had been consistent.
38. The Claimant's representative submitted all lettings sales staff were included in the remuneration scheme and no eligible employee had been excluded, that whilst the remunerations scheme could be discontinued at the Respondent's discretion, it had never been suspended or discounted in the four years of the Claimant's employment and commission had never been denied; that it was a long established custom and practice and through that there was an implication that the Remuneration Scheme became a contractual term of the contract of employment.
39. He argued that it was an implied term, if only for purposes of business efficacy as without such a scheme, it would be catastrophic on business operation of the Respondent unless there was a corresponding increase in the salary basic. He argued that the Respondent should not conduct itself in a manner likely to destroy trust and that the Respondent's evidence was that the Remuneration Scheme took precedent over commercial consideration for August 2022 and that the Respondent's position that there was no deviation from the terms of the remuneration scheme was perverse and that there were 'no winners'.

40. He relied on **Clarke v Nomura** as suggesting that discretionary bonus do have contractual status and should be paid but that in any event, s.27 Employment Rights Act 1996 provided that there was no entitlement to withhold monies from the Claimant where performance targets had been met and therefore the actions of the Respondent in not paying the Claimant, was in breach of contract.
41. He submitted that the term of the contract and Lettings Remuneration Scheme, that payment of commission or bonus would only be made if employed by the Company on the last working day of the month in which the commission was to be paid fell foul of s.27 ERA 1996 as essentially the employee would otherwise work for a month for free, which could not be compatible with that section.

Conclusions

42. It was accepted by the Respondent that it had not paid the Claimant:
- a. on 23 September 2022, her monthly commission for August 2022 (of either the % of branch income or the agreed % of August move-in target; or
 - b. on 25 October 2022, the quarterly commission/bonus for the period from 1 July – 31 September 2022.
43. I also concluded that a claim for such sums was outstanding when the Claimant's employment ended on 24 September 2022. The Tribunal therefore had jurisdiction to consider a claim as one of breach of contract in the alternative to one of unlawful deduction from wages under the Employment Rights Act 1996.
44. Whether the Claimant was entitled to payment of such sums was relevant to a claim brought as one of either breach of contract or as a deduction under the wages provisions of the Employment Rights Act 1996.
45. The focus of my deliberation was on whether the Claimant was able to demonstrate to me that it was a term of the contract that she would be entitled to such remuneration, before determining whether the non-payment of such remuneration was a breach by the Respondent of the Claimant's contract of employment or, in the alternative an unauthorised deduction from wages.
46. Whilst I accepted that the Claimant was contractually entitled to participate in a remuneration scheme, and the Respondent was under an obligation to exercise

that discretion in good faith (**Clark v BET plc**), I further concluded that the insurmountable problem for the Claimant in this case, in relation to either payment, was the wording of the March 2022 Lettings Remuneration Scheme, which I concluded was the scheme that applied to the Claimant's employment at the relevant time.

47. It was accepted by the Respondent that had the Claimant remained in employment and had not resigned, she would have been entitled to and would have received payment of either the August monthly commission or any Q3 commission (where the quarterly target had been reached). However, the Claimant had in fact resigned and in those circumstances the agreed terms included a term that payment would only be made if the Claimant was employed by the Respondent on the last working day of the month in which the commission was to be paid. She was not.

48. As the Claimant was not employed on the last working day of September 2022, being Friday 30 September 2022, and her employment having ended on 23 September 2022, the express terms and clear wording and construction of the March 2022 Lettings Remuneration Scheme was that no bonus or commission would be paid. The Respondent was under no obligation to pay her the August 2022 commission, whether she had achieved her target for that month or not, and therefore there was no legal obligation on the Respondent to pay that monthly commission to the Claimant.

49. My conclusions in relation to the Q3 bonus/commission are the same, namely that the express terms and clear wording and construction of the March 2022 Lettings Remuneration Scheme was that no quarterly bonus or commission would be paid as the Claimant was not employed on the last working day of October 2022, being Monday 31 October 2022.

50. I did not consider that there was anything irrational or perverse in the Respondent's decision not to pay in those circumstances.

51. I therefore concluded that the Respondent was not in breach of contract in respect of the non-payment of the August monthly commission and/or the October quarterly commission. I was not persuaded that **Brand** was supportive of the Claimant's case in circumstances where the express wording of the payment in circumstances of termination provided a right for the employer not

to pay. Rather, I considered that the express terms were clear and unequivocal, and in those circumstances there was no entitlement to payment.

52. In the alternative, I concluded that the Respondent had not made any unauthorised deductions from the Claimant's wages in September and/or October 2022 in respect of monthly commission for August 2022 and/or quarterly commission/bonus for the period from 1 July – 31 September 2022. Any non-payment of commission/bonus, or deduction was authorised by the written terms of the contract and/or the March 2022 Letting Remuneration Scheme, a copy of both being in the Claimant's possession and knowledge before the deduction was made.

53. The claims brought by the Claimant are therefore not well-founded and are dismissed.

Employment Judge Brace
Dated 11 April 2023

JUDGMENT AND WRITTEN
REASONS SENT TO THE PARTIES
ON 13 April 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche