



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Harith Taha

**Respondent:** Novatek Europe Ltd

**Heard at:** East London Hearing Centre (by Cloud Video platform)  
London South Employment Tribunal

**On:** 4 April 2023

**Before:** Employment Judge Taylor

## Representation

**Claimant:** Mr L Betchley Counsel for Claimant

**Respondent:** Mr Gus Baker, Counsel for Respondent

**JUDGMENT** having been sent to the parties on 5 April 2023 and written reasons having been requested (by the claimant) in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The claimant presented a claim to the Employment Tribunal on 8 November 2022.
2. The respondent provides regulatory compliance software solutions to the pharmaceutical, biotech and healthcare industries. It is a small company currently employing four members of staff in its sales team, including the claimant.
3. The claimant made claims of holiday pay, 'other payments' and unlawful deduction of wages.
4. Having considered the claim form and discussed the issues at the outset of the hearing it was identified that the issue to be determined by the tribunal was:

Did the Respondent make a deduction from the Claimant's wages in respect of commission payments referable to the period 1 January 2022 to 1 July 2022?

5. The claimant argues it was a term of his contract that he was entitled to be paid commission payments calculated on purchase orders that had been raised in response to client orders. The respondent argued that the claimant was entitled to receive commission payments calculated by reference to what had been invoiced to a client during a prescribed six-month period and had received all payments lawfully due to him.

### **The evidence**

6. The claimant was represented by Mr L Betchley of Counsel and the respondent was represented by Mr Gus Baker of Counsel.
7. The parties prepared an agreed bundle of documents for the hearing, comprising of 326 pages. The claimant gave evidence on his own behalf and had prepared a witnesses statement and appendices comprising 154 pages. Mr Nicolas Moreno-Gellini, founder and director of the respondent gave evidence on behalf of the company. The witness statement of Ms Penny Hever, the company secretary of the respondent, with responsibility for payroll was taken as read.

### **The findings of fact**

8. Having heard and considered the documentary the evidence the Tribunal found the claimant was initially employed by the respondent from 22 March 2004 as a technical consultant. The claimant has been continuously employed for 18 years. His employment is continuing.
9. The claimant's position in the company changed over time and he began working in a sales role. He was not issued with new or amended written terms and conditions of employment when he changed role.
10. The claimant's basic salary at the time he presented his claim to the Employment Tribunal was £2,271 net, plus commission. Commission was paid twice a year on 1 July and the 31 January.
11. Although the claimant has a number of grievances and concerns about various aspects of his employment, including his entitlement to sick pay, it was agreed that the only matter for determination at the hearing was what sum was properly payable by way of commission from Jan 2022 - July 2022 and whether the respondent had made unauthorised deductions in respect of commission payments due to the claimant.
12. Employees engaged in a sales role were allocated an individual sales target each year (164-169). This formula was fixed by Mr Moreno-Gellini each year and the formulation changed from year to year, depending on the needs of the business as identified by him. Several factors were taken into account including, the need to attract new business and the need to encourage and motivate sales staff; for example, in recent years repeat client purchases did not qualify for commission. Mr Moreno-Gellini exchanged emails and held meetings with the small sales team, by video, to discuss the proposed commission schemes before they were set down in writing and applied to each member.

13. All sales staff received an email setting out their sales target for the year 1 January to 31 December. To qualify for a commission payment the claimant and the other members of the sales team had first to exceed their personal sales target for each six month period.
14. There was a dispute between the parties about how the commission payments were calculated. The claimant contended that commission payments were based on the date of a purchase order put through by him. The respondent disagrees. The tribunal finds that a purchase order records what product and services a client has agreed to buy and at what price. The product can be complex and often there is a continuing dialogue between the client and the company about how complex software products are delivered over a period of time.
15. The respondent gave evidence, that was accepted by the tribunal, that commission is calculated by reference to the invoice date, that is the date a request for payment is made to the client. Often a sale can result in several invoices being submitted to the client, reflecting an agreement that the contract would be delivered to the client in two or more stages, over a period of up to 4 years. As an example, commission payable to the claimant for the half year July 2016 and January 2017 headed 'Purchase Order Schedule' was shown to have been calculated by date of the invoice (58-59).
16. The respondent sent an email to the claimant dated 28 July 2020 dealing directly with the claimant's claim that his commission should be calculated by reference to the purchase order date, explaining that commission cannot be paid until a purchase order has been invoiced and the invoice paid:

' ... Re: Commission Jan-June 2020... By way of an explanation the tracking page allows me to see everything that has been invoiced and when it was paid. Novatek pays you commission based on the purchase order but if the invoice is not paid then you are not entitled to the commission. I can enter purchase orders into the tracking page that you receive commission when it become[s] due. You just need ' tell me which purchase orders have been agreed prior to 30 June 2020 that have not already been invoiced.'(97)

17. In an email dated 27 July 2020 Mr Moreno informed the claimant :

'...DATES

The ideal in any company is that the commissions are paid once the company gets paid. But I understand that this can be a long time and the sales team needs to be rewarded sooner. To make it work we can use the invoice date instead of the purchase order date or payment date. (96)

18. Even if there has been a change of practice or room for misunderstanding by the claimant, the documentary evidence supports the respondent's case that from 2021 commission to the sales team was calculated from the date the client was invoiced. Several documents support the respondent. These are:

- 18.1 Document 87, an email to the claimant dated 10 March 2021 from Mr Moreno
- 18.2 Document 92 an email to the claimant dated 9 March 2021 from Mr Moreno
- 18.3 Document 93 an email to the claimant dated 3 March 2021 from Mr Moreno

- 18.4 Document 113 an email to the claimant dated 8 April 2021 from Mr Moreno
- 18.5 Document 246 commission structure document 2021 and
- 18.6 Document 268 commission structure document 2022.

19. The recent commission structure documents (246 and 248) evidence that employees in sale roles were notified each year of the commission scheme applicable to them, personally. Employees were entitled to commission if their sales reached the applicable minimum target. For each six-month period commission would be based on what had been invoiced during that period. Commission was calculated on invoice date. Employees are entitled only to commission from sales they themselves had made. It follows members of the sales team were not entitled to commission on sales made by their colleagues.
20. For invoices dated 1 January to 30 June any commission was scheduled to be paid by 31 July of that year. In respect of invoices dated 1 July to 31 December any commission would be paid by 31 January the following year. The claimant's minimum target for each six month period in 2022 was £195,000 in invoiced sales. Accordingly, the respondent notified the claimant of the 2021 and 2022 commission calculation, including the minimum target for each six-month period. Between 1 January 2022 and 30 June 2022 the claimant's invoices did not reach the minimum target (259, 260) and for the period July 2022 to December 2022 the Claimant' total invoiced sales did not reach the minimum target (261,262,264,265,266 and 290). Therefore, the claimant was not entitled to any commission on 31 July 2022 and he was informed of this (237 and 231).
21. The claimant stated that he had not signed any document to confirm agreement to the commission structure the respondent claims applied to him. That submission does not assist his case. The respondent established that the commission structure was changed from year to year. For the purpose of this case the tribunal found the claimant was informed in clear terms on 8 April 2021 (113) that if he did not accept the proposed commission scheme, for that year, he would not be entitled to any commission at all. The claimant and all of the other members of the sales team were informed, after consultation, of the company (and individual) commission schemes for 2021 and 2022 (246 and 268).
22. The claimant continued to work for the respondent after receiving that clarification of the commission scheme that applied to him and the commission element of his pay was calculated accordingly.
23. The claimant did not resign in response to the purported change to the basis of his commission remuneration. The Tribunal was therefore satisfied on the facts of this case that from year to year to the parties reached an express agreement as to the basis on which commission would be calculated and the date on which any such commission payable. The tribunal finds that claimant was paid according to the commission agreement for the period, 1 January 2022 to 1 July 2022 (268).

## **The applicable law**

### **Unauthorised deduction from wages**

24. Section 13 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—

(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.

**The submissions**

25. The respondent submitted that the claimant does not have a contractual entitlement to commission pursuant to any written statement of terms. Instead, at the beginning of each calendar year the employees were notified of the commission structure that would operate. Without any such notification, there was no entitlement to commission (113). The commission structure that governed 2022 can be found on page 268. It was sent to the Claimant in February 2022 (162). The commission structure stated:

a. "Commission is calculated on Invoice Date".

b. "If in a Semester you don't reach your Min Sales, no commission will be paid that semester".

26. The fact that commission in 2022 was based on 'Invoice Dates', not purchase orders, cannot have been a surprise to the Claimant. He had been told the same repeatedly in 2021 (87, 92, 93).

27. The claimant submitted that his position is that he did achieve his sales target for first half of 2022. He referred the Tribunal to several Purchase Orders and other payments which were raised in the first half of the year 2022. If given credit they would have generated the full commission payments due to him. The invoices have not been disclosed by the respondent. All of the invoices should have been released and the respondent is to be criticised for that. The claimant never agreed to the commission structure. His grievance was based on a previous commission structure paid on Purchase Orders.
28. The claimant had not been issued with a contract of employment or a notice of changes to his terms of contract, nor had he confirmed that agreed with any amendments made by the respondent.

### **The Tribunal's Conclusions**

29. The Tribunal found that the respondent offered a commission scheme based on certain sums invoiced to clients in time for the start of every calendar year. At the start of the year and following some consultation with the sales team, including the claimant, the respondent set out how commission was to be calculated in a commission statement document. The 2021 and 2022 documents do not support the claimant's contention that he should be paid commission calculated on purchase orders provided to the client. The burden was on the claimant to prove that he was entitled to receive commission payments on a different basis. The claimant has failed to provide any evidence that commission payable was agreed to be based on purchase orders for the period in issue.
30. The Tribunal considers that the claimant may have been motivated by grievances which he has referred to and set out both in his grievance and in the original claim form. However, those are not matters before the tribunal at this hearing, although they provide background to this claim. The Tribunal makes no criticism of the claimant who genuinely believes that he is entitled to make this claim. It is the role of the Tribunal to hear the claim and arrive at a conclusion having heard the evidence.
31. The Tribunal concludes that it is satisfied that the claimant has not proved his case. The Tribunal finds as fact that the claimant was entitled to receive commission payments for the year 2022 based on invoice payments. The claimant's contention that commission for 2022 should have been based on purchase orders has not been made out.
32. The question for the tribunal to decide was 'Did the respondent make a deduction from the Claimant's wages in respect of commission payments referable to the period 1 January 2022 to 1 July 2022? The claimant has failed to show that the respondent has failed to pay him wages lawfully due and therefore his claim that the respondent made an unlawful deduction in respect of commission payments is dismissed.

33. The respondent indicated that it proposed to make an order for costs. There was insufficient time to consider the application and separate case management orders were made.

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Employment Judge Taylor

17 April 2023