



EMPLOYMENT TRIBUNALS

Claimant: Mr. E. Stanley
Respondents: (1) Pello Capital Ltd (in voluntary liquidation)
(2) Secretary of State for Business and Trade

London Central by CVP

22 August 2023

Employment Judge Goodman

Representation:

Claimant: in person

Respondents: did not appear and were not represented

RESERVED JUDGMENT

1. The first respondent is liable to the claimant in breach of contract for the sum of £11,237.56 in unpaid commission.
2. In respect of the claim against the second respondent, it is declared that the claimant's pay included commission at the apportioned rate of £749.17 per week for the purposes of calculation of payments due under section 184(1) of the Employment Rights Act.
3. Permission to the claimant to apply to the tribunal to determine the amount payable if he considers the revised calculation is in error, such application to be made within is months of the date this decision is sent to the parties.

REASONS

1.This is a claim for unpaid commission. It is brought against the first respondent either as a claim for unauthorised deductions from wages or for breach of contract and against the second respondent for not taking commission into account when making payments under the insolvency provisions of the Employment Rights Act.

Parties to the Claim

2.The first respondent ("the company") employed the claimant as a stockbroker. On 14 December 2022 the company passed a winding up resolution and

appointed insolvency practitioners. They have been served with this claim but have not responded to it. They are aware of it, the claimant having recently been telephoned about it by someone on their behalf who questioned why he was bringing a claim against an insolvent company.

3. The second respondent is responsible for the Insolvency Service which makes the payments due to employees of insolvent employers under Part XII of the Employment Rights Act 1996. Her representative has responded to the claim, and relies on that as a written representation, and did not appear today, as the Insolvency Service relies on the first respondent's liquidators for information as to the relevant facts. The response states the second respondent was told by the first respondent that the commission claimed was a discretionary bonus, and so not payable as earnings.

The Issues

4. The issues were identified by Employment Judge Norris at a case management hearing on 22 May. Summarising, the tribunal must consider whether the claim was brought in time, whether commission was wages, what was properly payable and when, and whether any failure to pay commission for the months of August to October 2022 was a breach of contract.

Evidence

5. Today I heard evidence from the claimant, who had filed a witness statement, and answered questions from the tribunal. I have also seen correspondence between the claimant and the employer and between the claimant and the Insolvency Service. Some of this was sent before the hearing, some emailed to the clerk during the hearing.

Findings of Fact

6. The claimant's employment started on 3 December 2018. He had a basic wage of £25,000 per annum, paid monthly, and in addition commission calculated as 30% of the commission he had generated for the company after deduction of "cover", which was 2.5 times his basic salary. The remaining 70% stayed with the company.

7. Later, his basic salary increased to £30,000 while the commission structure remained the same.

8. Commission was paid quarterly, in the payroll for the month following the quarter end. A week or so before that payroll date the claimant was sent a calculation so that he could check and challenge the figures on which the calculation was based. The quarter used to be the conventional January to March as Q1, but this changed later to February to April as Q1. The new Q3 therefore ran from April to October, and was payable at the end of November.

9. In 2022 the claimant asked for a pay increase. After some negotiation it was

agreed that the basic salary would increase from £30,000 to £35,000, and at the same time his share of commission after cover would increase from 30% to 40%, all other terms remaining the same. A letter confirming this was sent to him on 31 August 2022. It says:

“I am writing to advise that with effect from 1 September 2022 your gross annual salary will increase from £30,000 to £35,000 per annum.
As of 1 September 2022, we shall pay you 40% net commission generated above your cover, with your cover being calculated as 2.5 times your gross annual salary. This will be paid on a discretionary basis, quarterly in arrears. All other terms and conditions of your employment remain unchanged.
Many thanks your contribution and keep up the good work”.

10. Early in November 2022 employees were told to work from home. Soon after, on 18 November 2022, they were sent notice of termination of employment on grounds of redundancy. The letter says the recent sale of the company had not gone through, and while the company would continue to seek a buyer of the company or its assets, he was likely to be made redundant. The claimant was given one month's notice of termination and told that he would be paid up until 17 December 2022. He should make himself available for work during the notice period to help achieve an orderly wind down of the business. It was envisaged that he would continue to be paid in the normal way, and his final salary payment and statutory redundancy payment would be made with the December 2022 payroll. He was asked to return all company property before the final day, and reminded that some terms of his contract would continue to apply after he left.

11. On 29 November 2022 the claimant was sent his calculation of commission for Q3, split between August as one total, and September to October as another, because of the intervening salary increase. A small amount was also included for November. The claimant understands this was done because the company appreciated that in the circumstances of impending termination he was otherwise unlikely to be paid commission for November when Q4 became payable at the end of February 2023. This calculation shows commission due for Q3 plus November as a total of £11,237.56. Splitting out commission due in respect of November, which including cross transfers with a colleague, totals £3,436.10, the amount due in respect of Q3 (August to October), and payable at the end of November, is £7,801.46.

12. On November payday (30th November) the claimant was not paid salary or commission. Nor was he paid anything at the end of December, as the employer's letter indicated would be done.

13. Following their appointment on 14 December 2022, the liquidators appointed a contractor, ERA, to liaise with employees. There was a short delay because of registration. The claimant was then invited to make claims to the Insolvency Service. On 4 January 2023 he received a letter from them saying he was to receive a redundancy payment based on four weeks' service, arrears of pay for 1 to 30 November 2022, all subject to the statutory cap on a week's pay (then £571). He was also to be paid notice for the period 19 November 2022 to 9

December 2022. The gross amount was £1,598.89, and after statutory deductions for tax and national insurance, and another small deduction for benefits he could have claimed during the notice period, he was being paid £1,547.83. The letter invites the claimant to contact the Insolvency Service if there is an error which cannot be solved by the insolvency practitioner, and also mentions the right to make a claim to an employment tribunal.

14. The claimant did challenge the calculation. He wrote on 8 January 2023 pointing out his basic salary was £35,000, so the latest figure was underestimated. He should also be paid commission from earnings, and attached the August 2022 email from the company, while stating he had always been paid commission as a regular and consistent part of his pay structure since the start of his employment, payment only to be withheld in the event of broker wrongdoing. He also questioned the absence of any payment for untaken holiday. He drew their attention to the company having no fixed holiday allowance, but permitting “unlimited within reason holiday days”, and said what holiday he had taken that year. He got a reply on 30 January 2023. He was told that the wages he was paid for the five weeks from 5 November to 9 December 2022 were subject to the statutory cap. It was conceded that he should have holiday pay, and this was later paid at the beginning of February.

15. The claimant says there were a couple of inconclusive telephone calls about unpaid wages, and he resolved to make a claim to the employment tribunal. He filled in the prescribed ET1 claim form on 1 March 2023. He discovered in doing so that he would need to approach ACAS for early conciliation, and so notified ACAS later that day, receiving a certificate on 3 March. He presented his claim on 5 March.

Claim against the First Respondent Relevant Law

16. The Employment Rights Act 1996 provides a scheme whereby workers can make claims in the employment tribunal for unauthorised deductions from wages. Wages are defined in section 27(1)(a) as “any commission...or other emolument referable to his employment, whether payable under his contract or otherwise” Questions have arisen about whether discretionary payments are ‘payable’.

17. It was identified in **Small v Boots Co. plc (2009) IRLR 328**, that “discretionary” may mean a number of things – there may be discretion to make no payment at all, or no discretion as to paying it, but some discretion as to the calculation, or the amount. Whether a scheme is in fact “discretionary” can be matter of statutory interpretation, not about whether discretion has been exercised in good faith – **Brogan v Investec plc 2016 EWCA Civ 1031**.

18. Where discretion is real, it may still become payable as a matter of legal obligation where it has been exercised in the employee’s favour, as discussed in **Coors Breweries Ltd v Adcock and others (2007) ICR 983**, and **Farrell Matthews and Weir v Harrison (2005) ICR 509**, which discussed bonus (rather than commission. Further, legal liability need not be under the contract, and an

amount was payable if it was quantifiable – **Nouradian v Tradition Securities and Futures (2009) EWCA Civ 60.**

19. By section 13 of the Act, the amount due as an unauthorised deduction is the difference between what was “properly payable” and what was received – which might, as in this case, be nothing.

Claim against First Respondent – Discussion

20. In this case, even if the amount had not already been declared, there would be a strong presumption that the payment of commission was not in fact a matter of discretion. Basic salary was low so that employees would be incentivised to earn for the company. In four years it had always been paid. It formed part of pay negotiation. The claimant’s explanation of the method of calculation included that the total could be reduced for a broker wrongdoing, an indication of the kind of discretion envisaged by the contract. It implies that both sides took it for granted commission would be paid as a matter of course, subject to adjustment in such cases. It was in any case declared on 29 November, meaning discretion such as it was, had been exercised and so the amount became a matter of contractual obligation. That means failure to pay was in breach of contract. It was also properly payable, so an unauthorised deduction.

21. The first respondent is liable to pay the claimant the sum of £11,237.56. That sum is liable to tax as employment income when received.

22. As to time, if the failure to pay arose on 30 November, then as of 1 March (when he went to ACAS and so stopped the clock) claimant is one day out of time in his claim for unauthorised deductions, because by section 23, the claim had to be presented “before the end of the period of three months beginning with...in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made” . However, in a claim for breach of contract within the employment tribunal jurisdiction, time runs from the effective date of termination of the contract. By virtue of section 97(1)(a) that was on the expiry of his contractual notice, 19 December. That claim is in time.

Claim against the Second Respondent

Relevant Law

23. The Insolvency Service is liable by virtue of section 82 to pay certain debts of an insolvent employer.

Employee’s rights on insolvency of employer.

If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

- (a) the employee’s employer has become insolvent,
- (b) the employee’s employment has been terminated, and
- (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.

24. By section 183(3)(a) insolvency occurs on the passing of a resolution for voluntary winding up, and, by section 185, that is the “appropriate date” for payment of arrears of pay.

25. The debts to be paid are listed in section 184, including:

- (1) (a) any arrears of pay in respect of one or more (but not more than eight) weeks.
- (b) any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2).....

Subsection (2) provides for certain statutory payments to be included in the calculation, such as guarantee payments and payments for time off for union duties. It is of interest that the ACAS Code of Practice on time off for union duties says that commission should be included in a calculation to ensure the representative is no worse off when on union duty.

26. In older cases about the calculation of a redundancy payment, it has been held that commission should be included in a week’s pay for that calculation – **Weevsmay v Kings 1977 ICR 244.**

27. How to calculate the amount of a “week’s pay” is set out in sections 221-226 of the Act. By section 221:

221 General.

- (1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.
- (2) Subject to section 222, if the employee’s remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week’s pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.
- (3) Subject to section 222, if the employee’s remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week’s pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—
 - (a) where the calculation date is the last day of a week, with that week, and
 - (b) otherwise, with the last complete week before the calculation date.
- (4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.
- (5) This section is subject to sections 227 and 228.

Section 222 provides for adding earlier weeks if within the last 12 nothing was payable in some weeks, and also covers overtime paid at premium rates. Neither applies in this case.

28. Commission structures have raised the question of whether in such cases remuneration does or does not vary with the amount of work done in the period, and so whether section 221(2) or (3) applies. In **Evans v Malley Organisation Ltd (2003) IRLR 156**, the Court of Appeal held that a salesman's commission, though a substantial part of his earnings, did not correlate to the amount of work done he might make a lot of effort wooing a customer who did not buy. But in **Adshead and other v May Gurney Ltd (2006) All ER (D) 388 (July)** the EAT held on the facts that commission did vary with the amount of work done. The "paradigm case of piecework" rewarded effective performance, not the number of hours put in (comparing a frenetic new starter with the results achieved by an old hand). In such cases what had to be considered was whether there was a close relationship between performance and results, and the degree of correlation "once a certain level of performance is achieved." It was noted that in many cases there might be an element of external factors on the amount of bonus other than the amount of work done, but that did not mean the payment did not vary with the amount of work done. Section 221(3) applied. Both cases concerned the calculation of holiday pay, where more recent decisions of the ECJ have altered the picture, but they remain valid on other applications of a week's pay.

29. Finally where payment was made at other times but referable to the relevant weeks, section 229(2) provides:

Where under this Chapter account is to be taken of remuneration or other payments for a period which does not coincide with the periods for which the remuneration or other payments are calculated, the remuneration or other payments shall be apportioned in such manner as may be just.

Claim against Second Respondent- Discussion and Conclusion

30. The second respondent's response to the claim indicates the objection to including commission in the calculation was it was discretionary. The discussion in relation to the claim against the first respondent shows that the tribunal does not accept it was a discretionary payment because (1) the only element of discretion lay in the calculation in certain factual situations understood by both parties to the contract, such that it was payable under the contract subject to those conditions, and (2) even if discretionary, discretion had been exercised in the stated sum payable to the claimant.

31. It is not said that the second respondent considers commission was not to be included in "arrears of pay" for 8 weeks, nor that it was not payable because the claimant fell within section 221(2) rather than section 221(3). The tribunal has nevertheless considered this.

32. Section 184 (1) (a) does refer specifically to a "weeks pay" only to pay for one or more weeks. The cases on redundancy payment considered commission was to be included in the calculation of pay which is then multiplied by a number of weeks to reach the relevant amount. I have had the materials to be able to consider the statutory wording at the time and whether there have been relevant changes.

33. As to section 221, on the brief facts available, and without knowing if the second respondent disputes the point, I find that the claimant's remuneration falls within section 221(3), that is, payment varied with the amount of work done. The pay structure, with a relatively low basic salary, and at least the same again paid as commission (the amount is likely to have fallen in the 2.5 months preceding notice being given, because the company was failing. In normal time

sit may have been much more), indicates it was not an add on, but integral and important. Like piecework arrangements, it was intended to encourage achievement, rather than putting in the hours, by steering employees to perform work that actually achieved results.

34. The claim was presented in time. By section 188 complaints about failure to pay must be made “before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant”. That was 3 or 30 January 2023. In either case the claim is in time.

Calculation

35. The facts on which the second respondent’s calculations were based include a dismissal date of 30 November, and refer to expiry of notice on 9 December, which is three weeks after notice was given, strictly correct because as of 18 November the claimant was 2 weeks short of 4 weeks service, although the redundancy payment was calculated on 4 weeks service. This is likely to be because by the date of expiry of his statutory notice he had acquired 4 weeks service. The table included in the 30 January email has no headings for its columns, so it is not easy to understand what the amounts refer to. The table covers 5 weeks, starting the week ending 15 November 2022 ending with 3 December, and does not include the week ending 9 December. The overlap between worked notice and unworked notice seems to indicate that the claimant was treated as having an entitlement to be paid for three weeks arrears of pay, and the rest was notice. This difficulty makes it hard to understand the basis for the payments made to the claimant, and so what any shortfall might be. Section 188 states the tribunal shall make a declaration and shall order payment of any shortfall. It is possible to make a declaration as to the amount of a weeks pay. On that basis the second respondent should reconsider the calculation of her liabilities under section 184. It is then open to the claimant to ask the tribunal to list a further hearing to decide the amount payable if there is still dispute as to the amount paid.

36. Taking 18 November 2022 (the date on which the notice period for which payment has already been made began) as the calculation date for arrears of pay, the average basic wage for the preceding 12 weeks was £35,000 divided by 52, so £673.07, which has either been paid by the employer (to 3 October) or by the second respondent. The tribunal considers it just to apportion the amount of bonus declared for Q3 and for the first 2 weeks of November (£11,237.56) by averaging that amount equally over the 15 weeks it covers, that is, £749.17 per week. A more refined apportionment relating particular weeks to particular elements of the commission is hard to achieve.

37. The result is that while the amount for arrears already paid is unaffected, because of the statutory cap, the claimant is entitled to the shortfall of unpaid commission for earlier weeks, subject to the maximum 8 payable, at £749.17, subject to the statutory cap.

23rd August 2023
Employment Judge Goodman

JUDGMENT AND REASONS SENT to the PARTIES ON

Case No: 2201838/2023

.23/08/2023

FOR THE TRIBUNAL OFFICE