



EMPLOYMENT TRIBUNALS

Claimant: Mr Nathan Cook

Respondent: Aqua Protec Limited

Heard at: Birmingham by CVP

On: 20 September 2023

Before: Employment Judge K Wright

Representation

Claimant: in person

Respondent: Mr Beever (counsel)

JUDGMENT

1. The sum of **£811.64** in commission is admitted by the Respondent as owing to the Claimant. The Respondent is ordered to pay this to the Claimant.
2. The remaining claims for commission are not well founded and are dismissed.

REASONS

The Respondent's ('R') counsel provided a helpful summary of the claim to the Tribunal in written submissions provided on the day of the hearing, 20 September 2023. The Claimant ('C') agreed that these accurately summarised the points in dispute, and this summary has accordingly been adopted below. The page references in this decision are to the bundle number (e.g. 88) and the corresponding PDF number (e.g. 102), in the following format - [88/109].

The Claim

1. C was employed by R as a Business Development Manager. It is agreed that he had a commission structure in his contract. He resigned his employment with notice on 16/9/22 to take effect on 9/12/22 [106/120].

2. This is a claim for commissions allegedly due: [8/8]: "I would just like to receive the money I am owed for the works which fell due for payment prior to my final day". It is a claim in breach of contract/unauthorised deduction of wages:

2.1. C has collated 5 pages of R's invoices at [25/31-30/36] which he says show that commission on those invoices is due to him.

2.2. At 31/39 is a spreadsheet analysis produced by C of all the claimed 69 invoices and if/why payment is not due. A separate excel spreadsheet, correcting an error made on the version in the bundle, was sent to the Tribunal and to C on the morning of the hearing. It is this second spreadsheet that is referenced throughout these written reasons.

2.3. There are 69 invoices in total, and the total commission claimed is **£7,123.37**. This is Column G. The maths is not in dispute. It is not in dispute that C's entitlement is to 5% of the net value of any eligible invoice. R, following have undertaking its analysis of the C's commission and producing the excel spreadsheet, now admits that commission in respect of 14 of the invoices is owed to C, totalling **£811.64**. This sum is no longer in dispute and R has been ordered to pay this.

2.4. R has provided 5 categories of response as to why the commission is not due. See Columns H, I, J, K and L of the spreadsheet. The 5 responses are:

2.4.1. Column H: Invoices not paid at time of C leaving employment (28 invoices)

2.4.2. Column I: Client not defined as "new business sales" (7 invoices)

2.4.3. Column J: Invoices cancelled due to admin error: (12 invoices)

2.4.4. Column K: Invoices not for a client of the claimant (8 invoices)

2.4.5. Column L: Payment to be made (14 invoices).

The basis for the dispute and tribunal's findings

Column H: Invoices not paid [by client to R] at time of C leaving employment (28 invoices).

4. in respect of 2.4.1 the sum at issue is **£3,413.30**. All the relevant invoices in Column H had been issued to the respective clients by the date of C's termination of employment on 9/12/22 (Column E). However, R confirmed that monies had not been received from any client by the date of C's termination of employment and R's counsel further confirmed that 15 out of 28 invoices remained unpaid as at the date of the spreadsheet (May 2023) (Column F).

5. The dispute between the parties arises because:

5.1. C alleges that his commission becomes payable once the invoice sum becomes payable by the client, i.e. 30 days after the invoice is sent out, and regardless of when the client pays. Therefore, if the 30 days for payment has expired before his termination date, he is due the commission, irrespective of when payment is received.

5.2. Whereas R contends that the terms of the contract define commission as being payable to C only at the point in time when the invoice is actually paid by the client. Commission is not payable to C unless monies were actually received from the client as at the time of termination of employment.

6. The relevant term is not in dispute. It is in the offer letter to C and C agreed that it is his contract term and that he signed/accepted it at the time [121/136].

7. The relevant (agreed) term is the 3rd bullet point of the offer letter, 15/12/20, [88/102], as R's counsel has done in his submission, I have emphasised the relevant sections:

'.....you are entitled to receive 5% commission on new business sales made by you in each year. Unless the Directors agree otherwise, the total amount of commission you are entitled to receive will be based on you hitting your performance related targets which will be agreed in writing at the beginning of each financial year by your line manager. The financial year which runs from 1st April to 31st March. Your commission will be calculated at the end of each month and based on sales for which full payment was received from the client. Commission is only payable in respect of monies actually received from clients or customers, not in respect of orders placed by clients or customers. You will not be entitled to receive any commission which falls due for payment after the termination of your employment (whether by resignation or dismissal), even if the sale was completed by you during your employment. The Company reserves the right at any time, in its absolute discretion, to vary the amount of commission payable and/or to vary the terms of the commission arrangements (including the cap) and/or to withdraw the commission arrangements in their entirety on giving you reasonable notice.'

8. R submits: (1) commission falls due only when money is 'actually received' from the client; but (2) C is not entitled to commission which falls due after the date of termination of his employment.

9. C submits that the above clause does not state that payment must be received prior to termination, therefore he could expect to receive commission for works which were due to be paid prior to termination, but the outstanding balance was settled after termination. In respect of what is meant by '*falls due for payment after the termination of your employment*', C submits that the critical factor for commission entitlement is the '*due for payment*' date, not the date of receipt. Therefore, any invoice due for payment prior to his termination, regardless of when actual receipt occurs, should rightfully entitle him to commission and that the '*due for payment*' date would be the final day of the 30-day period given on the invoice for receipt of payment.

10. In respect of this point, I sympathise with C and with C's interpretation of the wording above. However, I find that the wording '*falls due for payment*' refers to the commission falling due for payment and not the invoice from the client, and that the commission falls due only after full payment from the client is received. For this reason, I find that C is not entitled to this aspect of the commission.

Column I: Client not defined as "new business sales" (7 invoices) (paragraph 2.4.2)

11. There are 7 invoices. See lines 7, 55, 56, 57, 59, 62, 63. The sum at issue is **£1,170.51**.

12. The contractual term set out above at paragraph 7, contains an entitlement to commission based on 'New Business Sales'. R then says that the term is defined at [96/110] which is a statement of terms document:

13. The Company defines new business sales as:

13.1 A customer who has not placed an order with the Company in the last three financial years,

13.2 Their first order and any subsequent made by you during the first 12 months of engagement.

13.3 The first 12 months of a contract obtained by you through competitive tender.

13.4 The first 12 months of any new services or products added by you to an active client in addition to their existing contract terms.

14. It was agreed that 13.2 did not apply. New business sales therefore had 2 criteria 13.1 a renewed customer who had been absent for more than 3 years, 13.2 a new customer and any invoices within the first 12 months and then 13.4 which also allows for commission for 'new services or products'.

15. C says he did not receive this document during employment. Further, he is concerned that R initially disclosed the document without the (unsigned) final page. I agree with R's counsel that the alleged credibility point is irrelevant as R has provided the full (unsigned) document and is not purporting to say that C did sign.

16. In terms of the evidence on this point as to whether C was provided with this document, in cross-examination my note confirms that Mr Ross did not recall specifically whether he had provided this to C given how long ago this was. Mr Ross however gave evidence on what he would normally have done and the process he follows when carrying out an induction and that, given this, he considered that this would have been shown to C during C's induction day. In accordance with my note of proceedings, C was however adamant that this had not been provided to him and that he had not seen this document until after he disputed his unpaid commission.

17. Whilst I do not disbelieve Mr Ross that he would normally provide this as part of the induction, I prefer C's evidence on this point, that he did not receive this at his induction. Given this, I agree with R's counsel that 2 scenarios therefore arise: (1) it is not part of the contract at all, and C cannot therefore establish that the commission is due at all because he has no evidence as to what constitutes new business sales, or (2) the parties, by their conduct, including by C's recognition at the Hearing, have used and relied on the definition. I further agree, as asserted by the R's counsel that, even in evidence, C referred and relied on the definition and therefore, as submitted by R's counsel, option (2) fully reflects the reality and indeed both parties' position that they rely on the definition.

18. R contends that there is an overarching issue that again determines the entire category of invoices. It is this:

19. As submitted by R's counsel, in every case relating to the 7 invoices, there is an initial invoice date (Column T) which is more than 12 months before the invoice on which commission is claimed (Column D). For example, Joule UK, at line 55, shows an invoice claimed date (Column D) of 29/9/22 and an initial invoice date (Column T) of 29/3/21. It is therefore out of scope. I agree with R's counsel's submission and in fact C in evidence appeared to agree with this and that the starting point is that the commission is not due at all.

20. C's response to this is that each invoice reflects a 'new product/new service'. It is C's burden to show that commission is due. In Mr Ross's witness statement,

there was appended a list of invoices at [186-200/203-217]. In this list of invoices is a column with C's comment as to why the payment was due. In each case, with the exception of line 7 of the spreadsheet, invoice 19210, and line 63, invoice 21248, which I was unable to locate (and acknowledge C's criticism regarding that some of the invoices he had identified as having commission owing are missing from this list), C has identified that payment was due because the client was a 'new client' and has not mentioned that this was because it was 'new services/product' or claimed this in his witness statement or oral evidence. I therefore find in respect of invoices 55, 56, 57, 59, 62, commission is not due because, there is an initial invoice date (Column T) which is more than 12 months before the invoice on which commission is claimed (Column D) as pointed out by counsel and for the reasons stated above.

21.C did assert in respect of line 7, invoice: 19210, in oral evidence that this was a 'new site' which correlates with his original comments recorded in respect of the invoice in the list of invoices described above, which states TMV services as being provided. R's counsel did challenge C on this and asserted that it was a different building on the same site. Without additional witness evidence from R, this could not be resolved. However, Nottingham University Hospital appears elsewhere on the spreadsheet and has been identified as a client not onboarded by C and references TMV services, in the absence of further evidence, I therefore prefer R's evidence in the form of the spreadsheet that this was considered, but that it does not satisfy its definition on 'new services/product'.

22. As R's counsel has submitted, it is apparent that the 'new product' point was considered as part of R's analysis on several invoices. See for example lines 30, 49, 61, where in each case, the invoices were more than 12 months old, and commission therefore did not fall for payment but despite that, the conclusion (at Column X) was that it was a 'new product' and therefore R has agreed to pay. It is also clear that, whilst missing from the previous list of invoices, R has included invoice 21248 on the excel spreadsheet and has analysed whether payment is due. This further supports my conclusion at paragraph 21 above to prefer R's evidence on this point. I therefore find that C has not satisfied the burden of proof that commission is due and find on the balance of probabilities no commission in respect of these invoices are due.

Column J: Invoices cancelled due to admin error: (12 invoices) (2.4.3)

23. In every case, as is apparent from Column P, the invoice was cancelled. The value of this category totals **£787.21**.

24. C agreed in cross-examination that a cancelled invoice meant that commission was not due. However, C did comment that, in some respects, i.e. the "error of VAT" invoices, there was likely to have been a re-issued invoice. Counsel submits that either (1) there was a reissued invoice pre-termination of employment, in which case C admits it will have been factored in elsewhere, or (2) there was a re-issued invoice post-termination, in which case, C would plainly not know of it, but R contends that by definition, it is not 'money actually received' at the time of termination (even though it could be said to be a process mistake) and thus (See Column H above) no commission is due.

25.I find that, owing to my finding that '*fall due for payment*' refers to the commission rather than the payment date of the invoice, no commission is due. Even if I had agreed with C and found that '*payment*' referred to payment by the client of the invoice, where the invoice has been re-issued owing to a mistake with

the invoice after C's employment had been terminated, as the original invoice was incorrect, payment would not have properly been due to be paid to R by its client on the invoice within 30-days of the original invoice. Whilst hard on C, payment would still not be due in respect of those invoices as a new 30-day payment period would apply from the date of the re-issued invoice.

26.I accordingly find that commission is not due in respect of this column.

Column K: Invoices not for a client of the claimant (8 invoices)

27. R's counsel has divided this into 2 parts. The total sum of which is **£1,115.30**.

28. Part 1: lines 3, 4, 5, 8. The client is Nottingham University NHS Trust. C accepted in cross-examination that Leza Greenfield was the relevant person holding the client account. In that event, he would not be entitled to the commission. He said in evidence that at some point it was handed over to him.

29.R does not dispute that this may have been the case but contends that the client would no longer be 'new business sales' (see Column I). C claims however that commission was due because it was a 'new product'. Again, cross referencing to C's comments recorded in the document referenced as list of invoices 186-200/203-217, this is recorded as 'remedial works TMV services'. It is not immediate clear that this would be 'new product' or that C is claiming this to be the case. No further witness evidence was provided on this by C and again, the Respondent has identified in its spreadsheet that that TMV services were already being provided to this client. Owing to the analysis it has demonstrated it has taken, as set out at paragraph 22, I prefer R's evidence on this point that this was considered and not found to be 'new services/new product' and find that C has not established that it was, and that commission is owed. I therefore find no commission is due to C.

30. Part 2: lines 31, 32, 65, 66. Column B references the wrong client. In cross examination it was agreed that this mistake by admin input or by C. I however agree with Counsel's assertion that this is immaterial as, in each case, the correct client is not C's client and therefore C is not due the commission. C agreed in cross-examination with that proposition in that he agreed that in each case the 'true' client was not his client:

31. Line 31. Lincolnshire CHS is erroneous (Colum B). The true client is Midlands Partnership [64/75]. C agrees that it is not his client

32.Line 32. Lincolnshire CHS is erroneous (Colum B). The true client is Midlands Partnership [63/74]. C agrees that it is not his client

33.Line 65. Lincolnshire Partnership is erroneous (Colum B). The true client is Shaw Healthcare [65/76]. C agrees that it is not his client

34.Line 36. Lincolnshire Partnership is erroneous (Colum B). The true client is Midlands Partnership [66/77]. C agrees that it is not his client.

35.I accordingly find, no sums are owed to C in respect of the invoices listed at paragraphs 31- 35 which total £235.46.

Failure to provide written particulars of employment.

36.C addresses this in his submissions but it was not a claim that was understood to be being pursued during the hearing. It had been confirmed that the claim was

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limited to C's commission. R's counsel did not therefore have an opportunity to address me on this in terms of the award to be made and it would be disproportionate to hold a further hearing with the parties on this point. I am not prepared to now consider this.

Employment Judge **K Wright**
17 October 2023