



EMPLOYMENT TRIBUNALS

Claimant: Ms A Gardner

Respondent: Riskcare Ltd

Heard at: London Central Employment Tribunal (via CVP)
On: 17th June 2024

Before: Employment Judge Singh

Representation

Claimant: Mr S Crawford (Counsel)

Respondent: Ms J Shepard (Counsel)

JUDGMENT

1. The Claimant's claim for unlawful deduction from wages is not well-founded and fails. The claim is dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent from 11th February 2019. She remains in employment as at the date of the hearing.
2. The Claimant submitted this claim to the Employment Tribunal on the 1st March 2024. The claim was for unlawful deduction from wages.
3. The Claimant's claim focused on a bonus payment. The Claimant received a salary from the Respondent as well as a bonus payment. The Claimant claims that the bonus scheme was unilaterally changed in September 2023 and that this change substantially reduced the amount of bonus the Claimant would receive.
4. The Claimant claims that the failure of the Respondent to pay her based on the original bonus scheme amounts to an unlawful deduction from wages.
5. The amount claimed is £13,362.53.

6. The Respondent resists the claim. The Respondent argues that the bonus was a discretionary bonus and that as it was not an amount “properly payable” to the Claimant, she cannot claim that there has been an unlawful deduction for wages.
7. I was required to consider whether the bonus scheme was discretionary or contractual and thus whether or not the bonus payment was part of the Claimant’s properly payable wages.

Findings

8. I heard evidence from 2 witnesses- the Claimant and Ms Helen Duffy, CFO of the Respondent. Both witnesses had provided witness statements and both attended to be cross examined.
9. I was also provided with a 124 page electronic bundle which contained amongst other documents, the Claimant’s contract of employment and correspondence about the bonus from each of the years of the Claimant’s employment.
10. I was also provided with a skeleton argument from Ms Sherpard, with the authorities of Thom v Hobart Real Estate and Pendragon PLC v Jackson. Mr Crawford did not provide written submissions but did refer me to the authority of Horkulak v Cantor Fitzgerald International.
11. In relation to the relevant documents, the Claimant’s “Service Agreement” document stated that she would receive a salary of £40,000 per year. This document made no reference to a bonus. This confirmed the Claimant’s employment started on the 11th February 2019.
12. There was then a document entitled “Contract of Employment” in the bundle index. This document was dated the 24th February 2022 but confirmed that the Claimant’s employment began on the 11th February 2019.
13. This document confirmed that the Claimant’s salary was now £45,000 per year. This document did include a bonus clause. It stated that
“11.8 Bonus: The company may in its absolute discretion pay you a bonus of such amount, at such intervals and subject to such conditions as the Company may in its absolute discretion determine from time to time”.
14. It also stated at clause 11.19 that *“Any bonus payment to you shall be purely discretionary and shall not form part of your contractual remuneration under this Agreement”.*
15. However, although the words of the agreement between the parties set out that the bonus was discretionary, I still needed to look at the reality of the situation according to the guidance in case law.
16. The Claimant’s position was that in May 2019, the Claimant received an email from the Respondent with a document entitled “Riskcare Sales Strategy for 2019 v2.0” confirming that the commission rates (a term used

interchangeably with the word bonus) would be 55 for new business and 3% for repeat business. This was to be paid quarterly.

17. I did not see this document. There was a "2019 Sales Strategy" document in the bundle but this was dated 13th February 2019 and said that the bonus was 4% for new business and 2% for existing business.
18. There was an email in the bundle which confirmed that the Claimant had been sent the v2.0 document in May 2019. As such, it was likely that an updated document was provided to the Claimant but it was not certain what it said.
19. There was also a document entitled "Company Bonus Scheme" which said it covered May 1st 2017 to April 30th 2018. This set out the bonus as 5% for new business and 3% for existing business. The Respondent said that this covered the period from January 2018 to February 2019, when the Claimant started. It was not advanced that this document ever covered a period when the Claimant was earning bonus.
20. It was also agreed between the parties that in May 2020, the Claimant received a further document, this time entitled "Riskcare Sales Bonus Policy 2020". This document confirmed that for that year the bonus would be 5% for new business and 3% for existing business.
21. The final relevant bonus document was the "Bonus Scheme Policy 2023". This set out that the bonus would be 7% for new customers who are on the Respondent's target list, 3% for new customers not on that list and 1% for existing customers. It is this scheme that the Claimant was unhappy about as she says that she could not achieve sales from the target list and therefore saw her commission drop by 2% for new customers and 2% for existing customers.
22. The Respondent pointed out that each of the bonus documents confirm that the Respondent has the right to vary the scheme.
23. The Claimant countered that in each of the years she had been there, until 2023, the bonus scheme had not changed.
24. The Respondent also pointed out that that each of the bonus documents sets out a rationale for the bonus scheme being set as it was that year.
25. The Respondent explained that the bonus scheme is set to motivate its sales staff to focus on whichever area the business thinks need focusing on for that year. Ms Duffy gave the example that during Covid, it was more important to focus on existing clients but in other years, new client growth would be the Respondent's aim.
26. This is supported by the bonus scheme documents. They are not a simple update or repeat of what the percentages are each year. Although they were the same for multiple years during the Claimant's employment, that appears to be because the focus of the company was the same for those years. No company that wishes to survive will have aims that remain static throughout and it is inevitable that one would seek to move to a

different direction eventually and direct its employees to achieve that aim as well.

27. I accepted that that was the reason for the new scheme in 2023. The Respondent wanted sales staff to target specific new clients to achieve growth in that area.
28. Without commenting on the rationale, what it did demonstrate to me was that the Respondent's bonus scheme was fluid and subject to change according to the needs of the business. This, to me, indicated that the bonus scheme was not something that was contractual and could change at the Respondent's discretion.
29. The Claimant's argument was not that the bonus scheme as a whole was contractual, but that the scheme to which she had been paid for the previous 4 years- under which she received 5% commission for new sales and 3% for existing customers had become contractual over time.
30. I did not accept this argument. It was clear that the bonus scheme fluctuated from time to time. Although it may be correct that the Claimant received the same level of bonus during the last 4 years, that was a relatively narrow window to look over in my view as to what the Respondent's intention and actions had been. Prior to the Claimant starting in 2017 up to 2019, there had been a different bonus scheme and then in 2023 another different scheme was proposed.
31. If the Claimant had been able to evidence that the same rate for bonus payments had been provided by the Respondent for their entire period of existence, or at least during the entire period they operated a bonus structure, I might have been inclined to find that the 5% and 3% bonus had become contract over time, but this was not the case.

The Law

32. Section 13 of the Employment Rights Act 1996 confirms that an employer may not make a deduction from wages from a worker unless that deduction is required or authorised by a statutory or contractual provision, or the worker has previously signed an agreement consenting to the deduction.
33. S.13(3) defines a deduction as being an occasion where the employer has not paid the total amount of the wages properly payable to the worker.
34. A contractual payment will be wages that are properly payable to the worker, but a discretionary non contractual payment will not be. There must be a legal obligation to make the payment in question as set out in the case of New Century Cleaning Co Ltd v Church [2000].
35. Once an employer has exercised its discretion to pay the bonus, it becomes a legal obligation- Ferrell Matthews and Weir v Hansen [2000]. That situation would be if the employer has agreed that what the bonus payment is and agreed to pay it. However, until the discretion has been exercised it is not yet a legal obligation. That was the principle set out in the case of Thom.

Decision

36. As per the legal principles above and the findings of fact I made, I find that the bonus scheme was not contractual and was in fact discretionary. It was clear in the wording of the documents provided that the Respondent intended it to be discretionary and subject to change. It was clear that the Respondent exercised its discretion and changed its bonus structure to suit the needs to the business from time to time.
37. As I did not find that the bonus scheme was contractual, I find that the bonus amount the Claimant was claiming was not properly payable to her. She had no contractual right to the bonus scheme that had been in place since 2020. The Respondent did not have a legal obligation to continue paying her under that scheme once the bonus structure was changed in 2023.
38. As the amount claimed was not properly payable to the Claimant, the claim for unlawful deduction from wages fails.

Employment Judge **Singh**

Date 26th June 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

3 July 2024

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FOR THE TRIBUNAL OFFICE