EMPLOYMENT TRIBUNALS

Claimant: **Ms S Hare**

Respondent: **API Global UK Limited**

Heard at: London Central (by remote video hearing) **On:** 7 August 2024

Before: Employment Judge B Smith (sitting alone)

Representation
Claimant: In person
Respondent: Did not attend

JUDGMENT

1. The complaint of authorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages in the period November 2023 to June 2024.

2. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the amount payable by 10% in accordance with Schedule A1 Trade Union and Labour Relations (Consolidation) Act 1992.

3. The respondent shall pay the claimant the total sum of £5,995 which is the gross sum deducted. The claimant is responsible for the payment of any tax or National Insurance.

   The amount is calculated as follows:

Unauthorised deduction from wages:	£5,450
ACAS uplift (10%):	£545
Total	£5,995

Employment Judge Barry Smith
7 August 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

13 August 2024

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FOR THE TRIBUNAL OFFICE

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REASONS

1. The respondent is a property investment company. The claimant was originally employed in the role of Sales Progressor since 15 July 2020. This was changed to Sales and Mortgage Progression Manager in January 2022. The claimant continues to be employed by the respondent. ACAS conciliation started on 29 February 2024 and ended on 11 April 2024. An ET1 claim for unauthorised deductions from wages was presented on 29 April 2024.

2. No breakdown of alleged underpayments was provided by the claimant in her ET1 but the amounts were apparent from the claimant's documents that were sent to the tribunal for the hearing.

3. On the basis of all the correspondence and documents in the case, the issues were: what pay what payments were properly payable to the claimant, and if they were properly payable, was there an underpayment?

4. Although the claimant at one brief stage had some advice in relation to possible settlement, the parties were not represented.

5. The documents provided to the tribunal for determination of the claim by the parties were as follows; these were agreed by the claimant:

(i) Claim form;

(ii) ET3 response;

(iii) Claimant' s document one 'Doc exchanges' (6 pages);

(iv) Claimant's document two 'Underpayments' (11 pages);

(v) Claimant's document three 'Exchanges and pay slips' (99 pages);

(vi) Respondent's document 'API – New Pay Structure Confirmation' (1 page);

(vii) Respondent's document 'API Global – Contract of employment – Sarah Hare – signed' (19 pages);

(viii) Respondent's excel spreadsheet 'Sarah Hare pay breakdown as of June 24';

(ix) Respondent's email to claimant's solicitor dated 31 July 2024 at 14:42;

(x) Respondent's application to postpone the hearing sent at 16:04 by email on 6 August 2024;

(xi) Claimant's objections to postponement sent at 16:47 on 6 August 2024 by email; and

(xii) Respondent's reply sent at 17:07 on 6 August 2024 by email.

6. I disregarded references to potential settlement negotiations between the partes as these are not admissible in law in the circumstances of this case.

7. No adjustments were required for the hearing.

8. In terms of procedure, I first dealt with preliminary issues, and then the claimant confirmed her evidence under affirmation before making closing submissions. I also took into account the respondent's documents and explanations for the underpayments before making my decision. An oral judgment was given on the day and the claimant requested written reasons.

9. The first procedural issue to be dealt with was the absence of the respondent. The respondent had previously applied by email to postpone

the hearing and stated that the named individual (the CEO) at the respondent was on holiday today. However, I decided to continue in the respondent's absence, the respondent not having attended and no good reason for their non-attendance having been provided in the respondent's recent correspondence. The respondent was plainly aware and on notice of the hearing from its correspondence even if the CEO was not personally aware. This is because the respondent admitted that the notice of hearing had been received and put in a desk drawer by an employee. There was no indication from the tribunal that the hearing had been postponed and therefore it fell to the respondent to attend and make any postponement application during the hearing, if it wanted to. There was no evidence to suggest that only the respondent's preferred individual could represent it at today's hearing or that external representation could not have been arranged. It was plainly in the interests of justice for the hearing to continue in the absence of the respondent. However, I took this into account throughout when making my decisions to avoid unfairness. Also, the respondent had not replied to attempts by the tribunal clerk to contact them by email and telephone on the day of the hearing. I was satisfied that appropriate enquiries had been made before proceeding.

10. The second procedural issue to be dealt with was the respondent's postponement application. For a postponement less than 7 days before a hearing begins, the postponement may only be ordered if there are exceptional circumstances (rule 30A Employment Tribunals Rules of Procedure 2013). There was no suggestion or evidence that the application was necessitated by an act or omission of another party or the tribunal. The postponement application was refused. This is because it was accepted by the respondent that they had in fact received the notice of hearing letter dated 22 May 2024 but it had not been acted on due to inactivity by a (now former) employee. In those circumstances there are no exceptional circumstances that would justify a postponement. In particular, the claimant opposes the postponement on the basis that it would cause her additional stress which I accept, that being an inevitable impact of any postponement in the circumstances of this case. It is not in the interests of justice to postpone. Also, the respondent has provided relevant documentary

evidence and explanations for its conduct by email so it is not the case that it cannot advance at least some resistance to the claims; their prejudice is limited in those circumstances and the fact that they have not provided witness evidence is entirely their own fault.

11. I limited the additional oral evidence that I would take into account from the claimant in the absence of a witness statement for reasons of fairness. However, there was nothing unfair about the claimant confirming under oath the basis of her claim, her understanding of the difference in approach to the calculation of commission between her and the respondent, and the amounts claimed. This is because the amounts claimed in fact could be clearly ascertained from the claimant's documentary evidence submitted in advance of the hearing.

12. The right not to suffer unauthorised deductions from wages is found in Employment Rights Act (ERA) 1996, which so far as is relevant states:

13.— 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.

… (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.

13. The relevant question is whether the amount is properly payable which clearly connotes a legal entitlement: *New Century Cleaning Co ltd v Church* [2000] IRLR 27 CA.

14. The ordinary time limit for an unlawful deductions claim is before the end of the period of 3 months, in this case beginning with the date of the payment of wages from which the deduction was made (s 23(2)(a) ERA 1996).That time limit will be extended to allow for early conciliation, in accordance with s 207B ERA 1996. If the complaint is about a series of deductions or payments, the three-month time limit starts to run from the date of the last deduction or payment in the series: s.23(3) ERA 1996.

15. The ET1 states that the claim is as follows: *'…I have been underpaid my commission wages from November 2023 to present (unlawful deduction of wages). I am currently owed £4,150 and expect this to increase after I am paid in April. I have raised a grievance in January to which I still have had no reply except 'I'll look into it'. I have attempted ACAS conciliation…..*'

16. The ET3 simply says '*A new agreement was put in place. The commission Sarah is referring to is based on an incorrect structur*e'. The respondent further clarified in correspondence, however, that it suggested that the claimant's calculations as to her commission were on an incorrect basis.

17. In summary, the claimant says that her commission should be calculated by number of the dates between the date of a contract for residential property sales being issued and later exchanged. The respondent says that the commission arrangements changed and were based on the earlier date of instruction as opposed to contract issuance. This calculation includes more days and was disadvantageous to the claimant because more commission was payable if the period was shorter.

18. My findings are as follows.

19. This claim is about the correct way to calculate the claimant's commission. The procedure adopted was that she would email the respondent with the details deals done and how she calculated her commission on those deals. She was then paid her commission in her payslip. This is plain from the documentary evidence.

20. The claim is for the following alleged underpayments:

    (i) November 2023 - the commission claim to the respondent was for £1,150, although this should have been £1,100 (because of an incorrect understanding on furniture packs), the claimant was paid £900, so an underpayment of £200;

    (ii) December 2023 – the claimant claimed £600 (the £800 referenced in the email included the sum missing from November), she was paid £450, so an underpayment of £150;

    (iii) January 2024 – the claimant claimed £5,800, she was paid £3,250, so an underpayment of £2,550;

    (iv) February 2024 – the claimant claimed £2,950, she was paid £1,800, so an underpayment of £1,150;

    (v) March 2024 – the claimant claimed £1,750, she was paid £1,650, so an underpayment of £100;

    (vi) April 2024 – the claimant claimed £3,750, she was paid £2,850, so underpayment of £900;

    (vii) May 2024 – the claimant claimed 950, she was paid £700, so an underpayment £250; and

    (viii) June 2024 – the claimant claimed £650, she was paid £500, so an underpayment £150.

21. It became apparent that the claimant's claims went beyond the date of the presentation of claim. The claimant confirmed that, as required, she formally

wanted to amend her claim to include those additional dates after the presentation (so for April, May and June 2024).

22. The tribunal has a discretion to permit amendments to a party's statement of case. The two principal authorities to be applied are *Selkent Bus Company v Moore* [1996] ICR 836 *and Vaughan v Modality Partnership* UKEAT/0147/20/BA(V). In summary, when exercising my discretion I must take into account the overriding objective, and all the circumstances. These include the nature and extent of the amendment sought; the timing (including time limits and the implications of the amendment in terms of the impact on the trial timetable or costs); the merits (to a degree) of the proposed amendments; and the relative prejudice and hardship or injustice that would be caused to the parties if the application were to be permitted. In particular, applying *Vaughan v Modality Partnership*, I must expressly consider the balance of prejudice and injustice when making my decision.

23. In making my decisions it was necessary to first consider the nature of the amendment sought, and in particular whether it amounted to the addition of factual details to existing claims, whether it was the addition or substitution of other legal labels for the existing pleaded facts, or whether it amounted to a new claim. It was also necessary to take into account time limits when considering a new claim to be added by way of amendment. For the purposes of the hearing I took the time at which any new claim is deemed to have been received as the time at which the application to amend was made. I also had to take into account the extent to which any amendment would involve different areas of enquiry (*Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

24. I allowed the claimant to amend the claim to include the amounts owed for May, June, and July 2024. This was clearly intended by the claimant from the wording of her claim form and it caused no real prejudice to the respondent, even in their absence. This is because the additional amounts to include were modest. Also, the amended claim is on exactly the same basis as before and the same issues arise. It is simply a question of including additional dates and amounts as opposed to a new claim. The

respondent would also have reasonably to been expected to have anticipated that the subsequent amounts would be part of this claim from the wording used in the claim form. The prejudice to the claimant would be significant if the amendment was not allowed because she would be required to start a new claim to cover those amounts. However, this would be wholly contrary to the overriding objective because any new claim would simply replicate the same issues discussed today. The fact that the amended claim was not formally sought until now is entirely understandable where the claimant is not represented. Also, the amendment did not require any additional enquiries to be carried out. For those reasons, the claim was amended to include the full set of dates.

25. The claimant was originally employed under a contract dated 23 June 2020 on a salary of £25,000. That contract was signed by the parties on 23 June 2020. The commission, as distinct from a discretionary bonus, was based on units which progressed to exchange of contracts. The commission was £75 per unit if contracts were exchanged within 28 days from issuance of contract, £50 if it was between 29 days and 90 days from issuance of contract, and £25 if it was over 90 days from issuance of contract. Commissions are to be paid at the end of each calendar month with the claimant's salary. I make this finding because of the documentary evidence of the terms of employment.

26. The claimant's pay amounts were subject to negotiations between the parties and on 22 January 2021 amended pay amounts were agreed, effective as of 1 January 2021. This was emailed to the claimant at 18:41 and I find that this reflects the agreement reached between the parties as to her new pay arrangements. This is because it is supported by the documentary evidence and there is no other good reason to find that the contractual terms were anything else.

27. The new pay arrangements are recorded in a document dated 22 January 2022 which says that the position changes to Sales and Mortgage Progression Manager, the basic pay was £35,000 a year, and the commission amounts were £200 for an exchange within 28 days, £100 for

an exchange between 29 days and 90 days, and £50 for an exchange over 90 days. The commission payable for deals previously managed by another employee was £100, £75 and £50 respectively.

28. The claimant raised the issue of her pay in correspondence with the respondent but it was not resolved. However, by at least 11 June 2024 the respondent stated by email that it had reviewed the payments and revised payment structure and was of the position that the claimant had not just been correctly paid, more recently, but in fact the claimant had been overpaid by a significant amount.

29. The claimant's grievance was raised by email 19 January 2024. The respondent did not suggest that the claimant was properly paid until 11 June 2024, although a fuller and clearer explanation was never provided until the respondent emailed the claimant's solicitor on 31 July 2024 at 14:42.

30. The claimant relies on the documented contractual changes ie the documents which state her terms of employment as evidence of the date to be used for commission.

31. The correspondence between the parties about how her new contract was negotiated does not clearly indicate the dates to be used for the payment of commission.

32. The claimant always reported her commission calculations by email to the respondent.

33. If the date of issuance of the contract was used, as opposed to the date of instruction, then this gave the claimant protection from delays by the solicitors.

34. Although the respondent sought to argue that in a few isolated cases the claimant had incorrectly claimed an erroneous higher amount, this objection was not supported by witness evidence and it was not clear to me on the

documentary evidence that this was in fact an error by the claimant. I therefore do not find this objection to be sufficiently evidenced to find against the claimant on those amounts claimed.

35. I conclude as follows. The respondent sought to suggest that the claimant's commission structure was changed from January 2021 to be from the date of instruction rather than the date of the contracts being issued. However, I do not find that this is supported by the evidence, taking into account the plain wording of the employment contracts and the correspondence that led to the agreement of the revised terms. It is plain that the position the respondent adopted would amount to the claimant's terms being worse than before and it is inconceivable that if the claimant was to agree worse terms that this would not be formally recorded in the document dated 22 January 2021.

36. Ultimately I prefer the claimant's interpretation as to what the contractual documents say about how commission was to be calculated, and on her basis there was an underpayment. I find that the claimant's terms of employment required the commission to be calculated from the date of contract issuance and not the date of instruction. This is because this finding is best supported by the documentary evidence.

37. There is no evidenced challenge to the dates themselves, only the approach I should take to interpreting the employment terms. It follows that there were underpayments between November 2023 and June 2024 and total amount of underpayments was £5,450.

38. For completeness, I find that this was a series of unauthorised deductions ending within the relevant time period so this claim is in time.

39. In terms of remedy, no compensation can be awarded for stress in this type of claim. Also, the tribunal cannot order a revision of the claimant's commission structure for the future as this would be outside of its powers.

However, the tribunal has made findings about the sums that are properly payable to the claimant in accordance with her employment terms.

40. I also find that the respondent did not provide a response in any real sense to the claimant's grievance until its email dated 11 June 2024, after these proceedings were issued, or a full reply until its email until dated 31 July 2024. The delays were not properly or promptly communicated to the claimant contrary to paragraph [40] of the ACAS Code on Disciplinary and Grievance Procedures. Also, the respondent by email sought to discuss the grievance in at least one disciplinary hearing (as set out in the email dated 11 June 2024) which is inappropriate. This did not appear to provide for any real appeal mechanism to its decision dated 11 June 2024 that nothing further was payable. A 10% uplift in the award is appropriate in all the circumstances.

Employment Judge Barry Smith
7 August 2024

SENT TO THE PARTIES ON

13 August 2024
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FOR THE TRIBUNAL OFFICE