



EMPLOYMENT TRIBUNALS

Claimant: Ms E Callahan

Respondent: LMRE Ltd

Heard at: London Central (via Video) **On:** 23 August 2024

Before: Employment Judge S Connolly

Representation

Claimant: In person

Third Respondent: Mr Arnold (Solicitor)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's claim for an unlawful deduction from wages relating to unpaid commission is not well founded and is dismissed.
2. The claimant's breach of contract claim relating to unpaid commission is not well founded and is dismissed.
3. The claimant's claim for reimbursement of legal fees is not well founded and is dismissed.

REASONS

Claims and Issues

1. The claimant was employed by the respondent, from 6 May 2021 until 1 December 2023, following the claimant's resignation and a period on garden leave. She was initially employed as a Resourcer, was promoted to Consultant in October 2021 and Senior Consultant in June 2023. As a Consultant and Senior Consultant, she was eligible to earn commission.
2. The claimant says she is owed £18,654.04 (gross) unpaid commission, in respect of four candidate placements completed prior to the end of her employment. She complains of breach of contract (relying on clause 7.2 of her contract) and unauthorised deductions. The claimant's schedule of loss also claims for legal fees of £1,800.

3. The respondent's defence is that the claimant's contractual entitlement was to commission in banked fee income in accordance with the respondent's standard commission scheme, and no employee was entitled to receive commission following the handing in of their notice. It is the respondent's established custom and practice that no employee is entitled to receive commission following the handing in of their notice. This was explained to commission earning employees in a presentation delivered in or around December 2021, and a slide deck accompanying this presentation stated that "Consultants who leave the company during the year will forfeit their right to receive future commission".
4. There is a dispute between the parties as to whether the standard commission scheme means that commission was not due on work completed prior to resignation.
5. Further, it is also the Respondent's position is that even if commission payments are found to be payable, the sum should be £12,542.85 due to rules on commission based on paid invoices and split invoices between consultants in certain scenarios.
6. The issues the Tribunal will decide are set out below.
7. Unauthorised deductions
 - a. Were the wages paid to the claimant less than the wages she should have been paid?
 - b. Was any deduction required or authorised by statute?
 - c. Was any deduction required or authorised by a written term of the contract?
 - d. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
 - e. Did the claimant agree in writing to the deduction before it was made?
 - f. How much is the claimant owed?
8. Breach of Contract
 - a. Did this claim arise or was it outstanding when the claimant's employment ended?
 - b. Did the respondent do the following:
 - i. Fail to pay commission in respect of candidate placements completed prior to the end of the claimant's employment.
 - ii. Was that a breach of contract?
 - iii. How much should the claimant be awarded as damages?

Procedure, documents and evidence heard

9. The hearing was conducted via video. There were no technical issues during the hearing.
10. The claimant represented herself. The respondent was represented by Mr Arnold.

11. The Tribunal had the benefit of a Bundle of documents. There was a discussion about the submission of a late additional witness statement by the claimant and late disclosure by the respondent. Ultimately, it was agreed by the parties that these documents should be accepted. The claimant provided a witness statement and gave evidence in person. Mr Lloyd (Co-Founder and Director) and Ms Armstrong (previously employed by the respondent as a Consultant) provided a witness statement and gave evidence in person on behalf of the Respondent.

Fact Finding

12. The claimant was employed by the respondent, from 6 May 2021 until 1 December 2023, following the claimant's resignation and a period on garden leave. She was initially employed as a Resourcer, was promoted to Consultant in October 2021 and Senior Consultant in June 2023. As a Consultant and Senior Consultant, she was eligible to earn commission.
13. Initially the relationship went well. The respondent had initially taken a chance on the claimant to a degree as she had no experience and required visa sponsorship. However, the respondent was repaid by the claimant's good performance. She was promoted and was among the respondent's top performers, regularly featuring at or near the top of the respondent's performance leaderboards. The Tribunal accepted the claimant's evidence that her motivation to perform well was both to protect her visa status as well as financial gain through commission. The relationship became more strained in 2022 and the claimant ultimately resigned.
14. The Tribunal heard evidence on the 2022 relationship issues and the respondent submitted that this could be relevant to the claimant's motivation in bringing this claim. Tribunal does not accept that this is relevant and therefore makes no finding of fact on these matters.
15. The relevant clause (clause 7.2) of the claimant's contract of employment was as follows:

"The Employee shall also be paid a commission in banked fee income in accordance with our standard company commission scheme".

16. A new commission scheme took effect from 2022. This was the scheme in place for all relevant periods to this claim. A meeting took place in December 2021 to present the new scheme to the consultants. It was accepted that the claimant did not attend this meeting. During this meeting a PowerPoint deck of four slides was presented. The final slide include the "Terms" and the following sentence:

"Consultants who leave the company during the year will forfeit their right to receive future commission"

17. It was accepted that Mr Winterton (Managing Director, North America) sent an email to the claimant on 5 January 2022, attaching this PowerPoint presentation.
18. The Tribunal was also provided with a the scheme document itself, entitled "LMRE Commission scheme policy". It also includes a similar sentence:

"Consultants, who leave the firm during the year, will forfeit their right to receive a future commission."
19. The minor difference between the two sentences are not material for the purposes of the claim. No additional information on this forfeiture is included in the "Commission scheme policy" wording. The full LRME Commission scheme document was not shared with the claimant.
20. Mr Lloyd's evidence was that every consultant was aware of the position on forfeiture. However, Mr Winterton sent an email to the claimant following her resignation which stated that Mr Lloyd will be discussing this issue with the lawyers to understand the position. This suggested that Mr Winterton was not aware of the position. In response to a question from the Tribunal, Mr Lloyd said he didn't know the reason for Mr Winterton's approach but suggested that this was due to the claimant pushing back and questioning the issue in a stronger fashion.
21. There was a dispute as to whether the commission documentation was available to employees on the respondent's HR portal. The respondent implemented a new system called "Breathe" during the claimant's employment. Mr Lloyd said that this was implemented when the a new employee joined in HR (Mette Hojmark Nielsen) around June 2021. C said Mette didn't join until January 2022.
22. Ms Armstrong said she couldn't remember whether the commission documentation was on Breathe. The claimant said she didn't know didn't know it was on there. No documentary evidence was provided to evidence the availability of the documentation on Breathe. Whilst Mr Lloyd said it was on there as Breathe was a company database, he separately admitted that he didn't run the day to day elements of the business. The conclusion of Tribunal was that commission documents were not available on Breathe during the claimant's employment.
23. It was accepted that there was no specific discussion between the claimant and the respondent's management about forfeiture of commission on resignation specifically. The claimant confirmed that she did not ask about this in advance of submitting her resignation.
24. The Tribunal heard a lot of evidence and submissions about whether others considered claims or submitted claims against the respondent and on what basis. The Tribunal considers that an email in June 2023 means that there were questions raised about the forfeiture position. However, it was accepted that

there were no formal claims submitted on this specific commission forfeiture point. In any event, the Tribunal does not consider that the existence of other claims is directly relevant.

25. There was a debate about whether the respondent was deliberately slow to invoice the claimant's customers or that they failed to chase these invoices in the usual way. The claimant suggested that this was done to avoid paying the commission. This was denied by Mr Lloyd, who explained that the billing payment process was directly linked to the commission payment. The Tribunal accepts Mr Lloyd's evidence. It does not find that the respondent took these steps as alleged by the claimant. The usual process was followed in relation to invoicing. The Tribunal does not believe that it would be in the respondent's interest not to invoice and chase payment simply to avoid paying commission. The Tribunal also accepted Mr Lloyd's evidence that most people usually resign after they are paid the commission for the previous quarter.

The Law

Unauthorised Deduction from Wages

26. Section 13(1) provides the right for a worker not to suffer an unauthorised deduction from wages:

13Right 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.

27. Section 23 of the Employment Rights Act 1996 provides a worker with the right to bring a complaint to the Employment Tribunal:

23Complaints to employment tribunal.

(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

28. The claimant's right to bring a breach of contract claim in the Employment Tribunal is governed by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
29. The Tribunal has considered the relevant case law in relation to these matters including the following cases referred to by the parties, in particular: *Alam v BEC Consultants* (2600360/2017), *Brand v Compro Computer Services Ltd* [2004] EWCA Civ 2024, *Peninsula Business Services Limited v Sweeney* EAT/1096/02/SM

Submissions

30. The respondent's submissions can be summarised as follows:
31. The forfeiture was valid and enforceable. The cases referred to by the claimant can be distinguished on their facts. The current case is much more straightforward.
32. The respondent's wording says "receive" commission – it doesn't say "earn" or "get". The only possible meaning is that attributed by the respondent. The word "forfeiture" is also clear – it means to have given something up.
33. The respondent is a small and collegiate business. The claimant is not unsophisticated. She rose quickly and should have known about the rules of the scheme.
34. The claimant received a copy of the presentation on the new scheme in January 2022. It was widely spoken about and it is inconceivable that she wouldn't know about the scheme.
35. The wording in the clause is clear. There is a clear blanket rule applying to resignation so no further detail is needed. Given that the respondent is not a large company and had a lot of younger employees, they wanted to keep the scheme simple. Even if the clause isn't clear, the custom and practice shows that commission earned is forfeited on resignation. This is the first time that the respondent has had a contentious issue on this matter. Now the claimant is seeking preferential treatment
36. The claimant's submissions can be summarised as follows:
37. It was a niche business and we were trying to grow. There was some disorganisation for example, getting the contract late.
38. The claimant didn't understand that the wording meant giving up commission for previously earned commission. In her current role for example, anything billed up to resignation is not forfeited. It should be accepted that once invoiced, the commission due to be paid. The claimant's understanding was that if work invoiced during her time, she would get commission. This is not unreasonable.

39. It is not correct to say no one questioned these policies. Two employees left in June 2023 and there is an email about the forfeiture clause in July 2023. This seems a little out of the blue and suggests there were challenges.
40. Invoices relevant to the claimant's commission were not really chased and were paid late. There has been some suggestion that the claimant's action in bringing this claim is retaliation for other work matters. It could equally be said that the respondent deliberately delayed chasing payments so they would fall outside her garden leave.
41. Ms Armstrong not a reliable witness. She came to the claimant's house and they had many conversations and WhatsApp exchanges. It is interesting she would come back and testify against the business given the conversations we have had.
42. Mr Winterton said the respondent would talk to the claimant about the commission, the Financial Director said they would sort it out and then there was a U turn. The claimant left on good terms and handed over her clients. She is simply looking for compensation for clients she brought on and for whom the respondent has been paid. This is not unreasonable.

Conclusions

Unlawful Deduction from Wages

43. It is agreed that the key issue in this claim is whether the wages paid to the claimant less than the wages she should have been paid? Was the commission properly payable or not. This will involve an assessment of whether the forfeiture provisions were shared with the claimant and what those provisions actually mean. There is no suggestion of any deduction being authorised by statute or exempt in any way.

Was the claimant made aware of the forfeiture provision?

44. Previously this was in dispute but by the time of the hearing it was accepted that the claimant did not attend meeting in December 2021 but that she did receive a copy of the PowerPoint slides summarising the new scheme on 5 January 2022. This included the line "*Consultants who leave the company during the year will forfeit their right to receive future commission*". The full LRME Commission scheme document was not shared with the claimant.
45. The Tribunal accepts that no one from the respondent specifically discussed or raised the forfeiture provision with the claimant. However, it was open to the claimant to raise questions about this following receipt of the email on 5 January 2022 or at any later date. She did not do so.
46. As mentioned, above, the Tribunal does not accept that any documentation in relation to the commission scheme was included on the Breathe HR system. The Tribunal accepts that there were regular discussions among consultants about commission and performance leaderboards given that commission was such a big part of the nature of the respondent's work. However, the Tribunal does not accept that there were regular discussions about the forfeiture

element of the commission scheme. This is not something that would have been discussed on a regular basis.

47. Ultimately, it may be the case that the claimant did not read or consider the detail of the forfeiture clause. However, given the email sent to her on 5 January 2022, she was made aware of it

What does the relevant provision mean?

48. The respondent's position is that the clause is clear, that there is no other interpretation other than that presented by the respondent. This interpretation is what is understood by the respondent's employees and is common in the industry.
49. The claimant's position is that the clause means that commission for work done post resignation would not be paid and that the clause does not imply forfeiture of commission earned on placements completed before resignation. The "future commission" statement means that any processes that closed after she handed in my notice would not be paid. The claimant noted that it was not unreasonable to be rewarded for the work she had done up to her resignation.
50. The clause is short and the Tribunal considers that it could have benefited from more detail to set out in full what the implications are. However, the lack of detail does not necessarily mean that the wording as written is not clear and capable of being understood. The Tribunal accepts the respondent's rationale of keeping the clause simple.
51. The Tribunal has considered the well-established "contra proferentem" principle of contractual interpretation meaning that any ambiguity should be construed against the party who is seeking to rely on the contract term.
52. The Tribunal has also considered the claimant's suggestion of the perceived fairness of this clause. It accepts that there may be a sense of unfairness with the implications of the scheme. However, this is not relevant to the interpretation of the meaning of the clause.
53. The Tribunal considers that Mr Lloyd and Ms Armstrong gave convincing evidence on the usual practice in the industry in relation to commission and resignation. Mr Lloyd was unable to full answer why, if the position on forfeiture was so well established and clear, Mr Winterton did not clearly explain this to the claimant when she first raised the issue after her resignation. Mr Lloyd described this as an "overreach" and that Mr Winterton went a bit "left field". The Tribunal does consider that this undermines the respondent's position that the position was well known to everyone. It is possible that Mr Winterton was trying to be sure given the challenge from the claimant. In any event, this action of Mr Winterton does not directly change the interpretation of the wording.
54. The Tribunal is grateful to the parties for their submissions on the relevant case law. The Tribunal has reviewed these cases in light of the current facts. The Tribunal concludes that reference to other cases is of limited value given the fact specific nature of these scenarios.
55. Ultimately, despite a lot of evidence being submitted on the claimant's

motivations in bringing the claim, the position of others, the position in the wider industry, the determination of this claim falls to the meaning of the wording. The Tribunal accepts the interpretation of the respondent. When considering the “right to receive future commission” - the Tribunal considers that meaning of the word “receive” is clear. Following resignation, no further commission payment will be made. This is a blanket forfeiture regardless of what work has been done in the lead up to the resignation.

56. In conclusion, the respondent followed the commission scheme correctly and therefore, no commission was payable. There has been no unlawful deduction from wages.

Breach of Contract

57. The Tribunal has also considered whether the withholding of commission could have amounted to a breach of contract. However, the analysis above means that the same result would have been reached in relation to this claim.

58. The respondent did not breach the claimant’s contract.

Legal Fees

59. The Tribunal has the power to make awards in relation to reimbursement of legal fees only in very limited circumstances, including where there has been unreasonable conduct. This is included in the Tribunal’s powers to make Costs Orders under Rule 76 of the Employment Tribunal Rules of Procedure 2014. The Tribunal has no hesitation in concluding that these circumstances are not met in the current case. Therefore, no award in relation to legal fees shall be made.

Employment Judge S Connolly

4 September 2024

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 September 2024

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FOR THE TRIBUNAL OFFICE