



EMPLOYMENT TRIBUNALS

Claimant: Mr P Bull

Respondent: Oxford Residential Limited

Heard at: Manchester (by CVP)

On: 6 November 2024

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr D Holmes, Investment Manager and Head of Operations

JUDGMENT having been sent to the parties on 8 November 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent from 1 August 2020. He was dismissed in a telephone call on 8 December 2023. The claimant claimed that there had been an unauthorised deduction from his wages, and he was due commission of £26,736, and he claimed unfair dismissal.

Claims and issues

2. The claimant claimed that there had been an unauthorised deduction from his wages, and he was due commission of £26,736 which had been deducted without authorisation.

3. The claimant claimed unfair dismissal.

Procedure

4. The respondent did not submit a response in this case. When the case came to be considered at rule 21, it was decided that a proper determination could not be made without a hearing, which is why this hearing took place. A representative

attended the hearing from the respondent and sought to take part in the proceedings. I allowed him to take part, to an extent.

5. The claimant represented himself at the hearing. Mr Holmes represented the respondent.

6. In advance of the hearing, the claimant had provided some documents. During the hearing, I also asked for a copy of the full table which had been included in the email of 11 December (because only part was visible to me), which was provided. I also asked for a copy of the claimant's employment contract, which was provided. I adjourned the hearing so that the claimant could provide those documents, and he did so.

7. A brief witness statement had been provided by the claimant. Under oath at the hearing, he gave further evidence, particularly in relation to his commission. Exceptionally, I allowed the attendee from the respondent to ask questions of the claimant, that is he was able to cross-examine him (albeit I did not allow the respondent to call any evidence of its own). The claimant did not object to me doing so.

8. Both parties were given the opportunity to make submissions. Exceptionally, I allowed the attendee from the respondent to make submissions.

9. I considered both liability and remedy issues together at the same time.

The Facts

10. The claimant worked for the respondent from 1 August 2020. The claimant was paid commission. I was provided with a copy of the claimant's contract of employment.

11. The relevant provision in the claimant's contract was clause 4.4, headed "*commissions*". At 4.4A it said, "*1% on all Distribution Channel Sales that you are involved with management of that account*". The only additional relevant information in the contract, was that all due commissions were paid in line with the salary payment date.

12. It was the claimant's evidence that he was previously paid commission on exchange not completion.

13. On 8 December 2023, Paul Preston telephoned the claimant and dismissed him. No process was followed, as the respondent accepted.

14. I was provided with an exchange of emails of 11 and 12 December 2023 in which the claimant set out the commission he said was due on his sales and why. In an email sent at 6.31 pm on 11 December 2023, the claimant said he was due commission totalling £27,946. He provided a table containing the breakdown of each sale upon which he said commission was due, and the amount of commission he said was due for each.

15. Mr Preston replied by email at 10.30 am on 12 December. He said "*Good evening Phil, Yes, this is all correct. Many Thanks*". His email did not say anything else.

16. I was also provided with a subsequent email from Ms Baldres of 12.10 pm on 12 December, in which she addressed the commission claimed and queried one particular sale. Hers was a longer email. Notably, she went on to say the following, *“All the rest of the units below will be due to you only when exchanged and when we are in receipt of payment from the developer”*.

The Law

17. Sections 94, 98 and 111 of the Employment Rights Act 1996 apply to a claim for unfair dismissal. It is for the employer to show the fair, or potentially fair, reason for the dismissal. If it does not, the dismissal will not have been for a fair reason and therefore will not have been fair. Where it has done so, I must apply section 98(4) which says that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. That is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in that regard is neutral.

18. Section 119 of the Employment Rights Act 1996 provides for a basic award for unfair dismissal. Sections 123 and 124 provide for a compensatory award for unfair dismissal.

19. Sections 13 and 23 of the Employment Rights Act 1996 provide that an employer shall not make a deduction from the wages of a worker employed by it unless certain things apply. Those include, whether the deduction has been authorised. Section 27(1)(a) provides that commission referable to employment is included within the definition of wages.

20. Rule 21 of the Employment Tribunal rules of procedure says that, where no response has been submitted, the respondent shall be entitled to notice of hearings and decisions of the Tribunal but shall only be entitled to participate in any hearing to the extent permitted by the Judge.

21. In their submissions, neither party relied upon any particular law or case law. Their submissions were focussed upon the claim itself.

Conclusions – applying the Law to the Facts

Unfair dismissal

22. The claimant was unfairly dismissed. The respondent did not show a fair reason for dismissal, and it could not have done so because it did not put in a response. In any event, as the claimant was simply dismissed in a telephone call (and as was effectively acknowledged at this hearing), there was no fair process followed. Applying section 98(4) of the Employment Rights Act 1996, the dismissal was unfair.

Remedy

23. Determining the remedy for unfair dismissal was straightforward. Both parties agreed that the basic award was £2,572. The claimant claimed only a sum for loss of statutory rights as his compensatory award. The respondent agreed that a sum for

loss of statutory rights was due, or at least there was no reason why it was not due. I awarded £500.

Unauthorised deduction from wages

24. Turning to commission, the contract made clear that the claimant was due commission on sales. The claimant said that he was paid on exchange, not completion. The respondent said the contract document was silent, and the claimant would only be paid, and was only entitled to payment, once the sale had completed.

25. It was, perhaps, unfortunate that the contract document did not expressly provide for when payment should be made, save that it said it would be in line with the salary payment date. I would observe that any employer is able to set out clearly in the relevant document, the terms which apply to any commission payments. In this case, the respondent did not do so. I noted that, in the contract document, the payment of commission was not explicitly made subject to receipt of funds or to profit on the sale.

26. I accepted the claimant's evidence that he was previously paid commission on exchange and not completion. As a result, based on the claimant's evidence, I accepted that it was an implied term of the contract by custom and practice that payment of commission would be made on exchange. That was broadly supported by Mr Preston's email of 12 December in response to the claimant's statement of the commission due, where he said the amounts were correct and did not caveat his response by explaining that the payment was subject to completion. I also noted what was said in the email in response sent by Ms Baldres, in which she also said that payment was due to be made when exchanged (albeit she added a requirement, not present in the contractually agreed terms, that the respondent must be in receipt of payment from the developer).

27. Turning to the amount of commission due, I was left with something of a gap in the evidence heard, because of the lack of any response from the respondent and the fact that I had not heard evidence from the respondent (I refused to allow it to call evidence, where no response had been submitted). The respondent's representative, Mr Holmes, very fairly accepted that circa £11,000 of commission was due to the claimant, albeit he of course said that that would be due on completion, whereas I have decided that it was due on exchange. Mr Holmes had not identified specifically which sales it was he said had not exchanged, albeit in any event that would have been evidence.

28. Based on the evidence I heard, and the documents provided to me, and, in particular the claimant's evidence, I accepted that the claimant was due commission on all of the sales in the table he had compiled detailing the commission which he said was due. I found that there had been an unauthorised deduction from the claimant's wages when he was not paid for the commission due to him. There was no authorisation for the sums due being deducted and no other legally valid reason why they had not been paid. As a result, I found that the claimant was due the full commission sum claimed of £26,736 and have found that there was an unauthorised deduction from wages when that sum was not paid to him. I have reached that decision based in part on what the claimant said in evidence, but also by placing reliance upon Mr Preston's email of 12 December in which he said that yes, the amount claimed was all correct.

Employment Judge Phil Allen

Date: 10 December 2024

REASONS SENT TO THE PARTIES ON
16 December 2024

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