



# EMPLOYMENT TRIBUNALS

## Claimant

Ebizi Tobi

v

## Respondent

Medmatch Group Limited

**Heard at:** Watford, remotely via CVP

**On:** 11 September 2024

**Before:** Employment Judge de Silva KC

## Appearances

Claimant: In person

Respondent: Jack Rhodes, Director

## JUDGMENT

1. Medmatch Group Limited is substituted as Respondent, by consent.
2. The Claimant's claims for breach of contract and unlawful deductions from wages in relation to alleged unpaid commission are dismissed.

## REASONS

### PROCEDURAL HISTORY

1. By Claim Form presented on 28 March 2024, the Claimant presented a claim against Medmatch Medical (Locum Meds). It was agreed by the parties at the outset of the Final Hearing that the correct name of the respondent is Medmatch

Group Limited and that Medmatch Group Limited should be substituted as respondent.

2. The Claimant had ticked the box in section 8 of the Claim Form which asserted that the Claimant was owed *“arrears of pay”*. In the Details of Claim, the Claimant stated *“My previous employer ... failed to pay me my agreed upon commission of £800. The commission was for the successful placement of a GP at one of our client’s recruiting practices. I had confirmed that the GP has started working at the practice from 1 December 2023”*.
3. By letter dated 20 July 2024, directions were made for this Final Hearing which took place remotely via CVP. The Tribunal heard evidence from the Claimant herself and from Jack Rhodes and Gary Lehal on behalf of the Respondent. There were two other statements that the Claimant submitted, which the Tribunal read, but the evidence in these was not directly relevant to the issues in the case. At the outset of the Final Hearing, the Claimant helpfully identified that the sums she claimed were set out in the Schedule of Loss. These were £810 in relation to commission but also a sum of £8,100 for distress caused to her by the Respondent. The Tribunal explained that it did not have jurisdiction to award non-pecuniary losses for breach of contract or unlawful deductions from wages claims, including for injury to feelings. Therefore, the Claimant correctly did not pursue this head of loss. In the circumstances, this claim concerns the alleged non-payment of £810 plus interest in relation to the placement of a doctor who was referred to in these proceedings as SC.
4. All of the three witnesses were cross-examined by the other side and the Tribunal asked questions of the witnesses as well. The parties each represented themselves and the Tribunal is grateful to them for the courteous and focused way in which they conducted the hearing. In particular, as is often the case, there were a number of matters addressed in the witness statements which were outside the factual issues that the Tribunal had to determine to decide the case and the parties helpfully agreed not to focus on these and did not do so when it came to evidence and submissions.
5. Oral judgment was handed down at the end of the Final Hearing, after the Tribunal took time for consideration. After the Judgment was sent to the parties, the Claimant requested written reasons.

## **THE FACTS**

6. The Tribunal makes the following findings of fact. The Respondent is a company which deals with recruitment in the medical sector, in particular the recruitment of doctors. The Claimant worked there as a consultant until she gave notice of resignation on 29 October 2023, such notice expiring on 28 November 2023.
7. Her Statement of Main Terms of Employment had a section on Benefits which stated so far as relevant to the claim: *“Your position has the benefit of (i)*

*discretionary commission/performance scheme for sales staff..”. It goes on later to say (emphasis added) “Any commission/performance payments or bonuses will only be paid on the condition that you are in our employment and not serving notice at the time the commission/bonus is due to be paid. Any discretionary commissions or bonuses are not guaranteed and the company reserves the right to amend or withdraw these benefits at any time”.*

8. It appears from the evidence of both parties that the Claimant was a highly-regarded employee and was diligent in the work that she did.
9. There was a conversation about payment of commission between the Claimant and Mr Rhodes in the course of the Claimant’s notice period in November 2023. The Claimant relies on that conversation as the foundation of her claim and the Tribunal will return to this conversation below to make findings on what was said and the legal effect of this.
10. Commission was paid to the Claimant in December 2023 in the sum of £2,441.37 (taxable gross). Following this, the Claimant was concerned that she had not received commission for the placement of SC. She followed this up with Mr Rhodes in a message on 26 January 2024 in which she said *“Hi Jack I hope you’re well, I did not receive my commission for [SC] yet. Will that still be coming through as promised?”*.
11. She also emailed Mr Lehal on 26 January 2024 stating *“Jack promised that I received everything successfully closed before I left so I tried to keep a record of those last 3 deals”*. On 1 February 2024, she emailed Mr Lehal again saying *“Hi Gary, Has there been any update regarding when I can receive my commission? I haven’t heard back so thought I’d reach out again”*.
12. She messaged Mr Rhodes again on 2 February 2024 and Mr Rhodes replied explaining that his father had died and that he might be working the following week. He had flown to Thailand where his father had died in order to deal with matters such as the release of his father’s body from hospital.
13. On 9 February 2024, Mr Lehal wrote to the Claimant stating *“I do understand the importance of it and have tried to reach [Mr Rhodes] - he said that he thought that it was all paid in December but was going to look into it last week, then he had another family matter so he never came back”*.
14. On 20 February 2024, Mr Lehal wrote again to the Claimant stating: *“The update is that the client has moaned about the rate so we have to offer a discount -it looks like it’ll be 15-20%, They haven’t paid yet but when we agree this discount I can send you the commission direct. Your split of the deal was £8,100 so if we offer 20%, it will be £6,480 and your commission is £684”*.
15. As Mr Rhodes explained, the Claimant was paid in December 2023 for a placement for which the client had been invoiced, which was triggered by the doctor starting in November 2023 but not for SC, broadly because SC had not started and the client was not invoiced until after the end of the Claimant’s notice period.

## THE TRIBUNAL'S FINDINGS ON THE NOVEMBER 2023 CONVERSATION

16. As the Claimant made clear a number of times, the claim was not based on the written Statement of Main Terms but on the conversation that she had with Mr Rhodes during her notice period. The Tribunal agrees that this is the relevant exchange and it does not attach significance to the written exchanges between the Claimant and Mr Lehal because it is clear that Mr Lehal was only in sporadic contact with Mr Rhodes given Mr Rhodes' personal situation and the discussion with the Claimant about the discount came from a conversation between Mr Lehal and the client, rather than a conversation with Mr Rhodes.
17. It is relevant to note that neither party's account of the conversation in question was entirely certain. This is perhaps unsurprising given the nature of the conversation and the passing of time. For example, the Claimant refers in terms in her witness statement to the conversation as having taken place in her last week of employment but accepted in cross-examination that it must have been much earlier than this in her notice period. As for Mr Rhodes' account of the conversation, when he gave oral evidence, he said that they discussed invoices in November 2023. However, this was not mentioned in his witness statement and he candidly accepted that this may not have been discussed.

### The Circumstances of the Meeting

18. The Claimant says (and this was not disputed) that she saw Mr Rhodes sitting alone in one of the conference rooms and took the opportunity to confirm with him if she would receive commission for the deals closed in the notice period. The meeting was therefore *ad hoc* and informal and was not a planned meeting.

### The Claimant's Request

19. The Claimant's assertion that she asked Mr Rhodes to confirm whether she would receive the commission for all the deals that she had closed within the notice period is broadly consistent with the language that Mr Rhodes uses in his witness statement where he says that she asked whether she could expect to receive commission on the placements she was making in the final month.
20. The Tribunal therefore accepts that the question asked by the Claimant was about the commission on the deals closed. It also accepts of Mr Rhodes's evidence that his understanding was that she was talking about commission payments generally and he did not attach any significance to the difference between deals closed and deals invoiced in November 2023.
21. The fact that the Claimant was seeking to "*confirm*" (the word used in her witness statement) something with Mr Rhodes suggest that they were discussing existing obligations (in particular under the Statement of Main Terms and Conditions) rather than intending to create a new one.

## Mr Rhodes' Response

22. Turning to Mr Rhodes' response, the Claimant alleges that Mr Rhodes said 'yes' with certainty after that, said that she had done a good job and said "*well done*", mentioning no other terms or conditions. Mr Rhodes however alleges that he said that, provided the handover of accounts was smooth and there was no issue with placements, he would consider this fairly. The Claimant alleges that any discussion about handover was in a later conversation and was not a condition or criterion for receiving payment.
23. The Tribunal finds that Mr Rhodes did express something generally positive in response to the Claimant's question, which he understood to be a general one, but accepts his evidence that he was not specifically agreeing to what the Claimant was asking and did not simply say 'yes' with certainty. He was being positive about the consideration that he would give to the Claimant regarding the payment of commission. However, the Tribunal finds that he did not go as far as expressly stating that payment was conditional on the handover of accounts being smooth or there being no issue with placements, although this may have been in his head.

## RELEVANT LAW

24. As previously stated, the Claimant ticked the box in the Claim Form for "*arrears of pay*". Claims for arrears of pay are generally brought under the Employment Rights Act 1996 as unlawful deductions from wages claims or for breach of contract. In the view of the Employment Tribunal, as the sum in question would, if payable, fall due for payment after the end of the Claimant's employment, it would have to be brought a claim for breach of contract rather than unlawful deductions from wages. That is a legal matter which does not of itself determine the issue of the Claimant's entitlement.

## THE TRIBUNAL'S CONCLUSIONS

25. The effect of what was discussed between the Claimant and Mr Rhodes in November 2023 needs to be considered in light of the written Statement of Main Terms. The terms state that any commission/performance payments or bonuses will only be paid on the condition that the Claimant was in employment and not serving notice at the time that commission was due to be paid. The Claimant asserts that a separate agreement was made in the November 2023 conversation. The Tribunal finds that no such legally binding agreement was made. It was a passing conversation: Mr Rhodes was alone in a room and she took the opportunity to speak to him. Even on her own case there was no consideration, which would be necessary for it to be legally binding. This was a general conversation about the exercise of discretion by the Respondent, a matter on which Mr Rhodes was positive to the Claimant.

26. The Tribunal accepts that it was unusual for recruitment consultants to be paid by the Respondent in respect of placements which are only invoiced for after the termination of employment. Mr Rhodes' generally positive statement (although he did not express it in this way) related to individuals who would be invoiced for during the course of the Claimant's notice period, as a matter of his discretion. He was not required to make a payment in respect of a placement made in this period under the written terms and he was not making any specific promise to pay the Claimant in relation to any particular placement, in particular any placement for which the Respondent invoiced the client after the end of the Claimant's employment. There was nothing irrational or outside his discretion in not paying commission in relation to the placement of SC, which was after the end of the Claimant's notice period.
27. The fact that the Claimant did not follow up the conversation in writing is consistent with the discussion being about the exercise of his discretion rather than there being an agreement at the meeting. The Claimant stated in evidence that Mr Rhodes would not agree to anything in writing. This is also consistent with there being no intention to create a new legal agreement or obligation at this meeting.
28. In the circumstances, the Tribunal finds that there was no agreement by Mr Rhodes to pay the Claimant in respect of the placement of SC and the claim for commission in respect of this placement must fail.

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Employment Judge de Silva KC  
Date: 7/1/2025

Sent to the parties on: 10/1/2025

N Gotecha  
For the Tribunal Office.