



EMPLOYMENT TRIBUNALS

Claimant: Mr C Ekins

Respondent: Metric Solutions Ltd.

Heard at: Watford, by CVP

On: 1 March 2021

Before: EJ Price

Representation

Claimant: In person

Respondent: Mr Holye, Legal consultant

JUDGMENT

1. The claim for breach of contract succeeds.
2. The claim for unlawful deduction from wages is well founded.
3. The claim for breach of contract succeeds.
4. The Respondent is ordered to pay the Claimant the gross sum of £4,000 in respect of his claims. If the Respondent pays the tax and national insurance due to HMRC on this payment, payment of the net amount will meet the judgment debt.

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REASONS

Introduction and issues

5. The claim is for breach of contract and/or unlawful deduction from wages arising out of whether or not a commission payment of £4,000 was due to the Claimant upon the termination of his employment.
6. The Claimant's claim is that as he had brought new business into the Respondent's company in 2019, in particular for a development called Christopher Addison House and that when his employment was terminated he was due a commission payment on this under the terms of his contract. The Respondent agreed that it had not paid any commission on the basis as it did not consider that any was owing.
7. The issues for the Tribunal are as follows:

Unauthorised deductions

- a. Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

Breach of contract

- b. Did the claim arise or was it outstanding when the Claimant's employment ended?
- c. Did the Respondent fail to pay the Claimant £4000 by way of commission owing to him in relation to his work on the Christopher Addison House project?
- d. Was that a breach of contract?
- e. How much should the Claimant be awarded as damages?

Procedure, documents, and evidence heard

8. This was a remote hearing which had not been objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

9. The documents that I was referred to are in a bundle of 55 pages, together with the witness statements from Mr Cosgrove, the Technical Service Director of the Respondent, and Mr Ekins who both gave oral evidence.

Findings of Fact

10. The Tribunal made the following findings of fact, on the balance of probabilities, after giving careful consideration to the documentary and oral evidence provided to it and the submissions made by the Claimant and the Respondent's representative.
11. The Respondent installs mechanical and electrical systems. The Claimant's employment commenced with the Respondent on 19 November 2018. The Claimant was employed as a Project Administrator. His employment terminated by way of redundancy on 17 April 2020.
12. The Claimant was issued with a written contract of employment in 2018. This included a term that he was to be paid commission. The contract provided that the Claimant was to be paid £40,000 per annum and stated '*You will be paid monthly on or before the 30th of each month and pay will represent full salary for the whole calendar month in which pay is made, or a pro rata amount if less is worked*'. The term went on to provide '*You will also be working on a commissioning basis which is 2.5% of new work brought in from 200k up to 500k (net profit of each job) and 3% above 500k.*'
13. It was not in dispute that the terms of the Claimant's employment were varied by consent in May 2019 when he was given a pay rise to £45,000 per annum. Mr Cosgrove's evidence was the pay rise was to compensate the Claimant for the fact he wasn't being paid much commission due to the fact the business was new and therefore in order to win contracts for work had to work with narrow profit margins.
14. Mr Cosgrove also agreed that in January 2020 the Claimant received approximately £4,200 commission payment for sales that were made in 2019 and that this sum included commission for three jobs. An email sent by Mr Cosgrove on 15 January 2020 to Charlotte Cosgrove, another of the Respondent's employees records a request that '*As part of Ekins commission package his annual figure is £4,500 minus the usual tax Ni stoppages. Can you add to this months pay run?*' At least one of these jobs was still on going at the time the commission was paid in January 2020. Mr Cosgrove did not explain how this commission payment was calculated. Nor did the Respondent disclose any documents to support how this figure was calculated.

15. A new written contract of employment was sent to the Claimant on 20 March 2020 by email. It is not known on what date this was sent. It was signed on 20 March 2020 by Mr Cosgrove and was sent at some point after it was signed. The contract was dated 19 November 2018. The new contract did not include a term that entitled the Claimant to commission. However the contract terms in relation to pay were somewhat confusing in that they stated '*Your salary is £40,000.00 per year payable on or around the last working day of each month, by BACS, in arrears*' and also '*Pay rise given on the 01/05/2019 to £45,000.00 per year*'.
16. The Claimant was subsequently furloughed from work, due to the national lockdown directive having been given by the government on 23 March 2020. He was subsequently made redundant on 17 April 2020.
17. On 20 April 2020, the Claimant sent a message to Mr Cosgrove asking when he would receive various payments including the '*£4k commission I was going to get for Christopher Addison House?*' The response from Mr Cosgrove the same day was '*I am struggling to pay wages mate so it definitely wont be in your final pay but I'll see what I can do when things pick up*'. The Claimant followed this up in an email to the Respondent dated 27 April 2020 again asking when he would be paid the outstanding commission. The Respondent replied to the email within 3 minutes of receipt saying '*agreed Although yourself or Mectric need to get a quote for the damage to the company car. This will need to taken from any funds owed as I'm sure you would agree*'.
18. On 22 May 2020 the Claimant messaged the Respondent again asking for payment and suggested an agreement '*something over x amount of months?*'. The response to this message from Mr Cosgrove was '*of course*' ...'*I'm a man of my word*' and that '*I'm in a hole bruv between me and you x this goes no further*'.
19. A meeting took place in the autumn of 2019 between the Claimant, Mr Cosgrove and another of the Respondent's employees called Tim. It was agreed that at this meeting the Claimant's commission was discussed. A short note of the meeting written by Mr Cosgrove records that the Claimant would get '*0.5 15% profit*' of repeat business and '*new clients 2% to 15%*'. The Claimant's evidence was that he was told in this meeting he would get £4,000 by way of commission for his work on the Christopher Addison House project. Mr Cosgrove recalled that the commission that had been agreed during this meeting was based on a percentage of net profit and therefore could only be calculated once a project had been completed.
20. I accept the Claimant's evidence that during this meeting he was told he would be paid £4,000 by way of commission for the Christopher Addison

House project and that he was not told that this was conditional upon a certain level of profit being received by the Respondent. The Claimant was entirely consistent in his evidence on this point. Further his understanding of what was agreed was supported by the emails and messages he sent to Mr Cosgrove asking for this the money he considered owing upon the termination of his employment. Mr Cosgrove did not in response to these messages state that this sum was not owing, or query how the Claimant had calculated the sum of £4000, instead he had said that it would try and pay it, but he was having financial difficulties. Thus as late as April and May 2020, when he sent the messages, Mr Cosgrove accepted the £4000 was owing.

Submissions

21. The Respondent primarily disputed that any commission was owing to the Claimant. This was for two reasons. Either, the Claimant's contract of employment had been varied in 2019 when the Claimant had received a pay rise as a replacement for any commission arrangement. Alternatively, that the March 2020 contract was a variation of the terms of the Claimant's employment that removed any right to a payment for commission. As an alternative argument, it was submitted on behalf of the Respondent that if this variation had not taken effect, then any commission owing was based on a calculation of a percentage of net profit. This figure was currently unknown as the Christopher Addison House project was not yet completed, partly, at least, due to delays because of the emergence of Covid-19 and its impact on completion, and therefore the claim was premature and no sum was therefore due.
22. The Claimant submitted that he had evidence that he was due the payment and should therefore be paid. He had been told he would get £4000 by way of commission for his work on a specific project. He didn't know how this calculated as this was something for his employer, but he had been told he that was the sum due as commission to him and therefore he understood it was owing.

Conclusions

23. The terms of the Claimant's 2018 written contract of employment provided for payment for commission. I find that this contractual term was not varied so as to remove the Claimant's entitlement to be paid commission at any point in 2019. The Claimant was not informed in 2019 he would not be paid any commission going forward. There no documentary evidence of this purported change in terms, and Mr Cosgrove could not recall when he had

told the Claimant he would not be entitled to commission or any other details of this purported variation. Further the Claimant was paid commission in January 2020, for at least one on-going projects as well as for another that had completed. The payment of commission in January 2020 is entirely contrary to the suggestion that the Claimant's contract was varied to remove his entitlement to commission at some point in 2019.

24. In the autumn of 2019, the Claimant was informed verbally by Mr Cosgrove that he was to be paid £4,000 as the commission owing to him from the project Christopher Addison House. It is not clear how the Respondent calculated that figure, although the short note of the meeting does not refer to net profit. However, in the event this does not matter, as I find it was a term of the contract of employment that this commission would be paid to the Claimant as a result of his work on the Christopher Addison House project. And further that the term did not include a requirement that this commission was dependant upon the Respondent making or knowing its net profit.
25. There is no evidence of when the March 2020 contract was sent to the Claimant, save that it must have been after the 20 March 2020 when the contractual document was signed by Mr Cosgrove. Within two days, of 20 March 2020, the first national lockdown commenced as a result of the Covid 19 pandemic and the Claimant was furloughed and then dismissed. In these circumstances, I find that any variations to the terms of the Claimants employment contained in the March 2020 contract were not accepted by the Claimant and did not take effect.
26. The Respondent does not dispute that the £4,000 commission the Claimant seeks was not paid. The Claimant was entitled to be paid the sum of £4,000 that was owing to him under the terms of his contract of employment. The Respondent has made an unlawful deduction from the Claimant's wages and is ordered to pay to the Claimant the sum of £4,000, in respect of the amount unlawfully deducted.
27. As I have concluded that the Claimant is owed commission, I went on to consider whether failure to pay that commission was a breach of contract. As the Claimant's entitlement to commission was a contractual term, I must conclude not making the payment due was a breach of contract by the Respondent.
28. The facts of the breaches are entirely the same as for the deduction of wages claims.

- 29. The purpose of damages for breach of contract is to put the Claimant in the position they would have been in if the breach had not occurred.
- 30. The Claimant has not claimed for any additional loss attributable to the breaches.
- 31. As I have already ordered the Respondent to pay the deducted wages, I make no separate award in relation to the breach of contract claims.

Employment Judge Price

Date_____14/04/2021_____

JUDGMENT SENT TO THE PARTIES ON
20/04/2021

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FOR THE TRIBUNAL OFFICE

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