



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Stephen Moody**

**v**

**Impulse Innovations Limited**

**Heard at:** London Central (by CVP)

**On:** 6 August 2024

**Before:** Employment Judge Lewis

## **Representation**

**For the Claimant:** Represented himself

**For the Respondent:** Mr M Humphreys, Counsel

## **JUDGMENT**

The claim for unauthorised deductions for wages is not upheld.

The claim was in any event out of time.

## **REASONS**

### **Claims and issues**

1. The claimant has brought a claim for commission on a deal known as the 'LG Energy deal'. The respondent says (1) his claim is out of time and (2) he is not entitled to the commission in any event.
2. I heard from the claimant and, for the respondent, from its CEO, Darko Matovski. I had a witness statement from Alfonso Perra Garcia, who was unable to attend today as he is in Spain. I read the witness statement but I was not able to give it much weight because he was not here to be questioned by the claimant. There was an agreed trial bundle of 234 pages.

## Fact findings

3. The respondent provides AI powered decision-making solutions for enterprise. The claimant was employed from January 2022 as a General Manager in the Go to Market team.
4. The claimant's contract of employment does not say anything about commission or a 'compensation plan'. However, the claimant was provided with a letter dated 3 November 2021 regarding commission. The letter was referred to as the 'Compensation Plan' and it sets out the terms by which the claimant may be paid commission from time-to-time as a result of his closing client contracts for the company. The letter states:

'The Compensation Plan is not legally binding and does not form part of your employment contract. Any Commissions made to you will be at the sole discretion of the Company at all times. The Company reserves the right to change the Compensation Plan and/or Commissions at any time and at its sole discretion, this may be to meet the changing needs of the business or for any other reason.

'Notwithstanding the foregoing, the Company is aware that the Commissions are an important part of your overall remuneration and wants to ensure that you are incentivised to perform your role to the best of your ability and in accordance with the needs of the business at all times. Therefore (and where possible) we will work with you throughout your employment with the Company to ensure that the Plan is motivational, fair and reasonable.'

5. There follows some general Guidance. At point 9 it says that if the claimant or the company 'serves notice on your employment contract for any reason, then the Company will terminate this Commission Plan forthwith and you will no longer be eligible for any Commissions from the date that notice is served. You will not receive or be made good for Commissions that may be due beyond the termination date of your employment with the Company'.
6. The payment terms set out that Commissions are only payable once cleared funds have been received from the client. They are paid quarterly via payroll in the month following the end of each calendar quarter.
7. The claimant was given notice of dismissal for redundancy by letter dated 26 May 2023 with a termination date of 26 August 2023, as the claimant was entitled to 3 months' notice under his contract. The letter told him that he was put onto garden leave with immediate effect. Paragraph 3 of the letter stated:

'You will continue to be entitled to commission payments in the normal way, and subject to the rules of the 2023 commission plan, on any deals which close during your garden leave period and before the termination date. Thereafter, and subject to board approval, we will offer a 50% commission for which you are the deal owner at the date of this letter, and which converts into

an ongoing customer before the end of the calendar year and for which you remain actively involved during your garden leave period’.

8. The claimant relies on what was written at paragraph 3 of his termination letter as superseding the Commission plan. That is also the respondent’s position.
9. The termination letter also states that during the garden leave period, the claimant must not to attend the respondent’s premises or contact any of the respondent’s employees or clients. It says that he is not required to do any work unless expressly asked to do so.
10. The claimant says that he is owed commission on the deal with LG Energy. He claims that he is owed 100% commission on the PoC and 50% commission on the full deal because it closed between the end of his garden leave period and the end of the calendar year. It is agreed that he was the ‘deal owner’ at the date of the termination letter and that the deal was closed in the relevant period, ie in September 2023, although he did not know this at the time. The dispute between the parties is as to whether the claimant was ‘actively involved’ in the deal during the garden leave period.
11. At the time of the termination letter, the Proof of Concept (‘POC’) had already been agreed on the LG Energy deal. Very broadly speaking, POC is a pilot or early prototype for a product. This is often paid for. A deal is closed when the POC is converted to a full license. This does not automatically follow. The client decides whether to go ahead and changes can be made.
12. On 31 May 2023, the claimant messaged his line manager, Alan Flohr, on linked-in, asking for a strong reference letter. He also said that he would appreciate it if they extended the garden leave period to 4 months given that he would help with the transition. Mr Flohr copied the message to Mr Matovski. He said he was willing to provide a positive verbal reference. He went on ‘I would welcome Stephen’s active assistance as I think it is a better look for the company and will help smooth the transition, but I don’t think the other asks are fair to the company. I am not inclined to agree to them, but want to get your thoughts before responding. What I might counter with is clarification that we will honour the commission rate in force at signature, so if he signs a one year deal before his garden leave ends, he gets full commission for that ARR (vs only paying full commission on funds received during garden leave).’
13. I understand this to mean that what Mr Flohr was ‘countering’ with was clarifying that commission would be paid on deals signed before the end of the year even if cleared funds had not yet been received from the client within the relevant time frame.
14. Mr Matovski agreed. He felt the arrangement was already very generous as it went beyond what was in the Commission plan. Mr Flohr then emailed the claimant saying that he could not provide a written reference, but he would be happy to share his opinion (which would be ‘a very positive one’)

verbally with anyone wanting a reference. He said he could not extend the garden leave or do anything beyond the 100% commission during garden leave and 50% for the rest of the year. He continued:

‘A positive clarification though – the commission will apply to anything signed in that time period. Ex: a deal signed on the last day of 2023 would qualify you for 50% on the contracted amount (vs collected funds).

‘I know this is not all that you wanted but it is the best I can do and it will allow you to get at least some return on your prior investment for what should be less effort than normal. We will be relying on you for advice and client relations, but doing the bulk of the work on our side’.

15. The claimant interprets this email as defining ‘active involvement’ to mean ‘advice and client relations’. The respondent states that the agreement was simply as set out in the termination letter.
16. The claimant and Mr Flohr created a shared google sheet listing all the accounts where the claimant was the deal owner. The spreadsheet listed 27 live deals including the LG Energy deal. The claimant entered details regarding each deal of who everyone was and how to progress the deal forward. This was essentially a handover document.
17. Having said that, the spreadsheet was a live document. On some of the deals there were some follow up emails and exchange of information, although I am unclear as to how much. On the LG Energy deal, the claimant was unable to give a single example of an occasion or email or entry where he had been asked for or provided follow-up advice. Indeed he said he was unable to do very much since he had been told not to come into the office and had no access to any systems.
18. When the claimant went onto garden leave, Mr Matovski took over as lead on the LG Energy deal. A significant amount of work was required to conclude the deal, including Mr Matovski travelling to Korea. The claimant was not in any way involved with the Korea trip. During the garden leave period, Mr Matovski and his team spent approximately 242 hours on the deal. Mr Garcia carried out a significant part of the work. The claimant did not have any contact with the client, Mr Matovski or Mr Garcia about the deal during the garden leave period.
19. The only emails which the claimant could point to involving him during his garden leave period and relating to the LG Energy deal were him making enquiries regarding the state of the deal. As I will say later, these read to me like emails checking the state of play from the point of view of what the claimant hoped would be a commission entitlement. They do not demonstrate any kind of offer of help, let alone involvement.
20. On 26 July 2023, the claimant emailed Mr Matovski to say: ‘Hope you and the team are doing well. How did things pan out with LG in the end?’

21. On 12 August 2023, the claimant emailed Mr Flohr: 'Hope all is well? Any positive movement on the deals?' Mr Flohr replied with 'a quick recap on the top five' He said that LG was 'moving, but slowly'.
22. As I have said, unknown to the claimant, the LG Energy deal closed in September 2023, after the claimant's garden leave period but prior to the end of the year. The client paid in early October 2023 and commission was paid out to staff in October 2023. Had the claimant been entitled to commission, he would also have been paid in October 2023. This was the due date under the Commission plan, ie the month after the quarter in which a deal was concluded, provided the client had paid. One other Commission was paid in January 2024, but that was for a person working under a different Commission scheme.
23. On 3 November 2023, Mr Moody emailed Mr Flohr with the heading, 'Deals and end of year'. He said, 'Hope you and the CausaLens team are doing well, Hopefully some deals are closing around now?' Mr Flohr replies that evening, in friendly but vague terms: 'I can't share a lot of detail with you at this point, but we are making slow but steady progress on a few deals and some have dropped off the Earth entirely since you left.' There is no mention of the LG Energy deal.
24. The claimant made no further enquiries about the closing of the LG Energy deal. On 26 January 2024, he saw a case-study on the respondent's website which strongly suggested to him that the LG Energy deal had closed.
25. The claimant immediately emailed the respondent regarding his commission. Mr Flohr responded on 29 January 2024 saying that the claimant had not been 'actively involved'. The emails exchanges continued with the claimant threatening to take legal advice and go to tribunal. On 30 January 2024, the claimant said in an email, 'I will seek some legal advice and get back to you'. On 2 February 2024, the respondent made its position clear that it was still refusing to pay commission. On 8 February 2024, the claimant emailed the respondent stating he was entitled to commission and this was the last email he would send prior to starting the dispute resolution process with ACAS.
26. The claimant notified ACAS under the Early Conciliation rules on 15 February 2024. ACAS issued a certificate by email on 21 March 2024. The claimant presented his Claim form on 22 April 2024.
27. The claimant also referred me to two social media posts of some kind from senior staff at the respondent. On 18 July 2023, Mr Franca said he had worked with the claimant on a number of deals. He is full of praise for the claimant. He says nothing about what the claimant did on the LG Energy deal during the garden leave period. On 20 July 2024, Mr Magnetti also wrote a glowing commendation. Although unnamed, he refers to the LG Energy deal. He says that 'during the project, Stephen saw the entire life cycle, from initial contact to scoping and delivery'. However, he is not focussing his mind on what the claimant did in the garden leave period.

28. I do not find these short posts helpful. The comments are too general. Further, it is not accurate for Mr Magnetti to say that the claimant oversaw the entire life cycle because the deal was concluded in September 2023, after the claimant's garden leave period had ended. I also add that neither of these individuals were at the hearing and so available to be questioned by Mr Humphreys.
29. I would note here that the respondent does not in any way suggest that the claimant was other than a very good employee. However, that is not the issue in this case.

## Law

30. Section 13 of the Employment Rights Act 1996 says that an employer must not make deductions from a worker's wages. There are some exceptions, but these do not apply in this case. Failure to pay a sum entirely can be a 100% deduction from wages.
31. Time-limits apply for bringing an employment tribunal claim under section 13. Under section 23(4) of the Employment Rights Act 1996, where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
32. If the claimant satisfies the tribunal that it was not reasonably practicable to present his claim in time, the tribunal must go on to consider whether the claimant presented the claim within 'a reasonable time' thereafter. The length of time that is reasonable will depend on the overall circumstances and not purely the length of delay in isolation. Part of that is what the claimant knew about his rights and what he should have known.
33. The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months. (Cullinane v Balfour Beatty Engineering Services Ltd at paragraph 16).
34. Time is extended for ACAS Early Conciliation. Under section 207B of the Employment Rights Act 1996:
- (2)(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the

Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

## Conclusions

### Time-limits

35. If the claimant is entitled to the commission, it would have been due and payable in October 2023 for the reasons I have set out above. This is in accordance with the Commission plan and it is also when other employees were paid (apart from the person on a different commission scheme).
36. I do not have the exact payment date in October. However, I will take the date as 30 October 2023, being the last point in the month after the quarter when the client paid. The primary time-limit for presenting a claim would therefore be 29 January 2024. The claimant needed to notify ACAS under the Early Conciliation scheme by that date.
37. Applying section 207B, Day A was 15 February 2024. Day B was 21 March 2024. In working out the time-limit, the period from 16 February 2024 to 21 March 2024 inclusive is not to be counted. The difficulty for the claimant is that the time-limit had already expired on 29 January 2024, so that period would not have been counted anyway. The primary time-limit therefore remains as 29 January 2024. I will therefore next consider whether I am satisfied that it was not reasonably practicable for the claimant to have presented his claim before that date.
38. The claimant did not know when it happened that the LG Energy deal had closed in September 2023 and therefore that commission may have been payable in October 2023. He had made enquiries on 26 July 2023 and 12 August 2023 and had been given no indication that the deal might soon be signed. He could also have reasonably expected Mr Flohr to remember when

it did happen that the claimant wanted to be told that the deal was closed, and that he would tell him.

39. Arguably the claimant could have found out had he written to the respondent at the year end, which was the latest date when he could have earned the commission. However, he had written on 3 November 2023 and had been told that the respondent could not share details. Indeed Mr Flohr's response at that point was by omission positively misleading, which is difficult to interpret as accidental.
40. I am satisfied that it was not reasonably practicable to have presented the claim by 29 January 2024 (within the original 3 months) because the claimant did not know the deal had closed until his suspicions were raised by seeing the case-study on the website on 26 January 2024, emailing the respondent the same day, and having this confirmed by the respondent on 29 January 2024. He had tried to find out previously and had been misled.
41. The final question is whether the claimant presented his claim within a 'reasonable' time thereafter considering all the circumstances.
42. By 8 February 2024, the claimant had absorbed that the deal had closed and the respondent was not going to pay him the commission. He had had that firmly confirmed on 2 February 2024. He had considered taking legal advice from 30 January 2024. He knew the next step was to notify ACAS. He had researched this on the ET website. He waited a further week before notifying ACAS. He waited through the conciliation period. He then waited from 21 March 2024 until 22 April 2024 before presenting his claim. The reason he gave in the tribunal for the delay after the ACAS certificate was that it was not an easy decision, he had to think about it and he had to think about whether he needed legal advice.
43. The delay between 29 January 2024, the original deadline, and indeed when the claimant discovered the deal had closed, and 22 April 2024, when he presented the Claim form was 12 weeks. The delay from ACAS issuing the certificate on 21 March 2024 and the presentation of the Claim form on 22 April 2024 was 9 weeks 4 days. I think some further delay for the claimant to argue his case to the respondent after finding out on 29 January 2024 was reasonable. But by 15 February 2024 he had know the respondent's position for 13 days and had considered taking legal advice since 30 January 2024 if not before. So by 15 February 2024, I would say it was reasonable to put in the Claim form. It was not a complicated claim to formulate. The claimant had mentioned tribunals, looked up the Employment Tribunal website, and knew about ACAS Early Conciliation. The claimant did not tell me that he had mistakenly believed he had done enough by notifying ACAS and waiting for the certificate. But even if he did, he still waited a further month plus a day after the certificate. Moreover, the claimant ought reasonably to have known about time-limits by the time of the issue of the certificate if not before. He could have taken legal advice. In any event, the claimant did not say the reason was that he did not know the time-limits. He said the reason was that



it was not an easy decision and he had to think about it. This is not a powerful reason for waiting so long.

44. In all the circumstances, I find that the further delay beyond 15 February 2024 and certainly beyond 21 March 2024 was not reasonable. The claim is therefore dismissed because it is out of time.

#### Unauthorised deductions

45. Regardless of the time-limit issue, I have considered and made a decision regarding the substantive issue.
46. The claimant feels he was treated unfairly both in being made redundant so suddenly and in not being given commission on the LG Energy deal which he had led on obtaining the POC before he was put onto garden leave. I understand his frustration, but that is not the legal issue.
47. Point 9 of the Commission plan says that the employee is not eligible for any Commission from the date of notice of termination of the contract of employment. It was agreed by the parties that the claimant could not make a claim based on the Commission plan.
48. The claim is based on the agreement in the termination letter. The key issue is what was meant by 'actively involved' and what in fact happened. The claimant met the other eligibility criteria for commission on closure of the LG Energy deal.
49. The natural meaning of 'active involvement' suggests to me something far more than composing handover notes and writing a few chaser emails to find out if the deal had closed. The chaser emails were not from the point of view of helping to keep the project moving. They were 2-liners clearly designed to find out if the deal had closed, presumably because the claimant had his commission in mind. If the contract meant to say commission was payable simply on writing handover notes, I would expect it to say so. 'Active involvement' suggests to me at least a few discussions or actions or concrete contributions which contribute to moving the contract forwards, even if the respondent's remaining team does the vast majority of the work.
50. The claimant says Mr Flohr's email of 31 May 2024 and in particular, the sentence, 'We will be relying on you for advice and client relations, but doing the bulk of the work on our side' is a guide to interpretation of 'active involvement'. Mr Flohr also refers to getting commission for 'what should be less effort than normal'. To put that in context, the respondent's team spent over 200 hours closing the deal. It was not suggested the claimant needed that level of involvement to be 'actively involved'. However, he would have to have some kind of active involvement and I cannot see that he did anything beyond handover notes. I find the 'advice and client relations' sentence vague in terms of what Mr Flohr had in mind, but in any event, the claimant was not at all involved in client relations or in giving advice following his handover notes.

51. The emails between Mr Flohr and Mr Matovski suggest that Mr Flohr was anxious to keep the claimant happy in case he needed his help and did initially envisage that the claimant might be needed to assist. In practice, he does not appear to have needed help on the LG Energy deal beyond the handover information.
52. The claimant was not in any way actively involved. His evidence on this was vague. All he was able to refer to was his handover information which he put on a Google schedule for 27 clients including LG Energy. He says the schedule was a 'live document' but he was unable to give any specifics of any additional information he provided or involvement he had on LG Energy beyond that initial handover information.
53. Indeed the claimant says he was unable to do much on any of his clients because his access to the company systems was cut off. He did not show me any email or WhatsApp messages indicating active involvement on LG Energy during his garden leave. There were the two emails asking how the LG Energy deal was going (and the third after garden leave), which further indicate he had little or no active involvement, since he obviously had no idea.
54. The claimant did not communicate with the client or with the respondent's lead on the deal (Mr Matovski) about the deal during his garden leave. He did not have anything to do with the trip to Korea. There were roughly 242 recorded hours of work by Mr Matovski's team on the deal which did not involve the claimant.
55. The social media statements by Mr Franca and Mr Magnetti speak very well of the claimant, but they do not specifically address whether the claimant had 'active involvement' while he was on garden leave.
56. For all these reasons, I find that the claimant did not have 'active involvement' in the LG Energy deal during the garden leave period, and he was therefore not entitled to commission on the deal after it closed.

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Employment Judge Lewis

Dated: 8/8/24.

Judgment and Reasons sent to the parties on:

16 August 2024

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For the Tribunal Office: