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THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Lisauskas

AND

Langcomp Limited t/a Edgware
Academy

JUDGMENT AND REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 3 March 2017

EMPLOYMENT JUDGE: Miss A M Lewzey

Representation

For Claimant: Mr J Sykes, Advocate

For Respondent: Mr G Baker of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant is entitled to be paid £450 in respect of an unauthorised deduction from wages and the Respondent is ordered to pay such sum to the Claimant gross.
2. The claim for commission is out of time, it was reasonably practicable for it to be presented within time and there is no jurisdiction to consider the claim for commission which is dismissed.

RESERVED REASONS

1. The Claimant, Mr M Lisauskas, was employed by the Respondent as an Administrative Assistant and latterly as Marketing Director from 1 March 2004 until 29 July 2016. He presented his claim to the Employment Tribunal on 27 October 2016 claiming unauthorised deduction of wages and commission.

The Issues

2. Is the Claimant entitled to be paid the sum of £450 in respect of an unauthorised deduction from wages in respect of July 2016?

3. Is the Claimant entitled to be paid unpaid commission by the Respondent in respect of the sums of £10,101.42 for the period 21 March 2014 to 5 June 2015 and in the sum of £9,620.40 for the period 6 June 2015 to 31 July 2016?

Evidence

4. The Tribunal heard evidence from the Claimant who gave evidence by means of a written witness statement and from Ms Berrak Unsal Sharkawi ("Ms Unsal"), Director of the Respondent, who also gave evidence by means of a written witness statement.

5. In addition, the Employment Judge had an agreed bundle of documents to which reference is made by use of the relevant page number.

The Material Facts

6. The Respondent is a language school with a small administrative staff. Mr Lisauskas was employed as an Administrative Assistant on 1 March 2004. He was issued with a contract of employment dated 10 October 2008 (34). The contract did not provide for the payment of commission.

7. On 1 January 2012 Mr Lisauskas was appointed Marketing Director of the Respondent. Mr Lisauskas was paid salary and commission. Ms Unsal's evidence was that the Respondent paid all agents a discretionary bonus in the form of commission paid on each new client procured by that agent to enrol on a language course. She said that the agents received 1.5% of the tuition fees paid by each client procured.

8. For the period 1 January 2012 – 31 December 2012, Mr Lisauskas was entitled to commission of £5,194.49 (62) which was paid to him by a cheque for £2,600 on 18 January 2013, a payment of £2,400 on 19 March 2013 in cash and a subsequent payment of £194.49. Income Tax and National Insurance were not deducted from the commission and accounted for to HMRC. The evidence of both

parties (although no payslips were provided) was that the commission did not appear on the payslips.

9. In the year 1 January 2013 to 20 March 2014 (68) commission of £9,740.75 was due to Mr Lisauskas paid by cheques in the sums of £1,000, £1,493, £1,523, £1,000, £1,600, £1,500 and £1,100, totalling £9,216.00. A balance of £524.75 has not been paid.

10. There are within the bundle two further schedules for the period 21 March 2014 to 5 June 2015 (84) showing commission of £10,101.42. Mr Lisauskas also claims the sum of £9,620.40 for the period 6 June 2015 – 31 July 2016 applying average gross tuition fees.

11. To claim bonus payments, each employee submitted an annual schedule setting out the commission accrued on each client for the year. This was obtained by downloading the figures from the Respondent's computer.

12. Ms Unsal's evidence is that when he was promoted to Marketing Manager, Mr Lisauskas requested a salary increase and, accordingly, she transferred £820 to his account monthly on top of his net salary. She said that she was no longer drawing her own salary, although she was credited with salary and paid income tax and national insurance on the amount of her salary. No Tax and National Insurance was deducted from this sum of £820 paid to Mr Lisauskas.

13. There is a dispute on the evidence as to what took place in January 2014. Ms Unsal said she made the decision to discontinue the practice of paying bonuses to employees and invited the four employees of the Respondent, including the Claimant, to a meeting to discuss this. Mr Lisauskas denies that he was made aware of this change. Mr Lisauskas' evidence was that at the meeting Ms Unsal announced that reception staff would no longer receive commission, but that no reference was made to his own commission. It is clear from the evidence that the financial position of the Respondent deteriorated from early 2015. The decrease in turnover continued until 11 September 2015 when the Respondent closed its Covent Garden branch, where Mr Lisauskas had worked, and he moved to the Edgware Road branch.

14. Ms Unsal did not pay further commission to Mr Lisauskas. He sought alternative employment in the same industry and gave notice on 15 July 2016 (43-44) his email states:

"I would like to regretfully inform you that I have decided to resign from my position as marketing director effective 29 July 2016.

Although I enjoy my job tremendously, I am disappointed that I have not received my promised commission since April 2014. My evaluations have been consistently outstanding, but my salary does not appropriately reflect this fact. ..."

Submissions

15. Both Mr Sykes, for Mr Lisauskas, and Mr Baker, for the Respondent, produced a written skeleton argument which were supplemented orally. I took the submissions fully into account in reaching my conclusions and refer to them as appropriate in the conclusions.

Conclusions in Claim for Unauthorised Deduction from Wages

16. This is a claim under Section 13(1) of the Employment Rights Act 1996.

17. Mr Lisauskas claims that he was not paid £820 of his final salary. He raised this with the Respondent on 25 August 2016 (56) by text message which reads:

“Good morning Berrak. Thanks again for the bank transfer. Do you think you can deposit the remaining balance of £820 before 16th.”

18. On 30 August, as evidenced by Mr Lisauskas’ bank statements (164) the Respondent paid Mr Lisauskas £450. Mr Lisauskas says that the payment of £450 was for reimbursement of some tickets he purchased for groups. Mrs Unsal was cross-examined on this and agreed. There are no payslips. I found Mr Lisauskas a credible witness and I accept that the payment on 30 August was a reimbursement in respect of expenses for tickets. There is a document in the bundle (178) showing a cash deposit into Mr Lisauskas account on 28 February 2017 of £370. Mr Lisauskas says that this relates to part payment of the sum of £820. Mrs Unsal says that it relates to the balance of salary due. This sum must be deducted from the sum of £820. That leaves a balance due of £450.

19. The judgment of the Tribunal is that the Claimant is entitled to be paid the sum of £450 by the Respondent as an unauthorised deduction from wages and the Respondent is ordered to pay such sum to the Claimant.

Conclusions in the Claim for Commission

20. The first issue is the nature of this claim. The ET1 Form claims unauthorised deductions from wages under Section 13(1) of the Employment Rights Act 1996. There is no claim for breach of contract contained in the claim form. There has been no application for leave to amend to include a claim of breach of contract, either at this hearing or prior to it. Mr Sykes argues that the claim for commission is either a breach of contract or an unauthorised deduction claim and that the Employment Tribunal has always treated money claims as in the alternative. He argues that the claim may proceed as either. Mr Baker for the Respondent argues that the claim is one for unauthorised deduction and refers me to the decision in **Chandhok v Tirkey [2015] ICR 527**.

21. I disagree that I may simply treat this as a breach of contract claim. Langstaff J in **Chandhok v Tirkey** set out the position clearly at paragraph 18 when he said:

“It requires each party to know the essence of what the other is saying so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive the others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.”

22. The claim is very clear, The Claimant puts it as a claim under Section 13(1) of the Employment Rights Act 1996 in respect of salary and unpaid commission for the period 2013 to 2016. There has been no application for leave to amend to introduce a claim of breach of contract and it is not for me to simply assume that that is a claim of breach of contract in these proceedings. The claim proceeds as a claim for unauthorised deduction from wages only.

23. Section 13(1) of the Employment Rights Act 1996 provides:-

“An employer shall not make a deduction from wages of the 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.”

Section 13(3) provides:-

“Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker’s wages on that occasion.”

24. The question is what wages were properly payable to Mr Lisauskas between 2014 and 2016.

25. Mr Baker refers me to **New Century Cleaning Company Limited v Church [2000] IRLR 27** in which Beldam LJ held:

“For wages to be ‘properly payable’ by an employer, he must be rendered liable to pay, either under the contract of employment or in some other way. ... Nor is it difficult to see how a fee, bonus, commission, holiday pay or other emolument referable to employment may be payable otherwise than under a contract of employment. Such payments may be customary or required by collective agreements without express provision being made in a contract of employment.”

26. Mr Lisauskas’ contract of employment (34-41) dated 20 October 2008 contains no express provision for the payment of commission. The parties accept

that commission was payable and indeed has been paid during the course of employment, as evidenced by the commission analysis for 2014 for the period from 1 January 2013 to 20 March 2014 (68). No commission has been paid for the period from 21 March 2014 onwards. Indeed, in paragraph 10 of his witness statement, Mr Lisauskas says:

“Privately Ms Unsal advised me that she could not afford to pay commission any longer but would continue to pay my salary. I replied that my commission was owed. She said she could not pay it at that time. As we had a long and friendly relationship built up over 10 years, as such that we had a family type relationship, I decided to remind her regularly of the debt, which was increasing all the time with new contracts I obtained until she paid it.”

No commission was ever paid after 2014.

27. On the evidence before me, Mr Lisauskas was expecting the commission to continue to be paid and was relying on Ms Unsal to pay when she was able to do so. He has not been paid the commission which he says amounts to £10,101 for the period from 21 March 2014 to 5 June 2015 or a further, speculative amount based on estimates in the sum of £9,620.40 for the period 6 June 2015 to 31 July 2016.

28. Mr Sykes for Mr Lisauskas argues that Mrs Unsal repeatedly promised that the commission would be paid when it was possible. Mr Lisauskas did not sue for his unpaid commission before he gave up hope and resigned. Mr Sykes argues that the Respondent is estopped from resiling on that position applying **Central London Property Trust Limited v High Trees House Limited [1947] 1 All ER 256.**

29. In reaching my conclusions I do take note that there is no express contractual right to a commission payment. It is clear that there was an implied term until 2014 by virtue of the evidence of payment of the commission. The issue is whether that term continued thereafter. Mr Baker has referred me to the judgment of Bingham MR in **Phillips Electronique SA v British Sky Broadcasting Limited [1995] EMLR 472** as follows:

“The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting but wrong ... it is not enough to show that had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can be shown either that there was only one contractual solution or that one of the several possible solutions would without doubt have been preferred.”

Mr Lisauskas himself refers to a staff meeting in March 2014 when Ms Unsal announced that reception staff would no longer receive commission. The last commission payment that Mr Lisauskas received was £1,100 in respect of commission for the period between 1 January 2013 and 20 March 2014 (68). He did not receive the sum of £524.75 in respect of that period.

30. A further factor is that on the evidence before me, no tax and national insurance has been paid in respect of commission payments. The suggestion by Ms Unsal that for her to forego salary payable to her in respect of which tax and

national insurance was deducted is not satisfactory to discharge the tax and national insurance due in respect of Mr Lisauskas. The question arises as to whether the payment of commission was an illegal contract because no tax and national insurance was paid in respect of it. Mr Sykes argues that the Respondent has not raised the defence of illegality. The matter was raised by the Employment Judge. Mr Sykes referred me to Hall v Woolstan Hall [2001] ICR 99 and Allen v Hounsa EAT 0236/10. He argued that either the Respondent was not entitled to defend the claim because it was an illegal contract or they were unable to defend the particular claim on the facts. Mr Baker did not put forward a positive case that Mr Lisauskas was estopped by reason of illegality. I have taken all these arguments into account. I am satisfied that the contract in respect of commission was an illegal contract as far as the Respondent was concerned as they ought to have known that tax and national insurance should have been deducted. Mr Lisauskas said he did not know that tax and national insurance should have been deducted.

31. Mr Baker submits that because someone does something does not mean that is the contractual term. Mr Lisauskas took no action in respect of commission for the period from 21 March 2014 onwards. Periodically, he requested commission payments. There was no express waiver to be paid commission.

32. There is a further issue to be considered, namely the question of time limits. Section 23 of the Employment Rights Act provides:

“(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)),

.....

(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

.....

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

.....

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section 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.

[(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.”

33. Even if Mr Lisauskas was contractually entitled to a commission payment the last commission analysis submitted (84) was in June 2015. Mr Lisauskas submitted no further analysis. The Tribunal only has jurisdiction to hear this claim if the deductions took place after 14 June 2016.

34. The claim for commission is out of time. No evidence has been put forward that it was not reasonably practicable for the claim to be presented within time.

35. In the circumstances it is the judgment of the Tribunal that the claim for commission fails.

36. No claim has been made for the written statement of particulars of employment. In any event, there is a statement of terms and particulars of employment dated 20 October 2008 and there is no evidence of any breach. In addition, the claim is not pleaded and is therefore not one over which the Tribunal has jurisdiction.

RESERVED JUDGMENT AND REASONS

**Employment Judge Lewzey
16 March 2017**