



EMPLOYMENT TRIBUNALS

Claimant: Mr D Caldaralo

Respondent: Key Currency Ltd

Heard at: Exeter

On: Friday 11 January 2019

Before: Employment Judge Matthews

Representation:

Claimant: In Person

Respondent: Mr J Pinkney - Director

JUDGMENT

1. The Claimant's claim under section 23 of the Employment Rights Act 1996 that the Respondent has failed to pay wages due to the Claimant is well founded.

2. The Respondent is ordered to pay to the Claimant £6,403 in this respect. Any amount which the Respondent lawfully deducts from the above amount by way of income tax, national insurance contributions or otherwise shall be treated to that extent as in payment of the above order. In the absence of evidence to substantiate the lawfulness of such a deduction the gross amount specified shall be due under this Judgment to the Claimant.

REASONS

INTRODUCTION

1. These written reasons are provided at the request of the Respondent Company, made at the Hearing.
2. Mr David Caldaralo claims that the Company owes him commission. The sums in question are £5,403 in respect of

March 2018 and £640 in respect of April 2018. The total sum claimed is £6,403.

3. The Company says it is not contractually bound to pay the sums claimed. However, if the sums are payable, the total amount is agreed at £6,403.
4. On the Company's side the Tribunal heard evidence from Mr James Pinkney (a Director of the Company) and Mr Geoffrey Lambourne (Head of Partnerships). Each produced a written statement. A statement in support of the Company from Mr Andy Dyer (Head of Trading) was also produced. As Mr Dyer did not appear, the Tribunal explained that it would read his statement but attach no weight to it. The Tribunal heard from Mr Caldaralo who also produced a written statement. There was an agreed bundle of documentation. All references in this Judgment are to pages in the bundle unless otherwise specified.

FACTS

5. There is little dispute over the facts of the case.
6. Mr Caldaralo worked for the Company as a Trader from 1 February 2017 until 24 April 2018.
7. Mr Caldaralo's contract of employment is at 24-39. Those clauses of particular relevance to the issue the Tribunal must decide are these:

"3.4 In addition to your Basic Salary referred to in clause 3.1 above, you shall also be entitled to receive, by way of further remuneration, commission calculated in accordance with the Commission Schedule attached hereto. Such commission will be paid in arrears, usually on or around the last working day of the calendar month, immediately following the calendar month in which the commission was earned. The Employer may, in its absolute discretion, terminate, replace or amend the commission arrangement set out in the Commission Schedule attached hereto."....

"13.2 The following gives the minimum period of notice of termination of employment to be given by you to the Employer"....

"(b) thirty days if the period of continuous employment is three months or more."....

“13.5 During the notice period whether given by you or us, there is no entitlement to commission.”

“26.1 The Employer reserves the right to make reasonable changes to any of the terms and conditions of your employment.

26.2 You will be given not less than one month’s written notice of any changes which will be given by way of an individual notice to you. Such changes will be deemed to be accepted by you unless you notify the Employer of any reasonable objection in writing before the expiry of the notice period.”....

“Commission Schedule:

Commission is payable in accordance with the table below on the absolute discretion of the Directors.

Commission will be paid at the end of the month in arrears.”

8. The Commission Schedule was modified in the autumn of 2017 such that the commission so calculated was payable only after a deduction of an amount calculated by reference to the cost of earning that commission. This appears to have been explained and accepted.
9. The practice followed was that commission earned as a month progressed was shown on a display in the office. No doubt the idea was to have a visible incentive to encourage performance.
10. Mr Caldaralo received regular monthly commission payments whilst he worked for the Company except for the months of March and April 2018. Overall the commission paid exceeded Mr Caldaralo’s basic salary by some margin.
11. The only real factual dispute concerns the circumstances in which Mr Caldaralo left the Company. Mr Caldaralo says that he resigned when he was spoken to in an unacceptable way by Mr Pinkney. Mr Pinkney sees it differently. The Tribunal does not need to decide that dispute. What is not in issue is that Mr Caldaralo resigned with immediate effect on 24 April 2018 without giving any notice.
12. Exercising what it asserts to be its proper contractual rights in the circumstances, the Company withheld commission otherwise earned by Mr Caldaralo for the months of March and April 2018.

APPLICABLE LAW

13. Section 23 of the Employment Rights Act 1996 confers a right on a worker to present a claim to an employment tribunal in respect of unpaid wages, including commission.
14. In construing a contractual provision in a contract of employment that provides, in effect, for commission on a discretionary basis, there are a number of established implied terms. There is a general implied term to the effect that if an employee earns all or part of his or her remuneration by way of commission, the employer will not act in such a way as to deprive the employee of the opportunity of earning commission. There are also implied terms that the discretion will be exercised by the employer in good faith and in accordance with business common sense.

CONCLUSIONS

15. Clause 3.4 of the contract of employment gives Mr Caldaralo a right to commission calculated by reference to the Schedule.
16. The Company says it was entitled to exercise its contractual right under clause 3.4 to terminate the commission arrangement in respect of Mr Caldaralo. Further, the Company points to the provision in the Commission Schedule that commission is subject to the absolute discretion of its directors.
17. The implied terms referred to above, however, are engaged.
18. Applying those implied terms and construing the contract, it is the Tribunal's conclusion that Mr Caldaralo is entitled to the commission he claims. Whilst taking account of all the circumstances, the Tribunal takes particular notice of the following factors.
19. This is a case in which regular and substantial commission payments have been made and relied on as part of a remuneration package. In such circumstances, the implied terms have particular weight. In a case such as this, a commission clause is necessarily to be read as a contractual benefit to the employee as opposed to a mere declaration of the employer's right to pay commission if it chooses.

20. In this instance the Company exercised its discretions to withhold commission already earned because it was unhappy that Mr Caldaralo was leaving without giving notice causing, the Company says, economic loss. In essence, the Company was treating Mr Caldaralo as a “bad leaver”.
21. If the Company had wanted to act in that way it might have been expected to make specific contractual provision, as is common in such circumstances. Some attempt in that direction was made in clause 13.5 of the contract of employment. That clause, however, only applies during a notice period. Here there was no notice period. Further, the clause itself is ambiguous in its application to the entitlement to commission already accrued. It was probably intended to mean that no commission would accrue during a notice period, rather than that commission accrued before the notice period would not be payable. That clause does not, therefore, assist the Company either on its express wording or by analogy to its probable intention.
22. Clause 26 of the contract of employment does not help the Company either. This is not a case where the Company gave written notice of a change. To the contrary, the clause conflicts with the discretions in clauses 3.4 and the Commission Schedule. That conflict must also be construed against the Company.
23. Even if, notwithstanding its failure to comply with clause 26, the Company can rely on the general discretions in clause 3.4 and the Commission Schedule, those discretions must be exercised subject to the implied terms.
24. In the circumstances, the retrospective withholding of commission is a breach of the implied term that the employer will not act in such a way as to deprive the employee of the opportunity of earning commission. It is also a breach of the implied terms of good faith and business common sense. To the Tribunal it seems that, viewed objectively, the parties would have seen the withholding of commission which would otherwise have accrued during a notice period as business common sense. The same cannot be said for the withholding of commission accrued before an employee has left.
25. The fact that Mr Caldaralo did not give notice and may, thereby, have been in breach of contract himself is nothing to the point. The remedy for any resulting economic loss may be addressed in a different forum.

Employment Judge Matthews

Dated : 14 January 2019