



EMPLOYMENT TRIBUNALS

Claimant:
Mr B Teggin v

Respondent:
Vital Technology Group Ltd

Heard at: Leeds (via CVP)

On: 8 February 2022

Before: Employment Judge Fredericks

Appearances

For the claimant: In person

For the respondent: Mr L Evans (Director of the respondent)

JUDGMENT

1. The claimant's claim for unauthorised deduction of his salary is not well-founded and is dismissed.
2. The claimant's claim for failure to pay commission pay earned is not well-founded and is dismissed.
3. The claimant's claim in respect of pay for accrued but untaken holiday is not well-founded and is dismissed.
4. The claimant's claim for pay in respect of underpaid holiday as a result of his commission earnings is well founded. The respondent has underpaid the claimant's holiday and is ordered to pay the claimant the sum of **£1,968.00**¹.

WRITTEN REASONS

Background

5. The claimant was employed by the respondent as a Business Development Director from 5 February 2018 to 31 August 2021, when he was dismissed for gross

¹ The claimant's commission pay averaged at £98.40 per day and he took 20 days of holiday during the period claimed.

misconduct upon the discovery that he had stolen seven laptop computers from the respondent. There was a period of time when his wages were withheld, but then they were paid. He said that he was still owed £318.89 in respect of underpaid salary. He claimed £6,836.53 in respect of holiday pay, where he said he had 39 days accrued but untaken holiday outstanding. He claimed £2,300 in relation to commission which he said he had earned but which had not been paid. He also claimed an unspecified amount for underpaid holiday, where he said his holiday rate unlawfully did not take account of his usual commission earnings.

6. The respondent denied the claims were due. It said that the claimant had no shortfall in salary, and that the £318.89 shortfall may be due to a tax issue which the claimant should take up with HMRC. It said that the claimant had been paid for all of the holidays he had taken, specifically that he had entitlement only to 20 days and he was paid for all of them. It said it could find no record that any commission was due. It said that the claimant was paid his holiday at basic pay as was outlined by his contract.
7. The respondent did not assert any right to withhold pay as a result of the stolen laptops. I was told that that money is the subject of a separate County Court claim which did not concern me in these proceedings.

Shortfall in salary

8. The respondent produced the claimant's final pay slip for the month ending October 2021. This showed a gross payment of £3,750 was made to the claimant, which was the claimant's usual gross basic salary. The claimant's tax code on that pay slip was "OT w1m1" instead of his usual non-emergency tax code, and showed the net figure actually paid to him generated the £318.89 he sought to claim from the respondent. The respondent paid the claimant the gross salary to which he was entitled, and so this claim could not succeed. There was no underpayment of salary and so this claim was dismissed.

Failure to pay accrued but untaken holiday pay

9. The claimant asserted that he was entitled to 39 days' paid holiday, and relied upon a line on his payslip saying that this was the case. The respondent said that this was an error on the payslips, and that the claimant was entitled to 20 days of holiday for the eight months of the holiday year that he was employed. It said that he had taken all of those days of holiday entitlement and produced copies of his holiday records and the claimant's work calendar to show this.
10. The claimant accepted that he had not had 39 days' holiday allowance. He did not dispute the holiday records shown by the respondent in respect of his allowance and the number of days leave that he had taken. There was no accrued but untaken holiday and so the claimant could not expect to receive payment for any. This claim was dismissed.

Failure to pay commission earned

11. The claimant asserted that he was owed £2,300 commission at the point of his dismissal which had not been paid. The respondent said it could find no record of this.
12. The respondent's commission earning employees self-claimed commission using the respondent's system. Commission was then paid once it had been entered and verified. The claimant admitted that he had not processed any claims for commission in respect of the amount he said was outstanding. The respondent explained that the trigger for making a payment for commission was the entry of a claim by the employee in question. Because the claimant had not entered a claim, no commission had been approved for payment and so no commission was due.
13. In my view, it would be unreasonable to expect the respondent to pay commission that it had not been alerted was being claimed and which it had not had the opportunity to review and approve. The claimant admitted that he knew the mechanism by which commission would fall due and that he had not instigated that mechanism. Consequently, this claim was dismissed.

Rate of pay for days taken as holiday

14. The claimant claimed that his holiday pay was based on basic pay only, and failed to take account of his commission salary as required by law in circumstances where an employee regularly earns commission as a significant part of their remuneration, and where they cannot earn commission when on leave. The claimant worked in information technology sales, and generated commission upon completion of sales. This required some lead generation and the conclusion of deals. On the evidence before me, it was apparent that the claimant might put work into securing a sale, but may not receive the commission if he was on leave at the point of finalising the sale. He explained, and I accept, that he was unable to complete sales whilst on leave, and so would not be able to earn commission when away from work.
15. The contract of employment between the claimant and respondent, dated 13 February 2018, provides that the payment for holidays is done at the claimant's "*basic rate under your terms and conditions of employment for your normal hours of work*". This reads as though overtime hours might be taken account of when calculating holiday pay, but not commission pay earned. The respondent confirmed that the payments for holidays for all commission earning staff are based on basic pay only. No commission earning staff, I am told, are paid holiday which takes account of commission pay.
16. In 2014, the Court of Justice for the European Union handed down a ruling in *Lock v British Gas [2014] CJEU C-539/12*. That case found that, under *article 7 of the Working Time Directive*, commission pay should be taken into account when calculating the rate of pay for commission earning employees taking holiday. In October 2016, the Court of Appeal confirmed, in *Lock and Another v British Gas Trading Ltd (No 2) [2016] IRLR 946 CA*, that the *Working Time Regulations 1998* can be construed as requiring the same point: average commission pay should be included in the calculation for the amount of pay which an employee receives when on annual leave. In other words, it is no longer enough to pay an employee basic pay alone where they receive regular commission elements in their salary.

17. The position and remuneration terms of Mr Lock are, in my judgment, almost identical to that of the claimant and of the respondent's remuneration of commission earning employees generally. Like Mr Lock, the claimant could not earn commission whilst on holiday. Commission was an embedded and regular part of his remuneration package, and it is notable that he received monthly commission payments. It follows that he should be awarded holiday pay to make up the shortfall from a failure to take those commission earnings into account. This claim therefore succeeds.
18. In the holiday year to dismissal, the claimant received £16,433.40 in commission pay. This works out, over the 167 working days, as being an average daily commission pay of £98.40. The claimant had been paid for 20 days' holiday at basic pay, when he should have received an additional £98.40 for each of those days. It follows that the claimant is entitled to £1,968.00 in respect of holiday pay he should have been paid but was not so paid.

Employment Judge Fredericks

12 March 2022