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EMPLOYMENT TRIBUNALS

Claimant: Miss J. George
Respondent: Clements Agency Limited
Heard at: East London Hearing Centre
On: 9th and 10th January 2020
Before: Employment Judge McLaren

Representation

Claimant: Ms I Semeniuk (Trainee solicitor)
Respondent: Mr. E Davis (Director)

JUDGMENT

1. **The complaint to the Employment Tribunal that the employer has made a deduction from wages in contravention of section 13 is well-founded and I make a declaration to that effect.**
2. **I order the respondent to pay the claimant £1035, being the amount of the deductions made in contravention of section 13 ERA 1996.**
3. **The claim for constructive dismissal is upheld.**
5. **The matter will be listed for a remedies hearing to determine the basic and compensatory award due to the claimant.**

REASONS

Background

1. The claimant was employed from 1st January 2011 until she resigned on 6th February 2019. Her role was in the marketing team approaching the owners of commercial properties to create leads to whom the respondent could sell its services disputing the calculation of commercial rateable values as set by HMRC.

2. I heard evidence from the claimant on her own behalf and from another former employee of the respondent, Ms Dionne Atkins Lindo. I heard evidence from four individuals on behalf the respondent, Mr Elliot Davis, Mrs Leigh Munden, Mr Adam

Cashman and Mrs Susan Leslie. I was provided with a bundle of 138 pages which was then supplemented with documents relating to the incorporation of Phoenix Agency Group Limited, medical information relating to the claimant and three additional payslips for periods in 2014.

3. In reaching my decision I considered all the evidence I heard and those parts of the documents in the bundle to which I was directed.

The issues

4. The claimant brings claims for constructive unfair dismissal and for unlawful deductions. It was agreed that the claimant is an employee.

5. The issues to be decided at today's hearing were agreed at a case management hearing on the 27th June 2019 and are as follows:

"The Issues

5 The Claimant's Claim is made up of a claim for unlawful deduction of wages pursuant Section 13 of the Employment Rights Act 1996 (ERA) as well as constructive unfair dismissal. The Claimant asserts that between the period to November 2018 and the date of her resignation on 6 February 2019 (four months) the Respondent made unlawful deductions from her wages in the total of £2,507 which was not agreed by her and which has led to her resignation on 6 February 2019 in writing.

6 The Tribunal is to determine whether the Claimant suffered such unlawful deduction of wages in breach of contract and to determine the amount. In addition, if the Tribunal agrees with the Claimants submission that the wages were unlawfully deducted without consent whether this amounted to a fundamental breach of contract entitling the Claimant to resign and to determine whether the Claimant resigned as a consequence of such breach.

7 The Respondent for its part asserts that there were no unlawful deduction of wages and no breach of contract as the Claimant was paid the correct entitlement into her contractual wages."

6. At today's hearing helpful clarification was given as to the deductions claim. This is a claim for £100 a week from the week of 15th October 2018 until the week of 4th February 2019. The claim is about basic pay only and not about commission.

7. The respondent agrees that an element of the claimant's pay was reduced but only from November 2018 until the claimant's resignation. It was not at the rate of £100 for each week because the claimant was off sick on a number of days on each month which reduced her pay because no sick pay is given.

Findings of Fact

Contractual terms

8. The claimant was originally employed by this respondent under the terms of a

contract signed in 2013. While the contract did not specify the rate of pay, under the heading “period of payment” it stated that the employee would receive an attendance allowance and commission based upon the rate at that time. This was in addition to the national minimum wage.

9. On 16th September 2014 the claimant was issued a new contract having re-joined the respondent following her resignation.

10. While the claimant disputes this, I find that the claimant resigned in April 2014 as I accept that the emails at pages 3 and 4 are to and from the claimant. It is unclear when the claimant re-joined the respondent, Mrs Leigh considered it was probably after a maximum of 10 days. The claimant, while she did not accept, she had resigned, was adamant that her continuity of employment was not broken. This was not challenged by the respondent. On the respondent’s own evidence, the date the claimant’s employment commenced is incorrect on the contract and I therefore prefer the claimant’s evidence on this point that she has unbroken continuity from 2013.

11. The 2014 contract also did not specify how much the pay was, but it again referred to an attendance allowance and commission in addition to the national minimum wage.

12. In August 2014 the respondent’s structure changed and Mr E Davis took over its management from his father. The company trading name changed and it moved to new premises. Once things had settled down, the respondent wanted to change pay arrangements and increase the basic pay and to change the timing of commission payments.

13. A meeting was held with all staff which included the claimant, on 3rd March 2015. The notes of this meeting were at page 7 of the bundle and record that:

“... The basic weekly pay was increased for all staff to meet national minimum wage on a weekly basis. A performance -related pay was introduced to recognise staff who consistently exceed 12 minimum deals a month that would be given in addition to the basic pay that all telesales were given. This was set out on a sliding scale dependent on the number of deals consistently attained was subject to adjustment both ways dependent on the number of deals. Attendance; timekeeping and the consistency of attaining a level of deals would all contribute to the adjustment of the performance pay”

14. No additional details were given as to the method of calculation or the ratio attributed to attendance versus deal numbers. While the meeting note refers to 12 being the minimum deals and it is said that PRP will be removed entirely if that figure is not met, there is no information on what the rates are. Mrs Leslie is noted as explaining at while exceptional circumstances would be considered, if the level of deals fell the PRP would be adjusted and removed entirely if the attainment for a month was 12 or below. Usually the adjustment would be made at an appraisal.

15. The claimant signed another contract with the same respondent on 2 April 2015 which appears to have been intended to introduce the performance-related pay concept and the adjustment. Under the heading “period of payment” the contract now

states, “a performance -related pay and a commission based upon the rate at that time”.

16. I find this to be the contract that was in operation at the time of the deductions. It contains a positive statement that an employee will receive performance -related pay and makes no reference to the PRP amount being variable both up and down, or how that would be calculated, what elements it contained, their measurement and any relevant time period.

17. The contract referred to other documents for absence and disciplinary issues, but no reference is made to any PRP scheme rules.

18. I find there is an express contractual term that PRP will be paid, there is no express term that allows the amount once paid to be reduced. There is no express incorporation of any policy or rules document.

19. There is no other documentary evidence as to what the terms of performance -related pay were. The respondent relied on references in correspondence, course of dealing and what it said amounted to agreement by accepting reduced pay as evidence of an implied term that it had the right to reduce PRP.

Performance related pay in practice

20. Mr Davis and Mrs Leslie were clear that they operated a system of adjusting what they said was the PRP element of pay up and down. There were monthly appraisal meetings with all members of the sales staff. The number of deals would be discussed at these meetings.

21. It was Mr Davis’s evidence, supported by Mrs Leslie, that every quarter, if the deal target of an average of 12 deals a month had not been met, and taking into account attendance and behaviour, (what was referred to by Mr Davis as the stats and the facts), then for the following quarter the PRP element of pay would be reduced. Basic pay always remained the same at the national minimum wage level but the PRP element could be reduced from £100 to £0. If performance improved, then the following quarter PRP would be reinstated.

22. In evidence I was told by Ms Dionne Atkins Lindo that her understanding of her pay was that it reflected timekeeping, attendance and over time, but also an element of performance This was entirely separate from commission. When her pay was reduced from £350 a week to £250, she was told by Mr Davis that it was because she was not hitting the numbers he expected. She understood from conversation around the office that the minimum target was an average of 12 deals a month. She was clear, and I accept her evidence that this had not been explained to her during the interview process and it was not a term that she was aware of prior to starting her employment or before the deductions were made.

23. Mr Cashman, a current employee of respondent, who is also a telesales consultant like the claimant, gave evidence and confirmed that he was aware that his pay had three elements. A monthly basic, performance pay and commission. He was clear that performance pay is looked at every three months but is discussed at a monthly appraisal meeting and it is adjusted up and down according to the number of

deals made as well as good attendance, timekeeping, lead generation and the consistency of hitting numbers.

24. I find that Mr Cashman was aware of the system because he had been at the meeting in March 2015 and from it being put into practice for him as he had variable pay on a number of occasions, rather than from any documentation.

25. I also find that the company did not use consistent terminology when discussing this system with staff. Mr Davis explained that the term PRP was not used consistently within the company and would not generally be used when talking to sales staff. Instead the term bonus would be used. That has changed since the claimant left and PRP is now used with sales staff as well.

26. I find, that while an upward and downward adjustment system was operated by the respondent, this system was only explained in appraisal meetings when the need arose. It was not clearly documented or explained to the staff in a consistent way and I find that if an employee had not had deal flow below 12 on average, then they would not be aware of the deduction policy the respondent operated.

Lay out of pay information

27. The bundle contained details of all the sums paid to the claimant other than commission for the period of her employment. These are at pages 11 to 16. They have a heading "basic pay". No reference is made to PRP.

28. Mr Davis explained that payslips also showed one sum, and this was not broken down into basic pay and performance related pay because that was how their internal bookkeeper showed it. This did not change on payslips until after the claimant raised her dispute via ACAS.

29. In a letter of 27 November 2018 all staff, including the claimant, are told that because of the 2018 budget announcements on national living wage/ national minimum wage, the layout of the wage's notification would change.

30. This letter then refers to basic pay of £250 and says that wage slips will be laid out showing basic pay and performance related pay. The letter says actual pay will remain the same.

31. Mr Davis gave evidence on the question of whether the bookkeeper also changed practice from 27 November. In answer to questions he said that it had not changed, but in submissions he stated that he had misunderstood the question and it was clear that the recording of payments had changed on the document at page 15 and that the column headed overrides, which had previously been only about commission, now showed the performance element of pay. He said that this was the case from entry 35164, payments made for the week beginning 26 November onwards. Having considered the data on page 15 I accept his position on this point.

32. Mr Davis also gave evidence that the monthly appraisal meeting notes for staff were amended from November 2018 onwards to reference PRP, but this had not happened before.

33. I find that there was therefore no indication on any documentation given to staff which would show them that their basic pay contained two elements or indeed how that had been calculated.

Variations in pay

34. The documents at pages 11 to 16 show a complete history of the claimant's pay from 2014 to 2018. It started at £150 a month in August 2014 and then rose to £350 a month from September 2014 until February 2017 where it appears to be £400 a week.

35. In April 2018 the claimant's pay is reduced. Mr Davis gave evidence that in January 2018 due to a three-month reduction in attainment the respondent attempted to implement the terms of the employment contract by adjusting what he described in his witness statement as the bonus in place for performance. However, having had an appraisal meeting to discuss this, the claimant then stated she did not understand why the reductions were going to happen. As a result of this Mr Davis decided not to implement the reductions at that point. Instead, he decided to go down a three-month disciplinary route in order to make sure that the claimant understood the terms of her employment.

36. The bundle then contained three letters which show that warnings are given. Mrs Leslie wrote to the claimant on 8 January 2018 as a follow-up to a meeting that had been held with the three of them. This letter states that the claimant had been given a verbal warning because of the level of deals being achieved on a monthly basis. This letter gives formal notice of the need to meet the target of deals to maintain what described as a higher basic salary.

37. The bundle contains a letter of 6th February warning the claimant her pay may be adjusted downwards. The letter refers to the claimant having been given a verbal warning and that this letter 6 February is a first written warning. The letter refers to basic salary throughout, stating that "*it was discussed again how your basic salary was reflective of the levels of deals that you previously consistently produced on a monthly basis*". The letter states that the claimant has been reminded "*your basic salary was reflective of the level of deals you consistently produced*". There is no reference to performance-related pay as a separate item. The letter goes on to say that it is a formal notice of the need to meet targets to maintain higher basic salary and a second warning in a process. If the expectation is not met the letter says action will be taken to address the issue.

38. On 6 March there is then a further meeting which says "*you have been officially made aware of the need to meet the target of deals to maintain this higher basic salary on two previous occasions and this is the final warning in the event that this expectation is not met will have to take action to address the issue*"

39. I find that the respondent's actions accept that as at February 2018 the claimant did not understand her contract permitted reductions to pay. I find the respondent's actions confirm that this was the first occasion the system as it could impact her had been explained to the claimant

40. in April 2018 following this disciplinary process Mr Davis then told the claimant

that because of continued underperformance her basic pay would be adjusted downwards. The details of this are set out in a note of a meeting on 16th April 2018. This stated that the claimant did not object and in fact agreed to her wages being altered. Mrs Leslie relies on the claimant asking for the deduction be staggered as support for her view the claimant understood the position and had agreed the deduction. It was also pointed out the claimant had not raised any grievance at this point.

41. Mr Davis also explained that the claimant reacted positively in May and June 2018 to the conversation and, to show a level of fairness, the respondent increased her pay based on outstanding performance in July 2018. This increase took place one month earlier than the general three-month appraisal and what Mr Davis describes as the bonus is increased at a rate to compensate for the reduction made two months previously as the level of attainment had been outstanding. By July 2018 therefore any reduction the claimant had suffered in April had been compensated for. I find that neither asking for loss of pay to be smoothed out, nor failing to raise a grievance in April 2018 amount to consent by the claimant, particularly when the pay cut was short-lived and made back up to her within months.

42. In July 2018 what is described as basic pay becomes £425 a week until the payment date of 30 October 2018, which is when the deductions the claimant complains of occur.

43. On 7 November 2018 the claimant met with Mr Davis and the bundle contained a letter which referred to discussions over the last few months regarding the claimant's poor performance and how it would affect her pay unless there was a dramatic improvement. This letter stated that the claimant had been reminded that higher salary was directly linked to performance and that it had been made clear to her that an average deal ratio over the last three months of 13 deals would only attract a weekly wage of £300 per week. The letter stated this was something that had been discussed many times and which had to be applied on occasion. The letter records that the respondent has decided not to adjust the amount to the actual wage to directly reflect a deal ratio but to stagger the amount to give an interim opportunity to improve the figures and the letter also states the claimant had agreed to this.

44. The claimant states that she did not agree any such deductions. Mr Davis had a company witness present at the meetings, Mrs Leigh Munden who had taken over the role of human resources from April 2018. Mrs Munden confirmed that the claimant had not agreed to any of these reductions in the meetings at which she was present.

45. I accept the evidence of the claimant supported by Mrs Munden that the claimant had not agreed to the reduction in her wages that took place following this meeting. It was this that led to her raising a complaint to ACAS and issuing employment tribunal proceedings.

46. The claimant resigned in February 2019. It was the respondent's submission that the claimant had engineered the situation to create the circumstances allowing her to resign. She had done this because she had set up a competing business and taken commercial premises and was looking to obtain money to fund her new enterprise.

47. The claimant accepted that she had incorporated a company which was in the

same business as the respondent and had found a serviced office. She was unable to pursue this venture, however, due to a combination of family bereavement and personal ill-health. She has not worked since she left the respondent's employment.

48. The claimant told me that she loved her job and Mrs Leslie confirmed the same, that the claimant had always said that she loved what she did.

49. I find that the claimant's resignation was entirely motivated by the reduction in her pay and was not for any ulterior motive. I also find her resignation was timely and that she did not delay in reacting to this reduction.

What were the deductions?

50. The figures shown at page 15 of the bundle were not disputed. These show that the claimant was paid less than £425 in the week of 15 October and again, in the week of 22 October. Mr Davis' evidence was that they were continuing to pay the claimant £425 a week at this point and the reduction in pay for these weeks is because of her sickness absence.

51. The appraisal document for October noted that there were no sick days. The respondent, however, produced its internal sickness log for October which shows that the claimant had indeed been sick for one day in the week of 15 October and two in the week of 22 October. I accept this evidence and agree with the respondent's position that reduced pay for these weeks was not due to any deduction but because of absence.

52. It was the respondent's position that it reduced the claimant's pay from the week of 5 November to £350. The payment date on page 15 shows a number of weeks when the claimant was paid less than this.

53. I find that the claimant was sick for three days in the week of the 5th to 9 November, one day in the week of the 12th -16 November, one day in the week of 10th to the 14th, December one day in the week of the 17th- 21 December, and one day in the week of the 21st -25 January. I find that her pay of £350 a week was reduced in these weeks by the amount of her sickness absence.

Relevant law

54. The statutory prohibitions on deductions from wages are contained in Part II of the Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a 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.

(2) In this section “relevant provision” in relation to a worker’s contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion

(3) 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 the 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.

(4) (Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker’s contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

55. Any deduction must therefore be authorised but there can only be a deduction if the amount was properly payable, the question of what wages are ‘properly payable’ to the worker under S.13(3) is critical to determining whether an unlawful deduction has been made. Deciding whether the employee has a legal entitlement to the payment in question will involve analysing the factual basis of his or her claim.

56. The Court of Appeal in *Agarwal v Cardiff University and anor 2018 EWCA Civ 2084, CA*, is binding authority that an Employment Tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under S.13 ERA is properly payable, including an issue as to the meaning of the contract of employment.

57. Contract terms may be implied as well as express. Where the express terms of the contract fail to deal with an issue, the court will consider whether a term is implied “in fact” in order to reflect the parties’ intentions.

58. In order to make such a presumption, the court must be satisfied that one of the following tests is met

- the term is necessary in order to give the contract business efficacy, that is it must be necessary for the contract as a whole;
- an “officious bystander” would understand that the term is so obvious it goes without saying at the time the contract was entered into, not at the time the dispute arose;
- an intention to include the term is demonstrated by the way in which the contract has been performed.

Constructive unfair dismissal

59. Section 95(1)(c) of ERA 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer’s conduct.

60. In order to claim constructive dismissal, the employee must establish that:

- there was a fundamental breach of contract on the part of the employer
- the employer’s breach caused the employee to resign
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

Conclusion

61. In applying the relevant law to my findings of fact I have first considered whether the money, which all agree was taken from the claimant’s overall pay packet, was properly payable. If there was no legal entitlement to this money, then no deduction arises for the purposes of section 13 of ERA 1996.

62. I have started by looking at the terms of the contract and I have found that the express terms of the contract did not permit a reduction to basic pay on performance grounds. While there is a reference to performance related pay, this a positive statement that it will be paid.

63. I have then gone on to consider whether, despite its express terms, because the contractual reference is so limited, the contract can be said to have included an implied term that the performance related pay could be reduced or removed.

64. I conclude that this term does not have to be implied in order for the contract to work overall.

65. I have found that the way the scheme worked was very far from clear to anybody and it was not clearly articulated by the respondent. For example, its documentation presented to sales staff prior to the dispute arising was silent on PRP and this was not the language used. I have found that the respondent accepted the claimant did not understand this to be part of her contract prior to February 2018. I conclude that no officious bystander would have been able to deduce the operation of

the scheme as an obvious implied term at the start of the contract with the claimant.

66. The respondent has relied heavily on the way the contract has been performed to demonstrate that in its view a term should be implied. I have found that the claimant did not understand that her pay was to be adjusted downwards prior to February 2018, which the respondent recognised as it felt it needed to make position clear in a disciplinary process in 2018.

67. The fact that after February 2018 they made it clear they were going to make deductions from the claimant's pay, to which she strenuously objected, cannot imply a contractual term based on performance of the contract in practice.

68. Accordingly, I have found that the monies were properly payable to the claimant and that, as the respondent accepts, there was no written agreement to any deductions. Deductions made for "underperformance" are therefore in breach of section 13 and I make a declaration to that effect.

69. I award the claimant £1035 for these unlawful deductions. This is calculated by looking at the amount she was paid for each week from the date about which she complains, the week of 15 October, comparing this sum to £425, which is the amount she should have been paid, and reducing that to factor in unpaid sick leave in any week.

70. The differences are as follows. Week 5th November £30, week of 12th November £60, week of 19th of November £75, week of 26th of November £75, week of 3rd December £75, week of 10th December £60, week of 17th December £60, the weeks of the 24th and 31st of December £150, week of 7th January £75, week of 14th of January £75, week of 21st January £60, week of 28th January £75 and week of 4th February £165.

71. I've also found that the claimant resigned in direct response to this breach of her contract and unlawful deductions and that she was therefore constructively dismissed.

Employment Judge McLaren
Dated: 15 January 2020