



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr C Brice

SynApps Limited

Heard at: Watford

On: 31 July 2020

Before: Employment Judge Loy

Appearances

For the Claimant: Mrs R Hodgkin - Counsel

For the Respondent: Mr Large - Counsel

RESERVED JUDGMENT

The reserved judgment of the tribunal is that:

1. The claimant's claim for unauthorised deductions in respect of unpaid expenses is dismissed by the consent of the parties.
2. The respondent has made an unauthorised deduction from the claimant's wages in respect of unpaid commission and is ordered to pay to the claimant the sum of £1,195.39

REASONS

Introduction

1. The respondent is a specialist consultancy providing consulting, implementation and support expertise in the deployment of Electronic Content Management services in the healthcare, local government and financial services sectors. The claimant was employed by the respondent as its Business Development Manager from 9 April 2018 until 25 April 2019. Mr Brice brings two claims for unauthorised deduction from wages. The first, a claim for unpaid expenses. Secondly, a claim for unpaid commission on sales. During the hearing the parties reached agreement on the claim for unpaid expenses. In these circumstances, that aspect of the claim was dismissed by the consent of the parties. That left the claim for unpaid commission as the sole remaining matter for the tribunal's determination. Put simply, this is a dispute about how the claimant's contract of

employment provides for the calculation of commission on sales. The claimant's first position is that he was entitled to be paid six percent of the respondent's total gross sales without any deduction from the gross sales figure. The respondent's first position is that the claimant was entitled to be paid six percent of the gross sales margin. If the claimant is wrong about his first position, there is a further dispute about what costs should be deducted from the respondent's gross sales before the claimant's entitlement to six percent commission on that gross margin is calculated.

Claims and issues

2. This claim is a claim for unauthorised deduction from wages contrary to s.13 of the Employment Rights Act 1996 ("the ERA").
3. The following are the issues that arise for determination by the tribunal.
 - 3.1 Issue 1: Is the claimant entitled to a six percent commission on the total gross sales of the respondent?
 - 3.2 Issue 2: If not, what costs are to be deducted from the respondent's gross sales to produce the gross sales margin before the claimant's commission is then calculated?

Procedure documents and evidence heard.

4. The tribunal heard evidence from the claimant on his own behalf. He called no other witnesses. The tribunal heard evidence from Mr Paton, the respondent's Chief Executive Officer. The respondent called no other witnesses. Both the claimant and Mr Paton produced written statements. Neither party objected to the tribunal reading the witness statements provided.
5. There was a hearing bundle of 101 pages to which reference was made during the evidence of the parties' witnesses, during cross examination and during submissions. The tribunal asked to be directed to any document that either party wanted the tribunal to take into account.

Fact findings

6. The claimant was employed under a contract of employment signed by the parties on 19 March 2018 (bundle pages 35-51). The material clause applicable to commission is contained in a document entitled "Annex A to the Employee Contract, Annual Base Salary and Commission Plan for Chris Brice" (bundle pages 52-53). Annex A was signed by Mr Mark Winstone (the then CEO of the respondent) on 19 March 2018 and by the claimant on 20 March 2018. It was common ground between the parties that Annex A contains the contractual terms governing the claimant's entitlement to commission on sales.
7. The claimant told the tribunal that his anticipated annual earnings were £140,000 per annum. That was made up of an annual basic salary of

£80,000 and an “On target Annual Commission” of £60,000. The claimant referred to conversations that he had with Mr Winstone from which he understood that should £1,000,000 of Sales Income (ie gross sales as the CI saw it) be achieved by the company he would receive six percent of that figure. That would equate to £60,000 producing his anticipated on target income of £140,000 per annum. That calculation is also set out in Annexe A.

8. Mr Paton disagreed with the claimant’s understanding of Annexe A. He pointed out that Sales Income was a defined term in Annexe A. He said that it was perfectly clear that “sales revenue” (a term interchangeable with gross sales) of £1,000,000 was expressly qualified and defined in Annexe A as “Sales Income). In other words, the £1,000,000 of sales revenue is defined in Annexe A as gross sales margin not gross sales per se.
9. Annexe A states in express terms that “Sales Income” equals”
 - Gross margin for SynApps Professional Services assuming a cost base of £400 – day.
 - Year 1 support services and/or multi-year if sold in one transaction.
 - Gross sales margin on year 1 hosting services and/or multi-year if sold in one transaction.

Plus

 - Gross sales margin on re-sale of 3rd – party owned products.
 - Gross sales margin on re-sale of 3rd party owned products 1st year software support (if applicable).
10. Annexe A continues with further requirements such as “Meetings with customers”. The respondent produced a skeleton argument which said that the further requirements had not been met. However, these further conditions were not advanced at the hearing as a basis for reducing he claimant’s commission. In fact, the parties agreed the relevant figures and the respondent’s focus was on which costs fell to be deducted from gross sales to produce the gross sales margin on which the claimant’s six percent commission was to be calculated.
11. The parties adopted an agreed position on the calculation of the claimant’s commission depending on the tribunal’s findings as to the proper construction of Annexe A. It was common ground that the claimant had been paid £14,759.09 representing six percent of gross sales to the value of £245,985. The agreed position on commission was summarised by the parties as follows:
 - 11.1 If the claimant is entitled to six percent commission on gross sales without any deduction (the claimant’s first position) then he has been underpaid by £42,330.14.

- 11.2 If the claimant is entitled to six percent of the gross sales margin, where the respondent's costs of £400 per day for each day of professional services sold (158 days) fell to be deducted from gross sales, the claimant has been underpaid by £22,082.00. The 158 days on this calculation takes into account the £400 per day for each day of professional services only (and no other sales).
- 11.3 If the claimant is entitled to six percent commission on the gross sales margin where the respondent's costs of £400 per day is not restricted to services only (384.75 days) then the claimant has been underpaid by £12,625.00.
- 11.4 If the claimant is entitled to six percent commission on the gross sales margin as above, plus other direct costs incurred by the respondent (essentially the purchase price of software licences) but there is no deduction in respect of a 2.5 percent NHS procurement fee, the claimant has been underpaid by £1,195.39.
- 11.5 If the claimant is entitled to six percent commission only after deduction of all direct costs (11.4 above) plus a deduction of 2.5 percent for NHS procurement fees then the claimant has been paid in full and has accordingly not suffered a deduction from his wages.
12. During his evidence the claimant accepted that his £80,000 based salary was a fixed annual sum and that he understood that the on-target earnings of £140,000 were dependent on £60,000 being earned on commissions on sales. The claimant also gave evidence that he inherited a sales pipeline of £6M which, due to Brexit pressures, "Halved within a month".
13. From mid-December 2018, the claimant began to challenge the calculation of his commission. His position was that he was entitled to six percent of gross sales (see the claimant's witness statement at paragraph 8). The respondent's position was that the claimant's commission was to be calculated on a net basis, ie after deduction of the direct cost of sales.
14. At page 57 of the bundle, there is a spreadsheet which sets out how the respondent calculated the claimant's commission. That spreadsheet shows total gross sales of £856,289 for which the respondent deducted:
- 14.1 £153,900 (ie 384.75 days at £400) and
- 14.2 £436,481 (ie the direct purchase price costs to the company of re-sold software licences) producing a gross sales margin of £265,908. If the cost deductions had ended there the claimant would have received $£265,908 \times 0.06 = £15,954.48$. He accepts that he was paid £14,759.09 leaving an underpayment of £1,195.39 (see above). The respondent deducted further costs of 2.5 percent in respect of NHS procurement charges in the total sum of £19,923 reducing the total sales figure to £245,985 which $\times 0.06 = £14,759$. That is the figure that the claimant accepts that he received.

15. During cross examination the claimant conceded that he could not legitimately claim six percent commission on total gross sales. In effect, he resiled from his first position. It was quite proper for the claimant to do so in the tribunal's view since it is expressly set out at the first bullet point under "Sales Income" in Annexe A that in respect of the Professional Services Income stream (at the very least) a costs base of £400 – day is assumed. Effectively, the claimant's case was that in respect of the other incomes streams (Resale of Third Party Software Licences and Support Services) the £400 per day cost reduction did not apply and nor did any other cost of sales. The claimant's Counsel, Mrs Hodgkin, also realistically accepted that the claimant's first position could not be sustained. The claimant's first position therefore became that £400 per day for Professional Service Sales (158 days) was the only costs to be deducted from the gross sales figure to produce the gross sales margin on which he was entitled to six percent.
16. By adopting this approach, the claimant's position became that the purchase costs to the respondent of third party software which was then re-sold by the respondent should not be deducted from gross sales when calculating his commission. For example, the first entry on the spreadsheet at page 57 is for a company called Cloud Pay which purchased a third-party software licence called 200 External Users Licence. The respondent re-sold that licence to Cloud Pay for £30,000 having paid a purchase from the supplier of £28,500. It is the claimant's position that he is entitled to six percent of the £30,000 gross sales price. It is the respondent's position that the claimant is entitled to a commission on the sales margin of £1,500. That example encapsulates the essential difference in the positions of the parties.
17. The respondent made a concession based on the spreadsheet at page 57. The respondent's first position is that the six percent commission is payable on the gross margin of sales, not upon the net margin of sales. This is significant because the additional cost of 2.5 percent NHS procurement charges is deducted in the respondent's own spreadsheet after the gross margin has been calculated. Since it is the respondent's case in its own document that the six percent commission is payable on the gross margin, the respondent realistically conceded that the claimant has been underpaid by £1,159.39.

The law

18. Section 13(1) of the ERA provides:

“...an employer shall not make a deduction from wages if a worker employed by him...”

19. There are exceptions to that provision none of which apply in this case.

20. Section 13(3) of the ERA 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 the wages properly payable by him to the worker... 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."

Conclusions

Issue 1:

21. Is the claimant entitled to a six percent commission on the total gross sales of the respondent in the relevant period?
22. The tribunal prefers the respondent's construction of Annexe A to that of the claimant. Sales Income is a defined term in Annexe A which is expressly defined as the gross sales margin. Annexe A simply does not entitle the claimant to commission on gross sales without deduction.
23. Both parties accepted that Annexe A is poorly drafted. Indeed, it is. However, Annexe A plainly and expressly defines six percent commission being paid on "Sales Income". Sales Income is expressly defined in Annexe A as gross sales margin, not gross sales per se. The example provided in Annexe A to show how the claimant could reach it on target earnings of £60,000 sales commission has to be read in the context of Annexe A as a whole. The reference to £60,000 "Sales Revenue" is plainly confusing, but if the claimant's interpretation was to be preferred the words "margin" in the definition of gross sales margin would be entirely superfluous. The tribunal finds it wholly unlikely that the parties intended to word "margin" in this context to have no meaning or practical significance whatsoever.
24. There is also a commercial context within which Annexe A falls to be interpreted. If the claimant's construction is preferred, the respondent would be agreeing to provide the claimant with a commission which bore absolutely no relationship to the profitability of its sales. For example, it seems to the tribunal wholly unlikely that the respondent was agreeing to pay six percent commission on the re-sale price of £30,000 of the software re-sold to Cloud Pay when that licence had a purchase price of £28,500 to the respondent in the first place. In financial terms, the claimant's construction of Annexe A would entitle him to six percent of £30,000 = £1,800 when the gross sales margin was only £1,500. This would produce an overall loss to the respondent of £300 on that transaction. The respondent's construction entitles the claimant to six percent of the gross margin of £1,500, ie, £90. In that way the claimant shares in the gross profit earned by his employer.
25. The tribunal recognises that the parties are entitled to reach whatever bargain they consider appropriate. However, on this occasion, the plain and express words of Annexe A reflect the common sense position that sales commission would ordinarily and naturally not exceed the profit earned by the employer.
26. The tribunal's interpretation accords with the position conceded by the claimant in respect of sales generated from professional services where Annexe A expressly provides for a costs base of £400 to be deducted in

order to find the gross sales margin. The tribunal also finds that the words “gross margin” should be construed consistently throughout Annexe A. It would again be wholly unlikely that the respondent intended “gross margin” to mean “gross sales” when the term gross sales is not used at all in Annexe A.

27. Accordingly, on the first Issue, the tribunal finds that the parties agreed a commission scheme for the claimant based on gross sales margin. The tribunal finds that the example of £60,000/£1,000,000 in Annexe A needs to be interpreted in the light of Annexe A taken as a whole. Accordingly, only if the gross sales margin reached £1,000,000 would the claimant reach his on target sales earnings of £60,000 to bring his on target earnings to £140,000 per annum.
28. The claimant says rhetorically that it would be practically impossible for him to earn £60,000 sales commission on the gross margin. The tribunal makes two points in that regard. First, the express language of Annexe takes precedence for whatever legitimate expectation the claimant might have believed he had when entering into Annexe A. Secondly, it was the claimant’s own evidence that he inherited a sales pipeline of £6m when he joined the company which is considerably more than the gross sales £856,289 that materialised during the relevant financial period during which he was employed.

Issue 2:

29. What costs are to be deducted from the respondent’s Sales Income before the claimant’s six percent commission is calculated?
30. Having found that the claimant’s commission is to be based on gross margin the next question is what costs are to be deducted from the gross sales in order to determine that margin?
31. The tribunal understood the respondent in its submission to be conceding that the 2.5 percent NHS procurement charge should not properly be regarded as a deductible cost at the stage at which the gross margin is calculated. Whatever may be the reasons for that, it was factually the respondent’s own case on the documents that the 2.5 percent NHS procurement charge is deducted after the calculation of gross margin to produce a net margin. That appears explicitly from page 57 of the bundle where the respondent’s own spreadsheet does not deduct the 2.5 percent NHS procurement charge at the stage of calculating its gross margin. Accordingly, even if the respondent had not conceded this point, the tribunal would have decided it against the respondent since it is essentially the respondent’s own position that the 2.5 percent was deducted when calculating the net and not the gross margin.
32. The two remaining questions are therefore:
 - 32.1 Does the cost base of £400 per day apply only to professional services income; and

- 32.2 Is the cost of the third-party re-sale licences to be deducted at the point of calculation of gross margin?
33. The tribunal finds that both of these questions are to be determined in favour of the respondent. The tribunal considers that it would be illogical for the costs of £400 per day to be deducted only from professional services. It was not necessary for the respondent to repeat the cost base in Annexe A after having already defined it. The tribunal considers it much more likely than not that the underlying cost base was a constant and therefore fell to be deducted from all 384.75 days.
34. In the same way “gross sales margin” on re-sale of third party owned products... owned software support” is unambiguous. The claimant simply wants to ignore the words “margin”. There is no merit in construing a document in a way which ignores the express words used in it. In this context “margin” means the difference between the sales price of the third-party product and the cost price of that product. That is the ordinary and natural meaning of the word “margin”.
35. To summarise,
- 35.1 The claimant’s claim for unauthorised deduction from wages in respect of unpaid expenses is dismissed by consent, agreement having been reached between the parties.
- 35.2 The claimant’s claim for unauthorised deduction from wages in respect of unpaid commissions is partly upheld. The 2.5 percent NHS procurement charge should not have been deducted when calculating the claimant’s six percent commission of gross sales margin. The effect is that an additional sum of £1,159.39 was properly payable to the claimant but was not paid in his final salary instalment.

Employment Judge Loy

Date:04.09.2020.....

Sent to the parties on: 10.09.2020.....

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For the Tribunal Office