



EMPLOYMENT TRIBUNALS

Claimant: Mr W Merridith

Respondent: National Friendly Financial Solutions Limited

Heard at: Manchester (by CVP)

On: 24 March 2021

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr N Green, Counsel

JUDGMENT

The judgment of the Tribunal is that the respondent did not make unlawful deductions from the claimant's wages. The claimant's claim for unlawful deduction from wages is dismissed.

REASONS

Introduction

1. The claimant is employed by the respondent as a Sales Executive and has been employed since 6 January 2020. The claimant brought a claim alleging unlawful deduction from wages. The respondent denied that it had made unlawful deductions.

Claims and Issues

2. At the start of the hearing the issues to be determined were clarified with the parties.

3. On the face of his claim, the claimant's claim was for alleged unlawful deductions made from his wages on 21 October, 21 November and 21 December 2020.

4. At box 15 of the claimant's claim form the claimant had included details about his working hours. It was confirmed with the claimant that those matters had been resolved and did not need to be determined by the Employment Tribunal.

5. The claimant in his correspondence with the Tribunal had made reference to other unlawful deductions which he contended had been made from his salary in January, February and March 2021. The claimant also alleged that unlawful deductions had been made in 2021 following a pay increase which had been confirmed to him in a letter of 11 January 2021. As those issues and alleged deductions all arose after the claimant's claim had been entered at the Employment Tribunal, they could not be part of the issues raised in the claimant's original claim. The claimant applied to amend his claim to also claim those amounts as unlawful deductions from wages. The respondent's representative did not oppose the application to amend. The Tribunal granted the claimant's application to amend, and therefore went on to consider and determine the claims for unlawful deduction from wages for January, February and March 2021 (in addition to those for October to December 2020).

6. Two issues were raised in an email from the claimant to the Tribunal, which the Tribunal confirmed it would not be addressing. The claimant accepted that they were not issues to be determined by this Tribunal. These were: a complaint by the claimant that he was not being paid as holiday, for the day prior to and the day of the Tribunal hearing; and a claim from the claimant for printing costs.

Procedure

7. The claimant represented himself at the hearing. The respondent was represented by Mr Green of counsel.

8. The hearing was conducted as a hybrid hearing. The hearing had been proposed to be converted to be conducted by CVP remote video technology as a result of the COVID-19 pandemic. However, after the Tribunal had converted the hearing, the claimant informed the Tribunal that he would not be able to attend remotely and that he would be attending the Employment Tribunal building. As a result, the claimant attended in person. The respondent attended by CVP video technology, and the respondent's witness also gave evidence remotely.

9. The Tribunal was provided with two bundles of documents. The respondent provided a bundle which ran to 86 pages. The claimant also provided a separate bundle which ran to 57 pages. The Tribunal read only the pages from either of the bundles which were referred to within the witness statements, or were referred to by the parties in the course of the hearing. Where numbers are included in brackets in this Judgment they refer to pages in the bundles, with "R" being the respondent's bundle and "C" the claimant's bundle. During the hearing the claimant asked the Tribunal to read the notes contained in his bundle from his grievance hearing on 11 December 2020 (C20) and his grievance appeal hearing on 13 January 2021 (C32), and the Tribunal did so before reaching this decision.

10. The Tribunal was provided with a witness statement prepared by the claimant. The Tribunal was also provided with a witness statement prepared by Mr O Jones, the respondent's Head of Sales & Marketing. The Tribunal read both witness

statements, and the documents referred to in them, in advance of the hearing commencing.

11. During the hearing the claimant confirmed under oath that his statement was true and was cross examined by the respondent's representative. Mr Jones confirmed that his evidence was true under oath and was asked questions by the claimant. The Tribunal also asked questions of the witnesses. Mr Jones was briefly re-examined by his representative.

12. After the evidence was heard, each of the parties was given the opportunity to make oral submissions (neither party having provided any submissions in writing). Both parties made oral submissions.

13. Judgment was reserved and accordingly the Tribunal provides the Judgment and Reasons outlined below.

Facts

14. The claimant commenced working for the respondent on 6 January 2020. His evidence was that the commission scheme that would apply to him was discussed at interview and the terms were outlined to him verbally.

15. The Tribunal was provided with the statement of terms and conditions of employment which had been provided to the claimant at the outset of his employment and signed by him (C4 R6). The statement was made up of a single page containing information specific to the claimant (which had been signed as accepted by the claimant (C4), and six pages containing standard provisions.

16. The claimant's statement of terms and conditions said the following: "*Basic rate of pay: £[amount] per year (subject to Clause 5 overleaf) + commission (as outlined separately)*". Accordingly, the claimant, having accepted the terms offered, had a contractual right to commission to be paid under the relevant scheme in place at the time.

17. The standard terms which were part of the terms and conditions, included a provision in relation to deductions from wages, clause 6 (R8, C6). That entitled the respondent to deduct payments from the claimant's salary and other monies due to him in certain circumstances, including where there had been an overpayment of salary or other payment during the course of employment.

18. It was the claimant's evidence that whilst the statement of terms and conditions recorded that his commission was outlined separately, no document was provided to him at the start of his employment which outlined the terms of the commission scheme. Mr Jones did not contradict this evidence, as he confirmed that he was not involved in the claimant's recruitment or induction. The Tribunal did not hear any evidence from anyone who had attended the claimant's interview or detailed the terms on which he was to be employed.

19. A document was provided to the Employment Tribunal (R13) which did outline the terms of a bonus scheme. This was headed "*Greyfriars Estate Planning*" and said at the end of the document, after an asterisk, "*Bonus is paid at the discretion of the company*". It detailed what was required for a bonus to be paid and how it was to be calculated. The heading indicated that this was a scheme being operated by the

previous business from which staff had transferred to the respondent. The claimant was recruited by the respondent at about the same time that they took over the Greyfriars business, and he worked alongside two employees who transferred from it. There was no evidence before the Tribunal which showed that the claimant had been provided with the bonus scheme document. The claimant confirmed that the content of the document, in terms of how commission was calculated, accorded with what was agreed. He denied that he had ever seen the document or been made aware that bonus might be at the discretion of the company.

20. On 13 July 2020 there was a conversation between Mr Jones and the claimant. This conversation took place by telephone. Mr Jones explained that the respondent wished to move the claimant from the previous bonus scheme to a new one, the National Friendly Scheme (in common with other employees to whom the old scheme applied). The respondent had good reasons for wishing to transition staff, including that: they carried out regulated activities; the National Friendly Scheme more clearly accorded to good practice; it rewarded good behaviours; and complied with FCA Regulation. The claimant denied that he accepted the new scheme in this telephone conversation. Mr Jones' evidence was that the claimant accepted it, saying "*ok, we'll run with it*". There was no dispute that the claimant had not actually been shown the terms of the scheme when this conversation took place.

21. At 15:46 on 13 July 2020 (R15) the claimant emailed Mr Jones and asked him to provide full details of the commission structure. Mr Jones replied on 15 July 2020 (R14) providing what he described as the attached commission structure. Attached was a detailed document which described the National Friendly Sales Executive bonus scheme (R16-17). That outlined the qualifying criteria to receive a bonus and detailed how and when the bonus would be paid. It also confirmed that there was an element of discretion, if elements of the scheme were not met.

22. The Tribunal would observe that both parties appeared to refer to bonus and commission interchangeably in the course of the hearing and their evidence, and nothing appears to turn upon whether the word commission or bonus was used in any document. For ease in the hearing, the Tribunal referred to the old scheme and the new scheme and there was no dispute that the new scheme was intended to replace the old scheme. There was also no dispute that what was paid under either scheme was intended to be the payment referred to as commission in the terms and conditions document.

23. There is no dispute that the method of calculation of bonus/commission was very different under the new scheme. It is not necessary for the differences to be outlined in this Judgment. The claimant objected to two aspects of the new scheme:

- (1) for any policies sold and subsequently cancelled during the year, the bonus/commission payment would be clawed back by the respondent in the month following the clawback notification (pro rata for the remainder of the year). Under the old scheme there was no clawback arrangement, save that bonus/commission was not paid if the policy was cancelled before the payment to which it related was made; and
- (2) there was a minimum number of sales which were required to be made per month (six), and if that number was not met, no bonus/commission would be payable.

24. It was also not in dispute that shortly after receiving the scheme document, the claimant objected to these two aspects of the new scheme and continued to do so up until the Tribunal hearing. Mr Jones described in his evidence having three or four subsequent conversations when the conversation veered onto the subject of clawback, and stated that the claimant continued to object to the clawback. The claimant raised a grievance and subsequently appealed the outcome of the grievance, raising these two objections to the new scheme. It is not necessary for this judgment to record further what was raised in, or considered as part of, the grievance or the appeal.

25. On 1 August 2020 the respondent started applying the new scheme to the claimant and it subsequently made commission/bonus payments to the claimant as it calculated them to be due under the new scheme.

26. There was no dispute that the clawback element did not actually alter the payments being made to the claimant (under the new scheme) until the payment made in October 2020. The clawback did thereafter result in the payments for each month from October 2020 up to and including March 2021, being lower than they would otherwise have been under the new scheme had the clawback not applied. The minimum number of sales requirement did not impact upon the claimant or the payments made to him (albeit that, as he emphasised, it is possible that it might do so in the future).

27. Consistent with his earlier objections, the claimant objected to the fact that the amount paid to him in October had been reduced as a result of the cancellation of policies for which bonus/commission had previously been paid. He also objected for each subsequent month. For example, in an email of 16 October 2020 (R29) the claimant outlined that he still didn't agree with the clawbacks and other changes made and was still considering his decision (albeit he also acknowledged that what he would receive would more than make up for the deductions).

28. The Tribunal was provided with figures for the payments that had been made to the claimant under the new scheme, and the comparable figures for payments that would have been due to the claimant had the respondent applied the old scheme to him. Mr Jones' evidence was that the claimant was £1,982.25 better off under the new scheme over the period August 2020 to February 2021. The breakdown (R85) also showed that the claimant was better off in each individual month as a result of the payments being made under the new scheme, then he would have been had he received payments under the old scheme. The claimant was paid monthly. Those figures did not address the payment made in March 2021, but there was also no evidence from the claimant that the position differed in March (his case being that the payments made were less than he believed he was due, applying the new scheme but without the clawback element).

29. On 11 January 2021 the respondent wrote to the claimant to inform him that he would receive a pay increase (R50). That letter said: *"I am pleased to announce that a 2.5% increase will be applied to basic salaries with effect from 1st January 2021"*. The letter went on to confirm the amount of the claimant's increased basic salary from 1 January 2021. The claimant contended that he was contractually entitled to have received payments which applied the 2.5% increase to not only his basic salary, but also to the bonus/commission payments made to him (and to the figures used to calculate those bonus/commission payments). There was no dispute

that the respondent had not increased the commission payments by 2.5% in 2021 (or the basis upon which commission was calculated). It had increased the claimant's basic salary by 2.5%.

The Law

30. The claim was brought as one for unlawful deductions from wages under section 23 of the Employment Rights Act 1996, relying upon the right not to suffer unauthorised deductions from wages under section 13. Section 13 of the Employment Rights Act 1996 provides that:

“An employer shall not make a deduction from the wages of a worker employed by him unless:

- (a) The action 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.”*

31. Section 14 of the Employment Rights Act 1996 provides that section 13 does not apply to a deduction from a worker’s wage made by his employer where the purpose of any deduction is the reimbursement of the employer in respect of an overpayment of wages. Under section 27 “wages” includes any bonus or commission.

32. In practice the Tribunal therefore needed to determine: whether the claimant was contractually due amounts which were not paid to him; whether the claimant was paid the same (or more than) he was entitled to in each payment of wages; and, if not, whether any deduction made from the payment of any wages, was otherwise authorised in one of the ways described and/or was reimbursement of an overpayment of wages.

Conclusions – Applying the Law to the Facts

33. The position is that the claimant has not suffered a deduction from his wages if he is entitled to be paid what is provided for under either: the old scheme; or the new scheme in its entirety.

34. If the claimant is contractually entitled to continue to be paid bonus/commission based on the old scheme, the claimant has been paid more than he is entitled to receive in each and every month from August 2020 until February 2021. For March 2021 the Tribunal was not shown any evidence which showed that was not the case.

35. If the claimant is contractually entitled to be paid bonus/commission under the terms of the new scheme in its entirety, then the claimant has received the bonus/commission due, as the terms of the new scheme provide for clawback (over the longer period). The terms of the new scheme and the clawback arrangement outlined in it, mean that there has been no deduction actually made from any payment. Even if there had been a deduction, it was either an authorised deduction under the terms of the scheme (R17) or the deduction of an overpayment (under section 14 of the Employment Rights Act 1996).

36. The claimant can only succeed in his claim if he is entitled to bonus/commission payments calculated on the basis outlined in the new scheme, but without the elements of the new scheme which he has not accepted including the clawback. In other words, the claimant can only succeed in his claim if the new scheme partially applies to him. The claimant's submission to the Tribunal can be summarised as being that: he is contractually entitled to remain on his existing terms and conditions and to object to the clawback (which isn't in those terms); but he must be paid under the new scheme without the terms to which he objected.

37. The Tribunal does not find the claimant's submission to be correct. As a matter of contract law, the claimant's argument cannot succeed on the facts of this case. The Tribunal finds that either the claimant: remained employed on a contract which contained the terms of the old scheme; or was employed under a contract which had been varied to include the entire new scheme. In either case, the claimant's claim does not succeed, as there has not been an unlawful deduction from wages. Each month he has been paid more than the amount due under the old scheme. Each month he has been paid the amount due under the entire new scheme.

38. The Tribunal does not find that the claimant's contract was varied to include an obligation on the respondent to make commission/bonus payments calculated under the new scheme, but without including the aspects of the new scheme to which he objected. Such partial acceptance or variation of the contract is not what occurred and would not be legally correct. The claimant was unable to partially accept the variation offered – he either accepted it all, or he did not accept what was offered at all.

39. That resolves the claimant's claims. It is not necessary for the Tribunal to go on and determine which of the two bonus/commission schemes are in fact incorporated into the claimant's contract.

40. However, as evidence was heard and submissions made about that issue, the Tribunal also finds the following:

- a. The Tribunal accepted the claimant's evidence that the original scheme document (R13) was not part of the terms of his contract, as he had not seen it. The claimant was contractually entitled to be paid bonus/commission based on what he had verbally been offered and accepted, which it appears mirrors what is laid out in (most of) that document (R13). However, he cannot have accepted the discretionary caveat included in that document and there was no other evidence that some form of discretion to not pay bonus/commission due was otherwise a term of his contract;
- b. The Tribunal does not find that the claimant's contract was effectively varied by the telephone conversation on 13 July. Even were the Tribunal to accept the evidence of Mr Jones about what was said, the Tribunal does not accept that the claimant could accept the detailed terms of a new commission/bonus scheme based on a brief telephone conversation, without first having seen the document that contained the terms which applied. For the variation to have legal effect, the claimant would have needed to know exactly what it was he was agreeing to,

and as the details had not been sent to him he was not in a position to agree a variation to his contract in that conversation (even if he indicated that he would do so); and

- c. There appears to be no real dispute that from 15 July onwards the claimant objected to elements of the new scheme and therefore he never accepted the new scheme in its entirety.

41. From 15 July, when the claimant was first provided with the terms of the new scheme, there has never been a meeting of minds between the parties which would enable there to be an effective agreed contract variation. Whilst the respondent has chosen to pay the claimant based upon the new scheme, the claimant has continued to object to elements of the new scheme. As confirmed above, the Tribunal does not accept that the claimant can partially accept the new scheme and partially accept that his contract is varied. Accordingly, and as a result of the fact that there has been no acceptance of the new scheme in its entirety as offered to the claimant, the claimant's contract of employment has never been varied to incorporate the new scheme.

42. The Tribunal would add that it is always good practice if varying a contract, for an employer to ask an employee to: sign a document which contains the amended terms; or to confirm in writing (possibly by email) that those amended terms are accepted. Such a process enables an agreed variation to be evidenced. In this case there was no evidence of an agreed variation. The Tribunal would add that it has not been asked to determine any issues in respect of estoppel, as those do not apply to the issues in the claims brought.

43. With regard to the January 2021 pay increase, the Tribunal has not been shown any documentation or contractual term which evidenced that the claimant was entitled to an increase to his bonus/commission payment each year. The terms of the letter of 11 January 2021 (R50) clearly explained that the increase applied to basic salary, something which was further clarified by explaining what the claimant's basic salary for 2021 would be. The Tribunal finds that the increase applied to basic salary only and not bonus/commission. The Tribunal finds that the use of the words "basic salary" distinguished between an increase in the claimant's monthly basic salary payment, and other aspects of remuneration such as bonus or commission.

44. The Tribunal did understand the point made by the claimant, that his terms and conditions document (R6, C4) did appear to potentially include commission within the term "basic rate of pay", as it is included in the same line. However, the Tribunal has no hesitation in finding that the stated increase in basic salary applied to basic salary only, and that this aspect of the terms and conditions document did not mean that the increase outlined in the 11 January letter was converted into being a contractual commitment to also increase commission/bonus by the same amount.

Summary

45. For the reasons explained above, the Tribunal does not find that the respondent has made any unlawful deductions from the claimant's wages. The respondent has paid the claimant as much as, or more than, he was entitled to for each of the relevant months which formed part of the claim. There has been no unlawful deduction from his wages.

Employment Judge Phil Allen

29 March 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

31 March 2021

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