



EMPLOYMENT TRIBUNALS

Claimant:

Mr Kevin Okot-Ojok

v

Respondent:

Polycom (United Kingdom)
Limited (in voluntary liquidation)

Heard at:

Reading

On: 16 January 2020

Before:

Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr K Wilson (counsel)

RESERVED JUDGMENT

1. The respondent did not make an unauthorised deduction from the claimant's salary in respect of commission.
2. The claimant's complaint of unauthorised deductions from wages fails and is dismissed.

REASONS

Claim, parties and evidence

1. The claimant was employed by the respondent from 20 August 2018 to 11 January 2019 as an Inside Sales Account Manager. The respondent is a subsidiary of a US company which develops video, voice and communication technology. The respondent was acquired by Plantronics Limited on 1 April 2019, after the claimant's employment had ended. Polycom (United Kingdom) Limited remains responsible for the claimant's claim and is the correct respondent. Polycom (United Kingdom) Limited entered voluntary liquidation on 15 January 2020.
2. By a claim form presented on 28 February 2019 after a period of ACAS early conciliation from 24 January 2019 to 24 February 2019, the claimant brought a complaint of unauthorised deduction from wages in respect of commission (Annual Target Incentive).

3. The respondent's ET3 was presented on 18 April 2019. The respondent defends the claim.
4. The hearing took place on 16 January 2020. At the hearing I heard evidence from the claimant. The respondent had prepared a hearing bundle with 144 pages. Page references in this judgment are to that bundle.

Issue to be decided

5. At the start of the hearing I confirmed the issue to be decided by me. It was agreed by the parties that I need to decide whether the claimant's commission was properly calculated, or whether any additional commission is owing.

Findings of fact

6. The claimant was employed by the respondent from 20 August 2018 to 11 January 2019 as an Inside Sales Account Manager.

The claimant's terms and conditions

7. The claimant's terms and conditions were set out in an employment agreement dated 8 August 2018 (pages 63 to 79).
8. The claimant's employment agreement included at clause 11 a provision authorising the employer to make deductions from the employee's salary, or from any pay in lieu of notice or any other termination payment in respect of *'any sums which you may owe Polycom'*.
9. Clause 6 of the claimant's employment agreement provided that the claimant would be paid a base salary plus 'Incentive Compensation'. Clause 6.2 read:

"Provided that you are still employed by Polycom in this position and have not served notice to terminate your employment at the date it falls due for payment, and subject to your compliance with this Agreement, Polycom shall pay you an annual targeted commission payment of £9,000 per annum based upon the achievement of your set objectives, and in accordance with the terms of a Polycom plan to be provided. In the event that you are placed on garden leave in accordance with section 10.3 your active participation in the incentive compensation plan will cease from the date you are placed on garden leave."

10. The plan referred to in clause 6.2 was provided to the claimant by an email dated 4 September 2018 headed '2018 Sales Incentive Plan' (page 106). The email attached two documents, the Global Sales Compensation Plan Terms and Conditions (page 82 to 104) and Appendix A, the claimant's Plan Summary 2018 setting out his sales targets and how commission would be calculated for him (page 105).

11. Clause 3.2 of the Global Sales Compensation Plan stated:

“3.2 Incentive Compensation

...Each Plan Participant will be provided with an ‘Annual Target Incentive’ or ‘TI’ compensation amount which will be set forth in the Participant’s Appendix A. The TI is determined by the specifics of the Participant’s Plan, and will be allocated among each quarter within the Plan Period as a guide. The TI compensation amount is the amount of incentive compensation that a Participant could receive under the Plan for the Plan Period if the Participant is credited with achieving 100% of his/her Sales Quota/Goals. Incentive compensation for which a Plan Participant may be eligible to receive and, ultimately, earn under this Plan may consist of any or all of the following, to the extent set forth in the Participant’s Appendix A.” (emphasis included in the original)

12. The plan then listed a number of types of incentive compensation, including at clause 3.2.a ‘Commissions’. This clause provided (as far as relevant):

“Participants who are eligible for commissions will be informed in his/her Appendix A of the specific terms and conditions of any commission opportunities offered, and any specific time period(s) within the Plan Period applicable to those opportunities. Commissions may be based on sales transactions credited to the Participant, calculated (i) at the base appropriate commission rates based on progress toward annual quota attainment and (ii) accelerated commission rates for attainment in excess of annual quota, as set forth in the Participant’s Appendix A....

As described in Section 5.1 below, the commissions on sales transactions are calculated and payable to the Participant in advance of being earned, in anticipation that they will be later earned. Commissions are paid on a monthly basis as an ‘advance’, but are not earned until Polycom has received payment from the customers.”

13. The parties agreed that the claimant’s complaint concerns base commission only, not accelerated commission, as accelerated commission was only payable after the probation period, and the claimant did not complete his probation period.
14. The Sales Incentive Scheme also provided for Non-Recoverable Draws. This was a way of ensuring that new recruits received base level commission in the early months of their employment. Clause 3.4 provided:

“A Non-Recoverable draw is a set amount that is paid to a Participant over a defined period in order to provide the Participant with a steady income stream while the Participant is developing a pipeline of sales opportunities in a new role. Accordingly, Non-Recoverable draws are

offered (1) to newly-hired Participants...Non-Recoverable draws are typically calculated and paid at eighty percent (80%) of the Participant's target incentive compensation for each applicable month."

15. The typical Non-Recoverable draw period for new hires was said to be three months. Paragraph 3.4 set out details about how the Non-Recoverable draw payments are dealt with after the Non-Recoverable draw period. It provided:

"All Non-Recoverable draw payments will be reconciled after the end of the Non-Recoverable draw period against the total commission advances otherwise payable to the Participant based on his/her Credit for that period.

...If the total commission advances otherwise payable for that period exceed the total Non-Recoverable draws received, the Participant will receive an additional payment so that the total received for the Non-Recoverable period (Non-Recoverable draws plus additional payment) equals the total commissions advances otherwise payable for the Non-Recoverable draw period."

16. If the total commission advances due at the end of the Non-Recoverable draw period were less than the total Non-Recoverable draws received, the employee would not have to pay back the Non-Recoverable draws, but the employee would not be credited for any of their sales achieved during that period.

17. 'Credit' means an employee's sales which count towards calculation of commission. Credit was defined in clause 4 as, '*Credit towards quota achievement and for incentive compensation purposes*'.

18. Clause 5 also dealt with commission payments, and said at clause 5.3:

"Commissions will be calculated monthly, as part of the closing of the Company's financials for the month, based on all sales-related acts and events that occurred during that month triggering Credit to Participants under the Plan. Commission advances will be paid in the appropriate payroll run, approximately one month after the close of the applicable compensation period."

19. The claimant's Appendix A set out the specifics of the commission scheme for him. It provided that his Annual Target Incentive (that is, annual commission if the claimant met his target) was £9,000. This was pro-rated for 2018 to £3,000, to reflect the fact that the claimant had joined on 20 August 2018 and so the commission scheme only applied to him from September 2018, for the remaining 4 months of the year.

20. Appendix A also showed that the claimant's annual sales target was \$380,000, made up of a target of \$90,000 for quarter 3 (Q3) (September) and \$290,000 for quarter 4 (Q4) (October, November and December).

(The sales target was expressed as having two components, but there is no issue arising from this.)

21. The parties accepted that the commission scheme was uncapped, and that if the claimant achieved sales above his target, he would receive more commission than £3,000.
22. It was agreed that the claimant's Non-Recoverable draw (ie base level commission) was £600 per month. This would be payable for the first three months of the claimant's employment unless he earned commission in excess of this.
23. The email which was sent to the claimant attaching the Sales Incentive Plan and Appendix asked the claimant to reply by clicking on a voting button marked 'approve'. The email said that by voting 'approve' the claimant acknowledged receipt of the plan documents, accepted the terms of the compensation scheme and authorised the recovery of any and all overpayments.
24. The voting buttons on the email sent to the claimant did not work and he could not access the attachments. He raised this with his manager and a meeting was held with the claimant and two managers to discuss the Sales Incentive Plan, including his specific targets (page 105C). On 2 October 2018, after the meeting, the claimant sent an email replying to his manager saying, 'Please take this as confirmation that I accept the proposed plan.' (page 106). I find that by sending this email, the claimant accepted the terms of the Sales Incentive Plan and Appendix A and authorised the recovery of overpayments as set out in the email to him.

The claimant's sales and earnings in September 2018

25. The claimant was issued a Sales Compensation Statement showing his sales and earnings in September 2018 (page 121). The statement is a completed template, and sets out a 'Year to Date Quota' and 'Annual Quota', as well as the figures for each quarter.
26. The claimant's sales for September 2018 (Q3) were \$45,224.
27. The claimant's sales for September 2018 were calculated as giving rise to commission of £304. As this was less than the base level commission (Non-Recoverable draw), he was entitled to receive the Non-Recoverable draw of £600 for September 2018, payable on 28 October 2018.

The claimant's sales and earnings in October 2018

28. The claimant was issued a Sales Compensation Statement showing his sales and earnings in October 2018 (page 123).
29. The claimant's sales for October 2018 (the first month of Q4) were \$21,414.

30. The claimant's sales for October 2018 would give rise to commission of £447. As this was less than the base level commission (Non-Recoverable draw) of £600, he was entitled to the Non-Recoverable draw of £600 for October 2018, payable on 28 November 2018.

The claimant's sales and earnings in November 2018

31. The claimant was issued a Sales Compensation Statement showing his sales and earnings in November 2018 (page 125).
32. The claimant's sales for October and November 2018 (the first two months of Q4) were \$233,982.
33. The claimant's sales for November 2018 were calculated as giving rise to commission of £2,204. From this figure, the respondent deducted the Non-Recoverable payments made to the claimant in September and October 2018 (totaling £1,200), giving an entitlement to commission in November of £1,004. As this was more than the Non-Recoverable draw, this was the commission payable to the claimant. He was paid commission of £1,004 for November 2018, payable on 28 December 2018.

The claimant's sales and earnings in December 2018

34. There was no Sales Compensation Statement available for the claimant for December 2018. The respondent produced a document showing the claimant's total sales and commission earnings for 2018 (page 127).
35. The claimant's sales for Q3 (September 2018) were \$45,224. This was 50.27% of his target of \$90,000 for Q3. The claimant's total sales for Q4 (October, November and December 2018) were \$498,657. This was 171.95% of his target of \$290,000 for Q4.
36. In total for 2018 the claimant's sales were \$543,901. This was 143.13% of his annual sales target for 2018 (ie Q3 and Q4) of \$380,000.
37. The claimant's total commission due for 2018 was calculated by the respondent as £4,294. From this were deducted the commission payments he had already received, which in total were £2,204 (£600 for September, £600 for October and £1,004 for November).
38. The respondent said this gave a total commission payment for the claimant for December 2018 and for the 2018 year end of £2,090.

The overpayment in January 2019

39. The claimant left his employment on 11 January 2019. At the hearing before me the claimant said that he had had a week's notice period after 11 January 2019. However, the claimant said on his ET1 that 11 January 2019 was the date his employment ended. His payslip for January 2019 included 'pay in lieu', and the contract of employment included a power to

pay in lieu of notice. I find that the claimant was paid in lieu of notice and that the claimant's last day of employment was 11 January 2019.

40. In the claimant's pay for January 2019 he was paid commission of £750 (page 142A). This was equivalent to a commission advance for one month (the first month of the 2019 commission scheme) assuming 100% achievement towards the claimant's Annual Target Incentive of £9,000.
41. The respondent considered that the claimant was overpaid for commission in January 2019, as he was paid a full month's commission payment, but he only worked to 11 January 2019. This was an overpayment of 20 days. The respondent calculated the daily commission for January as £750/31 and the overpayment as $£750/31 \times 20 = £483.87$.

The claimant's final commission payment

42. The claimant was paid his outstanding commission for 2018 in February 2019. The sum of £483.87 was deducted from the total commission due of £2,090, giving a payment to the claimant in February 2019 of £1,605.68 (the difference in the sum for pence appears to arise from a rounding up of the commission payment).

The law

Deductions from wages

43. Section 13 of the Employment Rights Act 1996 provides:
 - "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 term 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; ...*
 - 3) *Where the total amount of wages paid on any occasion by the 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."*
44. Section 14 of the Employment Rights Act 1996 sets out a number of 'excepted payments' to which section 13 does not apply. These include deductions from wages where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages.

45. The definition of wages for the purpose of section 13 includes commission referable to employment, whether payable under the contract of employment or otherwise (section 27(1)(a) of the Employment Rights Act 1996).
46. When determining whether commission is properly payable to an employee for the purposes of section 13 the tribunal must consider carefully the wording of any documents setting out the terms of the scheme.
47. The Apportionment Act 1870 provides that payments accrue day by day at an equal rate. In Hartley and others v King Edward VI College [2017] IRLR 763, the Supreme Court confirmed that when calculating a daily pay rate from an annual salary, that act applies and that pay therefore accrues at a rate of 1/365 per day (ie the calculation is based on calendar days, not just working days). A contract of employment can provide for accrual on a different basis.

Conclusions

48. I have applied these legal principles to my findings of fact in relation to the issue for determination to reach my conclusions.
49. The issue for determination was whether the claimant's commission payments had been properly calculated. The key areas of dispute between the parties were:
 - i) Whether commission was based on annual or quarterly targets, and whether the claimant was entitled in December 2018 to commission on his sales in Q4 alone, which were 171.95% of his Q4 target; and
 - ii) Whether the respondent was entitled to deduct commission earned in previous months when calculating the claimant's commission due in December 2018.

Annual or quarterly scheme?

50. In relation to the claimant's entitlement to commission in December 2018, the claimant said that in previous months the calculation of his commission had been done by reference to the targets for the relevant quarter, not the annual figure. I have to consider whether the claimant was entitled to commission on his sales against target each quarter or on his sales against his annual target.
51. The Sales Incentive Plan referred to an Annual Target Incentive. Clause 3.2 of the Plan included the words 'Annual Target Incentive' in bold. The same clause referred to the allocation of target to quarters within the Plan Period 'as a guide'. The claimant's Sales Compensation Statements included the annual target ('quota'), as well as 'Year to Date Quota' and the figures for each quarter.

52. Clause 3.2.a says that commissions may be credited to the employee based on sales transactions and on "progress toward annual quota attainment" (emphasis added).
53. Clause 5.3 refers to monthly commission payments as 'Commission advances'.
54. The claimant's Appendix A included details of the target broken down into quarters, but has in its heading 'Annual Target Incentive'.
55. I conclude from the wording used in the documents that the Sales Incentive Plan was an annual target scheme, not a series of quarterly targets. The scheme makes clear that the quotas for each quarter were a guide, to show progress towards the annual target. The target to be met was the annual target.
56. The fact that the scheme was an annual one meant that final assessment of performance and entitlement under the scheme could only be made at the end of the year. The commission payments to the claimant in the months before December were 'advances', calculated by reference to his progress towards the annual target. The monthly payments to the claimant before December were provisional payments, with firm entitlement to be confirmed at the year-end in December.
57. For this reason, the calculation of commission entitlement in December was different to the way in which commission was calculated in earlier months. In December a final assessment of sales performance for all months worked in 2018 was carried out, whereas in the earlier months, there was a provisional assessment for each month, for each quarter and for the year to date, and the payments made were advances towards the final entitlement.
58. I conclude therefore that the respondent's calculation of the claimant's entitlement to commission in December 2018 (page 127) is correct. By the end of December 2018, the claimant had achieved sales of 143.13% of his Annual Target Incentive (ie 143.13% of \$380,000). He had achieved a higher percentage (171.95%) of his \$290,000 Q4 target, but the annual calculation had the target and sales in Q3 taken into account as well. The claimant had not met his sales target in Q3, and, when this was factored in, the claimant's overall sales performance for the year was lower than his sales performance for Q4.
59. I conclude that the claimant's overall entitlement under the annual scheme for 2018 was £4,294 which is 143.13% of his pro-rated Annual Target Incentive of £3,000.

Treatment of Non-Recoverable draw payments

60. Next, I have considered the way in which the scheme treated commission earned earlier in the year, that is the payments received before the final assessment in December 2018 of entitlement against the annual target. I have first considered the Non-Recoverable draw payments.

61. In the first two full months of his employment, September and October 2018, the claimant received Non-Recoverable draw payments of £600 per month. These payments were made because the claimant's entitlement to commission in those months calculated by reference to sales would have been less than £600, and the scheme guaranteed a payment of £600 in the first three months of employment.
62. The scheme provided in clause 3.4 for Non-Recoverable draw payments to be 'reconciled' at the end of the three month period. If (as happened in the claimant's case) the total commission advance due at the end of the Non-Recoverable draw period was more than the Non-Recoverable draws received, then the scheme provided for the employee to receive a payment which, together with the Non-Recoverable draws, was equal to the total commission advance due. This was calculated by deducting the Non-Recoverable draws received from the commission advance due at the end of the Non-Recoverable draw period.
63. In the claimant's case, the commission advance to due him at the end of November 2018 (the end of the Non-Recoverable draw period) was £2,204. The scheme provided for the Non-Recoverable draws he was paid in September and October (£1,200) to be deducted from his November 2018 commission advance, giving a payment to the claimant at the end of November of £1,004.
64. I have concluded that the deduction of the Non-Recoverable draw payments from the claimant's November 2018 commission advance was in accordance with the terms of the scheme.

Treatment of previous commission payments at year end

65. I have next considered the treatment of previous commission payments in the calculation of the claimant's entitlement at year end.
66. The claimant's final and total entitlement to commission for the year 2018 was calculated as £4,294. The respondent then deducted from this figure the payments the claimant had already received. These totalled £2,204.
67. The claimant said that this meant that his Non-Recoverable draw payments were deducted twice, as they had already been deducted in November.
68. In the claimant's case, there were two 'reconciliations'. The first was at the end of the Non-Recoverable draw period, to establish whether the claimant had earned more commission than he had so far received, and whether his Credits earned during the Non-Recoverable draw period would be counted towards his overall performance.
69. This first reconciliation took place at the end of November 2018. As set out above, the payments received by the claimant for September and October 2018 were 'deducted' from the commission which would otherwise have

been due to the claimant in November 2018 because the claimant had earned in excess of them, and that was what the scheme provided should happen. It was a taking into account of the base level commission which had been advanced to the claimant for the first two months.

70. There was then another reconciliation, at the end of December. This was the final assessment of the claimant's entitlement under the annual scheme. At this point, there was a calculation of the claimant's total entitlement for the year, based on his total sales for the year. The figure of £4,294 represented the commission due to the claimant from all of his sales from September to December 2018.
71. But the claimant had already received 'commission advances' based on his sales in 2018. He had received payments of £600 (September), £600 (October) and £1,004 (November). In total, he had already received £2,204. These payments had been advances, based on the claimant's progress towards his annual target. They had to be taken into account when calculating the amount due to the claimant in December 2018.
72. The Non-Recoverable draw payments were not deducted twice (although they were taken into account at two separate points). The £4,294 calculated in December 2018 was based on all of the claimant's sales for the whole 4 month period, and he had already received advance commission for some of those sales. If the claimant had received the full payment of £4,294 in December 2018, he would have been paid twice in respect of the sales he achieved in the period September to November 2018.
73. For these reasons, I have concluded that it was correct for the respondent to deduct the commission advances of £2,204 which the claimant received in September to November from the total amount of £4,294 which the claimant earned in commission for 2018, giving a balance due to the claimant in December of £2,090.

Overpayment in January 2019

74. The claimant received a payment of £750 for commission in January 2019. This was a monthly advance based on an assumed sales performance of 100% of the year to date target (£750 is annual target of £9,000 divided by 12 months).
75. The claimant was not employed by the respondent for the whole month of January. I have found that his employment ended on 11 January 2019 and that he was paid in lieu of his week's notice. He had no entitlement to commission as part of that pay in lieu of notice because clause 6.2 of the claimant's employment agreement provided that commission was only payable if the claimant was still employed by the respondent.
76. I conclude therefore that the respondent is correct that the claimant was overpaid commission in January 2019, as he was paid a commission

advance in respect of 31 days in January 2019 when he only worked 11 days in January 2019.

77. I conclude that (in the absence of any contractual provision to the contrary) the claimant's entitlement to commission in January 2019 accrued at an equal rate day by day. I conclude that the respondent's calculation that the claimant was overpaid £483.87 (for 20 days) is correct.
78. The respondent was entitled to make a deduction from the claimant's final salary in respect of the overpayment. The deduction was authorised by clause 11 of the claimant's employment agreement, which was a relevant provision of the claimant's contract, and by the email sent by the claimant on 2 October 2018 which was a written agreement for the deduction of overpayments, and by section 14 of the Employment Rights Act 1996 which excludes deductions to recover overpayments from section 13.
79. When the overpayment was deducted from the amount of commission owing to the claimant at the end of December, the payment due to him was £1,605.68. This was the sum paid to the claimant by the respondent in February 2019.
80. In summary, I conclude that the commission payments paid to the claimant for 2018 and 2019 were the amounts properly payable to him and there has been no unauthorised deduction of his commission payments by the respondent.
81. For these reasons, the claimant's complaint of unauthorised deduction from wages fails and is dismissed.
82. I apologise to the parties for the delay in this reserved judgment; this was contributed to by the change in working arrangements required as a result of the coronavirus measures.

Employment Judge Hawksworth

Date: 14 April 2020

Sent to the parties on: 22 April 2020

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For the Tribunals Office

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