



EMPLOYMENT TRIBUNALS

Claimants: Mr Muhammad Bilal Rajput
Mr Thishan Akmeemana

Respondent: Sky UK Ltd

By CVP

Before: Employment Judge Martin

Representation

Claimant: Mr P Lockley – Counsel

Respondent: Ms C Davis QC - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim in relation to the commission scheme has no reasonable prospect of success and is dismissed.
2. The Respondent's application for a strike out or deposit order in relation to the Claimants other claims is dismissed.

RESERVED REASONS

1. This hearing was listed to consider whether the Claimants claims have no reasonable prospect of success for the purposes of a strike out application or little reasonable prospect of success for the purposes of its application of a deposit order. I apologise to all for the delay in this decision this has been because of the weight of judicial work and the limited time available to consider and determine the applications.
2. The Claimant's claims are of:
 - (a) Unlawful deductions from wages contrary to s.13 Employment Rights Act 16 ("ERA"), in relation to:

- i. Sales commission and
 - ii. (In some instances) Store Manager Allowance (“SMA”);
- (b) Failure to inform and consult contrary to s.188 Trade Union and Labour Relations Act 1992 (“TULR(C)A”); and
- (c) Detriment on grounds related to union membership or activities, contrary to s.146(1) TULR(C)A.
3. The Lead Claimants are now Mr Muhammad Bilal Rajput (case number 2304368/2018) and Mr Thishan Akmeemana (case number 3334946/2018). Documents relating to their employment are included in the 950-page bundle.
4. I did not hear any live evidence. I had the bundle of documents and witness statements from the lead Claimants and Mr Jan for the Claimants and from Ms Amy Deas, HR Business Partner; Mr David Holmes, Director of Retail Operations; Mr John Johnston, former Head of Retail Sales; Ms Julia McVicar, Area Manager; all of which I considered carefully. For the purposes of this hearing, I have taken the Claimant’s statements at their highest. I have not necessarily addressed all parts of the evidence I considered. This judgment is limited to the matters that are necessary to explain my decision and relevant to the issues before me.

The law

5. Section 13 of the Employment Rights Act 1996 states an employer shall not make a deduction from wages of a worker employed by him unless – 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.
6. For the purposes of this preliminary hearing, I am taking the Claimants case and statements at their highest on the basis that their evidence is not challenged by the Respondent.

Unauthorised deductions from wages

7. There are two unlawful deductions from wages claims before the Tribunal:
- a. All Claimants claim that the replacement, with effect from 26 October 2018, of the Retail Commission Scheme (known internally as ‘Bounty’) with a new retail commission scheme gave rise to monthly unlawful deductions from wages for the period February 2019 to date. Each Claimant alleges that his/her monthly commission was lower in each month from February 2019 onwards than it would have been had Bounty remained in existence (the Bounty claim).
 - b. Those Claimants who had the job title of Store Manager prior to 26 October 2018 claim that the removal of the monthly Store Manager Allowance with effect from 26 October 2018 amounted to an unlawful deduction from wages (the SMA claim).

The duty to consult

8. Section 146(1)(ba) TULRCA provides that:

“A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of preventing or deterring him from making use of any trade union services at an appropriate time, or penalising him for doing so..”

Detriment on grounds related to trade union membership or activities

9. Section 146(1) of the Trade Union & Labour Relations (Consolidation) Act 1992 provides:

“A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of preventing or deterring him from making use of any trade union services at an appropriate time, or penalising him for doing so..”

The Bounty Claim

10. All Claimants were employed under a contract of employment. The Claimants accept that the contractual documents and the policies specify that commission shames were non-contractual. However, for completeness I am setting out the terms below.

11. There was a copy of the written statement of terms and conditions for Mr Thishan Akmeemana and Mr Muhammad Rajput. Both written statements and terms of employment contain the following:

“You will be eligible to receive commission payable on sales once confirmation of installation has been received. The terms of the commission scheme may be varied at any time at the Company's discretion and is non contractual. Details of the current commission scheme are available from the Area Manager”.

12. Version 2 of the commission policy dated 7 May 2015 states:

“This Commission scheme is not contractual and does not form part of an Adviser's contract of employment”.

This was applicable to all versions of the commission schemes. Over the years the commission scheme was changed. Each of the various commission schemes stated they were non-contractual. There were no complaints from any of the Claimants about the changes to the commission scheme until the changes made in 2018.

13. The scheme in place immediately before this was called the ‘Bounty Scheme’. This was in force from 27 July 2012. I accept the Respondent's position that since the Bounty Scheme had been introduced there were some 143 changes made which made changes to products, accelerators, and points. The scheme was a points-based scheme with stores having different gradings (A-C) depending on matters including footfall, demographics etc. The lower grade stores received a percentage uplift on their commission payments whilst the highest-grade stores did not receive any uplift. None of those changes caused any criticism from the Claimants. Whilst this scheme was intended to compensate those staff working in lower grade stores and who had less chance to earn commission, in practice this did not work and staff

in lower grade stores ended up potentially earning more than staff in higher grade stores. There is an email in the bundle from Mr Akmeemana on 17 June 2017 in which he confirms this is the case.

14. This led to changes in 2018 to address the unintended consequences of the Bounty Scheme. This included altering how many staff there were in different stores, ensuring that busy stores had more staff and quieter stores had less staff. The aim was to make all staff equally able to make sales and receive commission.
15. The Respondent consulted collectively with its sales staff before introducing the new scheme. Its view was that it was not required to consult collectively but that it wanted to do this. I was taken to the minutes of the collective consultation process on 17 August 2018 where it is recorded: ***“The commission scheme is non-contractual, meaning that we don’t have any legal obligation to consult with you but we have taken the decision to do so”***. The staff representatives did not make any comment on this although they did comment on other matters raised in the consultation meeting. From this I take it that they did not disagree that the scheme was non-contractual. There was no argument to the contrary including any argument that the terms of the commission scheme had become contractual through custom and practice.
16. I have read in full the other minutes in the bundle and note that at the consultation meetings held on 29 August 2018 and is recorded being said by a staff representative: ***“Our concern is that commission is non-contractual”***. Again there was no suggestion that the terms of the commission scheme had become contractual through custom and practice.
17. On 5 September 2018 the consultation minutes note from the Respondent’s side, ***“Consultation is exceptionally useful but remember that reward is not contractual.”*** This was also confirmed in an email from the Respondent to the representatives dated 06 September 2018 which said that the consultation process had ended. Again there was no counter argument that terms of the commission scheme had become contractual through custom and practice.
18. I find that the evidence shows that there is legal entitlement to a specific commission scheme, although there was the entitlement to a commission scheme. I accept the Claimant’s argument that commission payments are an integral part of the pay structure, but this does not change my view.
19. I went on to consider whether the Claimants argument that the commission scheme was contractual on any other basis had a reasonable prospect of success or little reasonable prospect of success. I can see from the history of Tribunal proceedings that various attempts have been made to get clarification from the Claimants about the legal basis on which they argue that the commission scheme was contractual. At the first preliminary hearing on 14 May 2019 the Claimants were asked to clarify this. This led to the following communications from the Claimants.

25 June 2019: “Unlawful deduction from pay: commission/bonus payment – all 32 claimants. There is ample evidence that members were paid significant commission/bonus as a regular part of their pay for years. The drop in pay following the cuts of 26.10.18 was enormous, sometimes over 50%. We therefore do not accept Sky’s view this is non-contractual.”

5 July 2019: “...the only documents are original contracts which said that commission bonus would be paid, but Sky said they were non-contractual...Commission/bonus has been a major part of all Claimants’ pay over many years. Without this they would not have taken/stayed in the job. Therefore Sky’s view that this is non-contractual is disputed...”

20. Further attempts were made to clarify the Claimant's arguments and very specific orders were made at the preliminary hearing requesting clarification of this aspect of the Claimants claims. In submissions the Claimants said this:

“The Claimants argue that the discretion to vary the scheme was subject to such a limitation, implied by custom and practice: namely that any variation would be within certain boundaries, specifically that the Bounty scheme could be varied but not abolished. The existence and extent of such a term is a matter on which the Tribunal will need to hear evidence: the Cs’ case is not that the term is to be found in the documents, rather that it arises from custom and practice: the duration of the Bounty scheme and the fundamental effect it had on their overall remuneration package.” It was submitted that this was a matter where evidence would need to be heard.

21. I considered whether this argument had any reasonable prospect or little reasonable prospect of success. The Claimants say that the Bounty scheme by custom and practice contractual. However, as noted above there were many different commission schemes over the years and even within a particular scheme there were many changes. In these circumstances I do not consider that the Claimant have a reasonable prospect of succeeding in their argument that the Bounty scheme was implied as a contractual term based on custom and practice. The custom and practice were to change the commission schemes or to alter the commission schemes as business needs dictated. The contractual right is to being able to participate in a commission scheme but not to a specific commission scheme.

22. I accept the submission put forward by the Respondent that as a matter of law, a discretionary benefit will not become an implied term merely because it has been paid for a number of years: ***Quinn v Calder Industrial Materials Ltd (UKEAT/302/95)*** and that as a matter of law, to constitute a binding implied term, a custom or practice must be ***“reasonable, notorious and certain”*** (***Bond v CAV Co [1983] IRLR 36***) and followed ***“because there is a sense of legal obligation to do so”*** (***Solelectron Scotland Ltd v Roper [2004] IRLR 4***).

23. In any event the Claimants are not able to quantify their claims. The Claimants says they can not quantify their claims and suggest that the Respondent would be able to. The Respondent says it is impossible. I have considered the submissions made by both parties and find that even if the Claimants could succeed in their argument that the Bounty scheme was contractual, they would fail as they have no reasonable prospect of being able to quantify their claims. I am mindful of the case law set out in the Respondent's submissions which whilst not set out here, I have considered carefully. The variable nature of commission is driven by sales which can vary from month to month for many reasons (including seasonality, the state of the economy, etc) means that a straight comparative exercise of comparing what the Claimants received under the Bounty Scheme and what they received after is not appropriate. There is also the additional complication of the Covid-19 pandemic and its effect on sales which must be factored in.

24. I have therefore struck out this part of the Claimants claims as it has no reasonable prospect of success.

The SMA Claim

25. The Store Managers received a SMA which was paid monthly. They say that this was a contractual amount. The role of Store Manager was removed, and the allowance was stopped on 25 October 2018. After this date no Claimant carried out the work of a Store Manager and this position was removed. I have been referred to the bundle and can see that when moved to the position of Store Manager, all Claimants were notified that his/her new job title would be Store Manager, he/she

would be entitled to a Store Manager allowance of £2860 per annum and all other terms and conditions would remain unchanged.

26. The Claimants submit: ***“properly understood, both the duties of Store Manager and the allowance in return for performing them were part of the contractual bargain between the Cs and R. As the Cs’ new role and duties have been imposed on them by way of an unaccepted breach of contract, the contractual position continues to be that R is obliged to offer, and the Cs to perform, the role of Store Manager. It follows that SMA remains properly payable to the Cs, every month, regardless of whether they have in fact continued to perform the work. R is not entitled to remove the work unilaterally, and then assert that the corresponding wages are no longer payable.”***
27. The Respondent submits that as the Claimants did not undertake any of the work associated with a Store Manager from 26 October 2018, they are not entitled to the payment. It also submits that the Claimants have continued to work and accept wages since this date and that the grievances did not amount to a state of the Claimants continuing to work under protest and that as such, they have accepted any breach that there may have been. The Claimants say that they have continued to work under protest. There is also an issue as to whether the payment of an SMA is contractual.
28. I find that whether the Claimants worked under protest and the contractual nature of the SMA payments are matters that should be examined in evidence at a full hearing and I can not say that there is no or little reasonable prospect of success. Therefore, I dismiss the Respondent’s applications for both a deposit order and a strike out in relation to the SMA claims.

Failure to consult on redundancy

29. There is a dispute between the parties as to whether the removal of the Store Manager role resulted in a redundancy situation. The Claimants argue that ***“While the question falls to be considered objectively, on a strike-out application the Tribunal must take the Cs’ evidence at its highest – and that evidence is that the proposed changes were so fundamental as to amount to dismissal and re-engagement. Certainly, without hearing all the evidence on an issue of fact and degree, the Tribunal cannot safely conclude that the Cs have no reasonable prospect of establishing that the Cs are wrong about the nature of the changes”***.
30. I have already noted above that there were several consultation meetings, with staff representatives able to put forward matters on behalf of the staff. There was also individual consultation.
31. Section 188(2) TULR(C)A stipulates minimum content for the consultation where it is required by s.188(1):
- (2) The consultation shall include consultation about ways of—***
- (a) avoiding the dismissals,***
(b) reducing the numbers of employees to be dismissed, and
(c) mitigating the consequences of the dismissals,
- and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.***
32. The purpose of consultation in a redundancy situation is for meaningful discussions to be had with a view to reaching agreement but not necessarily that agreement is reached. If it is found that there was a redundancy situation in relation to the Store Managers, I consider that there is some prospect of the Claimants succeeding in their argument that in terms of avoiding redundancies the consultation

was not sufficient. The question is whether there was a redundancy situation by the removal of the Store Manager role. I accept the Claimant's submission that as the Respondent did not consider this to be a redundancy situation, they did not approach it in this way and hence did not discharge their obligations for collective consultation as being a valid argument to pursue.

33. Looking at the consultation minutes, I can see some reference to redundancy with the Respondent disagreeing that it was a redundancy situation, and several references in the various grievances that were raised.
34. I can not say that the Claimants have little or no reasonable prospects of success without hearing evidence. Both parties have put forward arguments in submissions which need to be considered with evidence. Therefore, the Respondent's application to strike out this part of the Claimants claims is dismissed as is the Respondent's application for a deposit order.

Detriment on Grounds Related to Trade Union Membership or Activities

35. This part of the Claimants claim relates to the decision made by the Respondent to deal with their grievances as part of the collective process rather than by way of the use of the grievance policy. The list of issues states:

“Did the Respondent, by handling the Claimants’ grievances under its individual consultation procedure, as opposed to its grievance procedure, subject the Claimants to a detriment for the sole or main purpose of (i) penalising them for being members of an independent trade union; and/or (ii) preventing them from making use of trade union services at an appropriate time?”

36. The Respondent's position is that it did this because the issues all related to the RGP 2020 proposals that had been covered in the collective consultation process and that it saw no reason for dealing with the issues under an entirely separate process which would have caused substantial delay and duplication of effort.

37. The Respondent submits that:

- a) none of the Claimants stated at any time that she/he wished for his/her issue to be dealt with under the formal grievance procedure because such procedure would have enabled him/her to be accompanied to a meeting by a trade union representative
- b) none of the Claimants asked to be accompanied to an individual consultation meeting, whether by a trade union representative or anyone else, and
- c) none of the Claimants either stated that she/he considered that the Respondent was insisting on dealing with his/her concerns via the individual consultation process rather than the grievance process in order to prevent him/her being accompanied at a meeting by his/her trade union representative or identified any other detriment to which she/he was being subjected on grounds of trade union membership or activities.

38. I note these submissions however do not think these factors are determinative of this claim. I accept the Claimants submission that:

“The Tribunal cannot resolve this clash of evidence on a summary basis. It will need to hear the evidence of both Cs and Rs’ witnesses and draw appropriate inferences as to reason for the treatment about which the Cs complain. The Cs’ assertion that R wanted to avoid proper scrutiny and challenge is not inherently far-fetched, and the Tribunal is respectfully invited to conclude that on the material before it, it has reasonable

prospects of success.”

39. I find that I can not say that the Claimants have little, or no reasonable prospect of success and the Respondent's application is dismissed in relation to this.

Employment Judge Martin

Date: 4 August 2021