EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr V Kielty	**v**	Elephant's Don't Forget Limited

Heard at: Bury St Edmunds (by CVP) **On:** 19 March 2021

Before: Employment Judge KJ Palmer

Appearances
For the Claimant: Mr S McHugh (Counsel).
For the Respondent: Mr D Gray (Respondent CFO).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

It is the Judgment of this Tribunal that the claimant's claim for unlawful deduction of wages succeeds. A declaration to this effect is made. The respondent is ordered to pay to the claimant the sum of £8,760 to be paid without deductions.

REASONS

Background

1. The claimant was employed by the respondents from 9 October 2017 to the 25 September 2018 when he was dismissed with notice.

2. The claimant's claim is narrow. He pursues an unlawful deduction from two wages claim under s.13 of the Employment Rights Act 1996 for the non-payment of a contractual bonus he says he was entitled to in the sum of £8,760.

3. I had before me by CVP Counsel for the claimant and Mr Gray for the respondents. I heard live evidence via CVP link from the claimant, from Mr Adrian Harvey who is CEO of the respondent and from Mr Dan Gray who is CFO of the respondent.

4. The respondents are a specialised software company that provide software solutions to businesses. The software solution is called "Clever Nelly". It is a software package designed to assist employees in client organisations to recall and continue to implement training in various areas which they have undergone. The software reminds them to constantly engage with the knowledge they have gleaned from the training.

5. I had before me a bundle of documents, written submissions from Counsel and various sporadic witness statements from the respondents. Mr Harvey had produced different witness statements for each transaction in respect of which the claimant claims commission.

6. A mish mash of additional documents was also handed up, I marked those R2.

7. Significantly this matter came before EJ Laidler for a Full Merits Hearing on 4 October 2019. However it was not possible for EJ Laidler to proceed but EJ Laidler produced a very helpful and detailed summary of the case management hearing which took place instead of the Full Merits Hearing.

8. EJ Laidler isolated the issue in question which was the failure of the respondents to pay commission under the terms of a written contract. She sets out in that summary much of the law relating to the capricious or perverse exercise of a discretion not to pay an employee a contractual bonus. She made various directions one of which was that the respondents do produce by way of disclosure evidence to support their assertions that they were not capricious or perverse in exercising a discretion not to pay the claimant a bonus.

The claimant's written contract of employment

9. The claimant entered into a written contract of employment and there are various key clauses within it which are central to this case.

10. Paragraph 7.4 states:

> "Commissions payable shall at all times be at the sole discretion of the Company."

11. Paragraph 7.3 refers the reader to Schedule 1 appended to the contract. Schedule 1 sets out the commission scheme in place for the relevant period of the claimant's claims. The schedule sets out how commission or bonus payments are calculated:

> "an employee shall receive a commission equal to 20% of license fee income and set up fee income (Sales) up to the sales target for this period of £100,000. For sales achieved in excess of this target, employees shall receive a commission equal to 10% of sales."

12. Schedule 1 (paragraph 2) of the contract sets out qualifying criteria for the employee's payment entitlement once any commission has been physically earned:

> "The employee must be employed without having served notice of termination, on the last day of the financial year or quarter, as appropriate to be eligible for commission payment."

13. The claimant was employed to sell the software Clever Nelly to customers. Once a sale had been achieved the claimant would raise a commission claim form. On the basis of that commission is paid.

14. It is the respondent's case that it is not that simple and prior to commission being payable there has to be further evidence of work to help to implement any contracts secured with a customer rather than simply having secured the same. Implementation involves working with individuals at the customer to assist in the full implementation of the software. These individuals are referred to as stakeholders.

15. It is the respondent's case that the claimant failed to assist in this implementation and that his performance generally was extremely poor and that is why he was dismissed on the 25 September 2018. They say this poor performance entitles them to exercise their discretion and not pay commission or bonus which would ordinarily be due and payable in respect of three deals or contracts secured by the claimant with clients.

16. At Tribunal before me Mr Gray on behalf of the respondents appeared to rely solely on the argument that under 7.4 the company has a sole discretion to pay commission or not. In the ET3 however the respondents also raised the argument that they could rely on Schedule 1 paragraph 2 which says that the employee must be employed without having served notice of termination on the last day of the financial year or quarter to be eligible.

17. I shall deal with both of these issues in due course.

Findings of Fact

18. The claimant was employed between 9 October 2017 and 24 October 2018.

19. The reason given by the respondents for the claimant's dismissal is gross misconduct. The claimant says that the dismissal was simply a fabricated dismissal to attempt to deprive him of his bonus which he was due.

20. The three deals or contracts secured by the claimant which relate to the commission claimed are described as the "Irish Life" deal, "Al Ryan" deal and "Welsh Development Bank" deal. All of these deals were secured prior to the claimant's departure albeit that the respondents argue that they were not implemented until after his departure.

21. In the documents before me all three deals are shown to have been effected by the claimant and in respect of which he raised commission claims. This is despite the fact that the respondents seem to argue that certainly the Irish Bank deal was gifted to the claimant.

22. The respondent's argument seems to centre on the fact that they say more was required of the claimant namely that the claimant failed the "Good Deal Measure" and therefore the respondents were entitled to exercise a discretion and refuse to pay the commission/bonus.

23. It is worth remembering that the respondent paid the claimant his full commission payment for Quarter 2 that is April 2018 to June 2018 in the sum of £2,186.68. This includes his first "Irish Life" deal. In respect of this Irish Life deal no implementation document appears within the bundle. This is because the claimant had made Irish Life a client in Quarter 2. This is evidenced by the claimant's commission payment request which confirms Irish Life as both billed and live.

24. Once a deal had been secured there was then an implementation period which varied in length for the software to be set up, tested and effective at the customer's end.

25. Much of the respondent's argument in evidence centres on what they see as the claimant's failure to assist properly in this implementation process. Ms Kirsty Foster-Jennings who produced a witness statement for this Tribunal but who did not give live evidence was involved in that implementation process. She was employed by the respondents as Client Services Director but also was involved with the implementation process.

26. It is common between the parties that there was a meeting on 24 September between Mr Harvey and the claimant. It was at this time that the respondents say they raised the issue of performance with the claimant and handed him a written warning note at that meeting. I have what purports to be a copy of that written warning note before me. It is not signed nor does it appear on headed paper. The document is dated 24 September the day of the meeting.

27. In evidence the claimant says he never received that note. The significance of it is that it contains the following phrase:

> "I'm going to defer the payment of any variable pay/commission due to you under the commission scheme pending a sustained and material uplift in your prospecting activity and subsequent demo and meeting bookings success."

28. It appears that this was what was discussed at the meeting and the respondents say they handed the note to the claimant at the meeting.

29. The claimant accepts that he was told this at the meeting but it is the claimant's position that no such note was given to him, that the note contains reference to events that took place at the meeting so could hardly have been prepared before it and it is the claimant's position that the note has been falsified by the respondents for the purposes of this Tribunal.

30. Significantly this meeting took place three days before the claimant's commission was due to be paid. The claimant accepts he was told that commission would be withheld and that it was due to a lack of performance. The claimant said he asked Mr Harvey to send him conformation of this. He says he was handed no note.

31. The claimant then spoke to Mr Harvey the following day on 25 September and was dismissed over the telephone after he expressed dissatisfaction with the decision to withhold his bonus due and payable at the end of September.

32. It is the claimant's case that the commission by this time was already due and payable. He had secured the three deals, commission had been paid in respect of the first one and commission had accrued, was due and was payable but that the respondents sought to avoid their obligation to pay by raising issues about the claimant's performance three days before the commission was due and dismissed the claimant. The claimant says this was a cynical attempt to avoid payment of the commission.

33. I have carefully considered the evidence of Mr Harvey under cross examination and on the balance of probabilities I find that no such note was handed to the claimant on 24 September. I accept Counsel's submission that the note contains and deals with things that happened at the meeting and indeed happened later. Mr Harvey says he typed it at the site, printed it and handed it to the claimant. On balance I do not accept that and I prefer the claimant's evidence that he received no such note.

34. One aspect of this case is that the respondents have sought to rely upon the poor performance of the claimant as justification for dismissing him and in respect of exercising a discretion not to pay him commission or bonus in respect of deals which he had effected. At what turned out to be a preliminary hearing before EJ Laidler this was discussed. The respondents were advised of the authorities in this area of the Law in terms of non-payment of bonus and they were ordered to provide evidence in detail to support their assertion that the claimant had been legitimately dismissed for poor performance. Tellingly no such evidence has been provided and even in evidence given before this Tribunal Mr Harvey accepts this. He accepts that the deals were implemented but argues that the claimant needed to do more to secure payment of his commission. The concept of the Good Deal Measure is what they rely upon. When asked in cross examination where the evidence was of bad performance and the failure to comply with this

Good Deal Measure Mr Harvey answered that there was none. He said that all evidence had been deleted from the company's capsule system for GDPR purposes. He said he was not aware that he was going to be required to produce such evidence before a Tribunal. He says they minimise the amount of data they keep on each particular deal or process due to GDPR. With employees it is deleted straightaway.

35. The upshot is therefore that there is no real cogent evidence of the claimant's poor performance other than what Mr Harvey and Mr Gray say.

36. In evidence Mr Gray said that he accepted there was no documentation and nothing within the claimant's contract which stipulated that to qualify for commission bonus deals done would have to be "good" deals by some specific criteria. He said it was just accepted within the business that deals had to be good to get the commission paid. He said that they had previously deferred other payments for the same reason and that this had happened twenty odd times in the last 8 years.

The Law

37. The Law in respect of payment of commission or bonus payment under a written contract where there is a sole discretion clause has been greatly explored by the higher courts over the last 20 years.

38. In fact, at the preliminary hearing before EJ Laidler it was made very clear to the respondents what the law was. She in fact even verbatim read out the headnote of the case of Clark v Nomura International plc [2000] IRLR 766 into the record and this is produced in the summary. In that case the employer had sought to exercise a discretionary clause to fail to pay the claimant a bonus under the terms of his contract. It was held that an employer exercising a discretion which is on the face of it unfettered will be in breach of contract if no reasonable employer would have exercised the discretion in that way. The test is one of irrationality or perversity.

39. In this case we have a written contract of employment which sets out the terms of the payment of a bonus. I have already recited above the three pertinent clauses. There is a discretion at Clause 7.4. At Schedule 1 it is set out clearly the terms on which commission or bonus is payable by reference to a sales target and at Paragraph 2 of Schedule 1 there is a qualifying criteria.

40. This is a claim for unlawful deduction of wages under s.13 of the Employment Rights Act 1996. The first thing I have to determine is whether those wages or that bonus is duly payable under the terms of the contract. The respondents say that under the terms of the contract they have exercised a discretion. They say that they exercised it appropriately in light of the claimant's poor performance.

41. I have to determine whether they have exercised that discretion perversely and in a way in which no reasonable employer could do.

42. Whilst it was not raised before me at the hearing the respondents also in their pleading rely upon Paragraph 2 namely that the employee was not employed at the material time when the bonus was payable.

43. I deal with all of these in my conclusions.

Conclusions

44. The employee was instrumental in effecting the three deals and on the face of it under the terms of the contract of employment was entitled to his commission bonus payment. There is no dispute over the calculation of the amount.

45. Having not previously spoken to the claimant about his performance the respondents sought to meet with the claimant on 24 September explain to him that they were withholding commission due on those three deals which had already accrued and which were due for payment within the next few days and then subsequently dismissed him the following day. This they say was a reasonable exercise of their discretion. The justification for this is that they say that the claimant had not been performing, that the deals were not good and they argue a failure to implement those deals appropriately and properly. However when charged to produce evidence to support the supposed poor performance they produced none.

46. I found the evidence given by both Mr Harvey and Mr Gray to be unconvincing.

47. All the evidence before me points very clearly to the fact that they may have been unhappy with his performance for whatever reason but they certainly have not produced evidence to justify that before this Tribunal. They sought to deprive him of bonus which had already accrued and which was due and payable within the next three days by explaining to him that they were withholding it. When he failed to accept this ultimatum they dismissed him. They have not since paid the bonus.

48. I have no hesitation in finding that their purported exercise of the discretion under Clause 7.4 was perverse. No reasonable employer could in those circumstances have decided not to make the payment to the claimant at the end of September.

49. Had the respondents produced legions of evidence to support the claimant's poor performance it would have been an uphill battle for them to convince me that that still justified the exercise of discretion not to pay it. However they have produced nothing. They have produced only bare assertion through their oral evidence of his failures.

50. It is absolutely clear that the claimant was entitled to be paid his bonuses at the end of September in accordance with the terms of his contract of employment. The respondents were not justified in dismissing him or withholding that bonus.

51. Dealing with the fact that he was ultimately dismissed and the argument in their pleading that this meant that he was not employed without having served notice of termination I agree with Counsel's submissions. He was not in any sense serving notice of termination. He had been dismissed. He remained in post until his last day that of 24 October 2018. He was therefore clearly employed in accordance with his contract of employment at the time when the bonus was payable.

52. I have no hesitation therefore in finding for the claimant. The failure to pay him under the terms of his contract amounts to an unlawful deduction of wages and I make a declaration to that effect. I award the claimant the sum claimed of £8,760 which should be paid gross without deduction.

Section 12A Employment Tribunal Act 1996

53. Counsel for the claimant invites me to conclude that the non-payment of bonus constitutes aggravating behaviour by the respondent contrary to s.12A(1)(a) and (b) of the Employment Tribunal Act 1996. He therefore seeks that I make an award of a penalty against the respondents for those aggravating features. I have a power under s.12A(5) of the ETA to do so.

54. Before considering the aggravating features which Mr McHugh brings to my attention I note that the explanatory notes to the Act in question suggest that a Tribunal should consider the size of the employer, the duration of the breach, or the behaviour of the employer and the employee as well as whether the action was deliberate or committed with malice. I should also consider whether the organisation is one with a dedicated Human Resources team or whether the employer had repeatedly breached the employment right concerned. It may be less likely that a Tribunal will find an aggravating factor where the business is new or small or the breach was the result of a genuine mistake.

55. My Judgment has been fairly damming against the respondents. I find that without any good cause they sought to manipulate a circumstance under which they could avoid payment of duly constituted and payable bonus to the claimant. I found on the balance of probabilities that Mr Harvey was not telling me the truth about the note apparently handed to the claimant on 24 September. I found that the dismissal was engineered in the hope that its timing would afford the benefit of resisting payment under Schedule 1 Paragraph 2 of the claimant's contract of employment.

56. The respondent sought to exercise its discretion not to pay the bonus without justification. They say it was performance based yet despite specific orders set out pursuant to the preliminary hearing before EJ Laidler no evidence of any cogent nature has been produced to justify the allegations ranged against the claimant of poor performance. Prior to the 24 September there was no evidence that there was any prior discussions with the claimant about his performance.

57. It is significant that the respondents purported to produce documentation which ultimately was before this Tribunal which was an attempt to comply with the orders of EJ Laidler but which documentation did not advance the respondent's defence at all.

58. These are all significant features which have been instrumental in my reaching my Judgment in the claimant's favour. I have to determine whether they or any of them are aggravating features. I do determine that the dismissal of the claimant and the meeting on 24th were fabricated meeting trumped up to avoid making a due payment of commission/bonus to the claimant. This is an aggravating feature.

59. The fact that they have come to this Tribunal and alleged a series of damming allegations about the claimant's performance without any supporting evidence having been given adequate opportunity by this Tribunal to produce such evidence is also an aggravating feature.

60. However I conclude that in the circumstances of this case the threshold has not quite been crossed for me to consider it appropriate to make a financial penalty award payable to the Secretary of State against the respondent.

61. The reason that I say that is that clearly a company albeit that it employs 21 people is not a company well versed in HR processes. The company is clearly run as the alter ego of Mr Harvey and Mr Gray. Their attempts at interpretation of the Law and the processes required to successfully manage and run a case before this Tribunal can at best be deemed extremely naïve.

62. My decision on this point is certainly a very "close run thing" but on balance I do not consider bearing in mind the lack of HR resources and the size of the business it would be appropriate or just in these circumstances to punish the aggravating factors by the award of a penalty. I therefore decline to do so. The only award I make is the award in the claimant's favour set out above.

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Employment Judge KJ Palmer

Date: 17 June 2021

Sent to the parties on: ...18.6.2021.....
THY
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For the Tribunal Office