



EMPLOYMENT TRIBUNALS

Claimant: Miss C Briscoe

Respondent: CareShield Limited

On: 12 January 2022
10 March 2022 (in Chambers)

Before: Employment Judge McAvoy News

Heard at: Leeds Employment Tribunal

Appearances:

For the Claimant: In person

For the Respondent: Ms Y Montaz, Legal Consultant

RESERVED JUDGMENT

The Claimant's claim for unauthorised deductions from wages is not well-founded and is dismissed.

REASONS

Background

1. The final hearing of this case commenced on 19 May 2021. However, for the reasons provided in my case management summary dated 20 May 2021, that hearing was postponed. It was originally relisted for 5 August 2021 but was postponed following the consent of both parties.

Issues

2. It was agreed at the outset of this hearing that the Claimant's claim was limited to a claim for unauthorised deductions from wages. Specifically, it concerned

commission payments totalling £3,240 which the Claimant believed were due to be paid to her in her final salary instalment in late January 2021.

3. The Respondent's position was that the Claimant was not entitled to any commission because she had left her employment before these payments were due to be paid. In this regard, they relied upon Condition 11 of the commission scheme, which had been signed by the Claimant, referred to later in these Reasons. The Claimant accepted what this scheme stated, and that she had signed the scheme documentation, but contended that it had been varied following the two conversations referred to within these Reasons.
4. During the hearing on 19 May 2021, it was evident that insufficient preparation had been undertaken by either party to enable a fair hearing to take place. The Claimant gave evidence that she was owed commission payments in respect to some 83 different learners. However, she had not identified who these learners were and the Respondent had been unable to identify them itself with any certainty. The Respondent was unable to say with certainty whether these learners had been signed up and/or processed and/or paid for and, if so, when. The Respondent also said that the Claimant may have already been paid for some of the learners and/or some of the learners may have left the client before the training was provided. For this reason, together with the volume of evidence and the unrealistic two-hour listing, I decided to postpone the hearing and ordered the Claimant to further clarify these aspects of her claim.
5. Fortunately, for today's hearing, the Claimant had particularised the names of these learners and the Respondent addressed them in their evidence. In respect to some of the learners, the Respondent's position was that the Claimant had already been paid the relevant commission payment or no payment was received at all regarding the learner.
6. Unfortunately, the Claimant had not engaged with this evidence when preparing for this hearing. Consequently, we were faced with a position today whereby the Respondent would need to cross examine the Claimant on each of these individual learners which would have taken a significant amount of time and certainly would have resulted in the hearing needing to be relisted for another or perhaps two more days.
7. The difficulties this created were not aided by technical difficulties experienced by both parties and the fact that the Respondent had, contrary to my earlier case management orders, adjusted the hearing bundle and provided a new copy to the Claimant on the morning of this hearing. To ensure a fair trial, the Claimant needed time to consider this version of the bundle at the outset of the hearing before any evidence could be heard, delaying the commencement of the hearing.
8. To avoid the hearing going part-heard, and with the parties' consent, I directed that the sole issue that I would be determining today would be the circumstances in which the Claimant was entitled to receive commission payments on the termination of her employment. This meant that I needed to answer the following questions:

- a. Did Condition 11 of the commission scheme apply or was it varied? If Condition 11 applied, the Claimant's claims would be dismissed as it was agreed that the Claimant had been paid in accordance with it; and
 - b. If it was varied, what was it varied to state?
9. It was acknowledged that, if I found that the commission scheme had been varied, a further hearing may be required in order to determine the compensation payable to the Claimant, should the parties be unable to reach an agreement regarding this themselves.
10. I considered dealing with the case in this manner to be in accordance with the overriding objective in that it ensured I was dealing with the claim proportionately, with flexibility and saving expense.

Evidence

11. The Claimant served a witness statement and was cross examined on that statement. She also served a witness statement for her line manager at the time of her resignation, Jade Kelly, who was also cross examined on her statement.
12. The Respondent served witness statements for Emma Perry (Chief Operating Officer), who is referred to in these Reasons as Emma Sweetlove (her maiden name), Sarah Clutterbuck (Apprenticeship Delivery Manager) and Sharron Booth (Finance Manager). Each of these witnesses were cross examined on their statements.
13. I also had sight of a large bundle of documents. I informed the parties that I would only be reading those documents that were specifically brought to my attention during the evidence, which the parties acknowledged.
14. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

15. The Claimant commenced employment with the Respondent on 22 January 2019. Her employment terminated on 8 January 2021 following her resignation. At the time of her resignation, she was employed as a Senior Telesales Executive.
16. The Respondent is registered to develop and deliver technology enabled solutions to support the upskilling of their clients' staff members.

Commission scheme

17. On 11 June 2020, the Claimant signed the Respondent's commission scheme which stated, at Condition 11:

"should employees leave the company for any reason, all entitlement to commission or bonus payments will be withdrawn immediately" [45].

18. The Claimant accepted in cross examination that she had read these terms before signing the scheme document.

19. The Claimant's evidence was that, before signing this scheme document, she questioned Chris Davies, her line manager at the time, as she was unhappy with Condition 11. She said Mr Davies had told her to sign it as she would be paid her commission if she left on good terms, which was the standard procedure within the sales industry. The Claimant said she signed the documentation after this conversation, relying upon it.

20. The Claimant was challenged regarding this during the hearing. She accepted that there was no contemporaneous record of this conversation taking place between the Claimant and Mr Davies. She also accepted that she could have referred to it in her correspondence with the Respondent of February 2021 (considered later) but did not do so.

21. Mr Davies did not attend the hearing in order to give evidence regarding his recollection of this conversation. As I am required to make findings of fact based on a balance of probabilities, and I have no reason to believe that the Claimant was not being truthful when relaying her recollection of her conversation with Mr Davies as part of these proceedings, I have found that this conversation did take place, irrespective of the absence of contemporaneous documents evidencing the same. Whether this conversation amounted to a variation to Condition 11 of the commission scheme is considered within the conclusions section of these Reasons.

22. The commission scheme also stated:

- a. payment of commission will be made based on invoices paid up to the 20th of the month; and
- b. in order to claim commission for:
 - i. Apprenticeship sign ups, named learner details must be passed to Apprenticeship Department. Only successful sign-ups are eligible for commission (future learner sign ups from the customer directly to the assessor/tutor is not eligible for sales commission); and
 - ii. Funded Learning sign ups, named learner details must be passed to Apprenticeship Department. Only successful sign-ups are eligible for commission (future learner sign ups from the customer directly to the assessor/tutor is not eligible for sales commission).

23. Ms Booth's evidence was that, pursuant to this scheme, commission was only payable when the Respondent had been paid by a client in respect of whom a learner had already been signed up. Ms Booth explained that this was because it was not uncommon for clients who had been signed up to either drop out or not pay. The Respondent therefore needed to be safe in the knowledge that it had received the payment from its client before it could pay its employees their commission.
24. The Claimant accepted in cross examination that this was correct as far as clients were concerned but said that the position was different for government funded learners. In this regard the Claimant said that the funding was pulled down for these learners at variable points in time and believed that funding for some of the learners that she had claimed commission for had been pulled down before her employment terminated. She said that she believed that the commission became payable when the learner had been signed up which she confirmed meant, in her opinion, enrolled onto the course.

Learner enrolment process

25. Ms Clutterbuck gave evidence about the learner enrolment process. She explained that the sales team were required to put everything on to the tracker and send her an expression of interest form. That would then be used by the Respondent's data manager to make contact with the home manager in order to get the learner set up on the TAS account. The TAS account is the apprenticeship service that the funding comes from. She explained that learners cannot be enrolled until this is set up.

4 November 2020 conversation

26. It was agreed between the parties that a conversation between the Claimant and Ms Sweetlove took place on 4 November 2020.
27. The Claimant's evidence was that Ms Sweetlove had agreed that the Claimant would be paid any commission which had been "processed" if it was signed up before she left. Therefore, based on her witness evidence, the Claimant's position was that if a learner had been processed prior to 8 January 2021, she would receive the commission for that learner, regardless of whether the Respondent had received a payment for that learner prior to this date. The Claimant accepted in cross examination that this agreement was not confirmed in writing. The Claimant's evidence was that she relied upon this agreement when continuing to work for the Respondent between then and 8 January 2021.
28. In the first version of Ms Sweetlove's statement, prepared for the hearing on 19 May 2021, Ms Sweetlove's evidence was that, during this conversation with the Claimant, she explained that commission was paid up until her last working day on everything that she would normally be entitled to. She went on to state that she would not have said anything to the Claimant or any other employee which deviated from the terms of the commission scheme.

29. However, in the updated version of Ms Sweetlove's statement, she acknowledged that, during this conversation, she had agreed with the Claimant that she would receive commission for any learners who had been "processed" prior to the December cut off. It was not clear what the "December cut off" was but I expect she was referring to 20 December 2020, considering the above mentioned part of the scheme rules.
30. However, during cross examination, Ms Sweetlove said that she informed the Claimant that she would receive all of the commission that she was entitled to until the point of her leaving, i.e. 8 January 2021. She said that she informed the Claimant that once her employment ends her entitlement to commission would cease.
31. During re-examination, and following questions from me, Ms Sweetlove explained that "processed" means the learner was live, and had been uploaded, and the Respondent was able to claim funds for them, even if the Respondent had not received the payment for that particular learner. She also clarified that the learners would need to have been processed by the Claimant's termination date in order for the Claimant to receive a payment for them.
32. A subsequent conversation between the Claimant and Ms Kelly took during which Ms Kelly informed the Claimant that she should focus on getting learners signed up rather than new business to ensure she received the commission that Ms Sweetlove promised in the earlier mentioned conversation. Ms Kelly's evidence in this regard was that Ms Sweetlove informed the Claimant that she would receive commission in her salary instalment for January 2021 for all the learners who had been enrolled by January 2021.
33. I have addressed my findings regarding what was said during this conversation in the conclusions section of these Reasons. This is because I have relied upon the contents of the contemporaneous correspondence between the parties (considered later) when making these findings.

Resignation

34. On 11 December 2020 the Claimant resigned with notice from her employment with the Respondent. In her resignation email she stated: "As previously discussed I have been going through the recruitment process for the prison service and I have recently been accepted after going through the security checks etc. I am therefore leaving the company, please find the attached letter giving my 4 weeks' notice. I would like to take this opportunity to thank you for your support while I have been with the company I will be sorry to leave however I am leaving to follow a completely different career path. If you need anything from me or need me to do anything please just let me know. I look forward to hearing from you re what you would like me to do within my last few weeks".
35. In a letter appended to this email the Claimant confirmed that her last working day would be 8 January 2021. She asked the Respondent to confirm what she should expect regarding her final working scheduled, accrued holiday and employee benefits. She did not refer to her discussion with Ms Sweetlove in

either of these documents. Nor did she refer specifically to the commission which she believed she ought to be paid.

36. During the Claimant's exit interview she said that she felt that better communication between the apprenticeship team and sales team, especially in terms of commission, would improve the workplace [53].

End of January 2021

37. On 28 January 2021, after receiving her payslip for January 2021, the Claimant emailed Ms Sweetlove and stated: "Hi Sharon, I'm owed commission can you please let me know why my commission hasn't been paid? and why I don't have a commission statement?" [62].
38. Ms Booth responded the next day and informed the Claimant that she had calculated her final pay in line with the commission scheme and specifically referred the Claimant to Condition 11, quoted above.
39. She stated: "You will receive 1% commission for the Avery deal that should have been paid in December 2020, the reason this was not received was a result of an administrative error, as opposed to the end of your employment, you will receive this payment by the 5th February 2021, no further commission is due".
40. The Claimant replied that day and stated: "I spoke to Emma with regards to this when I handed my notice in and she informed me that any commission that has been processed before the January date i would still get as the majority of this commission was from November i would still be entitled to it" [57].
41. Ms Sweetlove responded shortly afterwards and stated: "To be clear, I absolutely did not say commission would be paid after leaving".
42. The Claimant responded and stated: "Emma, as mentioned in my Message to you this is commission from November – I understood that anything I put through in december/Jan wouldn't be paid but we had a discussed the things I had put through in November were to be paid if they were signed up before i left which they were" [56].
43. The message which the Claimant was referring to was a WhatsApp message dated 29 January 2021 stating: "hi Emma, sharron is saying that I'm not entitled to my commission however when we spoke you said I would still get everything that went through before the January cut off??"
44. Ms Sweetlove replied and stated: "I absolutely did not say that. I would not have gone against company policy".
45. The Claimant replied stating: "Emma I'm really disappointed that your stating this, I questioned this when I handed my notice in this is commission from November and the average commission i was supposed to get last month I understood everything that hadn't been processed before I left I wouldn't be paid on but you told me the previous things I'd get paid in my final wage".

46. Ms Sweetlove replied stating: "I agree with Avery that was an error from December. The remainder is not due as per commission terms and conditions".
47. A telephone conversation took place between the Claimant and Ms Kelly at around this time. The Claimant was upset because she had not received the commission which she believed she had been promised.
48. Ms Kelly then spoke to Ms Sweetlove about this. Ms Kelly's evidence was that Ms Sweetlove responded with: "if it's not in black and white, it didn't happen". In cross examination Ms Sweetlove said that Ms Kelly had informed her that the Claimant kept calling her because she was upset about not being paid commission. Ms Sweetlove's evidence was that she responded: "she's not been paid commission because it has not been processed, it's black and white, as simple as that".

Complaint to HR

49. On 8 February 2021, the Claimant submitted a complaint to the Respondent's HR team regarding her unpaid commission. In that complaint she stated: "due to having a conversation with Emma Sweetlove on 4th November 2020 where it was stated that any commission that was processed and paid before the January cut off would be paid in my final wage" [67]. She requested that payment be made within 14 days.
50. The Respondent's HR team replied on 11 February 2021 reiterating the points made in the previous correspondence.

The Law

51. Pursuant to section 13(1) of the Employment Rights Act 1996 (the "ERA"):

"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."

Section 13(2) of the ERA defines "Relevant provision" as a provision of the contract comprised—

"(a) in one or more written terms 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, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect,

of which in relation to the worker the employer has notified to the worker in writing on such an occasion.”

52. In ***Polymer Products Ltd v Pover EAT 599/80*** it was held that the individual terms of a contract must be sufficiently clear and certain for the courts to be able to give them meaning.
53. In ***Puntis v Governing Body of Isambard Brunel Junior School EAT 1001/95*** the EAT had to consider a situation where a deputy head teacher had told P, a teacher, that her temporary promotion would be made permanent. The deputy head had said: ‘Have no fears, Sue, your [promotion] will be made permanent.’ The EAT concluded that the deputy head’s remark was so brief that any contract arising from his remark would have been void for uncertainty. There was no indication in what he said as to when the permanent appointment would be made.
54. In ***Judge v Crown Leisure Ltd 2005 IRLR 823***, CA, the Court of Appeal held that a ‘promise’ made by a director at a Christmas party that he would eventually ensure that an employee was placed on roughly the same level of remuneration as other managers was not legally enforceable. The director had said that pay parity was likely to be achieved ‘eventually’ or ‘in due course’, which was too vague and uncertain to amount to a contractual promise. The Tribunal had found that a promise to achieve parity “eventually” or “in due course” was too vague to amount to a binding contractual promise. The EAT concluded that the Tribunal had applied the correct legal proposition to the facts and its conclusion was a logical outcome of that.
55. In ***Simmonds v Dowty Seals Ltd 1978 IRLR 211***, EAT, there was an oral agreement that S would change from working on day shifts to working on night shifts. This change was never reflected in his written statement of employment particulars. New management decided that S would have to revert to day shifts, which would entail a loss of money, and S resigned, claiming that he had been unfairly constructively dismissed. The EAT stated that regardless of whether an employee’s statutory statement of terms and conditions is altered to reflect the change, whether there has been a consensual variation of the terms of the employment depends on the evidence in the particular case. An agreement to vary the terms of a contract is not required to be in writing to have legal effect. S had proved that there had been a consensual variation of his contract, albeit an informal one, so that he was only required to work on the night shift.

Submissions

56. Both parties provided written submissions and were given a right of reply. The Respondent confirmed that it did not wish to reply to the Claimant’s submissions.
57. The Claimant complained that the Respondent provided their written submissions late and consequently requested that they not be considered by me. To do so would not be compliant with the overriding objective nor would it ensure a fair hearing. Instead, I provided the Claimant with a further opportunity

to reply to the Respondent's submissions and, if she did, to do so by 11 February 2022. I am told that no response from the Claimant has been received.

58. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

59. The basic legal position is that the terms of an employment contract are determined at its formation and strong evidence of mutual agreement is required to establish that they have been lawfully varied.

60. The key question I have had to answer is whether Condition 11 of the Commission Scheme was effectively varied by oral conversations. There are two situations relied upon by the Claimant in support of this proposition, which I have considered in turn:

Conversation with Mr Davies

61. I have found that, prior to the Claimant signing the commission scheme documentation, Mr Davies told her that, if she left the Respondent on good terms, she would receive her commission.

62. The above mentioned case law supports the proposition that a contract can be varied orally.

63. However, this is not a situation where the commission scheme was signed and was subsequently varied with the oral consent of both parties. After this oral agreement was reached between the Claimant and Mr Davies, the Claimant signed the commission scheme documentation. However, this agreement which was reached orally between the Claimant and Mr Davies was not included within such documentation. It is clearly impossible for a conversation which took place prior to signing a document to vary the promise set out within that document. The conversation would need to be had, and the oral agreement would have had to have been reached, after the scheme documentation had been signed for this argument to be plausible.

64. However, bearing in mind the fact that the Claimant is a litigant in person and noting that the Respondent has addressed this in evidence, I have considered an alternative argument, namely whether Condition 11 could be read as including the agreement reached between her and Mr Davies. If this was to occur, Condition 11 would state:

“should employees leave the company, all entitlement to commission or bonus payments will be withdrawn immediately save that, if they leave on good terms, commission will still be paid”.

65. However, this generates further questions, such as: what does good terms mean? What does “her commission” mean? Does it mean commission for

learners who have been processed by a certain date? If so, what does “processed” mean in this situation? Or does it mean commission for learners who have been paid for by a certain date? What is that “certain date”?

66. In light of the above, I find that the agreement between the Claimant and Mr Davies was too vague and uncertain to amount to a binding contractual promise. Therefore, the terms of Condition 11 were unaltered by this agreement reached between the Claimant and Mr Davies.

Conversation with Ms Sweetlove

67. A conversation between the Claimant and Ms Sweetlove took place on 4 November 2020, before the Claimant tendered her resignation. During that conversation the parties sought to vary Condition 11 of the commission scheme. However based on the findings set out above, it is wholly unclear how it was intended that Condition 11 ought to be varied.

68. Considering these findings, there are numerous ways in which Condition 11 could have been varied such as:

“all entitlement to commission or bonus payments will be withdrawn on the termination of your employment save as for commission payments due in respect to learners who have:

- i. been processed prior to the end of December 2020; or
- ii. been processed prior to 8 January 2021; or
- iii. have been signed up prior to 8 January 2021; or
- iv. been processed prior to 20 January 2021; or
- v. “gone through” prior to 20 January 2021; or
- vi. been processed prior to the end of January 2021”.

69. In respect to each of these, it is unclear whether the parties had agreed that the learners needed to have been paid for and, if so, when. For example, did they need to have been paid for by 20 January 2021, in accordance with the commission scheme rules?

70. Alternatively, it may have been agreed that Condition 11 ought to have been varied to state: “all entitlement to commission or bonus payments will be withdrawn on the termination of your employment save as for commission payments due in respect to learners who have:

- i. been processed and paid prior to the end of December 2020; or
- ii. been processed and paid prior to 8 January 2021; or

- iii. been signed up prior to 8 January 2021 and subsequently paid for; or
- iv. been processed and paid prior to 20 January 2021; or
- v. gone through prior to 20 January 2021 and subsequently been paid for; or
- vi. been processed and paid prior to the end of January 2021”.

71. In this regard, the Claimant’s letter dated 8 February 2021 suggests that the Claimant expected the learners to have been paid for before the commission fell due.

72. The word “processed” was used regularly but it was unclear what this meant. Considering Ms Sweetlove’s evidence it appeared to mean that the learner was live, and had been uploaded, and the Respondent was able to claim funds for them, even if the Respondent had not received the payment for that particular learner. However, in the above mentioned letter from the Claimant, the Claimant stated that she believed that the learners would have to have been paid for before the commission fell due, although this does contradict what the Claimant has said in her witness statement and in the other messages referred to earlier.

73. I find there to be strong evidence of mutual agreement on the part of both parties to vary Condition 11 of the commission scheme, which is likely to have been reached to motivate the Claimant to continue working hard for the Respondent up to her termination date. However, what was agreed in respect to the variation of Condition 11 is wholly unclear based on the evidence presented to me. I do not believe Ms Sweetlove or the Claimant themselves knew what was agreed following the conversation on 4 November 2020, which is not surprising given the Claimant’s comment during her exit interview regarding communication between departments about commission payments. The situation is not helped by the fact that there was no written variation agreement or contemporaneous records of what was agreed at the time other than the inconsistent references referred to earlier.

74. Therefore, what was discussed between the Claimant and Ms Sweetlove was too vague and uncertain to amount to a contractual promise. Consequently, Condition 11 was not effectively varied and stands.

75. Accordingly, as the Claimant was paid commission payments in accordance with Condition 11, the Claimant’s claim for unauthorised deductions from wages is not well founded and is dismissed.

Employment Judge McAvoy News

Case Number: 1802097/2021

23 March 2022