



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. Thomas Dagwell

**Respondent:** Ticket Media Ltd

**Heard at:** London South Employment Tribunal      **On:** 5 May 2022

**Before:** Employment Judge Rea

## Representation

**Claimant:** Litigant in Person

**Respondent:** Mr. Fintan Molloy (Litigation Consultant)

# RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claim as it was presented outside the 3-month time limit set out in section 23(3) of the Employment Rights Act 1996 and, it was reasonably practicable for the claim to have been presented within this statutory time limit

# REASONS

## The Claims and the Issues

2. The Claimant brings a claim for unlawful deductions from wages before the Tribunal. This relates to an alleged underpayment of commission.
3. It was agreed at the outset of the hearing that the issues which the Tribunal needed to determine were as follows:
  - a. When was the sale of £330k made by the Claimant?
  - b. What was the commission policy which applied to this sale?
  - c. Has there been an underpayment of commission to the Claimant?
4. At the end of the hearing, Mr. Molloy raised on behalf of the Respondent that the Claimant's claim may have been made outside the statutory time limit. This

had not been raised previously but as it is a jurisdictional issue the Tribunal is obliged to determine it.

5. The Respondent's position is that no additional commission was owed to the Claimant. However, if it was, since the Claimant has been unable to give a precise date when the remainder of this commission would be paid to him, the time limit for bringing the claim runs from the date when the original payment was made, which was in his May 2020 pay slip. The Claimant did not express a position on this jurisdictional issue.
6. As the time limit point is closely bound up with the facts of the case, the Tribunal has made findings of fact in order to determine this jurisdictional issue.

## Background

7. The Respondent is a limited company with approximately 14 UK-based employees. The Respondent business provides a range of ticket advertising services to media planners and buyers.
8. The Claimant worked for the Respondent as a Client Services Executive from 23rd April 2019 up to his dismissal by reason of redundancy effective from 26th March 2021. The Claimant sold a range of products to customers on behalf of the Respondent including tickets for a range of events.
9. Throughout the Claimant's employment, there has been no written policy setting out his entitlement to commission on sales made by him or how this would be calculated.
10. It is not in dispute that prior to March 2020, the Respondent's unwritten policy was that the Claimant, in common with his colleagues, would be entitled to receive a payment equal to 5% of the value of any sale made by him.
11. The Claimant's case is that at no time was a change or qualification to this policy communicated to him and that therefore he remained entitled to payment of commission equal to 5% of the value of all sales made by him after March 2020.
12. The Respondent's position is that whilst this policy remained unchanged in relation to the products it had been selling previously and continued to sell, a different commission policy was introduced by the Respondent which related only to PPE products which it began selling from March 2020 in response to the pandemic and the very different requirements of its customers. This commission policy provided that commission on sales of PPE products would be earned at the rate of 5% of the *profit* made on the sale by the Respondent, not 5% of the total value of the sale.
13. It is not in dispute that the Claimant made a sale of PPE equipment, specifically 3-ply face masks, to the value of £330k.

## Procedure, documents, and evidence

14. The Tribunal heard oral evidence from the Claimant and Mr. Ross Fraser, Finance Manager of the Respondent. Mr. Fraser had submitted a witness statement in advance, but the Claimant had not produced one. A hearing bundle was provided electronically prior to the hearing. The Tribunal also allowed the Respondent to produce one additional document which was highly relevant to the issues.

## The Law

15. Section 23 of the Employment Rights Act 1996 states (so far as relevant):
16. “(1) A worker may present a complaint to an employment tribunal
- (a) That his employer has made a deduction from his wages in contravention of section 13
  - (2) Subject to subsection (4) an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with
    - (a) ...the date of payment of payment of the wages from which the deduction was made
    - (3) .... references in subsection (2) to the deduction or payment are to the last deduction or payment in the series
    - (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”
17. Guidance for employment tribunals on the question of time limits for protection of wages claims was provided by the EAT in *Taylorplan Services Ltd v Jackson & ors* 1996 IRLR 184, EAT. The correct approach is for the Tribunal to consider the following questions:
- Is this a complaint relating to one deduction or a series of deductions by the employer?
  - If a series of deductions, what was the date of the last deduction?
  - Was that deduction within the period of three months prior to presentation of the claim?
  - If not, was it reasonably practicable for the complaint to have been presented within the three-month period?
  - If not, was the complaint nevertheless presented within a reasonable time?

## Findings of Fact

18. The Claimant's evidence was that the sale had been made by him in either March or April 2020. The Respondent provided an additional document which showed the sale had been made in April 2020. The Claimant accepted that this may be right. The Tribunal's finding is that the sale was made in April 2020.
19. Mr. Fraser's evidence was that sometime in March 2020, he and the Respondent's Managing Director had informed the whole sales team of the different commission structure that would apply to the newly introduced sale of PPE products, specifically that they would only qualify for 5% of the profit made by the Respondent on the sale of those products. Mr. Fraser stated that this was written on a whiteboard in the office area where the sales team, including the Claimant, worked. He was unable to say for certain whether the Claimant had been present during that meeting. This policy was not communicated in writing.
20. Mr. Fraser was unable to recall how long a period elapsed between this meeting and the UK going into the first lockdown. He therefore could not say for certain whether the Claimant would have attended the office on subsequent occasions

and had an opportunity to see the policy written on the whiteboard although he thought at least some working days elapsed before employees were instructed to work from home.

21. The Claimant's evidence was that he did not recall this meeting taking place or being told on any occasion how the commission policy would apply to the sale of PPE products. He didn't recall seeing the policy written on the whiteboard in the office. His position is that the same commission policy remained in place and that he was entitled to 5% of the total value of any sales made of these products.
22. The Claimant's case is that he had a conversation with Mr. Fraser by telephone about the commission he was owed from the sale made by him in April 2020. He states that Mr. Fraser said the Respondent could not afford to make the full commission payment owed to him because of cashflow difficulties caused by the pandemic, and that he would only receive a partial payment of £2k, with the rest to be paid at a later unspecified date.
23. The Claimant's evidence was that he had a good amicable relationship with Mr. Fraser and understood the pressures the Respondent was facing and so took this on trust. The Claimant did not ask for confirmation of the agreement in writing. The Claimant stated that he had sent a text message asking for a call with Mr. Fraser and then had the phone call. He claimed to have deleted the text message at the time which he said was his normal practice. The Claimant did not ask the Respondent for disclosure of the text message which would have been on Mr. Fraser's phone as he didn't know he had to.
24. During cross-examination, the Respondent's representative referred to the Claimant's pay slip for May 2020 which showed he had actually received a payment which was fractionally less than £2k, being £1,968.78. The Claimant stated that he had not noticed this before as he had never checked his pay slips, not even when preparing for the hearing. The Claimant said that he did not understand the basis for this calculation, even on the Respondent's case, as it did not equal 5% of the profit made.
25. Mr. Fraser's evidence on the calculation was that the profit made on the sale of this product was shared with another company. Carriage costs were deducted from the total sale and the profits were then divided in half which meant the Respondent's share of the profits came to £38,750. The commission owed to the Claimant was 5% of this figure.
26. Mr. Fraser produced an additional document which showed those calculations. This also showed that the Claimant also received commission for the sale of other PPE products in his August pay slip. The payment of £500 was equal to 5% of the total profit of £10k made by the Respondent on that sale. The Claimant had not queried the calculation of this commission payment. The Claimant's answer to this was that he only queried the largest commission payment as the other ones were too small to be worth challenging.
27. The Respondent points out that the Claimant did not challenge his commission payment until nearly a year after it was paid and after his appeal against redundancy was heard.
28. There is a direct conflict of evidence between the Claimant and Mr. Fraser as to what was agreed in relation to his entitlement to commission payments and when these were owed to him. There is no other evidence which would assist the Tribunal in resolving this conflict. On the balance of probabilities, the Tribunal prefers Mr. Fraser's evidence. The fact that the Claimant did not

challenge the amount of his commission payment until after his appeal against redundancy was heard is surprising. On the Claimant's own case, the sum he alleges was outstanding, £14,500, was a substantial amount of money. The Tribunal finds that it is simply not credible that the Claimant would have accepted an underpayment of this size without querying it at an earlier point in time.

29. This would be so, even if the Tribunal accepted the Claimant's evidence that he was content to have an open-ended verbal agreement with Mr. Fraser to delay receipt of this money for an unspecified length of time. However, the Tribunal finds on the balance of probabilities that no such agreement was reached with the Respondent.
30. The Tribunal finds that the commission policy applied by the Respondent was that the Claimant was entitled to 5% of the profit it received from the sale of PPE products. The Tribunal concludes that this was not a change to the existing commission policy, but an adjunct to it which applied only to products not previously sold by the Respondent.

## Decision

31. Applying the law to those findings, the Claimant's claim is not for a series of deductions, but for a one-off deduction which was made in his May 2020 pay slip. The time limit for the Claimant commencing Early Conciliation with ACAS was therefore in August 2020. The Claimant did not commence Early Conciliation until 7 May 2021, more than 8 months outside the statutory time limit set out in section 23(3) of the Employment Rights Act 1996.
32. The Tribunal notes that the not reasonably practicable test is a strict one and that there are good reasons why this is so; not least the need for parties to have legal certainty.
33. The Claimant's explanation for not bringing the claim earlier is tied in with his evidence about his belief that there was an agreement to delay payment of the balance of this commission and, that he was unaware the Respondent did not accept this was owed to him until he raised this after his appeal against dismissal was heard. Had the Tribunal accepted the Claimant's evidence on this point, the Tribunal would have concluded that the time limit for bringing the claim did not start to run until the date when he received his final payments from the Respondent. On that basis the Claimant's claim would have been submitted within the statutory time limit.
34. However, in light of the finding that there was no agreement to extend the date for payment of commission arising from this sale beyond May 2020, the Claimant's claim is substantially out of time. The Tribunal also finds that the claim was not made within a further reasonable period.
35. As the Tribunal does not have jurisdiction to hear the claim, there is no requirement to make a decision on its merits. However, it has been necessary to make findings of fact to determine the jurisdictional issue which are also relevant to liability. If the Tribunal is wrong on the jurisdictional issue and the claim is in time, the Tribunal would have concluded that the claim for unlawful deductions of wages would not in any event have succeeded. The Tribunal is satisfied, on the balance of probabilities, that the Claimant was only entitled to payment of 5% of the profit made by the Claimant on this sale and that the Claimant received the correct sum of money.

Employment Judge Rea  
Date 27 June 2022