



EMPLOYMENT TRIBUNALS

Claimant: Mr Billy Rashbrook

Respondent: Raymond Saul & Co LLP

Heard at: London Central

On: 22 February 2023

Before: Employment Judge Sullivan (sitting alone).

Representation

Claimant: in person

Respondent: Mr Feyi Fakoya

JUDGMENT having been sent to the parties on 20 March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant claims that unauthorised deductions were made from his wages. The respondent denies the claim and makes an employer's contract claim.
2. Early conciliation took place from 12 November 2022 to 29 November 2022. The claim form (ET1) was lodged with the Tribunal on 18 December 2022. The respondent has filed a response to the claim (ET3).

Hearing

3. In advance of and during the hearing I considered a 196 page bundle within which the parties had set out their respective positions in a comprehensive fashion. Both the claimant and Mr Fakoya gave evidence and cross-examined each other. I heard submissions from both parties and gave judgment at the conclusion of the hearing.
4. The request for written reasons from the respondent was made on 21 March 2022. This was within 14 days of the promulgation of the judgment. The request reached me on 10 May 2022.

Findings of fact

5. Although there was disagreement between the parties on certain issues, I did not find those issues to be relevant to the decision I made. The findings of fact relevant to my conclusions are not disputed by the parties.
6. The respondent is a firm of solicitors based in the City of London. The Managing Partner is Mr Feyi Fakoya.
7. The claimant was first employed by the respondent on 1 February 2019 progressing to become a trainee solicitor and then, in September 2021, a newly qualified solicitor. His employment ended on 1 November 2022.
8. On becoming a newly qualified solicitor, the claimant and respondent agreed a new contract of employment commencing on 4 September 2021. The claimant's annual salary under that contract was £38,000.
9. The contract had a section dealing with commission. The relevant clauses are produced below:

8.1 The Employee will be paid a commission calculated as follows:

(a) in each Commission Year, in relation to the profit costs invoiced by the Employee in an aggregate amount that exceed three times the amount of the Employee's Salary (e.g., 3 x £38,000) of such Commission Year, twenty per cent (20%) of such profit costs that exceed three times the amount of the Employee's Salary of such Commission Year which are invoiced by the Employee and which are subsequently paid to the Company by the relevant clients, in respect of the work carried out by the Employee whilst acting as a solicitor to the Company; and

...

8.2 On or before the last working day of each calendar month during the Appointment, the Company will agree a statement of account in relation to all sums due to the Employee pursuant to clause 8.1, for the avoidance of doubt all calculations of the sums due to the Employee pursuant to clause 8.1 shall be calculated against the relevant net profit costs received by the Company excluding disbursements and VAT on such profit costs.

8.3 All relevant sums due to the Employee pursuant to clause 8.1 shall be payable monthly in arrears following the month such sums are received by the Company, on or about the last working day of each calendar month directly into the Employee's bank or building society account, save that the Employee shall not be entitled to receive any sums pursuant to clause 8.1(a), until such time as the profit costs invoiced by the Employee in a particular Commission Year, in respect of the work carried out by the Employee whilst acting as a solicitor to the Company, are in an aggregate amount that exceeds three times the amount of the Employee's Salary in that same Commission Year.

10. The Commission Year ran from 1 September to 31 August, mirroring the respondent's financial year. The trigger 'profit costs' for the claimant was

£114,000. The term profit costs was taken by both parties to mean the amount invoiced by the claimant for work done on individual files.

11. Over the course of the Commission Year 2021 – 2022, the claimant stored copies of all the invoices he billed and kept a spreadsheet setting out the overall amount. In early August 2022 he began sending copies of the spreadsheet to the managing partner as, in his view, he had exceeded the profit costs trigger having invoiced £114,000 and was entitled to the payment of commission under his contract.
12. By the end of the Commission Year the claimant's calculations were that he had invoiced £179,225.84 and was owed £13,045 in commission, that being 20% of the amount invoiced in excess of £114,000.
13. Around the point of the Commission Year concluding, the managing partner informed the claimant that one large project he had worked on, known as Columbia House, would be subject to apportionment due to the work that a partner in the firm had done on the project. The claimant disputed this as he believed his contract made no mention of apportionment, but he in due course agreed that 60% of the overall invoices for the project should be apportioned to him, the claimant. This agreement was confirmed in an email from him dated 31 October 2022. The apportionment on this one project reduced his overall commission for the year, according to his calculations, to £7,866.16.
14. Having previously given notice, the claimant left the firm on 1 November 2022. He had tried to obtain clarity from the respondent as to what commission they intended to pay him, but by the point of his departure he did not have such clarity and had not been paid any commission. The respondent emailed the claimant on his last working day stating that the amount of commission payable was under review.
15. Under clause 8.2 of the contract the respondent was, throughout the Commission Year, obligated to provide the claimant with a monthly statement of account in relation to sums due to him as commission under clause 8.1. The respondent was in breach of this clause throughout the entirety of the Commission Year with no such statements being provided.
16. On 14 November 2022 the claimant was told by the respondent that he would not be receiving any commission, on the basis that all of his invoices were now to be subject to apportionment. He was told "your estimates of invoices helping you reach your commission threshold included time that was clearly due to partners supervising your work and trainees that provided assistance."
17. On 15 November 2022 the claimant wrote to the respondent asking for "a detailed breakdown of the files I worked on, together with your comments on each invoice where relevant, so I can see exactly how you have come to the decision that no commission is due."
18. The respondent responded to the claimant on 18 November and 19 November 2022 alleging that his "retention of billing information and this firm's client data is in breach of your employment contract and the GDPR." The relevant clause said to have been breached was 15.1. This provided, amongst other things, that upon the termination of his employment the claimant shall deliver to the

company or irretrievably delete, all materials, records and information relating to the business or affairs of the company in his possession or control.

19. The material being referred to was the billing information and file names contained within the claimant's spreadsheet, upon which he relied to advance his argument that he was due commission. This material has not been shared with anyone beyond the respondent and this tribunal.
20. In the same communication the respondent set out, for the first time, its detailed position as to the calculation of commission for the 2021 – 2022 Commission Year. It stated that the amount apportioned to the claimant for work on Colombia House would be reduced from the previously agreed 60% to 51% and that on all other invoices the apportionment to the claimant would be 65%. This led to an overall figure of £106,784.56 being apportioned to the claimant, short of his commission threshold of £114,000.
21. The files listed within the claimant's spreadsheet were files that he had been given by the respondent to run himself as a newly qualified solicitor. Once completed he billed the work and ensured it was invoiced. The invoices were calculated on a fixed fee basis. The claimant was supervised by partners within the firm over the course of this Commission Year and on occasion will have been assisted by trainee solicitors within the firm. The respondent accepted that there was very limited time recording taking place on these files in relation to the work that anyone other than the claimant was engaged in.

The law

22. 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 authorized 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."

23. 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."

24. Section 27 of the ERA provides –

“(1) in this part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including –

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise ...”

25. Regulation 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that employment tribunals have jurisdiction to consider an employer's claim for an employee's breach of contract subject to certain restrictions. One of those restrictions is that the employee must first have issued a claim in the employment tribunal for breach of contract against the employer. A second relevant restriction is that an employer's contract claim cannot be brought for a breach of confidentiality (regulation 4(b) cross referencing regulation 5(d)).

Conclusions

26. I interpret the wording of the contract as requiring the respondent, quite simply, to pay the claimant commission of 20% on the amount invoiced by the claimant in excess of a threshold of £114,000.
27. My interpretation is supported by the lack of any mention of apportionment within the contract in general terms or any specific mechanism for such apportionment. I am unable to read apportionment into the contract when there isn't the wording to allow me to do so. The respondent's interpretation of the contract is therefore a deviation from the wording of the contract.
28. I have concluded that the respondent was not engaged in any meaningful exercise of apportionment during the course of the Commission Year. If the respondent was so engaged I would expect the respondent to have provided monthly statements of account to the claimant as required by clause 8.2 of the contract. Such statements would have set out the apportionment that the respondent was engaged in. Instead the respondent breached the requirement within 8.2 of the contract for every single month of the Commission Year.
29. There being no mention of apportionment within the contract the respondent's first mention to the claimant of such an approach only came once the claimant had identified to the respondent that, in his view, he had crossed his commission threshold and was due commission payments. This led the respondent to push for, and agree with the claimant, an apportionment of one major piece of work, Colombia House. However, that reduction alone would still have left a commission payment due to the claimant. The respondent then, after the Commission Year had concluded, informed the claimant that apportionment would apply to every single piece of his work to mark the supervision he received from partners and assistance received from trainee solicitors. This second stage of apportionment was applied as a blanket percentage across all of the claimant's files and as such did not, and could not, have involved an analysis of the specific contributions made by supervising partners and trainees on individual files, which inevitably would have led to a variety of different percentages. This second stage of apportionment served to reduce the amount invoiced by the claimant to under the commission threshold.

30. There was no evidence before me of the respondent keeping the necessary records to properly engage in an exercise of apportionment on the claimant's files. Instead the respondent's position was that it had the discretion to identify blanket percentages of apportionment at the conclusion of the Commission Year. If that was correct I would expect wording to that effect to be contained within the contract and an indication of that approach in the statements of account required by clause 8.2.
31. I therefore reject the respondent's interpretation of the contract as entitling them to apply apportionment to the claimant's invoicing thereby reducing his commission claim to zero. However, the claimant did agree with the respondent to apply apportionment to his work on Colombia House and therefore I do apply that specific reduction to the commission claimed.
32. Having considered all the evidence in this case I am of the view that the claimant was doing the work on the files concerned and that the belated apportionment of some of the overall work to others was not based upon specific work anyone else had done on his files, as indicated by the blanket percentages applied, but instead involved a rather more vague concept of the support a newly qualified solicitor receives from others. In my view that concept was being deployed at a late stage for the purpose of reducing the claimant's commission to zero, rather than any meaningful exercise of calculating the actual work different people had carried out on the same file.
33. Consequently it is my judgment that the claimant's claim for unpaid wages in the form of unpaid commission is well-founded and that the respondent is to pay the claimant a total of £7,866.16. The respondent being responsible for making deductions for income tax and National Insurance.
34. Turning to the respondent's employer's contract claim, when giving my oral reasons I rejected this on its merits. I then neglected to include that rejection in my written judgment. My original reasoning was that the material referred to was necessary for the claimant to retain for the purpose of pursuing the respondent for the commission that I have found to be an unauthorised deduction. I noted that the material had not been shared beyond the respondent and this tribunal. In those circumstances I declined to find the claimant in breach of the relevant contractual clause. However, in preparing these written reasons I realise that I should have rejected the claim on the basis that I have no jurisdiction to deal with it when the claimant has not brought a claim for breach of contract. In my judgment, the claimant's claim was very clearly brought as a claim under section 13 of the Employment Rights Act 1996, but even if this is not correct, there is no jurisdiction over an employer's claim for breach of confidentiality. I have therefore issued a revised judgment on reconsideration alongside these written reasons.

Employment Judge Sullivan

Date 14 June 2023

REASONS SENT TO THE PARTIES ON

14/06/2023

FOR THE TRIBUNAL OFFICE