



EMPLOYMENT TRIBUNALS

Claimant: Mr C Regan

Respondent: Biosite Systems Limited

Heard at: West Midlands

On: 27th May 2021

Before: Employment Judge Steward

Representation

Claimant: In person

Respondent: Mr Zaman (Counsel)

JUDGMENT

- a. The Claim is amended so that the correct respondents are Biosite Systems Ltd
- b. The decision of the tribunal is the claim for breach of contract fails.

REASONS

1. The claimant was employed by the respondents as an Enterprise Business Development Manager from the 10.10.2018 until the 13.10.20.(ET1) Though the respondents suggest the period was 3.12.2018 until 12.11.20 (ET3) the exact dates are not relevant to the claim. The claimant had brought the claim against Cheney Morgan. The correct respondent is Biosite Systems Limited. Nobody took issue with the claim being amended to reflect this.
2. The claimants contract had the following clauses of relevance;
 - i. 7.5 commission: "you shall be entitled to join the software development commission scheme as detailed in appendix two. The terms of the scheme may change from time to time which is at the complete discretion of the company".

- ii. 15.2 “on termination of the appointments however arising you shall not be entitled to any compensation for the loss of any rights or benefits under any share option, bonus, long-term incentive plan or other profit sharing scheme operated by us or any group company in which you may participate”.
3. Appendix 2 in the contract set out the commission scheme. Under the scheme employees were entitled to earn commission in respect of each new contract that is signed by the customer. The commission payable was split across the term of the contract, with a percentage being paid two months after the purchase order is received and the remainder being divided by the length of the contract in years and paid in instalments at various intervals throughout the duration of the customer’s contract. The claimant handed in his resignation on the 16.10.20.
 4. The claimant states that he was entitled to commission from contracts he had secured being due in February 2021 August 2021 February 2022 and August 2022. The claimant’s case is that clause 15.2 of the contract as aforementioned does not include commission payments and that the contract does not stipulate that the employee must remain employed in order to receive the commission payments. The claimant therefore claims the sum of £2150 which reflect the four commission payments referred to above.
 5. The respondent states that clause 15.2 was drafted to encompass commission payments which are referred to as bonus and/or long term incentive plan. Further upon termination of the appointment all entitlement to such payments ends. The respondents also rely on the discussion they say they had with the claimant at a business meeting on the 25.4.2019 when the detail of the commission scheme was explained to the claimant and another employee. This is disputed by the claimant. The respondent accepts that the commission payments disputed are as set out by the claimant and the correct sum disputed is £2150.
 6. I had the opportunity to read the various emails and attachments that had been sent to the tribunal by the claimant. I also had the opportunity to read the respondent’s bundle of documents which ran to 74 pages and included the ET1, ET3, various whatsapp messages, the claimant’s contract of employment and the grievance procedure. I was also provided with the claimant’s statement and a statement and addendum from Mr Bryant on behalf of the respondent. I heard oral evidence from the claimant and Mr Bryant for the respondents. Neither party had any additional documents for me to consider on the morning of the hearing. Both parties agreed that the interpretation of clause 15.2 in the contract and the nature of the discussions that took place on the 25.4.19 were central to the case. The claimant appeared in person and the respondent was represented by Mr Zaman of Counsel. The claimant states the respondent was in breach of contract.

The Law

7. Employment Tribunals in England and Wales were given power to deal with breach of contract claims by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Findings of Fact

8. It is not disputed that the claimant was employed by Biosite Systems Ltd as an Enterprise Business Development Manager. The claimant says he handed in his

notice on the 2.10.20. The respondents say the correct date was the 16.10.20. the correct date is immaterial to the claim.

9. It is not disputed as a result of customer contracts that the claimant had secured he would have been entitled to commission payments in February 2021 and 2022 and August 2021 and 2022. The agreed total was £2150.
10. The claimant states that clause 15.2 does not include commission payments and therefore he was still entitled to the commission payments even after his contract of employment came to an end. The claimant said in evidence that the new contract which included Appendix 2 was not sent to him until December 2019 and this was a busy period. The claimant says in his statement at paragraph 16 that it was only then that questions are being raised about the commission payments being staged and what might happen after we left the company. The claimant also said in his statement at paragraph 17 that he raised questions with his line manager Richard Thompson about what would happen with commission payments if the claimant wanted to leave the company and why the payments had to be stage. The claimant says that he received no answers to these questions and shortly afterwards Richard Thompson was also made redundant.
11. The claimant also said in his statement at paragraph 18 that he never raised questions about the commission because he was under pressure with respect to his performance. The claimant also said at paragraph 19 that the assumption was that all outstanding commission will be settled upon leaving the company as per what happened with Richard Thompson.
12. During the claimant's grievance meeting on the 3rd of December 2020 the claimant was asked if he'd ever had the commission structure explained to him. The claimant stated that there had been unofficial meetings where percentages were discussed but that he had given Biosite room to breathe as software was new to Biosite. The claimant went on to say that it had been explained how commission was going to be broken down over the phone and he always thought he was going to get paid that commission. The claimant went on to say that he'd never been told formally why the commission scheme was paid down across the contract. However he also went on to explain that he understood the logic of spreading the commission over the length of the contract and stated that it may be due to the company struggling to pay the commission upfront and gave an example where this maybe a problem.
13. The respondents implemented the new software development commission scheme (the scheme) in April 2019. On the 25.4.2019 it is not disputed that a meeting took place between Michael Bryant Commercial Director the claimant and another employee Kamran Ali at a local restaurant. The claimant disputes that the issue of the commission scheme was discussed at this meeting. The claimant states the meeting was to discuss other business matters and opportunities. When the claimant gave evidence he suggested in cross examination that at the meeting

“Rough commission figures were thrown around”

And

“Not sure what was discussed”

14. Mr Bryant in his witness statement and in oral evidence was very clear that the main purpose of this meeting was to discuss the new commission scheme. Mr Bryant said this was explained to both employees and they both asked questions

about the scheme. I was referred to page 53 in the bundle which was a photograph of what appeared to be a diary entry. Mr Bryant said that this was his diary note for the meeting which explained the new commission scheme. It is noted that on the previous page there is a date and phone number entry which is the 26.4.2019. Mr Bryant could not say when that note was made but the date is the day after the meeting with the claimant and would seem to suggest therefore that these notes must have been made very close to the meeting on the 25.4.2019.

15. At the very bottom of the diary meeting note is the entry 'Kam £1.5m' Mr Bryant said in his evidence that the claimant and Mr Ali had asked Qs about the commission scheme and had given potential examples. It would appear that this entry is a note of such an example.
16. Mr Bryant was also interviewed as part of the investigation on the 9th of December 2020. He confirmed the meeting which took place on the 25th of April 2019 and that Kamran Ali and the claimants were present at that meeting when the new commission scheme was discussed. Mr Bryant distinctly recalled Mr Ali asking what would what happened to any commission not yet due if they left the business? They were advised that they would have to forfeit that.
17. As part of the investigation the respondent interviewed Kamran Ali on the 3rd of December 2020. Mr Ali outlined the key points of the commission scheme and noted that 1% is paid upfront and the remainder is paid over the life of the contract. Mr Ali was asked what his understanding would be with respect to future commission payments. Mr Ali said he would walk away from the commission owing and that was the reason why he had tried to get more upfront. Mr Ali went on to say that he knew this because Mike Bryant had mentioned this to him. Mr Ali confirmed that there was a meeting between the claimant Mr Bryant Richard Thompson and himself. Mr Ali went on to say that he could also recall conversations between himself Richard and the claimant.
18. On balance I accept that at the meeting on the 25th April 2019 the new commission scheme was discussed. As per the diary entry and the evidence of Mr Bryant the mechanics of the scheme were discussed and what would happen to future commission payments that were due if the employee left. They would be forfeit.
19. Mr Bryant explained in oral evidence that the company used various channels of communication both formal and informal. There was ample evidence in the bundle that the respondents did use various methods to communicate as can be seen in the way the meeting was organised on the 25.4.2019.
20. I also found that the claimant and Mr Bryant had a good working relationship. Though there would have been pressure on the complainant to meet his work targets the impression I got was that Mr Bryant was supportive of the claimant valued him and saw potential. Mr Bryant even suggested he would take the claimant back within the company employment.
21. The commission scheme was explained in detail by Mr Bryant and it made sense that a small percentage in commission was paid at the start of the contract with the remainder spread over the remainder of the contract on each anniversary of the contract. This protected the respondents from exposure to large commission payments should the contract be terminated or fail for some other reason. Mr Bryant said that the contracts normally last 2-3 years with the maximum contract at 5 years in length. I find therefore that the assertion you have to remain

permanently employed by the respondents to realise commission payments as incorrect. The likely period was 2-3 years or rarely 5 years.

Conclusions

22. After considering the bundle of documents, emails, statements and oral evidence I have come to the conclusion that the respondents were not in breach of contract for the following reasons,
- i. At the meeting on the 25.4.2019 the scheme of commission (as set out in appendix 2 of the claimant's contract of employment) was explained to the claimant and Mr Ali by Mr Bryant.
 - ii. I accept the evidence of Mr Bryant on this point which was clear and supported by the entry in his diary at 53 in the bundle. It was also supported by the grievance interview of Mr Ali.
 - iii. The claimant was not clear on what was discussed at the meeting on the 25.4.2019. He suggested when cross examined that he was not sure what was discussed and also suggested that some rough commission figures had been thrown about. It appears the claimant's memory of this meeting is not as clear as Mr Bryant's. The claimant seemed to suggest that commission had been discussed but was not clear to what extent.
 - iv. It's clear that the respondents used various channels of communication. I find on balance that its more likely than not that the topic of a change to the commission structure in April 2019 would have been discussed by the sales staff. This change would have been extremely important to them.
 - v. The claimant had said at paragraph 16 in his statement that he got the new contract on the 19th of December 2019. He went on to say it was only then questions were being raised about the commission payments being staged and what might happen after he left the company. Clearly the topic was being discussed as far back as December 2019.
 - vi. The claimant went on to say at paragraph 19 that he had never understood the ramifications of stage commission payments or why there was a need stage the payments. However in his grievance meeting the claimant said that he had done some research on the reasons why the commission payments had to be staged over the course of the contract and then gave an example.
 - vii. The claimant has relied on clause 15.2 of the contract of employment by stating that this clause does not cover commission payments. It is correct that the word commission is not used within this clause. The respondents suggest that the words bonus and/or long term incentive plan cover the issue of commission payments. I find that clause 15.2 can be interpreted to include commission payments. The meeting on the 25.4.2019 made it clear how the new scheme operated and what would happen to the commission entitlement if the employee left the employment. The commission scheme was designed to protect the respondents from initial large commission payments which exposes them to risk if the contract should end early for whatever reason. It would be highly unusual therefore for the respondents to bring in a scheme of commission payments that allows for payments to be made to staff up to 5 years after the employment comes to an end.

- viii. I find the respondents were not in breach of the contract of employment by failing to pay the commission payments as claimed and the claimants case must fail.

Electronically signed
Employment Judge **Steward**

Date_31st May 2021_____

JUDGMENT SENT TO THE PARTIES ON

Miss Z Ravat
01/06/2021

FOR THE TRIBUNAL OFFICE

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.