What is a ‘fair and reasonable’ level of split commission?

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An employer’s decision regarding the split of a commission pool between offices was unreasonable in circumstances where

the rules set out in the commission plan were not followed.

Mr Hills was employed as Niksun's regional sales manager in the UK. He was entitled to commission, the payment of which was governed by the employment contract and compensation plan. The commission plan stated that Niksun would determine a fair and reasonable level of compensation. The plan also stated that commission would be split between regions depending on (amongst other things) the location of the 'point of influence' – that is to say, the place where a particular deal is negotiated or managed.

Mr Hills negotiated a deal in the UK with Credit Suisse with some help from the US office. Niksun decided that the US was the point of influence in that deal and allocated only 48% of the commission to the UK. Mr Hills argued that 100% of the commission should be sent to the UK and, as a result, he had been underpaid by almost £7,000.

The Court of Appeal held that the point of influence should have been the UK, so Mr Hills had been underpaid. Evidence from Mr Hills' manager indicated that the US decision-maker had promised 'the lion's share' of the commission to the UK, which he understood to mean two thirds. As Niksun did not provide any evidence from the US manager as to how the 48% split was calculated, the conclusion could only be that it was not reasonable according to the terms of the commission plan.

Whilst this is a case which largely turned on its facts, particularly the wording of the commission plan, there is a point to be taken from it. Namely, employers should cast a critical eye over any calculations, tests or statements of discretion drafted for their contractual documents, as they can expect to be held to them by the court.

Hills v Niksun Inc [2016] EWCA Civ 115

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