EMPLOYMENT TRIBUNALS

Claimant: Miss Camille Grassick

Respondent: Grant Thornton UK LLP

Heard at: London Central (via CVP) **On:** 4th March 2021

Before: Employment Judge Nicklin

Representation
Claimant: in person
Respondent: Mrs K Skeaping (Solicitor)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

1. The Claimant's application to add a claim of unauthorised deductions from wages in respect of a payment allegedly due to her in January 2021 is granted.

2. The judgment of the tribunal is that the Respondent did not make unauthorised deductions from wages in respect of a discretionary bonus payment and the payment allegedly due in January 2021. The claims are accordingly dismissed.

REASONS

Introduction

1. By a claim form presented on 19th November 2020, the Claimant brought a claim of unauthorised deductions from her wages in respect of a discretionary bonus payment of £2,750, alleged to be payable to her in September 2020, a date after her employment had terminated.

2. On 20 January 2021, the Claimant contacted the tribunal to advise that she wished to amend her claim. On 25th February 2021, following a direction given by Employment Judge A James on the same day, the Claimant lodged written details of her application to amend the claim to include a further complaint of unauthorised deductions from her wages. For the months of May and June 2020, the Claimant had agreed to a variation of her contract of employment to reduce her contracted hours and pay by 20%. On 11 December 2020 and following a review of its performance, the Respondent announced that it would pay affected employees the 20% reductions from May and June in the January 2021 payroll for all employees who were employed on the date of that announcement. Whilst the Claimant was no longer employed by the Respondent, she applied to amend her claim to include this 20% (a sum of £2,000 gross pay) on the footing that she was an employee affected in May and June 2020.

3. The Claimant pursued her application at this hearing and the Respondent objected on the basis that the application was made late, although Mrs Skeaping accepted that there was no prejudice caused to the Respondent.

4. I was provided with an agreed hearing bundle running to 120 pages and witness statements from the Claimant and Ms Nikita Tayal (a manager from the People Advisory, People and Culture team of the Respondent). Both witnesses also gave sworn oral evidence to the tribunal.

The Claimant's application to amend the claim

5. I decided to grant the Claimant's application to amend, having regard to the principles in Selkent Bus Co Ltd v Moore [1996] ICR 836, for the following reasons (which were given orally at the beginning of the hearing):

    5.1. The new complaint has arisen since the Claimant's employment has terminated and subsequent to her presentation of the claim. She only became aware that employees who had agreed to reduce their hours and pay in May and June 2020, would be paid the 20% shortfall after the Respondent's CEO announced the decision on 11 December 2020.

    5.2. The Respondent has prepared for the hearing anticipating that this complaint might be considered. It has produced evidence to deal with the complaint and Ms Tayal's witness statement also provides a response.

    5.3. The complaint is in time because the deduction relied upon is said to have occurred in January 2021 (when this payment was made to current employees) and I considered the amendment at the hearing on 4 March 2021. As such, this new complaint is brought within 3 months of the alleged deduction.

    5.4. I have also had regard to the timing and manner of the application. The Respondent said that the application was made extremely late but does not point to any prejudice by allowing the amendment. Given that the basis of the new complaint only arose in December and the deduction was in January, I decided that any alleged delay was minimal.

    5.5. Both parties being in a position to deal with the new complaint at the hearing, it would cause a far greater injustice and hardship to the Claimant

not to be able to pursue this claim than it would cause to the Respondent, which accepts there is no prejudice.

Issues to be determined

6. The issues I had to determine were:

   6.1. The claim for a discretionary bonus payment:

      6.1.1. When did the Respondent declare a bonus in the Claimant's favour?
      6.1.2. Was any bonus declaration made subject to the conditions in clause 6 of the Claimant's contract of employment?
      6.1.3. Was it a rational decision?
      6.1.4. Was the Claimant entitled to be paid any declared bonus after her employment had terminated given she had originally expected payment in April 2020?
      6.1.5. Did any declared bonus amount to wages under section 27 of the Employment Rights Act 1996 ("the ERA")?
      6.1.6. If so, was there a deduction?
      6.1.7. If so, was the deduction authorised?
      6.1.8. If not, what sum is owing to the Claimant?

   6.2. The claim for 20% pay not paid in May and June 2020:

      6.2.1. Does this sum amount to wages under section 27 of the ERA?
      6.2.2. If so, was there a deduction?
      6.2.3. If so, was the deduction authorised?
      6.2.4. If not, what sum is owing to the Claimant?

7. The Respondent resists the claim on the basis that:

   7.1. The Claimant's terms and conditions of employment state that there is no right to payment of a bonus where the employee's employment terminates for any reason (or where they are under notice of termination) at or prior to the date when a bonus might otherwise have been payable; and

   7.2. The Claimant had no contractual right to be paid anything after the termination of her employment in respect of the 20% pay reduction in May and June 2020.

Findings of Fact

8. I set out the following findings of fact below.

9. The Respondent is a professional services organisation providing audit, tax and advisory services around the British Isles. The Claimant was employed by the Respondent from 21 August 2017 to 21 August 2020, initially as an Executive in Transaction Services and latterly in the role of Manager. She is an Australian national and was sponsored in her employment by the Respondent under a three-year Tier 2 General Visa. It is common ground that the Claimant gave notice to terminate her employment at the expiry point of the visa, having decided not to apply to extend.

Discretionary bonus

10. The Claimant's latest contract of employment provides as follows regarding a bonus:

> ***Discretionary bonus***
>
> 6.1 The Employer may in its absolute discretion pay you a bonus of such amount, at such intervals and subject to such conditions as the Employer may in its absolute discretion determine from time to time.
>
> 6.2 Any bonus payment shall be purely discretionary and shall not form part of your contractual remuneration under these Terms and Conditions. If the Employer makes a bonus payment to you in respect of a particular financial year of the Employer (being the period from January to December), it shall not be obliged to make subsequent bonus payments in respect of subsequent financial years of the Employer.
>
> 6.3 Notwithstanding clause 6.2, you shall in any event have no right to a bonus or a time- apportioned bonus if:
>
> i. you have not been employed throughout the whole of the relevant financial year of the Employer; or
>
> ii. your employment terminates for any reason or you are under notice of termination (whether given by you or the Employer) at or prior to the date when a bonus might otherwise have been payable.

11. These terms form part of an updated contract of employment which was provided to the Claimant and which she signed as accepted on 8 July 2019 (at page 73 of the bundle).

12. It was agreed between the parties that the disputed bonus which concerns this claim arose from the Claimant's period of working between 1 July 2019 and 31 December 2019. Ordinarily, a bonus declared for this period would be paid to eligible employees in April 2020.

13. As the Claimant accepts, the bonus scheme was discretionary and did not form part of the Claimant's contractual remuneration. It was a matter for the Respondent to decide to whom and in what sum it would pay any bonus and such payments would be subject to the conditions set out at clause 6.3.

14. The Respondent decided not to pay any bonuses in April 2020 because of the commercial uncertainty arising from the COVID-19 pandemic. For this reason, the Respondent had not declared any bonuses at this stage.

15. Accordingly, having decided not to declare and issue bonuses in April 2020, this was not "the date when a bonus might otherwise have been payable" under clause 6.3(ii) of the Claimant's contract of employment. This is because there was nothing payable at this point; the discretion to pay had not yet been exercised and it was uncertain whether the Respondent could make such payments in the circumstances.

16. On 15 July 2020, the Claimant attended a video meeting with a partner in her team, Patrick O'Brien. The parties are agreed that, in this call, the Claimant was advised that her bonus would be £2,750 and it would be paid in the September 2020 payroll.

17. I accept the Claimant's evidence that she was not told in this meeting that the payment would be subject to the clause 6 conditions. Ms Tayal's witness statement refers at paragraph 20 to the Claimant having to meet 'bonus payment conditions' to receive the payment, but she was not in attendance at the meeting. The Claimant has produced a contemporaneous note of the meeting which does not refer to such conditions and she was the only witness before the tribunal who was there.

18. However, I find that the Claimant was fully aware that any bonus declared by the Respondent was subject to clause 6.3 of her contract because she accepted that those conditions applied. The fact it was not mentioned at the meeting did not create some alternative arrangement for the payment of a bonus.

19. The Respondent met with the Claimant to inform her of the bonus on 15 July in the belief that she would still be employed by the Respondent at the time of payment in September 2020. This is because:

    19.1. The Claimant had not given notice to terminate her employment at the date of the meeting;
    19.2. On 13th July, two days before the meeting, an email from Alex Webster (Global Mobility Executive) to the Claimant shows that the Respondent believed at that date that the Claimant's visa expired on 30 September 2020 and this was not corrected by the Claimant until shortly after the meeting; and
    19.3. In the weeks following the meeting, consideration was given by the Respondent to arrange for an extension to the Claimant's visa to enable her to remain employed by the Respondent for longer. An email from Mo Merali, Head of Transaction Advisory Services, dated 27 July 2020 (at p.114 of the bundle) shows that the Respondent was willing to arrange this but the Claimant had decided to leave the UK on 1st September 2021.

20. The Claimant's employment terminated on 21 August 2020, giving short notice owing to her visa restriction. The Claimant was not paid any bonus in September 2020 because she was no longer employed at the date the bonus became payable.

21. In respect of other employees who left their employment prior to the bonus payment date, they also were not paid their discretionary bonus under clause 6.3. The Claimant's witness statement suggested that another employee from her team was paid a bonus after leaving, but she conceded during cross examination that this payment was not a discretionary bonus and was an ex-gratia payment made in relation to a specific project that employee had undertaken.

The 20% of pay not paid in May and June 2020

22. The Claimant consensually agreed to a variation in her employment contract, reducing her hours and pay by 20% for the months of May and June 2020. The variation is set out in writing in an email dated 30 April 2020 addressed to the Claimant and she electronically signed to confirm her acceptance of the variation on 4th May 2020 (p.100 of the bundle).

23. The variation was temporary, but I find that it was an entire agreement between the parties in respect of that two-month period:

    23.1. In her evidence, the Claimant told me that the 'messaging' from the Respondent about the variation, given in what she described as 'Q&A calls', was that if company performance was better than expected, they would repay the reduction. I do not find that this was a term of the agreement to vary the contract. It was at most a hope or aspiration given without promise. There was no measure specified about what performance would trigger a repayment to enable either party to have any certainty about when an obligation to repay would arise.

    23.2. The Claimant's working hours were reduced in line with the reduction in pay and the written terms of the variation do not place any obligation on the Respondent to later repay anything.

    23.3. The later repayment to staff was therefore gratuitous having regard to the fact that the contracted hours for the affected period had been reduced. There was no salary outstanding to the Claimant.

24. On 11 December 2020, the Respondent's CEO, David Dunckley, announced that, owing to better performance, the Respondent would repay the 20% reduction made to affected employees who had agreed to a variation in their contracts for the months of May and June 2020. This payment was made in January 2021.

25. The condition attached to repayment was that an affected employee needed to be employed by the Respondent on 11 December 2020 in order to be eligible. I accept Ms Tayal's evidence on this point, which was not challenged.

26. The Respondent did not pay the Claimant because her employment terminated before the announcement was made.

27. Whilst the Claimant pointed to another departing member of staff, Mr Coates, who did receive the payment in January, I accept Ms Tayal's evidence that this employee left the Respondent's employment on 18th December 2020, which was one week after the announcement.

Law

28. Where the employer operates a discretionary bonus scheme, Burton J set out the test to be applied when analysing the exercise of the employer's discretion in Clark v Nomura International Plc [2000] IRLR 766 at paragraph 40:

> *"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."*

29. Further, the Court of Appeal confirmed in IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212; [2018] IRLR 4 that where an employer exercises a discretionary power, the test to be applied is a rationality test equivalent to the *Wednesbury* test, namely: a.) whether relevant matters and no irrelevant matters had been taken into account, and b.) whether the decision was such that no reasonable decision maker could have made it.

30. For the purposes of a claim of unauthorised deductions from wages, so far as relevant, 'wages' are defined in section 27(1)(a) of the ERA as:

> *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*

31. In New Century Cleaning Co Ltd v Church [2000] IRLR 27, the Court of Appeal held by a majority that a worker had to show that there was a legal entitlement to the payment in order for the sum to fall within the definition of wages.

32. In the context of discretionary bonuses, the EAT held in Farrell Matthews & Weir v Hansen [2005] IRLR 160 at paragraph 40:

> *In the case of a discretionary bonus, whether contractual or by custom, or ad hoc, the discretion as to whether to award a bonus must not be exercised capriciously (see United Bank Ltd v Akhtar [1989] IRLR 507 and Clark v Nomura International plc [2000] IRLR 766). But until the discretion is exercised in favour of granting a bonus, provided the discretion is exercised properly, no bonus is payable. Once, however, an employer tells an employee that he is going to receive bonus payments on certain terms, he is, or ought to be obliged to pay that bonus in accordance with those terms until the terms are altered and notice of the alteration is given (Chequepoint (UK) Ltd v Radwan CA 15 September 2000). This situation applies equally where a discretion to award a bonus is granted under contract, as in Chequepoint, or by custom or by ad hoc decision.*

33. Section 13 of the ERA provides as follows (in respect of an unauthorised deduction from wages claim):

> *(1) 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.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means 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.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

35. In Delaney v Staples [1992] IRLR 191, Lord Browne-Wilkinson (at paragraph 11) referred to the need to keep the 'normal meaning' of wages in mind when considering the definition of wages:

> *the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word 'wages'.*

Conclusions

Bonus

When did the Respondent declare a bonus in the Claimant's favour?

34. In my judgment, the Respondent first declared a bonus at the Claimant's meeting with Patrick O'Brien on 15 July 2020, when she was informed that her bonus would be £2,750 and that it would be paid in September.

Was any bonus declaration made subject to the conditions in clause 6 of the Claimant's contract of employment?

35. The declaration of a bonus on 15 July 2020 was subject to the payment conditions in clause 6. Having found that the Claimant was aware of those conditions and that they operated, her legal entitlement to a bonus was regulated by those conditions. The parties had agreed in the contract, from the outset, that any discretionary bonus would be paid subject to those terms. In my judgment, there is no basis to argue that a departure from those conditions was or should have been made by the Respondent because the Claimant's employment later ended prior to payment owing to a visa restriction. Such a situation is not envisaged by the clear wording of clause 6.3.

36. As the Respondent genuinely believed it was declaring a bonus in circumstances where the Claimant would be employed at the date of payment, I do not accept the Claimant's contention that the Respondent informing her of the bonus on 15th July was an implied acceptance that this would be paid even if she had ceased employment prior to September because of her visa expiry. The terms of the contract were not varied by the meeting on 15th July 2020.

Was it a rational decision?

37. I conclude that the Respondent did not act capriciously in exercising its discretion in respect of the bonus:
    - 37.1. The Respondent was plainly not in a commercial position to determine bonuses or declare them in readiness for an April payment. Like many other businesses, the pandemic had affected its planning and forecast. In any event, it was not contractually obliged to do so.
    - 37.2. The parties had agreed clear terms in clause 6 of the employment contract and there is no evidence to suggest that the Respondent had acted in breach of those terms.
    - 37.3. The Respondent acted in good faith when it met with the Claimant on 15th July 2020, believing that she would be employed by the Respondent at the time of payment in September.
    - 37.4. There is no evidence to suggest that the Respondent failed to consider relevant matters or considered irrelevant matters. The Claimant was treated like other existing employees by being informed of an intended bonus at a time when the Respondent was first in a position to be able to make the declaration.
    - 37.5. The implementation of the clause 6 conditions (i.e. requiring the Claimant to be employed at the date of payment of the bonus) where the date for payment is communicated at the point of decision was applied consistently across the Respondent's workforce. There were no additional or capricious conditions attached to the bonus arrangement for the Claimant.
    - 37.6. In the circumstances, the decision to award a bonus, subject to clause 6 of the employment contract, was not irrational or perverse.

Was the Claimant entitled to be paid any declared bonus after her employment had terminated given she had originally expected payment in April 2020 and was employed at that point?

38. Whilst the Claimant had an expectation to be paid a bonus in April, I conclude that she did not have any entitlement to it at that point because, in line with the authorities of *Church* and *Farrell Matthews* cited above, no bonus had been declared and therefore no legal obligation to pay her any bonus had arisen.

39. Accordingly, in order to receive the bonus which had been declared, the Claimant needed to be employed at the date of payment in September and she was not.

40. As the Claimant has no entitlement to the bonus payment, her claim fails. However, I set out below how my conclusions apply to section 13 of the ERA.

Does the bonus amount to wages?

41. Having found that a conditional legal entitlement arose (i.e. a bonus being declared and payable subject to clause 6 of the contract) and in accordance with *Farrell Matthews*, I conclude that the bonus does amount to wages within the meaning of section 27(1)(a) of the ERA.

Was there a deduction?

42. It is not in dispute that no bonus was paid in September, the Claimant's employment having terminated on 21 August 2020. I conclude that, because the Claimant's entitlement to the bonus was conditional upon remaining employed at the date of payment, there was no sum which was 'properly payable' to her in September (pursuant to section 13(3) of the ERA) because her entitlement had become extinguished by virtue of her resignation.

Was the deduction authorised?

43. Even if it were the case that the bonus could be construed as properly payable, I conclude that, because the conditions in clause 6.3 operated, the deduction (i.e. the non-payment of the whole of the bonus) was authorised by virtue of a 'relevant provision' in the written terms of the Claimant's contract of employment. The Claimant had signed to accept these terms on 8 July 2019. Accordingly, pursuant to section 13(2)(a) of the ERA, clause 6 authorised non-payment in circumstances where the Claimant was not employed by the Respondent at the "date when a bonus might otherwise have been payable".

Is there anything owing?

44. It follows that the non-payment of the bonus was not an unauthorised deduction from wages and so no payment is owing to the Claimant.

20% pay from May and June 2020

Does this amount to wages?

45. There are no wages owing to the Claimant for her work done whilst employed by the Respondent.

46. I conclude that the CEO's announcement of a gratuitous payment to existing employees who were affected by the temporary variation to their contracts in May and June 2020 did not give rise to a contractual payment referable to the Claimant's employment. Having regard to *Delaney*, this was not a form of consideration for work done by the Claimant and it was not referable to any

obligation on the Claimant to render her services. The Claimant's contracted hours had been reduced for the two-month period in line with the reduction in pay. There had been sufficient consideration for that variation and there was no obligation on the Respondent to pay anything further for that period beyond her reduced pay.

47. Accordingly, the sum claimed does not amount to wages under section 27(1)(a) of the ERA and the claim therefore fails.

48. For the above reasons, it is unnecessary for me to consider the other issues under this head of claim regarding deductions and authorisation.

Outcome

49. Both complaints of unauthorised deductions from wages are therefore dismissed.

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Employment Judge Nicklin

Date 5th March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

10/03/2021...

FOR EMPLOYMENT TRIBUNALS