EMPLOYMENT TRIBUNALS

Claimant: Mr W Webb

Respondent: Network Scaffolding Contractors Limited

HELD AT: Manchester **ON:** 30 January 2019

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr B Culshaw, Solicitor

Respondents: Mr S Chowdhury, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claims of:

1. Breach of contract in relation to non-payment of bonus

2. Unlawful deduction of wages in relation to

   (a) car damage deduction of £200

   (b) failure to pay wages from 23rd March to 30th March 2018

3. Failure to provide written particulars contrary to section 1 of the Employment Rights Act 1996 succeed.

REASONS

1. The claimant brings a claim of breach of contract in respect of a bonus payment, unlawful deduction of wages in respect of the same, failure to provide a written contract, the claimant withdrew his unfair dismissal case in the course of the hearing on the basis the respondent agreed the claimant had left by way of resignation on 30th March 2018.

2. The issues in this case now are

Breach of Contract

3. Was there an agreement between the parties such that the claimant would only be entitled to a discretionary bonus of up to 33% of his salary in the 2017 bonus year.

4. If there was an expectation between the parties that a bonus would be paid beyond the 2017 bonus year was the claimant's entitlement to a contractually agreed bonus or a discretionary bonus.

5. In the event the claimant was entitled to a contractually guaranteed bonus and his employment terminated on 22 March should the bonus payment be pro-rata'd.

Deduction from Wages

6. If the claimant's employment terminated on 30 March was the claimant absent without leave between 23 March and 30 March 2018.

7. Did the claimant's absence entitle the respondents to refuse to pay the claimant for the period 23 to 30 March 2018.

Deduction from wages re car

8. Was the respondent entitled to make a deduction from the claimant's pay in respect of damage to the company car.

Section 1 Employment Rights Act 1996

9. Has there been a failure on the respondent's part to issue a Section 1 Statement of Terms.

10. In the event there has been such a failure is the Tribunal obliged to/or compensation under Section 32 of the Employment Act 2002, or only make a declaration under Section 11 of the Employment Rights Act 1996.

Witnesses and Evidence

11. The claimant gave evidence himself, for the respondent: Graham Moor (CEO Tasiker), Billy Dolan (general manager Scotland), Mark Jeavens (Operations Director), Jane Ratcliffe (CFO).

12. There was an agreed bundle, there was some discussion about the witness statements as the claimant submitted one from David Lea with short notice, Mr Lea was not going to attend to give evidence in any event and therefore I would have attached no weight to his written statement.

Tribunal's Findings of Fact

13. The claimant commenced employment for the respondent in 2012, the respondent operated two sites in the North West, Bolton and Salford. The claimant was employed as General Manager of the Salford site and in October 2017 became Regional Manager of both North-West sites, based at Bolton.There was still a general manager at the Bolton site.

14. The claimant's salary was £45,000, which then increased to £55 000 within 12 months. The claimant was aware that normally bonuses were given at the discretion of the MD and such amounts would not be known beforehand. Bonuses were paid for the yearly period April to March with payment following processing around the end of May or June. The claimant received this discretionary bonus following the end of March in 2014, 2015, 2016.

15. The claimant replaced KB when he joined who had been on a salary of £55,000. There was also a Commercial Manager (MF) for the Salford site on a salary of £52,000. MF left in early 2015 and was never replaced, the claimant then had to perform his own duties and those performed by the Commercial Manager. He made it clear to senior staff David Lea, the CEO of the parent company and Mr Tom Taziker that while he would cover for a few months, MF needed to be replaced as he could not do all the work on his own. However, MF was not replaced.

16. The Commercial management tasks at the Bolton site were conducted by a number of staff namely Dave Lea, MD, Tom Lea Operations Manager and later North West Regional Director, Mike Wynett Estimator, Ross Rimmer, Estimator and the Office Manager and Head of Accounts Mrs Fisk. Accordingly, it was the claimant's case that the General Manager of the Bolton site was responsible for significantly less work than he was at Salford following MF's departure. I accept this contention, it was entirely logical.

17. The claimant sought work elsewhere because he felt he was not being paid properly for the amount of work he was doing and was offered better terms by three companies in 2016. At the time his remuneration package with the respondent was a salary of £55,000 plus a discretionary bonus.

18. On 27 September the claimant spoke to Dave Lea and told him of these three job offers and the packages being offered and advised that he had only been offered them verbally at this stage. The next day Mr Lea met with the claimant to discuss his remuneration, the claimant pointed out that people at other companies were on £80,000 or £90,000 a year for similar jobs and he was doing the job of two people, whose combined salaries had cost the company £107,000 a year with bonuses on top of that. He asked to be paid a minimum of £80,000 per year. Mr Lea said that they could do that but the only issue would be if other General Managers found out C was on £80,000 a year, they would want that and he suggested that it be broken down into £60,000 annual salary with a £20,000 bonus, and that Mr Lea said he would make sure the claimant got this every year. This was agreed and the claimant received an email the next day confirming the agreement, copied to the Finance Director, PB.

19. This email from Dave Lee to PB was headed up re Will Webb and said:-

> "Paolo, after my meeting with Will today this is what we have come up with and I am happy with it. Please reply your comment.
>
> Wages annually £60k
>
> Year bonus 33% of his wage
>
> Looking at this for his position it is very fair"

20. PB replied agreed "it is the right decision given his commitment and what he is delivering". Mr Lea replied copying it to Karen Jones, "can you get Alison to draft this up as shown below and with the little bits that we spoke about". Nothing was ever put in writing however. The email linked the bonus to a percentage of C's salary and not to the company's performance. The claimant contended it was an ongoing arrangement, the respondent that it was a one-off for 2017.

21. In June 2017 however, the claimant received a bonus payment of £8,000 which he disputed as he said this was not what had been agreed.

22. On 5 July the claimant emailed Mr Lea and said "please see below the email chain I referred to in our conversation yesterday from 28 September, as per our conversation I understand and do appreciate your efforts with the fact that you went to back for us to ensure we received something from T1 this year in relation to bonuses, however, when I was informed that my bonus was being paid I obviously assumed it would be the amount we had agreed upon last year, having said and with the amount in question here I am sure you can understand why I was disheartened why I did receive my bonus, I believe it would be impossible for anyone expecting that amount of money to be happy when receiving 40% of the expected amount. Once again, I do appreciate you going out on a limb and challenging the board to secure the North-West staff with annual bonuses".

23. The respondent relied on this email to establish that in fact the claimant knew his bonus was not contractual but was as was the norm dependent on his and the company's performance. The claimant contented that whilst the email was couched in that context he was simply trying to be as amicable as possible in order to ensure the agreement was adhered to; by that stage he had worked a further 10 months under the impression he would get the £20000

24. Mr Lea had then sent an email to PB copied to the claimant which said:-

> "Paolo
>
> See email trail below, me and Will had a chat regarding his bonus and he was a bit upset with what he received, if you want to have a chat to him feel free to do so. As I stated to him we can't give out what we haven't got, I think you need to send Ross or Steph to go down to see him and go through the accounts showing how much money we have had to credit and write off, Will, I will always do the best for my team and like always they come before me and now its when I need all my staff to pull together and help me".

25. The claimant said there was a conversation with Mr Moore, CEO of Talisker (the parent company) regarding the claimant's claim for the £20,000 and Mr Moore had asked to see the email promising to pay him £20,000 which he showed him on his phone. The claimant said after reading this Mr Moore said, "it is what it is" and said it would be paid. He also said he would arrange for it to be formalised in a written contract and the claimant said he had been asking for that for ages. Shortly afterwards he was paid the remaining £12,000, £4,000 in August and £8,000 in September although a written contract was never provided.

26. Mr Moore in evidence stated that he did not say "it is what it is" nor recalls seeing the email in question. He said he was persuaded his performance merited a payment of £20,000 that year and accordingly exercised his discretion to award a bonus payment to him of £20,000 for 2017. He said he did not agree the payment was non-discretionary or a contractual payment. However I was not convinced by this evidence – it may be a memory lapse – but it was inherently unlikely he would have agreed an extra £12000 which exactly aligns with the email agreed amount of £20000 rather than some other amount which reflected the claimant's particular individual contribution.

27. The claimant agreed that discretionary bonuses were the norm for the other managers and if the group had not thrived then it was likely no bonuses would be paid. The respondents relied on a meeting of all the General Managers from 22 February 2018 where the claimant and Mr Dolan were present, Mr Dolan gave evidence that they were all aware no bonus payments would be made that year and this was recorded in the minutes of that meeting. However, the claimant said that he didn't say anything in that meeting because he had discussed with Mr Lea the fact that the other General Managers shouldn't know his situation as they would all be then asking for salary increases. Mr Lea then left the company in October 2017 and was replaced by Stephen Guthrie.

28. In approximately late January the claimant was offered a position with a new employer and he was unsure whether he had to work to the end of March to secure his bonus so delayed resigning to ensure receipt of the bonus. He thought he had to give four weeks-notice as he recalled that is what other staff did but as there was no written contract it was not clear. He gave his notice verbally to Mark Jeavens on Monday 5 March giving four-weeks' notice to end on Friday 30 March. Mr Jeavens recalls that he verbally resigned to Alison Coleman who asked him to put in writing and then he submitted a letter. However, the email from Alison Coleman was 13 March asking him to forward a copy of his resignation.

29. There was then a resignation letter on 13 March saying:-

> "Please accept this letter as my four-weeks' notice to terminate my employment with Network Scaffolding, following on from my verbal notice on Monday 5 March. My notice period will run from 5th March until my final date on 30th March".

30. The claimant said that he said the 30th March because the 31st was a Saturday so he thought that a Saturday wouldn't count for the purposes of notice as he didn't work Saturdays anyway.

31. The claimant was then given some work to do but not the full ambit of his normal work.

32. An incident then arose on 23 March, the claimant was at hospital with his son and believed that he had told Mr Jeavens a week or two earlier that that is what he would be doing that day, when he finally looked at his text messages from the day he saw one from Mark Jeavens telling him that he had spoken to Stephen Guthrie MD and that the claimant could leave work now but that they wanted the car and the car keys back and the keys to the yard. The claimant said he did not have a copy of this text as it was on the company phone.

33. Mr Jeavens said that the claimant had been absent the afternoon of 22 March and his vehicle tracker showed him at home at 3.41 when he should have still been on site. The claimant says that he got in early and left early and that he was free to do this in his capacity as General Manager. Mr Jeavens also said he knew nothing about the claimant being in hospital with his son on the 23rd March. Mr Jeavens denied that he had told him that he could leave work but that they needed the car and the car keys back and the keys to the yard. The claimant said that he believed he was then placed on Garden Leave for the remainder of his notice and he did return his keys and car keys on the Monday 25 March. The respondents position was that he spontaneously returned his car and car keys and they assumed that he had decided not to return to work to work the rest of his notice which is why they did not pay him for that week.

34. In a Facebook email exchange on 27 March the claimant says “I don’t think I have been treated very well from Network, everyone else that has been put on garden leave has been able to keep their vehicle but for some reason I am the exception, my son was in surgery on Sunday having his Appendix removed and as he is a child he could pop his stitches at any time, it’s good to know I’ve no vehicle to take him to the hospital if anything does happen. Also, the fact I have given six years of good service to the company I thought that someone would have spoken to me about handing my notice in but I guess I am the exception there as well”. The claimant relied on this as showing that he genuinely thought he was on garden leave and had returned his car and keys reluctantly at the company’s request.

35. On 28 March Alison Coleman sent a letter to the claimant saying that the car was damaged, that it had cost £200 to repair and that this would be deducted from his final salary due to be paid on 30 March. When the claimant became aware of this via his wife opening his pay slip as the claimant was not at home he emailed Ms Coleman about the car deduction. He said there was no evidence of damage when he returned the car, he had received no proof of it and that in the six years he had worked for the respondent no other person was other deducted money from their wages for scratches to vehicles. He said the vehicle was dropped off at Salford depot and subsequently moved by others to Blackrod (in Bolton), driven by others including Stephen Guthrie in February and that he had never damaged the vehicle.

36. The claimant on 12 April raised with Alison Coleman the bonus payment and provided the email in relation to it from 28 September stating that he should receive the full bonus, she replied on 20 April stating that “the deductions was a fair deduction and in reference to the bonus, bonuses were only paid on achieving financial targets being employed throughout the full financial year and remaining

employed by the company to the date of payment. As you left the company on 22 March 2018 and did not work your complete notice period you are not entitled to being paid a bonus, that being said even if you were still employed by the company no bonuses are being paid this year due to financial targets not being met and you would not be eligible for payment".

37. Subsequently the respondents refused to pay the bonus or the £200 the claimant issued these proceedings.

38. In respect of the claimant's performance the claimant stated that the Salford depot had been profitable in all the six years he was employed, there was only one project that didn't go well and this was due to design flaws produced by an engineer employed by Network Scaffolding and that was out of the claimant's control, this soured the relationship between the client and the respondent. The claimant had not been involved in pricing the project or making any of the arrangements which was all carried out through the Bolton depot prior to him becoming Regional Manager so he merely ran the project as best as he could and therefore he would dispute that his branch had not made a profit.

Respondent's Submissions

39. The respondents submitted that the documentation did not show that the claimant was promised a guaranteed bonus year in year out. It was agreed that he was promised a bonus up to 33% of salary for the year 2017 in a situation where he might leave at a critical time for the business, the claimant's own correspondence where he says, "I appreciate you going out to bat for us" shows that he did not expect this every year. Documentation showed that he did not believe that he had been promised a year in year out guaranteed bonus. If it wasn't a guaranteed bonus it was clear that no one else within the company received a bonus in 2018 and therefore he was not entitled to a bonus on a discretionary basis.

40. The respondent accepted the claimant's employment ended on 30 March but he was not paid wages because he was absent without leave, there was no evidence the respondent asked him to bring in the car and keys. The evidence was that Mr Jeavens continued to ring the claimant because he was absent without leave whereas he would not have done so had he been on garden leave.

41. Regarding the terms and conditions, he had to succeed o nanother cause of action in order for an award to be made under Section 38.

Claimant's Submissions

42. Unfair dismissal was withdrawn on the basis of an agreement the claimant worked until 30 March.

43. Re wages act. There was clearly no authority to make the deduction of £200 whether there was damage or not. There was in any event no evidence he had caused any damage to the car.

44. Wages 22 to 30 of March: The claimant should be believed about returning the car and the keys as he would not have known at the time he asserted he had received a text to that effect, that these texts would not be found in the course of these proceedings.

45. Re: the Section 1 Employment Rights Act 1996 claim. The claimant clearly did not receive any written particulars of claim.

46. Bonus payment: The claimant should be believed as his evidence was credible and consistent and that Mr Lea was not here as a witness to challenge the claimant's evidence. PB did not give evidence either for the respondent. The respondent did not call Mr Lea because they knew he would support the claimant's version of events and documentary evidence supported this, as why would they have paid the £20,000 in September 2017 half way through the financial year which did not appear to relate to anything in particular.

47. It is consistent there would have been such an agreement as the claimant was undertaking two jobs.

48. If it was discretionary the respondents failed to give him the discretionary bonus because he left which was capricious in the extreme on the basis of Nomura and the claimant did not accept the respondents had produced enough evidence that nobody received a bonus in that year.

The Law

Unlawful Deductions

49. Section 27(1) of the Employment Rights Act 1996 defines wages as "any sums payable to the worker in connection with his employment, this includes any "fee, bonus, commission, holiday pay or other emolument referable to the employment". These may be payable under the contract or otherwise to be a contractual entitlement. The contractual bonus falls within the definition of Section 27(1) although a discretionary bonus would fall to be recovered by way of a breach of contract claim.

50. Section 13(1) defines a deduction as "whether 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 deficiencies shall be treated … as a deduction made by the employer from the worker's wages on that occasion". Deductions in this section refers to statutory deductions such as tax and national insurance.

51. The Tribunal therefore has to decide what is properly payable and which requires the Tribunal to determine what the claimant is entitled to contractually and then to go on to decide whether that entitlement has been met or not.

52. The approach to determining properly payable is that adopted by the Civil Courts in contractual disputes, the Tribunal must decide on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasions.

Authorised Deductions

53. Section 13(1) of the ERA states

> "an employer must not make a deduction from the wages of a worker unless
>
> (1) The deductions required or authorised to be made by virtue of statutory provision or a relevant provision of the workers contract or,
>
> (2) The worker has previously signified in writing his or her agreement to the deduction".

Breach of Contract/Implied Terms

54. As there was no written contract or terms and conditions there were clearly no express terms to refer to, accordingly I could either find there were verbal express terms or there were implied terms. In relation to oral promises this is a question of factually establishing that the promise was made and what the content was, this obviously required looking at any corroboration of the alleged term. Express terms take precedence over implied terms although implied terms can be used to qualify express terms.

55. In respect of implied terms, it is a question of law. The legal test for implying a term are: -

> (1) The term is necessary in order to give the contract business efficacy; or
>
> (2) It is the normal custom and practice to include such a term in contracts of that particular kind or
>
> (3) The intention to include the term is demonstrated by the way in which the contract has been performed; or
>
> (4) The term is so obvious that the parties must have intended it".

56. I was not directed to any particular case law in respect of this although in submissions Clark vs Nomura International (2000) HC was briefly referred to which establishes that a discretionary bonus should not be capriciously refused.

Section 1 of the Employment Rights Act 1996

57. The legal requirement to provide employees with a written statement of their employment particulars is contained in Sections 1 to 6 of the Employment Rights Act 1996, and the required particulars Section 1 states that "not later than two months after the beginning of the employee's employment the employer must give him or her a written statement of his or her employment particulars, the particulars that must be included in that statement are set out in Section 13, 14 and 3(1). This applies even if there is a disagreement between the parties as to one or more terms of the contract. Such terms should be identified when the written statement is provided.

58. The length of notice is certainly a provision along with remuneration, place of work, date of employment, holiday terms, sick pay.

59. Where there has been a failure to provide particulars a tribunal can award either two or four weeks pay under section 38 Employment Act 2002. However it is not on a freestanding basis – a claimant must succeed on another claim such as unlawful deductions or unfair dismissal, inter alia.

Conclusions

Re: The claimant's wages of 22 March to 30 March

60. In the light of the Facebook messages between the claimant and Mr Jeavens which corroborate that the claimant believed he had been put on Garden Leave I find that the claimant had been told not to attend work and to return his car and keys and accordingly he is entitled to be paid for that period.

Car Damage

61. As there was no contract of employment or written particulars the respondent had no authority to make any deductions in any event and the claimant is entitled to have the £200 reimbursed to him. In addition, the respondent's evidence regarding this was unsatisfactory, did not show that the claimant had caused the damage and there was no evidence that this was custom and practice in any event.

Bonus

62. The claimant was not provided with a written statement of terms and conditions in accordance with Section 1 of the Employment Rights Act 1996, accordingly, he is entitled to compensation. Given that the respondent is a reasonably large firm and that I found the claimant had asked for his terms and conditions to be set out in writing I award the claimant four weeks salary in respect of this.

Bonus

63. I find there was an agreement that the claimant would be paid a bonus of 33 1/3rd of his salary on a yearly basis while he performed the dual roles of General and Commercial Manager. I find this because:

(1) I find the claimant a credible witness;

(2) The email of 28 September supports his contentions;

(3) The email of 5 July whilst not totally consistent with his contentions does not undermine the claimant's contentions given his explanation that he was seeking to be amicable;

(4) His Facebook messages were consistent with his other contentions pointing to an underlying credibility in relation to that issue and the claimant's evidence generally;

(5) The payment arrangements were inherently logical and rational with the percentage linked to his salary and therefore being able to be increased without further discussion; which suggests an ongoing arrangement

(6) The fact that the £20,000 was paid to the claimant in 2017;

(7) The fact that the respondent did not call David Lea or PB to give evidence.

64. Accordingly, the claimant is entitled to his bonus as he contends. Insofar as it is necessary to decide the point it would be inherently logical to imply a term that any bonus would be pro-rated if the claimant did not complete the year given that there was no express term to the contrary.

65. The matter will be listed for remedy if the parties advise within 21 days they cannot agree quantum

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Employment Judge Feeney

Date: 8TH May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.10 May 2019

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FOR THE TRIBUNAL OFFICE

[JE]