EMPLOYMENT TRIBUNALS

Claimant: Mrs J Davies

Respondent: Droylsden Academy

HELD AT: Manchester **ON:** 17 February 2017

BEFORE: Regional Employment Judge Robertson
(sitting alone)

REPRESENTATION:

Claimant: Miss L Quigley, counsel
Respondent: Miss J Connolly, counsel

JUDGMENT

1. The claimant's complaint that the respondent made unauthorised deductions from her wages, contrary to section 13 of the Employment Rights Act 1996, is not well-founded and is dismissed.

2. The claimant's complaint of breach of contract is not well-founded and is dismissed.

REASONS

Introduction

1. This case comes before me on remission from the Employment Appeal Tribunal. The claimant, Mrs Davies, says that the respondent, Droylsden Academy, failed to pay the wages properly due to her under her contract of employment. She claims the sums due to her either as unauthorised deductions from her wages, contrary to section 13 of the Employment Rights Act 1996, or as damages for breach of contract.

2. The claim concerns the claimant's entitlement to wages including a bonus based on the performance of the respondent's lettings business, and covers the period from 1 November 2014, when the claimant transferred to the respondent's employment from her previous employer, Schools Plus Limited ("SPL"), under a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied, until 10 April 2015, when her employment ended by reason of redundancy.

3. Section 13 of the 1996 Act sets out an employee's right not to suffer unauthorised deductions from wages. Enforcement of the right is by complaint to the Tribunal under section 23. Section 13(3) provides that where the total amount of the wages paid by the employer to a worker employed by him on any occasion is less than the amount properly payable on that occasion, the amount of the deficiency shall be treated as a deduction from the wages properly payable on that occasion. Wages are properly payable where the employee is contractually or in some other way legally entitled to be paid them.

4. Miss Quigley and Miss Connolly agree that the claimant's complaints alleging breach of section 13 or breach of contract proceed on the same basis: was the claimant paid less than that contractually due to her. The only practical difference between the complaints is the availability of the section 207A uplift, limited to the section 13 complaint.

The issues

5. The specific issues in the case are as follows:

(a) The precise terms of the claimant's entitlement to wages including bonus;

(b) Whether, following the transfer of her employment from SPL to the respondent on 1 November 2014, the claimant's contract of employment still included all or some of the terms of the bonus scheme or whether all or some of such terms, or the scheme as a whole, had become impossible to perform and thereby unjust or absurd such that they no longer had effect;

(c) Whether, in calculating the bonus, deductions should properly be made for (i) licence fee (notwithstanding that following the transfer of the business from SPL to the respondent, a licence fee was no longer payable), (ii) the cost of a report from KPMG on the future operation of the lettings business, (iii) an amount representing premises costs, and (iv) staff costs, particularly the wages of two individuals whom the claimant asserts were effectively doing her job;

(d) What credit should be given by the claimant for sums already paid to her by the respondent on account of wages or bonus due in the relevant period;

(e) By how much, if at all, the payments made to the claimant were less than those to which she was contractually or properly entitled; and

(f) Whether, in respect of the claimant's complaint alleging breach of section 13, any uplift should be applied under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 for the respondent's failure to comply with the ACAS Code of Practice on Discipline and Grievance.

The hearing

6. The claimant has been represented by Miss L Quigley, counsel, and gave sworn evidence. The respondent has been represented by Miss J Connolly, counsel, who called sworn evidence from Mr W Lyon, Finance and Buildings Manager. I have also considered the contents of an agreed Bundle of Documents. This is my Reserved Judgment and Reasons.

Findings of fact

7. I find the following facts. References to page numbers are to the agreed Bundle of Documents.

8. The respondent, Droylsden Academy, is a school. It allows the wider public to rent its facilities, including its Sports Hall, outside normal school hours. Between 1 August 2010 and 31 October 2014, the respondent engaged SPL to manage its lettings. Effective 1 November 2014, the respondent took its lettings in house, by way of a transaction to which the parties accept the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied.

9. The claimant, Mrs Davies, was employed by SPL from 1 August 2010 as Venue Manager to manage the lettings at the respondent's site. Her employment was governed by a written contract of employment, clause 6 of which provided as follows as to pay (39-40):

> "6. Pay
>
> (a) Your base pay is the minimum wage.
>
> (b) There is also a discretionary bonus scheme, that is decided by Us [SPL] on an annual basis and will be communicated to You.
>
> (c) If there is insufficient revenue to meet Your base pay, the shortfall will be made up for by Schools Plus Limited. This transfer will be made monthly to Your operating company bank account in response to an emailed request from You to Schools Plus HQ. The transfer is recorded as a liability that Your operating account needs to repay to Schools Plus Limited. In this situation no bonus can be taken.
>
> (d) You are responsible for all equipment and materials that are issued to You. We reserve the right to deduct from Your pay an amount to cover the loss or repair of any item where such loss and damage is caused by Your negligence."

10. In early July 2014, the respondent decided to take the lettings business in house and, therefore, not to renew SPL's contract. It was appreciated that the 2006 Regulations would be engaged and, therefore, that the employment of SPL's employees assigned to the business, including the claimant, would transfer to the respondent. On 15 July 2014 SPL's HR and Marketing Director, Mr M Deakin, wrote to the respondent with brief details of the employees who would transfer to the respondent under the 2006 Regulations (53-55). As regards the claimant, the information provided that her basic rate of pay was the National Minimum Wage but she also received bonus payments, described as:

> "Keep the Change: retention of all profit from letting activities after deduction of costs."

11. On 9 October 2014, Mr Deakin wrote to the respondent's Principal, Mr K Mackey, in response to Mr Mackey's request for further information about transferring employees, in the following terms as to the claimant (68):

> "Julie's pay is calculated as the balance of the income to the school after paying:
>
> - Licence fee to the school
> - 15% of income to Schools Plus HQ
> - Wages and general expenses
>
> Julie is free under our contract to carry out her duties at the school (subject to availability of a desk) or at another location, such as her home.
>
> Julie's job is a full-time role.
>
> Clause 7 does not apply in Droylsden as the business has for a long time been capable of sustaining a manager's income above the full-time National Minimum Wage.
>
> …"

12. Mr Deakin wrote to Mr Mackey again on 28 October 2014, in the following terms as to the claimant's income (76):

> "In response to your questions:
>
> The deductions from income would be:
>
> - Licence fee payable to the school as per the client contract
> - Staffing costs
> - Other expenses such as stationery/general items
> - 15% of turnover payable to Schools Plus
>
> This is as confirmed in the Bonus Scheme data previously supplied on [9 October 2014] and attached here.
>
> …"

13. The parties agree that Mr Deakin's email of 28 October 2014 (76) accurately set out the terms of the claimant's bonus entitlement. Although the discretionary nature of the claimant's bonus might have allowed of a change in the scheme post-transfer, no change was made.

14. Mr Deakin described the claimant's bonus scheme as "Keep the Change". The claimant used the same terminology in her evidence to the Tribunal. The way it worked was as follows:

(a) The start point was the gross income from the lettings at the respondent's premises;

(b) This was then subject to a number of deductions representing the cost of operating the business;

(c) First, 15% of income was deducted and paid to SPL, I infer as a contribution to SPL's Head Office overheads and a profit element;

(d) Second, the licence fee payable by SPL to the respondent under its contract with the respondent from time to time was deducted. I infer that the licence fee represented the respondent's costs and overheads of letting its premises and a profit element, but I do not have any evidence as to what was included specifically in the calculation or how the calculation was done;

(e) Third, staffing costs were deducted;

(f) Fourth, expenses for stationery and other incidentals were deducted;

(g) Finally, the balance, after all deductions, was payable to the claimant as her "Keep the Change" bonus, with a guaranteed floor income of the National Minimum Wage.

15. SPL and the respondent renegotiated their contract yearly. As at 31 July 2014, when the last contract between them expired, the licence fee payable by SPL to the respondent was 50% of income above £30,000. After expiry of the contract on 31 July 2014, until the respondent took the business in house on 1 November 2014, SPL continued to operate the lettings business on a transitional basis which did not include the payment of a licence fee (53). During this period, no deductions were made from the claimant's bonus in lieu of licence fee. If SPL had entered into a renewed yearly contract, a licence fee would again have become payable.

16. I accept the claimant's evidence that deductable expenses covered minor matters such as stationery and breakages. Staff costs included the wages of those individuals engaged in administering the contract, including the claimant's base salary equivalent to the National Minimum Wage.

17. Following the transfer on 1 November 2014, the circumstances of the claimant's employment were unusual. Although she was accepted to have transferred to the respondent's employment, she was not assigned any duties and ultimately her employment terminated by reason of redundancy on 10 April 2015.

18. Because the respondent's management remained unclear about how the claimant's bonus arrangements worked and what sums were due to her, the claimant did not receive regular payment of wages but payments were made on account: £1,255.12 on 26 November 2014 (80), £1,500 on 6 February 2015 (89-90) and £2,000 on 27 March 2015 (111). The claimant accepts that these were payments on account of wages and she is required to give credit for them in the sum of £4,755.12 in the calculation of any sums due to her. Upon the termination of her employment, a final payment in respect of wages of £9,212.50 gross was made on 14 April 2015 (121). Again, the claimant accepts that in calculating any sums due to her, credit must be given for this payment, net of tax, and Miss Connolly proposes a notional deduction of 25% for tax and National Insurance Contributions.

19. In the five and a half-month period November 2014 to April 2015, the respondent received income of £35,791.50 from lettings (126). It will be recalled that the claimant's bonus arrangements provided for the deduction of 15% payable to SPL but the respondent no longer had any contractual relationship with SPL and no

payment was made. Further, as the respondent was now managing its own lettings, there was no licence fee. As to salary costs, three individuals employed by SPL on a casual basis transferred to the respondent's employment under the 2006 Regulations, these being Mr Ali, Ms Bakare and Mr Hunte, and I accept Mr Lyon's evidence that the respondent's Finance Officer, Mr Whelan, and Premises Supervisor, Mr Jones, spent time working in the lettings business. Mr Lyon, however, was not employed by the respondent at the material time and the percentages he gives for their time on lettings of 63% for Mr Whelan and 15% for Mr Jones are, with respect to him, entirely unevidenced and in my view, little more than guesswork. Similarly, the figure which Mr Lyon gives for premises costs associated with lettings, £600 per month or 1% of the respondent's total premises outgoings, is only his estimate of the relevant outgoings and is not supported by individual accounts or invoices.

20. Following its decision to take lettings in house, the respondent instructed KPMG to prepare a Lettings Business Plan. I have in the Bundle of Documents the first draft of the KPMG Business Plan dated 12 September 2014 (193). This covered (1) what kind of lettings and charging were allowed, (2) the possible pricing structure, (3) VAT issues, and (4) setting up a subsidiary company to operate lettings. KPMG submitted its invoice for its work in December 2014 (133).

Submissions for the respondent

21. Miss Connolly, for the respondent, reminds me that the issue is whether the claimant was paid the amounts properly due to her as wages under her contract of employment. There are issues between the parties as to the proper calculation of the amounts due and, in particular, the respondent's entitlement to make deductions for the licence fee, the cost of the KPMG report, premises overheads and the costs of Mr Whelan and Mr Jones. The claimant must also give credit for the payments made to her on account covering the period November 2014 to April 2015. However, Miss Connolly says that the position is complicated by the transfer under the 2006 Regulations and whether the terms of the bonus scheme can continue to apply after the transfer.

22. Miss Connolly directs me to the authorities of **Mitie Managed Services Limited v French [2002] IRLR 512** and **Tapere v South London and Maudsley NHS Trust [2009] IRLR 972**. She says that the terms of the bonus scheme will not transfer if they are impossible to perform such as to produce an unjust or absurd result. In such circumstances, the respondent's only duty would be to provide a scheme of substantial equivalence.

23. Miss Connolly says that plainly, following the transfer, the payment of 15% of income could not be made to SPL as the respondent no longer had any contractual relationship with SPL. Further, it was no longer possible to deduct the licence fee as no licence fee remained payable. The licence fee alone was a substantial liability, in the region of £2,000 per month, and it would be wholly unjust if, in effect, the claimant received a windfall in the calculation of her bonus because certain of the deductions contemplated in devising her bonus could no longer be made. Miss Connolly contends, therefore, that the terms of the bonus scheme as they existed immediately before the transfer can no longer be performed after the transfer. Therefore, she says, they do not form part of the claimant's contract and the claimant's claim must fail.

24. In the alternative, Miss Connolly contends for the deductions which the respondent seeks to make. She says that the parties are agreed that the 15% payment to SPL can simply be retained by the respondent. She contends that the same should apply to the licence fee. Even if a licence fee is no longer payable, its purpose was to provide for a share of turnover to the respondent for operating the lettings business and there is no reason why the respondent, now solely responsible for the business, should not retain the benefit. She reminds me that the alternative is that the claimant will enjoy a windfall which is wholly unmerited, if the deductions are not made.

25. As to expenses, Miss Connolly directs me to the broad terms of the contractual entitlement to deduct expenses. She says that on a proper construction of the bonus scheme, the cost of the KPMG report was plainly an expense of the lettings business as it was wholly concerned with the future operation of the business. She contends that once the respondent was managing the lettings, it was entitled to make deductions for general expenses and overheads such as cleaning, maintenance and utilities, and the sums claimed amounted to a genuine estimate of such expenses. As to Mr Whelan and Mr Jones, she says that staffing costs were deductable and as long as the costs claimed were properly and genuinely incurred in the lettings business, it is immaterial that the individuals may have been undertaking work which the claimant would otherwise have done. In any event, Miss Connolly says, there is no hardship to the claimant as no deduction has been made for her equivalent salary cost.

26. Miss Connolly accepts that if and insofar as any award is made to the claimant in respect of breach of section 13 of the 1996 Act, an uplift is potentially available under section 207A of the 1992 Act. She accepts that the Tribunal has already determined that the respondent acted in breach of the relevant ACAS Code of Practice on Discipline and Grievance and this finding has not been overturned by the decision of the Employment Appeal Tribunal. Miss Connolly says, however, that this is not a case where nothing was done. She accepts that the respondent did not comply with its Grievance Procedure but she reminds me that the claimant did not wish to attend a grievance meeting. She suggests that any uplift should be no more than 10%.

Submissions for the claimant

27. Miss Quigley says that the **Mitie** and **Tapere** cases impose a high threshold, in the context of the protection of transferring employees' contractual rights within the 2006 Regulations. She says that I should not lightly conclude that the terms of the claimant's bonus arrangements have become impossible to perform.

28. Miss Quigley says that in **Mitie**, the transferee clearly could not provide the same profit sharing scheme as it did not have access to the Sainsbury's share ownership scheme and in **Tapere**, the terms of the mobility clause, if they transferred literally, would have been significantly more onerous for the employee, which was inconsistent with the purpose of the 2006 Regulations.

29. In this case, however, Miss Quigley says that the claimant's contractual bonus arrangements can be construed without any practical difficulty. She concedes that the construction she contends for may benefit the claimant but this does not render performance impossible. In effect, she says, the respondent stands in SPL's shoes

and if there is no longer any licence fee payable, no deduction can be made. She accepts, however, that the respondent is entitled to take the 15% deduction previously payable to SPL for Head Office costs.

30. Miss Quigley does not ask me to decide what would have been the terms of a bonus scheme of substantial equivalence. She says it is unnecessary to do so, as the existing terms can be applied without unjust result post transfer.

31. Miss Quigley accepts that I have to decide whether the respondent is entitled to deduct the sums it claims under the heading of expenses. She says, however, that when KPMG was instructed to prepare its Business Report, the respondent was not responsible for the lettings business, which was still in the hands of SPL, and the cost of the report cannot be a cost of the lettings business even though KPMG invoiced its fees post-transfer. She says that the cost self-evidently cannot properly be regarded as part of the expenses of running the business.

32. As to premises costs, Miss Quigley says that the respondent must identify the expenses precisely, but has not done so. She accepts that the respondent may have incurred additional costs and expenses in running the lettings business, but has not provided proper evidence of such costs. She says that Mr Whelan and Mr Jones were effectively doing the claimant's job when she was excluded from the business, and whilst she accepts that a sum equivalent to the claimant's guaranteed minimum wage should be deducted, the claimant cannot be asked to give credit for the wages of Mr Whelan and Mr Jones in addition. She agrees with Miss Connolly that the claimant's guaranteed wages for the period, based on the rate of the National Minimum Wage, were £5,606.25, against the sum of £7,507.00 sought to be deducted for the cost of Mr Whelan and Mr Jones.

33. Finally, as to the amount of the section 207A uplift, Miss Quigley says that this was a serious and repeated breach of the ACAS Code of Practice by an employer with access to professional advice, and the uplift should be in the maximum allowed of 25%.

The respondent in reply

34. In reply, Miss Connolly makes one point. She says that if an amount is not deducted in respect of the licence fee, the effect will be that the claimant will receive by way of bonus an additional amount of 50% of the lettings income above £30,000, pro-rated for the period from November 2014 to April 2015. She asks whether this can be what the parties contemplated when they established the bonus arrangements.

Discussion and conclusions

35. I turn to my conclusions and I begin with the issue whether the claimant's contractual bonus arrangements survived the relevant transfer from SPL to the respondent.

36. I set out the arrangements as they existed immediately before the transfer at paragraphs 11-14 above.

37. Regulation 5(2) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides that on the completion of a relevant transfer, all the

transferor's rights, powers, duties and liabilities under or in connection with the contract of employment of any person employed by the transferor in the undertaking shall be transferred to the transferee. There is no dispute that the claimant was employed by the transferor, SPL, on the completion of the relevant transfer to the respondent and, therefore, on the face of it, the liabilities in respect of her contractual bonus arrangements transferred to the respondent under regulation 5(2).

38. **Mitie**, however, concerned the contracts of employment of transferring employees which included a term that they were contractually entitled to participate in the profit sharing scheme of the transferor employer, Sainsbury's. Following the transfer, it was impossible for the transferee to provide the employees with access to or benefits under the Sainsbury's profit sharing scheme as they were no longer employed by Sainsbury's.

39. In paragraph 16 of the decision, the Employment Appeal Tribunal said this:

> "We have not found this to be an easy case but, in our judgment, the decision of the Employment Tribunal was erroneous for the reasons set out in the second and third of Miss Ellenbogen's submissions, as we have enumerated them. There are limits to the literal or, as Miss Ellenbogen puts it, black letter approach contended for by Mr Brown. We are encouraged to this view by the concluding observations of Charles J, albeit obiter, in **Unicorn**. They opened a door through which we consider it appropriate to pass. We do not consider that **Abels** obstructs such a passage. It would make it difficult if not impossible to contend that a profit related pay entitlement could not be the subject of transfer but it is not conclusive as to precisely what has transferred by way of contractual entitlement in relation to a particular scheme. So far as that is concerned, it is our view that the entitlement of the transferred employees in a case such as this, which has complications absent from, say, **Unicorn**, is to participation in a scheme of substantial equivalence but one which is free from unjust, absurd or impossible features. In most cases, we would expect the transferee company to be able to negotiate a scheme of such equivalence with the transferred employees or their unions. If a negotiated conclusion is impossible, then it is appropriate for an application to be made to an Employment Tribunal, probably under section 11 of the Employment Rights Act, for a determination of the relevant particulars of employment…"

40. As I have said, Miss Quigley does not ask me to decide on the terms of a bonus arrangement of substantial equivalence. She contends that there is no reason why the bonus arrangements cannot be operated after the transfer to the respondent and she invites me simply to construe the terms of the bonus arrangements in respect of the particular deductions sought to be made by the respondent.

41. **Tapere** concerned a contractual mobility clause, the terms of which, post transfer, were significantly more detrimental to the employee. The Employment Appeal Tribunal said this, at paragraphs 37 and 38 of the decision**:**

> "37. **Morris Angel and Son Limited v Hollande** was cited in **Mitie**, as it had been in the earlier case of **Unicorn Consultancy Services v Westbrook [2000] IRLR 80**, which was relied on in **Mitie**. The Employment Appeal Tribunal is bound, of course, by decisions of the Court of Appeal but doubts as to the correctness of the decision in **Morris Angel** were not even hinted at in either Employment Appeal Tribunal case. This is not surprising. Where there is a contractual term, which can be continued without practical difficulty, the benefits and obligations remain the same; this is what **Morris Angel** establishes. In such cases there is no need to consider substantial equivalence. Where, however, there are practical impediments, as was the case in **Mitie**, and the clause cannot be implemented with precisely the same benefits and obligations, then equivalent benefits and obligations can be substituted, so long as neither benefit nor burden is increased or enlarged.

> 38. What the Employment Tribunal did here was to increase the scope of the geographical area in which the employee could be required to work. This altered the terms of her contract to her disadvantage and resulted in her employment being less protected after the transfer than it was before. Such an interpretation is the antithesis of the purpose of the Directive 2001/23/EC and, thus, of TUPE 2006, which is the domestic implementation of it. There was no difficulty about either construing the clause or as to its practical implementation. That there was a practical difficulty caused by the nature of the transaction cannot alter the meaning of the clause. The appellant was based at Burgess Park. Her contract only empowered her employer to require her to move to other locations within the area of the Community Health South London NHS Trust. It was an inherent part of the transaction that the geographical location of the undertaking must move from Burgess Park to Bethlem Hospital and no doubt that created a practical difficulty but such a difficulty cannot invoke the concept of substantial equivalence…"

42. I have sought to apply these principles, and it appears to me that this is indeed a case where there were practical impediments which meant the claimant's bonus arrangements could not be continued post transfer with precisely the same benefits and obligations as before. This is for the following reasons:

(a) The bonus calculation provided for a payment of 15% of turnover to SPL. This could no longer be paid post transfer because SPL did not have any contractual relationship with the respondent;

(b) The bonus calculation also provided for the deduction of the licence fee agreed between SPL and the respondent. But post transfer, there was no contractual relationship between them and no licence fee agreed or payable. If there was no license fee, no deduction could be made in respect of it;

(c) I agree with Miss Connolly that it cannot have been in the contemplation of the parties when they made the bonus arrangements that if a licence fee (or, for that matter, the 15% SPL payment) ceased to be payable, the claimant would correspondingly benefit, in this instance to the extent of (i) 15% of turnover (an additional amount of some £5,368 over five and a half months) and (11) 50% of the lettings turnover over £30,000 (a sum of about £12,000), whilst the respondent would recover only its expenses. That was not the bargain which the parties had agreed, and this is a case where, if the bonus arrangements transferred exactly as they existed pre transfer, the benefit of the arrangements to the claimant would be substantially and unjustly enlarged. It would not be, on any proper construction, a "Keep the Change" bonus;

(d) In my judgment the bonus arrangements cannot be construed as requiring deductions to be made and paid to the respondent of sums equivalent to the previous 15% deduction and licence fee. These were not the terms of the arrangements, which stipulated 15% to SPL and the payment to the respondent of a licence fee commercially agreed as part of the yearly contractual negotiations between the respondent and SPL. I note that between 2012 and 2013, upon the last yearly renewal, the threshold for the licence fee increased from £25,000 to £30,000. As Miss Connolly put it in argument, that arrangement would effectively be "fossilised". This cannot be a proper interpretation of the agreement.

43. For these reasons, I find that the claimant's existing bonus arrangements did not transfer under regulation 5(2), as they were impossible to perform in a way which was not manifestly unjust to the respondent and correspondingly conferred unjust benefit on the claimant.

44. In these circumstances, the respondent did not make unauthorised deductions from the claimant's wages in terms of section 13 of the 1996 Act or act in breach of contract in failing to make the payments under the bonus arrangements.

45. In my judgment, the respondent's obligation was to provide a bonus scheme for the claimant of substantial equivalence and which would have the result that neither benefit nor burden was substantially enlarged. It is not difficult to conceive of such a scheme where sums were retained by the respondent equivalent to the total of the 15% and the licence fee, plus staffing and incidental expenses, with the balance paid to the claimant by way of bonus. Miss Quigley, however, has expressly declined to argue the case on the basis of the respondent's failure to provide a scheme of substantial equivalence, and the result is that the claimant's complaints must fail and be dismissed. I need express no opinion, in light of my conclusions, about whether the deductions sought to be made by the respondent were properly made under the terms of the bonus scheme, and I will not do so.

Regional Employment Judge Robertson

1 March 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

06 March 2017

FOR THE TRIBUNAL OFFICE