Case Number: 1601129/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Dodd**

Respondent: **Department for Work and Pensions**

Heard at: **Cardiff** **On: 7 May 2019**

Before: **Employment Judge R Harfield (sitting alone)**

Representation:
Claimant: In person
Respondent: Ms Masoud (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's claim of an unlawful deduction from wages is unsuccessful and is dismissed.

REASONS

Introduction

1. By way of a claim form presented on 24 November 2017 the claimant brought a claim of an unlawful deduction from wages in respect of an unpaid performance bonus of £500. He did not receive the bonus because of the end of year appraisal marking he had received in April 2017 of "requires improvement." The respondent defended the claim in a response form presented on 16 January 2018. ACAS conciliation commenced on 22 August 2017 and concluded on 20 September 2017.

2. At the time of submitting his claim form the claimant had recently appealed a grievance decision and he requested his claim be stayed until the appeal process was concluded. The respondent agreed. Following the conclusion

of the grievance appeal a case management hearing took place on 21 December 2018. Directions were made and the case was listed for final hearing on 7 and 8 May 2019. The issue to be determined at that hearing was clarified as:

> "*What was the amount that was properly payable by the respondent to the claimant? To decide this, the employment judge will have to consider the claimant's employment contract/ terms of the performance bonus and the circumstances and decide whether the claimant had a legal entitlement to the non-consolidated performance bonus i.e. had he satisfied the conditions to be awarded an "achieved" assessment?*

3. The case came before me on 7 May 2019. I heard from the claimant who represented himself in the proceedings. On behalf of the respondent I heard from Amanda Lynn (the claimant's line manager) and Alan Davis (who investigated the claimant's grievance). The respondent was represented by Ms Masoud of counsel. A hearing bundle had been prepared. During the course of the proceedings both parties handed up additional documents which had formed part of disclosure but which had been omitted from the hearing bundle. They were added to the bundle. The evidence and submissions completed on 7 May 2019 and my decision was reserved.

Findings of Fact

4. I make the following findings of fact. The references to page numbers are to page numbers in the bundle.

5. The claimant has been employed by the respondent since 1 June 1987. He works as a case manager for Personal Independent Payments. The appraisal year in dispute ran from April 2016 to March 2017. For the period April 2016 to September 2016 the claimant was line managed by Bryan Mallett.

6. There is a practice within the respondent's organisation of holding monthly 1-2-1 discussions (also called a "time for us" discussion). A mid year performance review is also undertaken as well as an end of year appraisal. A mid year performance review was undertaken by Mr Mallett. The claimant's comments are at p76 to 77. Mr Mallett commented:

> "*Further to Mike's summary. Agreed that he is achieving KWOs to date. Positive contribution to team MEIs and quality outcomes. Mike's current involvement on AR1 pathfinder team will continue to provide challenges which will enable him to use his analytical skills and existing PIP expertise to bed-in trial process. There will also be opportunities for him to support colleagues moving onto new process. Mid year performance indicative rating – Achieved."*

7. Under Mr Mallett's line management the claimant was therefore on course for an "achieved" appraisal rating. Mr Mallett then left the organisation. On 3 October 2016 Ms Lynn became the claimant's line manager. On 17 October 2017 the claimant started a 5 week period of annual leave returning on 21 November 2016. Mr Robert Morgan managed another team in the same location. On a date in or around November 2016, when the claimant was absent on leave, Mr Morgan raised concerns with Ms Lynn that the claimant would be logged in at work in the mornings but not at his desk until 7:30am. It had been suggested to Mr Morgan by individuals in his own team that the claimant would come in to work, log in and then take a shower. Ms Lynn states, and I accept, that following the claimant's return she came into work early herself on 22 November 2016 and that she found the claimant had logged in at 7am but was not at his desk until around 7:30am. She did not know what he was doing in that time.

8. Ms Lynn spoke with the claimant on 28 November 2016. She states the claimant told her that he was using his daily 30 minute break to take a shower before starting work. She states she told him that he could not do so and that he needed to shower before logging in. Ms Lynn sent the claimant a follow up email on 28 November 2016 at p41- 42. The email states, amongst other things, that the claimant had said in their meeting that he had always done it that way, it had not been an issue before and that the claimant asked to move to another team if they were going to have a problem. Her email concluded that she did not believe they had a problem, that it could be worked through, and that she would like to meet again to talk through the issue.

9. The claimant replied to state that he did not agree with the summary of the conversation as presented by Ms Lynn and that he felt her non verbal responses towards him in the short time they had worked together were indicative of someone that does not want him as part of the team. He repeated his request for a transfer. Ms Lynn replied by email to state "I

would be happy for you to the account below." I was told this email accidently omitted the words "add to". The claimant stated in his grievance complaint that he had not received a reply from Ms Lynn. He accepted in evidence before me that he had made a mistake in his grievance and that Ms Lynn had in fact replied and that it was the claimant who did not reply further in writing to set out his summary of their initial conversation. The claimant's account in the grievance process was that he did not take a break during that time and was working and that he had always complied with the department's break policy. He stated that Ms Lynn had simply asked him whether he took a break first thing in the morning between 7 and 7:30am and that she did not give a reason why she believed he was taking breaks at that time. He accepted he had made no notes of the initial conversation. His evidence before me was likewise that he did not tag a break on to the start of the day.

10. I find, bearing in mind Ms Lynn's contemporaneous email and the fact I find that she was acting in accordance with information given to her about showering, that it is likely that at some point in their conversation, the question of whether the claimant was potentially taking a shower was discussed as part of their wider discussion about whether the claimant was taking breaks at the start of the day. It is also likely that the claimant did say something to the effect that he sometimes used a break to take a shower, and that he had always done so. In my view, in the claimant's mind he was complying with the break policy and he thought it was acceptable to, and it had been his historical practice, to sometimes take a break at the start of the day (whether to take a shower or indeed for any other purpose). This discussion and the challenge to the claimant's practices led him to feel that he was being overly scrutinised by his new manager and had led to him, in part at least, requesting a move.

11. On 29 November 2016 the claimant emailed Ms Lynn's manager, Liz Prichard, stating he was reluctant to do so but may need to raise a grievance. He said Ms Prichard stated she would look into his concerns. A 1-2-1 then took place between the claimant and Ms Lynn on 30 November 2018. The written record is at p45A to 35B (the middle page is unnumbered). The claimant had summarised over the first two pages his contributions towards "delivering the business", "leading people" and his own development. Ms Lynn's written summary is at the bottom of p45B. Neither individual commented in writing upon the discussion on 28 November or the claimant's request to move. No concerns were

documented in writing by Ms Lynn as to the claimant's performance or behaviour. Ms Lynn stated, and I accept, that she did not refer to the showers or breaks policy as she considered it had already been tackled in their conversation on the 28 November.

12. The claimant produced in evidence credit card statements (p232 -235) which show purchases for Arriva Train Wales in Cardiff which would be indicative of a purchase of a train ticket. There are such purchases, for example, on 21, 22, 23, 24, 25, 28, 29, 30 November 2016 and 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 19, and 29 December. They do not however set out the time of purchase, time of travel or destinations. The purchase of a train ticket does not mean that the claimant was not potentially cycling part of the way bearing in mind he lives in Barry, Vale of Glamorgan and his place of work is Gabalfa, Cardiff. It is also not evidence that was before Ms Lynn at the time. I therefore do not find it to be proof that the claimant did not take a shower in work, or that he did not ever take a break between 7am and 7:30am. Certainly, it does not show that Ms Lynn did not have cause to believe that he was taking a shower or otherwise absent from his desk between those times on some mornings.

13. Various statements were taken from colleagues, again after the event, as part of the subsequent grievance investigation. Within these a colleague, Gary Samaden, provided a statement to say he had seen the claimant arrive in cycling clothes and then go for a shower, usually returning to his desk by 7:30am, and that it happened every day. Mr Samaden stated that he did not report the practice as he thought the claimant was clocking in at 7:30am. Mr Samaden in his grievance statement recalled a team meeting at which Ms Lynn had raised an issue of the flexi policy and breaks and that there had been a disagreement between the claimant and Ms Lynn about whether you could take a break first thing in the morning. Mr Samaden stated in his grievance statement that following this meeting the claimant's behaviour changed and he stopped showering first thing in the morning. But that in mid to late December the claimant started going for a shower again, so Mr Samaden checked the claimant's flexi sheets and saw that the claimant was clocking in earlier than he was sitting at his desk and so he reported it to Ms Lynn. Ms Lynn likewise stated in her statement for the grievance investigation that in late December Mr Samaden had told her that the claimant was "up to his old tricks again" which she took to mean the claimant was showering in the first half an hour of the day again. The issue therefore re-emerged for Ms Lynn.

14. Within his grievance the claimant complains that on 13 January 2017 at a team information centre meeting he was singled out by Ms Lynn for not completing an online e-learning security checklist when she referred to the checklist and said “What about you Mike, have you done this?” The claimant felt it was unfair as there were other colleagues who had not completed it. Ms Lynn has no recollection of the incident. Nor did the colleagues spoken to as part of the grievance investigation. I accept Ms Lynn may well have asked the claimant if he had completed it but, if so, it was not intended to single the claimant out and was a genuine question, hence why the other individuals involved have no recollection of it. The claimant, however, perceived it that way.

15. On 16 January 2017 Ms Lynn needed to reallocate a customer case which had been handled by up to that point by a colleague, Michael Stinton. Ms Lynn stated, and I accept, that she suggested the claimant should take it as he was sat near Mr Stinton and they could easily discuss the case. Ms Lynn and Mr Stinton approached the claimant. The claimant stated that he would not take the case and left to go for lunch. The claimant states that he already had his coat on and was in the process of leaving to meet colleagues for lunch so could not stop to discuss the case at that point in time, and that when he said he would not take it, it was a joke: in reality he was saying he could not discuss it there and then. Ms Lynn states that the claimant moved towards his coat during their exchange. Mr Stinton states in his grievance statement that he did not recall having the impression the claimant was going for lunch. Neither he or Ms Lynn considered the claimant to be joking. I find that the claimant, whilst he may well have intended it as a joke, and that he was intending to imply he could talk about taking the case later on after lunch, did not give that impression to Ms Lynn and Mr Stinton in their exchange. Instead he left both of them with the impression that he was declining to take it at all. That led to the case being given to someone else instead.

16. The claimant states that he asked about the case later in the day and offered to take it and that everyone saw it as having been a joke other than Ms Lynn. Ms Lynn denied that the claimant had made such an offer. I accept it is likely the claimant did enquire about the case later on in some manner and was told it had been passed to someone else. He may also may well have said that he had only been joking in refusing it earlier on. I accept, however, that Ms Lynn was still left with the impression from the original

interaction that the claimant had been refusing to take the case and that he was abrupt with her in the way that he spoke about the issue.

17. On 24 January 2017 Ms Lynn noticed a discrepancy between the number of decisions that the claimant had recorded on two separate systems called the AR1 and PIP CS. The claimant's statistics showed he had cleared 4 cases but only 3 appeared on the payment list. Ms Lynn approached the claimant and asked him to change the figure on the spreadsheet whilst it was investigated. She states that the claimant refused to do so, and did so in an abrupt manner, stating he was not interested in the figures that Ms Lynn had collated from PIP CS and that PIP CS was her issue. As he would not assist her she states she contacted a business champion for help with finding out the reason for any discrepancy. The claimant's account is that he was working on a trial project with Mr Morgan and that the statistics on the trial sheet were not meant to balance with PIP CS as otherwise when the disputed case completed the management check it could end up being counted twice. He states that if he followed Ms Lynn's system it would impact upon the trial results. He denies being rude to Ms Lynn and states that his concern was with the trial. He states that he could not look the cases up for Ms Lynn as he did not have access to the records and that he also went and discussed the issue with Mr Morgan who agreed with him about how to record it.

18. Mr Morgan's evidence in the grievance investigation was that the claimant did come to speak to him. Mr Morgan told the claimant that they were only looking at the conversion rate so it did not really matter but it was possible the case had gone for a management check and would appear as a payment in the next couple of days so he should count it as a decision. Mr Morgan's statement states he also told Ms Lynn this but she was concerned whether a payment might still be outstanding and that she wanted to investigate it further.

19. Ms Lynn's evidence to me was likewise that she was concerned about whether a payment to a customer could be outstanding because she had dealt with an incident a week previously where a colleague had an imbalance of figures due to the fact that individual had forgotten to close a task at the end of the action. That had resulted in the customer not being paid. I accept that evidence. Ms Lynn therefore felt that the claimant was being obstructive and overly defensive when she was trying to legitimately check whether there was a problem. The claimant, however, felt that he was being overly scrutinised and the accuracy of his statistics on completed cases was being challenged. I accept it is likely that he therefore did

respond in an abrupt manner with words to the effect that his principle concern was with the trial and not with PIPCS and that is why Ms Lynn contacted the business champion. In my view, neither of them properly understood the other's perspective as they were not communicating well. Such polarised views of the same exchange are, in my view, the outcome of the increasing difficulties in communication between the parties.

20. Also on the 24 January 2017 there was clash between two different meetings. Ms Lynn attended the internal audit report meeting and the claimant attended a People Group meeting. Ms Lynn stated she did not know the claimant was due to attend the People Group meeting and found that out at the start of the internal audit report meeting. She went to speak to the claimant to tell him the other meeting was about to start and left it to him to decide which he wished to attend. Ms Lynn took some notes from her meeting and approached the claimant to give him some feedback from her meeting. She states that she asked to speak to him but the claimant responded he was busy with a difficult case so could not have a discussion with her. She states that she tried again later and he told her to "go away". She states that shortly thereafter she observed the claimant having a 10 minute conversation with a colleague and he then left the office for 35 minutes with another colleague. She felt the claimant had given her the brush off when he had time to speak to others.

21. The claimant himself felt aggrieved for different reasons, complaining in his grievance that Ms Lynn had called the meeting knowing that it clashed with his and that she had done so on other occasions leaving him marginalised. Ms Lynn denied this and stated that the audit meeting had been called by Kate Goulden and not by her. The claimant states that he was busy and that when he later spoke to other colleagues that was because he had finished with his complicated case. He denies telling Ms Lynn to "go away."

22. I accept that Ms Lynn did not know about the claimant's People Group meeting and that is why when she found out about it she went to speak to him so that he could choose. I accept that the claimant may have been engaged in a complicated matter when Ms Lynn first approached him to discuss the meeting. I find it is also likely that he did later tell Ms Lynn in an abrupt manner words to the effect of "go away" or that he did not have time to speak to her. She recorded it relatively contemporaneously in her handwritten entry and the notes from their subsequent 1-2-1 on 25 January 2017. Again, I find it is symptomatic of the deteriorating relationship between the two. I accept it may well be the case that Ms Lynn's approaches were not good timing from the claimant's perspective as

opposed to the claimant simply deliberately refusing outright to have a discussion with her. But because the claimant was feeling overly scrutinised he was abrupt in his responses and did not fully explain himself and this meant that Ms Lynn formed the view that she did.

23. The next day, 25 January 2017, the claimant and Ms Lynn had a further 1-2-1. The written record is at p49 to 54 and there are also Ms Lynn's notes at p159 -160. Again the claimant set out his contributions over pages 49 to 52. A section on the form invites comment on "feedback" including feedback on the line manager's performance. Mr Dodd did not comment other than "My HEO has been consistent during my time on the team." Both parties agree that at the 1-2-1 some time was spent discussing the content of the claimant's summary in more detail and Ms Lynn recorded in writing it was a well written appraisal. Ms Lynn, however, also recorded that she had discussed a number of issues relating to the claimant's behaviour. This listed, in summary:

    a. Clocking in at 7am and taking a shower. The claimant stated that his routine had not changed from the meeting in November. It was to be discussed in a separate meeting;

    b. Leaving early and extended periods away from the desk. Ms Lynn gave an example of a day on which the claimant attended a People Group that she was not aware of and that he later left his desk for 30 minutes outside of his lunch time without telling her where he was going. She states the claimant told her he was attending a further meeting relating to the People Group. Ms Lynn recorded that she had highlighted a number of occasions where he had finished early and she was left wondering where he was. The claimant told her he had informed her deputy. It was agreed, according to the written record, that going forward the claimant would give Ms Lynn's deputy a list of meetings a week in advance and that any additional meetings or early finishes would be agreed with her;

    c. The incident where Ms Lynn had understood the Claimant to have refused work. She records the claimant told her he was joking;

    d. Ms Lynn records that she raised the claimant's tone and manner towards her and that she considered the claimant's behaviours towards her had deteriorated over the previous two weeks. She recorded that she gave an example of the claimant refusing to assist with her attempt to clarify the discrepancy between AR1 and PIP CS and his responses when she approached him to feedback from the

audit meeting. She recorded that the claimant told her he had the chats with colleagues only because he had finished his difficult case by that stage. She recorded that she told him that she was his colleague as well as his manager and that she would not speak to anyone like he speaks to her and that he apologised.

24. Ms Lynn recorded: "I advised Mike that these behaviours could potentially lead to a must improve box marking and I suggested we conduct our next 1-2-1 in 3 to 4 weeks time to reassess the situation."

25. The claimant's account of the meeting is that Ms Lynn offered him a move to Business Support and that when he declined she threatened him, stating she would consider placing him on a performance plan but would not say why and that he was threatened with disciplinary action over breaching the break policy. Ms Lynn states that she did not offer him a move or threaten him with a performance plan if he did not move. Her account is that she raised the fact that four job opportunities had come up since the last 1-2-1, and that as the claimant had asked for a move previously but had not applied for them, she had asked him if he was happy now on the team. She states he replied "for now."

26. Ms Lynn states the discussion did happen as recorded and that her observations were legitimate. She states that the claimant did spend time away from his desk and she did not know where he was and that the claimant stated he told her deputy, Dave Harries, because he did not know where Ms Lynn was. Ms Lynn states she told the claimant that no one else on the team did this and she felt it reflected a lack of common courtesy and communication with her and that she told the claimant that if communications did not improve the formal route would involve a performance plan.

27. Ms Lynn states she understood the claimant's comment that his morning routine had not changed to mean he was saying it was still going for a shower and that was why she said she would see him separately about it. She states that before she could do so she became aware that the claimant had approached Ms Prichard and that mediation was then suggested (as set out below).

28. I accept that Ms Lynn's account of the 1-2-1 is broadly as the meeting occurred. In terms of the concerns raised by Ms Lynn I have already set out my findings of fact above. I also accept that Ms Lynn legitimately had and raised with the claimant concerns that she did not at times know where he was and that whilst the claimant may have told her deputy, she was

telling him that he wanted her to communicate directly with her as other members of staff did. I also accept that, given the deteriorating relationship between the two, the claimant's perception was that he was vulnerable to further action being taken against him. But as his manager Ms Lynn did legitimately have to let the claimant know where he stood.

29. On 27 January 2017 Ms Lynn forwarded on to the claimant a response she had received from the business champion about the discrepancy between the AR1 and PIP CS figures. She asked him to take a look at a case highlighted in green and check all actions and been completed and to let her know the outcome (p 55 – 57). She did not receive a response and forwarded the email to the claimant again on 31 January 2017. The claimant responded somewhat abruptly to state "Has a referral for FEv to AP outstanding. Decision not appropriate." I find that the initial lack of a response, and then a short, terse response to Ms Lynn's query was indicative of the deteriorating relationship between the two, and also added or at least reinforced Ms Lynn's concerns about how the claimant was communicating with her in terms of avoiding to do so where he could, and in being abrupt in style.

30. On 2 February 2019 the claimant approached Ms Prichard with a grievance and requested a change of team. It is not disputed that Ms Prichard suggested mediation, which both the claimant and Ms Lynn agreed to, or that attempts were made to progress mediation. One meeting was held but it was subject to delays because of the difficulties in getting all parties together. Ms Lynn believed that the claimant blamed her for the delays in mediation. He confirmed at the hearing that he did not.

31. Ms Lynn states that the claimant's behaviours towards her did not improve. She states that in early February 2017 he was rude and aggressive in a response to her following a request for information from the line manager of another team. I was referred to written account taken from a colleague, Karen McCarthy, as part of the grievance investigation. It is dated 3 October 2017 at p127. Ms McCarthy states she saw Ms Lynn approach the claimant and explained there was a case that needed to be referred back to him and the claimant stated something along the lines of "OK, you can go away now" and then when Ms Lynn tried to explain the action needed that the claimant just kept telling her to go away. The claimant denies this. I accept it is likely some along the lines of the incident as recalled by Ms McCarthy did happen and this was another instance of the claimant being abrupt in his exchanges with Ms Lynn and not wishing to engage with her except to the minimum extent necessary.

32. A further 1-2-1 took place on 13 March 2017 (p 61 – 66). Again the claimant set out in detail his contributions since the last discussion at pages 61 to 65. On page 66 both parties agree that the claimant's contributions were discussed in more detail. Ms Lynn adds "In relation to my comments on Mike's behaviours from the previous "time for us" discussion. I stated that Mike needed to communicate more with me, especially being a PG and IC Rep. This is something we will put in place moving forward. We briefly discussed breaks and "common courtesy" and agreed to discuss this further during our mediation meetings." Ms Lynn's handwritten note is at p169 and states "I stated that going forward Mike needed to work on communicating more with me. I stated that I felt he still cut me out of the team and as the PG rep and IG rep I would expect to be kept more informed of site concerns raised." Ms Lynn stated in evidence that the reference to common courtesy related to not knowing when the claimant was finishing work early. I accept that Ms Lynn's account in broad terms sets out the discussion that was had. I also accept that she continued to have concerns about the claimant communicating with her.

33. On 7 April 2017 Ms Lynn conducted the claimant's end of year appraisal in question. The People Performance Report is at p72 – 81. The claimant's comments are at page 79. Ms Lynn wrote at page 80:

> "*Many positives for Mike this year including his participation in the AR1 Support Workshops. We discussed Mike's willingness (since our last 1-2-1 discussion) to improve his discussion with me. I have noticed a definite change in his behaviours and thus within the team. I am confident that Mike will continue this improvement moving into the next reporting year and no further action will need to be taken."*

34. Ms Lynn gave the claimant a recommended rating of "3" (called a box marking) which equates to a "requires improvement." Ms Lynn's witness statement contains little detail as to how and why she reached that assessment on the day in question. However, she provided further information in her evidence in chief, and the claimant did not object to her providing that further evidence.

35. Her evidence was that the factors she took into account were the claimant's communication with her, that she did not always know where he was, his tone and manner and his behaviour towards her. She referred to the claimant telling her to "go away", and the incident when he refused to take work. She stated that the issue about showering/ the claimant's morning

routine was not a factor she took in to account as that had not reached a conclusion. She stated that she did take into account the claimant's performance as well. She stated that she did also consider the claimant's performance and behaviour across the whole year including that under his previous manager.

36. The claimant states that Ms Lynn told him that she felt his communication with her had improved but she said in a threatening manner that she alone was responsible for him receiving a bonus payment that year and he should be mindful of that in the future. The claimant states he replied to say that if she was happy he was happy and that Ms Lynn left the meeting stating she would now discuss his end of year and she went immediately into Business Support. He did not receive his anticipated end of year marking at the meeting itself and he was not sure who she was discussing it with.

37. Ms Lynn agrees she did not discuss the actual grading with the claimant at his appraisal meeting as that was her understanding of the organisation's guidance as the rating needed to be signed off by her line manager (not Business Support). I find that the discussion that day was brief. It is likely that Ms Lynn did make some reference to there having been some improvement in communication along the lines as set out on the form. It is likely that she also made a comment that she had to decide whether the claimant would get his bonus. This reflected the reality of the situation that she felt there had been some improvement in communication, but she still had overall concerns (including the historic concerns), and she had to decide ultimately what marking to give the claimant which would affect his bonus. Likewise given the brevity of the discussion and the comments about improvement I can understand how there was the potential for the claimant to not have clearly understood that there was a real risk he could receive a "requires improvement" rating.

38. Ms Lynn submitted her recommended rating to her own line manager who was the counter-signing manager. The completed appraisal was given to the claimant in June 2017 by Ms Lynn's deputy as Ms Lynn was away on leave. Ms Lynn's deputy told her that the claimant was unhappy with his box marking. On 7 June 2017 she emailed him with a link to the respondent's policy on appraisal disagreements suggesting that they get together to try to resolve the disagreement informally (p82).

39. The claimant and Ms Lynn met on 14 June 2017. The claimant states that Ms Lynn said her explanation was in her comments on his report and she also again mentioned a lack of communication. He states that she

threatened him that if he continued to appeal his marking she may consider issuing a performance plan. He states that he asked for evidence of the alleged lack of communication and was told that it was within the 1-2-1s. He states Ms Lynn told him he should be grateful for not being put on a performance plan. Ms Lynn states that at this meeting she referred to the performance plan process because the guidance is that anyone on a "must improve" marking should be on one which would mean the claimant would not get a pay rise. However, she had decided not to put the claimant on a performance plan because she considered his behaviour had already improved to a point where this was not necessary. She states she was trying to reassure the claimant that he would get his pay rise as normal. However, the end of year marking itself was based on performance for the whole year. She states the claimant became heated suggesting she was threatening him so she ended the meeting.

40. Ms Lynn then emailed the claimant to acknowledge that he was unhappy with her decision to uphold his end of year box marking and that he wanted to move to the management investigation stage. She provided the claimant with details of how to trigger that process stating that he needed to give her a G1 form and she would then arrange a formal meeting. The claimant thanked Ms Lynn for her email and asked for copies of his 1-2-1s (p84), which were provided (p86). The claimant's grievance is at p150 to 158. He handed it direct to Andrew Vaughan as the complaint contained an allegation of bullying by Ms Lynn. The claimant complained that trust between himself and Ms Lynn had broken down and that he found her to be closed off and dismissive towards him and he considered he was being bullied. He complained in particular about the meeting in November 2016 when Ms Lynn spoke to him about taking a break at the start of the day, that her email summary of that meeting was not accurate, that he had been singled out at the team meeting on 13 January 2017, that on 16 January 2017 she insisted on meeting with the claimant despite the fact he was leaving for lunch. The claimant also explained that his grievance had been triggered by the end of year box marking which he said was unjust, was not discussed at his end of year meeting, and did not reflect his performance. He stated his complaint could be resolved by a detailed explanation of the box marking, a change of the decision to accurately reflect his evidenced work throughout the reporting period and a move of teams.

41. The grievance was investigated by Alan Davis, Grievance and Appeals Manager who received the grievance in early June 2017. He held an investigative meeting with the claimant on 22 August 2017 (p 89 to 96). He

stated that he would check with HR whether the grievance regarding the claimant's box marking needed to be dealt with as a separate process or not.

42. Mr Davis met with Ms Lynn on 12 September 2017 (p 97 – 103). Statements were also taken from Mike Stinton, Wayne Williams, Hayley Sparrow, Robert Morgan, Gary Samaden, Karen McCarthy and Alison Menzies (p 122 – 128).

43. On 10 November 2017 the claimant was sent a letter stating that his grievance was not upheld. The grievance report is at p129 to 130. Amongst other things, it was found that there had been no bullying campaign against the claimant and therefore there were no grounds to change the end of year marking. The claimant appealed the grievance stating that he disputed the end of year performance marking was inappropriate. The appeal was handled by Geraint Williams who met with the claimant on 29 January 2018 in which he expressed concern about whether he could look at an appeal about box marking when the original grievance had been about bullying. On 1 February 2018 Mr Williams wrote to the claimant stating that the grievance investigation had looked at the allegation of harassment and bullying and had not considered a review of the box marking and that following advice he was not in a position to consider the claimant's appeal. The claimant was informed that if he wanted his box marking reviewed he would have to submit a fresh grievance. He did not do so. He stated in evidence that he decided not to do so bearing in mind how long the earlier process had taken.

44. Those who qualified for end of year bonuses were paid on 31 July 2017.

45. In my view Ms Lynn looked at the claimant's performance and behaviours overall over the whole reporting year. I accept her evidence that she did take into account the previous assessment of the claimant's previous manager. She was unable to actually discuss it with Mr Mallett as he had left the organisation. She also took into account that there were no issues with the claimant's performance in terms of the work he was delivering. She had in the 1-2-1s and end of year form commented upon the claimant's performance in a positive manner which would be consistent with her taking that into account. She did, however, have concerns with the claimant's communication with her and his tone and manner which she considered could be disrespectful to her as a manager. In particular, there were various occasions on which he had spoken to her abruptly if not rudely, including on 16 January 2017, both incidents on 24 January 2017, and the incident

that Ms McCarthy witnessed in February 2017. She considered he had been unhelpful in his response to her query about the PIP CS statistical query, both at the original request and when she followed it up with the business champion response. She legitimately considered that he had refused to take work on 16 January 2017. She considered that the claimant tried, if he could, to avoid speaking to her or passing on information unless absolutely necessary. This was demonstrated by her concerns that he would not tell her where he was going, when going off for meetings, or leaving early and that he would, unlike other colleagues, tend to tell her deputy rather than telling her directly. Likewise, she had concerns about his engagement with her in matters such as being PG and IPC rep. I accept that she placed to one side her potential conduct concerns about whether the claimant was still taking breaks at the start of the day, as that was subject an ongoing process which had become caught up in the mediation delays.

46. Considering the claimant's performance and behaviour as a whole Ms Lynn decided that her concerns were not sufficiently serious that she felt she needed to place him on a performance plan. She considered she could continue to work with the claimant on that and via the mediation process. She was aware that would mean the claimant would lose any pay rise and she did not wish that eventuality to occur as it would be disproportionate. She decided, however, that given the behavioural concerns about the claimant outlined above, that looking at the yearly picture overall that she considered a "requires improvement" rating was the correct one. She was aware the claimant would lose any annual performance bonus and she felt that was the appropriate balance and outcome.

The Bonus Scheme

47. It is agreed that equivalent terms to those applied to the claimant can be found at p218 to 231, a document entitled "Employee Deal: DWP Pay Offer 2016 (AA – HEO)". Paragraph 2 defines the eligibility criteria for the pay deal on offer stating:

"2.1 To be entitled to the pay offer you must;
(a) be employed by the Department for Work and Pensions (DWP) each year of the offer on both 30 June and 1 July;
(b) have satisfactory performance. This means that:

- You will not be eligible for a consolidated pay increase whilst you are undergoing formal poor performance action and have received a Must Improve end of year performance marking.

- You will not be eligible for a non-consolidated performance payment if you have received a Must Improve performance marking for the performance year (regardless of whether or not any formal poor performance action has been commenced on RM or equivalent future system)…"

48. Paragraph 16 of the document sets out the "Non-Consolidated Pay Offer" stating:

> "16.3 You will be eligible for a non-consolidated payment in recognition of your individual contribution if you attain an "Exceeded" or "Achieved" rating under People Performance and where in post on 31 March 2016 and 1 July 2016.
>
> 16.4 If you have a "Must Improve" rating you will not receive an end of year performance award, regardless of whether formal poor performance action has commenced…"
>
> 16.6 Individual performance awards will be:
>
> - Determined on the basis of the performance marking achieved for the 2015/6 performance year
> - Paid at the level appropriate to the grade in which you have been assessed, unless otherwise stated.
> - Paid as a non-consolidated, non-pensionable, non-superannuable lump sum; and
> - Subject to tax and National Insurance."

49. The non-consolidated payment values are set out in a table at paragraph 16.11. Both parties agree that the claimant would have received £500 if he had been eligible for payment. It is, in effect, a performance related bonus payment. It is likewise not in dispute that the claimant did not receive the end of year performance award because he received a "Must Improve" performance marking under People Performance for the performance year in question. It is the determination of that performance marking the claimant disputes.

The legal framework

50. The material parts of section 13 of the Employment Rights Act 1996 ("ERA") provide:

"13(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…

13(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 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 decision made by the employer from the worker's wages on that occasion…"

51. Section 27 of ERA sets out the meaning of "wages" and the material parts provide:

"27(1) In this Part "wages", in relation to a worker, means any sum payable to the worker in connection with his employment including

(a) any fee, **bonus,** commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.." [my emphasis]

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part –

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made."

52. The respondent concedes that the bonus payment which the claimant seeks is "wages" within the meaning of section 13. The issue in dispute is whether that bonus is "properly payable" within the meaning of section 13(3).

53. It could only be "properly payable" to the claimant if he received at least an "achieved" rating on his performance marking. That was at the discretion of Ms Lynn who was, in effect, exercising a discretionary power.

55. Ms Masoud identified that the tribunal, when assessing the exercise of that discretionary power, had to follow the principles laid down by the Supreme Court in Braganza v BP Shipping Ltd [2015] IRLR 487. A copy of the authority was given to the claimant and he was given time in which to read it.

56. That case was concerned with death in service benefits. However, the point of principle taken from it is that when a court or tribunal is assessing the exercise of a contractual discretion it may involve implying a contractual term to moderate the exercise of that discretion. What term is implied with depend upon the facts of a particular case, however, any decision making function entrusted to an employer has to be exercised in accordance with the implied obligation of trust and confidence. When assessing whether an employer is in breach of that implied duty, public law principles of rationality will apply. This means that the decision must be made rationality, in good faith, and consistent with its contractual purpose. Assessing rationality in that public law sense means considering:

    (a) the decision making process - have the relevant matters (and not irrelevant matters) been taken into account; and

    (b) the outcome - is the result such that no reasonable decision maker could have reached it?

57. I note that in Patural v DG Services (UK) Ltd [2015] EWHC 3659 (QB) Mr Justice Singh held that these principles from Braganza applied to disputes about the exercise of contractual terms in relation to the payment of discretionary bonuses.

Submissions

58. In his submissions the claimant set out his position on some of the factual disputes, that I have already dealt with above. In particular, he considered that there was a lack of convincing evidence in support of many of the allegations made, particularly bearing in mind that they all work in an open plan office. He submitted that his positive performance evidence had been

disregarded along with the positive mid year indicative rating from his previous line manager. He argued that his positive performance should be 50% of the assessment, and that given the alleged behaviour infringements were only from January 2017 onwards it was, even if proven (which he disputed), only a minimal amount of time in the overall reporting period, and therefore the other positive behavioural assessment for the rest of the period should be added on and properly taken into account. The claimant argued that he had not been given sufficient warning that he was at risk of receiving that rating or sufficient support or the opportunity to improve. He argued that he had been told in the January that there was the **potential** for a requires improvement rating, but no plan for the way forward was put in place. He had asked to move but instead had been directed down the route of informal mediation which he had agreed to as he wanted a good working relationship. But the delays in mediation meant he was deprived of that opportunity.

59. The respondent submitted that the assessment was not a straight forward arithmetical calculation. It was submitted that I should find Ms Lynn's account to be accurate and that she was entitled to take into account considerations of behaviour, tone and manner. Ms Masoud referred to the February 2017 incident as evidence that the behaviours complained about did not go away and submitted that the claimant had been given ample opportunity to address his behaviours. Ms Masoud argued that Ms Lynn's assessment was approved by the countersigning manager and that the claimant did not fully avail himself of the opportunity to challenge the box marking received.

Findings

60. Applying my findings of fact set out above to the legal principles I have identified, I do not find that the performance bonus was properly payable to the claimant.

61. I do not find that Ms Lynn was acting in bad faith when reaching her decision.

62. The purpose of the performance bonus would be to reward performance and behaviours demonstrated throughout the reporting year. Ms Lynn's assessment and decision, as I have summarised above, was consistent with that contractual purpose.

63. In terms of the decision making process, the factors that I have set out above that I have found Ms Lynn took into account were relevant and legitimate factors for her to take into account. I do not find that she took in to account irrelevant factors.

64. In terms of the ultimate decision reached, it was for Ms Lynn to assess and weigh the factors in reaching her decision. It is not for this tribunal to substitute the decision of the decision maker and even if I considered that I would not have reached the same decision or weighed the relevant factors in a different way, that is not relevant. There was a broad discretion open to Ms Lynn and I do not find that she reached a decision outcome that was so unreasonable no reasonable decision maker could have reached it. The outcome was therefore not irrational in a public law sense or in breach of the implied duty of trust and confidence.

65. The claimant complains that he did not have sufficient warning that he was at risk of the finding of "requires improvement" in the run up to the end of year review or indeed at the end of year review itself. The March 1-2-1 did not include an express comment about it; however, it is clear that Ms Lynn was still expressing some concerns about the claimant's communication with her. Likewise, whilst I accept it would have been preferable for Ms Lynn to be clearer with the claimant at his appraisal meeting that his box marking was still at stake, there had been the series of discussions with him and she did discuss it with the claimant again, upholding her original decision. The overall process, including the degree of warning and reasoning provided to the claimant, was therefore not procedurally improper in a public law sense or perverse or in breach of the implied duty of trust and confidence.

66. The claimant also complains that he did not have chance to improve or to address the working relationship, and that he was disadvantaged by the delays in the mediation process. I agree that it was disappointing that the mediation process was subject to delays and this did not help either the claimant or Ms Lynn improving their working relationship. However, he was, as I have found, spoken to about the concerns that Ms Lynn had and those concerns were relevant factors she took in to account when reaching her decision. Further, I have found as a matter of fact that events happened which gave Ms Lynn grounds to hold those concerns. Irrespective of the potential for the claimant to work on improving their working relationship, it

was relevant for Ms Lynn, if she wished to do so, to take into account the previous events and concerns as part of her overall assessment, and balancing exercise for the appraisal year in question. Likewise, she was not bound by the previous indicative rating from Mr Mallett nor that the behavioural concerns only related to a limited amount of time, as they were only part of the overall assessment she had to make of all relevant factors. As stated, I find that Ms Lynn did take into account all the relevant factors and her balancing of those factors to produce her decision was not irrational or perverse in a public law sense or in breach of the implied term of trust and confidence.

67. I should comment that I make no criticism of the claimant for not pursuing a fresh grievance. Whilst I accept the claimant could have been clearer in his initial grievance that the box marking was a specific act complained about in itself, to my mind it was always clear from the claimant's grievance that an important element of his complaint was that his box marking was unjust. The respondent, in my view, took an overly technical approach in finding that the claimant could not pursue his grievance appeal because it was it was "subtly different" to his original complaint of bullying and directing the claimant to restart the grievance process as opposed to addressing its mind and process to the substance of the claimant's complaint. That is, however, not a matter on which I can make a formal adjudication.

68. The claimant's claim for an unlawful deduction of wages is therefore unsuccessful and is dismissed.

_____

Employment Judge Harfield
Dated: 10 July 2019

JUDGMENT SENT TO THE PARTIES ON

……11 July 2019……..

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS