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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Miss L MacLean	**AND**	Hogarth Architects Limited

Heard at: London Central **On**: 24 July 2019

Before: Employment Judge Palca (sitting alone)

Representation
For the Claimant: In person
For the Respondent: Mr S Hoyle, Employment Consultant

EXTENDED REASONS

Parties

1. The Claimant was employed as an Associate by the Respondent architecture company from 2015 until she left, having resigned on 13 June 2018.

Issues

2. The Claimant claims that she is entitled to be paid £2,988.79 as an unlawful deduction from wages, being the second tranche of a profit related pay entitlement which she claims is contractually due to her. The Respondent claims that the Claimant was only entitled to profit related pay if the company made a profit in excess of £124,848 in the relevant year which it did not do, and therefore no payment is due.

Evidence

3. The Claimant and Mr Ian Hogarth, a Director of the Respondent, gave evidence. Both had produced witness statements. Each party had produced a bundle of documents.

Facts

4. The Claimant joined the Respondent in April 2015 as an Associate. Her contract of employment states

> "*Your salary will be paid monthly in arrears at the rate of £42,000 per annum paid by direct transfer to your bank/building society account… In addition to the basic salary above you are entitled to profit related pay which is based upon the yearly company profits. This will be at a rate of 5%, which based on the profits from the last financial year (October 2013 to October 2014) equates to roughly £5,000. This PRP is applicable only in times of full time employment and will be paid pro rota in any situation of prolonged absence (e.g. sabbatical, maternity leave, long illness etc).*"

5. In December 2015 that contract was varied, as set out in a letter dated 23 December 2015. The Claimant accepted a pay cut to £40,000 salary per annum but her profit share was increased from 5% to 10%. That letter stated

> "*As discussed before this is calculated at 10% of any post tax profit in excess of £120,000 per year, adjusted annually for inflation up to a ceiling of £220,000. Over this level 5% will be paid*…
> *The figures for the profit related bonus are not guaranteed. They are only paid if the practice has any post tax profit as mentioned above.*
> *The payment is calculated from our draft accounts in December, with an approximate 50% included in your December salary, and confirmed with our published accounts in June with a balancing payment*. *The bonus referred to In your appointment letter now comes into place. Below is a statement of what is receivable based on our draft accounts for 2014/15. There may be minor adjustments before they are signed off but nothing significant. This is pro rota for 6.7 months.*

Profit after tax	*£221,000*
Less base	*£120,000*
Total	*£101,000*
10% share (5% over £220,000)	*£5653.13*
Payable December salary	*£2,825.56*
Payable June salary (approx.)	*£2,826.56"*

The Claimant was paid £2,828.56 in December. In June she was paid £2,836.02 £10 more than the approximate sum set out in the letter of 23 December.

6. For the financial year 2015/16, the Claimant was informed on 20 December 2016 that the draft accounts had been prepared and that she would be paid £5,112.63 in December and "*payable June salary £5,112.62 (*approximate)". On 22 June the Claimant was informed that the final accounts had been prepared and that the amount to be paid in the June salary was £5,110/82 – £2 less than the December letter.

7. On 23 January 2018 Mr Hogarth, one of the two Directors of the Respondent, wrote to the Claimant:

> "*We now have our finalised accounts and the first tranche of PRP for the year is payable.*

Profit after tax	*£189,442.76*

Less base £124,848
Total £59,987.87.
10% share (5% over £237,33.97), £5,998.79.

Paid January salary £3,000
Payable June salary £2,998.79"

8. The Respondent claims that the language of this letter was a typographical error. However, the words are clear and until the parties were in dispute no attempt was made to correct them. In any event any error does not seem to be typographical. The letters states that accounts have been finalised, that a payment has been made and that another is due. Unlike in previous years, o mention is made of any final payment being either provisional or approximate.

9. The Claimant handed in her notice in May 2018. The practice had not performed well and a number people left and were not replaced. The Claimant in fact left the company on 12 June 2018 and shortly after this began chasing the payment of her profit related pay. She was initially told that there was a cash flow problem so the payment would be delayed. At that stage there was no mention that the original letter had been a typographical error or that any of the payments were in jeopardy. On 23 July the Claimant was emailed and told that the final accounts were not looking good. On 31 July, the deadline for finalising the Respondent's accounts with Companies House, the Respondent told the Claimant that profits after tax had reduced to £56,349, so that after deduction of the base cost of £124,848, there was a negative balance and so no payment was due. It concluded

"*As this is a negative figure, no PRP should have been payable for the entire period. As we already made a payment on account, we cannot ask for a return, but sadly there will be no second tranche for this period. We are very sorry about this, but I am sure you are fully aware of the practice's fragile financial position. It is not great for any of us.*

Paid January salary £3,000
Payable June salary 0
Yours sincerely
Ian Hogarth"

10. There was a discussion in evidence before the Tribunal as to whether or not the finalised accounts are correct. They were prepared with the help of a firm of chartered accountants. While it is surprising that the accounts as finalised should differ so markedly from the accounts produced in December 2017 there is no evidence before the Tribunal that they have been falsified and the Employment Tribunal therefore accepts the accounts filed on 31 July 2018 as presenting a true and fair view.

11. The Respondent and the Claimant accepted that the Claimant knew nothing about the financial position of the company or its accounts beyond the monthly management figures that she did see.

Submissions

12. The Respondent submitted that the Claimant made a series of erroneous assumptions about the Respondent's financial position. Given that the Respondent did not make a sufficiently high profit in 2016/17 to justify a performance related payment, no payment was contractually due. It was also argued that it could not be said that there was custom and practice that the Claimant would always be paid the bonus sums due to her set out in the letter sent to her in December/January at the time of the first tranche payment. There had only been two years of payment before the year in question, and on each of those years the payments actually received had varied to a minor degree from the sums that had been set out in the December letters. Therefore, no precedent had been set. The Tribunal had referred parties to Attrill v Dresdner Kleinwort Ltd 2011 EWCA Civ 229 CA. The Respondent distinguished this case on the basis that the present case did not relate to a guaranteed minimum bonus pool. Even if that case did set a precedent, any award would have to be based on the financial position of the company at the time payment was due. The letter of 23 January 2018 did not amount to a variation of contract as it contained a typographical error which should clearly have been accepted by the Claimant as a forecast - it was a simple and obvious error.

13. The Claimant argued that she was told that she would be paid the funds and had every right to believe that this would happen. It was only after leaving the company that the payment was pushed back.

Law

14. Section 13(1) of the Employment Rights Act 1996 gives employees the right not to have unlawful deductions made to their wages. By s.27 of the Act wages include any bonus, commission or other emolument referable to employment. The word "deductions" includes non-payment.

Conclusion

15. The issue for the Tribunal is whether or the terms of the letter of 23 December 2015 apply, so that payment of a profit share would only be made if the company made profits in excess of £120,000 (as adjusted) in any financial year, or whether these terms were varied or superseded by the terms of the letters sent to the Claimant on 23 December 2017.

16. The provisions of the letter of 23 December 2015 are clear. The Claimant's entitlement to a profit share is not guaranteed, but it is only payable if the Company's profits exceed £120,000 (varied by inflation). While the accounts produced in early January 2018 indicated that profits substantially exceeded this sum, following discussions with the Respondent's accountants the final filed version of the accounts showed a much smaller profit of £56,349, as a result of which, if the only issue is interpretation of the letter of 23 December 2015, the profit share payment due in June would not have been payable.

17. However, in contrast to earlier years, when notification of entitlement to the second tranche of the profit share has been couched in terms of an approximate or estimated payment, the letter of 23 January 2018, written by Mr Hogarth, states clearly:

a. that the accounts for 2016/17 had been finalised, whereas letters in previous years at this stage had referred to draft accounts; and
b. Of the two amounts set out, one was referred to as paid and one as payable in June. There was no qualification in relation to the June payment, as there had been in previous letters.

The wording of this letter could not have been clearer. In this case the letter was sent by one of the two Directors of the company. The Claimant did not know any details of the financial position of the company or of any bad debts it might have, it would not therefore been obvious to the Claimant that any typographical error or mistake had been made. The company never told her that the letter's contents had been written in error until these proceedings were brought. The Claimant was therefore entitled to take at face value, in circumstances where the parties were already in a contractual relationship, that the two payments would be made. The letter amount to a representation that accounts had been finalised and a contractual promise that both payments would be made unconditionally.

18. Alternatively, the letter of 23 January 2018 amounts to a variation of contract stating unconditionally that the profit share payments would be made. In general where an employer unilaterally varies the terms of a contract of employment to the benefit for the employee, the employee's continuation in the same employment amounts to consideration given to the variation and acceptance of it. The tribunal found that to be the position in this case.

19. The Tribunal therefore found that the second tranche of the 2016/17 profit share due to the Claimant was unlawfully deducted from her wage. It is ordered that the sum of £2,998.79 be paid to the Claimant by the Respondent forthwith.

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Employment Judge Palca

Dated:30th July 2019

Judgment and Reasons sent to the parties on:

31/07/2019

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For the Tribunal Office