EMPLOYMENT TRIBUNALS (ENGLAND & WALES)

Mr P Southall
Claimant

Accenture (UK) Ltd
Respondent

V

HELD AT: London Central ON: 6/12/2019
Employment Judge: Mr J S Burns

Appearances
For Claimant: In person
For Respondent: Mr L Dilaimi (Counsel)

Judgment

The claim is struck out as having no reasonable prospect of success.

Reasons

1. This is an Open Preliminary Hearing to decide a number of issues as set out in paragraph 5 of the order of Judge Pearl signed on 24/9/2019.

2. The Claimant claims payment of a bonus which the Claimant says should have been paid on 31/12/2018 and which the Respondent says was not ever payable but which would have become payable on 21/12/2018 had it been due at all. As the Claimant left his employment with the Respondent on 31/8/2018 it has already been recognised that the claim cannot be brought in contract as a consequence of the provisions of Regulation 3(c) of the ETs Extension of Jurisdiction (E and W) Order 1994.

3. The questions for today are whether the claim has any reasonable prospect as a wages claim under section 27 ERA 1996 and if so whether it has been brought in time.

4. The documents were in two bundles, one from each side. I heard evidence from Andy Swann, who is employed by the Respondent as a Total Rewards senior manager. I accept as reliable his evidence about the operation of the Respondent's bonus scheme in 2018.

5. I also heard evidence from the Claimant who appeared reliable and honest but on his own evidence he had little or no recent first-hand knowledge of the Respondent's bonus scheme. The Claimant's evidence was based on his work with another company called Avanade which he left in November 2015. This work gave him some insight into the activities of the Respondent at that time. However, in 2016 the Respondent changed its scheme to one which was based on discretionary decision making.

6. I accept that the document at R48 is an extract from the Claimant's employment contract – in clauses 2.5 and 2.6 it provided for a discretionary bonus plan and that the timing of any payment of a bonus was also a matter of absolute discretion.

7. I find that under the scheme in order for the Claimant to be paid a bonus at all he would have had to be given a talent rating of *Continue Progressing* or better. The assignment of the talent rating is based on the managers' assessment of the employee's performance and overall contribution throughout the year (in this case the period to 31/8/2018) and this depends on a host of different factors. In this case the Claimant was given a *Not Progressing* rating and hence was automatically assigned to a nil bonus.

8. Had the Claimant been awarded a sufficient talent rating the next step would have been that a decision would have been taken by a meeting of relevant managers to decide what amount of bonus should have been awarded. This would have been a percentage of basic annual salary but there is a wide range of different percentages assigned from about 5% to over 30%. The award of different percentages depends on a comparison made by managers who do not simply assess one individual's contribution, but place the individual in context alongside his or her peers. That requires subjectivity and insight into the performance of many employees.

9. There are no minutes recording the specific decision-making in the Claimant's case but he did raise a formal grievance and then appeal against the decision to assign him the *Not Progressing* talent rating. The decisions rejecting the grievance and appeal indicate that the Respondent relies on several specific performance-related concerns which are said to explain and underlie the decision.

10. It is plain that no decision was made to pay the Claimant any bonus sum. Hence there is no ascertained amount.

11. Having regard to the relevant case law to which Mr L Dilaimi referred me, - in particular Coors Brewers Ltd v Adcock 2007 EWCA Civ 19, Lucy v BA PLC UKEAT/0033/08/LA and Jandu v Crane Legal UKEAT/0198/13/DA, the question is whether the bonus claim is for a specific sum which is reasonably ascertainable by the tribunal. The fact that the ascertainment may be difficult or

require some mathematical calculations, or exploration in evidence of a specific issue, does not bar the claim. However, if there are a number of factors to be considered in the quantification which involve the exercise of some discretion and judgment, then the claim will not fall into the category of straightforward claims which was identified in Coors Brewers as suitable for the wages jurisdiction in the ET.

12. The Claimant says that the actual decision makers have not been brought to the Tribunal to explain the decision-making process and if they did then the Tribunal could carry out its own analysis of what actually happened. The names of the decision makers however are unknown to the Claimant.

13. If the name of the original decision maker was known and he or she appeared at the Tribunal they would inevitably seek to justify the decisions by reference to the wide range of claimed performance issues and conclusions which are mentioned in the grievance and appeal outcomes.

14. In order for the tribunal to reach the conclusion that the talent rating of *Not Progressing* should be set aside and then to go on and assign a percentage of annual salary to the Claimant the tribunal would have to step into the shoes of the decision makers and carry out a wide-ranging survey of the Claimant's annual performance in the context of the performance of his peers. That would be a task which it would be impossible or extremely difficult for the tribunal to undertake.

15. I conclude that this is a claim for a bonus which is not only unascertained but not reasonably ascertainable by the tribunal; and in any event it is unclear whether, if the difficult task was undertaken, it would result in any different conclusion to that already reached by the Respondent. Hence the claim cannot be brought as a wages claim and must be struck out as having no reasonable prospect of success.

16. The claim would also have been out of time anyway. Clause 2.3 of the employment contract applied to ordinary salary but clause 2.6 of the contract applied to the timing of bonus payments namely that it was a matter of absolute discretion. Time ran from 21/12/2018, which was when all the 2018 bonuses were paid. The Claimant had previously received his bonus before Christmas when he worked for Avanade and in 2017 the Respondent's bonuses were paid on 22/12/2017, a matter which the Claimant would have been informed about by email dated 24/11/2017. He plainly thought time ran from 31/12/2018 but made no attempt to check, for example by asking the Respondent when it had made its 2018 bonus payments. He received advice from both ACAS and his own solicitors during the three-month period, but that advice appears to have been based on incorrect information. He also waited for the outcome of the

internal grievance, but it is established that that is not a good reason for waiting. This is a claim which was brought outside the three-month period (subject to EC extension) in circumstances in which it would have been reasonable practicable for it to be brought in time.

17. The Claimant suspects that there was no reasonable exercise of discretion and that the Respondent simply decided to withhold his bonus because he had resigned from his employment.

18. As I explained to the Claimant, there is a duty on employers, even when dealing with a discretionary scheme, to exercise the discretion in good faith and not to make perverse decisions. If that duty is breached then the disappointed employee can bring a contractual claim in the County or High Court for damages for breach of contract, and the time limit for that is 6 years.

19. I express no opinion about the Claimant's suspicions.

20. However, my conclusion is that the Employment Tribunal does not have jurisdiction so the ET claim is at an end.

6/12/2019

Employment Judge
J S Burns London Central

_____
For Secretary of the Tribunals

_____
Date sent to the Parties
28/01/2020