EMPLOYMENT TRIBUNALS

Claimant: Mrs J Jackson

Respondent: Berkeley Catering Ltd

Heard at: Croydon
On: 15 January 2020 and in chambers on 14 February 2020

Before: Employment Judge Nash

Representation
Claimant: Ms Anderson of counsel
Respondent: Mr Robson of counsel

REMEDY JUDGMENT

1. There is no basic award.
2. The compensatory award is £54,000.
3. Accordingly, the respondent shall pay to the claimant the sum of £54,000 under this judgment.
4. The prescribed element of the award is £53,700
5. The period to which the prescribed element applies is from 20 April 2018 to 17 March 2020.
6. The amount by which the total award exceeds the prescribed element is £300.

REASONS

The Hearing

1. The listing for the remedy hearing on 15 January 2020 proved short. The Tribunal, having agreed with issues with the parties, provided the parties orally with its decisions on the issues identified.

2. It was agreed with the parties that they should therefore be able to agree the compensation between them.

3. However, it was not clear at the hearing if the resulting agreed award would exceed the statutory maximum on compensation awards for unfair dismissal. It if did so, then there was a dispute between the parties as to how the maximum should be calculated.

4. Further, the tribunal did not discuss the amount of compensation for loss of statutory rights. The tribunal informed the parties by way of a Case Management Order dated 15 January that it was minded to award a week's pay capped at the date of the presentation of the ET1 as compensation in this regard and invited the parties to make submissions if advised as to this.

The parties' positions and submissions

5. The parties agreed in correspondence that the amount of compensation for statutory loss should be £300.

6. The parties agreed that, based on the tribunal's findings on the issues, the compensatory award, before application of the statutory maximum pursuant to section 124 Employment Rights Act 1996 would be £63,446.28. However, they did not agree as to the amount of the statutory maximum. The claimant stated in correspondence dated 20 January that the applicable statutory maximum was £66,000. However, the respondent stated in correspondence dated 20 January that he applicable statutory cap was £54,000.
7. Accordingly, the only issue for the in chambers hearing on 14 February was the correct calculation of the statutory maximum, which would be determinative of the amount of the compensatory award.
8. The respondent contended that a "week's pay" on these facts was the claimant's contractual pay, which did not include commission. This was the plain meaning of the statute as confirmed by the Court of Appeal in *Evans v Malley Organisation* [2002] EWCA Civ 1834. The claimant's commission varied month on month depending on the company performance. Accordingly, the remuneration did not vary with the amount of work done and a week's pay should be calculated exclusive of commission.

9. The claimant, however, contended that she was contractually entitled to her commission. The facts could be distinguished from those in *Evans*. In *Evans* there was a lengthy delay between the date the claimant did the work and the payment of commission generated. Further, *Evans* was decided before *Lock v British Gas [2016] EWCA Civ 98* where "a week's pay" was differently interpreted. Further, section 229 permitted the Tribunal to apportion in such a manner as the Tribunal sees fit.

10. Further and in the alternative, the claimant had a contractual right to her bonus at the time it was earned.

11. The claimant accordingly submitted that a week's pay should be calculated so as to include the claimant's commission.

The Law

12. The statutory cap on a compensatory award is set out at section 124 Employment Rights Act 1996 as follows

124Limit of compensatory award etc.

(1)The amount of—

(a)any compensation awarded to a person under section 117(1) and (2), or

(b)a compensatory award to a person calculated in accordance with section 123,

shall not exceed the amount specified in subsection (1ZA).

(1ZA)The amount specified in this subsection is the lower of—

(a)£86,444**,** and

(b)52 multiplied by a week's pay of the person concerned.

13. The relevant provision in these proceedings is section 124(1ZA)(b) which refers to "a week's pay", defined at ss220-229 ERA. It was agreed that the claimant was an employee with normal working hours. The relevant provisions are as follows:-

221General.

(1)This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2)Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

(3)Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—

(a)where the calculation date is the last day of a week, with that week, and

(b)otherwise, with the last complete week before the calculation date.

(4)In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

(5)This section is subject to sections 227 and 228.

229Supplementary.

(1)In arriving at—

(a)an average hourly rate of remuneration, or

(b)average weekly remuneration,

under this Chapter, account shall be taken of work for a former employer within the period for which the average is to be taken if, by virtue of Chapter I of this Part, a period of employment with the former employer counts as part of the employee's continuous period of employment.

(2)Where under this Chapter account is to be taken of remuneration or other payments for a period which does not coincide with the periods for which the remuneration or other payments are calculated, the remuneration or other payments shall be apportioned in such manner as may be just.

Determination

14. The first question for the Tribunal was whether a week's pay, and consequently the statutory maximum, should be calculated in line with s221(2) or (3). To put it another way, did the claimant's remuneration vary with the amount of work done in the period?

15. There was no material dispute as to the claimant's compensation package. She was entitled to a basic salary together with a bonus dependent on company performance.

16. The Court of Appeal in *Evans* considered whether a salesperson (whose contract allowed for a basic salary and a commission on sales) received remuneration that did or did not vary with the amount of work done in the period for the purposes of s221 (para 41).

17. According to Lady Hale at paragraph 43

"There are several good reasons to conclude that although this remuneration varied it did not vary "with the amount of work done":

(i) "work done" would ordinarily mean tasks undertaken, such as researching potential clients, making telephone calls, writing letters, meeting potential clients; it would not mean "success achieved". [Counsel for the employer] quite rightly says that work done leads to success achieved; but that does not mean that the words have the same meaning.

(ii) The ordinary meaning of the "amount" of work done would refer to its quantity and not to its quality or its results.

(iii) The variation of remuneration in this case was not "with" the amount of work done in the period but with success achieved as a result of the work done in a completely different period, usually 9 months later.

(iv) The concept of averaging over 12 weeks is difficult to fit with the concept of success fees relating to a completely different period."

18. She continued at paragraph 4

    "There is nothing in s222(4) to change that. This is clearly defining remuneration for the purpose of what is included in remuneration, but that still has to be done within the overall criterion of varying with the amount of work done."

19. The effect of *Evans* is that s221(4) does not mean that all cases with commission fall within s 221(3). S221(4) simply clarifies the meaning of 221(3) i.e. how the average is calculated, including commission. Subsection (4) does not assist with determining if it is a case falling within subsections (2) or (3).

20. Ms Anderson sought to distinguish this case on the basis that Lady Hale's points (iii) and (iv) do not apply on the facts; unlike in *Evans,* there was no nine month delay before payment of this claimant's bonus.

21. The Tribunal did not accept that the facts in this case could be so distinguished from those in *Evans*. The factors (i) and (ii), which Lady Hale listed first, do apply on these facts. Further, this claimant's bonus did not depend on the claimant's efforts alone. Unlike a salesperson's bonus which might be very largely attributable the individual's own efforts (that is sales achieved), this claimant's bonus was payable according to the company's overall performance. There was accordingly less of a link between the hours of work done by the claimant and the remuneration than was the case on the facts in *Evans*.

22. Further, the Tribunal could not accept Ms Anderson's arguments in respect of section 229. Section 229 is no more relevant than s221(4). Section 229 only refers to a situation where calculations must be done "under this Chapter". That is not so in a subsection (2) case, unlike a subsection (3) case.

23. Further, the tribunal was not persuaded by Ms Anderson's reliance on *Lock v British Gas.* In *Lock* the domestic courts were asked to interpret domestic legislation (the Working Time Regulations) in line with EU law, the Working Time Directive. The court interpreted the regulations consistently with the Directive, which (according to a determination of the CJEU) required that holiday pay be calculated by reference to commission.

24. No such consideration applies under s221. Unfair dismissal is a domestically derived right, unlike holiday pay. It is a general principle of our law that the same words should be interpreted in the same way in legislation. It might be said that the way that EU law operates creates an apparent exception to this principle. However, it is arguably not an exception in fact. In effect the wording of the domestic statute has been altered by the operation of EU law. The employment tribunal in effect adds an extra subsection into the Working Time Regulations 1998 to make them comply with the European Court's ruling and as a result, the words are no longer the same in the two pieces of legislation.

25. The Court in *Lock* stated in terms at paragraph 13 that, looked at through the lens of domestic law, pay is confined to salary and excludes commission.

26. The Tribunal finally considered if the claimant was contractually entitled to her bonus, thereby bringing her within s221(2). According to the claimant's written submissions, the claimant was contractually entitled to her bonus and she relied upon Mr Patel's letter of 15 June 2017 (p85 liability bundle). This letter stated that the claimant's "rate of pay will increase to £54,000 per annum". The letter went on to state that the "maximum potential bonus" would remain at £1,000 but be calculated differently. The original contract of employment included a right to a salary but there was no reference to a bonus. On 15 December 2016 the claimant's salary was increased and a bonus structure introduced but there was no reference to this being contractual. The tribunal did not accept that there was a contractual right to a bonus.

27. Accordingly the compensatory award is capped at £54,000 based on the agreed gross annual salary exclusive of bonus.

28. The respondent applied for an order staying payment of the award pending outcome of an appeal under Rule 66 of the 2013 Rules of Procedure. The claimant objected. By the time this judgment was prepared the tribunal had received notification that the respondent had appealed to the EAT. However, the tribunal concluded that the making of such an order is not an appropriate matter for this Tribunal that has no enforcement jurisdiction. Further, these proceedings have been subject to considerable delay; the effective date of termination was nearly two years before the date of this judgment.

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Employment Judge Nash

Dated: 17 March 2020