EMPLOYMENT TRIBUNALS

Claimant: Mr D Casement

Respondent: Hose Care (UK) Limited trading as Pirtek Bradford

Heard at: Leeds by Cloud Video Platform **On:** 12 October 2020

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: in person
Respondent: Mr Lunt, a manager of the Respondent

JUDGMENT

1) By consent, the Respondent's name is amended to Hose Care (UK) Limited trading as Pirtek Bradford.

2) The Respondent acted in breach of contract by failing to pay the Claimant the salary agreed with him from September 2016 until February 2020. The Respondent is ordered to pay the Claimant **£8241.00** as damages for breach of contract.

3) That amount is increased by two weeks' pay, an amount of **£1050**, because the Respondent was in breach of its obligations under section 1(1) of the Employment Rights Act to give a written statement of particulars when these proceedings were begun. The total amount that the Respondent is ordered to pay the Claimant is therefore **£9291.00**.

REASONS

Preamble

1. The Claimant's employment with the Respondent ended following his resignation with effect from 27 March 2020. Following the termination of his employment, the Claimant presented a claim to the Employment Tribunal on 13 August 2020 for arrears of pay.

2. The hearing of the claim took place by Cloud Video Platform ("CVP") on 12 October 2020 with a 3-hour listing. Some time was lost at the beginning of the hearing as a result of Mr Lunt having difficulties connecting to CVP and because the parties did not both have the same documents. Once Mr Lunt had managed

to join the hearing there were no difficulties in him being seen or heard. Indeed, there were no further technical problems during the hearing generally.

3. The Claimant gave oral evidence in support of his claim. He called no other witnesses. He relied on a bundle which had an index and then 20 paginated pages. Mr Lunt gave evidence on behalf of the Respondent, who called no other witnesses. He relied on documents which had been emailed to the Tribunal on 21 September 2020 and which ran to 18 pages. The Claimant had produced a very short witness statement. Mr Lunt had not prepared a witness statement. They therefore both gave their evidence in chief by answering neutral questions that I asked by reference to the list of issues agreed at the beginning of the hearing (and as set out below).

4. After the Claimant and Mr Lunt had given their evidence they each made very brief submissions; essentially each simply relied on the oral evidence they had given. I then reserved my judgment. There was no time for me to reach a decision on the day because of the time lost at the beginning of the hearing.

The issues

5. Neither party was professionally represented and there had been no previous case management. Consequently there was a fairly lengthy discussion of the issues arising in the claim at the beginning of the hearing.

6. It was agreed by the Claimant and Mr Lunt that the Claimant had originally been employed by the Respondent as an engineer in 2011. It was also agreed that his role changed from 1 September 2016, when he became the Respondent's Centre Manager in Bradford, and that he held that role until his employment ended on 27 March 2020.

7. The Claimant contends that it was agreed that from 1 September 2016 his salary would be the amount of his P60 earnings for the tax year ending 5 April 2016, which was £27612.20 (£2301.02/month). The Respondent contends that it was agreed that from that date his pay would comprise a basic salary of £18000 per annum and a guaranteed bonus of £600 per month. This reflected the £2100 a month which the parties agreed the Claimant had been paid until February 2020, when his salary had been increased to £27138.96.

8. The parties therefore agreed that what was in dispute, factually, was whether the Claimant had been underpaid by £201 a month for 41 months, i.e. by a total of £8241. (All figures are before tax.)

9. The claim form expressly characterised the claim in box 8.1 as "arrears of pay" but the more detailed pleading in box 8.2 set it out principally as being one of unauthorised deductions from wages. The last deduction was made on 31 January 2020. Early conciliation was from 25 June 2020 until 17 July 2020. Consequently any unauthorised deduction claim was out of time, subject to any extension of time on the basis that it had not been reasonably practicable to present the claim within the three-month time limit running from the date of the last deduction.

10. The claim form, however, made quite clear that the claimant was arguing that there had been a breach of contract: "It was an expressed [sic] term of my contract that my new annual basic salary for the role of Centre Manager would be

equal to that of my combined earnings for the previous financial year… Pursuant to this term I was due to be paid £2301… Across 41 months I was underpaid by £205.91 per month…". I therefore concluded that the claim form read as a whole presented the claim as being one for breach of contract or unauthorised deductions and that no amendment was necessary for a breach of contract claim to be pursued. (I should note that if leave to amend had been necessary I would have granted it and, when asked, Mr Lunt said that he would have no objection to that.)

11. I therefore proceeded to deal with the claim as one for breach of contract. As a breach of contract claim, it was not out of time because time ran in those circumstances from the last day of the Claimant's employment, 27 March 2020 (article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). Taking into account early conciliation, the earliest date that an act could be in time was 26 March 2020.

12. The Claimant also contended that:

    12.1. The Respondent had failed to provide him with a statement of employment particulars as required by section 1 of the Employment Rights Act 1996 ("the 1996 Act") and so any award should be increased by two to four weeks' pay pursuant to section 38 of the Employment Act 2002. The Respondent contended that in fact such a statement had been provided; and

    12.2. The Respondent had unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") in relation to a grievance he had brought in relation to the claimed underpayments and that any award should be increased by 25% on that basis. The Respondent denied that any such grievance had been brought or that it had failed to comply with the ACAS Code.

13. The issues for the Tribunal therefore were:

    13.1. Did the Respondent act in breach of contract by paying the Claimant £2100 a month instead of £2301.02 a month for 41 months, the period running from 1 September 2016 to 31 January 2020? If so, it was agreed that £8241 was payable in damages by the Respondent to the Claimant. If not, the claim failed.

    13.2. If the Claimant's breach of contract claim succeeded, should the award be increased pursuant to section 38 of the Employment Act 2002 because the Respondent had failed to provide a statement of particulars as required by section 1 of the 1996 Act?

    13.3. If the Claimant's breach of contract claim succeeded, should the award be increased by up to 25% because the Respondent had unreasonably failed to comply with the ACAS Code?

The Law

14. A breach of contract occurs when a party to a contract fails to fulfil an obligation imposed by the terms of the contract.

15. A breach of contract gives the innocent party the right to sue for damages, i.e. for financial compensation for losses flowing from the breach. The general principle which applies to all types of claim for breach of contract is that damages should return the innocent party to the position they would have been in if there had been no breach. A claim for damages for breach of contract may be pursued in the Employment Tribunal when it arises, or is outstanding, on the termination of employment, but not otherwise.

16. Section 38 of the Employment Act 2002 applies to proceedings before an Employment Tribunal under any of the jurisdictions listed in Schedule 5 to that Act. Such jurisdictions include a claim for breach of contract.

17. If the employer was in breach of its obligations under section 1(1) of the 1996 Act to give a written statement of initial employment particulars when proceedings to which section 38 applies were begun, this will normally affect the compensation to be awarded if those proceedings are successful. This is because the Tribunal must (subject to section 38(5) of the Employment Act 2002) increase the award made in such proceedings by an amount equal to two weeks' pay or, if no award would otherwise be made in such proceedings although the Tribunal has found in the employee's favour, make an award of an amount equal to two weeks' pay (in either case capped at the amount provided for by section 227 of the 1996 Act).

18. Further, the Tribunal may increase any award by up to four weeks' pay (again capped) or, as the case may be, make an award of up to four weeks' pay if it considers it just and equitable in all the circumstances to do so.

19. Section 38(5) of the Employment Act 2002 provides that if there are exceptional circumstances which would make an award or increase unjust or inequitable then it is not necessary to make an award or increase.

20. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") applies to claims under any of the jurisdictions listed in Schedule A2. These include a claim for breach of contract.

21. If in the case of proceedings to which section 207A applies it appears to the Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies and the employer has unreasonably failed to comply with that code in relation to that matter, the Tribunal may, if it considers it just and equitable in all the circumstances, increase any award it makes to the employee by no more than 25%.

22. The relevant code of practice in this case is the ACAS Code.

Findings of fact

23. In making these findings of fact I have taken account of all the evidence before me, even though I do not of necessity refer to all of it in these findings.

24. The key issue for me is what the Claimant and Respondent agreed when he became Centre Manager in September 2016. The most significant relevant evidence before me in relation to this issue may reasonably be summarised as follows:

24.1. The Claimant's oral evidence:

24.1.1. The Claimant explained that before September 2016, as an engineer, he had earned a basic salary, a payment for being on-call, a payment for going out on-call, and commission. Commission was 10% on sales over £8000. He said that when he had agreed in principle to accept the Centre Manager role he had said to Mr Lunt that he "did not want to do the role and be financially worse off than being in a van". He said that the agreement reached was that he would be paid a salary equivalent to his total earnings for the tax year ending in April 2016. He said that he had said to Mr Lunt that he thought this was around £28000 and that Mr Lunt had said that they would go off the P60 figure (which was in fact £27612);

24.1.2. The Claimant said that he had received the email dated 28 November 2016 from Mr Lunt when he had asked for evidence of his then salary because he was applying for a mortgage. The figure given in that email was £27139 (not £27612). The Claimant said that he had not noticed this error at the time. Rather he had simply forwarded the email to his girlfriend who was dealing with the mortgage application;

24.1.3. The Claimant said that he had only realised he was being paid less than £27612 (or £27319) in 2019, when he had been re-mortgaging. Again his girlfriend was dealing with the paper work and she had noticed this. The Claimant said that he had then raised this with Mr Lunt on a number of occasions. Mr Lunt had essentially prevaricated until the end of February 2020, at which point he had begun to pay the Claimant monthly payments equivalent to an annual salary of £27139. The Claimant said that the increase in salary came after a "heated phone call" but denied in cross examination that Mr Lunt had told him that he was increasing his salary following him threatening to leave.

24.2. Mr Lunt's oral evidence:

24.2.1. Mr Lunt explained that the agreement reached when the Claimant became Centre Manager was that he would be paid a basic salary of £18000 and a guaranteed bonus of £7200, giving guaranteed pay of £25200. He explained that there would also have been a further bonus paid if sales for the centre in Bradford exceeded £50000 a month, but they never did, instead fluctuating at around £30000;

24.2.2. Mr Lunt said that in September 2016 the Claimant had been prepared to accept guaranteed paid after his promotion to Centre Manager of £25200, which was £2400 lower than his gross pay in the previous tax year as an engineer, because of practical advantages to him of doing the role. These were that he would no longer have to be on-call (which meant one had to be ready to go out on-call and so could not drink alcohol) or go out on-call (with the anti-social hours that that could bring);

24.2.3. So far as the email of 28 November 2016 was concerned, Mr Lunt said that he had never sent it, but accepted that it appeared to have come from his email account. He did not offer any explanation for how the email had come to be sent but did note that the footer of it was not typical

of his emails: the email ended with him signing off "Gary", whereas, he said, his emails would normally have a footer of the kind that could be seen at the first page of his documents (his full name, Gary Lunt, plus his work address, telephone number and email). It is worth noting that the email at the first page of his documents was from gary.lunt@pirtekbradford.co.uk.

24.2.4. Mr Lunt did, however, accept that the Claimant had forwarded him the email of 28 November 2016 in around January 2020 when the Claimant was chasing what he said were arrears of pay due to him. Mr Lunt said that he had initially "laughed it off" but, when I asked him specifically, said that he had said to the Claimant that it was fabricated. However he had subsequently "become afraid" that the Claimant would leave (which would have posed difficulties as the covid-19 crisis had begun to loom) and so he had begun to pay the increased salary of £27139 (i.e. the figure in the email which he said was a fabrication) from the end of February 2020.

24.3. The email of 27 November 2016. This is an important piece of evidence and so I set it out in its entirety. It is apparently from gary.lunt@pirtekleeds.co.uk and is to d.casement83@gmail.com. It states:

Private & Confidential

Hi Danny

As discussed, I confirm your salary for your new role as Centre Manager will be a basic salary of £27,139 per annum which equates to the amount you earned last financial year.

There will also be a bonus scheme in place which will work on the total sales per month at Pirtek Bradford, more details will follow at a later date

If you have any questions please let me know

Gary

25. In considering this evidence, I should observe that in principle I found the explanations of both the Claimant and Mr Lunt for the salaries that they claimed were agreed plausible. In particular, it was plausible that the Claimant would not, as he said, have agreed to do the Centre Manager role (which represented a promotion of sorts) if that would have resulted in him being paid less than his salary as an engineer. However, it was also plausible, as Mr Lunt claimed, that the Claimant might have settled for a lower guaranteed salary given (1) his total pay as an engineer had not been guaranteed; (2) there was an additional bonus scheme on offer so his pay might not in reality be lower; (3) there was an advantage to the Claimant in not having to be on-call or do call-outs with the unsocial hours that those entailed.

26. However, when the evidence is taken in the round, I find that on the balance of probabilities the Claimant has proved that what he and Mr Lunt had agreed was

that he would be paid a salary equivalent to his P60 pay for the tax year ending in April 2016, taking particular account of the following points:

26.1. Although the figure in the email of 27 November 2016 is wrong (it gives the figure of £27139 whereas the actual P60 figure was £27612), the email describes the principle for which the Claimant contended ("the amount you earned last financial year");

26.2. The Claimant's explanation for why he had not noticed the relatively small difference between £27612 and £27139 was entirely plausible: the email had been obtained for the purpose of a mortgage application and he had simply forwarded it on to his girlfriend who was dealing with that application without checking it against his P60 for 2015/2016;

26.3. By contrast, Mr Lunt's explanation of how he had reacted to the email of 27 November 2016 being sent to him in around January 2020 by the Claimant who was at that time pursuing what he regarded as the underpayment of his salary was implausible. Mr Lunt's basic explanation was that, rather than investigating the provenance of the email (which at the hearing he did not accept that he had sent), he had increased the Claimant's salary to the figure mentioned in it to prevent him leaving. I found this to be implausible because I find it highly unlikely that any business manager would pay the salary requested in an email which he was treating as a fabrication to an employee in a position such as that of the Claimant rather than raise issues with the employee in relation to the fabrication of the email. I find it highly unlikely because any employer would have substantial concerns if it felt that an employee in a position of trust (the Claimant was the Centre Manager) was fabricating emails to further a pay claim and would be highly unlikely to ignore such concerns, even if they also had concerns about the employee leaving their employment;

26.4. Further, I find that there is little in the email footer point made by Mr Lunt. In fact the two emails to which Mr Lunt referred came from two separate email addresses which reflect, I find, that at the time Mr Lunt was responsible for the Respondent's centres in both Bradford and Leeds. The email of 28 November 2016 was from gary.lunt@pirtekleeds.co.uk and the one at the first page of his documents was from gary.lunt@pirtekbradford.co.uk. There is no documentary evidence before me which suggests that emails sent from the Leeds address always had a footer. Further, I take judicial notice of the fact that emails may or may not have footers depending on whether they are sent from a PC, laptop, tablet or mobile device, depending on the settings of those devices;

26.5. Finally, I do not find it implausible that the Claimant had not raised the issue of underpayment before mid-2019. Given the way in which the arrangement was reached, it is perfectly plausible that the Claimant only became aware that he was being paid less than he ought to be paid when his girlfriend checked the figures in 2019, when a new mortgage application was being made. The reality is that most employees are primarily aware of the amount of their pay after tax month to month and so an error in gross pay on which net pay is calculated may go undetected.

27. Overall, therefore, I find that the email of 27 November 2016 reflected the agreement reached by the parties in relation to the Claimant's salary from when

he became Centre Manager in September 2016. That is to say it was agreed that he would be paid his P60 pay from the tax year 2015/2016, which was £27612 (albeit there is an error in relation to the actual figure in the email).

28. Turning to other matters in relation to which I must make findings of fact, the Claimant accepted that he had not raised a written grievance with the Respondent about its failure to pay him what he regarded as his correct pay. Rather his evidence was (and I accept that this was the case) that he had simply raised the matter verbally with the Respondent and chased a response.

29. Finally, I turn to the question of whether the Respondent issued the Claimant with a section 1 statement. The evidence before me in relation to this issue was as follows:

    29.1. The evidence of the Claimant that it had not. The Claimant pointed in this respect to the fact that the Respondent was unable to produce any such document at the hearing. He also pointed to emails contained at page 20 of his bundle of documents from 3 March 2020 in which he had emailed Mr Lunt an "employment of contract template that might be useful to you". Mr Lunt had replied "Thanks".

    29.2. The evidence of Mr Lunt that it had. This was his recollection. He also pointed to the two Pirtek UK Operational Audit documents he had provided from 2016 and 2017. Each of these comprised a check list for the auditor to check (Pirtek is a franchise). In both of these the question "Do all staff have a contract of employment" has been answered "yes".

30. I find, on the balance of probabilities, that the Claimant was not provided with a section 1 statement by the Respondent either at the beginning of, or during, his employment. This is for the following reasons:

    30.1. The simple fact is that the Respondent has been unable to produce a copy of such a document relating to the Claimant (or, for that matter, to any other employee) and Mr Lunt provided no clear or detailed explanation for why all the contracts of employment of employees at the Pirtek Bradford branch might have gone missing;

    30.2. The email of 3 March 2020 is highly consistent with there being no section 1 statements/or contracts of employment in place and I attach some weight to it. It is difficult to see why the Claimant would have sent Mr Lunt a blank form contract of employment on that date and why Mr Lunt would have said "Thanks" on receiving it if employees already had contracts of employment. In those circumstances a more likely response by Mr Lunt would have been: "Why are you sending me a blank form contract of employment? I have one that I use already."

    30.3. By contrast, I attach little weight to the two audit documents. In particular, it is not clear whether the person who completed the audit saw the contracts of employment in question or was simply assured that they existed.

Conclusions

31. The Respondent has acted in breach of contract by failing to pay the Claimant the salary agreed between him and Mr Lunt when the Claimant began his position as

Centre Manager in September 2016. In light of the issues agreed at the beginning of the hearing, it was agreed that in this event the Claimant would have been underpaid by £8214. I therefore order that the Respondent pay the claimant £8214 as damages for breach of contract.

32. However I conclude that the Claimant never raised a formal grievance about this – and I note that the Code of Practice states (its paragraph 32):

    If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

33. Taking matters in the round, I therefore find that the Respondent did not unreasonably fail to comply with the ACAS Code and, accordingly, the award made to the Claimant should not be increased pursuant to section 207A of the 1992 Act.

34. Finally, I turn to section 38 of the Employment Act 2002. I conclude that that the Respondent was in breach of its obligation under section 1(1) of the 1996 Act when this claim was begun because I have found above that a section 1 statement of terms and conditions was never issued to the Claimant. Accordingly I increase the award made to the Claimant for breach of contract by two weeks' pay. At the date of his dismissal the Claimant's annual salary was £27612 and so a week's pay was £531. That weekly pay is therefore capped at £525 by section 227 of the 1996 Act and so the amount of two weeks' pay is £1050. I do not consider that it would be just and equitable in all the circumstances to increase the award by four weeks' pay and so do not do so.

Employment Judge Evans

Date: 29 October 2020