EMPLOYMENT TRIBUNALS

Claimant	*Respondent*
Mr Stephen Ravenscroft	Animal and Plant Health Agency

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
AT A PUBLIC PRELIMINARY HEARING (PrPH) by telephone

HELD AT NEWCASTLE ON 7 January 2021
EMPLOYMENT JUDGE GARNON
Appearances
For Claimant in Person
For Respondent: Mr A. Jones of Counsel

JUDGMENT STRIKING OUT THE WHOLE CLAIM

I strike out the claims of unlawful deduction of wages and breach of contract

REASONS (bold print is my emphasis and italics are quotations)

1. On 26 August 2020 I conducted a preliminary hearing the notes of which included

2. The facts alleged, can be shortly stated. The claimant worked for the respondent or its predecessors from 29 July 1991 until he retired on 29 March 2019. For the purposes of a bonus scheme, which the respondent says was discretionary, but arguably was contractual, he was rated as "excellent" and would have received a bonus based on his performance in the year 1 April 2018 -31 March 2019. However, the bonus scheme is said by the respondent to contain a term bonus would be payable at the end of November only if he was in employment on 1 July 2019. He says the respondent's HR department should have advised him of this and, had they done, he would have postponed his retirement to 2 July.

3. On 8 July Employment Judge (EJ) Arullendran identified the potential claims as unlawful deduction of wages and/or breach of contract and raised a point not taken by the respondent as to whether the claims were presented in time. I expressed my view the claimant need not be concerned about the time limit point. She spotted a second issue and asked the claimant to say whether he agreed with paragraph 7 of the response which sets out the conditions on payment. He did in theory. I then set out some law thus

8. The House of Lords in Scally-v-Southern Health and Social Services Board 1991 ICR 771, held *there is an implied obligation on employers to* ***inform*** *employees of a contractual benefit to which they are, or may be, entitled, in that case a contractual right to purchase extra pension entitlement on*

advantageous terms. Such an implied term will only arise where all of the following circumstances obtain: (a) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (b) a particular term of the contract confers on the employee a valuable right contingent on action being taken by the employee to avail him or herself of it; and (c) ***the employee cannot reasonably be expected to be aware of the term unless it is drawn to his or her attention****. In those circumstances, said Lord Bridge, it was not merely reasonable but necessary to imply an obligation on the employer to take reasonable steps to bring the term to the attention of the employee.*

9. One person may owe duties to another under a contract or under the branch of law known as "tort" which, in non-legalistic terms, includes a duty not to be negligent in dealing with another person who may foreseeably be harmed. This Tribunal has no jurisdiction to decide a negligence claim which must be brought in a County Court. The courts have been reluctant to develop the law in such a way as to impose duties on employers to protect the economic wellbeing of employees. In University of Nottingham-v-Eyett 1999 IRLR 87, *the High Court held where an employee took voluntary retirement on a date chosen by him, the employer was not under a duty to tell him his pension would have been higher had he waited until the following month to retire. In* Outram-v-Academy Plastics 2000 IRLR 499, *the Court of Appeal ruled any duty of care in tort the employer owed to the employee would go no further than the implied contractual duty set out in Scally.*

10. The Court of Appeal confirmed in Crossley-v-Faithful and Gould Holdings Ltd 2004 ICR 1615, *employers do not, as a general rule, have an implied contractual obligation to protect employee's economic wellbeing. The employee in that case decided to take early retirement not realising he would lose valuable benefits under a permanent health insurance scheme. He argued the employer knew his resignation would seriously prejudice his right to benefit under the scheme and had failed to warn him. Lord Justice Dyson, with whom the other members of the Court of Appeal agreed, noted the House of Lords in Scally could have chosen to identify an implied term obliging all employers to take reasonable care in respect of their employees' economic wellbeing. However, they had not identified such a wide-ranging obligation. Also in* Spring-v-Guardian Assurance plc 1994 ICR 596, *Lord Woolf had observed a court will only imply a duty on an employer to care for the economic wellbeing of an employee in 'appropriate circumstances'. It was not for the Court of Appeal 'to take a big leap to introduce a major extension of the law in this area' when the House of Lords in* Scally *and* Spring *had declined to do so. Such an implied term would 'impose an unfair and unreasonable burden on employers'.*

11. In Peninsula Business Services Ltd-v-Sweeney 2004 IRLR 49 the *Employment Appeal Tribunal (EAT) held a resigning employee was bound by the term of a commission scheme which provided that, on leaving employment, he forfeited any right to commission he had earned but which had not yet become due for payment at the date of termination of the contract. There was no suggestion the employer had misled the employee in any way as to the effect of the commission rules, which were set out in clear language in a document that formed part of the terms of the contract of employment. Although the employee had not fully appreciated the effect the term would have in the event of his employment terminating, by signing the commission agreement he had accepted all its terms, however onerous those terms might be and regardless of whether the employee had read the agreement or not.*

12. The Supreme Court in James-Bowen-v-Commissioner of Police of the Metropolis 2018 ICR 1353, *confirmed there is no general contractual duty to take care for employees' economic wellbeing within the law of negligence or contract*

13. The message of these case is that employers are not their employees' financial keepers and, unless an employer assumes the responsibility of giving financial advice or the Scally *criteria are satisfied, employees will not be able to argue the employer should have pointed out the small print regarding any rights and options they have by way of financial benefits. In short there is a duty to* ***inform*** *but not a duty to* ***advise*** *employees in connection with payment rights.*

2. I wrote I could not see how the claimant will overcome the case law I had cited but he must be given an opportunity to research the matter for himself and take advice. When he had, and the respondent had replied, an EJ could say if his claim has no or little reasonable prospect of success and on that basis, it may be struck out or a deposit ordered. I ordered the claimant is to inform the Tribunal in writing, with a copy to the respondent, whether he withdrew his claim, and if he did not to give a brief explanation of how he intended to argue in this Tribunal the respondent had a contractual duty to advise him of the consequences of retiring when he did. The respondent had leave to reply to any argument he put forward within 14 days thereafter. The parties' submissions would be referred to an EJ to decide whether to list the case for a full hearing **or** a public preliminary hearing to consider striking it out or ordering a deposit to be paid. EJ Aspden decided the latter.

3.The claimant has said the scheme for the year in question was not put on the intranet until after he had left. That is accepted but on the point of having to be in service at a certain date the schemes for previous years said the same. In any event the respondent will say the scheme was discretionary.

The Law as to strike out and my Conclusion

4. Rule 37 includes :
At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it .. has no reasonable prospect of success;

5. A claim may be struck out if it has **no reasonable** prospect of success. Mr Justice Megarry once said: *"the path of the law is strewn with examples of open and shut cases that somehow were not, and unanswerable charges that were in the event fully answered."* Lady Smith said in Balls-v-Downham Market High School 2011 IRLR 217 *:*

"*I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short a high test. There must be no reasonable prospects."*

6. The standard is high but although a judge can rarely say a claim has **absolutely** no prospect of success the wording is no "reasonable" prospect and sometimes that can be said . If a claim has

little reasonable prospect of success, Rule 39 provides for the making of a deposit order. No matter how small a deposit I ordered, if the claimant pays it , proceeds and fails at trial, a costs order against him, for probably far more than he is claiming, is highly likely to be made. When I told him I think he has a mountain to climb in overcoming the legal obstacles to success, he preferred not to run the risk of a deposit order.

7. The claimant said how hard he had worked for the respondent and I have considerable sympathy for him. However, this is one of the rare cases in which I can say his claim stands no reasonable prospect of success and should be struck out.

Employment Judge TM Garnon
Judgment authorised by the Employment Judge on 7 January 2021