EMPLOYMENT TRIBUNALS

Claimant: Miss C Charles

Respondent: Citicourt and Co Limited

Heard at: London Central (via CVP) **On:** 12th May 2021

Before: Employment Judge Nicklin

Representation
Claimant: Mr K Harris (Counsel)
Respondent: Ms J Bartin (Director and CEO of the Respondent)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

1. The claim for holiday pay is dismissed on withdrawal by the Claimant.

2. It is the judgment of the tribunal that:

    a. the Claimant was wrongfully dismissed. The Respondent is in breach of contract for failing to pay the Claimant one month's notice pay. **The Respondent shall pay the Claimant £5,000 gross notice pay**, subject to making the appropriate tax and National Insurance deductions from that sum.

    b. The Respondent has made unlawful deductions to the Claimant's wages in September 2019. **The Respondent shall pay the Claimant £1,817.32 gross in unpaid wages and bonus**, subject to making the appropriate tax and National Insurance deductions from that sum.

    c. The Respondent shall pay the Claimant a **15% uplift** on the award of notice pay (£5000) and the separate gross sum of £115.39 (an award of wages for half a day's pay owing for hours worked on 19th August 2019), for its unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The 15% uplift is to be applied to the net amounts of these two sums,

once tax and National Insurance deductions have been taken into account.

REASONS

Introduction

1. By a claim form presented on 20th March 2020, the Claimant brought the following claims:
   1.1. Breach of contract on the basis of wrongful dismissal – a claim for one month's notice pay;
   1.2. Breach of contract/unlawful deductions from wages – a claim for wages owed up to the date of termination of employment and a claim for accrued but unpaid holiday pay;
   1.3. Breach of contract/unlawful deductions from wages – a claim for an alleged guaranteed bonus in respect of the Claimant's period of employment up to termination.

2. At a public preliminary hearing before Employment Judge Russell on 16th November 2020, it was determined that the tribunal has jurisdiction to hear the Claimant's complaints and the Respondent was granted an extension of time in respect of the presentation of its ET3 Response.

3. During the course of this hearing, the Claimant's counsel confirmed that the claim for holiday pay was withdrawn on the basis that the Claimant was satisfied that this had been sufficiently repaid.

4. The Claimant attended the hearing and gave sworn evidence. She was represented by Mr Harris, of counsel. The Respondent company was represented by Ms Bartin, its CEO and director. She also gave sworn evidence on behalf of the Respondent.

5. I was provided with a 170-page electronic bundle and witness statements for each of the two witnesses. It was confirmed at the outset of the hearing that all of the documents on which both parties relied were contained in the electronic bundle. In addition, during an early break, Ms Bartin sent an email to counsel for the Claimant which was also provided to me. This set out the Respondent's breakdown of the amounts which had been paid to the Claimant in respect of her short period of employment. It was confirmed that, as this set out the Respondent's case on the amounts paid, both parties wished for me to also take this into account. I therefore considered this email in addition to the evidence set out in the electronic bundle and witness statements.

Issues

6. At the beginning of the hearing, I clarified the issues with the parties and explained these issues in outline, once identified, to Ms Bartin so that she was clear on the matters which the tribunal needed to determine.

7. The issues are:

   Wrongful dismissal – notice pay

7.1. Did the parties contractually agree that there would be a period of one month's notice during the first three months of the employment contract? The Claimant contends that the parties are bound by a written offer letter dated 17th August 2019.

7.2. If so, was this subsequently varied prior to the termination of the Claimant's employment? The Respondent contends that the parties are bound by a written contract of employment which supersedes any initial agreement.

7.3. Was the Respondent entitled to terminate the contract without giving any agreed notice?

7.4. If not, how much notice pay is owing?

Wages and Bonus

7.5. What sum was properly payable to the Claimant for her employment between 1st – 5th September 2019 and in respect of any alleged time off in lieu owing for a half day worked on 19th August 2019?

7.6. Did the parties contractually agree that the Claimant would be paid a guaranteed 25% bonus referable to the entire period of her employment? The Respondent contends that any bonus was not guaranteed and is not payable in the circumstances.

7.7. Has there been a deduction in respect of these sums in September 2019?

7.8. If so, was the deduction authorised and therefore lawful?

7.9. If not, how much is owing to the Claimant?

7.10. Alternatively, was there a breach of contract in failing to pay any sums due?

ACAS Uplift

7.11. Was the Claimant's email to the Respondent on 5th September 2019, following a decision to dismiss her, a grievance?

7.12. If so, did the Respondent fail to investigate and respond to the Claimant's grievance?

7.13. Is the Claimant entitled to any uplift for any alleged failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")?

Findings of Fact

8. I make the following findings of fact.

9. The Respondent is a corporate finance company which specialises in mergers and acquisitions; fundraising; debt and equity financing and corporate advisory. Its office is based in London. Ms Bartin is the CEO.

10. The Claimant was employed as an Executive Assistant/Office Manager from 20th August 2019 until 5th September 2019.

The contract

11. Shortly before the Claimant commenced her employment, she was given an offer letter dated 17th August 2019, signed by Ms Bartin. The Claimant had been introduced to the Respondent through a headhunting agency called Page Personnel. However, the terms of employment were negotiated and agreed between the Claimant and Ms Bartin directly.

12. The parties agreed a base salary of £60,000 per annum. The Claimant had been paid more than this in her previous role (£90,000). The offer letter sets

out the agreed base salary and explains that this will be reviewed after 6 months. The other benefits in the offer letter included an advance loan to fund a London Travelcard ticket; the company pension scheme and "*various other benefits if and when they are introduced, an example is our EMI (employee) share scheme*".

13. Further, the offer letter provided for a bonus scheme in the following terms:

> "*You will be granted 25% bonus on base salary and considered for discretionary annual bonuses of an additional target 25% following your probation period of three months (based on the success of the company during that period, currently we are aiming to pay bonuses in Dec and June, but these dates may change as we staff up over the next few months to accommodate tax year etc)…"*

14. The offer letter states that there would be a three-month probationary period connected to this 'conditional offer', the details of which would be outlined in the contract of employment. The offer letter explained that the Claimant would receive a copy of that "*as soon as possible but no later than three months after joining*".

15. It was also agreed that there would be a one-month notice period during the probationary period and a three-month notice period thereafter with the following caveat: "*unless otherwise stated in your employment contract*".

16. The offer letter set out many of the principal terms of the employment relationship which one might expect to be later set out in the contract, unless subsequently varied. In addition to the above terms, the letter makes clear:

    16.1. That employment would commence on 20th August 2019.

    16.2. That the Claimant would be expected to perform 40 hours per week, from 8.30 – 5.30pm with a total of a one hour break during the day, with additional hours as reasonably necessary.

    16.3. That the Claimant would have 23 days holiday plus 8 bank holidays (31 in total).

17. The Claimant signed the offer letter on her first day of employment. She was also given various other documents at the same time such as a dress code policy and IT policy.

18. At page 162 of the electronic bundle, there is a copy of what appears to be the Claimant's employment contract, dated 5th September 2019. It is signed only by Ms Bartin, dated by hand as 20th August 2019.

19. The relevant principal difference between the offer letter and this contract is that there is a term in clause 6 of the contract which says: "*During the first month of your employment, the Company or you may terminate your employment without notice*". It then provides for one month notice for the remainder of the probationary period. In respect of the bonus, it says: "*You will not be entitled to receive a bonus if you are no longer employed by the Company or you are under notice of termination of employment, whether the notice is given by you or the Company, on the date the bonus is payable*".

20. At no point during the Claimant's employment was she made aware of these different terms or given a copy of this, or any other, employment contract. I find this because:

    20.1. I accept the Claimant's evidence that she was not given a copy of this contract. I found her to be a reliable and credible witness, giving straight forward answers to the tribunal. She had not seen a copy of the contract which is in the electronic bundle until it was disclosed during these proceedings.

    20.2. Conversely, Ms Bartin's evidence on this point was contradictory:

        20.2.1. In the Respondent's Amended Grounds of Resistance, at paragraph 12, it states:

        12. On 5th September 2019 the Respondent dismissed the Claimant. On 5th September the Respondent issued a statement of particulars of employment to the Claimant, posting her employment contract to ensure she had it to hand. The Respondent had not had opportunity within the two week period of employment to issue same to the Claimant.

        20.2.2. Contrary to the statement in the ET3, above, in her witness statement prepared for the hearing, which she verified as true on affirmation, it states that "*The Claimant left her employment contract on her desk and did not return to the office to collect it or sign it. The Respondent was required to post the employment contract to the Claimant…*". The implication here was that the contract had been given to the Claimant during the course of her employment and she had left it on her desk and neglected to sign it.

        20.2.3. During oral evidence, Ms Bartin said that she posted the contract out to the Claimant on 5th September 2019.

        20.2.4. In her email to the Claimant confirming termination of employment, sent at 3:37pm on 5th September 2019 (page 123 in the electronic bundle), it was confirmed that a copy of the Claimant's contract "*has been posted to you which you should receive if you have not done so already*".

        20.2.5. I find that Ms Bartin's evidence was confused and unclear about the preparation and provision of the contract, fluctuating from the position adopted in the ET3 (dated 10th November 2020) to the position in evidence before the tribunal that the contract had earlier been given to the Claimant and had been left on her desk.

    20.3. The copy of the contract in the electronic bundle says on its face that it is dated 5th September 2019, the day the Claimant's employment was terminated. The bottom left of the document is also marked with this date. However, Ms Bartin signed and dated the contract with the date of commencement of employment despite telling the tribunal that the datemark on the bottom of the document (5th September 2019) bears the date it is printed out from a computer.

20.4. On the balance of probabilities, I find it is more likely than not that a copy of the contract was first created on 5th September 2019, in circumstances where the Respondent had decided to terminate the Claimant's employment and sought to rely on the newly created terms therein, which were plainly to its advantage. The copy of this contract was then sent out to the Claimant by post in order to rely on these terms as if they represented the true contractual position, but, for whatever reason, this post was not received by the Claimant.

<u>*Bonus*</u>

21. As part of the negotiations before the Claimant commenced employment, the Claimant and Ms Bartin discussed the 25% bonus. I accept the Claimant's evidence that this was said, in discussions, to be a 'guaranteed' bonus, which would be paid out twice a year. The Claimant was happy with this as it supplemented her income given this post was a reduction in salary compared to her previous employment.

22. The Claimant asked Ms Bartin if the word 'guaranteed' could be included in the offer letter as she wanted confirmation of this to support her mortgage application. The revised offer letter was sent, as above, to the Claimant on 17th August 2019. In her covering email attaching the offer letter (at page 95 of the electronic bundle), Ms Bartin said: "*We have not included the word guaranteed however, I can confirm this word included or not will not impact your receiving or not receiving a mortgage or its value* (sic)".

23. I find that, whether or not this word was to be used, the parties had agreed and understood that a 25% bonus was payable and referable to the Claimant's base salary. That is clear on the face of the offer letter signed by the parties.

24. The 25% bonus on base salary was not, on the wording set out in the offer letter, expressed to be payable only after the probationary period had been completed. The letter refers to two parts of the bonus scheme: the granting of a 25% on base salary and, separately, consideration for a discretionary annual bonus of an additional target 25% following the probation period.

<u>*Time off in lieu*</u>

25. Ms Bartin asked the Claimant to come into the office, as set out in the offer letter, on Monday 19th August 2019 at 5pm for "*a few hours and take these back later*". Both parties accept that this did happen. It occurred before the Claimant's employment commenced but it was agreed that the time would be brought into account in the form of time off in lieu. Ms Bartin accepted in her evidence that the Claimant would take these hours back but insisted that this had been compensated because the Claimant was late to work on three days during her short period of employment.

26. I find that there had been no compensation for the additional hours worked the evening before the employment contract commenced. The parties explicitly agreed, in the form of the offer letter, that the Claimant would be given time off in lieu for coming in to the office for a handover on 19th August 2019. There is no evidence that the parties agreed that such time off in lieu had been taken in the form of any lateness or absence from work prior to termination of the Claimant's employment on 5th September 2019.

<u>*Termination of employment*</u>

27. The following events occurred prior to Ms Bartin's decision to terminate the Claimant's employment:

    27.1. On her second day in the role, the Claimant experienced train delays and arrived 30 minutes late. She stayed late in the office that evening.

    27.2. On 27th August 2019, the Claimant was unable to attend work owing to the illness of a family member. Ms Bartin acknowledged and accepted this.

    27.3. She was late again on 28th and 29th August. I do not accept any lateness was as much as 25 minutes, as alleged by the Respondent. The Respondent's policy was that lateness should be reported where an employee is more than 15 minutes late. On balance of probabilities, I find that any lateness was more likely, as the Claimant said in evidence, less than this, although the Claimant regularly worked longer than her contractual hours during her period of employment.

    27.4. On Friday 30th August 2019, the Respondent should have paid its staff their monthly pay. This did not happen because there was a problem with the Respondent's payroll process.

    27.5. On Monday 2nd September 2019, the Claimant attended work despite having not been paid. She was told by Ms Bartin that there had been issues with payroll and she would be paid.

    27.6. The following day, the Claimant had still not been paid her salary. The Claimant sent a text message to Ms Bartin explaining that, owing to her direct debit commitments, she did not have the funds to travel into work. Ms Bartin later telephoned the Claimant and apologised for the delay in payment. She offered to transfer £12.50 to the Claimant's account to provide the funds for her to attend work. Ms Bartin found it very difficult to believe that the Claimant could not afford to travel to work (despite having not been paid) and did not consider that it was the Respondent's responsibility to finance travel in these circumstances. However, on balance of probabilities, I accept the Claimant's evidence that she could not sustainably afford to travel into central London having not been paid. The Claimant had her own monthly commitments which required her salary to be paid. As she said to Ms Bartin in a text message on 4th September 2019 (p.118 of the electronic bundle), she had tried to extend her overdraft but she could not.

    27.7. Despite the telephone call, funds were not transferred to enable the Claimant to travel into the office.

    27.8. On 4th September, the third working day of the month, the Claimant had still not been paid. She sent another text message to Ms Bartin asking about payment (as referred to above). The Claimant did not have the funds to attend. Ms Bartin asked the Claimant to stop texting her and to telephone her.

    27.9. On 5th September, Ms Bartin telephoned the Claimant. She told the Claimant that she was lying about not having the funds to travel to work and was holding the Respondent 'hostage' for not paying her

salary. The Claimant told her she would return to work once she had been paid. I accept the Claimant's account of this telephone call having regard to my earlier findings as to her credibility and, also, because the Claimant's follow up text message sent to Ms Bartin that day offers a contemporaneous record which supports the Claimant's evidence (p.66 of the electronic bundle).

28. Later on 5th September, Ms Bartin telephoned the Claimant for a second time. In this call, she told the Claimant that her employment was being terminated and that she did not need to work any notice. The Respondent has declined to pay any notice pay subsequent to dismissal.

29. The Respondent sent a letter confirming dismissal on the same date (p.125 of the electronic bundle). This says:

> I am writing to confirm that your employment with the company was terminated on 05 September 2019 due to your unwillingness to adhere to our working hours, sick leave/holiday request, having been late to work 4 days in the 2 weeks of employment, and not attending work two days this week without following our sick leave / holiday request policies, as well as other policies such as locking confidential documents away. In general, you are not performing your role as would be expected of a highly experienced office executive.

30. The Claimant had not received any informal or formal warnings about being late to work. The Respondent relied on a 'Sick and Late days' tracker which set out a number of incidents of late attendance. I find that it is more likely than not that this was created at or around the time of the Claimant's dismissal on 5th September and is not an accurate or contemporaneous log of the Claimant's attendance. This is because:
    - 30.1. I accept the Claimant's evidence, having regard to my findings about credibility, above, that it is not an accurate record of her attendances.
    - 30.2. The tone and narrative of the entries appears to be prepared from a point of mounting frustration, with hindsight of later events. For example, the first entry simply says: "*august – Late to work – train delays apparently*". It is unlikely that the Respondent would include the word 'apparently' if it was the Claimant's first day or two. Further, on 29th August: "*25 minutes late, does not seem to understand responsibility and accountability…does not get it*". Despite these entries, no action was taken against the Claimant.

31. The other reason given for dismissal, an allegation concerning the locking away of confidential documents, has not been evidenced before the tribunal.

32. The Respondent does not know whether the events on which it relied to dismiss the Claimant amounted to gross misconduct. Ms Bartin told the tribunal that she did not want to dismiss the Claimant for gross misconduct.

33. The Claimant was therefore dismissed on 5th September 2019 without notice. She had not attended the office during that week (Monday to Thursday).

Grievance

34. On the same day as dismissal, at 5.47pm, the Claimant sent Ms Bartin an email in response to the termination letter. The Claimant relies on this email as a grievance. It says, in outline:

34.1. The Claimant had been in contact with ACAS regarding her allegation of breach of contract;

34.2. She was willing and able to work out her notice period and expected to be paid the 4 weeks notice as per the offer letter;

34.3. She complained there was no disciplinary process in respect of her dismissal and no reason was given on the telephone (although reasons were set out in the letter);

34.4. The Claimant complained she had not been given a contract and referred to the offer letter as a statement of her terms of employment;

34.5. She complained that the absence policy was created during her employment and amended a number of times;

34.6. She complained she had not been paid and was not paid any travel monies as promised; and

34.7. She explained her lateness and clarified that she had made up her time and worked over her contractual hours on all but one day. She also claimed she was owed for the 3 hours handover on 19th August.

35. The Respondent did not consider that this was a grievance and did not respond to the email, save to say in an email at 5.57pm:

> A copy of your contact has been supplied by post, you will not be hearing from us further than this outside squaring up on any amounts due and sending your P45, to you through yesterday. Please return our keys immediately.

Wages

36. Following termination of employment, the Claimant was paid her August salary on 9th September 2019 in the amount of £2,076.93 gross. This was calculated on her base salary for the 8 working days of August and the summer bank holiday. She was not paid any salary for Monday 2nd – Thursday 5th September 2019.

37. A payment was later made on 13th November 2020 in the sum of £346.15 but this was a payment only in respect of holiday pay.

38. The parties agree that the gross daily rate for the Claimant's base salary was £230.77. Her gross monthly pay was £5,000.

Law

39. Section 13 of the Employment Rights Act 1996 ("ERA") provides for the right not to suffer unauthorised deductions from wages. So far as relevant to this case:

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> > *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

40. For the purposes of a claim of unauthorised deductions from wages, so far as relevant, 'wages' are defined in section 27(1)(a) of the ERA as:

> *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*

41. In New Century Cleaning Co Ltd v Church [2000] IRLR 27, the Court of Appeal held by a majority that a worker had to show that there was a legal entitlement to the payment in order for the sum to fall within the definition of wages.

42. Under section 86(1)(a) of the ERA, where an employee has been continuously employed for one month or more, the statutory notice entitlement is not less than one week's notice where continuous employment is less than two years.

43. The tribunal has jurisdiction to hear claims for breach of contract pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order"). This includes a claim for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries), which a court in England and Wales would, under the law for the time being in force, have jurisdiction to hear and determine; it is not excluded by Article 5 (which does not apply here) and is a claim which arises or is outstanding on the termination of the employee's employment.

44. Section 207A of TULRCA provides, as regards ACAS uplifts for failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures, as follows:

(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

45. Claims for unauthorised deductions from wages and breach of contract claims (under the 1994 Order) are both listed as applicable jurisdictions for the above discretionary power in Schedule A2.

Conclusions

Wrongful dismissal – notice pay

Did the parties contractually agree that there would be a period of one month's notice during the first three months of the employment contract?

46. I conclude that the contractual terms governing the Claimant's employment were those set out in the signed offer letter dated 17th August 2019. The Claimant was not given a copy of the later produced employment contract and was not aware of its proposed terms. She therefore had no opportunity to consent to them. She accepted the role on the terms in the offer letter. This provided for a one-month notice period during the probationary period, which was to last for three months.

Was there a subsequent variation prior to the termination of the Claimant's employment?

47. The Respondent's contention is that, after the commencement of employment, the written employment contract was provided to the Claimant and these terms superseded the offer letter. It that were correct, it would amount to a variation of the contract given the divergence in the terms set out therein, so long as the parties agreed to such a variation.

48. As above, I conclude that the Claimant was not given a copy of the contract relied upon by the Respondent and, in any event, clearly had not consented to any terms of employment which were to her disadvantage compared to the offer letter.

49. Accordingly, there was no variation. The Claimant was entitled to one month's notice upon termination in the absence of circumstances entitling the Respondent to terminate without notice (i.e. gross misconduct).

Was the Respondent entitled to terminate the contract without giving any agreed notice?

50. I do not find that the Claimant's conduct, at its highest on the evidence being late attendance and not attending work when the Respondent was in breach of contract for failing to pay the Claimant her owed wages, amounted to circumstances which would have entitled the Respondent to dismiss without notice. Neither party considered that the Claimant was guilty of gross misconduct and, on the evidence, such circumstances for summary dismissal had not, in my judgment, arisen.

51. The Claimant was therefore entitled to be paid her full one month's notice. As confirmed in her email of 5th September 2019, she was ready and willing to work her notice.

How much notice pay is owing?

52. The Claimant is therefore owed one month of her base salary as notice pay which is £5,000 gross. The Respondent must pay the net amount of this sum to the Claimant, after tax and any National Insurance ("NI") has been deducted. This is because the award of notice pay is subject to deductions for tax and NI.

Wages

What sum(s) is/are properly payable for the Claimant's wages in September 2019?

53. The Claimant is owed 4 working days pay up to her date of dismissal. This amounts to £923.08 gross (£230.77 daily rate x 4). This sum was properly payable under the Claimant's contractual terms because, notwithstanding any dispute about her non-attendance in circumstances where she had not been paid her August salary, the Claimant was ready and willing to work and the Respondent was contractually bound to pay her salary. The Respondent was not entitled to unilaterally withhold the Claimant's pay on the basis that she had not attended work in these circumstances.

54. As regards the half day claimed in lieu of the Claimant's attendance at the Respondent's office on 19th August 2019, I conclude that the Claimant was contractually entitled to be paid for half a day because the parties had clearly agreed as such in the offer letter. At the termination of the Claimant's employment on 5th September 2019 (the half day having not been taken in lieu by agreement or paid prior to that date) the Claimant was entitled to be paid the half day worked as part of her final salary.

55. Such a sum, in my judgment, falls within the definition of wages in section 27 of the ERA. It was a sum that was referable to the Claimant's employment with the Respondent: a handover in preparation for starting the role. The contractual terms in the offer letter included the Respondent's commitment to account for this additional time worked and, accordingly, I conclude that the sum was payable under the Claimant's contract of employment and remained due and owing upon termination.

56. Even if the sum did not amount to wages under section 27 of the ERA, failure to pay the amount, in light of my findings and conclusions above, amounts to a breach of contract and the Respondent would be accordingly liable to pay the Claimant for the half day on that alternative basis.

Did the parties contractually agree that the Claimant would be paid a guaranteed 25% bonus referable to the entire period of her employment?

57. As I have found the offer letter to represent the contractual terms agreed between the parties, it follows that the 25% bonus set out in the offer letter was a sum to which the Claimant is contractually entitled.

58. The 25% was payable on base salary and, unlike the further discretionary bonus (which is not claimed), the amount was not conditional on completion of the probationary period nor reliant on any exercise of discretion on the part of the Respondent. I therefore conclude that the wording of the offer letter provides, in clear terms, that the 25% bonus was properly payable on base salary for any period worked by the Claimant during her employment.

59. It is plain from the wording of section 27 of the ERA that wages can include the payment of a bonus. In the circumstances of this case, the bonus to which the Claimant is entitled formed part of her wages. The use of the term 'base salary' for the first £60,000 makes the point for itself that there was a greater salary entitlement above this sum.

Has there been a deduction in respect of these sums in September 2019 and, if so, was the deduction authorised and therefore lawful?

60. There is no dispute in this case that the above sums have not been paid to the Claimant. The sums are therefore deductions to the Claimant's wages.

61. Applying section 13 of the ERA, there is no authorised basis upon which the Respondent could lawfully withhold payment. The terms of the offer letter do not authorise such deductions and, similarly, at no time has the Claimant signified her agreement or consent in writing to the making of any of these deductions. On the balance of probabilities, the sums were withheld because the Claimant did not attend work whilst she remained unpaid. Such a reason does not authorise the deductions and, accordingly, the deductions are unlawful.

How much is owing to the Claimant?

62. The Respondent must therefore pay the Claimant for the four working days in September 2019 up to termination (£923.08, as above) and for half a day in respect of the handover attendance on 19th August. The half day is calculated as £230.77 / 2 = £115.39 gross.

63. The total amount of wages owing on base salary is therefore: £923.08 + £115.39 = **£1,038.47 gross**. The Respondent must pay the net amount of this sum to the Claimant, after tax and any NI has been deducted.

64. The amount owing in respect of the bonus is calculated as follows:

Gross wages already paid for August 2019:	£2,076.93
Wages owing as above:	£1,038.47
x 25% on £3,115.40:	**£778.85**

65. I reject the Claimant's submission that the bonus calculation should include the one-month notice pay. This was not a period worked by the Claimant where she was earning her 'base salary'. She has been awarded the notice pay due under the contractual terms as an award for her wrongful dismissal. In my judgment, the words "*You will be granted 25% bonus on base salary*" does not mean that the parties intended that a bonus would be payable in respect of a sum of notice pay where the Claimant was not required to work out her notice. It would be stretching the contractual words too far to construe them in such a manner.

66. For the above reasons, the Respondent shall pay a further £778.85 in wages in respect of the 25% bonus for the period of her employment. This sum is awarded gross and the Respondent must pay the net amount of this sum to the Claimant, after tax and any NI has been deducted.

67. The total gross amount of wages is therefore **£1,817.32** (£1,038.47 + £778.85).

Alternatively, was there a breach of contract in failing to pay any sums due?

68. Had I not found that section 13 of the ERA was engaged, I would have found that the sums calculated above were due and owing and the Respondent was in breach of contract for failing to pay the sums, which were outstanding upon termination of the Claimant's employment. This is because the sums have not been paid and the Claimant is entitled to payment under the contractual terms which operated during her employment.

ACAS Uplift

69. In my judgment, the email dated 5th September 2019 did amount to a written grievance, raising a number of concerns and complaints the Claimant had about the termination of her employment; the requirement for her to be paid notice and the fact she had not been paid. These complaints (and in particular the complaint about notice pay) are the substance of her claims to the tribunal. The Respondent has denied it is liable for further amounts of wages or notice pay.

70. The ACAS Code of Practice on disciplinary and grievance procedures provides for a number of steps to assist parties to resolve a grievance. These include inviting the employee to a meeting (with a statutory right to be accompanied), investigation and an appeal process.

71. The Claimant did not identify her email as a grievance and Ms Bartin did not consider it to be a grievance. However, the response saying 'you will not be hearing from us further' save for 'squaring up' on any amounts due (which clearly did not include pay for September 2019 or any notice pay) was wholly inadequate. Had the Respondent engaged with the grievance, there may have been scope to resolve some of the disputes.

72. The tribunal has jurisdiction to make an uplift to an award in a claim for wages and/or breach of contract where:

    72.1. *The claim to which the proceedings relate concerns a matter to which the Code of Practice applies.* Here the Code applies to the Claimant's grievance which was raised to try and resolve the disputes as to pay and notice.

    72.2. *The Respondent has failed to comply with the Code.* In my judgment, there was no compliance with the steps identified for the resolution of grievances whatsoever. The Respondent made the decision to dismiss and then made payment on 9th September for August pay only.

    72.3. *The failure to comply was unreasonable.* I conclude that it was unreasonable to ignore that Claimant's email and the complaints it raised. The response was sent 10 minutes later and made clear that the Respondent was not interested in considering what the Claimant had to say about the contract and payments due. I have had regard to the fact that Ms Bartin did not think that the email was a formal grievance and did not realise she should address the concerns upon termination. However, it was unreasonable to ignore the complaints altogether, especially when the Code of Practice provides guidance as to how the Respondent could reasonably have addressed the concerns.

72.4. *It is just and equitable in all the circumstances to increase the award*. In my judgment, it is just and equitable to increase the award for notice pay and the wages awarded in respect of the handover on 19th August only. Whilst the grievance raised a complaint about not being paid, this concerned the failure to pay August salary at the end of August. This was paid on 9th September 2019. The grievance itself, being sent as it was on the day of dismissal, did not raise the particular points about pay and the Claimant's bonus which have been the subject of the claim heard by the tribunal. The claims dealt with by the tribunal which were properly raised in the grievance were the one month's notice pay and the half day handover. It is just and equitable that those awards are increased, having regard to all of the circumstances, because the Respondent's unreasonable failure to comply with the Code of Practice left the Claimant with no redress without instituting these proceedings.

73. As to the amount of the increase, I consider it is just and equitable to increase those awards by 15%. Whilst the Respondent did not comply with the Code of Practice, I conclude that it is not just and equitable to award the full uplift having regard to the fact that this email came shortly after dismissal and it did not identify itself as a grievance despite the Claimant having made contact with ACAS before writing it. Ms Bartin did not think it was a formal grievance at the time and was unaware of her obligations. Plainly, the grievance should not have been ignored and the Respondent should have considered it and taken advice if necessary. However, in my judgment, this is a factor which is relevant to the just and equitable test. I therefore consider that an uplift of 15% is just an equitable in the circumstances.

74. As the award of notice pay in the sum of £5,000 and the £115.39 for the half day handover are both awarded gross but subject to deductions for tax and NI, the Respondent must pay the 15% uplift to the Claimant on the net amount of these sums, once calculated.

Outcome

75. For the above reasons, save for the holiday pay claim which has been withdrawn, the Claimant's claims succeed in the amounts set out in the tribunal's judgment, above.

Employment Judge Nicklin

Date 8th June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.10/06/2021.

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FOR EMPLOYMENT TRIBUNALS