EMPLOYMENT TRIBUNALS

Claimant: Ms E Andreeva

Respondent: VIP Tour London Limited

Heard at: London Central (via CVP) **On:** 26th May 2021

Before: Employment Judge Nicklin

Representation

Claimant: Ms Y Volfovskaya (Lay representative)

Respondent: Mr Y Pestov (Director of 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 Respondent's application to extend time to present its ET3 Response (a copy of which was sent to the tribunal on 23rd July 2020) is granted.

2. The Respondent made an unlawful deduction to the Claimant's wages in respect of her accrued holiday entitlement upon termination of her employment. The Respondent shall pay the Claimant the gross sum of **£245.92**, subject to any necessary deductions from that sum for tax and/or National Insurance.

3. The Respondent did not make any unlawful deductions to the Claimant's wages in respect of any bonus. The Claimant's claim for a payment in respect of any bonus during her employment with the Respondent is therefore dismissed.

REASONS

Introduction

1. By a claim form presented on 17th March 2020, the Claimant brought a claim of unlawful deductions from her wages in respect of two matters:

   1.1. **Holiday pay:** the Claimant says she should have been paid for accrued but unused holiday entitlement arising upon termination of her employment with the Respondent, in the sum of £614.18; and
   1.2. **Bonus payment:** the Claimant says that, in accordance with clause 14 of her employment contract, she should have been paid a bonus payment upon termination of her employment in the sum of £1,282.

2. This claim was listed for a 3-hour full merits hearing. A Russian translator, Mrs I Lawrie, joined the CVP hearing and provided full translation of the hearing for the Claimant.

3. At the start of the hearing, it was established that the Respondent's application for an extension of time to present its ET3 Response needed to be determined. I heard this application first, before proceeding to determine the rest of the claim. After I had given oral reasons for my decision on the Respondent's application, all parties and Mrs Lawrie confirmed they were available to remain in the hearing for the afternoon in order to complete the evidence and submissions in the case. It was in accordance with the overriding objective to extend the length of the hearing on 26th May, rather than cause any further delay to the determination of the case. As a result, I confirmed that my decision on the claim would be reserved as there was insufficient time to deliberate and give judgment in the afternoon.

Extension of time for the Respondent to present its ET3 Response

4. The Respondent's ET3 Response was due by 8th July 2020. It was presented on 23rd July 2020. On 14th April 2021, in response to an order sent out to the parties by Employment Judge Adkin, the Respondent filed its evidence. In the Respondent's bundle a new ET3 form was included, which differed from the original copy sent on 23rd July 2020. The Respondent confirmed that the application was to proceed on the basis of the originally filed ET3.

5. I decided to grant the Respondent's application meaning that it has permission to rely on its ET3 Response presented to the tribunal on 23rd July 2020.

6. I gave oral reasons for this decision during the hearing. Written reasons for that decision are not included here. If either party wishes to request written reasons for the decision on the Respondent's application to extend time for presenting its ET3 Response, they must request these in writing within 14 days of the date this judgment is sent to the parties.

7. Having determined the application, I then proceeded to hear sworn evidence from the Claimant and Mr Pestov, the director of the Respondent. Both parties had filed a small bundle of documents on which they relied and these were considered along with their oral evidence and the submissions made by both parties.

Issues

8. The issues I needed to determine were: -

   8.1. What, if any, holiday entitlement was outstanding upon the Claimant's termination of employment? The Claimant relies on her entitlement set out in clause 9 of her employment contract.
   8.2. If any holiday pay was outstanding, was any deduction authorised and therefore lawful?
   8.3. If not, how much is owing?
   8.4. What contractual entitlement does the Claimant have to a bonus payment upon termination of employment?
   8.5. Had the Claimant met the terms of the contractual scheme to be paid a bonus payment?
   8.6. If so, was a bonus declared by the Respondent and, in either case, was the Respondent's exercise of its discretion rational in the circumstances?
   8.7. Is any bonus payment owing to the Claimant?

Findings of fact

9. I make the following findings of fact relevant to the issues identified above.

10. The Respondent is a UK based tour operator. The Claimant was employed as a Travel Manager from 15th June 2019 until 22nd January 2020.

11. The employment contract signed by both parties provides as follows:

    11.1. The Claimant was entitled to a one-month notice period (clause 2.1) with a right to terminate immediately and pay in lieu of notice (clause 14);

    11.2. The role was full time, Monday to Friday (clause 6.1);

    11.3. The Claimant's salary was an 'initial salary' of £24,000 net per annum;

    11.4. Clause 7.4 and Schedule 2 provide as follows as regards a bonus:

> 7.4 In addition to your basic salary, you may be entitled to discretionary bonus payments, as set out in Schedule 2 of this Agreement. Such entitlement may be terminate at the sole discretion of the Company and does not apply to Garden Leave, nor to any notice period relating to Termination.

SCHEDULE 2

BONUS SCHEME

1. Definitions

1.1 The definitions in this paragraph apply in this Schedule.

- **Payment Date**: the next salary payment date after the notification of bonus payment for the relevant Quarter is received from the Company.
- **Personal Performance Targets**: £2,000 net received by the Company to their bank account per calendar month from their client for the services rendered by the employee, not including any outgoing payments or purchases made for the same client or in relation to the same bookings. This does not include any payments which have not been cleared or do not appear on the account.
- **Quarter:** three consecutive months of the year, first Quarter of the year beginning on 01 January and ending 31 March, second Quarter beginning on 01 April and ending on 31 June, and so forth.
- **Scheme**: the bonus scheme as detailed in this Schedule, as amended from time to time.

2. Entitlement

2.2 You shall be entitled to be paid a bonus in relation to each month of the Appointment on the terms of the Scheme.

2.3 The amount of your bonus in any particular Quarter (if any payable) is subject to your achievement of the Personal Performance Targets for each month. You shall not be entitled to any bonus payments for any particular month where you do not achieve your Personal Performance Target. For any period where you achieve your Personal Performance Target, your bonus entitlement shall be calculated in accordance with the following formula:

Any cleared funds debited to the account minus expenses (for example, holiday bookings, taxi or travel expenses), minus Personal Performance Target; the bonus payable shall be 30% of the remaining amount.

For example, if a client paid £10000 for the services, and the Company had to pay for the hotel booking £5,000. From the remaining £5,000 we deduct the Personal Performance Target of £2,000, and the remainder is multiplied by 30%. The bonus payable in this instance shall be £900 minus PAYE taxes and NI contribution where applicable.

2.4 If you:

(a) commence employment part way through the year; or

(b) work on a part-time basis,

the sum calculated in accordance with paragraph 2.3 shall be pro-rated, as appropriate.

2.5 No later than 30 days after the end of each Quarter, the Company shall notify you in writing of the extent to which the Personal Performance Targets for that Quarter have been achieved and the amount of your bonus (if any payable). The decision of the Board shall be final and binding.

2.6 The bonus (if any payable) shall be paid to you on the Payment Date.

11.5 As regards termination, paragraph 4 of Schedule 2 provides:

4. Termination of employment

4.9 If, as at the Payment Date, you are no longer employed by us or either you or we have given notice to terminate the Appointment, there shall be no right to a bonus or a pro-rated bonus, except where such termination of employment:

(a) is by reason of death;

(b) is by reason of redundancy (as defined in section 139(1) of the Employment Rights Act 1996);

(c) is by reason of injury, ill-health or disability.

In such circumstances or otherwise at the sole discretion of the Company, you shall be entitled to a pro-rated bonus in respect of the period of service in the Quarter in which the Appointment terminates, calculated at the end of that year and payable on the Payment Date.

11.6 As to holidays, the contract provides:

9. Holidays

9.1 Our holiday year runs between 01 January and 31 December. If the Appointment commences or terminates part way through a holiday year, your entitlement during that holiday year shall be calculated on a pro-rata basis rounded up to the nearest half day.

9.2 You shall be entitled to 28 days' paid holiday in each holiday year which shall include the usual public holidays in England and Wales or days in lieu where we require you to work on a public holiday.

9.3 All holiday requests must be approved in writing in advance by your line manager. You must give at least 4 weeks' notice of proposed holiday. No more than 14 days' holiday may be taken at any one time unless prior consent is obtained from the Director. Unless authorised by the Director, half of your annual leave entitlement must be taken during the first six months of the year and the other half during the second six months of the year, to ensure that holiday leave is spread evenly throughout the year. We may require you to take (or not to take) holiday on particular dates, including during your notice period.

9.4 You shall not carry forward any accrued but untaken holiday entitlement to a subsequent holiday year.

9.5 You shall have no entitlement to any payment in lieu of accrued but untaken holiday except on termination of the Appointment. The amount of such payment in lieu shall subject to clause 9.6 be 1/260th of your full-time equivalent salary for each untaken day of the entitlement.

9.6 If we have terminated or would be entitled to terminate the Appointment under clause 15 or if you have terminated the Appointment in breach of this agreement any payment due under clause 9.5 shall be limited to your statutory entitlement under the Working Time Regulations 1998 (*SI 1998/1833*) and any paid holidays (including paid public holidays) taken shall be deemed first to have been taken in satisfaction of that statutory entitlement.

9.7 If on termination of the Appointment you have taken more holiday than your accrued holiday entitlement, we shall be entitled to deduct the excess holiday pay from any payments due to you calculated at 1/260th of your salary for each excess day.

Holiday pay

12. The Claimant was entitled to 28 days paid holiday per leave year. As she began working for the Respondent on 15th June 2019, her 2019 entitlement

was 15 days leave. The Claimant claims her entitlement, in her schedule of loss, as 14.95 days for the 6.5 month period in which she was employed in 2019. This figure is not challenged by the Respondent.

13. Clause 9.1 of the contract provides that the pro-rata calculation is rounded up to the nearest half day. Accordingly, the Claimant was therefore entitled to 15 days, rounding from 14.95.

14. The Claimant says she took 12 of these 15 days as leave in 2019 meaning there are 3 left over. The Respondent says all of her entitlement was used. There are two holiday periods in 2019 which concern how much leave entitlement was used.

15. The first period concerns a holiday in August 2019. The Claimant took leave from 5th August 2019 to 9th August 2019 (5 days). The Respondent did not provide contrary evidence to show that a different amount of leave was taken during this period.

16. The second period of leave was said to be from Thursday 3rd October 2019 to Friday 11th October 2019 (7 days). The Respondent contended that the leave ran from Monday 30th September 2019 (10 days).

17. I find that the Claimant's holiday for this period commenced on Monday 30th September 2019 and ran for 9 working days to Friday 11th October 2019 (excluding Tuesday 1st October, which was not holiday). This is because:

    17.1. It was not disputed that the Claimant flew out to Moscow on Sunday 29th September 2019.

    17.2. Whilst the Claimant was going to be in Moscow for a holiday, there was an important tour operator exhibition taking place at the Ritz Hotel, in Moscow, which Mr Pestov was planning to attend with another colleague. The exhibition took place on or around Tuesday 1st October.

    17.3. I accept Mr Pestov's evidence that the Claimant discussed with him the possibility of her attending with him, as she would be travelling to Moscow for a holiday. It is clear that she did attend the event and also took holiday over the following two weeks (which is not disputed).

    17.4. Mr Pestov alleged that the Claimant had sought to book off two weeks for her holiday to Moscow and then offered to attend the exhibition with the Respondent as part of the beginning of her holiday. I find that the agreement the parties reached about the exhibition was:

        17.4.1. That the Claimant would attend in the place of the other colleague for whom Mr Pestov had previously booked a place. Mr Pestov told me that he was able to change the name of the person attending the exhibition with him;

        17.4.2. There was no suggestion that attending the exhibition on behalf of the Respondent would not ordinarily be work performed under the contract of employment. Mr Pestov simply relied on the Claimant offering to attend as she was going to Moscow on holiday. Mr

Pestov was not on holiday and it was not alleged that the other colleague would have been on holiday by attending with him.

17.4.3. On the balance of probabilities, I find it more likely than not that, because of the Claimant's travel plans, it was agreed she would attend the exhibition in place of the other colleague and was working whilst she was in attendance. She was plainly not on holiday when she was preparing for or attending the exhibition for the Respondent.

17.4.4. I find that the Claimant was not working on Monday 30th September 2019 when she arrived. I accept Mr Pestov's evidence that they both met for a friendly lunch, given they were both in Moscow at the time. However, there is no other evidence of the Claimant having any contact with her employer or performing any work on this day. Given the Claimant had gone to Moscow for a holiday, I find it more likely than not that she was on holiday on this day but chose to meet Mr Pestov for lunch.

18. Accordingly, the Claimant took a total of 14 days holiday in 2019 (5 days in August and 9 days as set out above).

19. The Claimant therefore had 1 day of accrued leave which she did not take in 2019.

20. This day's leave was not taken in 2019 and clause 9.4 provides that the employee shall not carry forward any accrued but unused holiday entitlement into a subsequent leave year (i.e. after 31st December 2019).

21. In 2020, the Claimant's employment terminated on 22nd January. She calculates her accrued entitlement for the part month of January as 1.66 days (as per her schedule of loss). This figure was not challenged by the Respondent. In accordance with clause 9.1 of the contract, this is rounded *up* to 2 days (as the nearest upwards half day).

22. The Claimant did not take either of these 2 days during January 2020 (before her employment was terminated) and she was not paid for this leave in her final pay. The Respondent paid the Claimant her one-month notice (in lieu), but this did not include any payment for accrued but unused holiday entitlement.

23. The Claimant's gross daily rate of pay was £122.96. This has been calculated for the Claimant by her accountant and is set out in her holiday pay calculation document. Whilst the contract provides for an annual salary net of tax, I accept the Claimant's evidence that £122.96 is the gross daily rate (calculated at a rate of 1/260th of her gross annual salary). The calculation was not challenged by the Respondent.

Termination

24. The Claimant's employment was terminated by a letter dated 21st January 2020, with effect from 22nd January 2020. She did not remain employed after this date and was paid in lieu of notice.

Bonus

25. The bonus operated on the basis that the Claimant was entitled to a payment for any month where she exceeded her personal performance target ("PPT"), which was £2,000. This meant that where the profit from her clients in one month exceeded the PPT, she was entitled to 30% of the profit, after the PPT and any expenses had been deducted.

26. As is set out at clause 2.3 of Schedule 2 of the employment contract, the Claimant was not entitled to any bonus payments for any particular month where she did not achieve her PPT. Clearly, she would need to exceed £2,000 profit in order to have any bonus entitlement at all.

27. Clause 7.4 of the employment contract also attaches a general discretion in respect of the bonus scheme. The Claimant's entitlement to such a bonus (calculated in accordance with Schedule 2, as explained above) may be terminated in the sole discretion of the company and does not apply to garden leave or any notice period.

28. The Claimant's claim is based on a sum she says she saw on the Respondent's CRM computer software (which is the software which calculates a bonus payment using the employee's profit figures) on 22nd January 2020, the day her employment terminated. However, on balance of probabilities, the information she saw on the computer about her assumed bonus must have been incorrect or did not properly apply to her employment. I find that she did not meet the terms of the Respondent's bonus scheme during her period of employment because:

    28.1. Neither party has produced any evidence to show that the sum of £1,282 was calculated by the Respondent's CRM computer software or how that sum could be calculated using the Claimant's profit figures from her employment.

    28.2. I accept Mr Pestov's evidence that the Claimant did not generate a sufficient level of profit to be entitled to a bonus payment under Schedule 2 of the employment contract. This is because:

        28.2.1. His evidence was clear and straightforward. I found him to be a reliable witness who, unsurprisingly, had more knowledge and understanding than the Claimant about how the CRM system worked and the policy concerning bonus payments. That is not a criticism of the Claimant, but both parties were reliant on information provided by the CRM software in advancing their case on the question of whether any bonus was payable. I preferred Mr Pestov's evidence about the CRM software and the information it generated.

        28.2.2. His evidence was that the Claimant's total profit for her employment was £5,758.96 and there was no month in which the Claimant generated profit exceeding £2,000, which was her PPT.

        28.2.3. This is supported by a screenshot of the Respondent's CRM software, which records this profit figure in the Claimant's employee account. That screenshot appears to be from April 2021, but I

accept Mr Pestov's evidence that the screenshot represents all of the Claimant's profit generated during her employment.

28.2.4. The Claimant also confirmed in her evidence that when the Respondent began using the CRM software to calculate bonuses from around December 2019, she uploaded all of her previous projects onto the system. This supports the Respondent's contention that the total profit figure recorded is accurate.

Law

29. Where the employer operates a discretionary bonus scheme, Burton J set out the test to be applied when analysing the exercise of the employer's discretion in Clark v Nomura International Plc [2000] IRLR 766 at paragraph 40:

> *"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."*

30. Further, the Court of Appeal confirmed in IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212; [2018] IRLR 4 that where an employer exercises a discretionary power, the test to be applied is a rationality test equivalent to the *Wednesbury* test, namely: a.) whether relevant matters and no irrelevant matters had been taken into account, and b.) whether the decision was such that no reasonable decision maker could have made it.

31. 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.*

32. 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.

33. In the context of discretionary bonuses, the EAT held in Farrell Matthews & Weir v Hansen [2005] IRLR 160 at paragraph 40:

> *In the case of a discretionary bonus, whether contractual or by custom, or ad hoc, the discretion as to whether to award a bonus must not be exercised capriciously (see United Bank Ltd v Akhtar [1989] IRLR 507 and Clark v Nomura International plc [2000] IRLR 766). But until the discretion is exercised in favour of granting a bonus, provided the discretion is exercised properly, no bonus is payable. Once, however, an employer tells an employee that he is going to receive bonus payments on certain terms, he is, or ought to be obliged to pay that bonus in accordance with those terms until the terms are altered and notice of the alteration is given (Chequepoint (UK) Ltd v Radwan CA 15 September 2000). This situation applies equally where a discretion to award a bonus is granted under contract, as in Chequepoint, or by custom or by ad hoc decision.*

34. Section 13 of the ERA provides as follows (in respect of an unauthorised deduction from wages claim):

> *(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.

Conclusions

What, if any, holiday entitlement was outstanding upon termination of the Claimant's employment?

35. I conclude that the Claimant had accrued 1 day of untaken holiday entitlement in 2019. However, the parties expressly agreed in the contract of employment (at clause 9.4) that accrued leave would not be carried over into a subsequent holiday year. The holiday year was 1 January to 31 December. As such, there was no entitlement to this leave from 1 January 2020, when the Claimant entered a new holiday year. This 1 day of leave was therefore not outstanding upon termination of employment on 22nd January 2020.

36. However, I have found, above, that the Claimant was entitled to 2 days holiday (rounded up in accordance with clause 9.1 of the employment contract) which had accrued in January 2020. She did not take those days in 2020 and was not paid for them upon termination of her employment. Accordingly, the Claimant is entitled to be paid for the 2 days holiday accrued in January 2020.

If any holiday pay was outstanding, was any deduction authorised and therefore lawful?

37. The 2 days holiday entitlement is provided for under the Claimant's contract of employment. The employment contract does not authorise the Respondent to make deductions to the Claimant's final pay in respect of these amounts. There is no evidence that the Claimant ever consented in writing to her final pay being deducted in respect of holiday entitlement.

38. Accordingly, the failure to pay the Claimant her accrued but untaken holiday entitlement was an unauthorised deduction from her wages.

If not, how much is owing?

39. The Respondent must therefore pay the Claimant for her 2 days accrued holiday entitlement in 2020. Clause 9.5 of the employment contract provides that this shall be calculated as 1/260th of the Claimant's full time equivalent salary for each untaken day of the entitlement.

40. As I have accepted the Claimant's calculation of her gross daily pay as £122.96, it follows that the Respondent must pay the Claimant £245.92, subject to deductions for any tax and National Insurance which may be applicable to that

sum.

What contractual entitlement does the Claimant have to a bonus payment upon termination of employment?

41. There is a bonus scheme set out within Schedule 2 of the employment contract. The scheme is discretionary, but the Respondent operated it using its CRM software to generate a bonus for a particular employee where profit was generated by that employee in accordance with Schedule 2. This means that the Claimant would need to have exceeded £2,000 profit in one particular month to have become entitled to a discretionary bonus payment for that month. As such, I conclude that the Respondent would only exercise its discretion to pay a bonus where the contractual terms of the scheme were met.

Had the Claimant met the terms of the contractual scheme to be paid a bonus payment?

42. As set out in my findings, the Claimant did not meet the terms of the bonus scheme in any of the months when she was employed by the Respondent. For this reason, the CRM software would not generate a bonus entitlement and no discretionary payment was therefore payable.

Was a bonus declared by the Respondent and, in either case, was the Respondent's exercise of its discretion rational in the circumstances?

43. Whilst the Claimant believed she had seen a bonus payment due to her on the CRM software, I conclude, based on my findings in respect of the scheme, her profit level and Mr Pestov's evidence, that no bonus was payable and the Respondent had not declared that any such bonus had become payable.

44. I have had regard to the authorities requiring me to consider whether the exercise of the Respondent's discretion was rational (i.e. not capricious). I conclude that the scheme, set up as it is through the Respondent's CRM software, is operated on fair and clear contractual terms. Those terms are applied to the software and, so long as an employee inputs all of their projects (which will provide the software with the necessary profit information), CRM will calculate any bonus payment. The Respondent therefore operated a scheme using clear and transparent rules, to which the Claimant had agreed in her employment contract.

45. The Respondent's exercise of its discretion in respect of the bonus scheme was therefore rational.

Is any bonus payment owing to the Claimant?

46. For the above reasons, no bonus payment is owing to the Claimant.

Outcome

47. The Respondent must therefore pay the Claimant £245.92 in respect of unpaid holiday pay, subject to any deductions for tax and National Insurance. The bonus payment claim fails and is dismissed.

Employment Judge Nicklin

Date: 17th June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 18/06/2021..

FOR THE TRIBUNAL OFFICE