



EMPLOYMENT TRIBUNALS

Claimant: Mr D Sarson

Respondent: (1) Osborne Developments Holdings Limited
(2) Geoffrey Osborne Limited

Heard at: London South Employment Tribunal (By CVP)
On: 20 August 2021

Before: Employment Judge Keogh

Representation

Claimant: In person
Respondent: Mr I McGlashan (Consultant)

JUDGMENT

Having been sent to the parties on 23 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim in this matter is for unlawful deduction from wages. The claimant contends that he is owed the sum of £62,010 in respect of bonus payable for the financial year 2019/2020. I heard evidence from the claimant and from Mr Stuart Hammond (Group Financial Director) and Mr Andrew Steele (Group CEO).
2. The issues are as follows:
 - (i) Who is the claimant's correct employer?
 - (ii) What wages were properly payable to the claimant in relation to bonus for the financial year 2019/2020?
 - (iii) Did the respondent make a deduction from such wages which was not required or permitted by a statutory or contractual provision and/or where the claimant had not given his prior written consent to the deduction?

3. The claimant was employed by the second respondent from 6 May 1998. On 29 January 2018 he received a letter stating that his employment was going to transfer to the first respondent. The respondents contend that such a transfer did not in fact take place. The claimant's wage slips refer to the second respondent as the claimant's employer. The claimant's redundancy process was handled by the second respondent. The claimant refers to an internal auditing form which deals with his remuneration as a director of the first respondent. This refers to him receiving remuneration in the region of £292,000 for the financial year ended 2019, referable to 'fees and salary'.
4. Correspondence confirms that the claimant received bonus year on year, in varying amounts. In September 2009 a letter was sent setting out the formula for the bonus scheme for the financial year 2009/2010. A similar letter was sent in June 2010 for the financial year 2010/2011, in May 2011 for the financial year 2011/2012 and in May 2012 for the financial year 2012/2013. A letter was sent to the claimant in December 2012 setting out a personal bonus scheme.
5. By letter dated 28 April 2015 the second respondent invited the claimant to participate in a structured bonus scheme for 2015/2016, based on the performance of all development and property investment activity that the claimant and his team undertook. The formula provided was based on the Development Profit Before Tax ("*PBT*") such that no bonus was earned for PBT up to £2.549m, 2.5% bonus was awarded for PBT of £2.550m to £4.999m and 3.5% was payable on PBT of £5.000m and above. The following year another letter was sent, referring to the 'structured bonus scheme for 2016/17'. This had different levels of PBT triggering payment of bonus. The claimant contends that the percentages remained the same, the trigger levels were to do with the annual budget which had been set. A similar letter was then produced in June 2017, referring to the year 2017/18.
6. In the week commencing 14 May 2018 Mr Hammond spoke to the claimant about the annual bonus scheme for the following year 2018/2019. A feature of the scheme was that it would be based on the group PBT rather than the developments PBT. Mr Hammond followed this up with an email attaching guidance on the scheme. The claimant raised a dispute about some elements of the scheme. These were responded to by Mr Hammond and by Mr Steele, who had a number of discussions with the claimant. I find that this included a discussion that the group couldn't pay out money if it didn't make sufficient profit. In the context, this can only have referred to payment of bonuses.
7. The claimant was in due course paid a substantial bonus under the 2018/19 scheme.
8. No letter was sent out in 2019 relating to the annual bonus scheme. However, the Remuneration Committee approved a bonus scheme for the financial year 2019/2020 on 28 March 2019. This included a threshold of £3.4m group PBT before any bonuses were paid.

9. On 20 May 2020 the claimant was sent a letter in relation to his redundancy. This confirmed in relation to annual bonus that as the group had not achieved the minimum level of profit for the 2019/2020 financial year no bonus payments were proposed.

Correct employer

10. The claimant contends that his employer is the first respondent, following a TUPE transfer in around February 2018. The respondent contends that the transfer did not take place and the second respondent remained the claimant's employer throughout. Having considered the available evidence I consider it is more likely than not that the transfer did not take place. The claimant did not challenge Mr Hammond's evidence on this point. He relies only on an internal form which does not expressly refer to him being an employee of the first respondent. As the claimant's wage slips and all relevant correspondence refers to the employer being the second respondent I find that it more likely than not the claimant's employment remained with the second respondent. In the circumstances the claim against the first respondent is dismissed.

Unlawful deduction from wages

11. The first step in determining whether there has been an unlawful deduction from wages is to construe the contract between the claimant and the second respondent to determine what bonus, if any, was due to the claimant in relation to the financial year 2019/2020.
12. It is clear from the numerous letters sent to the claimant that the bonus schemes applying to him changed regularly. From 2015 there was a change in pattern in that performance was measured by reference to the development area's PBT rather than the group PBT. However, each letter sent was explicit that it referred to a particular bonus scheme for a particular financial year.
13. I find that the claimant was informed about a change in bonus scheme for the financial year 2018/2019 in around May 2018. He was provided guidance as to how the scheme would operate. He was paid a substantial bonus the following year.
14. I find that a different scheme was then put in place for the financial year 2019/2020. Although the claimant was not informed of that scheme, I accept what the respondent states in its response to the claim, that he would have been contractually entitled to join that scheme. I do not consider that he would be excluded from the scheme because a letter was not sent to him.
15. However, I do not accept the claimant's submission that because no letter was sent the earlier 2015 scheme must still apply. Each year had a separate and distinct annual bonus scheme which applied to the financial year in question. The claimant did not have any entitlement within his contract of employment to any particular bonus scheme year on year, such that this was at the discretion of the company. The claimant only had a contractual

entitlement to any bonus once the scheme for each year had been announced (or at the very least approved). There is nothing in any of the letters provided which suggests that any particular annual bonus scheme would roll over to the following year should a further scheme not be announced.

16. In the circumstances I find that the claimant was contractually entitled to have the 2019/2020 approved annual bonus scheme applied to him. This required a group profit of £3.4m to be met before any bonus payments were made. As the group profit fell below this figure, the claimant was not contractually entitled to any bonus. Nor was any discretionary bonus declared which might otherwise entitle him to wages in respect of bonus.
17. In the circumstances there cannot have been any unlawful deduction from wages and the claim against the second respondent must also fail.

Employment Judge Keogh
Date: 9 September 2021

Sent to the parties on
Date 14 September 2021