5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4110155/2021

Hearing held by Cloud Video Platform (CVP) on 2 September 2021

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Employment Judge Ronald Mackay

Mr C Marshall	**Claimant** **In Person**
Peter Vardy Ltd	**Respondent** **Represented by** **Charles Oliver** **Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Respondent having made unlawful deductions from the Claimant's wages in contravention of Section 13 of the Employment Rights Act 1996 ("ERA") the Respondent shall pay to the Claimant the sum of TWO THOUSAND FIVE HUNDRED AND SIXTY THREE POUNDS AND EIGHT SIX PENCE (£2,563.86).
30 The Respondent shall be responsible for accounting to HMRC for income tax and national insurance payments due in respect of the payment.

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REASONS

Introduction

1. This claim is brought under Section 23 ERA. The Claimant contends that the Respondent made unlawful deductions from his wages. The Respondent has defended the claim.

2. An agreed bundle was lodged in advance of the Hearing. A number of additional documents were added shortly before the commencement of the Hearing and at the outset.

3. The Claimant gave evidence on his own behalf. Given that he was unrepresented, it was agreed that there would be introductory questions from the Employment Judge before cross-examination.

4. For the Respondent, evidence was led from Mr Huw Roberts, Group People Director, and Mr James Williams, Group Finance Director.

5. The Claimant gave evidence in a clear, straightforward and candid manner. The same can broadly be said of the Respondent's witnesses. In one respect, however, Mr Roberts placed an interpretation on an important point of evidence which was contradictory and not borne out by the documentation (see Findings in Fact at para 23).

Findings in Fact

6. The Respondent is a motor retailer employing approximately 1,000 people in Great Britain.

7. The Claimant commenced employment on 4 January 2016. He started as a Sales Adviser and was promoted to Sales Controller in December 2019. He was based at the Respondent's dealership in Dalgety Bay, Fife.

8. As Sales Controller, he supervised a small sales team and reported to the managing partner of the dealership.

9. The Claimant's contract of employment contained the following clauses regarding remuneration:

"***5. Basic Salary***

You will be paid £32,500 per annum. You will be paid at monthly intervals on or about the last working day of the month. Payments are made by direct credit transfer.

6. Incentive, bonus and commission schemes

You are entitled to participate in the relevant commission or bonus scheme if appropriate. Your estimated on target earnings are £50,000 per annum at minimum level, £55,000 per annum at achievable level and £60,000 per annum at optimistic level. These schemes are non contractual and are on an ex-gratia basis. There is no guaranteed level of earnings from these schemes and the Company reserves the right to amend the schemes from time to time. Details of the relevant scheme will be attached to your offer letter. All bonus, guarantees and incentives will be paid one month in arrears. In the event of an absence over four weeks the Company reserves the right to withdraw any bonus or commission payments. During any period of Maternity, Paternity, Adoption or Parental Leave, bonus/commission payments will not be due paid beyond the legislative mandatory periods."

10. The Claimant's remuneration was accordingly composed of a fixed basic salary and a bonus element based on performance. Together, they are referred to as "on-target earnings". This is common in sales roles where a significant portion of remuneration can be composed of bonus or commission.

11. Each month, the Claimant participated in bonus arrangements and if relevant targets were met, bonuses were paid. The Respondent had the right to vary the terms of these from time to time, and it did so. There was no suggestion, however, that once agreed parameters were set out, the Respondent would not to make bonus payments triggered.

12. By letter dated March 2020, the Claimant was notified that he was being placed on furlough leave with effect from 25 March 2020. During this period, he was paid 80% of his basic pay. This was an enhancement of the Government scheme in that the cap was not applied.

5 13. The Claimant was asked to sign an electronic certificate confirming his agreement to the change to terms & conditions. He did so on 29 March 2020. He remained on furlough until 15 June 2020.

14. The terms on which he returned to work were set out in an undated letter in June 2020. The letter contained the following statement:

10 "…*you have been identified as playing a key role in supporting the business through this lockdown period and have been invited to join our Peter Vardy SAS squad effective from 15 June 2020.*"

15. The SAS squad was a group of employees whom the Respondent identified as being key in supporting its operations with a view to resuming business in
15 due course. All remaining employees returned shortly thereafter.

16. In the same letter, the Claimant was informed that he would work his normal hours but be paid 90% of base pay and up to 90% of minimum on-target bonus entitlements. The latter were subject to performance targets.

17. The final paragraph of the letter contained the following terms:

20 "*Please confirm acknowledgement of this letter via email to confirm your acceptance of this temporary change to terms and conditions – we truly need to come together as a PVL family to ensure our sustainability."*

18. The Claimant did not send any email to confirm his acceptance. The electronic acceptance mechanism previously used by the Respondent when
25 placing employees on furlough, was not deployed.

19. The effect in terms of remuneration was that the Claimant received 90% of his base pay and this arrangement continued until his employment ended in

April 2021. Subsequent letters to that effect were issued to the Claimant periodically.

20. A table was produced by the Respondent which appeared to suggest that salary was not reduced in February 2021. The Respondent's witnesses were not able to provide an explanation for the apparent anomaly. The Tribunal preferred the evidence of the Claimant that the salary was reduced in that month as well. That is consistent with the quantum calculation advanced by the Respondent in its ET3 and the evidence from the Respondent that salaries reverted to 100% for affected employees only after the Claimant had left.

21. During the period of the salary reduction, the Claimant received monthly bonus payments. These were earned in accordance with terms set by the Respondent. Certain of these were valued at sums equivalent to the 10% salary reduction. Payment was subject to performance and the meeting of relevant targets. Those payments were treated as bonus and not salary and were referred to in calculating the Claimant's on-target earnings.

22. Prior to receiving the letter dealing with his return to work, the Claimant received a phone call or a text from his managing partner to say that he was to come back. No consultation took place with the Claimant regarding the reduction in his earnings. No collective consultation with the Respondent's employee representative body ("Colleague Forum") took place.

23. Whilst Mr Roberts sought to argue that the reduction was "*voluntary*" and that the letter amounted to an invitation to accept reduced pay, that position is at odds with the reality of the situation. In his oral evidence, Mr Roberts described the letter as: *"The notification that he was returning to work*". That does not convey a choice for the Claimant and the Claimant did not consider that he had a choice. Mr Roberts could not provide an explanation as to what would have happened had an employee refused to accept the reduced terms.

24. Following his return to work, the Claimant regularly raised concerns with his line manager about the reduced pay. He described doing so "almost weekly".

He was discouraged by his manager from elevating his concerns. He gave evidence that his manager told him that if he complained formally he would be sacked. Mr Roberts was concerned by this suggestion and referred to the fact that it had not been raised at the time such that it could have been investigated with the Claimant's line manager.

25. The Tribunal was satisfied that, whether or not the Claimant's line manager expressly stated that he would be sacked if he complained formally, the Claimant was dissuaded from elevating his complaint beyond the level of his line manager and feared losing his job. He was not in a position financially to leave or risk losing his job until he had secured alternative employment. He waited until he had done so before resigning.

26. By email dated 25 February 2021, the Claimant made a request for financial help in accordance with the Respondent's loans facility. The request was prompted by recent changes to the Respondent's bonus structures which meant that the Claimant would have a lower earning potential. He expressed concerns about the reduction in both salary and bonus entitlement. He was awarded a hardship loan on around 2 March 2021. He resigned with notice on 10 March 2021.

27. By email of 7 May 2021, the Claimant wrote to Mr Roberts setting out his claim for unlawful deductions from wages.

28. In response to the Claimant's grievance, Mr Roberts wrote to the Claimant on 14 May 2021. He referred to the change in base pay having been enacted and that as the Claimant "*continued in employment throughout the period, there was implied acceptance of the change to [his] salary*". He also made the point that the Claimant's total earnings, including bonus, were in excess of his base salary during the period in question. This foreshadows the submission made at the Tribunal that the discretionary nature of bonuses meant that they could be used to make up the shortfall in salary.

29. The monthly shortfall claimed by the Claimant is £270.83 gross. Whilst the Claimant sought to claim for the reduction during his time on furlough, he

accepted before the Tribunal that this was not appropriate. It applied for around 9 and a half months. The Tribunal accepted the shortfall to be that specified by the Respondent in its ET3 - £2,563.86 gross.

Relevant Law

5 30. It is unlawful for an employer to make a deduction from a worker's wages unless (a) the deduction is required or authorised by statute or a provision in the worker's contract or (b) the worker has given their prior written consent to the deduction (Section 13 ERA).

31. The relevant definition of wages is contained in Section 27 ERA.

10 32. Wages means "*any sums payable to the worker in connection with his employment"* and includes (*inter alia*): (a) "*any fee, bonus, commission, holiday pay or other emolument referable to the worker's employment, whether payable under the contract or otherwise*" (Section 27(1)(a) ERA; and (b) "*any payment in the nature of a non-contractual bonus which is, for any*
15 *reason, made to a worker by their employer*". In respect of bonuses falling under (b), the amount of the payment is treated as payable to the worker as wages on a day in which the payment is made (Section 27(3) ERA).

33. ERA includes a number of payments which are expressly excluded from the definition of wages. None of these is relevant in the present claim.

20 34. Section 13(3) ERA provides:

"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 [of ERA] as a
25 *deduction made by the employer from the worker's wages on that occasion"*.

35. The term "properly payable" was considered in ***New Century Cleaning Co Ltd v Church*** [2000] IRLR 27 at paragraph 62:

"*For wages to be "properly payable" by an employer, he must be rendered liable to pay, either under the contract of employment or in some other way. Section 27 contains some examples of sums which may be payable either under contract or because for some other reason the employer is liable to make payable as an addition or supplement to "wages".*"

36. In ***Farrell Matthews & Weir v Hansen*** [2005] ICR 509, the EAT held (in relation to non-contractual bonuses):

"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. This situation applies equally where a discretion to award a bonus is granted under contract, or by custom or by ad hoc decision."

Submissions

37. Given that the Claimant was unrepresented, Mr Oliver agreed to make his submissions first. He referred to the relevant statutory tests. Thereafter, he advanced two alternative propositions. First, that the Claimant agreed to the reduction in his salary such that only 90% was properly payable. If that is wrong, he submitted that the Claimant had no entitlement as a matter of contract to any bonus so the Tribunal should take account of the fact that the total amount paid to the Claimant was always above the base salary and find there to have been no unlawful deduction.

38. In relation to the first point, he interpreted the letter informing the Claimant of the terms of his return to work as an offer and the Claimant's having commenced work (or thereafter having continued working) under those terms as an acceptance. He invited the Tribunal to find that the Claimant was not working under protest. He referred to the case of ***Solectron Scotland Ltd v Roper & Others*** [2004] IRLR 4 as it relates to the question of an employee accepting new terms by continuing to work without complaint. He also referred to ***New Century Cleaning Co Ltd*** as it relates to bonus payments, submitting that it supported the proposition that non-contractual bonuses

falling under section 27(3) ERA could be used to make up for any shortfall in salary.

39. At the end of his submissions, Mr Oliver raised a point not foreshadowed in the pleadings to the effect that there was a time bar point arising from what he submitted was a break in the series of deductions. He pointed to what appeared to be a gap of one month where a deduction was not made and argued that that would break the chain.

40. On his own behalf, Mr Marshall submitted that he did not agree to the reduced salary and that he had to continue working for fear of losing his job. He could not afford financially to resign without another job to go to. He drew a distinction between salary, which was fixed and bonuses which were subject to performance and argued that the two should be considered separately.

Decision

41. It is not disputed that the Claimant's base salary amounts to "wages" for the purposes of ERA. Nor is it disputed that the Respondent implemented a 10% reduction in those wages for a period of several months.

42. The Tribunal first considered the Respondent's primary argument that the Claimant had agreed to the revised terms on the basis that the Respondent's letter of June 2020 was an offer of new terms which, by virtue of commencing work, the Claimant demonstrated acceptance.

43. For the reasons outlined in the Findings in Fact above (paragraph 23), the Tribunal did not accept the Respondent's submission.

44. The Claimant saw the letter as an instruction to return and that is consistent with the oral evidence of Mr Roberts. He did not consider he had an alternative.

45. The inclusion of the paragraph at the end of the letter set out at paragraph 17 above is indicative of the Respondent's appreciation that written agreement was required from the employees to whom pay reductions were being applied.

46. The Tribunal went on to consider whether by continuing to work under the regime for several months, the Claimant had by his actings accepted the new terms imposed.

47. The Tribunal had regard to the guidance in ***Solectron Scotland Ltd*** at paragraph 30:

    "*If an employer varies contractual terms by, for example, changing the wage or perhaps altering the job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights.*"

48. The question for the Tribunal in the present case is whether the actions of the Claimant mean that he accepted the reduced salary.

49. Having accepted the Claimant's evidence (which was not challenged) that he complained to his line manager almost weekly and raised the issue in writing at the time of applying for a hardship loan, the Tribunal concluded that the Claimant was making clear that he did not accept the change and was thus not forfeiting his contractual rights.

50. Whilst a formal letter to that effect might have been preferred, the Tribunal had regard to the fact that the Claimant was not legally represented and had been dissuaded from raising the point more formally.

51. The Tribunal, therefore, concluded that the Claimant's contract had not been varied such that the base salary properly payable to him remained at the 100% level.

52. The Tribunal went on to consider the Respondent's secondary position that the bonuses payable to the Claimant should be offset against the deductions in salary and that given his remuneration was never lower than his base salary, his claim should fail on that basis.

53. The Tribunal considered the terms of the bonus arrangements and the statutory provisions outlined above. It had no hesitation in concluding that the bonus payments were payable under the contract of employment. Throughout his employment, the Claimant enjoyed bonus payments calculated in accordance with agreed schemes from time to time. The bonus element of his remuneration was a substantial component of his total potential earnings.

54. Each of the bonuses paid by the Respondent was paid in accordance with criteria formulated by the Respondent and communicated to the Claimant. Although the overall bonus scheme was described as discretionary, once the Respondent fixed the rules of a particular scheme for a particular month or any other period, it had an obligation to make payments in accordance with those arrangements until such time as the scheme was varied once again.

55. The fact that the Respondent put in place bonus arrangements which would allow (subject to performance) the Claimant to receive a bonus payment equivalent to the reduction in salary does not obviate the need to pay the salary in full where there was no agreement that it should be reduced. Both elements were wages properly payable.

56. The Respondent's attempt to rely on Section 27(3) ERA to allow a set off of non-contractual bonuses against salary payments mischaracterises the nature of the bonus payments in the present case, which clearly fall under Section 27(1)(a). Even if they did fall under Section 27(3), the Tribunal did not agree with the premise of the Respondent's submission. All bonuses paid to the Claimant would have become wages on the day in which payment was made in any event (***Farrell Matthews & Weir v Hansen*** at paragraph 23):

"The proper interpretation of section 27(3) is not that it applies to all bonuses thereby limiting the application of section 27(1)(a) but only to non-contractual bonuses to which no legal entitlement or legal liability to pay arises. When they are paid, however, they are, as Morritt LJ said in New Century Cleaning Co Ltd v Church [2000] IRLR 27 , 34, para 62, treated "as payable". The bonus is thereby deemed to have been a legal entitlement"

57. Given that the Tribunal found that there were no gaps in the series of deductions, it was not necessary to consider the Respondent's final submission. A series of deductions across nine months with a gap of one month would not, in any event, constitute a break in the chain of causation (see for example ***Bear Scotland Ltd v Fulton and another; Hertel (UK) Ltd v Woods and others; AMEC Group Ltd v Law and others*** [2015] IRLR 15).

Compensation

58. It was agreed that the gross deduction each month amounted to £270.83. The deductions took place from 15 June 2020 until the termination of employment, amounting to nine and a half months. The Tribunal is content to accept the Respondent's quantification as being £2,563.86. This is a gross figure from which the Respondent is required to deduct tax and national insurance before making payment to the Claimant.

Employment Judge: Ronald Mackay
Date of Judgment: 19 October 2021
Entered in register: 21 October 2021
and copied to parties