



EMPLOYMENT TRIBUNALS

Claimant: Mr I Butt

Respondent: Simpson Millar LLP

Heard at: Leeds by Cloud Video Platform **On:** 20 December 2021

Before: Employment Judge Evans (sitting alone)

Representation

Claimant: in person

Respondent: Ms Moorhouse, solicitor

This has been a remote hearing. The form of remote hearing was video by Cloud Video Platform. A full face-to-face hearing was not held because all issues could be determined in a remote hearing and the parties raised no objection to the claim being heard in this way.

JUDGMENT

1 The claimant's claims for unauthorised deductions from wages and for breach of contract fail and are dismissed.

2. The respondent's claim for breach of contract is dismissed following its withdrawal by the respondent at the hearing on 20 December 2021.

REASONS

Preamble

1. The claimant was employed by the respondent from 15 April 2019 until 30 September 2021 as a finance business partner. On 25 October 2021 the claimant presented a claim form to the Tribunal arguing that the respondent had failed to pay him two of the three instalments of a bonus he said he was due to him.
2. The claim was listed to be heard as a short-track case on 20 December 2021 with a time estimate of two hours. The parties had not agreed a complete bundle

but at the beginning of the Hearing it was agreed that I needed the following documents:

- 2.1. The claim form;
 - 2.2. The response;
 - 2.3. A bundle prepared by the respondent running to 69 pages (“the Bundle”);
 - 2.4. The witness statements of the claimant and of Mr Samways, the “Head of Commercial Finance, M&A and Working Capital” of the respondent.
3. The witnesses both affirmed and answered questions in cross-examination. After they had given their evidence, first Ms Moorhouse and then the claimant made brief oral submissions. I then reserved my decision: it was 3.30pm and the issues were not so straightforward as to permit me to reach a decision and give it orally with reasons in the time remaining.
4. Page references are to the pagination in the Bundle unless otherwise stated.

The issues

5. The claimant confirmed that his factual argument was that the respondent had failed to pay him two instalments of his bonus for 2020. Each instalment would have been £1833.33 before tax and so the total amount claimed was £3666.66.
6. I asked the claimant when he contended these two instalments should have been paid. He answered that the first should have been paid in July 2021 and the second on the termination of his employment on 30 September 2021 (final pay slip, page 66).
7. The claimant has been unrepresented throughout. Realistically, the claim form could be read as contending that the respondent had either made two unauthorised deductions from the claimant’s wages or had acted in breach of contract by failing to pay the two bonus instalments. In light of this, the issues were agreed to be as follows:

Unauthorised deduction from wages

- 1) Were the wages paid to the claimant on the payday at the end of July 2021 and on 30 September 2021 less than the wages the claimant should have been paid? The claimant contends that he should have been paid £1833.33 on each date in respect of his annual bonus for 2020.
- 2) Was any deduction required or authorised by a written term of the contract?
- 3) Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 4) Did the claimant agree in writing to the deduction before it was made?
- 5) How much is the claimant owed?

Breach of contract

- 6) Did this claim arise or was it outstanding when the claimant's employment ended?
- 7) Did the respondent do the following:
 - a) Fail to pay the claimant £1833.33 in July 2021;
 - b) Fail to pay the claimant £1833.33 on the termination of his employment.
- 8) Was that a breach of contract?
- 9) If so, how much should the claimant be awarded as damages?

The Law

8. Turning first to unauthorised deductions, section 13 of the Employment Rights Act 1996 ("the ERA") provides that an employer may not make a deduction from the "wages" which are properly payable to a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.
9. Section 27 of the ERA provides where relevant that "wages" means any sums "payable to the work in connections with his employment, including ... any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise".
10. Turning secondly to breaches of contract, a breach of contract occurs when a party to a contract fails to fulfil an obligation imposed by the terms of a contract.
11. A breach of contract gives the innocent party the right to sue for damages, i.e. for financial compensation for losses flowing from the breach. The general principle which applies to all types of claim for breach of contract is that damages should return the innocent party to the position they would have been in if there had been no breach. A claim for damages for breach of contract may be pursued in the Employment Tribunal when it arises, or is outstanding, on the termination of employment, but not otherwise.

Findings of fact

12. There was actually relatively little disagreement about the facts in this case. Much turns on the correct interpretation of the documentation. Nevertheless, in making the findings of fact set out below I have taken account of all the evidence before me although I do not of necessity refer to each and every item of it.
13. This dispute concerns the claimant's entitlement to a bonus in respect of 2020. The 2020 Bonus Scheme General Criteria were at page 3. They provided, where relevant:

9. When will my bonus payment be paid?

The annual and Q4 bonus payments will be made in March 2021 as part of payroll. Some schemes provide for monthly, quarterly or half yearly payments. Where an advance payment is made before March 2021 such payments are a payment on account of bonus and the final calculation will be made in March 2021. Bonus payments will be pro rata'd for part time employees. Specific payment dates can be found in the scheme specific criteria...

12. Joiners and leavers

...

Leavers: *To be eligible for a bonus you must be employed by the firm (and not have handed in your notice or otherwise be working your notice period) at the date of payment.*

If a colleague resigns from their position within a month of receiving a bonus payment the firm reserves the right to reclaim all or part of the bonus payment which has been made in the colleagues [sic] final pay.

20. Status of the bonus scheme

All bonus schemes operated by the firm are discretionary and all bonus payments made are discretionary. This scheme is non-contractual and can be varied or withdrawn at any time without notice.

14. There were also "2020 Business Services Bonus Scheme Guidelines" (page 9) which contained more information about how bonuses would be calculated for employees in the claimant's department.

15. On 9 March 2021 the respondent wrote to all its employees by email (page 18). There was a section in this email headed "2020 Annual Bonus Payment Arrangements". This explained the ongoing impact of the covid pandemic on the respondent's business and said:

We want to ensure that colleagues who are entitled to a bonus still receive the full amount and to achieve this, whilst still being responsible, we have taken the decision to phase the payment of the annual discretionary bonus for 2020 performance.

16. Under the heading "What this means for colleagues" the email went on to state:

For 2020 bonuses over £1000 (gross), payments of the total amount will be split into three, and these amounts will be added to the colleague's April, July and October pay.

17. The respondent subsequently sent a letter to the claimant dated 29 March 2021 (page 17). This stated:

... I am delighted to tell you that you have achieved a bonus payment of £5500.

18. The letter went on to refer to the disruptions of covid and the respondent's desire to make sure that "colleagues who are entitled to a bonus still receive the full amount..." and then states:

To achieve this, whilst still being responsible, we have taken the decision to phase the payments of the annual discretionary bonus for 2020 performance.

As your bonus payment is over £1,000 (gross), you will be paid in three equal amounts and these amounts will be added to your April, July and October pay as detailed below:

Payroll 2021	month	Amount
	<i>April</i>	<i>£1833.33</i>
	<i>July</i>	<i>£1833.33</i>
	<i>October</i>	<i>£1833.33</i>
	Total	£5500

19. The letter then reminded the claimant that if he resigned within a month of payment the respondent might reclaim all or part of the bonus payment. The letter referred to "the Bonus Scheme criteria".
20. Before moving on from the documentation included in the bundle, I should note that the claimant's contract of employment (page 32) did not contain any reference to any bonus scheme.
21. The respondent paid the claimant the bonus instalment for April 2021. However it subsequently decided to move the July bonus payment back to October and the October payment back to March 2022 ([10] of Mr Samways witness statement). The respondent was unable to locate the email in which it notified its employees of this decision but the claimant accepted that he was so notified.
22. The claimant did not object contemporaneously to the bonus payments initially being deferred so that they were to be paid in three instalments (rather than in a single payment in March 2021 as envisaged by the Bonus Scheme Criteria) or to the subsequent decision to defer the July and October 2021 payments to October 2021 and March 2022 respectively. His evidence in this respect, which I accept, was that he did not wish to be difficult about the changes and, also, did not think that it would make any difference to the amount he ultimately received (because he had no intention of leaving the respondent's employment).
23. In August 2021 the claimant sought to agree with the respondent that he would work four days a week rather than five. The respondent did not respond positively and so the claimant found and accepted a job elsewhere working four days a week. Having done this, he resigned on 9 September 2021. In his resignation letter he asked if he could be released on 12 November 2021, before the expiry of his three-month notice period. He also asked for confirmation that the two outstanding instalments of his bonus would be paid.

24. Mr Samways and the claimant subsequently agreed that the claimant's employment would terminate on 30 September 2021 and so it did. The claimant raised a query in relation to his outstanding bonus instalments in an email to Helen Sutton on 13 September 2021 and she replied stating that because he was "under notice of leaving" he would not be entitled to receive any further instalments (pages 57 and 58). The respondent formally responded to the claimant's resignation by a letter dated 14 September 2021 (page 59) in which it recorded the agreed termination date of 30 September 2021 and stated that "You will be paid all monies owed and holiday pay outstanding in the normal payroll which will be on or around 30 September 2021".
25. On the termination of the claimant's employment, the respondent paid him his salary for September 2021 and an amount in respect of accrued but untaken holiday pay. It did not pay him any further amount in respect of his 2020 bonus. The final pay slip of the claimant was at page 66.

Conclusions

26. In order to determine the issues set out above, I must really consider the following matters:
- 26.1. Whether the claimant at any point had a contractual right to receive a bonus of £5500 on particular dates in April, July and October 2021.
- 26.2. If so, whether the respondent acted in breach of contract by varying the dates on which the second and third payments were due to be made. The respondent will not have done so if under the contract it was entitled to vary the dates as it did or the claimant agreed to the variation.
- 26.3. In any event, whether the claimant was entitled under the terms of the contract to be paid any bonus instalment due in October 2021 when he had resigned on 9 September 2021 and his employment had ended on 30 September 2021.
27. I conclude that the wording of clause 20 of the 2020 Bonus Scheme General Criteria makes clear that the claimant did not in principle have any right to be paid a bonus. As such, it would have been open to the respondent to say, for example, "we have decided to make no payments under the scheme this year because of the impact on our business of the covid pandemic". Further, clause 20 entitled the respondent to vary or withdraw the bonus scheme.
28. The claimant did not argue during the Hearing that the respondent was not entitled to change the payment date envisaged by the 2020 Bonus Scheme General Criteria (clause 9 – March 2021) to April, July and October 2021 as announced by its email to staff on 9 March 2021. However, such an argument would have been doomed to failure. That is because I conclude that the respondent's right to vary the 2020 Bonus Scheme General Criteria as set out in clause 20 included a right to change the dates on which bonus payments were made and so there was no breach of contract when it did this.

29. The most significant issue for me, therefore, is whether the claimant acquired a contractual right to receive a bonus of £5500 on particular dates when the respondent wrote to him as it did on 29 March 2021.
30. In considering this issue, I note that the letter of 29 March 2021 to some extent adopts the language of entitlement not discretion: “you have **achieved** a bonus payment of £5500.” “It’s important to the firm that we ensure that colleagues who are **entitled** to a bonus still receive the full amount...” ... “you **will** be paid in three equal amounts and these amounts **will** be added to your April, July and October pay as detailed below”. (Bold emphasis added.) However I also note that the letter refers to the bonus being “the annual discretionary bonus”, refers to the leaver provisions and also notes “For further details refers to the Bonus Scheme criteria”.
31. No evidence about how bonuses have been calculated or paid in other years has been adduced. In these circumstances, I conclude that the letter of 29 March 2021 was insufficient to convert what had previously quite clearly been participation in a discretionary bonus scheme into a contractual right to specific amounts on specific dates. In reaching this conclusion I have taken into account that:
- 31.1. The contract of employment does not create a contractual right to participate in *any* bonus scheme (whether contractual or discretionary) because the contract does not refer to a bonus scheme at all;
- 31.2. Clause 20 of the 2020 Bonus Scheme General Criteria expressly states that the scheme is discretionary, that payments made under it are discretionary, that the scheme is non-contractual, and can be varied or withdrawn at any time without notice;
- 31.3. The letter of 29 March 2021 expressly refers to the 2020 Bonus Scheme General Criteria and a reasonable person with the relevant background knowledge would understand that the payment of the bonus in it remained subject to those criteria;
- 31.4. In reality, the language of entitlement simply reflects the fact that the actual amount of the discretionary bonus which the respondent intends to pay has been calculated as at the date of the letter.
32. In light of this conclusion, the respondent subsequently deciding not to pay the second and third instalments of the 2020 annual bonus will not have amounted to a breach of contract unless this exercise of its discretion was irrational or perverse. I find that the reason for the respondent exercising its discretion not to pay the whole bonus to the claimant was (1) a decision to delay the payment of the second and third instalments because of cashflow issues arising from the pandemic; combined with (2) the fact that under the 2020 Bonus Scheme General Criteria the claimant was not entitled to be paid any amount once he had resigned on 9 September 2021. I conclude that the respondent’s decision to exercise its discretion not to pay the whole of the bonus as a result of these matters did not even approach being an irrational or perverse decision. There

was an obvious business logic to the delay. Equally, there was an obvious logic to then not paying the outstanding instalments because the claimant had given notice and so not paying him reflected the leaver provisions in the 2020 Bonus Scheme General Criteria. That logic does not dissolve merely because the claimant was unlucky to be caught by the leaver provision as a result of the payment dates being put back.

33. However, in case I am wrong in my conclusion that the letter of 29 March 2021 did not give rise to a contractual entitlement to the payment of a bonus on particular dates, I have considered whether, if such an entitlement had arisen, the respondent acted in breach of contract by varying the dates on which the second and third instalments were to be made with the result that the claimant received neither of them.
34. I conclude that the email sent to the claimant in July notifying him that the two outstanding bonus payments would be put back by several months was notification of a variation to the bonus scheme as permitted by clause 20 of the 2020 Bonus Scheme General Criteria. The respondent was entitled to vary the scheme in this way. Consequently, if I had concluded that the claimant had acquired a contractual entitlement to the payment of a bonus of £5500 on particular dates (and I have not so concluded), I would have gone on to conclude that nevertheless the respondent did not breach the claimant's contract of employment by changing the dates on which the payments were due to be made.
35. The final question for me then would have been whether the respondent acted in breach of contract by failing to pay either the original or the revised October payment on the termination of the claimant's employment on 30 September 2021. By October, when the payment fell due, the claimant was no longer employed by the respondent. As such he was caught by the leaver provision at clause 12 of the 2020 Bonus Scheme General Criteria: "To be eligible for a bonus you must be employed by the firm... at the date of payment". If the claimant had acquired a contractual right to be paid an instalment of £1833.33 in October 2021, that right would quite clearly have remained subject to the 2020 Bonus Scheme General Criteria. As such, the failure to pay him an amount on 30 September 2021 was not a breach of contract by the respondent.
36. In light of these conclusions in relation to the three main matters which I needed to consider, I conclude in relation to the agreed issues that:

Unauthorised deduction claim

- 36.1. The wages paid to the claimant at the end of July 2021 and at the end of September 2021 were not less than the wages that were properly payable that should have been paid. This is because the claimant was not entitled to a payment of £1833.33 in respect of his bonus under his contract of employment or otherwise on either date.
- 36.2. Issues two to five therefore fall away and the claimant's claim for unauthorised deductions fails and is dismissed.

Breach of contract

36.3. In light of my conclusions, the respondent did not breach the claimant's contract of employment by failing to make payments to him of £1833.33 at the end of July 2021 and at the end of September 2021. His claim for breach of contract therefore also fails and is dismissed.

Employment Judge Evans

Date: 22 December 2021