THE EMPLOYMENT TRIBUNALS

BETWEEN

Ms Samantha Zenda Ovies ***Claimant***

and

Mr Mahiul Muhammed Khan Muqit ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

REGION: London Central **ON**: 7, 8 and 9 December 2021
EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS: sitting alone**

Appearances:
For Claimant: Mr L Betchley of Counsel
For Respondent: Mr A MacMillan of Counsel

JUDGMENT

1. The Claimant was unfairly dismissed;
2. The Claimant is owed one day's wages in respect of holiday pay;
3. The Claimant upon the termination of employment was owed a bonus payment that was outstanding from June 2020 in the sum of £2,000 gross; and
4. Permission to either party to apply to the Tribunal for a listing of a remedy hearing which, unless there be special circumstances of which this Tribunal was unaware, should not take more than one full day, such application to be made so sooner than 14 days after the date on which this Judgment and Reasons is sent to the parties.

REASONS

1. The Respondent is a consultant ophthalmologist and a vitreoretinal surgeon. He operates his practice known as 'Practice of Mr Mahi Muqit' in London at Moorfields Private Outpatient Centre (the "Moorfields Clinic") in London.

2. The Claimant met the Respondent when she was employed as a temp acting as a practice manager for several consultants at the Moorfields Clinic for a couple of months in 2014. Some three months later, the Respondent – who had been one of those consultants – contacted her and offered her a full-time position as his Practice Manager which offer she accepted, starting her employment on 12 January 2015.

3. The employment ended when the Claimant was dismissed with the effective date of termination being 22 October 2020. On 22 January 2021, the Claimant presented an ET1 to the Employment Tribunal in which she claimed she had been unfairly dismissed. She also claimed a redundancy payment and indicated she was seeking to be paid the bonus payment she had not received in June 2020 and compensation for the fact that her Annual Leave of 10 days had been reduced to 6. Later, at a Preliminary Hearing (Case Management) conducted on 28 June 2021, her "complaints of whistleblowing and redundancy payment entitlement" were dismissed upon withdrawal by the Claimant – the former complaint not being something that had been highlighted on the ET1 – and a List of Issues was agreed for the benefit of the Tribunal conducting the full merits Hearing, in other words, for my benefit.

4. At this Hearing conducted remotely using the Cloud Video Platform, I heard evidence from both the Respondent and the Claimant, each of whom have been ably represented by counsel whose industry has been of great assistance to me. A statement was provided by the Claimant in respect of a witness named Ms Christine Collier but, with Respondent's counsel indicating he did not wish to ask questions of this witness whose evidence he considered irrelevant, counsel for the Claimant indicated some degree of agreement by not calling her to give evidence so, in the event, I did not read her statement.

The Facts

5. The relationship between the Claimant and the Respondent appears to have been a good one up to the Claimant embarking on a period of annual leave which she took with her family to the Scottish Highlands in August 2020.

6. At Christmas in the early years of the employment, the Respondent had elected to give the Claimant a bonus to assist her in what he perceived to be a period of financial difficulty for the Claimant. It is fair to say that the Claimant disputed the idea that she had in any way indicated she had financial difficulties but it is clear that the Respondent decided to make a Christmas bonus payment that was not provided for in the contract of employment.

7. That document, signed by the Claimant at the end of November 2014, had provided for remuneration in the form of a salary of £33,000. That salary had been increased when, in or about 2018, the Claimant had pressed for a further salary increase. The Respondent asked what she wanted and she indicated that she wanted to receive a net payment of £3,300 per month. When the Respondent investigated what that might mean in gross terms, he discovered it meant a gross salary of close on £60,000, a salary level he asserts he knew some of his consultant colleagues to be earning. He offered a 10% rise coupling his offer with a further offer of paying a bonus of £2,000 in both December and in June.

8. The Claimant accepted the offers he made and accordingly her salary rose to £47,200 and she was paid a bonus of £2,000 at Christmas 2018. When June 2019 came, the Claimant initially did not receive a bonus, a matter which she raised with the Respondent on 27 June 2019. As a result, a bonus of £2,000 was paid to the Claimant and the Respondent requested that the Claimant in future should remind him to make a June bonus payment. A further bonus payment was made at Christmas 2019, again of £2,000.

9. The initial bonus payments had been made as a gross sum with the Respondent considering he had made them as discretionary payments from which, quite properly, no deductions were made. However, in my view, such payments made after the salary negotiation in 2018 could no longer be regarded as discretionary. They had become part of the Claimant's remuneration. Unfortunately, the parties continued to act in the same manner as before. The £2,000 bonuses paid in December 2018, June 2019 and December 2019 did not have tax and national insurance deducted from them. The Claimant appears to have assumed it was appropriate for her to receive the sums as gross and the Respondent assumed the payments continued to be classed as "discretionary" although they were no longer.

10. The relationship appears to have deteriorated in the summer of 2020, a period when, as I accept on the evidence I have heard, the Respondent's practice was badly affected by the restrictions placed on lots of people's activities by the pandemic and the Government's response to that. In August of that year, the Claimant went on a hiking holiday in the Scottish Highlands and there appear to have been difficulties in the arrangements made for cover when she was on her annual leave. Initially, the Respondent had asked the Claimant if she, whilst she was on holiday, would be able to field calls to the practice and book patients in and the Claimant had agreed but then retracted her agreement when she realised how that might impact on her holiday. She advised the Respondent to appoint a temporary secretary while she was away, but the Respondent preferred to field the calls that came into his practice himself. He asked the Claimant to arrange for such calls to be forwarded onto his phone.

11. Before she went on leave on 10 August, the Claimant made such arrangements but, whether as a result of her not making the correct arrangements or for some other cause, the Respondent experienced difficulties which led him to make a number of calls to the Claimant whilst she was in Scotland, calls which, for the first six days of her holiday, the Claimant was unable to take because her phone had no reception. When she regained reception for her phone, she realised not only that the Respondent had called her, which calls she had missed, but also had left a number of messages. He requested activity on her part, but she regarded his requests as an intrusion into her holiday time, messaging him on 18 August with:

> I am on annual leave for 10 days. I would appreciate it if you would respect that.

12. When she returned from Scotland, the Respondent asked for a meeting, and they agreed to meet at Moorfields on 25 August. They went to a café to have their conversation.

13. A number of topics were discussed. First, the Respondent informed the Claimant that it had been “chaos” while she had been away. The phone forwarding system had not worked, and the Respondent had attempted to deal with these difficulties by purchasing a new SIM card. Then he indicated that he very much wanted the Claimant to be able to attend clinics, something the Claimant was not in a position to do as she had a child at home unable to attend her usual day-care centre - because it was closed - and the child did not start her induction to school until 17 September.

14. The Respondent offered to assist with childcare, the assistance being offered was that of his wife. He then mentioned that, should he phone the Claimant and she be on another call, she should end the first call and speak to him.

15. The Respondent spoke of his bank having told him that he needed to take out a loan. The Claimant then made a reference to the bank perhaps calling for the Respondent’s Maserati to which the Respondent said: “I drive a car”. The Respondent then said his accountant had advised that he would have to look at restructuring the practice. And seeing as the business was not doing so well, he was afraid he would have to let the Claimant go. He must have mentioned that he was making her redundant because, when he told her she would have 10 weeks’ notice, she asked “Why 10 weeks? If I am being made redundant, I can leave now.” The Respondent’s response was: “Samantha, you cannot leave now, there is work to be done.”

16. The Respondent produced minutes of the meeting which he sent to the Claimant that evening. In the minutes, reference was made to the Claimant having personal problems that required her to see her GP, something which shocked the Claimant as she did not think she had referred to personal problems. She sent a blunt email to the Respondent the following day not only asserting that her GP never featured in their discussions but asking why he would make this up. “Lying” she wrote “is a discussing habit”. The Respondent’s reply elicited the disclosure from the Claimant that she had recorded the discussion, something the Respondent asserted was a violation of GPDR, but he apologised for what he described as a mistaken recollection. He wanted it known, however, that he did not want what he described as “the forthcoming final redundancy consultation meeting on September 8” to be recorded.

17. That meeting took place by Zoom. It was not to be the final meeting for, on 11 September 2020, an HR Advisor, Aisa Mushtaq, wrote to the Claimant inviting her to a Final Consultation Meeting on 17 September 2020. That meeting did not alter the outcome of the Claimant’s dismissal but did result in the days that the Claimant was unwilling to return to the office because of covid-19 safety concerns would be put down as unpaid leave or set against her holiday entitlement.

18. At the meeting on 17 September, the Respondent provided the Claimant with 4 different job roles that he said the business had created to help reduce business costs. The Claimant did not go for any of these roles which essentially represented her previous role broken up into four which were:

    a) Practice Typist – 5 hours weekly

    b) Practice Theatre and Admission Coordinator – 4 hours weekly

c) Office Receptionist – 10 hours weekly

d) Office Billing and Debt Management – 10 hours weekly

19. The total number of hours that these four roles required of their occupants was therefore 29 while the total weekly remuneration they would have received, at £14 per hour, was £406.

20. The Claimant appealed against the decision to dismiss but was unsuccessful. Two grievances she raised were also rejected.

21. The Claimant's last day of work officially was 22 October 2020 but, in fact, she had not attended work citing difficulties that related to her daughter having asthma. After the Claimant had officially left, the Respondent employed temporary agency staff in order to assist him in running his practice. He was particularly impressed with the service that one of these temporary staff had provided

Discussion

22. For the purposes of this discussion, I am following the list of issues as set out by Employment Judge Davidson in her Case Summary issued on 28 June 2021.

Unfair Dismissal

23. I am satisfied on the evidence that the Respondent has established that the reason for the Claimant's dismissal was redundancy. He had decided to reduce the outgoings of his practice by cutting back on staffing costs. I accept his evidence that this decision came to be made because there had been a significant financial decline in his business because of the pandemic and that he had been contacted by his bank and advised that he should take out a loan. The bank was clearly concerned that the reduction in income meant his expenditure was exceeding his income. That expression of concern was augmented by advice from his accountant that he should consider restructuring his business.

24. I am satisfied that the Respondent did not decide upon dismissing the Claimant so as to reduce his costs purely on the basis that there had been difficulty in their relationship during and after the Claimant went on her annual leave. And, for the avoidance of doubt, I am further satisfied that the Claimant's reluctance to attend clinics and to work from home because of her daughter's asthma was not the reason for dismissal.

25. However, I do not think that the Respondent, in deciding to dismiss the Claimant for the reason of redundancy, acted reasonably having regard to those matters set out in section 98(4) of the Employment Rights Act 1996. He was deciding upon redundancy at the end of August 2020. In March 2020, the government had introduced its furlough scheme with a lot of publicity. Initially, the government would pay 80% of the wages of an employee who was put on furlough as opposed to being laid off because of the economic effects of the pandemic and, while the support of the government was engaged, the employee was prohibited from doing any work that either made for the organisation or provided services for the organisation. However, from the beginning of July 2020, the government introduced the flexible furlough scheme whereby employers could bring furloughed employees back to work on a part-time basis while still able to claim

government support providing 80% of the pay for the hours that the employee did not work.

26. Doubtless the Respondent would have needed to take advice on the Rules surrounding the flexible furlough scheme in order to fit the Claimant appropriately within the scheme. But he did not consider the possibility of putting the Claimant on furlough. Initially, he ran the practice by employing temporary agency staff and then, in February 2021, started one of those temporary staff on a training course which led to her starting full-time employment in March 2021 as a Practice Coordinator at a salary of £48,000 per annum which compares to the Claimant's salary before bonus payments are considered of £43,656.

27. I am assisted in the view I have formed that consideration of the furlough scheme is part of a fair redundancy process by two decisions of another Employment Judge that are of persuasive authority only, those decisions being:

- *Mhindurwa v Lovingangels Care Ltd ET 3311636/20*
- *Collard v STS Storage Systems Ltd ET 3307470/20*

28. In my view, had the Respondent considered the flexible furlough scheme and applied it to the Claimant, it is more likely than not that the Claimant would have worked part-time during the period when temporary agency staff were employed and would have resumed her full-time position as Practice Manager when the Respondent's income picked up which clearly must have been the case when the Respondent appointed a Practice Coordinator.

Holiday Pay

29. I accept the evidence of the Claimant that she did several hours work on four days of her holiday but I do not accept that the hours she worked each day justify payment of a full day's pay. The evidence of the Claimant was vague on the actual number of hours she worked on each of the four days. Doing the best I can, it appears to me that the hours she worked justify one day's holiday pay.

Bonus Pay

30. As I have indicated above, I am satisfied that there a change in the nature of the bonus payment as a result of the salary negotiations in 2018 in that the Claimant accepted the offer of an increased salary that was not as much as she hoped for because the Respondent offered to pay a bonus of £2,000 in June and December. The failure to pay the bonus of £2,000 in June 2020 was a contractual breach of contract that was outstanding at the termination of the employment. The Claimant is entitled to damages of £2,000 gross in respect of that breach.

Summary

31. My conclusions are that:

    a) the dismissal was unfair,

    b) the Claimant is owed one day's holiday pay and

    c) the Claimant is owed a bonus of £2,000 that the Respondent was contractually obliged to pay and was outstanding at the termination of the contract.

32. I did not hear evidence as to remedy and therefore leave the parties to attempt to agree remedy without recourse to the Tribunal. If, however, agreement on remedy is not reached within two weeks of the date this Judgment and Reasons was sent to the parties, then either party has leave to apply for a hearing date on the issue of remedy which, unless there are special circumstances with regard to that issue, is liable, in my view, to require a listing of no more than one day.

7 January 2022

Employment Judge Paul Stewart

DECISION SENT TO THE PARTIES ON
10 January 2022

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FOR SECRETARY OF THE TRIBUNALS