EMPLOYMENT TRIBUNALS

Claimant: Mrs S Shay

Respondent: Monica Vinader Limited

HELD AT: Manchester **ON:** 16 March 2021

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Ms Bannister, HR Manager

Following a hearing on 12 October 2020 a written judgment on liability was issued which found that the claimant's claim succeeded in respect of breach of contract and unlawful deduction of wages. At a subsequent remedy hearing on 16 March 2021 the claimant was awarded £3016.16 and a preparation time order of £200. Reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, in respect of the remedy hearing the following reasons are provided:

REASONS

1. Following a hearing on 12 October 2020 a written judgment on liability was issued which found that the claimant's claim succeeded in respect of breach of contract and unlawful deduction of wages. The breach of contract claim related to whether the claimant was entitled to four weeks' notice rather than the one week she was paid, and secondly, as to whether she was entitled to a bonus payment for the period November 2019 to January 2020. In respect of unlawful deduction of wages, the claimant claimed payment for 20 February as her dismissal date was wrongly recorded as 19 February.

2. At a remedy hearing on 16 March 2021 the claimant was awarded £3,016.16 and a Preparation Time Order of £200.00. The claimant then requested written reasons for that judgment.

3. Issues

(1) What would have been the length of the disciplinary process the claimant would have been subjected to had one been followed.

(2) What notice period was the claimant entitled to

(2) What bonus was the claimant entitled to.

(3) Was the claimant entitled to an ACAS uplift.

(4) was the claimant entitled to a preparation time order and if so how much

Claimant's Submissions

4. The claimant submitted that in accordance with the Liability Judgment she was entitled to one month's net pay for her notice less the one week already paid, the sum of £1,524.96. In relation to the failure to follow an implied disciplinary process the claimant submitted she should be entitled to four extra days pay. In respect of the 20 February she submitted she should be entitled to one day's net pay of £98.78. In respect of the bonus due to the production of additional documents during the hearing the claimant revised her estimate of her bonus although she was concerned that various documents had not been disclosed earlier. She originally submitted she should be entitled to the amount she originally claimed which was £ 2,880 net.

5. Regarding the ACAS uplift the claimant submitted she did not have to plead this in her original pleadings the Tribunal should be able to apply it irrespective of that; she was not aware initially that she could apply for this and it only came to light before the remedies hearing. In respect of the respondent's failings she stated that her grievance was not fully investigated, she was not aware that the investigation could result in her dismissal, she was not given the right of appeal; even if she had not completed her six month probationary the ACAS code of practice stated there should still be a fair process.

Respondent's Submissions

6. The respondent agreed that the claimant was due one day's pay for 20 February. They agreed that the claimant was due three extra weeks' pay of £1,594.96. In respect of the disciplinary process they say it would have taken two further days, they submitted the respondent's disciplinary process was not contractual and no further investigation was warranted. Accordingly, they rejected it would have taken four further days, they had sufficient corroboration of the complainant's evidence from two of the claimant's colleagues and they would not have interviewed third parties in any event.

7. In respect of the bonus the respondent accepted that the situation was confused and they explained that the documentation recently disclosed had not been disclosed earlier because the HR Manager Ms Bannister was unaware of a legal requirement to do so and had not been involved in a Tribunal hearing before. They submitted the claimant seemed to accept that

she had seen the relevant emails setting out the bonus she was due to be paid in February before her dismissal. It had been sent to her correct work email address and there was no explanation why she would not have received it nor read it. They submitted that the gross figure was £744 which was £595.20 net.

8. In respect of the uplift the respondent submitted that it needed to be pleaded in the original claim and there was no reference to it in the judgment. They submitted that the process had been followed to a relevant extent, there was an investigation that was a reasonable investigation, it aligned with the modified grievance procedure, as it was non-contractual. The respondents did not feel obliged to follow their procedure to the letter and it was reasonable for it not to do so as it was not obliged to do so. Further it was a genuine error that the respondent took the view the claimant was still in her probation period and they did not have to apply the letter of the disciplinary process.

9. In respect of the uplift also there had to be a relevant code of practice and regarding three elements of the claimant's claim there was no relevant code of practice, where there was a relevant code it was purely an error regarding the probationary period. In respect of the unlawful deductions this was an administrative error and in respect of the bonus there was a genuine different view. They submitted there could be no uplift in accordance with Section 207.

Legal Section in relation to Section 207

Law

10. Under Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 207 says that:-

    (i) A failure on the part of any person to observe any provision of a code of practice issued under this chapter shall not of itself render him liable to proceedings.

    (ii) In any proceedings before an Employment Tribunal …. Any code of practice issued under this chapter by ACAS shall be admissible in evidence and any provision of the code which appears to the Tribunal committed to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

11. Section 207A effect of the failure to comply with the code: adjustment of awards

    (i) This section prior to proceedings before an Employment Tribunal relating to a claim by any employee under any of the jurisdictions listed in Schedule A2.

    (ii) If, in the case of proceedings to which this section applies it appears to the Employment Tribunal that:-

(a) the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies;

(b) the employer has failed to comply with that code in relation to that matter; and

(c) that failure was unreasonable. The Tribunal may, if it considers it just and equitable in all the circumstances to do so increase any award it makes to the employee by no more than 25% …

(iii) In subsection (4), in subsections (2) and … "relevant code of practice" means the code of practice issued under this chapter which relates exclusively or primarily to the procedure for the resolution of dispute.

12. Schedule A2 states that the Tribunal's jurisdiction to which Sections 207(a) applies includes Section 23 of the Employment Rights Act 1996 (unauthorised deductions and payments). The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (breach of Employment Contract and Termination), Section 111 of the Employment Rights Act 1996 (unfair dismissal). Accordingly, the claimant's breach of contract claims, and unlawful deduction claims were matters to which the uplift applied. The claimant was unable to pursue an unfair dismissal claim as she did not have two years' service.

Preparation Time Orders

13. Section 76 of the Employment Tribunal Rules (in England and Wales) 2014.

(i) A Tribunal will make a Costs Order or Preparation Time Order and shall consider whether to do so where it considers that:-

(a) A party or that party's representatives acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or proceedings (or part) or the way that the proceedings (or part) have been conducted.

(b) Any claim or response has no reasonable prospect of success; or

(e) A claim has been postponed or adjourned on the application of a party made than less than seven days before the date on which the relevant hearing begins.

(ii) A Tribunal may also make an order where a party has been in breach of any order or practice or direction, or where a hearing has been postponed or adjourned on the application of a party ….

14. Vexatiously, abusively, disruptively or otherwise unreasonably applies to the parties in question conduct in the litigation. The aim remains compensation of a party who has incurred expense in winning his case not punishment of the losing party, where the allegation itself is unreasonable conduct there is no legal requirement for a precise causal link between the conduct and the costs orders, **McPherson -v- BNP Paribas 2004** and **Salinas -v- Bear**

Stearns International Holdings Inc 2005. However, in **Barnsley MBC -v- Yerrakalva 2011 Court of Appeal** it was stated that the comments in McPherson were not meant to suggest that causation is irrelevant but that it was of the factors to be considered. 25(2) defines the preparation time order as "an order that a party (the paying party) makes a payment to another party (the receiving party) in respect of the receiving party's preparation time while not legally represented. Preparation time means time spent by the receiving party (including any employees or advisors) in working on the case except for time spent at any final hearing.

15. The Tribunal has a mandatory duty to consider costs where it considers any of the grounds have been made out, whether or not an application has been made. The parties must have an opportunity to make representations before making a decision. It is said to be a two-stage process:

    (i) there is a finding that the statutory threshold, under Rule 76(1)(a) or (b) has been met; and

    (ii) if it has then the Tribunal must then consider whether it is appropriate to make an order in all the circumstances i.e. exercise its discretion.

    And then it proceeds to the third stage to consider the amount of the award payable. What is not permissible is to go from the first to the third stage without exercising a discretion.

16. Following the guidance set out on costs in **Benyon -v- Scadden 1999 EAT** "the proper test for the Employment Tribunal was not whether its order accorded with this authority or that but ultimately … whether it was just to have exercised as it did the power inferred upon it by the rule … (the EAT) must not consider whether we would have ordered as the Employment Judge did but instead ask ourselves whether the Employment Tribunal took into account matters which it should not have done or failed to take into account that which it should have done or whether in some other way it came to a conclusion to which no Employment Tribunal properly directing itself could have arrived".

17. The rate of a Preparation Time Order was originally set in 2014 of £33 and it was stated it would increase by £1 on 6 April each year. Accordingly, as the hearing was just before 6 April 2021 I increased this by £6 and therefore if I decided to award costs the amount would be £40 an hour.

Facts

18. On the day of this hearing the respondent submitted documentation regarding the calculation of the claimant's bonus which had been available prior to this hearing but was not disclosed until today. Ms Bannister explained that the letter submitted at the previous hearing was applicable to head office staff and was only produced to show the bonus was discretionary She explained she had not disclosed the documentation relating specifically to the claimnat's bonus as she was unfamiliar with the legal process and had not taken legal advice before. The new documents showed that the calculation behind the

claimant's December bonus set out in a letter available at the previous hearing of 17 February 2020 which stated that the claimant's bonus was £744. The claimant had felt that was wrong as there was much less than her bonus for the previous period which did not include Christmas and logically she assumed as one would that the sales figure would be much higher for December. She had received £ 1131 in the previous quarter.

19. However, those calculations were explained by Ms Bannister. On promotion to concession manager the claimant was entitled at the most to a bonus of £1250 in any one quarter. She was no longer entitled to earn commission.70% of the bonus was based on sales performance a maximum of £875. As the claimant's branch achieved 85% of the sales target the claimant was due £744.The rest of the bonus was based on inventory performance and the target there was not achieved. Documentation was produced which supported this contention.

20. The email which was showing the calculation of the bonus had been sent to the claimant, however the claimant did not believe she had received it. She could not however suggest any reason why it would not have arrived in her inbox at work as a correct email address had been received and there was no history of emails going astray. The claimant had asserted that she believed there had been another email saying there would be an uplift to the bonus for that quarter but Ms Bannister gave evidence that there were no other emails that related to the bonus and none had come to light during the claimant's subject access request, therefore, her evidence was there was no such bonus uplift promised or implemented. She produced the Deputy manager's bonus calculations which showed the same method of calculation..

21. Ms Bannister also apologised for only providing the information today and not either at the last hearing or in a timely fashion before this hearing. She had not realised its importance and she did not receive legal advice until later in the process and had not been employed at the point when the information was sent out. In cross examination whilst the claimant believed she had not received these bonus calculation emails she could not explain why she would not have received them, and she accepted that she could see how the bonus had been calculated in the light of their disclosure. However those emails were unavailable to the claimant once she had been dismissed and she was dependent on the respondent's disclosure.

22. In respect of her claim regarding any additional monies for the implementation of a disciplinary hearing the claimant argued it would have taken at least four days for the respondents to re-interview the witnesses after speaking to her and putting the points she made to them, for example, that she believed that the witnesses had colluded because they were unhappy with her firm management style. Further a disciplinary hearing should have been held. The respondent believed only two additional days would have been needed to hold a hearing and to give slightly more notice to the claimant.

Conclusions

23. The parties had agreed the amounts for notice pay, unpaid wages but not strictly the bonus, the length of disciplinary process and any ACAS uplift and the Preparation Time Order.

Bonus

24. In effect the claimant had agreed the calculation amount of the bonus in cross examination as there was no explanation for why she would not have received that documentation and that documentation corroborated the letter which had been disclosed earlier on 17 February 2020. Accordingly, I find that the respondent's documentation is genuine and supports the figure put forward by the respondent which net was £595.20.

Disciplinary Process

25. The respondent submitted the disciplinary process was non-contractual and that this was clear from the contract. However, otherwise the respondent said the reason the disciplinary process was not applied was because the claimant was still within her probationary period. The claimant had evidence that the process was applied to those with over six months service. The actual process to be used may have been non-contractual but some procedure would have been followed is, I find, an implied term given that the respondent reserves it from applying in the six month probationary period in full therefore I find the procedure which would have been followed would have been a reasonable one and that would have been one requiring witnesses to be re-interviewed, in particular to explore the possibility of collusion and that a hearing should have been held.

26. Accordingly, I find a four-day extension to the claimant's employment by virtue of a reasonable disciplinary process is a modest claim on behalf of the claimant and I have no difficulty in finding that a reasonable disciplinary process, (even for somebody still within the probationary period) would have added four more days on given the difficulties of speaking to people, arranging the hearing etc, and giving the claimant notice of what was going to happen. Accordingly, I award the claimant four days net pay for this, the sum of £395.12.

ACAS Uplift

27. The respondent had submitted that section 207, A Tulr (c)) a 1992 as recited above, did not apply to the claimant's claim. However I have disagreed. There are codes of practice applying to unlawful deductions and to claims under the Employment Tribunals Extension of jurisdiction (England and Wales) Order 1994 . Although there is a code of practice on disciplinary hearings in relation to unfair dismissal however in my view section 207 does not require the complaint to actually have a claim under that section as she has a contract claim which does require consideration of that code of practice.

28. I find there was an unreasonable failure to follow the grievance procedure or any reasonable procedure in relation to the claimant's grievance .

29. There was also a failure to follow the code of practice in relation to disciplinary issues, on one view the failure in relation to the disciplinary case was because in the respondent's construction of their contract the respondent understandably wanted to set up a contract which excluded those who had not completed a probationary review from the full disciplinary process but unfortunately the contract did not express that properly. It is the respondent's contract and I find it cannot be used as an excuse for unreasonable behaviour. The rush to judgment in the disciplinary case deprived the claimant of potentially of other payments as well as her actual job. The claimant tried to raise her concerns via the grievance procedure, and this was not dealt with in a proper fashion.

30. I find therefore that an uplift should be awarded in these circumstances The fairness of the investigation was undermined by the failure to follow a reasonable procedure. There was no proper consideration of the grievance. The maximum I can award is 25% however I viewed the respondent's failings as 75% of 25% failings and therefore award 15% uplift, a sum of £392.10.

Preparation Time Order

31. I found the introduction of the previous bonus documents to be extremely misleading, Ms Bannister has given evidence regarding why these documents were not provided before and it is her belief that the payments were discretionary, so they were not relevant. Plainly, they were relevant. Ms Bannister also said she was not there when these documents were created, however, a simple enquiry or search should have led to these documents being discovered and they should have been disclosed, either for the first hearing or in good time for this hearing in which case this hearing may not have been necessary so I find that conduct unreasonable, exacerbated by the fact that incorrect documents were produced earlier therefore I award the claimant some preparation time on that basis. I find it just and equitable to do so on the grounds that the claimant has had an uphill battle to obtain any payments from the respondent after being dismissed in a peremptory way;. that the respondents were in a position to obtain legal advice as they are a medium sized company which is relatively profitable and therefore Ms Bannister could or should have been able to access legal advice from an earlier point which may have meant that the remedy hearing may have proved unnecessary.

32. I award the claimant five hours at the current rate of £40 for her preparation time in respect of preparation for this hearing which might not have been necessary, had the documents been disclosed earlier.

Employment Judge Feeney
15 November 2021

REASONS SENT TO THE PARTIES ON
17 February 2022

FOR THE TRIBUNAL OFFICE