



EMPLOYMENT TRIBUNALS

Heard at: Central London (by video) On: 7 April 2022

Claimant: Miss Lorraine Randall

Respondent: Homes and Communities Agency

Before: Employment Judge Fowell

Representation:

Claimant In Person

Respondent Mr Peter Oldham QC

JUDGMENT

The complaint of breach of contract is dismissed

REASONS

1. These written reasons are provided at the request of the claimant following oral reasons given earlier today.
2. Miss Randall was a senior manager for the Homes and Communities Agency. This is a dispute over a bonus payment which she says was owing to her when she left on 5 November 2021.
3. Claims for outstanding payments of this sort can be classed as a breach of contract or as an unlawful deduction from wages. Slightly different rules apply to the two types of claim. Claims for unlawful deduction from wages can only be brought for money that is owed when the employment comes to an end. That is when wages stop being paid. If all of the wage payments are correct to that point then there has been no unlawful deduction.
4. It is clear here that the bonus, if paid, would have been made later on, so this is a claim for breach of contract only. That boils down to what was agreed between

the parties.

5. Here the Agency say that the proposed bonus was just that – a proposal. It was part of a wholesale re-negotiation of pay – Pay and Grading Exercise - involving trade unions, started May 21, extended to an annual pay increase dating back to July 2021. When the proposals were finalised, and the employee agreed, the bonus and arrears of pay would be made, but not earlier. Ms Randall says that she was £525 bonus. This was set out in a letter on 25 August 2021.
6. Her main complaint is over the delay, which deprived her of the chance to get this bonus. Gave notice on 9 Sep. 3 months' notice. Should have left 9 Dec. Agreed to bring it forward to 5 Nov. Starting another job. Pay and Grading going on since May 21. She fully expected that any additional money from that exercise would be received before she left. No positive assurances however.
7. All in the docs. Bundle of 79 pages. Submissions on each side.
8. On 9 September 2021, the Respondent sent "People Managers", including the Claimant, an email stating:

"Dear People Managers,

As you know, Homes England has been working with Trade Unions and Elected Representatives on proposals to modernise our pay and grading arrangements.

The individual data and the job framework have been requested by both managers and colleagues and we are now in a position to share these. Following positive discussions with Elected Representatives and Trade Unions, we are now moving to the next phase of the project as we move towards implementation. On 15 September, all colleagues will receive an individual letter setting out what the revised Pay and Grading proposal means for them...

Next steps

On Wednesday 15 September all colleagues will receive an individual letter setting out what the proposal means to them, including their job level and the impact of the 2020 pay review as well as the job framework. Colleagues will then be asked to have a 121 with their manager and to discuss any questions or concerns they might have.

Managers will be able to seek guidance from the Pay and Grading team on any

matters that cannot be answered from the published documents...”

9. All quite vague. Individual letters to follow. Discussions with manager. No clear timeline.
10. Letter to all employees on 10 Sep in similar terms. Feedback over a 4 week period to 15 October.

Therefore, no later than week commencing 1 November we will write to you again, setting out whether there are any further changes that impact your situation, and asking you to accept the new arrangements on a voluntary basis...”

11. Going to be tight!
12. 27 Sep email to say some matters unresolved.
13. The key document is the letter of 25 October 2021, which states:

“Dear Lorraine

Pay and Grading Project

As you know, Homes England have been working with the trade unions and Elected Representatives on proposals to modernise our pay and grading arrangements. The full detail of the rationale for this work and why it is important was published in **April 2021** and is available [HERE](#).

We have now arrived at a point in the review where we are able to set out what these proposals mean for you in terms of your individual pay and job level. We are publishing the individual consultation proposals now that we have made our final offer to the unions and closed the consultation with elected representatives. Please read it [HERE](#). This marks the opening of a 4-week period of consultation with each colleague where you can consider the implications of the review and the impact for you personally. You will be able to comment via a number of routes, firstly through your manager or through the pay and grading inbox [HERE](#). As a reminder, it may be helpful to view the Frequently Asked Questions section on the intranet [HERE](#)

The purpose of this consultation is twofold: firstly, to give you every opportunity to consider the implications of this review on you personally; secondly, to contribute to discussion if you feel there are aspects to our proposals that we should reconsider. Job descriptions were made available for individuals to review some weeks ago. If you want to review yours, please ask your line manager for a copy. Then please read the guidance on job evaluation [HERE](#) if you believe that your job description does not reflect your current role. If you have any questions about your job description or this process, please speak to your manager.

Your consultation period will run from now to **15 November 2021**. At the end of the consultation, we will consider the feedback we have received from you and other

colleagues and, w/c **29 November 2021** we will write to you again confirming our final pay and grading proposals. This will include information on whether anything has changed in the process and will confirm the position for you personally. At that point, we will send you a letter seeking your agreement to the pay offer under the pay and grading proposals which will take effect from **1 January 2022**, with pay increases for those eligible being backdated to **1 July 2020**.

Details of how the proposed pay and grading arrangements affect you are shown in appendix 1; and an explanation of the award categories that apply to you. Please note that your job and your terms and conditions of employment will not change as a result of these proposals.

If, after you receive our second letter at the conclusion of the period of consultation you do not wish to accept the pay offer made and you want to confirm your reserved right to continue on the same pay, then please also return the confirmation for this.

...

If, after careful consideration of the final proposals set out in our second letter, any colleague declines to accept the proposed new terms, then the new grading structure will be applied from the implementation date of **1 January 2022** but pay will be maintained at the existing level on a reserved-rights basis.

However, we are very much seeking to progress by voluntary agreement with each individual given that for the majority of colleagues there will either be an increase in pay or an unconsolidated lump sum payment, or no impact with no pay reduction. We are particularly keen to bring colleagues with us in modernising our pay and grading arrangements.”

14. So, all put back by a period of weeks. Should be January.
15. That last paragraph shows that a few people might be getting less under the new arrangements, underlining the need for agreement. Read as a whole it is clear that these were proposals, with a second letter to follow, after which the individual needed to agree the new terms, hopefully from 1 January 2022.
16. There was then an Appendix to this letter. It set out Miss Randall’s pay details in the form of a table, together with boxes for the Estimated Pay Arrears – which were £0 – and “Estimated Non-consolidation One Off Payment (Gross) of £525.
17. There was then some further explanation which stated:

Your pay is between 105% to 115% of the proposed midpoint for your grade, as such your salary remains unchanged, however your pay will continue be reviewed on 1 July each year with any uplift being determined by Homes England taking into account any applicable wider public sector pay remits at that time. You will receive a one off non-consolidated payment of up to £525 in respect of the 1 July 2020 pay review. If you are part time this payment will be pro rata’d based on your FTE.

18. Although it says “You will receive a one off non-consolidated payment of up to £525 in respect of the 1 July 2020 pay review.” But that has to be seen in context. The letter as a whole does not say that she would receive that bonus. It needed her agreement, and the process would take longer. The fact that it was connected with the July 2020 pay review did not mean that it was money that was already earned either. The letter as a whole makes clear that the bonus and (for some) the extra pay, were all related to this major renegotiation. Those who signed up to it would have all their backpay. But it still needed agreement.
19. Given the timescale and the need for further agreement, there is a strong implication that all this was meant for those who were still in the business at the time that agreement was needed. It would be unusual for ex-employees to be asked to give agreement to a retrospective pay rise. There would be no reason for the company to reward or incentivise those who had left, and they would usually already have received their P45s, confirming to HMRC and future employers the total amount they had earned in that employment.
20. Complicated by her performance bonus. For year to April 21. Earned. Told she would not get this, but she did. Not connected but confusing. One is in respect of past performance, and so earned, the other for pay rises going forward.
21. Some further clarity was achieved with a consultation document issued on 27 October. This stated:

Will people who have left Homes England receive the July 2020 pay review?

The July 2020 pay review is linked to the pay and grading changes, and the implementation date for the review is 1 January 2022. Following consultation, colleagues will be asked to voluntarily accept the new pay arrangements, including the pay review, in letters planned to go out w/c 8 November. Any colleague who signs to accept the new arrangements when they receive their letter in November, and prior to their leaving date, will receive any money to which they are entitled under the pay and grading review.

22. Hence, it would apply to those who were still with the Agency to give their agreement. Arguably that was a generous measure. Someone on their last day could confirm agreement and still get their bonus etc. This would then be included on their P45, so it was also a viable arrangement.
23. The day before this, in response to a direct query from Miss Randall, she received an email from the Payroll and Grading Team setting out again the arrangements and quoting from the FAQ document which was being published that day. This set out more detailed eligibility criteria. The relevant point was this:

“you are employed at date of payment (date of payment to be confirmed)”

24. There is an inconsistency between the two communications. One says

emphasises the date of payment and the other the date of the agreement. Later, Miss Randall had another email from a Mr Donovan, Lead Consultant, Pay and Reward, to say that the cut off date would be 31 December, but Miss Randall had left long before that.

- 25. Whether the correct date was the date of agreement or the date of payment, it is clear that agreement was needed and that had not been provided by the time Miss Randall left on 5 November 2021. On that basis therefore I have to find that there was no agreement that the bonus would be paid regardless of Miss Randall's departure, and so the claim must be dismissed.
- 26. Bonuses are often used to reward loyalty so it is quite common to see rules that only employees with the company on a certain date are eligible. There is nothing wrong in that approach. The question in each case is simply what the rules of the scheme are, not whether it is harsh for an employee who left too soon.
- 27. In **Locke v Candy and Candy Ltd** 2011 ICR 769, CA, the Court of Appeal dealt with a case where an employee was dismissed with payment in lieu of notice (PILON), i.e. he was told to go immediately and was paid for his notice period in a lump sum. He was held not to be entitled to a contractual bonus even though he would have had it if he had worked his notice. So the question here is what was said or promised.
- 28. No question of deliberate dragging of feet here to avoid the bonus. Key thing is that there was no definite promise to C before she gave in her notice or agreed a shorter notice that she would receive this bonus. It was her assumption or expectation. Understandable, but it did not crystallise into a legal obligation at any point.

Employment Judge Fowell

Date 27 July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....27 July 2022.....

.....

FOR THE TRIBUNAL OFFICE