



EMPLOYMENT TRIBUNALS

Claimant: Mr S Sweeney

Respondent: Synenergy Logistics Limited

Heard at: By CVP at Midlands West Employment Tribunal

On: 15 September 2022

Before: Employment Judge Platt sitting alone

Representation

Claimant: In person

Respondent: Mr Sutton of Peninsula

REMEDY JUDGMENT

The Respondent shall pay compensation to the Claimant for unfair dismissal and unlawful deductions from wages as follows:

- a. A basic award for unfair dismissal of **£3,228.00**. This sum falls under section 401 of ITEPA 2003.
- b. A gross sum of one month's notice pay of **£5,416.66** (subject to deductions for income tax and national insurance).
- c. A compensatory award for unfair dismissal (including loss of statutory rights) of the sum of **£65,000.00** being 52 weeks' gross pay. This sum falls under section 401 of ITEPA 2003.
- d. A gross sum of **£57,890.58** (subject to deductions for income tax and national insurance) being the total amount of unlawful deductions made from the Claimant's wages in respect of bonus payments for the months of June – November 2020.

REASONS

Issues

1. The parties agreed that the amount of the basic award payable to the Claimant is £3,228.00. This sum falls under section 401 ITEPA 2003.
2. The parties agreed that the Claimant having been found by the Tribunal to have been constructively dismissed, was owed one month's notice pay under his contract of employment. He resigned from his employment on 16 March 2021 and his one month notice period would have expired on 16 April 2021. This is taxable as earnings pursuant to ITEPA 2003 and the gross sum is £5,416.66.

3. The parties agreed that the compensatory award for unfair dismissal payable to the Claimant is subject to the statutory cap of 52 weeks' gross pay that being the lower amount of 52 weeks' pay (£65,000) or £88,519 pursuant to section 124 of the Employment Rights Act 1996.
4. The Respondent accepted the figures put forward by the Claimant in respect of his losses for 2021/2022 tax year and his future losses for 2022/2023 tax year and accepted that the Claimant had ongoing losses until the end of the 2022/2023 tax year. The Claimant mitigated his losses by £10,972 in 2021/2022 and is projected to mitigate his losses by £10,972 in 2022/2023.
5. Those matters aside the parties agreed that the Claimant's net losses for 2021/2022 (starting from 17 April 2021) and 2022/2023 exceeded the statutory cap of £65,000 and thus the compensatory award is capped at that sum. This sum falls under section 401 ITEPA 2003.
6. The principal issue for the Tribunal to determine was the amount of the bonus payments that should have been paid to the Claimant for June – November 2020 based on the total sales to Amazon for ad hoc works. The amount of ad hoc costs for that period were £663,500. The Claimant asserted that he was owed £83,463: £69,588 being the amount based on total ad hoc work income for the period and £13,875 based on 8 launch sites and 4 upgrade sites.
7. The Respondent's position was that the Claimant is owed £57,300.30. Its position was that the profits for the ad hoc works were less than the Claimant asserted because it was never paid for the 8 launch sites and 4 upgrade sites. It was accepted that ad hoc costs it presented to the Tribunal needed to be adjusted by £6,650. The Respondent's position was that pension contributions, national insurance and factoring costs should be deducted from the bonus pool. The Claimant disputed that pension contributions and factoring costs were deductible.
8. The main evidential matters the Tribunal needed to determine were the correct amount of the bonus pool and as part of that whether pension contributions and factoring costs should be deducted from the profits to give the bonus pool (of which it was agreed the Claimant was then entitled to 25%).
9. The Claimant accepted that it had been agreed that deductions of 13.7% for national insurance would be made to take account of the "full cost" of the bonus.
10. It was agreed that the Claimant had already received £12,286.86 in bonus payments and therefore credit should be given for this.

Procedure

11. The Tribunal had made Case Management Orders for the Remedy Hearing which were sent to the parties on 18 August 2022. The Claimant had complied with the Tribunal's Orders. The Respondent did not provide a Counter Schedule of Loss or List of Issues as ordered by the Tribunal.
12. The Respondent's previous representative Mr Williams gave late notice to a colleague that he could no longer conduct the Remedy Hearing and Mr Sutton therefore represented the Respondent. Mr Sutton was given time by the Tribunal to take instructions and familiarise himself with the relevant issues.

13. The Tribunal was provided with a witness statement with documents appended to it from the Respondent comprising 25 pages. The Claimant provided an updated Schedule of Loss, a witness statement and 8 attachments.
14. The Claimant gave evidence to the Tribunal and Tracey Hargreaves gave evidence for the Respondent.

Findings of fact

15. Mrs Hargreaves gave evidence about how the bonus pool was calculated. Her evidence was that during the period June to November 2020 the total sales for Amazon ad hoc works were £988,772, less factoring costs of £17,800 and costs associated with the projects of £670,000 (ad hoc project costs). These figures were referred to on an MS Excel spreadsheet called Amazon Works June 2020 – November 2020. The most useful tab of the spreadsheet was the “income per xero” tab that had been prepared by Mrs Hargreaves and showed the workings arrived at.
16. The Claimant took issue with the deduction of factoring costs from the bonus pool. He also argued that the total sales figure was inaccurate because it did not include 4 launch sites and 8 upgrade sites and that some of the costs associated with the projects should not have been offset because they were in fact contracted costs, not ad hoc project costs.
17. Mrs Hargreaves accepted in her evidence that some of the ad hoc projects costs should not have been included and she discounted £6,650 of these costs from the project costs. There was insufficient time to work through each of the project costs which the Claimant took issue with and determine which were ad hoc costs and which were contracted costs. Mrs Hargreaves’ evidence was that this categorisation was made by the Respondent’s Finance Team based on information given by the Claimant and Mr Brough at the time based on the applicable contractual arrangements in place. The Tribunal accepted this evidence. The Tribunal finds that the project costs were £663,350 not £670,000 as originally asserted by Mrs Hargreaves. There was insufficient further evidence to determine whether any other ad hoc costs had been allocated incorrectly.
18. The Claimant’s position was that £111,000 worth of work should have been invoiced in respect of 8 launch sites and 4 upgrade sites. Mrs Hargreaves’ evidence was that these costs had not been invoiced to Amazon. Based on her oral evidence and the spreadsheet Amazon Works June 2020 – November 2020 the Tribunal accepted this position. The Claimant conceded that there was a degree of speculation on his part around these figures and that he would accept 50% of these costs had been invoiced – i.e. £55,000. The Tribunal accepted Mrs Hargreaves evidence in relation to whether these costs had been invoiced and paid by the customer and acknowledged the Claimant’s admission around the speculative nature of his figures. It was therefore accepted by the Tribunal that the correct figure for the total sales was £988,772.
19. Mrs Hargreaves’ evidence was that it was agreed between the parties that factoring costs would be deducted from the bonus pool. The Claimant’s evidence was that this was never agreed. The Claimant’s contract of employment which included a clause setting out his entitlement to bonus makes no reference to factoring costs and the Tribunal was not presented with any documentary evidence to substantiate that this had been agreed. The Tribunal finds that it was not agreed

that factoring costs would be deducted. The onus is on the Respondent to show that it was entitled to make this deduction and it has not done so.

20. Mrs Hargreaves' evidence was that pension contributions would be deducted from the bonus pool at a rate of 8% to reflect the true cost to the business. The Claimant's evidence was this had never been agreed. He had never been a member of the Respondent's pension scheme having opted out of it and was in receipt of a military pension. His position was that he did not agree that this should be factored into the calculation of the bonus pool and there was no reason why he would have done so. The Claimant's evidence is accepted: if he was not a member of the pension scheme then pension contributions would not represent a cost to the business which should have been taken into account in respect of his bonus. The burden is on the Respondent to show that it was entitled to make the deduction and it has not done so. The Tribunal finds this amount should not be deducted from the bonus pool.

Law

21. Section 13 of the Employment Rights Act 1996 sets out the right not to suffer unlawful deductions. Section 13 (3) sets out that where an amount is less than the total amount of the wages properly payable the amount of the deficiency will be treated as a deduction made by the employer. The Tribunal must determine the amount of the bonus properly payable to the Claimant for the period June – November 2020.

Conclusions

22. The basic award payable to the Claimant for unfair dismissal is £3,228.00. This sum falls under section 401 ITEPA 2003.
23. The Claimant is owed one month's notice pay under his contract of employment which is a gross sum of £5,416.66 (subject to deductions for income tax and National Insurance).
24. The compensatory award for unfair dismissal payable to the Claimant is the sum of £65,000.00 that being the lower amount of 52 weeks' gross pay (£65,000) or £88,519 pursuant to section 124 of the Employment Rights Act 1996. This sum falls under section 401 ITEPA 2003.
25. In respect of the unlawful deductions made from the Claimant's wages, the Tribunal finds that the amount of the total sales to Amazon for ad hoc works during the period June to November 2020 was £988,772. The amount of ad hoc costs for that period were £663,500.
26. There was no agreement between the parties that factoring costs would be deducted from the bonus pool or that 8% pension contributions would be deducted from the bonus pool. The parties agreed that a deduction of 13.7% would be made from the bonus pool to account for the cost of National Insurance.
27. The correct amount of the bonus pool is $£988,772 - £663,500 = £325,272$ minus $£44,562.26$ (13.7% of $£325,272$) = $£280,709.74$
28. It was agreed that the Claimant was entitled to 25% of the bonus pool which is a sum of $£70,177.44$ ($£280,709.74 \times 25\%$).

29. The Claimant has already been paid £12,286.86 and is therefore entitled to be paid the gross sum of £57,890.58 (subject to deductions for income tax and National Insurance) in respect of unpaid bonus for the period June – November 2020.

Employment Judge Platt

Date 5 October 2022