EMPLOYMENT TRIBUNALS

Claimant: **Miss V Leachman**

Respondent: **Gloucestershire County Council**

Heard at: Bristol (by video) **On:** 23 December 2022

Before: Employment Judge C H O'Rourke

Appearances
For the Claimants: Ms J Millar-Lewis – support person
For the Respondent: Ms C Ibbotson - counsel

RESERVED JUDGMENT

The Respondent made an unlawful deduction of £1000 from the Claimant's wages and is ordered to pay the Claimant that sum.

REASONS

Background and Issues

1. The Claimant is employed by the Respondent as a Child Protection Chair, her employment having commenced in January 2019.

2. It is not in dispute that the Respondent withheld a 'retention payment' of £1000 from the Claimant, due to be paid in April 2022.

3. Nor is it in dispute that in November 2021, the Claimant was the subject of formal performance management, having had a warning letter place on her file, in force for twelve months [73].

4. As a consequence, the Claimant brings a claim of unlawful deduction from wages.

5. The issues are as follows:

a. The Claimant asserts that she is contractually entitled to that payment and therefore to withhold it is an unlawful deduction from wages;

b. The Respondent contends that the payment is discretionary, not contractual but that even if it was, it can be withheld, in the event of formal performance management, which is the case here.

The Law

6. Section 13 of the Employment Rights Act 1996 ('ERA') states the following:

Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

7. Section 27 ERA defines 'wages' as follows:

Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

8. Ms Ibbotson referred me to the following authorities:

a. In **New Century Cleaning Co Ltd v Church [2000] IRLR 27, CA**, the majority of the Court of Appeal took a restrictive approach to the

definition of wages properly payable and held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition. Its reasoning suggests that unless a worker can show some other legal entitlement to the non-contractual discretionary payment, the worker will be unable to bring a claim under s.13 in respect of that payment.

b. In **Park Cakes Ltd v Shumba and ors [2013] IRLR 800, CA**, the Court clarified that, when Lord Coulsfield in *Quinn and ors v Calder Industrial Materials Ltd* stated that the crucial question is whether the circumstances support the inference that the employer intended to be contractually bound, he was referring to the employer's intention as objectively evinced. In other words, what matters is not what the employer actually intended but what intention its words or conduct would reasonably communicate to the employees. Similarly, when considering whether a payment was made 'automatically', what matters is not whether the company, internally, believed that it was making a unilateral choice whether to grant the benefit or make the payment but whether that was what should reasonably have been understood by the employees. Underhill LJ went on to list some of the circumstances that will typically be relevant in an enhanced redundancy payment case when considering what, objectively, employees should reasonably have understood. These include the number of occasions on which, and the length of the period over which, the benefits have been paid; whether the benefits are always the same; the extent to which the benefits have been publicised; how the terms are described; what is said in the express contract; and the equivocalness of the employer's actions.

The Facts

9. I heard evidence from the Claimant and on behalf of the Respondent from Ms Judith Taylor, an HR Adviser.

10. The Claimant's evidence was as follows:

a. She applied for the position in September 2018, having seen it advertised on the Respondent's website [35]. Under '*pay and reward'* the advertisement stated that '*in addition to your salary Gloucestershire are offering Advanced Practitioners* (which included the Claimant) *a welcome payment of £3000; relocation package of £8000; Retention payments of £2000 …'*. (It is common ground that these retention payments were paid in sums of £1000, twice a year.)

b. On 22 October 2018, she received a letter and contract from the Respondent, offering her the role [38]. She agreed that while these documents did refer to other types of payment, such as the 'welcome payment', basic salary and overtime, there was no reference in this documentation to the retention payment.

c. When asked how she knew of the retention payment, she said that she saw it in the advertisement and that it was also in the 'welcome pack'.

(The Claimant was unable to refer to this document at that point, having failed to adequately familiarise herself with the joint bundle, but did refer to it stating that '*the rewards don't stop once you start'*. Such a phrase is used in an '*Our Offer'* document of the Respondent's [76], which states, under the heading 'Retention Payment' that '*The rewards don't stop once you start. We want to promote a stable workforce and believe that your ongoing commitment to the children and families in Gloucestershire should also be rewarded. Stay with us, and once eligible we will pay you a further £2000 per annum as a thank you.'* She also said that she'd been told of it by her line manager, on 2 January 2019. She said that she was told that she would get it if she met the '*eligibility requirements of being a social worker'* (in other words, simply retaining that qualification). She denied that she'd also been told about the requirement that she not resign, or be subject to performance measures, or disciplinary warnings. When challenged as to how, after four years, she could be so certain, she said that she remembered the conversation.

d. She agreed that the 'Principal Statement of Particulars of Employment' [56] also made no reference to the retention payment [56], stating 'N/A' under 'additional allowances'.

e. It was put to her that the employee handbook also made no mention of the retention payment and she said that she hadn't looked (and to which document I was not in any event referred).

f. She was referred to a document, headed '*Child Protection Conference Chair (Children's Social Work)'* dated January 2020 [43], which made reference to various allowances (some asterisked), to include the retention payment, with the asterisk being explained as '*all our pay and reward scheme offers are subject to meeting the eligibility criteria and are non-contractual'*. She had herself provided that document, as part of disclosure for these proceedings and said that she had obtained it from a friend, who had applied for a similar role and who had provided it to her on 19 April 2022, which was the first time she'd seen it.

g. She agreed that following the issue of her capability warning, on 25 November 2021, she had made enquiries about the retention payment to her manager, stating '*please can you confirm with me whether the decision today affects my retention payment …'.* She was informed that it would be affected, and she responded '*… so that I am clear, will my retention payment be withdrawn whilst the formal plan is in place … oppose to my retention being withdrawn for the period that formally being on record until 24.11.22?*' [70]. When it was suggested to her that she had asked this question because she knew her entitlement would be affected by the warning, she said '*No, I didn't know about it'*. She was further challenged on this point, it being pointed out that she was not arguing that she should, nonetheless, be paid the retention payment, but was simply querying the length of time she wouldn't receive it for. She said that this was not correct. When it was suggested to her that if she believed that regardless she was entitled to the payment, she would have said so and would have challenged the non-payment, but didn't,

indicating that she knew she had lost the entitlement, she said that she '*could have worded it better'*.

h. She agreed that the initial performance plan was extended from twelve weeks to twelve months.

i. It was suggested to her that it was only at the point, in answer to her challenges that HR were saying that they could not locate any written policy in respect of the withholding of the payment that she argued that she should be paid it. She said that that was not how she '*put it'* and that she was entitled to the money, as she'd been previously paid it and there had been no mention in the capability hearing, or the subsequent letter, of her losing it. She said that retention was nothing to do with capability.

11. The Respondent's evidence was as follows:

a. It had identified a shortage of and a need to retain social workers and produced policy documents to that effect, advising that a retention payment be offered [47-54] (referred to also as a 'stability allowance') and referring to two £1000 payments per year, on a temporary basis and subject to review. It recommended that *'the payment will be withheld if the social worker resigns during the six months prior to the payment or if a formal performance plan or disciplinary warning applies'* [53].

b. It was undisputed evidence that in the two-year period to May 2022, two other employees had had retention/stability payments withheld.

c. Documents in respect of this matter were not held on the 'Staffnet', due to its relevance to only a relatively small number of people, not all employees.

d. On further enquiry, Ms Taylor located the policy document referred to above [47-54], to confirm that her decision was correct. She agreed on further challenge by the Claimant that there was '*no specific policy that covers stability payments, but it is established practice that all discretionary additional payments are subject to satisfactory service'* [90].

e. The Respondent continued to deal with queries from the Claimant, until her commencement of these proceedings.

f. When asked whether the Claimant should have been notified at the point of recruitment as to the policy for non-payment of the retention payment, Mrs Taylor that she would have '*expected that'*, but '*did not know what was communicated to her at the time'*.

g. She said that while she agreed that the non-payment was linked to performance, but despite that it was not referred to in the performance policy, she said that was because the payment only related to certain social workers, whereas the performance policy covered everybody.

Submissions

12. Respondent

    a. Ms Ibbotson referred to her skeleton argument.

    b. The payment is discretionary. There is no contractual entitlement to it and it is not mentioned in the offer letter, or the statutory terms and conditions of employment.

    c. The Respondent's policy document shows the intention of the payment, stating that payment is not automatic and dependent on certain criteria being met.

    d. The Claimant knew that it was discretionary, as otherwise she would never have turned her mind to the length of time it could be withheld, but instead merely demanded payment of it. Her emails [70-71] show her knowledge that while the increment payment was unaffected, the retention payment was. She accepted that decision. It was only when she became aware that the Respondent was having difficulties locating a written policy to support their decision that she started to challenge it. She did know that the payment was discretionary and that she was temporarily no longer eligible for it but was saying the contrary.

    e. The payment is non-contractual, that was communicated to the Claimant and it was not paid to two other employees, in similar circumstances.

    f. If, in the event that the payment is not discretionary, the burden is on the Claimant to show that it can be implied into the contract, by custom and practice, or other mechanism.

13. Claimant. On behalf of the Claimant, Ms Millar-Lewis made the following submissions:

    a. The Claimant was confused between the 'increment' and the 'retention' payments, which she'd not been told were linked to performance. She was merely seeking clarification on this point.

    b. She was not notified at any point, by either HR or her manager as to the restrictions on this payment and therefore knew nothing of it, until it was refused.

Conclusions

14. Implied Term(s)? Are the following implied terms of the Claimant's contract of employment:

    a. That she be paid a twice-annual retention payment of £1000;

    b. That in the event that she be subject to a formal performance procedure, that payment could be withheld?

15. In respect of the term as to payment, I find that that is implied into the contract, for the following reasons:

    a. Applying the guidance in **Shumba**, *'the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are, or should reasonably have been, aware of it.'* In this case, the Respondent communicated the entitlement to the payment in the job advertisement and (I find as a fact) probably in conversations between the Claimant and her manager at the outset of her employment. What was lacking, in terms of communication, was any evidence of direct communication to the Claimant that the payment was 'discretionary', or 'non-contractual'. While it was expressed as such in the policy document, there's no evidence that the Claimant had sight of that until just prior to these proceedings. I don't accept that it is sufficient for the Respondent to argue that because there is no express reference to the payment in the contract that the Claimant should somehow have assumed therefore that the payment was non-contractual.

    b. It was undisputed evidence that, until the decision made in late 2021, the payment, of £1000 on each occasion, had been routinely made to the Claimant, so (I assume, as no evidence was advanced in respect of this issue) on six previous occasions, over the three previous years.

    c. It is correct, as stated that the payment is not referred to in the express contract, but again applying **Shumba**, absence of such reference is not evidence of any inconsistency with the express terms of the contract. The contract does not, for example, say that 'this is your contractually-entitled remuneration – any other payments are discretionary/non-contractual.' (which would render any implied term inconsistent with the express terms). I am conscious too, applying the *contra proferentem* principle that any ambiguity should be interpreted against the drafter of the contract (in this case, the Respondent).

16. In respect of the Respondent's entitlement to withhold that payment, I find that such a term is not implied into the contract, for the following reasons:

    a. There is nothing like sufficient evidence to indicate that the Claimant was '… *or should reasonably have been, aware of it.'* The only such evidence that the Respondent can call upon is its interpretation of the Claimant's queries to her manager at the time she received the warning. The formal communication of the decision to give the Claimant a performance warning was not made until Ms Connolly's letter of 14 December 2021 [72]. That letter refers to Ms Connolly having '*shared verbally'* the outcome decision with the Claimant at the time of the meeting, on 25 November 2021. There was no evidence before me as to what Ms Connolly may have said to the Claimant, but very shortly afterwards (on the same day, at 12.52) the Claimant wrote to her asking as to confirmation as to whether or not the decision affected the retention payment, also stating '*I now know that it does not affect my increment*', but that she had forgotten to ask about the retention payment. While the

Claimant's oral evidence on this point was somewhat confused and she agreed that she '*could have worded'* her email better, I read her email as indicating that she had been told by Ms Connolly either at or following the meeting that her increment payment would be unaffected, but that the Claimant had forgotten, in what no doubt was an upsetting meeting, to ask about the retention payment. It seems perfectly logical to me that having been told that one supplementary payment was unaffected by the decision that she would be prompted then to seek confirmation on the other supplementary payment. I don't view that query as indicating a prior knowledge of any term entitling withholding of the payment that the Respondent now seeks to attribute to the Claimant.

b. The only documented reference to an entitlement to withhold the payment was in the policy document, of which there's no evidence the Claimant had any knowledge of, until just before these proceedings. What instead is documented is that the payment would be of £2000 annually, for the purpose of retention of employees and without any reference to performance issues and that the Claimant was encouraged to '*Stay with us, and once eligible we will pay you a further £2000 per annum as a thank you.'* (with 'eligibility' clearly relating to the holding of a social worker qualification). Indeed, the Respondent's own struggles, at the time, to locate a relevant document, to set out the term they now seek to rely on, indicate the nature of its non-communication of this alleged term to affected employees, including the Claimant.

c. While it was undisputed evidence that two other employees had had the payment withheld, there was no evidence that the Claimant was aware of this fact at the time, thus potentially alerting her to this implied term and indeed this point was not put to her. In fact, it would seem highly likely, in such circumstances that the withholding of such payments would be a confidential matter between employer and employee and not be broadcast to other employees.

17. Clearly, while it could be argued that such a term was eventually communicated to the Claimant at the point of the exchange of emails in late November 2021 and in communications thereafter and that therefore it is now an implied term, it is not the case (applying s.13(2)(b)) that the Respondent had informed her of '*the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on an occasion prior to the employer making the deduction in question.'* While the deduction was not physically made until the following April (when it would otherwise have fallen due), the operative decision to do so was made in late November 2021, at a point, as I have found, when the Claimant had not been notified in writing, prior to that decision being made.

Judgment

18. For these reasons, therefore, I find that the Respondent made an unlawful deduction of £1000 from the Claimant's wages and is ordered to pay the Claimant that sum.

Employment Judge O'Rourke
Date: 28th December 2022

Sent to the parties on
4th January 2023 by Miss J Hopes

FOR THE TRIBUNAL OFFICE