Case No: 2202787/22

EMPLOYMENT TRIBUNALS

Claimant: Mr. Simon Jenner

Respondent: National Grid UK Limited

Heard at: London Central via CVP **On: 11 November 2022**

Before: Employment Judge D Wright (Sitting Alone)

Representation
Claimant: Jesse Crozier, Counsel
Respondent: Nigel Porter, Counsel

JUDGMENT

1. The Respondent has made unlawful deductions from the Claimant's pay.

2. The Respondent is to repay the sum of £170,888.63 to the Claimant.

3. The Respondent is to pay the further sum of £2,300.50 to the Claimant by way of interest.

4. Upon the Respondent informing the Tribunal that they are taking steps to correct the underpayment of tax to HMRC the Claimant has withdrawn his claim for that sum, and it is dismissed. The Tribunal noting that this withdrawal has been made in reliance on the Respondent's representations.

REASONS

1. On the day of the hearing, I informed the parties of my decision as recorded above. I informed them that I would provide full written reasons following the hearing. These are set out below. There has been a delay in providing them as there was some confusion over the claimant requesting the written reasons, shortly followed by an email from the respondent saying they did not require them as they were not going to appeal the decision, leading the Tribunal to mistakenly take the view that they were no longer required.

2. This claim was brought by Mr. Simon Jenner against his former employer, National Grid UK Ltd. Mr. Jenner's employment as a chief information security officer began on 1 March 2019 and ended by way of resignation on 27 February 2022.

3. Both parties were represented by counsel. Mr. Jenner gave evidence and was crossed examined. On behalf of the Respondent, I heard evidence from Mr. Stewart and Miss Jenkins. Miss Jenkins was not cross examined but Mr. Stewart was. I also note that Mr. Stewart gave evidence from the United States of America. I was satisfied that all the relevant procedures had been followed to allow the Tribunal to take evidence from outside of the jurisdiction.

4. Both before and during the hearing the parties worked to narrow the issues between them, making concessions where appropriate. I am grateful to the parties and their legal representatives for the mature and sensible approach taken towards this litigation.

5. It is not disputed that the Respondent withheld £170,888.63 in salary otherwise properly due to the Claimant between October and February 2022. The Respondent says it was entitled to withhold these sums to discharge a debt owed from by operation of a claw-back provision set out in the Offer Letter. The Claimant says the claw-back provision does not apply to the award the Respondent seeks to recover, and the deductions were unlawful.

Background

6. The Claimant was in discussions with the Respondent about potentially joining them, and the terms on which he would be employed, from 2017 onwards. These discussions were conducted through a headhunter and were not continuous as they broke down for a period before restarting again.

7. On 31 January 2019 in the latter stages of negotiations, the Respondent sent to the Claimant (and the Claimant subsequently accepted) the Offer Letter detailing the terms on which he would be employed.

8. The Claimant joined the Respondent as its Chief Information Security Officer on 1 March 2019.

9. On 27 August 2021 the Claimant resigned on notice for health reasons and the Claimant was placed on gardening leave.

10. On 15 September 2021 the Respondent asserted the right to recoup £261,000 from the Claimant upon his resignation. The parties engaged in correspondence regarding the Respondent's entitlement to recoup from September 2021 to February 2022.

11. On 24 September 2021, the Respondent confirmed that it would deduct the sums it alleged were due from the Claimant's salary until termination of his employment.

12. The Claimant's employment ended on 27 February 2022. At the date of termination, the Respondent had withheld £170,888.63 in salary otherwise due to the Claimant.

The Sign-On Award

13. The Claimant's remuneration package was set out in the Offer Letter. The remuneration package included a bespoke sign-on award ('the Sign-On Award') which was recognised to be in acknowledgement of cash bonus

and unvested stock which the Claimant had forfeited upon leaving his prior employment.

14. These two elements were reflected in the Sign-on Award, which was set out in the following terms:

> "Subject to your acceptance of this offer, [the Respondent] will make a cash payment of £472,000 in April 2019 payroll. [The Respondent] will also grant you an award of National Grid Shares to the value of £435,000 which will vest in accordance with the following timeline:
> • 40% of the award will vest in March 2020
> • 60% of the award will vest in March 2021"

15. The Sign-on Award was subject to the following condition, which has been referred to during proceedings as the clawback provision:

> "All sign-on awards are subject to you providing evidence of forfeiture prior to the award being made and to satisfactory performance and your continuous employment with [the Respondent] at the time of award and payment/vesting. Should you resign within 12 months of a payment being made, you will be required to repay the relevant amount."

Contractual Recoupment Provisions

16. The Respondent relies upon Clause 4.6 of the Contract as entitling them to deduct sums due under the Claw Back Provision. Clause 4.6 reads:

> "[The Respondent] reserves the right to recover any overpayment made to you by mistake or through misrepresentation or for any other reason. This will be achieved by giving you reasonable notice at any time during your employment of the amount due for deduction form your salary. Upon termination of your employment [the Respondent] may deduct from your final salary payment, or any other termination payments due, an amount equal to any sums you owe to [the Respondent]."

17. The Claimant accepts that deductions made pursuant to Clause 4.6 (and only where made pursuant to this clause) are excepted deductions for the purposes of s.14(4) of the Employment Rights Act 1996 ('ERA 1996'), namely pursuant to arrangements to which he consented in writing.

The Dispute

18. The dispute in this case largely revolves around how the clawback provision should be interpreted. More specifically:
    a. whether it applies solely to cash payments or if includes awards of shares; and
    b. when does the 12 months start running in relation to the shares. Does it apply to the date of the award being made or the date of vesting?

The Claimant's Case

19. The Claimant says that the Sign-On Award consisted of two distinct elements:
    a. The Payment: the first element constituted a buy-out of the cash element of the Forfeited Benefits which the Claimant would have

been entitled to receive had he remained in his previous employment. This was a lump sum cash payment of £472,000 made to Claimant in April 2019.

b. The Award: the second element constituted a stock award made in lieu of unvested stock foregone by the Claimant upon leaving his former employment. The Award was in a value equivalent to £435,000 of shares which vested according to the staggered schedule set out in the Offer Letter. No cash sums were paid by the Respondent to the Claimant by the Award element.

20. The Claimant contends that reference to resignation "within 12 months of a payment being made" and to having to "repay", on ordinary principles of contractual construction, must relate back only to the Payment and not to the Award element (either the award itself or the relevant vesting date). This is for a variety of reasons.
    a. Firstly, the contract refers to payment/vesting elsewhere in the contract and in the clawback provision only refers to payment. Therefore, it must only relate to the cash payment;
    b. The use of "payment" and "repay" is inapt to apply to either an award of shares or vesting of shares.
    c. No payment was made. Instead, the shares were granted on one day, with them vesting on two different days. As there was no payment, there is no payment date from which the 12 months can be calculated or alternatively it is unclear whether the date should be the award date or the vesting date.
    d. There is no defined value for repayment as the share value is only linked to a cash amount on the day of granting. If they were to be recouped then it is unclear whether the Claimant would be liable to repay the value of the shares at the date of grant, date of vesting, or date of recoupment.
    e. There is no good commercial reason for the Respondent's construction: Claw back is unnecessary and otiose in circumstances where the award of and vesting of shares is subject to its own, discrete rules, including the vesting schedule set out in the Sign On Award and separately the Respondent's retention plan rules. Insofar as the commercial purpose of the Claw Back Provision is to aid retention, this purpose is adequately and fully accomplished by the vesting schedule. Consequently, it is only the Payment which requires a claw-back option in the event of early departure.
    f. The Respondent's construction is based on inadmissible/irrelevant evidence: The Respondent's construction relies heavily on Terms Sheets prepared internally for prior occasions on which they were considering hiring the Claimant. These documents are inadmissible and, in any event, irrelevant. To the extent that the Terms Sheets are evidence of prior negotiations, or at least the position adopted by the Respondent in prior negotiations, these are inadmissible as an aid to construction. Moreover, there is no evidence that the Claimant was made aware of the Terms Sheets – and therefore even if admissible, the Term Sheets are no guide to what the parties would reasonably have understood the Offer Letter to mean. Although it appears that the Terms Sheets may have been sent to the headhunter who was acting as an intermediary the Claimant denies having received them. The Claimant avers that he carried out a search of his email inbox

and could find no record of them

g. Finally, should I find that the clause is ambiguous, the Claimant relies on the doctrine of *contra proferentem* to say that the ambiguity should be resolved in his favour.

The Respondent's Case

21. The Respondent's case was that the cash payment and the shares were both recoverable under the contract. Mr. Porter directed me to a number of authorities on contractual interpretation which I do not copy out again here, but which I have taken into account when reaching my decision.

22. They say the sign on award consisted of three elements:
    a. A cash payment of £472,000 in April 2019
    b. An award of national grid shares to the value of £435,000 which would vest on the following timescale:
        i. 40% of the award in March 2020
        ii. 60% of the award in March 2021

23. The point out that the share elements are directly and expressly linked to a cash value. As such they are a "payment" for the purpose of clawback.

24. They say that had this been intended to only apply to the cash payment the provision would have been written more simply and explicitly referred to the cash payment of £472,000 made in April 2019. Therefore, it must apply to the whole thing.

25. The Respondent relies on the fact that the language uses the plural "awards" when referring to the cash bonus and unvested stock.

26. They rely on the fact that this was a retention scheme, and so it would be unreasonable to prevent clawback, although I note that the retention scheme here was that the shares, although granted, were not vested until a later date, therefore requiring the claimant to remain in employment for a period of time.

27. They also relied upon pre-contractual discussions, including those discussions which initially led to the claimant declining to take up employment. I can give very little, if any weight to these discussions.

Findings

28. Looking at the wording of the clause in question, which I must say has been slightly clumsily drafted and is a little bit ambiguous, I prefer the claimant's submissions on how I should interpret it.

29. I take into account the principle of *contra proferentem*, but I also have to look at the meaning of the words in there. Where possible I give them their normal meaning, although I also take into consideration the context.

30. I find that the varying use of awards, payments/vesting and payment within that clause being ambiguous, should be resolved in the claimant's favour.

31. In particular I note that the provision which says:

> "*All sign-on awards are subject to you providing evidence of forfeiture prior to the award being made and to satisfactory performance and your continuous employment with the Company at the time of award and payment/vesting. Should you resign within 12 months of a payment being made, you will be required to repay the relevant amount."*

could be taken as being two clauses rather than one. The first being a requirement to provide evidence of forfeiture prior to becoming eligible to an award. However, the change from "award" to "payment" in relation to the clawback element, I find, means that it only applies to cash payments.

32. I find that these awards were primarily an inducement for the claimant to leave his previous employment, where he would have been entitled to various share awards and cash payments, and join the respondent. I find that the claimant would not have given up guaranteed awards at his previous role with the consequences that the respondent seeks. I find that the primary purpose here was recruitment, and not retention. The retention element was covered by the delayed vesting of shares, and clawback provisions on the cash payment.

33. Therefore, I find, for the reasons put forward by the claimant, that the clawback provisions did not apply to the grant of shares.

34. If, however, I am wrong on that point, and the respondent's interpretation is correct, that the claw back provisions apply to the shares as well. In that case I would find that the relevant date for starting the clock for the 12 months would be the date that the shares were granted and not the date that they vested.

35. This, I would find, would be consistent with the document attached to the offer letter called "Proposed Buyout Terms". In particular, Note Three which talks about repayment being possible if you leave within one year of employment.

36. Furthermore, if one were to take the date of vesting as starting the clock for the 12-month period, there is the difficulty as to what the actual value of the award would be at the point that the claimant would have to make a repayment. The only date where there is a nominal value attached to these shares is the date of granting. The agreement was that he would be granted £435,000 worth of shares.

37. The hypothetical situations set out by Mr. Crozier are somewhat extreme, but did have some merit in principle, in that the value of shares go up and down over time and had the drafter of this clause intended to tie the value to the date of the vesting then they would have explicitly said that. As it stands it would be manifestly unfair to tie the value of the granted shares to the date of granting, but to start the clock at the later date for the purpose of repayment. It may be that by the date of vesting the shares had gone down in value and therefore the claimant would be on the hook for a value below that which he was actually given.

38. If we are tying value of the shares to the date of granting, then all rules of fairness and ordinary interpretation as to how a reasonable person would see this, would say that the relevant period would start at the date they are

granted.

39. Therefore, even if I'm wrong on preferring the claimant's interpretation, and the respondent is correct as to the extent of the clawback provisions, I would find that the clawback was not available to them in any event.

40. As such the Respondent has made an unlawful deduction from the Claimant's pay.

Employment Judge **D Wright**

Date__19/06/2023_____

JUDGMENT SENT TO THE PARTIES ON

.21/06/2023

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