



EMPLOYMENT TRIBUNALS

Claimant: Mr D Thorpe
Respondent: Apex Evolution Limited
Heard at: East London Hearing Centre (by video)
On: 20 July 2023
Before: Employment Judge P Klimov (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Ms L Moor (HR Focus)

JUDGMENT

1. The claimant's claim is not well-founded and is dismissed.

REASONS

1. By a claim form dated 9 January 2023 the claimant brought complaints of unlawful deduction from wages and a breach of contract. The claimant claims that the respondent has failed to pay him a bonus for his work on various projects in the total sum of £15,000.
2. On 2 March 2023, the respondent presented a response denying the claim on the grounds that the claimant had no legal entitlement to any bonus, as all bonus payments under the terms of his contract of employment with the respondent were discretionary, and in any event, the claimant had been paid more than what on the claimant's case the bonus payments should have been.
3. On 3 March 2023, the Tribunal listed the claim for a final hearing on 3 July 2023 (subsequently postponed until 20 July 2023) and made various case management orders, including:

“Send us:

- A copy of all documents and witness statements upon which you intend to rely in the hearing.*
- These must be -in electronic format; sent by 4pm seven days before the date listed for the hearing; copied to the other party”.*

4. At the hearing today the claimant represented himself and Ms Moor appeared for the respondent.

5. I was referred to various documents in the bundle of 81 electronic pages. The claimant did not submit a written witness statement. When I asked him about that, he said that he wanted his email to the Tribunal of 7 July 2023 at 11:27am to stand as his evidence to the Tribunal. The respondent did not raise an objection to that. I accepted that email as the claimant’s evidence in chief. The claimant was sworn in and cross-examined by Ms Moor.

6. There was one witness for the respondent, Mr Adam Brodie, the Managing Director of the respondent, who had prepared for the hearing a short witness statement. Mr Brodie was sworn in, however, the claimant said that he did not wish to cross-examine Mr Brodie on his evidence. I explained to the claimant that it meant that I would accept Mr Brodie’s evidence as stated in his witness statement. The claimant said that he understood that.

7. The hearing started late, at 10:45am, because a wrong CVP link had been emailed by the Tribunal to the respondent, for which I apologise to the parties on behalf of the Tribunal.

Findings of Fact

8. The respondent is a small technology services company specialising in IT asset disposal. The claimant was employed by the respondent as a Project Manager from 9 August 2021 until 11 November 2022, when he left the respondent by reason of resignation. The claimant was the only employee in that role.

9. The claimant was paid a base salary of £38,000, increased in January 2022 to £45,000 per annum.

10. The claimant’s contract of employment contained the following clause:

“Any incentive scheme will be as determined by the company and may vary from time to time. Commission or bonus schemes do not form part of the contract and are at the discretion of the employer. Payments under such schemes will only be applicable if the member of staff is in employment at the time payment is due.”

11. In cross-examination the claimant accepted “100%” that: (i) this term formed part of his contract of employment, (ii) it meant that it was entirely within the respondent’s

discretion whether or not to pay him a bonus, and (iii) to be eligible to receive a bonus the claimant had to be in employment of the respondent at the time the bonus payment became due.

12. During his employment for the respondent the claimant worked on various projects. The projects generated profitable revenue for the respondent. The claimant discussed with his managers that he should be paid a bonus upon completion of the projects as a percentage of profit received by the respondent from the projects. The figure of between 1.5% and 3% of the generated profit was discussed.

13. The claimant was told by his managers that the respondent intended to set up a bonus scheme for the claimant. However, by the time of the claimant's departure no bonus scheme rules for the claimant had been put in place. Instead, the respondent told the claimant that he would be paid a discretionary bonus on completion of large projects.

14. The respondent paid to the claimant the following bonus payments: £1,140 in October 2021, £1,099.44 in November 2021, £4,242.80 in March 2022 and £2,014 in November 2022. The last payment was made by the respondent, as a goodwill gesture, calculated on an estimate of the profits to date, despite the project had not been completed by the termination date of the claimant's employment.

15. The total profit generated by the respondent from the projects on which the claimant worked since November 2021 was: £167,220.53. 1.5% of this figure is £2,508.31 and 3% is £5,016.62.

The Law

Unlawful deduction from wages

16. Section 13 of the Employment Rights Act 1996 ("**ERA**") prohibits an employer from making a deduction from wages of a worker employed by him, except when certain conditions are met. A deduction is a complete or partial failure to pay what was *properly payable* on a particular occasion (section 13(3) ERA).

17. The definition of "wages" is found in s.27 ERA, which reads:

"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,
[...]"

18. In *New Century Cleaning Co Ltd v Church* 2000 IRLR 27, CA the Court of Appeal held that in order for a payment to fall within the definition of wages properly payable, there must be some legal (although not necessarily contractual) entitlement to the sum in question.

19. S.27(3) of the ERA states:

“(3) *Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part –*

(a) *be treated as wages of the worker, and*

(b) *be treated as payable to him as such on the day on which the payment is made.”*

20. The effect of these provisions is that bonuses to which a worker has no legal entitlement do not fall within the definition of wages under S.27(1)(a) ERA, however, a non-contractual/discretionary bonus that has been paid to the worker will be treated as wages for the purposes of S.27 ERA and will thereby be ‘*deemed to have been a legal entitlement*’ - see *New Century Cleaning Co Ltd v Church*.

21. Discretionary bonuses may come with the definition of wages under s.27(3) ERA where the employer told the worker that he would be paid a bonus on certain terms – see *Farrell Matthews and Weir v Hansen* 2005 ICR 509, EAT at [40].

Breach of Contract

22. It is trite law that for a legal contract to come into existence, there must be both an agreement on essential terms with sufficient certainty to be enforceable and an intention to create legal relations (see, for example, *Baird Textile Holdings Limited v Marks & Spencer Plc* [2001] EWCA CIV 274). To form an agreement there must be an offer and acceptance. In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some “consideration”. If these elements are present, a valid contract can be made orally, in writing, arise from the parties’ conduct, or by a combination of these forms.

Analysis and Conclusion

23. The claimant claim is misconceived.

24. Having accepted the respondent’s case that:

- (i) any bonus payable to the claimant was non-contractual and discretionary,
- (ii) he had no entitlement to receive any bonus if he was not in the respondent’s employment when the bonus payment became due, i.e., after the project in question had been completed and the respondent had decided to award the claimant a discretionary bonus for that project, and
- (iii) the bonus scheme that he had been asking the respondent to set up for him had not been set up before his departure, and hence any bonus he was paid or promised to be paid was subject to the terms of his employment contract, the claimant essentially accepted that he

had no legal entitlement to any bonus payment. That by itself is sufficient to defeat his claim.

25. Furthermore, the claimant was unable to explain on what basis he claims the respondent owes him £15,000 in bonus payments. The claimant accepts that the respondent paid him several bonus payments, and he takes no issue with that. He said it was not about what he had been paid, but about what he had not been paid.

26. However, the respondent's evidence, which the claimant chose not to challenge, is that the total sum paid to the claimant by way of bonus payments was more than 3% of the total profits generated by the claimant's project. The claimant accepts, and indeed it is part of his pleaded case, that he was verbally told by the respondent's senior management that his *"bonus would be between 1.5 and 3% of the total profitability of all the projects [he] ran."*

27. The claimant said in evidence that he thought the profits were far higher than what the respondent presented in evidence. He gave the figure of £1,000,000. However, he presented no evidence to support that assertion. On the contrary, the claimant accepted in cross-examination, and repeated the same in his closing submissions, that the £1M figure could have been mentioned in conversations about these projects simply as "bravado" or "bragging", and not as the real profitability figure. The claimant did not argue that he was entitled to a bonus calculated by reference to "bravado profits". Any such argument would have been nonsensical and doomed to fail. The claimant also accepted that he had no evidence to challenge the respondent's calculations.

28. Therefore, taking the claimant's case at its highest and accepting, for the sake of argument, that the claimant was promised by the respondent that under the terms of a bonus scheme, to be set up for him, he would be paid between 1.5 and 3% of profits generated by the projects on which he worked, and that promise created some kind of a collateral and legally binding contract between the parties, which terms disappplied or overrode the clause in the claimant's employment contract stating that bonus schemes are at the discretion of the respondent, all that means is that the claimant would be entitled to claim damages for breach of contract, namely for the respondent's failure to set up a bonus scheme on those terms.

29. Such damages would be calculated on the basis to put the claimant in the position he would have been had the respondent performed the collateral contract, i.e. had the respondent set up a bonus scheme for the claimant, under which the claimant would have been entitled to receive between 1.5 and 3% of the profits generated by his projects.

30. However, on the evidence accepted by the claimant that amount would have been less than what the claimant was actually paid by the respondent by way of discretionary bonuses for these projects.

31. In short, whichever way one looks at the claimant's claim it fails on the facts, and it fails even if one takes the claimant's case at its highest. The claimant has totally failed to substantiate his claim that the respondent owes him £15,000 in bonus

payments, not only as a matter of law and evidence, but also as a matter of simple logic.

32. It is very surprising that after the fallacy of the claimant's claim was laid bare at the hearing, and while accepting that his claim for £15,000 was not supported by any evidence, the claimant still concluded his submissions by saying that he believed his claim was valid.

33. For the reasons explained above, I find that it is not. The claim fails and is dismissed.

34. The following does not form part of the reasons for my judgment.

35. At the end of the hearing Ms Moor indicated that the respondent would be making an application for a costs order. I explained to the claimant what that meant and the relevant provisions of the Employment Tribunals Rules of Procedure under which the respondent's application will be decided, and in particular that if the claimant wished the Tribunal, when deciding the application, to take into account his ability to pay, he should send to the Tribunal and the respondent relevant evidence of his financial situation, including his income and outgoings, prospective income, capital, debts, and such other information as he considers relevant for the Tribunal to have regard to.

36. The claimant is referred to Rules 74 – 84 of the Employment Tribunals Rules of Procedure: <https://www.gov.uk/government/publications/employment-tribunal-procedure-rules> and is encouraged to seek legal advice.

37. To ensure that I receive the parties' correspondence in relation to the costs order application promptly the parties are requested to mark it: "**For attention of EJ Klimov**".

Employment Judge P Klimov
Date: 20 July 2023