



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Dr R Homeny

Independent Vetcare Limited

Heard by: CVP

On: 18 July 2023

Before: Employment Judge Adkin (sitting alone)

Representations

For the Claimant: Claimant in person

For the Respondent: Mr S Harding, of Counsel

REASONS

1. The Respondent requested written reasons following an oral judgment given in the hearing on 18 July 2023 dismissing the claim.

Summary of claim

2. This is a claim brought as an unlawful deduction claim. A dispute regarding a bonus broadly speaking from September 2021 to September 2022, in essence the Claimants claim is that she should have been paid 100% of the maximum bonus entitlement whereas she was paid 50%. I will come to the figures in the reasons below.

Findings of Fact

3. The Claimant's employment commenced on 17 September 2018. At that stage her title was Commercial Support Manager and she was paid £40,000 p.a.

4. Clause 5.4 of that contract provided that she was eligible for a bonus of up to 10% of her gross salary. That clause contained these words

“all of our bonus schemes are annual discretionary and non contractual. The terms and objectives of the bonus will be determined each year”.

5. There was a letter sent to the Claimant on 13 December 2019 which confirmed that the bonus scheme is 10% of her salary and the bonus had been calculated by reference to a mixture of business level and individual performance and for that year the Claimant was given the maximum bonus of 10%.

2020

6. On 17 January 2020 the Claimant received a letter notifying her that salary was increased to £42,000, bonus scheme details were provided for the period 1 October 2019 to 30 September 2020 [page 84] in a one page document headed Bonus Scheme. The bonus broke down in this way: 4% of salary for matters relating to a compliance rate defined, 4% of salary for practice purchase analysis improvement by 5% and 2% salary by reference to the EBITDA of the UK business, i.e. a profitability performance metric for the UK business. The following information is given

“Please note: this bonus scheme is entirely discretionary it does not form part of your contractual terms and conditions of employment and does not form part of pensionable pay. Entitlement to participate in the scheme this year does not necessarily mean that you will be eligible to participate in any future schemes, no awards of bonus payments are guaranteed but are based on a participant’s achievements of this specified target. This scheme may be withdrawn, changed, or cancelled in future years including the basis on which any bonus calculation is made. If IVC Evidensia decide to continue with any bonus arrangement in future years for which you are eligible to participate details will be notified to you in writing.”

7. On 21 May 2020 the terms of the bonus scheme were set out by letter of the period 1 May 2020 to 30 September 2020 in very similar at page 85:

“lease note this bonus scheme is entirely discretionary it does not form part of your contractual terms and conditions of employment and does not form part of pensionable pay, entitlement to participate in this scheme this year does not necessarily mean you will be eligible to participate in future schemes, no awards or bonus payments are guaranteed but are based on a participants achievement of the specified targets if we decide to continue with any bonus arrangements in future years which you are eligible to participate details will be notified to you in writing.”

8. On 1 December 2020 a bonus of £11,700 was paid to the Claimant for the years 1 October 2019 to 30 September 2020.

2021

9. The following year on 3 December 2021 a bonus of £3,427.20 was paid for the year 2020-2021. That figure was challenged by the Claimant.

2022

Promotion

10. In 2022 the Claimant received a promotion to the Head of Supply Chain and an increase in salary to £70,000 per annum.
11. I accept the Claimant's evidence that there was some delays in finalising her new contract as she was attempting to agree contractual matters with her then line manager Claire Slater. The documentation coming back from the Respondent presumably from the HR function did not fully reflect what the Claimant was discussing with Ms Slater. The Claimant says that she was challenging eligibility criteria and this was not provided
12. On 5 July 2022 the employer signed a contract and it was signed by the Claimant the following day 6 July and that contract was stated to be effective from 1 April 2022.
13. What it said about bonus is at page 69 containing specific terms of the terms and conditions of employment and says,

Bonus: You will be eligible for participate in a discretionary non contractual annual bonus scheme of up to 20% of your gross salary. The scheme rules, terms and objectives may change each year.

14. It is common ground between parties that the eligibility criteria for the period September 2021 to September 2022 were never supplied to the Claimant, indeed they do not seem to have been supplied to employees generally. The Claimant says that she chased this. It was thought by Respondent witnesses giving oral evidence in this hearing to be an administrative oversight but it was against the context of senior management changes.

50% bonus

15. In December 2022 poor performance relative to UK EBITDA targets meant that the decision was taken that every member of staff entitled to a bonus would be restrictive to 50% of their maximum bonus entitlement. Everyone was paid 50% save for individuals who were in their first year of service who had a guaranteed bonus.
16. No element of individual performance was taken into consideration.

17. Initially the Claimant was paid on the basis of 50% of a 10% possible bonus but this was corrected to 20% for the period in her new role which is what would have been agreed with her when she was promoted.
18. The Claimant was paid £4,635 which contained two elements, 50% of a maximum 10% for the six months in which she was in her old role and 50% of the maximum 20% for the six months in which she was in the new role following her promotion.
19. The arithmetic does not appear to be in dispute.
20. What the Claimant says is she should have been paid the maximum bonus for both of those periods i.e. twice what she did actually receive.

Grievance

21. The Claimant raised a grievance on 29 December 2022 albeit the detail of the grievance was provided later.
22. Tess Harris-Durant replied by email on the same day acknowledging the Claimant's grievance and agreeing the Claimant's suggestion that discretion for bonus should be exercised in good faith and on reasonable grounds. She explained that the company did not meet EBITDA targets for the first time in the previous year and with the result that no bonus was payable at all but in recognition of hard working colleagues a decision had been taken to pay 50%.
23. Full grounds of grievance were provided by the Claimant on 5 March 2023.
24. A grievance outcome was provided on 31 March 2023 by Mr Williamson, Head of HR.

2023

25. It may not be relevant to the present claim but just in terms of completing the chronology in February 2023 the Claimant's bonus for the next year was confirmed to be 20% of salary and it was defined as being based on a combination of group EBITDA performance and group clinic sales performance i.e. it was fully related to business wide metrics not individual performance.

Tribunal claim

26. The Claimant then presented a claim on 18 May 2023 and this hearing took place on 18 July 2023.

Submissions

27. The Claimant's submission in summary is that by custom and practice an element on individual performance was a contractual binding term and should mean that she is paid higher than the 50% which she has been awarded for this bonus.

28. The Respondent's submission is that previous years were expressed to be entirely discretionary references made to the case of Laverack v Woods [1966] EWCA Civ 4 which sets out the least burdensome principle. It has been highlighted in submissions that the bonus provision changed from year to year and in essence it cannot be custom practice if there is not a consistent practice by which reference might be made.

Conclusion

29. This is not a claim for a breach of contract. The Claimant has not had her contract terminated which would require for the Tribunal to have jurisdiction.
30. Laverack v Woods has particular application where there is a termination or breach of contract and the Court is entitled to conclude that the employer would pay the least it could under the contract. It is not immediately clear to me that that is this situation.
31. It seems to me that this is a claim for unlawful deduction from wages falling under s.13 under the Employment Rights Act 1996. In order for such a claim to succeed the amount that is said to be payable by the Claimant must be capable of quantification. The scheme of these claims under the Employment Rights Act is for straightforward claims which can be dealt with in a summary way.
32. The Claimant has quantified her loss, she says on the basis of her performance that she was guaranteed to be paid the maximum bonus. In essence she is inviting me to carry out the discretionary exercise that the employer carries out.
33. I doubt whether I can carry out that exercise for the following reasons:
- 33.1. I cannot carry out an assessment to the Claimant's performance, I do not have the evidence to do that.
- 33.2. There are no eligibility criteria for the period in question to enable me to do that.
- 33.3. I accept the Respondents submission that there is not a consistent approach to bonus in previous years which could give rise to a custom and practice approach.
34. Ultimately, I find that the Respondent in this case did exercise its discretion. I have no basis to conclude that this was not in good faith or not on reasonable grounds. The Respondent's approach to paying everyone 50% on the basis that although the EBITDA target had been missed this was a fair approach to represent team effort seems to me to fall within the ambit of discretion provided for by the contract.
35. The burden is on the Claimant to show that there is a sum owed to her that has not been paid and I do not find that that burden to established a sum owing has been satisfied in this case. Accordingly I will not make any award and the claim is dismissed.

Comment

36. Before I conclude however I would make a comment that the reason that the Claimant is in this situation and brought this claim is that the eligibility criteria were not provided to her. I make the observation that she was no doubt working very hard on what she assumed was going to take place in terms of assessment to the bonus. I can see that to her this outcome probably seems unfair and frustrating.
37. I would hope that the Respondent organisation will take this away as a learning point to prevent a situation arising in future.

Employment Judge Adkin

Date 16 August 2023

JUDGMENT SENT TO THE PARTIES ON

16/08/2023

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FOR THE TRIBUNAL OFFICE

Notes

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