EMPLOYMENT TRIBUNALS

Claimant: Mr Russell Bowering

Respondent: FCC Environment UK Limited

Heard at: Leeds **On:** 15 August 2023

Before: Employment Judge Jones

REPRESENTATION:

Claimant: Mr B Jones, Counsel
Respondent: Mrs A Hall, HR Business Partner

JUDGMENT having been sent to the parties on 21 August 2023 and a request having been made by the representative of the claimant in accordance with paragraph 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following:

REASONS

Evidence

1. The Tribunal heard evidence from the claimant and from Mr Andrew Baxter, Area Manager (North) of the respondent. The parties produced a bundle of documents running to 236 pages.

The Issues

2. This is a claim for unauthorised deductions from wages. It concerns a particular part of the claimant's pay known as the Site Productivity Bonus. The claimant did not receive an increase in the rate of his Site Productivity Bonus in the years 2022 and 2023. He says that the shortfall, that is the amount of the increase he should have received, was an unauthorised deduction. The Tribunal had to determine whether he should have received those increases.

3. The Tribunal allowed an amendment to extend the claim to 2023 when there was a further increase which has not been applied to the claimant's SPB.

The Facts

4. The claimant has been employed by the respondent since December 2016 following a transfer under the TUPE Regulations in 2015. The claimant had previously worked in the same capacity, originally for Humberside County Council when he was employed as a Relief Operative in January 1982. The respondent is a Waste Management and Energy Recovery Company. The claimant continues to work as a Mobile Plant Operative at the Wilmington Transfer Station. In addition, he acts in the capacity of Union Shop Steward on behalf of Unison for the Hull and East Riding of Yorkshire Recycle and Disposal. Unison has a recognition agreement with the respondent.

5. The claimant has written terms and particulars of employment. A copy of these was included in the file of papers for the hearing, and it is signed and dated 20 April 1990, but the parties accept it continues to be the effective written terms and conditions subject to any variations which have happened in the meantime. That provides, in respect of remuneration at paragraph 6, as to his hourly rate of pay and his basic pay, and for overtime. Under a separate section headed "Other Benefits" there is provision for Site Productivity Bonus and contractual overtime payments.

6. The Site Productivity Bonus ("SPB") was not in fact related to productivity as such, although it had been named that before the claimant started his employment back in 1982. Since then, the SPB has increased at the same rate as the rates of pay (known as "remuneration" in the contract") up until 2022. In that year the respondent negotiated with Unison, in meetings with the claimant in his capacity as union shop steward, and an offer was made which is recorded is an email of 3 October 2022 that the offer was 5% on contracted pay rates only with no increase related to any contracted bonus payments. That offer was subsequently voted upon by the union membership and accepted. When the claimant's pay was received following that vote it did not include a 5% increase on his SPB. It is common ground that this is the first time there had not been the same increase for any of the years of his employment.

7. When the claimant joined the respondent there was a discussion with Mr Baxter and the claimant about the SPB. The claimant had asked Mr Baxter about his SPB in the light of the fact that the living wage had been brought into effect, and I am satisfied from the evidence of Mr Baxter and the claimant that Mr Baxter had said that the bonus would not automatically increase in line with the minimum wage increase but would be subject to negotiations with Unison. The SPB continued to increase in line with the other pay rate increase. I am satisfied that at the meetings when negotiations took place with Unison that no specific mention was made of the SPB.

8. When the claimant did not receive an increase on his SPB in 2022 he raised a grievance with the respondent, but his complaint was rejected both at the grievance and at the appeal, it being the respondent's position that the claimant did not have the contractual right to have the SPB wage increase linked to the other pay increase.

9. In 2023 the respondent wrote with an offer of a 7% increase on all salary points with the exception of those affected by the National Living Wage and contractual bonuses.

10. There is another type of bonus which is paid – the accident or damage and attendance bonus – that is not in the claimant's written particulars: it was introduced by Hargreaves (the predecessor of the respondent). I am satisfied from what I heard that it became contractual although it has not been reduced to writing. That particular bonus, which applies to a number of employees, has not increased apart from in one year when it was specifically agreed in negotiations with Unison.

Submissions

11. For the claimant, Mr Jones submits that there was an express term of the contract that the annual increase in pay rates would include the SPB. He says if that is not an express term of the contract, having regard to the history of matters, it was an implied term because it was sufficiently notorious, clear and well-known for it to be custom and practice.

12. The respondent on the other hand disputes that. It suggests that there had been no contractual right as suggested, either expressly or by implication, and that although the rates of pay had tracked one another, there was no obligation for that to be the case and the situation had changed in 2022.

The Law

13. By section 13 of the Employment Rights Act 1996:

> *(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.*
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

Analysis and conclusions

14. Section 13(3) of the Employment Rights Act 1996 requires me to consider whether the respondent has not paid the claimant a sum which is 'properly payable'. In order to determine whether it is properly payable I have to consider the terms of the contract. As established in case law, where the parties disagree that involves

construing the common intention of the parties to the contract of employment. That is not their subjective intention. That may, and probably will, differ. It is what the expressions used in making the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time. That will of course include considering the words of any written document, but it may also include considering conversations, particularly when one is dealing with relationships which exist over a long period of time in which the contract will change.

15. The first and obvious point is that there was nothing said or written to guarantee any increase in pay or remuneration in any particular year or at any particular time. The written terms of the contract stipulate the rate of pay in 1990. Those rates have increased. That is because there have been variations to the contract (or particulars terms of it) each year at the time of the increase. In practice that happens through the union, Unison. But the right to an increase each year is not a term of the contract. It requires agreement, each time, to vary it.

16. There is no express term of the contract, at least in the written terms, incorporating the collective agreements reached between the union and the respondent. I did not invite the parties to address me on whether there was incorporation of those collective agreements by an implied term of custom and practice. It did not seem to me necessary to determine the issue in this case. I am satisfied that every year that a negotiation took place with the union, by accepting the outcome of the discussion both employer and employee adopted the accepted offer as a variation to the individual contract.

17. In respect of the variation for the material years, I must ascertain the common intention of the parties. What words were used? The language used by Mr Baxter in his email of 3 October 2022 is that there was an offer of 5% on contracted pay rates only, with no increase relating to any contracted bonus payments.

18. I did not find of particular help the rationale given for why in this year there was no increase. The respondent was keen to explain that the purpose of increases in the past had been to ensure the claimant was paid in parity with other staff. That parity was reached back in 2017. Notwithstanding, the respondent continued to increase the claimant's, thereby creating a disparity in his favour. It does not seem to me to help determine the dispute in this case; it is a distraction, rather than a focus on the words used.

19. I am satisfied that in his offer on behalf of the respondent, Mr Baxter drew a clear distinction between contractual pay rates on the one hand and other contractual bonus payments on the other – the former receiving 5%, the latter receiving none. That offer was accepted by the union membership and put into effect.

20. On the face of it, there is no doubt about what that means. However, Mr Jones says that other contracted bonus payments had been treated differently up until 2022 because the attendance and damage bonus had attracted no increase (save for on one year) and the SPB had always attracted the same increase – it had (as he put it) tracked the basic pay increase. Mr Jones draws attention to the evidence of the claimant, that in discussions he had with the respondent in his

capacity as Shop Steward, Mr Baxter would use language of contracted bonus payments or contracted bonuses to refer to the attendance and damage bonus, but the parties were silent when it came to the SPB. Mr Jones says that it was uncontested that this language which was used, and therefore it must follow that in the email of Mr Baxter, the reference to "contractual bonus payments" did not mean the SPB.

21. I do not agree. The language of "contracted bonus payments" had not been used in any previous written offer or acceptance of changes to pay. The only other helpful document to indicate what happened in the past (at page 175), in an email of 9 May 2019 from Ms Hart of the respondent to Rachel Hodson of Unison. In that year a revised pay offer of contractual pay rates was increased to 3%. The letter specifically set out by bullet point that the 3% would apply to contractual and overtime rates; it distinguished between NLW rates (which were dealt with specifically); it identified team leader rates and it made specific reference to the attendance and damage bonus which would remain at £1,000 per annum. It did not use the collective term "contractual bonus payments". I am not satisfied that term had been used in any offer or acceptance of a pay variation in any formal sense until 2022. No evidence has been adduced to suggest otherwise.

22. I do not therefore attach the significance to the evidence about references to one type of bonus as a contractual bonus payment as distinct from another in the discussions, which Mr Jones invites. It is true that the respondent had repeatedly increased the productivity bonus when they had not increased the attendance and damage bonus. But I am satisfied that when the respondent specifically identified the difference in their offer of 2022, it would be understood that they were differentiating between a contractual rate of pay and other pay in the form of bonuses; any other bonus which was contractual. It is clear from the claimant's written terms that the bonus of SPB would fall into that category. (I did not find the distinction between paragraphs 6 and 7, in the written terms, of any help at all. There is no sense in describing SPB as not remuneration, but it is plainly a contractual bonus). I find the language that the respondent used was clear. The common intention was that any bonus which was contractual would receive no increase. It matters not that it was not specifically drawn out and discussed at the meeting with Unison. It fell within the category of contractual bonuses. It therefore follows that I do not accept the claimant had varied his contract, by reason of the discussions and offer which was accepted, in such a way as to enjoy an increase which tracked the rate of pay with respect to the SPB.

23. I do not need to consider implying a term because I am satisfied that this was a matter dealt with by an express term of variation, as explained above. It is trite law that an implied term cannot contradict an express term.

24. To summarise there was no guaranteed increase every year. Every year it was up to the parties to renegotiate any increase in pay. Every year it was open to the parties to differentiate between increases in one type of pay from another. There was no commonality in increase which was guaranteed. The increase which was agreed in 2022 and 2023 was clear from the language used. SPB was a non-contractual bonus.

25. Even if I had found in favour of the claimant in respect of the 2022 year, I would have found against him in respect of the 2023 year. If I had found, as invited, that the language "contracted bonus payments" excluded SPBs in the light of the discussions which had taken place in 2022 and the previous years, I would have decided that the grievance had made it absolutely clear that the respondent had never intended that to be included. By 2023, there would be no doubt what was included or excluded from the offer.

26. In light of those reasons, I do not find in favour of the claimant. I do not find there was an unauthorised deduction from wages, and I dismiss the claim.

Employment Judge Jones

Date: 4 September 2023