EMPLOYMENT TRIBUNALS

Claimant: Mr M Yates

Respondent: DHL Supply Chain Ltd

Heard at: Liverpool Employment Tribunal (by CVP)

On: 1 September 2023 and 1 November 2023

Before: Employment Judge Dunlop

Representation

Claimant: In person (on 1 September 2023)
Ms M Kalnina (claimant's partner) (on 1 November 2023)

Respondent: Mr E Stenson

RESERVED JUDGMENT ON A PRELIMINARY HEARING

1. The following complaints are struck out:
   1.1 The complaint that the respondent failed to comply with a contractual dismissal procedure.
   1.2 The complaint that the claimant is entitled to additional payments because the contract subsisted beyond 10 March 2023, as the claimant did not accept the respondent's repudiation ("the Geys point").
   1.3 The complaint that the claimant's PILON payment should have been calculated to reflect an anticipated pay rise in June 2023.

2. The remaining complaints will proceed to hearing on a date to be notified to the parties.
   1.1 The complaint in respect of arrears of pay, relating to an alleged verbal agreement as to the claimant's salary. This is to proceed as a claim of unauthorised deductions from wages under s.23 Employment Rights Act 1996 or, in the alternative, a claim of breach of contract.
   1.2 The complaint of breach of contract arising out of the respondent's alleged miscalculation of the claimant's PILON payment and/or arising

out of the respondent's timing of PILON payments.

3. No further complaints have been identified in the claimant's claim.

REASONS

Introduction

1. Mr Yates commenced employment with the respondent ("DHL") as a Transport Manager in October 2021. He was later prompted to General Manager. By letter dated 10 March 2023 he was purportedly dismissed with immediate effect.

2. By a claim form presented on 8 June 2023, Mr Yates made complaints about his employment and its termination. He was not legally represented (as is often the case with Tribunal claimants) and it was difficult to understand from the claim form the basis for his claims (again, that is something which is common).

3. The case was listed for a two-hour final hearing on 1 September 2023. In its response, the respondent asked for the claim to be struck out pursuant to Rule 37 Employment Tribunal Rules of Procedure 2013, on the grounds that it had no reasonable prospect of success. Alternatively, it applied for a deposit order pursuant to Rule 39. The respondent's position was that Mr Yates had been paid everything he was entitled to on termination of his employment, and there were no other complaints discernable from the claim form which the Tribunal had jurisdiction to consider.

4. The hearing on 1 September 2023 was converted to a public preliminary hearing to determine the respondent's application.

The law relating to strike-out and deposit order applications

5. Rule 37(1)(a) provides that a claim, or any part of a claim, may be struck out if it is "has no reasonable prospect of success". Appellate authorities caution against striking out claims brought by litigants in person, particularly where the real problem lies in the fact that the claim is unclear and cannot be readily understood. It is the role of the Tribunal to first understand the claims that the claimant is seeking to bring, and then to consider whether they can be said to have no reasonable prospect of success (see e.g. **Cox v Adecco and ors 2021 ICR 1307**). Further, where the claim relies on facts which are disputed, the claimant's case should normally be taken at its highest.

The Hearings and establishing Mr Yates' claims

6. Whilst most video hearings nowadays proceed without incident, this hearing, unfortunately, was one of the exceptions. We lost significant time during both the first and second days of the hearing due to connection difficulties, largely on the claimant's side, but also due to a power-cut which

meant that I was disconnected for a period of time on the second day. This meant that the hearing took longer, and was more difficult to manage, than would otherwise have been the case. Given the extra time allowed, I am satisfied that both parties had a full opportunity to put forward their case despite the connection problems.

7. At the start of the first hearing, I attempted to clarify with Mr Yates what that claims were that he was seeking to bring. At box 8.1 of the ET1 the claimant had indicated via the tick-boxes offered that he was owed notice pay and arrears of pay. He also said he was making another type of claim, which he described as "Breach of contract/Wrongful Dismissal". There were no details of claim set out at Box 8.2, but the claimant had attached a three-page addendum.

8. The addendum describes the history of Mr Yates' employment, including his promotion to General Manager and a subsequent change in reporting line which he was unhappy about. He described being isolated from the business and having various responsibilities removed, and alleges that colleagues were asked to report on his performance, because a senior manager had taken a dislike to him. It states that he was signed off sick with work-related stress on 9 March 2023, and declined to attend a requested meeting on 10 March due to having been signed off. On 10 March, Mr Yates received a dismissal letter which purported to terminate his employment with immediate effect on grounds of capability.

9. The addendum goes on to assert that the capability concerns were not genuine, and that there were ulterior motives for the dismissal. It complains further about the lack of procedural formalities. It is alleged that the whole process "*went against DHL's values, policies and my contractual terms*".

10. Towards the end of the addendum Mr Yates asserted that he had not received his contractual entitlement in full "*as per PILON*". It was said that his base salary had not been taken into account, that the payment had not been calculated properly and he had not been given a detailed breakdown, despite being given various different figures. No where in the claim, however, did Mr Yates set out what he says he is owed by way of underpayment of PILON nor, indeed, any other payment.

11. The respondent filed a response to the claim in which it asserted that the claim was misconceived. The Grounds of Resistance (attached to the response) asserted that Mr Yates had been paid his pay in lieu of notice, all outstanding holiday pay and additional sums which he had no contractual entitlement to. The respondent's position was that there were no further sums due, and the claim should therefore be struck out as having no reasonable prospects of success (or alternatively should be made subject to a deposit order).

12. The respondent alternatively requested that the Mr Yates be ordered to provide further particulars of what he said he was owed and how this was calculated. Mr Yates, in the meantime, had made his own request, in correspondence, that the Tribunal order the respondent to provide calculations supporting the payments made, and disclose certain documents.

13. In advance of the hearing on 1 September, the respondent produced a statement from Georgina Graham, an HR Business partner, setting out the respondent's position as to the termination payments due to the claimant and the payments that had been made. It is evident from that statement that the respondent's processing of the termination payment at the time of dismissal was, at the very least, extremely confused. The respondent acknowledges that the intended PILON payment date was missed, and that several payments were subsequently made. Ultimately, however, Ms Graham's statement elaborated on the stance taken in Grounds of Resistance and reached the same conclusion – nothing further was owed. In fact, on the respondent's case, Mr Yates had been overpaid.

14. Mr Yates produced a Schedule of Loss in advance of the 1 September hearing. This set out losses under the following headings:
Compensation for failure to follow ACAS code when amending terms and conditions of employment
Compensation award for future loss and backpay
Under this heading, Mr Yates asserted that he had been underpaid since he moved into the General Manager role on 1 December 2022. There had been commensurate underpayments of pension contributions. Mr Yates also set out the loss of earnings he had sustained between the expiry of his notice period and securing a new job.
Compensation for Injury to feelings due to discrimination, harassment and detriment
Mr Yates referenced the Equality Act 2010 and *Vento* bands. He did not assert that he had been discriminated against on the basis of any specific protected characteristic.
Uplift for failure to follow ACAS code
In relation to the dismissal.

15. I took the view that until I could understand what claims Mr Yates believed he had (which were within the Tribunal's jurisdiction) I could not assess the strength or weakness of those claims. I therefore spent a considerable time trying to elicit from Mr Yates what he believed his claims to be, in light of what he had put in the claim form and, afterwards, in the Schedule of Loss. I spent a significant amount of time explaining why some claims, and some heads of loss, were simply not available to Mr Yates to pursue on the facts of this case.

16. It became clear that there would be insufficient time on 1 September to clarify the claims and then to hear the respondent's application. As we came to end the end of the first part of the process, Mr Yates' connection to the hearing dropped out and he was unable to reconnect. I therefore had to end the hearing abruptly. By letter dated 4 September 2023, I wrote to the parties informing them that the hearing would be reconvened on on 1 November 2023. I also set out the claims as I understood them at that juncture, along with the following commentary:

    1. *A claim that the respondent has breached his contract by not utilising a dismissal procedure.*
        There may well be obstacles to such a claim but, even if it is successful, the damages recoverable would be based on the time

*that the respondent would have taken to complete such a procedure. There is no scope to claim for damages based on the fact that the employee may not have been dismissed if the procedure had been followed. (See, for example, **Fosca Services (UK) Ltd v Birkett 1996 IRLR 325**).*

2. *A claim that the respondent has underpaid the sums Mr Yates was due on termination of employment. Mr Yates has so far been unable to quantify those sums.*

   One advantage of the hearing being adjourned part-heard is that he has the opportunity to take time to do so. Mr Yates has requested that I ask the respondent to provide information instead. Whilst there are some complexities around the payment of the PILON, the respondent has provided a full account of the sums that it says were due, and how these were paid, in a witness statement prepared by Ms Graham and in documents which appear in the bundle. It is now for Mr Yates to explain if he disagrees with any part of that account in a way which results in sums being due to him. I appreciate there is a dispute between the parties as to whether certain elements of the payment were contractually due (the respondent says it has made certain payments as a matter of 'goodwill'). Ultimately, however, if the sums have been paid then Mr Yates has no claim for them, even if the parties disagree with the basis on which payment has been made.

17. I made an Order for Mr Yates to send to the respondent his calculation of PILON underpayment (if any) by 6 October 2023. The calculation which was provided, and which was considered at this hearing, asserted that the financial value of the claimant's claims came to £4,525.00. This document was explained further at the reconvened hearing on 1 November 2023.

18. (It is convenient to note here that Mr Yates was represented at that hearing by Ms Kalnina. Ms Kalnina is Mr Yates' partner and not a lawyer. However, there is no requirement in the Tribunal that representatives be legally qualified and there was no difficulty in permitted Ms Kalnina to speak for Mr Yates at the hearing.)

19. Turning back to the 6 October figures. Of the £4,525.00 total, some £551.54 related to alleged underpayments of salary and pension contributions from December 2022 to March 2023. This arises out of Mr Yates' contention that he had a verbal agreement to be paid a higher salary than that set out in his written contract.

20. Another small sum, £71.46, relates to a further increase which Mr Yates (on his case) was due to receive in June 2023. His argument (as I understand it) it that his PILON payment should have reflected this anticipated increase in respect of the proportion of the notice period which would have extended into June (had PILON not been used).

21. The bulk of the financial loss asserted by Mr Yates in his 6 October 2023 document (a sum of £3,902.00) is said to reflect overpaid tax, which was deducted from Mr Yates as a result of the respondent's poor handling of the PILON payment. Mr Yates did not assert, either in his document, or at the

hearing, that the respondent's *gross* calculations of his PILON amounts were incorrect. The respondent asserts that the gross sums represented significant overpayment to Mr Yates, as there were contractual benefits included which he was not contractually entitled to receive as part of a PILON payment.

22. I expressed concern to Mr Yates that, generally, errors in deductions which have been made for income tax or national insurance policies do not fall within the jurisdiction of the Tribunal. However, it became clear upon listening to Mr Yates and examining the documents recording the payments, that this is not simply a case of a claimant trying to recover deductions made under PAYE. There is an argument that the timing and manner in which the respondent has made (and attempted to correct) the PILON payment has resulted in financial loss to Mr Yates which is (at least arguably) recoverable in the Tribunal. The detail is set out further below.

23. Once the claims were understood, on the basis set out above, I invited Mr Stenson to make his application for strike out (alternatively for a deposit order) and Ms Kalnina to respond. I took note of three witness statements which had been submitted by the parties – on behalf of the respondent there was the statement from Georgina Graham (referred to above) which had been served before the first hearing. Between the first and the second hearing, Mr Yates served a statement in his own name, and one from a former colleague, Mr Smith. Ms Graham attended the hearings, Mr Smith did not.

24. I informed the parties that I would read the statements, but would not permit any cross-examination given the summary nature of the strike-out application. As it is for the respondent to show me that Mr Yates' claims have no reasonable prospect of success, I have assumed that the factual disputes which Ms Kalnina and Mr Yates pointed to in the statements will be resolved in Mr Yates' favour. Having said that, where those disputes revolve around matters such as whether Mr Yates was performing well, and whether the decision to dismiss was justified, they will not be relevant to the claims Mr Yates can bring. I informed Mr Yates many times, in both hearings, that as he has insufficient service to bring an unfair dismissal claim (which he accepts) questions around the respondent's reason for dismissal and its dismissal process (save insofar as it may have breached his contract in the way it dismissed him) will not be relevant to the matters the Tribunal has to decide.

25. As I have had regard to witness statements but heard no sworn evidence, I make no formal findings of fact. The factual matters which I reference below are set out for the purposes of determining this application only. Nothing I have said is binding on the Tribunal which hears the final hearing.

The claim of "wrongful dismissal"

Contractual procedure

26. As noted in my letter to the parties following the first hearing, Mr Yates argues that the respondent was obliged to follow a contractual dismissal

process (in this case, it would seem, the capability process) and failed to do so. He characterises this as a claim of wrongful dismissal.

27. This claim is based on clause 30 of his January 2023 employment contract. The contract states that "*Clauses 30-31 are only applicable to new starters to the Company*". Mr Yates was not, at the time of signing this contract, a new starter to the company.

28. Clause 30 states: *"for external appointees only, your employment is subject to the successful completion of a 3 month probationary period. Please note that the Company may, at its discretion, extend your probationary period. During your employment and probationary period you must comply with the Company's Policies and Procedures. The Company's Disciplinary Procedure will apply to you after the successful completion of your probationary period. If you fail your probationary period for any reason, you may be dismissed without notice, on one week's notice, or with pay in lieu of notice, as appropriate. You will however, be entitled to benefit from the Company's Grievance Procedures from the commencement of your employment."*

29. Mr Yates's position is that the necessary contractual implication of this clause is that a disciplinary procedure *will* apply to employees outside their probationary period. There is nothing elsewhere in the contract to suggest that the disciplinary procedure, or indeed the capability procedure, forms parts of the contract. Nor is there anything explicit within the capability procedure (to which I was referred) to indicate that it does, or does not, have contractual force.

30. It is very rare for an employer (particularly outside the public sector) to have contractual dismissal procedures. Where they do exist, that will be unequivocally expressed. I cannot conceive that any Tribunal would find that Mr Yates had a contractual right for a particular procedure to be followed in relation to his dismissal on the basis of clause 30 of his contract. This is a matter of pure contractual interpretation and it is difficult to see how any evidence or submissions presented at a final hearing could have any material bearing on the conclusion.

31. For this reason, I find that Mr Yates' claim that the respondent has breached his contract by failing to follow its own dismissal proceedings has no reasonable prospect of success, and is therefore struck out.

32. I note for completeness that Mr Stenson also argued that the respondent had not, in any event, failed to follow the capability procedure on a strict reading of the obligations of that procedure. Given my conclusions above, I found it unnecessary to consider that point.

'Geys' point

33. In his statement served between the two hearings, and in the hearing before me, Mr Yates also sought to argue his wrongful dismissal claim in another way.

34. He argued that the respondent's dismissal letter of 10 March 2023 had not been effective in terminating his contract. That letter instead represented a repudiatory breach which left it open to him to elect to end the contract or affirm it. He elected to treat the contract as continuing, and expressly affirmed it, by letter dated 27 March 2023.

35. Mr Yates appears to submit that the contract continued to run on an open-ended basis, but also states in his witness statement that "*I am reaffirming*" the contract "*until 8 May 2023 (additional 8 weeks)*" at which point he secured alternative employment. There is no suggestion, so far as I understand, that he did anything at this point to communicate to the respondent that the contract was now at an end.

36. In the case of ***Geys v Société Générale*** **2013 ICR 117** the Supreme Court confirmed that the 'elective' rather than 'automatic' approach applies to summary dismissal. This means (except in cases of gross misconduct where the employee themselves is in breach) that a purported dismissal in circumstances not provided for by the contract of employment will amount to a repudiatory breach which can be accepted by the employee to bring the contract to an end or, alternatively, the employee can decline to accept the breach and instead affirm the contract, which is then treated as subsisting.

37. The key question is whether the purported dismissal on 10 March 2023 was an effective dismissal within the terms of the contract, or whether it was merely a breach which Mr Yates could choose to accept.

38. The contractual provision in **Geys** provided that the employer could terminate the employment:
"at any time with immediate effect by making a payment to you in lieu of notice"
In contrast, the contractual provision is this case states:
"The Company may at its discretion terminate your employment without notice and make a payment of salary in lieu of notice."

39. Mr Stenson argued that this difference in wording was enough to allow Geys to be distinguished. In that case it was the act of making the payment which effected the dismissal. In this case the employer was at liberty to terminate without notice, albeit that doing so would give rise to a liability to make the PILON payment.

40. Mr Yates says that the effect of ***Geys*** is broader. He points to the principle, set out in para 52 in the Judgment of Baroness Hale of Richmond JSC, that where a PILON clause is being utilised, the employee is entitled to be told that that right is being exercised and how and when it is intended to operate. He says that that applied in his situation as much as in Mr Geys'. Further, he says, the 10 March letter did not comply with those requirements.

41. Mr Yates sets out three conditions which he says apply when an employer seeks to terminate an employee's contract using a PILON clause. The employer must, he says:

41.1. Notify the employee clearly and unambiguously that the employer is terminating the contract of employment and that it is doing so in accordance with the relevant PILON clause contained in the contract;
41.2. Specify the date on which the termination takes effect; and
41.3. Notify the employee of the date upon which the PILON was made or will be made.

42. These three conditions are not set out in that form in ***Geys***. It appears they may come from an online article commenting on a case called, ***Cole v Consolidated Minerals Ltd***. I have been unable to find a copy of that case, which seems to be a Tribunal decision, perhaps pre-dating the online register of Judgments. I am not persuaded that the effect of ***Geys*** is, as Mr Yates contends, that these three principles will apply in every case. It seems to me that what an employer is required to do in each case depend on the precise wording of the relevant PILON clause.

43. In consider that the letter of 10 March was effective in terminating the contract in accordance with the PILON clause. The letter stated "*it is my decision to issue you with notice to terminate your employment with immediate effect. You will receive a payment in lieu of notice along with any accrued but untaken holiday and will be processed in the next available pay run in conjunction with payroll cut offs."* That wording, in my view, satisfies the requirements set out in paragraph 52 of ***Geys***, set out above. There was no requirement for Mr Yates to accept the repudiation. That is a matter of pure contractual interpretation, which it is appropriate for me to determine as part of a summary determination of a strike-out application.

44. A problem did then arise, however, in that having acted effectively to terminate the contract, the respondent failed to meet the payroll cut off and the PILON payment was not made in the anticipated manner. That failure cannot resuscitate the contract which was validly terminated on the 10th. It may well, however, represent a breach in its own right and/or have given rise to subsequent breaches as regards to the later attempts to make payment.

45. It seems to me that there is an issue which will require determination at a final hearing about what exactly contractual obligations arose in respect of the timing and amount of the PILON payment once the contract had terminated. This is discussed further below.

46. Arguably, the ***Geys*** point is not apparent on the face of the claim in any event, and would have required an amendment to enable it to proceed. Mr Stenson took this point and argued that no amendment should be permitted. If he is right, then there would be no requirement to "strike out" the claim, as there would be no extant claim to strike out. Given that Mr Yates had made a claim of "breach of contract/wrongful dismissal" if I had considered that the point was arguable, then I would have considered that it amounted to a clarification of a claim that was already in the pleadings. In the Judgment above I have made clear that the claimant's claim of wrongful dismissal is struck out insofar as it relates to this point.

The claim for arrears of pay.

47. As noted above, Mr Yates seeks to claim a small amount of contractual arrears of pay. Mr Yates' contractual salary, set out in the written contract for his Transport General Manager role, was £49,450.00. It is Mr Yates's position that he was verbally promised a 5% pay increase every three months from the point of taking on his new role, to enable him to progress a salary of £61,600p.a. by the end of 2023, notwithstanding the respondent's pay controls.

48. On this basis, he claims that he was underpaid for December, January and February 2023 as he ought to have been paid at a rate of £50,933.00 p.a., rather than £49,450.00. He claims to have been underpaid for the 10 days he worked in March, during which, on his account, his salary should have increased again to £53,480.00 p.a.

49. Mr Stenson submitted that this was a new claim, which emerged from the Schedule of Loss and the 6 October email. It required an amendment application to be included in the claim, and no such application had been made. On the respondent's case, the matter did not even get to strike out – there was no claim there at all.

50. I find that no amendment application is necessary. Mr Yates had ticked the box at question 8.1 on the ET1 Claim form indicating that he was claiming "arrears of pay". Although he did not set out the basis on which he said he was owed arrears of pay until later, when he served his schedule of loss, it is common in the Tribunal for pay claims to be made in general terms and quantified at a later date. This claim has now been quantified, and the lack of particulars in the original claim form is not a bar to it proceeding.

51. I am prepared to find that there is a reasonable prospect that Mr Yates will be able to establish at a final hearing that there was a verbal agreement to increase his salary as he suggests. This is supported, in particular, by Mr Smith's statement. If he establishes this, there may be further arguments as to the legal effect of such an agreement, including the authority of Mr Smith or others to enter into it, whether Mr Yates affirmed the pay rate in the written contract. Whilst those matters represent further obstacles, I cannot say that there is "no reasonable prospect of success" of Mr Yates succeeding in this claim.

52. The respondent also suggested that the claim could be defeated on the basis that it had overpaid the claimant at the end of his employment, and the overpaid sums exceeded any underpayment. I am not sure that this is correct, in principle, if the claims of underpayment are pursued as unauthorised deductions from wages. Although Mr Yates has not specified the basis for his claim as between a statutory unauthorised deductions claim and a contractual claim, there is some authority to suggest that a claimant in those circumstances should be assumed to be utilising the statutory jurisdiction (**Read v Ryder Ltd [2019] ICR D5, EAT**). In those circumstances, I am satisfied that the arrears claim, proceeding as an unauthorised deduction from wages claim, does have prospects of success. I will permit it to proceed in the alternative as a contractual claim so as not to tie the hands of the parties, or the Tribunal at the final hearing, as arguments may be advanced relevant to one or both of these causes of action which have not been advanced before me.

53. The respondent has asked for a deposit order in the alternative. The test under Rule 39 has a lower threshold – I must be satisfied only that the claim has "little reasonable prospect of success". As noted above, I consider this complaint to be arguable and do not find that the "little reasonable prospects" test is met.

The claim is respect of PILON

June increase

54. The claimant's email of 6 October includes a sum of £66.15 (plus £5.31 in respect of pension) which is asserted to be owed on the basis that a further pay increase would have become due from 1st June, and that this should have been reflected in the PILON payment.

55. There are obstacles to the claimant showing that he would have been entitled to this anticipated payrise, as discussed above. Even if he would have been if he stayed in employment until June 2023, that does not mean that it must be taken into account in a PILON calculation.

56. The contract of employment contains an express PILON clause (clause 13) which states that PILON payment is calculated with reference to "basic salary (as at the date of termination)." To my mind, this leaves no room to rely on an anticipated pay increase which would have taken effect during the putative notice period, even if the expectation that the pay increase would have taken place (absent termination) is not disputed. Again, this is a matter of simple contractual interpretation. This part of the claim has no reasonable prospect of success and falls to be struck out.

Amount of PILON

57. The more complex aspect of the claim related to PILON is the tax point, as discussed above. It is convenient to set out here a summary of what the claimant received, and how it was taxed. (Again, the matters set out below are apparent to me from the statements and documents before me, I do not preclude the Tribunal at the final hearing making different, or additional, findings).

58. Mr Yates expected to receive a PILON payment in his March pay. He did not. Instead, he was paid only for the 10 days he had worked in that month. Subject to the small arrears claim, I understand that payment was correct. It is reflected in a payslip dated 24 March 2023.

59. Mr Yates then received, at his request, a BACs payment on or around 31 March. I understand from Ms Graham's evidence that that payment was calculated as a gross amount of £18,473.41 (being the sum of the amounts in paragraph 22 of her statement). The payment was subject to tax and NI deductions and I understand the actual sum paid to Mr Yates was £9,212.10 (the sum shown on the payslip at pg 107).

60. A correcting payment was made in the April pay run. That contained many of the same elements, although not all of the same elements, as the 31st

March payment. The gross sum shown on the payslip was £19,899.49. £7,804.79 tax was deducted (i.e. 40%), along with NI. From the resulting net sum, a further sum of £9,212,10 was deducted, representing recovery of the net figure paid on 31 March.

61. That meant that, following deductions, the net value of the £19,899.49 payment to Mr Yates was only £2,191.47.

62. Whilst the respondent is correct to say that it is not a matter for the Tribunal to interfere with the deductions which are made for tax purposes, it appears to be the case here that the claimant has been 'paid' the same sums twice, and therefore taxed twice. As far as HMRC are concerned, payment has been made on 31 March (with tax deducted) and again on 25 April (with tax deducted). The effect of the 'Advances recovered' deduction on the 25 April payments is that the claimant has not had the benefit of the payment that he received on first occasion, as it has been recovered from him on the second occasion. It does, therefore, appear to me that he has been left out of pocket and that all, or some part, of the 'Advances recovered' deduction may be properly recoverable by him as a result. To put it another way, the payments made on the 31 March and recovered on the 24 April, do not simply cancel each other out, because of the tax implications of making the payments on two separate dates.

63. The simpler approach, from the claimant's perspective, would have been to provide him with a detailed account (in a form similar to a payslip) of the gross payments made, tax deducted and net payments made on 31 March, and then to restrict the sums shown on the April payslip to anything further which had been calculated to fall due. This would have resulted in a much smaller tax payment on that occasion. The respondent seems to have been rather hamstrung throughout this process by the technical limitations of its payroll system and/or those operating it, and that has led to unnecessary complexity which Mr Yates has fallen victim to.

64. It may be, again, that fuller evidence from either party sheds more light on the matter. For the purposes of today's hearing, however, I cannot say that the claim that the respondent has breached contractual obligations to the claimant in respect of the PILON payment stands no reasonable prospect of success (nor, alternatively, little reasonable prospect of success).

65. As noted above, I consider that a Tribunal at the final hearing will need to make determinations (having considered submissions from the parties), as to the exact contractual obligations (whether express or implied) which the respondent had in relation to making the PILON payment, including the timing of payment, and accuracy of payments made, including how these are recorded given the apparently negative tax implications of the methods adopted by the respondent as set out above. It seems to me that it is at least arguable on behalf of Mr Yates that the respondent has failed in those obligations and that the effect of the failure has been that he has suffered financial loss in the form of tax payments which may not necessarily be recoverable from HMRC.

66. Again, the respondent argues that the additional elements included in the PILON as a matter of goodwill would offset any underpayment. However,

given the size of the tax discrepancy identified by Mr Yates in his 6 October email (£3,902.00) I cannot say with any certainty that the offset argument would extinguish any liability which does arise.

Conclusions

67. The necessary conclusion is therefore that this matter must proceed to a final full merits hearing. Listing details and case management orders will be sent to the parties separately. In preparing for that hearing, the respondent will have to engage with the question of whether Mr Yates is worse off in net terms than he would have been if the PILON payment had been made in a correct and timely way in the March payroll and, if so, by what amount. It will not be sufficient for the respondent simply to present evidence about the calculation of the gross sums paid to Mr Yates and ignore the tax/deductions position.

68. It is important for Mr Yates to understand that the effect of this Judgment is that the Tribunal at the full merits hearing will not be considering the respondent's reasons for dismissing him, and whether the dismissal was justified on the facts of the case and/or whether an appropriate procedure was carried out. The case is only about the contractual wages due to Mr Yates prior to his dismissal and the termination payments due.

69. The parties are reminded that it remains open to them to seek to resolve the claim between themselves, and they are encouraged to explore the possibility of doing so.

Employment Judge Dunlop

22 November 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

24 November 2023

FOR EMPLOYMENT TRIBUNALS