



EMPLOYMENT TRIBUNALS

Claimant: Andreia Oliveira

Respondent: Kingdom Cleaning Limited

Heard at LONDON SOUTH
Remotely via CVP

On: 15 November 2023

Before EMPLOYMENT JUDGE N COX
sitting alone

Appearances:

For the Claimant: Mr Welch (Counsel)

For the Respondent: MS Kennedy-Curnow (Litigation Consultant)

WRITTEN REASONS

Pursuant to Employment Tribunal Rule 67

1. The claimant was employed as a key account manager with the respondent, a commercial contract cleaning company, from 16 November 2015 until 3 March 2022.
2. She was paid a basic wage and she was entitled to commissions and bonuses.
3. This case concerns in particular a commission payment in respect of what the parties called 'one off' sales: that is to say 'up sales', or new clients introduced which are long term or durable contracts.

4. Conciliation began on 8 May 2022 and ended on 18 June 2022. The claimant's ET1 was presented on 15 July 2022 and the respondent provided an ET3 dated 16 September 2022.
5. The respondent, was the subject of a change of ownership and control to which TUPE applied. The original contracting party was Facilicom Cleaning Services Ltd . It is common ground that any pre-existing obligations of Facilicom were transferred to the respondent.

Claims and Issues

6. The claimant claims that it was an express and/or implied term of her contract of employment that she would be entitled to commission on 10% of gross profits on one off Sales for the Payment Period 2021. In broad outline she claims that there was a longstanding contractual arrangement, dating back to 2017 when her probation period ended which was not expressly discretionary, whereby she would be paid a commission of 10% on all one off sales.
7. She claims that during the Payment Period for 2021 the Claimant generated Sales of £1,298,966.11. That resulted in a profit value for the respondent of £593,133.55 entitling her to a Commission payment of £59,313.36 under the contractual arrangement she relies upon
8. It was common ground that that sum was not paid. She was instead paid a sum of £3,775.94, which she has retained.
9. She asks also for an uplift of 25% on any compensation order in respect of the respondent's breach of the ACAS Code of Practice on Disciplinary and Grievance procedures.
10. The respondent denies the claims. In broad terms the respondent accepts that it always operated an arrangement for payment of commissions that it was initially an informal oral arrangement, which was always discretionary and renewed and could change every year. It says that the claimant received a written statement of commission entitlement in respect of the 2020 year, which included the 10% one off sales bonus and that that made clear that the arrangement was discretionary and liable to change annually, or indeed through the bonus year, and superseded all previous arrangements ("the 2020 Bonus Scheme Terms").
11. It is common ground that the claimant was paid a sum of £58,908 by way of one off sales bonus in Feb 2021 by reference to (at least in substantial part) the 10% one off sales commission arrangements. The respondent says that by accepting that payment and continuing to work the claimant's conduct amounted to acceptance of the 2020 Bonus Scheme Terms.
12. Having accepted the 2020 Bonus Scheme Terms (which were expressed to be an annual scheme, capable of being changed during the bonus year, and discretionary as regards the basis for granting or calculating commission or bonus payments), the respondent was entitled to vary the basis upon which bonus or commission

was paid as a matter of discretion for 2021 It says that thereafter, in April 2021 but backdated to January 2021 the contractual commission position was varied by the 2021 Bonus Scheme. The 2021 Bonus Scheme excluded any sum for one off sales.

13. The respondent says that the claimant knew about those new terms, carried on working and did not object to them and so is to be taken to be bound by them.

14. The Claimant makes three claims against the Respondent:

14.1. Unlawful Deduction of Wages (contrary to Section 13 of the Employment Rights Act 1996);

14.2. Wrongful Dismissal/Breach of Contract (contrary to the Employment Tribunals (Extension of Jurisdiction) Order (SI 1994 No. 1624); and

14.3. Breach(es) of the ACAS Code of Practice on Disciplinary & Grievance Procedure ("the ACAS Code").

15. The Issues before me were agreed to be (slightly re ordered):

16. Breach of Contract

16.1. Did the Claimant have a contractual right to the bonus/commission payments?

16.2. If so, did the Respondent have a unilateral right to vary that entitlement ?

16.3. If not, did the Claimant agree the purported variation of the contractual terms of the contract of employment ?

16.4. What sum is due to be paid to the Claimant ?

16.5. Is the Tribunal's jurisdiction limited to making an award of not more than £ 25,000?

17. Unauthorised deduction from wages

17.1. What was the amount of sales generated by the Claimant for the period which the Claimant believes the bonus/commission should be paid ?

17.2. Were the bonus/commission payments, "wages" within the meaning of Section 27(1) of the Employment Rights Act 1996 ?

17.3. If so, were the bonus/commission payments "properly payable" to the Claimant within the meaning of Section 13(3) of the Employment Rights Act 1996 ?

17.4. If so, had the Claimant expressly signified in writing her agreement or consent to the making of the deduction within the meaning of Section 13(1)(b) of the Employment Rights Act 1996 ?

17.5. If not, what sum is due to be paid to the Claimant ?

18. Breach(es) of the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code")

18.1. It is accepted that the ACAS Code applies to the unlawful deduction of wages claim and the breach of contract claim (Section 207A(1) and Schedule A2 of the Trades Union and Labour Relations Act 1992 ("TULRA 1992")). The issues are as follows:

18.2. Did the claimant raise a grievance with the respondent ?

18.3. If so, what was the grievance ?

18.4. Was the respondent's grievance procedure applied by the Respondent? If so how ?

18.5. Was the ACAS Code applied by the respondent? If so to what extent ?

18.6. Did either party breach the respondent's grievance procedure and/or the ACAS Code ?

18.7. If so, in what way was the respondent's grievance procedure and/or the ACAS Code breached ?

18.8. Should there be an uplift ?

18.9. If so, what should be the percentage uplift (up to 25%) ?

The Hearing

19. There was a trial bundle of some 123 pages.

20. I heard oral evidence from the claimant herself and from Mr Bentley, now the respondent's commercial director, and from Mr Peter Buff, who was employed from 2018 as the CEO of the respondent but was no longer employed by the respondent by the time of the hearing.

21. I was also provided with a skeleton argument from Mr Welch for the claimant and an authorities bundle. Ms Kennedy-Curnow for respondent made oral submissions at the hearing. I am grateful for their assistance and focussed submissions.

Findings of Fact

22. I make the following findings of fact on the evidence before me. Although I took into account all of the material to which I was referred. I set out below only the main findings which underpin my conclusions.
23. Numbers in brackets refer to page numbers in the bundle.
24. The claimant was employed by the respondent.
25. The claimant's initial employment offer letter in 2015 confirmed that a bonus scheme for 2016 would be put in place following successful completion of her probationary period. She in fact completed that probation period (page 4)
26. I find that the words used in the 2015 letter made sufficiently clear that the bonus scheme was, and it was in fact operated as an annual scheme which was revised each year.
27. No formal bonus scheme was notified to her in writing.
28. The respondent in fact operated a scheme to reward /incentivise 'one off' contracts. There was a reference to that scheme in an email exchange in 2017 (see page 51 and preceding).
29. That scheme was well known and was the subject of informal discussion. It was never expressed to be a discretionary arrangement.
30. Although expressed to be an annual scheme, I find on the balance of probabilities that in relation to the one off sales commission the bonus scheme in fact consistently provided for a commission of 10% of gross profits each year.
31. Until 2021 there was an established practice for operating the scheme. The employee, here the claimant, maintained an excel spreadsheet – the 'one-off tracker'. That document recorded the employee's version of the one off sales she had achieved and the invoiced amounts. The practice was that the tracker would be submitted by the employee and checked and verified by the respondent's finance department and/or managers and verified monthly.
32. Initially the 10% commissions were paid monthly. At some time that practice changed (subject to one off requests for early payments) to annual payment in February of the following year once the total amounts of Gross Profits and one off sales were in the previous financial year (which ran from 1 January to 31 December) were finalised and verified.
33. The respondent paid the following sums to the claimant by way of bonus/commission
 - 33.1. 28 February 2017 - £2,430.46 (for 2016 financial year);
 - 33.2. 28 February 2018 - £6,108.77 (for 2017 financial year);

- 33.3. 28 February 2019 - £3,414.24 (for 2018 financial year);
- 33.4. 28 February 2020 - £6,965.50 (for 2019 financial year);
- 33.5. 28 February 2021 - £58,908.00 (for 2020 financial year).
34. There was a dispute about whether these sums involved just one off payments or a mixture of one off commission and other incentive payments. The claimant's claim refers to these sums as Commission payments, and explained in evidence that she did not receive other elements of bonus. The respondents in its ET3 accepted that these sums were paid, but does not set out a positive case that they were a mixture, of different bonus and incentive payments or if a mixture in what proportions. The Claimant and Mr Buff gave conflicting evidence on what the payments consisted of. In the absence of any explanation as to what other elements these sums included, I preferred the evidence of the claimant and accept that these amounts were payable by way of one off commissions up to 2020. Thereafter there is material from the 2020 Bonus Scheme document that indicates that other factors were included in the bonus payment, but the respondent did not put forward any evidence as to what proportion of the 2020 year payment was not related to one off sales commission. I therefore find that the sums paid in February 2021 were in respect of one off commission payments alone.
35. On 5 June 2020 the respondent (Mr Buff) emailed the claimant with a statement of the 2020 Bonus Scheme Terms (pp 64 & 65-66).
36. The 2020 Bonus Scheme started on 1 Jan 2020. The 2020 Bonus Scheme Terms provided:

4. Duration

In principle the bonus is applicable for one year and will run in line with the Company's financial year from 1st January to 31st December. If the commencement date of entitlement to a bonus is during the year, the bonus agreement ends the 31st of December of that year. The amount paid is pro rata.

5. Payment of bonus

If the criteria set out in article 8 are met, then bonus is paid. The payment takes place with the second salary payment of the next year. In exceptional circumstances, the board reserves the right at its discretion not to make a payment or to only pay part of the bonus. Such a decision will be supported with clear reasons.

9. Condition of bonus payment

If the Company makes a loss, no bonus will be payable on any element.

10. Duration of the agreement

This bonus agreement is valid from the commencement date until 31st December 2020. Thereafter, the agreement may be carried forward one year at a time but the Company reserves the right at the end of any bonus year to vary the conditions of the scheme for the following year.

This agreement terminates all previous bonus scheme agreements. The company reserves the right to vary an area at its discretion during a bonus period

37. The 2020 Bonus Scheme Terms document contained a box for the claimant to sign. The claimant did not sign the document
38. Instead, the claimant asked questions about details of the 2020 Bonus Scheme on 9 June 2020 [63]. She asked:-

"As this is an actual sale and not a bonus based on contract performance, I have always received all the payment regarding the one-off, Could you please clarify if that will remain the same? And the articles below will not affect these payments? Otherwise, it seems to me that I would be losing a benefit I have always consistently had."

39. There was no response to this question from Mr Buff or the respondent.
40. Pursuant to the 2020 Bonus Scheme the claimant was paid the sum of £58,908 on 26 Feb 2021 [p 67].
41. The claimant accepted that payment and did not raise any further questions or pursue her previous email question.
42. It was common ground and I accept that the amount paid to the Claimant for 2020 Bonus Year was unexpectedly high. The reason it was so high was that the need for cleaning in response to the COVID pandemic was extremely high, and as a result the demand for one off cleaning work skyrocketed.
43. On 20 April 2021, two months after the claimant received her large bonus payment referable to the 2020 Bonus Scheme Mr Buff circulated to the claimant a new bonus scheme document expressed to take effect retrospectively from 1 January 2021 (the 2021 Bonus Scheme Terms document).
44. The 2021 Bonus Scheme Terms document was in materially the same terms as regards duration, the discretionary nature of the bonus scheme and the right of the respondent to vary it during the year, as the 2020 Bonus Scheme Terms (pp 68- 73)
45. The signal difference in the 2021 Bonus Scheme Terms was that (p70) was that the one off sales commission payment was no longer included, although other heads of incentive payments were.

46. The 2021 Bonus Scheme Terms document also contained a box for signature by the employee. Mr Buff's email accompanying the sending out of the 2021 Bonus Scheme Terms document said: *'On receipt please sign, scan and return a copy to myself and Lesley.'*
47. The claimant did not sign or return this document.
48. On 26 May 2021 she noted in an email that the document did not include the one off sales commission. She asked:

'Shall I take it that this will remain the same as previous years ? I know there is a lot of talk etc about this, changes etc. ? If not this would be a huge decrease in my earning potential (not just this year – already up £220 plus in profit) as I always received commission during my 6 years ... Could you kindly please clarify.

On the plus my 'one-offs' is already over £260k profit with £209k already invoiced so far! I'm already well on my way to reaching our target with Kingdom!

49. Neither Mr Buff nor anyone else from respondent responded to the claimant's email question.
50. The Claimant did not pursue the query any further and continued to work without the issue having been clarified for her.
51. I find that she did in fact generate one off sales in the amounts she alleges during 2021.
52. The claimant received the sum of £3,775 in respect of her 2021 bonus entitlement in February 2022.
53. On 4 March 2022 she wrote :

"Please accept this letter as notice of my resignation from the position of National Key Account Manager at Kingdom Cleaning.

Since my notice period is 1 month, I believe my last day will be 06/04/22. Please let me know how much accrued holiday and pay I am owed. Also, as you know I have a large amount in commission due which is more than £59k as I made an excess of 600k profit for the company.

Please note I'm not just talking about the bonus (which is measured on performance, that I should also have received on my last payrun) I'm asking about the commission as referenced in my emails to you dated 26th May 2021 and 28th February 2022, to which I have not received a response. I expect payment of both my commission and bonus entitlement to be made to in full without delay, as these payments should have been made to me on 28th February.

Thank you for the support you've given me during my time at Kingdom Group. Please let me know if there's anything you need from me before I leave."

54. The respondent accepted her resignation on 29 March 2022.
55. On 1 April 2022 she wrote through her solicitors setting out her complaint about not receiving her one off commission.

Relevant Law

Unauthorised deduction of wages

56. Section 13 (1) of the Employment Rights Act 1996 ("ERA 1996") creates a right not to suffer an unauthorised deduction from wages.

(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.

57. Section 23 of the ERA 1996 gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction of wages. There is no qualifying period of service.
58. There is no cap on the amount that can be awarded in respect of unauthorised deductions of wages.

59. Wages are defined in s 27(1) of the ERA 1996. Wages are any sums “payable to the worker in connection with his employment.”. Commission and bonus payments are a common form of wages s 27(1)(a).
60. Where there is a dispute as to whether a sum is ‘properly payable’ within the meaning of s 13 (3) of the ERA 1996 a Tribunal may construe the contract to determine that question; Agarwal v Cardiff University [2018] EWCA Civ 2084

Breach of contract

61. The Employment Tribunals (Extension of Jurisdiction (E&W) Order 1994 Reg 3 confers jurisdiction to hear claims for breach of contract where the claim arises out of or is outstanding on the termination of an employee’s employment. But the amount an employment tribunal can award in the proceedings by way of damages for a breach of contract is capped at £25,000 (Reg 10).

Contractual Terms – Implication of terms

62. I adopt these propositions from the Respondent’s skeleton: I have considered them and the relevant authorities and accept they correctly state the law.
63. A term can be implied into a contract of employment by the conduct of the parties or by custom and practice. Either way, the test is essentially the same “*what was agreed between the employers and employees...either expressly or by clear implication*” (Garratt v Mirror Group Newspapers Ltd [2011] IRLR 591 Per Leveson LJ §35).1
64. “A custom or established practice applied with sufficient regularity may eventually become the source of an implied contractual term that occurs where the point is reached when the courts are able to infer from the regular application of the practice that the parties must be taken to have accepted that the practice has crystallised into contractual rights...The parties must be shown to be applying the term because there is a sense of legal obligation to do so” (Per Elias J §21-22). Solectron Scotland Ltd v Roper [2004] IRLR 4 Elias J
65. In Park Cakes Ltd v Shumba [2013] IRLR 807 Underhill LJ approved CSC Computer Sciences Limited v McAlinden [2013] EWCA Civ 1435 (Per Underhill §36) the factors relevant in deciding whether there was an intention to be bound (in that case to pay enhanced redundancy payments) (“The Park Cake Factors”). These include:

(1) On how many occasions and over how long a period had the benefits been paid;

(2) Whether the benefits are always the same;

(3) The extent to which the enhanced benefits are publicised generally;

(4) How the terms are described;

(5) *What is said in the express contract; and*

(6) *Equivocalness*

The right to unilateral variation of contractual terms

66. In Solectron Scotland Ltd v Roper [2004] IRLR 4 the Court of Appeal stated that:

“The fundamental question is this: is the employee’s conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change, they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights...”. (Per Elias LJ §30).

67. In Khatri v Cooperative Central Raiffeisen-Boerenleenbank BA [2010] EWCA Civ 397 Mr Khatri was asked to sign a new scheme removing an existing bonus entitlement to “Indicate your acceptance of this offer”. He did not sign it and continued to work as before and accept payment of his salary. The employer later refused to pay his bonus and argued that Mr Khatri had accepted the offer by continuing to work. That argument was rejected by the Court of Appeal: “...it seems to me it would be quite wrong to infer from all the circumstances that the claimant had accepted changes to his contract which were wholly to his disadvantage...there was no unequivocal act implying acceptance” (Per Jacob LJ §47 & 51).

The ACAS Uplift

68. The Tribunal has discretion pursuant to s207a and Sch A2 of TULRA if it thinks it just and equitable in all the circumstances to do so to increase any award it makes to an employee by no more than 25% if it appears to the Tribunal that the claim to which the proceedings relate concerns a matter to which a Code of Practice issued under TULRA applies, the employer failed to comply with that Code in relation to that matter and that failure was unreasonable. The Tribunal is likewise empowered to reduce an award where it appears that an employee has unreasonably failed to comply with an applicable Code.

69. In Slade v Biggs & Others [2021] EA-2019-000687-VP and EA-2019-000722-VP the EAT set out the following four stage test for tribunals assessing the appropriate percentage uplift for failure to comply with the Acas Code:

69.1. Is the case such as to make it just and equitable to award any Acas uplift?

- 69.2. If so, what does the tribunal consider a just and equitable percentage, not exceeding, although possibly equalling, 25%?
- 69.3. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings? If so, what in the tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
- 69.4. Applying a final sense check, is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms? If so, what further adjustment needs to be made?

Conclusions

Breach of Contract

Did the Claimant have a contractual right to the bonus/commission payments?

70. I have found that there was until 2020 a regular, annually repeated practice of payment of one off bonuses calculated on the basis of 10% of gross profit of one off sales.
71. I am satisfied that this arrangement amounted to a binding contractual obligation in the form of an implied term that a bonus would be paid at the rate of 10% of Gross Profits for one off sales as determined by the verified invoice value of those sales generated by the employee.
72. My reasons are:-
- 72.1. The 2015 letter refers to a bonus scheme, so the claimant was entitled to expect that such a scheme would be an aspect of her employment;
- 72.2. It was sufficiently clearly expressed and had conveyed an intention to be bound such that it had the quality of a contractual obligation;
- 72.3. There was an established practice and procedure for claiming and paying the bonus – the Tracker;
- 72.4. The bonus payments were included and recorded in formal payslips;
- 72.5. It was referred to in a 2017 email when the claimant changed her job title;
- 72.6. The evidence from the claimant and Mr Bently supports a conclusion that the 10% bonus scheme operated;
- 72.7. The 2020 Bonus Scheme Terms document included a provision for bonus payments on similar terms.

73. The Contractual obligation was renewed annually, but before 2020 was not expressed to be, and there is no evidence that it was ever varied as a matter of discretion by R. Unless varied by agreement or conduct the respondent did not have a right to vary the existing contractual arrangement with the claimant which subsisted before the 2020 Bonus Scheme Terms document was issued.

Did the Respondent have a unilateral right to vary that entitlement ? If not, did the Claimant agree the purported variation of the contractual terms of the contract of employment ?

74. The 2020 Bonus Scheme and the 2021 Bonus Scheme documents were not signed by the claimant. Those documents themselves and the accompanying emails make clear that the respondent expected the claimant to signify her agreement to their terms by way of a formal signature.

75. Although Mr Buff said that he considered that there was no requirement for signature, that the request was just being polite and that he in fact had the power to vary bonuses unilaterally, his subjective understanding or intentions is not determinative. Looking objectively at the parties' behaviour, the respondent asked for but did not obtain a signature from the claimant.

76. The respondent did not have, and did not purport to assert a unilateral right to vary the claimant's pre-existing entitlement to the one- off sales commission payments.

77. The claimant did not indicate consent by words. On the contrary she asked for but did not receive answers to clarification questions and in relation to the 2021 Bonus Scheme Terms expressly asked if she should assume the bonus would be paid as before and received no answer.

78. She did however work as normal without asking further, and in doing so took a risk that her doing so might amount to acceptance by conduct. However, in this regard a telling consideration is that the change in 2021 was sought to be made in the middle of the year. By that stage claimant had already, as I have found generated considerable profits and the potential for a bonus payment of some size.

79. On balance, having regard to the fact that (i) the changes in 2020 and 2021 were disadvantageous, more strongly so in 2021, (ii) she had queried the terms and received no response, and (iii) taking into account that in Khatri the CA emphasised that something akin to unequivocal acts is required, I find that the contractual entitlement to the 10% one off bonus was not varied by the consent, express or implied, of the claimant.

What sum is due to be paid to the Claimant? Is the Tribunal's jurisdiction limited to making an award of not more than £ 25,000?

80. I consider the amount payable below but it follows from the above that the failure to pay commission earned between January 1 2021 and 31 Dec 2021 and payable on 28 February 2022 was a breach of contract by Respondent.

81. The Tribunal's power to award damages for breach of contract is limited to £25,000, but the same facts are relied upon by the claimant as amounting to an unauthorised deduction of wages. An award for payment of unpaid wages is not so limited, and since the awards cover the same amounts of money, there would be double recovery to award sums under both heads. The statutory limit on damages therefore is not relevant if no separate damages award is to be made.
82. In light of my conclusions below I make no separate award of damages for breach of contract.

Unauthorised deductions from wages

Were the bonus/commission payments, "wages" within the meaning of Section 27(1) of the Employment Rights Act 1996 ?

83. In light of my factual findings the bonus payments were clearly payable to the claimant in connection with her employment. The bonus therefore amounted to 'wages' within ERA s 27(1)(a).

Were the bonus/commission payments "properly payable" to the Claimant within the meaning of Section 13(3) of the Employment Rights Act 1996 ?

84. I have found that the time for payment of the bonuses was established by 2020 and 2021 as being by February of the year following the bonus year. The sums due to the claimant in respect of one off sales during FY 2021 were therefore properly payable to her by 28 February 2022.

Had the Claimant expressly signified in writing her agreement or consent to the making of the deduction within the meaning of Section 13(1)(b) of the Employment Rights Act 1996 ?

85. The claimant had not consented to any deduction.

What sum is due to be paid to the Claimant ?

86. The respondent's submissions were to the effect that it did not accept that the claimant's calculation of the amount of sales and hence the amount of commission was correct. I was encouraged to adjourn matters of quantum to another hearing.
87. This was a novel submission. The respondent had not previously taken issue, at least not expressly, with the amount claimed by the claimant. It would have been in a position to do so because, even though it might not have undertaken the analysis at the time because of its mistaken (as I have found) conclusion about its entitlement to vary the contract, it would clearly have had access to the invoice details, and has had for some time a copy of the Tracker document that the claimant relied upon and which was in the hearing bundle.
88. In the absence of evidence of some different amount, and having regard to the Overriding Objective of dealing with cases fairly and justly including avoiding delay,

I was not persuaded that I should list a further hearing. I have the material before me from the claimant which is unchallenged and accept her calculation of the amount deducted from her wages is correct.

89. The respondent must pay the claimant the sum of £55,537.42 (gross) in respect of wages unlawfully deducted.

Breaches of the ACAS Code of Practice

90. In this case I find that the respondent ought to have recognised that the letter of 4 March 2022 contained a complaint to which the ACAS Code could apply, namely that she had a contractual right to a bonus which had not been paid. Further, before the termination of her employment the claimant's solicitor had written again in clear terms setting out a complaint.

91. The respondent did not apply any grievance procedure. It therefore failed to apply the ACAS Code of Practice.

92. Applying the four stage test of whether to make an uplift:

93. I consider that this is a case such as to make it just and equitable to award some ACAS uplift. No grievance process was applied at all. I consider that the unilateral change in employment terms part way through a bonus year when the respondent had had the financial benefit of the claimant's efforts in an attempt to avoid paying a substantial bonus and its failure to respond to the claimant's inquiries about that conduct are aggravating elements of the general context for the failure to adopt a grievance process. On the other hand I have taken into account that the claimant's letter of 4 March 2022 was combined with a decision to resign she had indicated an intention to resign as soon as her notice was completed. The respondent was labouring under a genuine misapprehension as to its rights in relation to the bonuses and did not act wilfully in breach of the Code. The fact that there were extensive failings follows from the nature of the misapprehension

94. In all the circumstances a just and equitable percentage uplift is 5%. This results in a headline uplift of £2,776.87.

95. There is no overlap with other awards and standing back this is a proportionate sum and no further adjustment is necessary

96. The claimant shall pay the claimant the total sum adjusted for ACAS uplift of £58,123.20 (gross).

Employment Judge N Cox

Date : 15 March 2024

SENT TO PARTIES: 27 March 2024

FOR THE TRIBUNAL OFFICE

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