



# EMPLOYMENT TRIBUNALS

**Claimant:** S Magazov

**Respondent:** Lumora Limited t/a Erba Molecular

**Heard at:** Watford

**On:** 21 August 2024

**Before:** Employment Judge Feeney

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms A Akers, Counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim is in time.
2. The claimant's claim that the respondent made an unlawful deduction of wages in respect of his bonus succeeds.

# REASONS

## Introduction

1. The claimant brings a claim of unlawful deduction from wages in relation to a bonus. The claimant argues that it was agreed he would get a 20% bonus, whereas the respondent says this was subject to a number of factors including the overall performance of the business, and accordingly the claimant did not receive a 20% bonus.

## Preamble

2. The claimant had attended the Tribunal by VR on the basis that he did not produce a witness statement. The respondent pointed out that it had urged the claimant to submit a witness statement, but the claimant stated it was unnecessary as the documents spoke for themselves.

3. Whilst the claimant had had the opportunity to submit a witness statement either under the Tribunal's order or on the prompting of the respondent, I finally made a decision that it was fair for the claimant to give oral evidence today subject to the respondent having sufficient time to respond and subject to no new matters being raised, of course. The respondent did oppose this but due to the inequality of arms (the respondent was represented by counsel and the claimant was on his own), I decided that it was the proper way of proceeding.

4. The claimant therefore gave evidence himself and the respondent gave evidence via Mr Laurence Tisi, President of Erba Molecular. There was an agreed bundle.

### **The Issues**

5. The issues for the Tribunal were as follows:

1. Time Limits – Unlawful deduction from wages (section 23 Employment Rights Act 1996)

1.1 Was the unlawful deduction from wages claim made within the time limit set out in section 23 of the Employment Rights Act 1996, namely:

1.1.1 Was the claim made to the Tribunal before the end of the period of three months beginning with the date of the payment of wages from which the deduction was made (plus early conciliation extension)?

1.1.2 If not, was there a series of deductions?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.1.4 The claim form was presented on 12 December 2023 and early conciliation lasted from 6 November 2023 to 28 November 2023. Any complaint about something that happened before 7 August 2023 is potentially out of time.

2. Unlawful deduction of wages (section 13(1) Employment Rights Act 1996)

2.1 Was the claimant contractually entitled to a bonus of 20%?

2.2 Did the respondent make any authorised deductions from the claimant's wages in terms of section 13(1) of the 1996 Act?

2.3 If so, was the extent of such authorised deduction?

### **Findings of Fact**

6. The claimant began working for the respondent on 31 August 2021. The claimant had negotiated with the respondent over his terms and conditions as he had initially turned the role down, but later when offered a 20% bonus and a healthcare

package he agreed to accept the job. He negotiated these with the respondent's HR manager Tel Rashid.

7. The claimant was sent an offer letter on 12 July setting out his place of work, his holiday entitlement, probationary period, notice period, health insurance, etc. On the second page of that letter the claimant signed had it and it was dated 15 July.

8. The second paragraph of the offer letter stated:

"I also confirm you will be entitled to receive a performance-related bonus, due date March 1 each year, of up to 20% of salary (pro rata'd for joiners during the year). Exact details and criteria will be agreed on joining."

9. The claimant said in cross examination that he did not remember discussing the bonus with anyone when he started, and the respondent brought no evidence to contradict this.

10. There was a contract of employment that went along this, which described the claimant's role as New Product Introduction Manager, and the claimant amended the first date of work as 31 August 2021.

11. Under paragraph 7 (Remunerations and Expenses) it said:

"7.1 Your basic gross salary is £85,000 per annum accruing on a daily basis.

7.2 ...

7.3 You are not entitled to any payment in respect of any hours worked in excess of your normal weekly hours unless agreed in advance with Dr Laurence Tisi or another director.

7.4 ...

7.5 Your performance and salary will be reviewed (but not necessarily increased) annually during the annual performance review process. The company at its absolute discretion may award a salary increase. For the avoidance of any doubt, any such increase in salary will not entitle you to an increase in subsequent years."

12. Mr Tisi stated that bonus was set on the basis of the following. First of all there would be an annual appraisal generally at the beginning of January based on performance over the previous year. The bonus was then paid in or around March of the following year. The bonus was performance-related but was still at the owner's discretion – there was no automatic right to a bonus. The matters taken into account were:

- (1) appraisal scores regarding key responsibility areas (KRA);
- (2) appraisal scores regarding an employee's agreed objectives;
- (3) contributions to key high level company objectives; and
- (4) added value contributions (for example an invention).

13. Mr Tisi would make a presentation to the Board regarding the bonuses and the decision would then take into account the financial position of the company. Mr Tisi said that sometimes no bonus was paid or amendments were made. Mr Tisi said there had never been a simple formula specifically to set a bonus.

14. In relation to appraisals, guidance was given to staff undertaking self appraisals that a score of 3 out of 5 represented "just doing your job". Scores below 3 indicated a need for improvement training. Scores above 3 indicated good performance, with a score of 5 representing exceptional performance.

15. There was no contractual right to a bonus set out in the claimant's contract.

16. The claimant then received a bonus for 2021 of £3,000 covering 30 August 2021 to the end of the year. Three months of that time represented his probationary period. This was paid to the claimant in April 2022. The claimant had performed well, the respondent said, but at the standard they would expect for a senior engineer. The claimant was disappointed as he was expecting a full bonus which pro rata'd would have been £5,000.

17. On 29 April 2022 the claimant sent an email to Tel Rashid in HR stating:

"Tel, I've just got what I imagine is my bonus bundled with my salary. It came to £6,300. This doesn't feel like what we agreed on. 20% of £85,000 is £17k, less 40% tax roughly £10k. For six months pro rata that comes to £5k."

18. Mr Rashid replied:

"Hi The bonus you would have received would be based on your performance for appraisal score applied to 20%, so full score 100% on your review would certainly gain you 20%. Any less reflects the score assigned by your manager. If you don't have a breakdown please do ask Laurence or Lynn. This should be maintained locally."

19. The claimant says he sent this to Laurence Tisi but never got a reply and he did not chase it up.

20. However, at this point in time the claimant did not have an appraisal score – he had passed his probation and that was taken into account, according to Mr Tisi's evidence (which I accept). Mr Tisi met with the claimant to discuss his disappointment and he explained to the claimant then the facets of the bonus payment – that they had taken into account his technical progress had been good in 2021, and he had received a positive probation report from his line manager. The claimant said he was disappointed as he had expected to get the full 20% bonus which would have been £5,000 net. Subsequently, Mr Tisi agreed to pay him an extra £1500 as the company wanted to incentivise him and the claimant seemed to accept this.

21. The respondents in 2022 paid all staff an extra £1000 as a one-off payment in view of the increase in the cost of living.

22. A performance review was undertaken in respect of the claimant's 2022 performance. The claimant following the company's process initially scored himself. He originally scored himself 5 out of 5 against his objectives. Mr Laverick discussed

this with the claimant as this was a concern as it suggested a lack of understanding of the process and a lack of objective critical review. The claimant's line manager Mark Laverick explained this to him, and indeed he set it out in writing on Friday 13 January 2023.

23. Following discussion with Mr Laverick and the claimant agreed to review his self score and changed the score to 3 out of 5 for his objectives, which represented just doing the job i.e. not exceptional performance. Mr Laverick scored the claimant 3.5 out of 5 overall. He received £2500 in respect of 2022 plus the £1000 cost of living one off payment. The claimant had a meeting with Mr Tisi on 29 March 2023 when his bonus was explained. The claimant said that the bonus had operated as a disincentive. He also mentioned that he could have used some software he had designed but didn't. Mr Tisi advised him anything developed whilst working for the respondent belonged to the respondent and advised him to get legal advice.

24. The claimant was made redundant in August 2023 as the business was under financial pressure. He was first told of this on 1 August 2023. The business owners felt there was not enough commercial value in the claimant's project. The claimant spent his three month notice period on garden leave. Historically Mr Tisi said they had not awarded bonuses for employees leaving the company for whatever reason, so the claimant was not offered a review of his 2023 performance, neither did he request one. The claimant's last day of service was 4 November 2023.

25. On 11 September 2023 whilst on garden leave the claimant emailed Mr Tisi and asked if, rather than paying his bonus (which at this stage he was claiming £25,000 in unpaid bonus) he would settle for keeping the equipment the respondent had bought him so he could work from home. Mr Tisi replied on 18 September 2023 stating that he was formally refuting the statement that the company owed the claimant £25,000 and he asked the claimant to return the equipment and said he had no authority to give any equipment away.

26. Further, Mr Tisi said that he would arrange a meeting to discuss the claimant's complaint, however on 19 September 2023 the claimant indicated he wished to bring a grievance. Lynn Golding from HR suggested they had a meeting to discuss the outstanding issues regarding the bonus and the equipment. The claimant stated there was nothing to discuss about the equipment – if they were not going to do a compromise he would return it, and as far as the bonus was concerned there was nothing to discuss; that Mr Rashid had explained it well in his email and that Mr Tisi had supposedly discussed the situation with Tel and he had heard nothing further. His position was that Mr Rashid had made commitments on behalf of the respondent and there was nothing further needed to be said.

27. The claimant wrote again to the respondent on 21 September 2023 stating:

“During my remuneration negotiation with Tel I was told there is a performance based bonus scheme, the scheme that works as per the score on the performance assessment and pays off at 20% of the yearly salary pro rata'd on the performance score.”

The claimant referred to the email from Tel Rashid referred to above.

28. The claimant was told at the time of that email that Mr Tisi would discuss it with Mr Rashid and get back to him, but he never did. The claimant stated the bonus now constituted £25,000 without taking into account inflation and his pay rises:

“Laurence has formally refuted the existence of this bonus in the email earlier this week. I proposed earlier that in lieu of bonus Erba is contractually obligated to pay me you let me keep the hardware. The value of the hardware is significantly below the total bonus value. I am proposing this agreement despite the significant monetary loss to me to save everyone the stress and anxiety of dealing with the dispute through official channels. If you refuse I am prepared to immediately return the hardware at your first request. If you choose to follow the path I shall raise a formal grievance. In that case please let me know what Erba’s grievance policy is when you respond to this email. If you do not have a grievance policy I shall follow the one offered by ACAS. There are no more nuances to the situation to be discussed and based on my personal choice and advice from ACAS I would prefer all further discussions were done in writing to maintain clear communication. If you have any questions please let me know via email and I shall endeavour to respond as soon as possible.”

29. The claimant was asked several times to have a meeting via Teams with Ms Golding and Mr Tisi but declined. As can be seen from that letter, the claimant only wanted to communicate via email at that point. By 6 October 2023 the claimant said he would discuss it by telephone if necessary, having raised a formal grievance on 5 October 2023. The claimant stated it was his understanding that he would get a performance based bonus of 20% of his yearly salary and the bonus would be pro rata’d depending on his performance score. However, the claimant had not been paid that bonus.

30. The claimant accepted an invitation to a Teams meeting on 30 October 2023. The claimant’s calculations were queried as he had not followed the calendar year and they were not sure why so that they could not understand his calculations. The claimant said it was common sense and based on estimates. The claimant expected that the year he was made redundant (2023) he would receive a pro rata’d bonus having worked from January to November. It was the company’s case that in any event as the claimant had spent three months on garden leave it would only be to August. The claimant had in his calculation suggested a score of 4.9 but there was no basis in particular for that as no appraisal took place.

31. It was Mr Tisi’s evidence that to get the 20% (all other things being equal) the claimant would have to get 5 in his **KRAs** and his KPIs. If he got less than this there was no delineation of the relationship between the scores and a proportion of the performance bonus – obviously other factors were involved such as the general performance of the business. If there was a strict pro rating a 3 rather than a 5 would be the equivalent of 12% rather than 20%, and this would be a far higher bonus than the company would generally award. Part of the thinking behind the bonus was to encourage retention – if somebody was leaving there was no need to encourage the retention.

32. The claimant’s outstanding payments were made at the end of November on the normal payment date.

Claimant's calculation of sums owed

33. The claimant calculated as follows:

- September 2021 to August 2022  
Salary £85,000;  
Performance score from Zoho 4.9;  
Duration one year;  
Bonus at 4.9 of 5 is the equivalent of £16,660.
- September 2022 to February 2023  
Salary £85,000;  
Performance score 3.5;  
Duration half a year;  
Bonus  $£85,000 \times 20\% \times 3.5/5 \times 0.5 = £5,950$ .
- March 2023 to October 2023  
Salary £89,000;  
Performance score 5;  
Duration 0.583;  
Bonus  $£89,000 \times 20\% \times 5/5 \times 0.583 = £10,383.33$ .

34. It can be seen therefore that the claimant's method of calculation was based on his salary and on one occasion his actual performance score, and working this out as a percentage of 5 as referred to above, and then presenting that as a proportion of 20%. The claimant based this on different periods which did not accord with the way in which the respondent calculated bonuses, which the claimant was aware of as the discussion would be early January about the previous year and then the money would be received in March or April. Further there was no appraisal for 2021 or 2023. Further the claimant had argued for 2021 prorated on a time basis his bonus should have been £5000. I do not accept the claimant has set out a rational way of calculating his entitlement and therefore if the claimant succeeds a remedy hearing would be required.

35. In respect of time limits the claimant relied on there being a series of payments.

36. He also advised he had spoken to ACAS in March 2023 but at the time did not want to fall out with his employer and was considering his options.

37. The claimant entered into early conciliation on 6 November and his certificate was discharged on 28 November 2023. He issued proceedings on 12 December 2023.

**Respondent's Submissions**

1. Time Limits

38. The respondent submitted that it was not a series of deductions – they were one off, once a year payment based on January to December with a review in the January of the year after the performance review years plus a payment made in March or April so that the last payment would have been due in March 2023 for the

year 2022. He was paid at this time and if he wished to challenge it he should have filed his claim within 3 months plus any ACAS conciliation extension of that event.

39. The claimant was made redundant partway through the year and on the basis of the respondent's practice no bonus was payable for that year. Therefore the claimant was out of time and had not advanced any reason for it being reasonably practicable.

## 2. Section 13 Employment Rights Act 1996

40. The claimant had based his calculations on what he called "common sense" or what he would do if he was running the respondent business, and was not supported by any policy term in the contract or any documentation at all. The payment, although it would fall under wages, was non contractual and wholly discretionary and the Tribunal should find this was correct on the basis of the evidence of Mr Tisi; no custom or practice to pay it every year; not paid it in 2022; the email of Tel Rashid does not assist the claimant to the extent he thinks it does as he stated there had to be a local agreement regarding how much would be paid unless the person had got 100% perfect scores. As the payment was discretionary to encourage retention, it made sense that nothing would be payable if the person left before an appraisal was undertaken – whether that was for a good reason or a bad reason or (as in this case) a reason out of the control of the claimant i.e. redundancy.

41. Basically, the claimant has invented his own method of calculation which is not reflected anywhere in the paperwork and which was not even discussed when he was recruited or at any time subsequently.

42. In respect of the claimant's first period of employment in 2021, this was mainly his probationary period and the respondent chose to make a bonus payment for that period based on his performance. There was no actual appraisal undertaken.

43. In respect of the second year, whilst the claimant assessed himself at 3 and Mr Laverick at 3.5, there was no exact relationship between scores and the percentages of 20%. Even somebody getting perfect scores might not get the bonus depending on the company performance.

44. The claimant has not given evidence that he was told it would be pro rata'd down from 20% if he got less than perfect scores in his appraisal.

45. The fact that the respondent awarded the claimant an extra £1,500 as an incentive in 2022 for performance in 2021 shows that this was wholly discretionary and not based on any strict calculation.

46. The claimant had not given evidence that he had been told he would get a bonus if he left the respondent's employment.

### **Claimant's Submissions**

47. The claimant stated he accepted the job on the basis of the 20% bonus. He knew he was a good engineer and he expected he would get very close to the 20%. He accepted Mr Rashid's email was ambiguous to some extent. He had offered an example and Mr Rashid did not demure from it, but neither did he agree.



48. In respect of time limits, the claimant did not want to get ACAS involved earlier as he was hoping to maintain a good relationship with his employer. In any event the claimant would argue that he was due a payment in March or April 2024 or following the end of his employment and therefore his claim was in time.

## The Law

### Time limit for unlawful deduction claims

49. There is a three month time limit for presenting a complaint to a Tribunal under any of the heads set out in section 23(1) of the Employment Rights Act 1996. If the complaint relates to a deduction by the employer, the operative date from which time starts to run is “the date of payment of the wages from which the deduction was made”. If the complaint relates to a payment received by the employer, the operative date is the date when payment was received. If the complaint is about a series of deductions or payments, the time limit runs from the last deduction or payment in the series.

50. Section 27(1) of the Employment Rights Act 1996 defines wages as any sums payable to the worker in connection with his employment. This includes any fee, bonus, commission, holiday pay or other emolument referable to the employment. The respondent accepted that the bonus was potentially within the ambit of section 27 but denied that the claimant was contractually entitled to it.

51. Regarding what a deduction is, it is defined in section 13(1) of the 1996 Act as:

“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...as a deduction made by the employer from the worker’s wages on that occasion.”

52. The “after deductions” in that section refers to statutory deductions such as tax and national insurance.

53. In respect of what is properly payable, this is determined by common law and contractual principles, and that is really what we are concerned with in this case – whether or not the claimant was entitled to a 20% bonus or a proportion thereof.

54. Whether a deduction is a series of a one off payment depends on the nature of the payment, regularity, frequency etc. There is no longer a principle that the gap between payments must be no more than the 3 month time limit.

### Contractual or discretionary

55. In respect of discretionary payments, it has been previously held that non contractual discretionary payments fell within section 27 if there was a reasonable expectation that they would be paid. However, this was overturned by the Court of Appeal in **New Century Cleaning Company Limited v Church (2000)** – there had to be some legal although not necessarily contractual entitlement to the payment in question.

56. Generally, in respect of bonuses difficulties may arise where the parties' agreement is not set out in writing or is ambiguous. Bonuses can be an important part of remuneration and are often used as a means of incentivising performance as loyalty as here.

57. It is a very difficult area to decide whether a bonus is contractual or discretionary. Obviously, a bonus scheme will be contractual if it is incorporated into the terms of the employee's contract, either expressly or by implication, and a scheme will usually set out conditions of eligibility and the amount to be paid or the manner of calculating the amount. Even where a bonus is discretionary the discretion must not be exercised in an irrational or perverse manner.

58. It might not be transparent as to whether "discretionary" refers to the payment itself or the calculation or the amount or all three. There have been cases that even where the word "discretion" has been used a bonus has been found to be contractual.

59. The safest way to proceed from an employer's point of view is to ensure that there is a term in the bonus scheme, the contract or offer letter stating that the scheme does not give employees a contractual right to be paid a bonus.

60. Neither is an employer's discretion unfettered as referred to above.

61. There has been case law on the implied duty not to exercise discretion in a way that is irrational or perverse.

62. Clearly, all the advice is that a respondent should make this point absolutely clear as even the use of the word "discretionary" is not necessarily sufficient to establish that a payment is discretionary rather than contractual.

63. I note that I was not referred to any caselaw in respect of the contractual issue.

## **Conclusions**

### Time Limits

#### *Was the claimant's claim in time?*

64. The bonus was a regular payment paid once a year assessed and paid at the same time every year. Accordingly, the claimant would have been expecting a payment without his redundancy event in April 2024. On the basis that it was a regular defined by time payment, I find it was a series of deductions. On that basis we are looking at the last payment that was not made.

65. The last payment the claimant complains about was a bonus for 2023 which was due to be assessed in January 2024 and paid in April 2024. Obviously as the claimant was made redundant, which was not possible. Accordingly, I have taken the approach that had a payment been made it would have been made with his last payment, which included his redundancy pay, any notice pay etc. and holidays, and therefore time would run from then. That date is 4 November 2023. Accordingly, the claimant's claim is in time. Further the respondent had no difficulties with making pro

rata payments based on time in the job as they had done this in the first period of the claimant's employment and Mr Rashid had explicitly referred to this.

66. If I am wrong on this then the last payment under consideration that the claimant complains about was from April 2023. The claimant had an opportunity to consider bringing a claim once he knew he was going to be made redundant, even on his own reasoning that he did not want to issue proceedings against his employer while still employed. The claimant knew he was being made redundant from 1 August and began negotiating to keep their equipment rather than claim against them. Accordingly, at that point in time there was time (taking ACAS early conciliation into account) for the claimant to bring a claim in time. His argument that he did not want to fall out with his employer falls away from 1 August once he knew he was being made redundant.

67. Obviously, the respondent has said that they were not going to make a payment that year because they do not pay leavers, whether good or bad. However, I have approached the time limit on the basis that had they intended to make a payment it would have been rolled up with his redundancy pay etc.

68. Therefore I find that the claimant's claim was in time as the claim stands. It is only if I am wrong about when the last payment would have been made (or should have been paid) that the claimant is out of time.

Was the claimant entitled to a bonus?

69. I find in this particular case it was a contractual bonus even though it is not referred to in the employment contract, which of course is not determinative. The claimant was induced to enter into the employment contract with the respondent on the basis of it and no parameters were ever discussed with him save of course that he must perform. The letter says, "You will be entitled to receive" – it doesn't say you will be eligible to receive - and I find that sets up a legitimate expectation not dispelled by anything subsequently said in that letter or in the contract that the claimant would receive a bonus. The respondent brought no evidence to show that at the point of inducing the claimant to join they set out any factors or criteria – they could have brought Mr Rashid to give evidence about that. There was further enlightenment from Mr Rashid in the email – that the claimant needed 100% performance to receive the full bonus and that it could be pro rata'd timewise – but Mr Rashid did not elaborate on how anything less than 100% would be calculated.

70. The respondent could have put that in the offer letter; they could have had the bonus arrangements set out in a separate sheet that they gave to the claimant when he joined, but they did neither of these things and (as I have explained above) the fact that they explained it orally at different times in the claimant's employment does not mean that the offer in the offer letter was not a contractual one.

71. Further and of relevance is that I do not accept that the respondent would not pay the bonus if an employee was leaving as in this particular case as this had not been suggested at any point in time. Whilst I accept the purpose of a bonus can be to incentivise there is also the concept of good and bad leaver and often a good leaver (i.e. as here redundancy) will get their bonus.

72. I have taken into account the fact that the respondent proceeded to explain to the claimant the factors that in fact they took into account in practice when deciding a

bonus subsequently and that the claimant did not complain about this until after he had left his employment. However, I find that is not unreasonable and does not mean that the claimant had accepted the situation. There was no suggestion from Mr Rashid either that it was 20% or nothing, and in any event a respondent would be required to act rationally in assessing a bonus if the parameters of the bonus were not clear.

73. Therefore, I find that the claimant was entitled to a bonus on all three occasions referred to.

74. Was there a deduction? Whilst I am not satisfied with the claimant's method of calculation particularly as he has not used the calendar year which was clearly used by the respondent he has not received a proportion of 20% based on his salary in respect of the two payments actually made. Logic suggested that there would have been a connection between the score and the 20% in the claimant's situation at least. No explanation has been provided for exactly how the claimant's bonus was calculated in the one year he was assessed i.e. 2022. On the face of it there were deductions and that is my finding.

75. A remedy hearing will have to be listed in order to assess this what the claimant was entitled to in respect of the three deductions.

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Employment Judge Feeney

Date: 19 November 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
28/11/2024

FOR THE TRIBUNAL OFFICE

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