EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Baker

Respondent: Chesterfield Borough Council

Heard at: Midlands East Employment Tribunal (Nottingham)
On: 4th, 5th 6th and 7th November 2024

Before: Employment Judge Singh

Representation
Claimant: Mr Liam Rich (lay representative)
Respondent: Mr J Milford KC (Counsel)

JUDGMENT

1. The Claimant's claim for Breach of Contract is not well-founded and is dismissed.

REASONS

1. The Claimant was employed as a Gas engineer by the Respondent from July 2000 until July 2023. The Respondent is a local authority.

2. The Claimant brings a claim regarding his pay. He claims that he has not been paid properly for the entirety of his employment.

3. The Claimant says that his contract states that he would make a record of each task done as part of his day and each of those tasks was assigned a "cash value". He says that his contract of employment states that he should be paid his basic salary, plus the total of the cash value each month.

4. The Claimant says that, instead, the Respondent had been deducting the basic salary from the cash value.

5. The Respondent does not deny that this is how the Claimant was paid. However, they argue that the Claimant has misinterpreted the contract. They say that the way that the Claimant has been paid is correct in line with the contract.

6. The Respondent's position is that the contract states that the Claimant will be paid is basic salary and a "productivity payment". They say that the productivity

payment is calculated by adding up the total cash value each day and then deducting the basic salary from that.

7. The Claimant has pursued this as a breach of contract claim. He stated that he was aware that he is limited to how much he can claim in the Employment Tribunal for breach of contract and even though the total value of his claim is worth more than the cap, he still wanted to proceed.

The claims and issues

8. As stated, the claim is for breach of contract. The tribunal must determine the following
    a. What is the clause that is alleged to have been breached?
    b. Was it breached?
    c. If so, what remedy is the Claimant entitled to?

9. The clause the Claimant relies upon is clause 5 of his contract of employment. This states.

> *"5. Remuneration*
> *Your wage is £14,182 per annum, equating to £272.73 basic for a 37 week plus productivity payment"*

10. The central issue is what the contract means by "productivity payment".

11. Does this mean, as the Claimant argues, the total of cash value of works carried out by workers such as the Claimant.

12. Or does it mean, as the Respondent argues, the balance of the cash value minus the worker's basic salary.

13. If the Claimant's interpretation is the correct one, then the Respondent will have been in breach of that clause as they have not been paying the total cash value. The Respondent does not dispute this.

14. However, if the interpretation of the Respondent is accepted, then there has not been a breach as the Respondent has been paying the Claimant in line with their interpretation. The Claimant did not challenge this either.

The hearing

15. The hearing took place over 4 days in East Midlands Employment tribunal between 4-7th November 2023.

16. There were 2 days of evidence and submissions in person, 1 day of deliberations by the Employment Judge in chambers and the decision was delivered via CVP.

17. The Claimant attended and was represented by a lay person, Mr Liam Rich, who is also a union rep. Mr Rich also provided a witness statement supporting the Claimant.

18. The Respondent was represented by Mr Julian Milford KC. Rachel O Neil, Service Director Digital, HR and Customer Service gave evidence for the Respondent.

19. There was one preliminary issue at the start of the hearing, which was about the bundle. The Claimant had supplied his own and used that in preparing his witness statements. The references in those statements were to documents in that bundle. However, the Claimant confirmed he had received the Respondent's bundle in good time in advance of the hearing. It was agreed that the Respondent's bundle would be used for the hearing as the Claimant confirmed it contained all the relevant documents.

The Law

20. Although employment tribunals are often reluctant to interfere in employment contracts, they are sometimes required to make findings on the interpretation of clauses.

21. When interpreting the express terms of a contract, the court or tribunal's aim is to give effect to what the parties intended.

22. The 'golden rule' in ascertaining that intention is that the words of the contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or 'repugnancy' (i.e. an interpretation that is contrary to the contract itself or its unambiguous express terms).

23. The primary source for determining what the parties meant when they entered into their agreement are the words actually used in the contract, interpreted in accordance with conventional usage. This preference for the ordinary and popular meaning of words means that any alternative technical or specialist meaning is eschewed unless there is evidence that that alternative meaning was intended.

24. Several cases provide useful authorities in respect of this particular case.

25. In *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) 1998 1 WLR 896, HL,* Lord Hoffmann emphasised that a contract should be interpreted not according to the subjective view of either party but in line with the meaning it would convey to 'a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

26. *Chartbrook Ltd and anor v Persimmon Homes Ltd and anor 2009 1 AC 1101, HL* states that if a contract is badly drafted and its literal interpretation would lead to a result that had clearly never been intended by the parties, it should be interpreted in light of the context and commercial background behind it

27. In this regard, the general principles of contractual construction recognise that contracts in general — and employment contracts in particular — are not formed in a legal vacuum.

28. In *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*, the principle was established that the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'

29. In the case of *Burns International Security Services (UK) Ltd v Archer EAT 1229/96* the tribunal decided that the written contract did not represent the whole agreement. It was therefore proper for the tribunal in such circumstances to consider extrinsic evidence in order to determine the terms of the contact. They do not need to restrict themselves to just the words of the contract, but also draw from other sources and what was actually going on in reality which can often better demonstrate the intention of the parties.

30. In *Carmichael and anor v National Power plc 1999 ICR 1226, HL* it was established that it is only appropriate to determine an issue (which was employment status in that case to be determined in that case) solely by reference to the contractual documentation (such as it was) if it appeared from the written terms and/or from what the parties said or did subsequently that such documents were intended to constitute an exclusive record of their agreement. Thus if it is clear that the parties always intended for some documents to also aid with interpretation of the contract, they can be considered.

31. However, the court or tribunal's proper role is confined to that of interpreter and it is not entitled to draw on surrounding evidence to create the bargain between the parties. In the absence of an express term, it is not, for example, entitled to imply a term into a contract based on an assessment of what it thinks would be a fair bargain — see, for example, *Vision Events (UK) Ltd (formerly known as Sound and Vision AV Ltd) v Paterson EATS 0015/13*.

Findings of fact

32. There were few facts in dispute in the case and the evidence in cross examination was limited.

33. Some key points however were as follows;

34. The Claimant accepted that there had been a pay increase regularly over time of the basic pay. However, the Claimant said that he had not felt the impact of this due to the fact that his pay had always been the total of the cash value of work done, which he say had not been subject to any increases. He had always received more than his basic pay in his wages, as the cash value was always higher than the basic pay.

35. The Respondent accepted that although there was a guaranteed minimum of pay available to employees of basic pay plus 12.5%. If employees did not reach a cash value that was more than their basic pay plus 12.5%, for whatever reason, they would be paid that amount. As that amount was linked to the basic pay of the employee, it did go up with pay rises. The Respondent however stated that very few employees were actually paid that because almost everyone achieved a cash value higher than their basic pay plus 12.5%.

36. The Claimant accepted that even though the amounts in the Schedule of Rates for tasks (which was the document that set out how much each piece of work

was worth) had not increased over year, he hadn't seen his pay decrease over the years. He felt it had gone up but not as much as the pay rises that the Respondent had given each year. He also said that he had been negatively impacted by the increased cost of living.

37. The Respondent accepted that it had not increased the Schedule of Rates but said that efficiencies meant that tasks could be done quicker, so the amount people achieved as a cash value had increased regularly. The amount that people could achieve had always been competitive in their opinion.

38. The Claimant accepted that although the words "Productivity Payment" and "bonus" are used interchangeably in some of the documents, the word "Productivity Payment" and "Cash value" are not used interchangeably anywhere.

39. The Respondent proposed that there had been a local agreement which set out what "Productivity Pay" was and how it was calculated but said that because this was agreed over 30 years ago, before records were routinely digitised, a copy could not be found.

40. However, the Respondent said it was clear that the parties had been working to such a method of calculating Productivity Pay (that is total cash value less basic pay).

41. The Claimant accepted that this is how he had been paid for the entirety of his employment. He accepted that most other workers doing similar trades work were paid the same way. He argued there were some exceptions but could not provide evidence to support this.

42. The Claimant accepted that the Respondent usually agreed any changes in the contract with the recognised unions. Although the Claimant did not accept that the Respondent always achieved all agreements with all 3 unions.

43. The Claimant did say that there were occasions when the Respondent had made changes without union agreement, but he could not give specifics or provide evidence of this.

Submissions

44. The parties' submissions can be summarised as follows;

45. The Respondent's argument was that firstly, the Tribunal should find that there was an express written agreement setting out what the term "Productivity payment" meant. They stated that the tribunal could do so when it was clear the wording of the agreement was incomplete. In this case, they argued that the fact that the Productivity Payment hasn't been interpreted anywhere else must mean that there was some other place it was expressly set out.

46. It did not agree that Productivity Payment and Cash Value had the same meaning.

47. The Respondent argued that that express clause can be determined using the conduct of the parties. For the last 20 years at least (that is the entire time of the Claimant's employment), the Respondent has been deducting the basic salary away from the cash value to work out the Productivity Pay and then paying that to employees as well as the basic pay.

48. In that time, no employees have challenged this as being incorrect.

49. In the alternative, the Respondent argued that a term can be implied where it is necessary "in order to give business reality".

50. Again, the Respondent's argument was that that clause can be constructed by looking at what the parties were doing and that that method of calculating Payment Pay had been accepted by the employees for the last 20 years.

51. The Respondent also pointed out that the burden of proof was on the Claimant as they were pursuing the action.

52. In response, the Claimant argued that the burden should fall on the Respondent as they were trying to argue the clause should be interpreted a particular way.

53. The Claimant argued that the Respondent failure to properly and clearly set out the terms of remuneration in a written document that they could produce was a breach of the ERA 1996. That set out the requirement for written particulars of employment.

54. The Claimant said that they found it hard to believe that such a big organisation as the Respondent was not able to produce a copy of the agreement which set out how Productivity Pay was to be calculated.

55. The Claimant argued that the term being proposed by the Respondent was not fair. Calculating the Productivity Payment the way they have been doing meant that employees did not receive the benefit of any pay rise and would have to do more tasks in order to earn more.

56. The Claimant also argued that the clause cannot be implied by custom and practice as it did not meet the necessary parts of the test of being notorious, reasonable and fair. For their part, the Respondent said they were not relying upon the custom and practice argument. They said that this only applied in circumstances when there was no clause of a contract.

Findings

57. My decision is there was not a breach of the Employment Contract by the Respondent and the Claimant's claim fails. The reasoning for my decision is as follows;

58. As stated, the starting point is the contract that was provided in the bundle. Both parties agreed that this was the Claimant's contract and that it was a valid contract.

59. The clause I was being asked to determine was at section 5 of the document. As stated above, it said that the Claimant's remuneration would be his basic pay plus a productivity payment.

60. I did not agree with the Claimant's assertion that the Productivity Payment was the same as the total cash value.

61. The Claimant has the burden to prove this. He is bringing the claim and seeking to rely upon his interpretation of the contractual clause. He would therefore have to convince me that the Productivity Payment means total Cash Value.

62. I only have to find on balance of probabilities, that is that it is more likely than not that the Productivity Payment means total cash value.

63. I find that the evidence does not support a finding in the Claimant's favour. The Claimant accepted that there was nothing in the documents that said that Productivity Payment meant total cash value.

64. I accept that documents do not always tell the full picture however and sometimes anecdotal evidence of the reality of the situation can allow a tribunal to better determine how a clause should be interpreted.

65. In this case, the reality of the situation also did not support the Claimant's argument. The Claimant accepted that for the entirety of his employment (barring the special arrangements made during the covid years) that Productivity Payment was calculated as Total Cash Value less basic pay.

66. Given this calculation was applied to all trade staff and given that the Respondent is a heavily unionised employer, if this was an incorrect interpretation of the clause, I would have expected someone to have raised this earlier. Instead, the Claimant and his colleagues have been paid using this calculation for at least 24 years.

67. I accepted that the Respondent's argument that there would have been a written agreement to be the more likely scenario. The Claimant accepted that the Respondent normally seeks agreement with unions about contractual terms. There were exceptions but, as the Claimant pointed out, this was such an important and fundamental clause, it was unlikely an agreement with union reps would not have been reached and recorded.

68. I accepted the Respondent's submission as to why this document wasn't supplied. Given the historic nature of the agreement and the lack of digitisation, it was more likely than not that a copy had been lost or not retained. This was a plausible explanation, and I did not believe that the Respondent had purposely chosen not to provide it or had lost it.

69. I also accepted the Respondent's submission the reality of the situation could inform my finding as to what the parties, that is the Respondent workforce, and the Respondent had intended the calculation of Payment Productivity to be. It was clear and transparent that employees were being paid Productivity Payment based on total cash value less basic pay. The Claimant was fully aware of it and

although he said that it was difficult to understand his bonus sometimes as it was based on 5 weeks rather than 4 weeks as his pay was, it was clear he understood that the amount of Productivity Payment was not the total cash value of jobs done. He had also chosen to accept this through his employment and not challenged it until very recently. He had clearly accepted that this was how things were done.

70. Although the Claimant put arguments forward about the fairness of the clause and the fact that it did not allow workers to feel the benefit of pay rises, I make no finding based on this. As stated in the case law, my role is not to decide if the clause is fair or reasonable, but what it should be and whether it has been breached.

71. I also accepted the Respondent's argument that "custom and practice" was not a ground they were relying upon so the elements of that test need not be applied.

72. In summary, I find that the Claimant has misinterpreted the clause in his contact for the purposes of this claim. There is no evidence that would allow me to find on balance of probabilities that "Productivity Payment" means "total cash value" in his contract or that the parties to the contract ever intended it to mean that. As such, I do not find that the Respondent has breached the Claimant's contract and the claim fails.

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Employment Judge **Singh**

_____9th January 2025_____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....10 January 2025.....

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FOR THE TRIBUNAL OFFICE