



# EMPLOYMENT TRIBUNALS

**Claimant:** S Shay

**Respondent:** Monica Vinader Limited

**Heard at:** Manchester

**On:** 12 October 2020

**Before:** Employment Judge Feeney

## REPRESENTATION:

**Claimant:** In person

**Respondent:** M Bannister, HR Manager

# JUDGMENT

The judgment of the Tribunal is that the claimant's claims of:

1. breach of contract, and
2. unlawful deduction of wages,

succeed.

The claimant's remedy will be determined at a hearing to be fixed.

# REASONS

1. The claimant brings claims of unlawful deduction of wages and breach of contract including wrongful dismissal in relation to matters arising from her dismissal in February this year.
2. The claimant's claims are:-

### Breach of contract

- (i) That she was entitled to four weeks' notice and not the one week's paid;

- (ii) That she was entitled to a bonus payment for the period November 2019 to January 2020.

Unlawful deduction of wages

- (iii) Payment for 20 February, the date of her dismissal wrongly recorded by the respondents as 19 February.
3. I explained to the claimant that due to her insufficient length of service she could not bring an unfair dismissal claim and therefore damages were not at large but were specific to the losses relating to breach of contract and unlawful deductions.
  4. I discussed with the parties whether or not it was conceded that the claimant was not dismissed for gross misconduct, the respondent agreed that was the case hence paying the claimant one week's notice, this meant that we did not have to take evidence in relation to what exactly happened when the claimant was dismissed.
  5. The main factual issue is a mixture of fact and law was whether the claimant was still within her probationary period when she was dismissed as if she was she was only entitled to one weeks' notice and the full disciplinary procedure did not apply.
  6. The issues for the Tribunal therefore were:-
    - (i) Was the claimant's probationary period concluded or had it been extended by the respondents;
    - (ii) If the probationary period had concluded the respondent accept that the claimant would have been entitled to a month's notice and the full disciplinary process would have applied;
    - (iii) Was the claimant dismissed on 20 February rather than 19 February;
    - (iv) What remedy is the claimant entitled to in respect of the failure to implement the disciplinary procedure i.e. is it the length of time it would have taken for a proper disciplinary procedure to be applied;
    - (v) Was the claimant entitled to a bonus, this is dependent on whether the claimant was within her probationary period or not. If the claimant was outside of the probationary period are the respondents entitled not to pay the bonus on the basis that the claimant was subject to disciplinary procedures;
    - (vi) Was the bonus scheme contractual or non-contractual. If it was non-contractual were the respondents required not to exercise any discretion in a capricious way, if so, did the respondents exercise their discretion in a capricious way.

7. The claimant gave evidence and Ms Banister HR officer for the respondent. There was an agreed bundle although the respondent produced further documents during the course of the hearing.

### Findings of Fact

The Tribunal's findings of fact are as follows:

8. The claimant began her employment with the respondent on 30 July 2019 as Deputy Concession Manager. The respondent company sells jewellery. The claimant was promoted to Concession Manager on 8 September 2019, the claimant's probationary period was to last for 6 months from when she started and was therefore due to expire on 30 January 2020. On 31 January 2020 the claimant received an email invite to a probation meeting via Skype for Thursday 6 February 2020. On Wednesday 5 February the claimant received an email which cancelled the invitation to the probation meeting but she was told nothing else. As she would later discover a complaint had been made against her by MO, her junior Deputy Manager on or around 3 or 4 February. The claimant was not interviewed about this until 19 February, the claimant never saw the full grievance from MO and in fact until her dismissal was unaware that there were allegations of discrimination. The claimant received an email on 20 February stating that she was dismissed, this is why the claimant states that her dismissal was effected on 20 February and not 19 February as claimed by the respondent. The claimant asked to appeal but she was informed she did not have the right to appeal but she wrote with a grievance to the business owners on Wednesday 26 February.
9. The respondent acknowledged the grievance and undertook an investigation but on 11 March it was confirmed that the decision to dismiss was being upheld. The claimant was never interviewed regarding her grievance, nor did she receive an answer to any of the points she raised.
10. It is the respondent's position that the claimant was not entitled to a longer period of notice or to the benefit of a full disciplinary process because she had not completed her probationary period. In addition, the respondent said that she was not entitled to the bonus as it was non-contractual and therefore they were entitled not to pay the bonus and that even if it was contractual it would not have been paid because of the complaints made against the claimant.
11. Of course, as the claimant did not have two years' service the claimant could not proceed with an unfair dismissal claim. As the respondent did not contest the fact that the claimant was not guilty of gross misconduct I have not explored these complaints including the strength of those complaints in the light of the interviews I have seen with the claimant and three members of staff.
12. At paragraph 3 the contract of employment says:-
  - "3.2 the first six months of your employment will be a probationary period during which your performance will be assessed. The probationary period may be extended at the company's discretion. During the

probationary period the full disciplinary and grievance procedure will not apply.

- 3.3 During the six-month probationary period the notice required by either party to terminate your employment with the company will be one week.
  - 3.4 Following the official end of the probationary period your contract of employment may be ended by giving the following written notice. The notice that the company will give you to terminate your employment is one month and the notice you need to give the company to terminate your employment is one month.
  - 3.6 The company reserves the right to require you not to attend work and/or not to undertake all or any of your duties of employment during any period of notice of termination, whether given by you or the company provided always that the company shall continue to pay your salary and provide employee benefits in such circumstances.
  - 3.7 Nothing in this contract prevents us terminating your employment summarily or otherwise in any event if any serious breach by you of the terms of your employment or in the event of any acts or acts of gross misconduct by you.
13. There was nothing in the contract about the bonus scheme and at paragraph 10 there was a reference to the company commission scheme. I accept the respondent's indication that this was not commensurate with the bonus scheme and the bonus scheme was different.
  14. During the course of the hearing the respondent provided further documents. There were documents relating to a probationary meeting the claimant had conducted as manager. This included a letter inviting the claimant's subordinate to a probationary meeting advising her there were problems with her performance and a script for the meeting). The respondent they relied on this to show that the claimant knew full well that the probationary period was not completed until the review meeting took place and a decision was made. The script for the probationary period meeting the claimant was to conduct states that if the employee is dismissed she would be due one month's notice.
  15. In addition, one of the additional documents was a letter regarding a bonus payment. The respondents accepted that this was a sample letter, the claimant said she had never seen anything similar herself. The respondent's bonus scheme letter said that:

"This potential award will only be released subject to the company meeting its sales and EBITDA targets which have been agreed by the board in the 2019/20 budget. The targets are outlined in the table below .... Assuming a bonus pool is released individuals will then be assessed on the basis of team and individual performance to determine what percentage of salary that individual will receive from the bonus pool, when assessing individual performance instances of performance management, absence management

or any disciplinary action on an employee's record will be taken into account. Bonus awards will be communicated in salary review discussions and payment made in the September 2020 payroll. Employees must be actively at work at September 2020 pay date and not have given notice to leave the business. All other terms and conditions associated with the discretionary bonus scheme

16. The letter regarding the discretionary bonus says the person has to be actively at work and not have given notice, however this reading suggests that the individual themselves has to have given notice not the employer. That disciplinary action on an employee's record will be taken into account - it does not say that this means the person will not receive any bonus.
17. There was also a letter setting out the manager's bonus that was going to be paid to the claimant, that letter was generated on 17 February and stated that she was going to be awarded £744 to be paid in the February payroll.
18. The claimant expressed some surprise at this as her previous bonus had been around £1,200 and was prior to the Christmas period so she was expecting her bonus to be three times the figure quoted.
19. I advised the parties that if the claimant was successful in her claim regarding bonus that the matter of remedy in respect of that or any other claim she succeeded in would be considered at a separate hearing.

## **The Law**

### Breach of contract claim

#### Oral Promises

20. Obviously, an oral promise can be an express term or contract, however the problem will be establishing what that promise was and whether it was made at all, in this case the claimant relied on oral promises regarding her bonus which had led her to believe that the bonus was contractual and was not subject to any conditional arrangements, such as, for example, that the person had to be in work at the date that the bonus was due to be paid.

#### Written terms

21. In relation to express written terms the claimant did have a contract, in interpreting written terms an objective test is applied to the construction of written terms i.e. that the meaning is to be conveyed as to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract. This can mean that if a contract is badly drafted and its literal interpretation would lead to an outcome that clearly had never been intended by the partners it should be interpreted by taking into account the context and commercial background behind it.

22. There is however a general rule that extrinsic evidence is not admissible to help interpret a written contract unless it is ambiguous or does not cover all the matters on which the parties can be presumed to have agreed.
23. The contract can also include implied terms but express terms always take precedence over implied terms although it is possible that an implied term can qualify an express term in some circumstances.

### Wrongful Dismissal

24. Any dismissal by the employer in breach of contract, whether constructive or express, will give rise to an action for wrongful dismissal at common law in circumstances where the dismissal was with no notice or inadequate notice, where summary dismissal was not justifiable i.e. the employee was not guilty of gross misconduct: dismissal in breach of a contractual disciplinary procedure.
25. There are other examples but these are the two most relevant here.
26. A claim for wrongful dismissal is a breach of contract claim under the jurisdiction of the Tribunal by virtue of section 3 of the Employment Tribunal's Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The claim has to arise or is outstanding on the termination of the employee's employment and relates to one of the following:
  - (1) A claim for damages for breach of contract of employment or other contract connected with employment;
  - (2) A claim for a sum due under such contract;
  - (3) A claim for recovery of a sum in pursuance of any enactment relating to the terms and performance of such a contract.
27. Certain contractual claims are expressly exempt from the Tribunal's jurisdiction:
  - (1) A claim for the recovery of damages in respect of personal injury;
  - (2) A claim for breach of a contractual term regarding living accommodation;
  - (3) A claim for breach of a contractual term regarding intellectual property;
  - (4) A claim for breach of a contractual term imposing an obligation of confidence or breach of a covenant in restraint of trade.

Damages for a breach of contract in this situation is the period of notice that should have been given by the employer. It will be either be the contractual notice period or, in the absence of that, the statutory period set out in section 86(1) of the Employment Rights Act 1996.

### Bonus

28. In relation to the payment of a bonus in the context of a wrongful dismissal case where the individual is *contractually* entitled to a bonus or commission the court will estimate what he or she would have received during the damages period and include it in the award, **Addis -v- Gramophone Company Limited [1909]** House of Lords.
29. However, if the payment is *discretionary* it will be ignored, even if the employee had a reasonable expectation that it would be paid and it would in fact have been paid if he or she had continued to work during the damages period, **Lavarack -v- Woods of Colchester Limited [1967]** Court of Appeal.
30. The distinction between a contractual bonus and a discretionary bonus has been subject to much litigation. In **Clark -v- BET PLC and Another [1997] QBD** the High Court found that despite C's contract referring to the bonus as discretionary the employee was under an obligation to exercise that discretion in good faith, as a result C was contractually entitled to participate in a bonus scheme providing an amount equivalent to a maximum of 60% of his salary. In **Horkulak -v- Cantor Fitzgerald International [2005] Court of Appeal** the Court of Appeal held that although a clause in H's contract stated the employer may in its discretion pay a bonus he was entitled to receive damages in respect of the amount that, but for his dismissal, he would probably have received. The court narrowly construed Labberack as there was nothing to assume that the employer's discretion would have been exercised against the employee in a way in which no reasonable employer would exercise it.
31. The principle is that an employer will exercise a discretion rationally and in good faith

#### Unlawful Deduction of Wages

32. Part 2 of the Employment Rights Act 1996 sets out the statutory requirements for an unlawful deduction of wages claim. Section 27(1) defines wages as "any sum payable to the worker in connection with his employment". Wages includes commission payments. Expenses, however are excluded but these can be recovered as a breach of contract.
33. Under section 13(1) of the 1996 Act, "A worker has the right not to suffer unauthorised deductions". A deduction is defined in the following terms:  
  
"Where the total amount of wages payable 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."
34. The deduction referred to in "after deductions" refers to the statutory deductions such as tax and national insurance.

35. The question of what is properly payable has to be determined by the Tribunal on normal contractual principles.
36. In addition, the payment in question must be capable of quantification in order to constitute wages properly payable under section 13(3).
37. A counterclaim cannot be made against an unlawful deductions claim: it can only be made in the Tribunal against a breach of contract claim.
38. An authorised deduction is as follows:
  - (1) The deductions required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract.
  - (2) The worker has previously signified in writing his or her agreement to the deduction.

## Conclusions

### Breach of contract

#### Notice and disciplinary policy

39. The first question is whether or not the claimant had completed her probationary period. No mechanism for reviewing the probationary period was set out in the contract although clearly there was a procedure as the claimant as manager had received a script to assist her in undertaking a review of an employee who had some problems.
40. In addition the review date for the claimant's probationary review was arranged for after the actual end of the period. I do not know if that was generally the practice at the respondent firm. However, I note the contract uses the word 'during' the probationary period which has already been defined as six months.
41. Additionally, however, the contract refers to 'following the official end of the probationary period' although it does not define what it means by official, it could be the passage of the 6 months or it could be once a review meeting has taken place. The review meeting may have taken place before the end of the six month period in which case it would be the end of the 6 month period.
42. The wording of the contract could be interpreted to mean there was a six month period when the disciplinary procedure did not apply and that was simply six months with nothing more as 3.2 does not say 'until the official end of your probationary period the full disciplinary procedure will not apply'. Accordingly it is different from the notice provision at 3.4 which refers to the official end probationary period which required some sort of formal 'signing off following which the notice period would increase to one month.
43. One approach would be if the provisions were considered to be ambiguous would be to say that this is a situation where there is an outcome neither side would have envisaged which is that rights would be acquired after the mere



passage of six months when clearly each side knew that would not arise until the probationary period had officially ended by the holding of a successful review.

44. However I do not consider that 3.2 is ambiguous accordingly as the 6 month period had ended I consider that the claimant was entitled to the benefit of the respondent's disciplinary procedure.
45. In respect of 3.4 the respondent has referred to the 'official end of the probationary period' however in the absence of any further description or interpretation I consider it would not be appropriate to read into this that a review process must be followed and the probationary period signed off before the employee gets the benefit of 3.4. If the respondent wished this to be the case it should be referred to in the contract even if that is a reference to a staff handbook or a relevant policy. The respondent is in charge of drafting the contract – in this situation there is very little equality of arms and they have failed to make the position clear. In deed there was nothing regarding an agreed process produced at tribunal only documentation used in relation to another member of staff which may well have been a customised template but there was no overall procedure produced.
46. Therefore I find the claimant does get the benefit of the one months' notice and the application of the full disciplinary policy.
47. Whilst the notice period is clear the time it would have taken to conclude a disciplinary process and whether it would have been any longer than the procedure which took place needs to be determined and will be considered at any remedy hearing. The claimant would be entitled to be paid for an additional period that arises, if there is any, and it would also effect when the notice period would begin.

### Bonus

48. I do not accept that the reference in the contract to commission was the same as the bonus scheme. The claimant had never received anything official regarding the bonus scheme and therefore it falls to be decided on the reconstruction of what was orally agreed. As to how the bonus was calculated the claimant did not know just that she had been promised it that it was never suggested she would not receive it and that she had received £1200 the previous month.
49. I have to decide whether the bonus was contractual and if so whether she would have received it.
50. Two further issues arise here – would it have been paid during her notice period if this was one month and would it have been paid in the light of the complaints against the claimant?
51. If it was not contractual I have to consider whether the respondents would have acted capriciously (**Horkulak**) in not paying it.( this may have required an enquiry into the decision to dismiss or the handling of the complaints and

the views the respondent took of those complaints if the discretionary factors referred to in the template letter did apply to the claimant)

52. However, I find that it was contractual, the very fact there was no written document to the claimant supports this contention as if it was discretionary there was likely to be a document setting out those discretionary factors. The absence of anything regarding the bonus in the claimant's case suggests to me that it was taken for granted she would receive one. Whilst a template was produced at tribunal I accept the claimant's evidence that she had not only never received it but did not in fact know how the bonus was calculated only that she had received a previous bonus which she was content with and was expecting a larger one covering the busy period over period
53. Accordingly, I do not accept that the terms of the claimant's contractual bonus were as referred to in the letter produced at the hearing. As the claimant had never seen such a letter or had any discussion about any conditions or limitations on the payment of the bonus then the provisions in that letter regarding being in work at the time, not giving notice (although I would query whether this would apply anyway) and having complaints against you taken into account would not apply to the claimant.

*Was the bonus actually payable?*

54. I find the bonus was payable, and as the claimant should have been given a month's notice, this would have taken her past the time when the bonus was payable. Accordingly, in the light of my findings above the claimant should have received her bonus.

#### Unlawful deductions

55. The claimant did not receive notice of her dismissal until 20 February accordingly that is the date of her termination and she should be paid for that one day.

#### **Remedy**

56. A remedy hearing will now be listed unless the parties settle the matter in the interim.

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Employment Judge Feeney

Date: 4 January 2021

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 January 2021

FOR THE TRIBUNAL OFFICE

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