Appeal No. UKEAT/0197/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18th February 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

BLUESTONES MEDICAL RECRUITMENT LIMITED APPELLANT

MR M SWINNERTON RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA GOULD (of Counsel) Bluestones Group Telford Court Chester Gates Business Park Chester CH1 6LT
For the Respondent	Written representations

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The Claimant claimed sums that he said were due to him by way of unpaid bonus. His written contract of employment stated that any bonus was discretionary but there had been a further agreement regarding his bonus when he was promoted to General Manager in April 2015. The Respondent argued that the bonus remained discretionary; it had been intended that the Claimant would become a shareholding Director and would be paid these sums by way of dividend but, until that had been put into place, the monies due were advanced by way of Director's loan. The ET held that the method by which the sums were paid to the Claimant did not detract from his entitlement (as agreed and as arising from custom and practice) to the bonus in question; on that basis, it upheld the Claimant's unauthorised deduction of wages claim.

The Respondent appealed, contending the ET had failed to make the relevant findings of fact or carry out the requisite assessment to support any conclusion that the discretionary nature of the Claimant's bonus entitlement had been varied (see the guidance laid down in **Park Cakes Ltd v Shumba** [2013] IRLR 800 CA); its decision failed to have regard to the unchallenged evidence adduced by the Respondent and, given the evidence of the loan payments made to the Claimant, its conclusion was perverse. In support of its arguments on appeal, the Respondent further raised the question whether the ET had jurisdiction to determine the Claimant's claim given that subsection 27(2)(a) **Employment Rights Act 1996** did not extend to loan payments.

Held: allowing the appeal

It was unclear whether the ET had made any finding as to whether there had been an express agreement in April 2015 that varied the previous discretionary quality of the Claimant's bonus entitlement. In any event, it had failed to make the necessary findings of fact or to carry out the requisite assessment to support its decision that an entitlement had arisen from custom and practice and it had made no finding as to the nature of any agreement reached in April 2015,

which was necessary in order to determine whether the payments made to the Claimant were in fact loans (and therefore excluded by subsection 27(2)(a) **ERA**). The unauthorised deductions claim would be remitted to a differently constituted ET to determine afresh.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the approach to be taken when determining whether a contractual entitlement to a (previously discretionary) bonus has arisen by means of custom and practice. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the Employment Tribunal sitting at Liverpool (Employment Judge Wardle, sitting alone on the 16 January and on 2 and 7 March 2018; "the ET"), sent to the parties on 11 April 2018. The Claimant appeared in person before the ET and has continued to represent himself on this appeal but has not attended this hearing due to the expense of travelling to London. He has, however, relied on his written submissions sent to the Employment Appeal Tribunal in advance of the hearing and to which I have had due regard. The Respondent was represented by Counsel below, but not by Ms Gould who now appears.

2. By its Judgment, the ET rejected the Claimant's complaint of unfair dismissal but upheld his claim of having suffered an unauthorised deduction of wages in respect of unpaid commissions or bonus, in the sum of £4,687.87. The Respondent appeals against the ET's Judgment on the unauthorised deductions claim; there is no appeal against its finding on the unfair dismissal complaint.

The relevant background and the ET's Decision and Reasoning

3. The Claimant's period of continuous service went back to October 2013. Initially he had worked for Bluestones Education but in February 2014 he transferred to the Respondent's

employment, first as a Medical Recruitment Consultant but then, on promotion in April 2015, as Bluestones Medical Manager, the General Manager for the Respondent. The Respondent is part of Bluestones Investment Group Limited ("the Group"), an investment company that invests in recruitment and staffing solutions companies.

4. The Claimant's written contract of employment was dated 24 February 2014 and provided for a non-contractual discretionary bonus. Although the ET did not set out the relevant term, the contract has been included in the papers before me (as it was before the ET) and at clause eight it is provided as follows:

> **"Non-contractual DISCRETIONARY bonus**
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> **1. BONUS**
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> **(1.1). The Company may in its absolute discretion pay the Employee bonus of such amount at such intervals and subject to such conditions as the Company may in its absolute discretion determine from time to time.**
>
> **(1.2). Any bonus payment to the Employee shall be purely discretionary and shall not form part of the Employee's contractual remuneration under this agreement.**
>
> **(1.3). Notwithstanding clause 1.2 the Employee shall in any event have no right to a bonus or time - apportioned bonus if:**
>
> > **(a) they are absent from work as a bonus would only be paid if an Employee completes a full recruitment cycle for a client of the Company e.g. initial client contact, resourcing for the candidate or regular client contact. This is not an exhaustive list. Examples of absence from work include holiday, sickness, and maternity leave. This is not an exhaustive list.**
> >
> > **(b) the Employee's employment terminates for any reason or is under notice of termination (whether given by the Employee or the Company) at or prior to the date at which when a bonus might otherwise have been payable.**
>
> **(1.4) Any bonus payment shall not be pensionable.**
>
> **(1.5) The Company may alter the terms of any bonus targets or withhold them altogether anytime time without prior notice."**

5. As the ET noted, from the outset of his employment the Claimant had been paid a bonus out of a shared 10 % pot, based on monthly gross margin. When he was promoted to the position of General Manager of the Respondent, however, the ET found it had been agreed - through Mr Conway, the Respondent's then Managing Director - that the Claimant would be paid 6.5 % of the net profit or business operating profit, payment of which was then made

quarterly. It seems that the intention had been for the Claimant to become a shareholding Director of the Respondent and it was the Respondent's case that, in the meantime, Mr Conway had wanted the Claimant to be paid a dividend of 6.5 %. This, however, was not possible as the Claimant was not a shareholder. In those circumstances, it was the Respondent's case (adduced through the oral evidence of its Chief Executive Officer, Mr Pendergast) that it had then been proposed that the Claimant should be paid this sum as a discretionary bonus, subject to PAYE deductions. That, however, was something neither the Claimant nor Mr Conway wanted and the Respondent contended that it had then been arranged that the payment should be processed as a Director's loan, but on the understanding that, if the Claimant had not been made a shareholder Director by the date the next dividend was due, the payment would then be subject to PAYE.

6. Although the ET does not refer to the documentary evidence in this regard, I have seen various internal emails (all of which were before the ET) which would seem to corroborate the Respondent's case. Specifically, by email of 5 January 2016 Mr Hardman, the group Finance Manager, is recorded as stating, "*I would suggest we make a loan payment to Mark until we are able to process the bonus through PAYE at the end of the month*". There is then a further internal email where it is stated that it would be confirmed to the Claimant that the payment, "*Is a loan advance and will be repaid from the outstanding 'dividend' entitlement*".

7. On 28 February 2017, the Claimant was suspended pending a disciplinary investigation into a number of issues regarding dishonest and fraudulent activity by former employees of the Respondent. Specifically, there was a concern relating to misuse of a company PayPal account by Mr Conway, who had left the Respondent in 2016. Ultimately, these matters led to the Claimant's summary dismissal on 26 May 2017 by reason of gross misconduct. The ET found

A that the Respondent had reasonably concluded that the Claimant had been grossly negligent in carrying out his duties such as to justify the summary dismissal. Given that it had to determine the Claimant's claim of unfair dismissal, the ET's findings address these matters in some detail but, as the current appeal only concerns the unauthorised deductions claim, it is unnecessary for me to set out those findings.

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8. On the question of the Claimant's entitlement to bonus, the ET concluded that, as at the date of his dismissal, bonus due to the Claimant was outstanding and amounted to an authorised deduction of wages. The ET noted that the Claimant's pay advices for April and May 2017, made no provision for bonus payments despite the business showing an operating profit of £68,248 for April and £22,035 for May. For the Respondent it was said - consistent with its case, as I have recorded above - that such bonus payments had only ever been paid to the Claimant as loans, which would be repaid by the Claimant from dividends received upon his becoming a shareholder Director, which never happened. The ET concluded, however, that:

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> **"…the manner in which this money was to be paid [to the Claimant did not] impact upon his entitlement by virtue of custom and practice to receive 6.5 % of business operating profit for the period from 1 April 2017 until 26 May 2017 when his employment was terminated…" (see paragraph 45 of the ET's Reasoning).**

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9. On that basis, the ET found that the Claimant had a contractual entitlement to receive 6.5% of business operating profit:

> **"…on the basis of the agreement entered into by the respondent in the form of Mr Conway with [the Claimant] and its custom and practice of paying him this bonus quarterly from his appointment as General Manager in April 2015…"(see paragraph 60 of the ET's Reasoning).**

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10. On the ET's calculations, the net sum thus owed to the Claimant from 1 April 2017 until the Claimant's dismissal on 26 May 2017 was £4,687.87 (see the ET at paragraphs 45 and 60).

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The Appeal

11. The Respondent's grounds of appeal can be summarised as follows:

(1) the Respondent's evidence before the ET, given by its Group Chief Executive Officer Mr Pendergast, had been that:

(a) there was no right to commission/bonus in the Claimant's contract of employment;

(b) across the entire group all bonuses were discretionary and non-contractual, as was expressly stated in the Claimant's contract;

(c) in any event, the Claimant had agreed that, in lieu of being considered for a discretionary bonus, he would receive a loan from the Respondent.

(2) The Claimant gave no relevant evidence-in-chief on the unauthorised deductions claim. On the unchallenged evidence of Mr Pendergast bonuses were discretionary.

(3) In the circumstances, the ET's decision was properly to be characterised as perverse.

12. For the Claimant's part, he essentially asked for the ET's reasoning to be upheld.

The relevant Legal Principles

13. The protection against unauthorised deductions of wages is provided by section 27 of the **Employment Rights Act 1986** (the "ERA"), which relevantly states as follows:

> **"Meaning of "wages" etc**
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> **(1). In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including-**
>
> > **(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,**
> >
> > **…**
>
> **but excluding any payments within subsection (2)**
>
> **(2). Those payments are-**
>
> > **(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such an advance)**

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…

(3) Where any payment in the nature of non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part-

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which payment is made."

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14. It is for a Claimant to demonstrate the legal entitlement to a payment said to have been unlawfully deducted (see **New Century Cleaning Co Ltd v Church** [2000] IRLR 27 CA). Moreover, the claim must be in respect of an identifiable sum, see the case of **Coors Brewers Ltd v Adcock** [2007] IRLR 440 CA in which it was held that unquantified claim to payment under a profit share scheme, which had not yet been finalised, could not succeed.

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15. In the present case, the first question for the ET was to determine whether there was any relevant contractual term that established the entitlement claimed by the Claimant. The ET acknowledged that the Claimant's written contract provided for "*A non-contractual discretionary bonus*" but went on to find that bonus payments had been made to the Claimant pursuant to his agreement with Mr Conway and "*By virtue of custom and practice*".

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16. I return to these findings below but at this stage note the point made by the Claimant in his written submissions that, when considering a bonus scheme, it is possible for a degree of ambiguity to arise from the use of the term "discretionary". As was observed by the EAT (Slade J presiding) in the case of **Small and Ors v Boots Company PLC** [2009] IRLR 328:

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"19. …the use of the term discretionary in a bonus scheme may be attached to the decision whether to pay a bonus at all, its calculation or its amount. No doubt there are other factors to which discretion may be attached. In determining whether the reference to a discretionary bonus conferred any contractual entitlement, the Employment Judge should have decided to what aspect of the scheme the term discretionary was attached…."

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17. In the present case, to the extent that the ET was finding that the previous discretionary quality of the Claimant's bonus entitlement had been varied by implication, the Respondent

relies on the well-established principle of contract law that no term should be implied whether by custom or otherwise, which is inconsistent with an express term of the contract unless an intention to vary the relevant contractual term is established. The approach that should be adopted in such cases was considered by the Court of Appeal in the case of **Park Cakes Ltd v Shumba and Ors** [2013] IRLR 800. Although that case specifically concerned the question of an entitlement to an enhanced redundancy payment, the guidance provided by Underhill LJ (see paragraph 36) is helpful in identifying the potentially relevant considerations to the determination of a contractual benefit more generally, which will typically include: (a) the number of occasions, and over how long, the benefits in question have been paid, (b) whether the benefits were always the same, (c) the extent to which those benefits have generally been publicised, (d) how the terms are described, (e) what is said in the express contract, and (f) equivocalness, such that an employee will be unable to discharge the burden of proof if the employer's practice is - viewed objectively - equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation.

The parties' Submissions

The Respondent's Case

18. The Respondent relies on the evidence of Mr Pendergast (summarised above), supported by the documents before the ET. It says this confirmed the sum sought by the Claimant had, at least in the recent past, been paid by way of loan advance; something the Claimant had sought for his own financial benefit. On that basis, the payments claimed were explicitly excluded from an unauthorised deduction from wages claim by virtue of section 27(2)(a) **ERA**, albeit that was not a point raised before the ET below. In the alternative and in any event, the ET had failed to make the necessary findings as to the relevant circumstances as identified in **Park Cakes v Shumba**; specifically, it had failed to carry out the required assessment of the relevant

circumstances to determine whether the Claimant had met the threshold required to displace the express discretionary bonus term with an entitlement based on custom and practice, and failed to give any or any sufficient weight to the express discretionary bonus term within the contract or to the Respondent's evidence. Furthermore, the Respondent contends there was no, or no sufficient, evidence on which the ET could make a finding that the express discretionary bonus term ought to be displaced so as to entitle him to the payment of an identifiable sum.

The Claimant's Case

19. The Claimant argues - relying on the EAT's Judgment in the case of **Small and Ors v Boots**, that simply describing a bonus as discretionary does not necessarily mean that the employer has a right not to pay it, and he points to the case of **Frischers Ltd v Taylor** [1976] UKEAT/386/79 as an example of a finding of an implied term, arising through years of custom and practice, that a bonus would be paid. As for the evidence of a loan arrangement, as asserted by the Respondent, the Claimant contends that this was only agreed until a more tax efficient way to process the payments was found; he had not agreed that any loans should be repayable and would not have accepted a bonus structure made up of repayable loans. The manner in which payment was made, as the ET found, did not detract from the fact that the sums in question were owed to him.

Discussion and Conclusions

20. Perhaps understandably, given that the focus of the ET hearing was on the unfair dismissal claim, the findings of fact made relevant to the Claimant's complaint in respect of unpaid bonus are not as detailed as might have been hoped. That said, although the ET did not set out the relevant term of the Claimant's written contract, it did acknowledge that provision had only been made for a non-contractual discretionary bonus. While, as the Claimant has

pointed out, the use of the phrase "discretionary" may be capable of various meanings in the context of an employee bonus scheme, here the relevant contractual provision might be seen as comprehensive in its characterisation of any entitlement as subject to the Respondent's discretion. Certainly, that much, at least, seems to have been the ET's understanding of the position, at least up until the Claimant's promotion to General Manager in April 2015.

21. Turning then to events in April 2015, at that stage, the ET found it had been expressly agreed that the Claimant would be paid 6.5 % of net profit or business operating profit. For the Respondent it is said that this would still have been subject to the discretion provided by clause eight of the Claimant's written contract. It is, however, unclear as to whether that was the ET's finding or whether it in fact found that this was an expressly agreed variation to the previous position. As the Claimant would urge, the ET's reasoning could be read as favouring the second possible interpretation; after all, at paragraph 45, the ET went on to refer to the Claimant's "entitlement" in this regard, something that would suggest - even if not explicitly stated - that the ET had concluded that this was no longer a matter for the Respondent's discretion. Against that, the Respondent makes the point that had that been the ET's finding there would have been no need for it to go on to rely on custom and practice.

22. In any event, the Respondent further objects that, even if the ET had intended to state that there was a contractual entitlement to the 6.5 % profit related bonus, such a finding would have failed to have regard to the unchallenged evidence that the only agreement that could be identified was for loan payments to be made to the Claimant, which he would need to pay back as and when he became a shareholding Director. The Claimant again disagrees with this suggestion and, relying on the ET's finding, urges that this has to be seen as merely the manner in which payment was to be made; it did not impact upon his actual entitlement.

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23. I have had the benefit of seeing the documentary evidence before the ET relevant to this issue and the witness statement of Mr Pendergast, which sets out what I am told was his unchallenged evidence before the ET. That evidence seems to me to be capable of more than one interpretation. On one view, the Claimant's entitlement remained unquantifiable; as in the case of **Coors Brewers Ltd v Adcock**, there was an agreement to establish a scheme. In the present case, the dividends that would be due to the Claimant as and when he became a shareholding Director had not yet been put into place. The loan payments were to ensure that the Claimant was not left out of pocket in the interim but they were, not least due to the tax position, loans and nothing more. On the other view, it can be said that here - in distinction to the position in the **Coors Brewers** case - a specific entitlement had been agreed: 6.5 % of business operating profit and what was described as a "loan" was merely a means by which the sums due could be paid to the Claimant; it was a method of payment, nothing more, and did not detract from the contractual entitlement.

24. The Respondent says that the fact that these were loan payments, or monies paid as an advance, must mean that, in any event, any such sums were excluded from the ET's jurisdiction by virtue of subsection 27(2)(a) **ERA**. This is however, an argument that has first been advanced in the Respondent's skeleton argument for this hearing, it is not included in the grounds for appeal and was not a point taken below. As a point potentially going to the ET's jurisdiction, that might not be fatal, but I am mindful of the fact that the Claimant is not at this hearing and is unrepresented in this matter; in the circumstances, I am inevitably concerned by the potential prejudice he faces from this point being taken in this manner. In any event - anticipating what might have been said on the Claimant's behalf - it could be said that the ET had effectively found that this was not a loan or advance of wages in fact; it was simply the way

in which the sums due were to be paid (as a matter of custom and practice) whilst the Claimant remained an employee and not a shareholding Director.

25. For the Respondent however, it is contended that such a submission again raises the question as to what the ET actually found and how it approached its task: to the extent that the ET found there was an agreed variation to the Claimant's contract (arising through custom and practice), it had failed to address the factors identified in the case of **Park Cakes v Shumba**, failing even to make the relevant findings of fact that would have enabled it to carry out the necessary assessment.

26. In my Judgment, that is the real issue on this appeal. The problem with the ET's Judgment is that it is impossible to see how it carried out the relevant assessment. On the claim for unpaid bonus, due and outstanding at the date of the Claimant's dismissal, the ET failed to make clear findings as to whether there was any such entitlement by way of express agreement, an agreement that varied, and stood in place of, the previous provision whereby any bonus was a matter of discretion. To the extent, which is unclear, that the ET found there was such an agreement, it then failed to engage with the question whether this was contingent upon the Claimant becoming a shareholding Director of the Respondent, a question that arose from the way in which the payments were made. Taking that point further, the method by which the Claimant was paid would thus not merely be a matter of form. On the Respondent's case, it demonstrated the true nature of the sums that had been advanced in the past, an assertion that might well bring subsection 27(2)(a) into play, and thus give rise to questions of jurisdiction. The ET's failure to engage with these various issues, and make the relevant findings of fact, means that its decision on the unauthorised deductions claim cannot stand.

27. For its part, the Respondent urges me to go further and hold that there is only one outcome possible in this case: that the ET effectively reached a perverse conclusion in failing to find - in particular, on the basis of the Respondent's unchallenged evidence - that bonus arrangements remained a matter of discretion and/or that this was a loan payment and thus outwith the ET's jurisdiction by virtue of subsection 27(2)(a). Notwithstanding Ms Gould's forceful submissions this morning, however, I am not so persuaded. In terms of what was agreed between the Claimant and Mr Conway in 2015, it seems to me that it would be open to an ET - as this ET may have intended to find (or, at least, that is one possible reading of its reasoning) - to hold that there was an express agreement to vary the bonus entitlement and to remove the discretionary quality of that payment. As for the manner of payment, whether this should properly be characterised as a loan or advance might depend on the finding made as to what had been agreed in April 2015. The ET might be forgiven for failing to see the potential importance of this point in respect of the argument now developed by the Respondent under subsection 27(2)(a) but it was, in any event, necessary for proper findings to be made as to the nature of the Claimant's entitlement and the ET's failure to do so amounted to an error of law.

Disposal

28. For the reasons I have given, I allow the Respondent's appeal and remit this matter back to the ET for the unauthorised deductions claim to be determined afresh. I note, as the Respondent observes, that the burden of proof is firmly on the Claimant. Here, however, it seems that there was in fact little dispute as to the history of this matter; the dispute between the parties is as to the findings that should be made on the basis of that history and the legal assessment that arises therefrom. Given the paucity of findings on the relevant issues by this ET, I consider that the unauthorised deductions claim needs to be heard afresh.

29. Having considered the factors in the case of **Sinclair Roche and Temperley and Ors v Heard and Another** [2004] IRLR 763 EAT, I am further satisfied that remission should be to a different ET. This is a case where the ET's approach to this particular part of the case before it (the unauthorised deductions claim) was fundamentally flawed. There is thus no utility in sending this matter back to the same ET; the matter needs to be considered afresh, with proper findings made on the evidence already before the ET, and the legal assessment carried out on that basis.