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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No.: 4101277/2022

Hearing Held via Cloud Video Platform (CVP) on 11 May 2022

Employment Judge: M Sutherland

10 Robert King

Claimant
Represented by:
Mr Bailantyne, Solicitor

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Ponticelli United Kingdom Ltd

Respondent
Represented by:
Mr T Hadden, Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that there was no unlawful deduction from the
25 Claimant's wages and his claim is dismissed.

REASONS

1. The Claimant lodged complaints for unlawful deduction from wages. A final hearing was arranged to determine all issues.
2. The Claimant was represented by Mr Bailantyne, Solicitor. The Respondent
30 was represented by Mr Hadden. Solicitor.

3. It was not in dispute that the Claimant's contract of employment transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') from Petrofac Facilities Management Limited ('Petrofac') to the Respondent on 1 May 2020.
4. The Claimant gave evidence on his own behalf. The Respondent did not call any witnesses. Parties had lodged a joint bundle of documents. Both parties made legal submissions.

List of Issues

- 10 5. The issues to be determined were as follows -

Unlawful deduction from wages (Section 13 Employment Rights Act 1996 ('ERA'))

- a. Were the deductions from wages properly payable to the Claimant on each occasion?
 - b. What was the total amount of wages paid to the Claimant on each occasion?
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 - c. Was the amount paid less than the amount properly payable such that there should be a declaration and an order to pay?
- 20 6. The Respondent did not seek to assert that the deductions, if any, were authorised or excepted deductions (Section 14) or that the complaint was made out with the statutory time limit (Section 23)

Findings of Fact

- 25 7. On 20 September 2019 the Claimant received an email from Petrofac headed 'Production Technician' which included the following statement: "I am pleased to advise that we would like to offer you the position. The starting salary will be £49,979.33 which is 70% of the full rate of the Prod Tech role and your salary will go up in increments as you progress through your CPP

and P* modules", it /as understood .etween the irties that . 'P' referenced specific certification as competent and "POL" referenced specified open learning. Attached to that email was a Development Plan. The Development Plan articulated four stages requiring completion of the CPP to a specified percentage and completion/ pass in a in number of POL modules. It provided: "Each stage is timebound for a period of six months. Comr - of each stage will be determined by receipt of POL certificate and confirmation from CP r tion. and increrr will be processed upon the above confirmation being received equivalent of: 75% of production salary (stage one), 80% of full production salary (stage 2), 90 . of full production salary (stage 3), 100% c roduction salary (stage 4)/' In respect of Stage 4 it pro\ - (etion of production technician CPP (to be identified) to 100% and completion / pass in another 3 POL modules ..." i.e. 10POI modules in total.

15 S. On 24 September 2019 the Claimant received a letter from Petrofac headed "Offer of Employment" which included the following statement: "Further to recent discussions we are pleased to confirm our offer of employment... the terms e conditions of your employment, in addition to those described in this letter will be set out in the attached Statement of Particulars of Employment and Employee Handbook". The leftar n nclude a start date.

9. On 27 4; ttember 2019 the Claimant signed both the letter and the State nent expressly signifying his a - ant to its to ms

10. **The** Statement deciares that **it is** a contract of rr t between the parties which sets out the terms of his employment.

25 11. Clause 4 of the c - it regarding the date : ir encement of employment is marked - 0".

12. Clause 24 of the Statement provides: the contractual terms and cond tions pertinent to each t fee can be found in the following: Offer Letter, Statement of Particulars of Employment... Employee Handbook, Code of Conduct Booklet".

13. Clause 26 of the Statement provides: "the Company reserves the right to make reasonable changes to any of your terms and conditions of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change."
- 1 14. Clause 28 of the Statement provides: "this Contract of Employment constitutes the whole agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations between the parties, whether written, oral or implied, relating to its subject matter."
- 10 15. On 28 November 2019 the Claimant commenced his employment with Petrofac as a Trainee Production Technician.
16. On 13 January 2020 the Claimant received an email from Petrofac which included the following statement: "Please see attached development plan which identifies the stages required to enable you to reach Production Technician status (and salary)." The Development Plan was attached to that
15 email.
17. On 1 May 2020 Claimant's employment with Petrofac transferred under TUPE to the Respondent. The Respondent advise the Claimant that: "Employees will transfer on their existing contractual terms and conditions except for those
20 listed in the appendix to this letter". The Development Plan was not referred to in the appendix.
18. On 23 November 2020 the Claimant wrote to the Respondent seeking an upgrade in his salary, noting that there is no CPP now, and that the POLs have been put on hold but that he's passed 4 of 10 POLs.
- 2« 19. On 11 December 2020 the Claimant wrote to the Respondent asserting that he should be on stage 2 because he has completed and passed 4 POL exams. The Respondent replied advising that he was not eligible for an increase because his salary is higher than 75% of the Respondent salary banding.

20. On 17 December 2020 the Respondent advised that his current but not any future salary tupe'd across to the Respondent.
21. In April 2021 the Claimant s certifie s having c rmed his training and became a Production Technician. The Respondent advised that Claimant of -own Apprentice Improver programme.
22. On 30 April 2021 the Claimant was offered by the Respondent a prover Year 1 salary effective from 1 April 2021 which he did not accept.
23. On 6 August 2021 he was offered a salary of £64,700 with **effect** from 1 **July** 2021 which he did not accept.
- 10 24. The Claimant was in regular dialogue with HR asserting their failure to backdate his salary increase to 1 April 2021 when he was signed off and for failure to pay the original Petrofac full salary (£71,399) when he'd been TUPE'd across. On 12 September 2021 the Claimant raised a grievance this effect. A grievance meeting was **held** on 27 September 2021.
25. A grievance outcome was provided to the Claimant on 28 September 2021 which stated that "We confirm that having looked at your current contract of employment that TUPE transferred over, there is no indication of **any** agreement regarding the remuneration that would be paid to you upon completion of your Improvership. The rate that you have indicated is a legacy **rate and** these **legacy** rates do **not** TUPE over **to** Ponticelli **UK** Ltd as **Ponticelli** UK Ltd standard rates. Ponticelli UK Ltd have their own standard rates and are not obligated to increase employee rates in line with legacy rates. Ponticelli UK Ltd have however, offered you an increase in salary in ime with the banding for an entry level Production Technician" It was however affected that he ought to nave received their entry level rate of £64,700 from 1 April 2021 and his salary was backdated accordingly.
- 25 26. On 4 September 2021 the Claimant submitted a grievance appeal which was heard on 12 October 2021. A grievance outcome was provided to the Claimant on 28 September 2021 which in **summary** stated that the trainee programme was non contractual by virtue of the entire agreement clause, that
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the production salary he seeks is a legacy Petrofac salary and that he has not completed the full 10 POLs.

27. On 1 January 2022 the Claimant's salary increased from £64,700 to £66,700.

Observations on the evidence

5 28. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event, etc was more likely than not, then the Tribunal is satisfied that the event did occur. There was however little if any dispute on the evidence. The Claimant's testimony was consistent with the contemporaneous documentary evidence
10 and there was no reason to doubt his reliability or credibility as a witness.

The Law

Unlawful deduction from wages

15 29. Section 13 ERA 1996 provides that an employer shall not make a deduction from wages of a worker so employed unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.

20 30. Under Section 13(3) ERA 1996 there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

25 31. Section 27 defines wages as sums payable to the worker in connection with his employment.

Claimants' Submissions

32. The Claimants' submissions were in summan/ as follows -

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- a. Where terms are ambiguous the tribunal should ascertain what a reasonable person would have understood having the background knowledge available to both parties (*Patersons of Greenoakhill Ltd v Biffa Waste Services Ltd* [2013] CSOH 18; *Spectrum Agencies v Benjamin* EAT 0220/09)
 - b. The relative bargaining power of the parties must be taken into account in deciding whether the terms of the contract in truth presented what was agreed (*Autoclenz Limited v Belcher & Ors* [2011] UKSC 41).
 - c. The email of 20 September 2019 amounted to a valid offer which was accepted. The tribunal are entitled to glean all the circumstances and not just what is contained within the Statement.
 - d. Alternatively, the email of 13 January 2020 -amounted to a valid variation to the terms of his employment under Clause 26 of the Statement.
 - e. Further in the alternative, the Development Plan was apt for incorporation and was thus incorporated
 - f. *Lucy and Besong* (see below) fall to be distinguished.

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0 33. Although there was brief reference in the pleadings to the Claimant's entitlement to "a comparable substantive scheme," no argument was made in submission to that effect and there was no evidence that the Development Plan was tied up with Petrofac's identity such that a substantively equivalent scheme was required.

15 Respondent's submissions

34. The Respondent's submissions were in summary as follows -

- a. The burden of proof is upon the Claimant

- b. Clause 24 of the Statement sets out the documents incorporated into the contract which does not refer to the Development Plan or the email of 20 September 2019.
- c. Clause 28 of the Statement is an entire agreement clause. Section 1 of the Contract (Scotland) Act 1997 provides that where a terms of the contract is to the effect that the documents comprises all the express term of the contract that term shall be conclusive. Accordingly the emails of 20 September 2019 and 13 January 2020 are incapable for varying the contract.
- d. Further the email of 13 January 2020 is not an offer and it was not accepted and as such does not vary the Claimant's contract.
- e. Even if the Development Plan had contractual effect, the Claimant did not meet the specified CPP and POL eligibility criteria for payment of 100% under Stage 4 of Development Plan.
- f. The Claimant has not asserted and is unable to assert a claim for breach of contract for failure to provide the CPP and POLs (*Besong v Connex Bus (UK) Ltd UKEAT/0436/04* - not being paid for failure to be provided with work is not capable of resolution under this jurisdiction) and *Lucy and others v British Airways pic UKEAT/0033/08* (likewise not being paid flying allowances during periods of non-flying as a result of a base closure).

ussion and decision

35. The Claimant's complaint is in summary that the Development Plan became a term of his contract by virtue of an agreement arising on 20 September 2019, or by virtue of express incorporation into the Statement of Employment entered into on 27 September 2019, or by virtue of a change made on 13 January 2020, and that he is entitled to be paid according to its terms. The Respondent's defence is in summary is that any such agreement or change

was excluded by the entire agreement clause or alternatively that he has not complied with its terms.

36. The Statement agreed between the parties declares that it is a contract of employment which sets out the terms of employment. A contract should be interpreted to give effect to the shared intention of the parties. That intention is ordinarily inferred from the wording of the contract. Where there is ambiguity in that wording, extrinsic oral and documentary evidence may be considered to resolve that ambiguity.
37. The Statement contains an 'entire agreement clause (Clause 28): 'this Contract of Employment constitutes the whole agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations between the parties, whether written, oral or implied, relating to its subject matter ''
38. Section 1 of the Contract (Scotland) Act 1997 provides that "whenever one of the terms of the document (or in the documents) is to the effect that the document does (or the documents do) comprise all the express terms of the contract or unilateral voluntary obligation, that term shall be conclusive in the matter.' Clause 28 of the Statement is unambiguously to that effect
39. Whilst Section 1 of the Act does not prevent an action for rescission, it does not apply to implied terms, and does not prevent consideration of the factual background as an aid to interpretation, it does render an entire agreement clause conclusive as to the contractual terms. Accordingly, Section 1 of the Act appears to prevent consideration (per *Autoclenz*) of whether the terms truly represent what was agreed given the relative bargaining power of the parties.
40. Clause 28 of the Statement therefore has the effect of excluding any prior agreement. Accordingly any agreement which may be contained in the email of 20 September 2019 (that the Claimant's salary would "go up in increments as you progress through your CPP and POL modules' is thereby excluded.

41. In the alternative, the Claimant asserted in evidence that the email of 20 September 2019 constituted the "Offer Letter" referred to in Clause 24 of the Statement such that it was incorporated. Clause 24 of the Statement provides: "the contractual terms and conditions pertinent to each employee can be found in the Offer Letter, Statement of Particulars of Employment... Employee Handbook, Code of Conduct Booklet". On an objective analysis "Offer Letter" is clearly intended as a reference to the letter of 24 September 2019 which itself stated "the terms and conditions of your employment, in addition to those described in this letter will be set out in the attached Statement of Particulars of Employment" and to which the Statement was attached.
42. On 13 January 2020, subsequent to agreeing the Statement - Claimant received an email from Petrofac which included the following statement: "Please see attached development plan which identifies the stages required to enable you to reach Production Technician status (and salary)." The attached Development Plan articulated four stages requiring completion of the CPP to a specified percentage and completion/ pass in a certain number of POL modules, it provided: "Each stage is timebound for a period of six months. Completion of each stage will be determined by receipt of POL certificate and confirmation from the CPP team of % completion. An increment will be processed upon the above confirmation being received equivalent of: 75% of production salary (stage one), 80% of full production salary (stage 2), 90% of full production salary (stage 3), 100% of full production salary (stage 4)2
43. Although the email did not specify the salary, the Claimant had previously been advised that his own salary was currently 70% of the full wage. The Respondent submits that the Claimant cannot rely upon this prior representation because of the entire agreement clause in Clause 28 of the Statement which "extinguishes all previous assurances, warranties, representations". It is clear from its context that the contractual intention here is to exclude any misrepresentations, in circumstances where there was no assertion of misrepresentation it does not prevent the Claimant and the

Respondent having a shared understanding that he was currently on 70% of the full wage. Having regard to the objective understanding and intention of the parties in the circumstances, the email of 13 January 2020 was sufficiently clear in its terms amount to a conditional promise to pay according to its terms if the Claimant performed according to its terms.

44. The Claimant also sought to assert that the Development Plan was apt for incorporation but had not articulated any mechanism for its incorporation by way of an express or implied incorporation clause other than as considered above.
45. Contrary to the Respondent's submission, changes to terms made after execution of the Statement are not excluded by the entire agreement clause, because Clause 26 expressly anticipates that the Company may make reasonable changes to the terms of employment. In any event the scope to agree future changes would be readily implied in an employment context (e.g. agreeing an annual wage increase). Further, it is noted that the relevant clause regarding the start date of the Claimant's employment was marked "TBC" in the Statement, and accordingly that term must have been agreed after execution of the Statement.
46. Although the Development Plan had become a term of his contract, the Claimant did not perform according to its terms and is not therefore entitled to payment thereunder. The Development Plan articulated the stages required to be met to reach Production Technician status and the specified salary. In respect of Stage 4 (the final stage) it provided: "completion of production technician CPP (to be identified) to 100% and completion / pass in another 3 POL modules ..." i.e. 10 POL modules in total. Although the Respondent certified the Claimant as having completed his training and reached Production Technician status, the Claimant did not complete the production technician CPP and he did not pass 10 POL modules. He did not do so because the Respondent did not provide the CPP or the POL modules (which they no longer required for him to achieve Production Technician status).

47. The Claimant briefly argued that when the Respondent no longer provided the CPP or the POL modules he was entitled to the specified increase by virtue only of achieving the Production Technician status. That interpretation is not supported by the express terms of the Development Plan, no implied variation had been pieced, and there was no evidence of such a variation.

48. The Claimant also briefly argued that failure to provide the CPP ; he ³OL modules amounted to a breach of contract. The Claimant has not made such a complaint and in any event it cannot be determined as part of a complaint for unlawful deduction from wages. A complaint for unlawful deduction from wages considers the amount properly payable not the loss of opportunity to earn that amount (*Lucy*). *Lucy* applies to “remuneration which is earned if ; tasks are carried out” which “remuneration, in my judgement, can only become payable to the employees if the applicable task is carried out” (para 39 *Lucy*).

49. Accordingly there was in the circumstances no unlawful deduction from wages and the complaint is therefore dismissed.

Employment Judge: M Sutherland
Date of Judgment: 17 May 2022
Entered in register: 18 May 2022
and copied to parties