



EMPLOYMENT TRIBUNALS

Claimant: Ms S Smith

Respondent: Ineos Acetyls UK Limited

Heard at: Leeds (by CVP) **On:** 27 March 2023

Before: Employment Judge Bright

Representation

Claimant: Mr Morgan (Counsel)

Respondent: Mr Salter (Counsel)

RESERVED JUDGMENT

The respondent made an unauthorised deduction from the claimant's wages.
The respondent shall pay to the claimant the sum of £5,554.08 gross.

REASONS

The claim

1. The claimant presented a claim on 23 September 2022 (following a period of ACAS early conciliation from 16 July 2022 to 24 August 2022) for unauthorised deductions from wages. The claim was heard by Cloud Video Platform, both parties having agreed to a video hearing.
2. The complaint is that the respondent did not pay to the claimant on 29 April 2022 an Annual Cash Bonus in respect of the 2021 performance year ("the 2021 Bonus"). The claimant says she was contractually entitled to the 2021 Bonus. The respondent says the 2021 Bonus was not contractual and that it was entitled under new scheme rules to withhold payment because the claimant had given notice of resignation as at the date of payment.

The issues

3. The issues were:
 - 3.1. Was there a contractual right to a bonus prior to the TUPE transfer to the respondent on 1 January 2021?
 - 3.2. Was there any variation of the contract at any stage?
 - 3.3. Was the failure to pay the 2021 Bonus a breach of contract and therefore a deduction from wages? or
 - 3.4. Was the 2021 Bonus part of the claimant's pay which was properly payable in April 2022? I.e. was there a lawful entitlement to that payment, rather than a contractual bonus scheme as a whole?

Evidence

4. The claimant gave evidence on her own behalf and Ms B Marshall (Head of HR Europe and America) gave evidence on behalf of the respondent. Both referred to written witness statements. The parties also presented an agreed electronic file of documents of 180 pages.

Findings of fact

5. The claimant was employed by BP as an Operations Technician from 6 August 2012. Her contract of employment with BP included a clause which stated that the employer could award, at its absolute discretion, an Annual Cash Bonus ("ACB") based on the company's and the employee's performance in the previous 'performance year' (January to December). It was not disputed that the claimant received the ACB in respect of every performance year from 2012 (with the exception of 2020, because of the Covid-19 pandemic) until her employment transferred under the Transfer of Undertakings Regulations to the respondent on 1 January 2021.
6. It was agreed that the respondent confirmed that a payment would be made in April 2022 on the 'bonus framework' in place during a 'protected period' for discretionary benefits which would run from 1 January 2021 to 31 December 2021.
7. The BP Annual Cash Bonus Global Policy ("the BP Policy", page 43) stated, under 'Eligibility':
 - 1.1 *All individuals who are legally employed by BP on 31 December of a performance year are eligible for the ACB in respect of that performance year unless they fall within one of the excluded groups listed below:*
 - 1.1.a *Employees who participate in any other annual cash bonus programme.*
 - 1.1.b *Employees who joined BP after 1 October in the performance year (or, where 1 October is not a business day, employees who joined BP after the first business day following 1 October).*
 - 1.1.c *Summer students, vacation students and interns.*
 - 1.2 *All individuals who leave employment with BP during the course of a performance year but who are covered by the exceptional circumstances set out in paragraph 4 will be eligible for ACB in respect of that*

performance year, on a time pro-rated basis as detailed at paragraph 2.3.e.

8. Mr Morgan for the claimant submitted, and I agreed, that the BP Policy stated that eligibility for the ACB was dependent on being legally employed by BP on 31 December of the performance year. The excluded groups listed did not include those who had served notice after the end of the performance year and the category of special circumstances related to those who had resigned during the performance year, not after its conclusion. The BP Policy stated that, provided an employee was legally employed on 31 December of the performance year, they would qualify for the ACB for that performance year.
9. Paragraph 6.1 of the BP Policy provided that the ACB was a discretionary plan which did not result in a guarantee or entitlement of payment to any individual nor a contract of employment. BP reserved the right to vary, amend, terminate or withdraw the ACB at any time and without prior notice.
10. The claimant's offer letter from BP also identified (page 53) that the benefits including the ACB were at the company's absolute discretion and were not contractual, as did other offer letters and terms and conditions set out at pages 55, 56, 67 and 68 of the bundle.
11. It was not disputed that the claimant received ACB payments at the end of March 2017, 2018, 2019 and 2020. She received documents entitled 'Your Pay Discussion Guide' with each of those payments (pages 74, 75, 76, 77 respectively). I accepted the respondent's evidence that a legal notice (page 78) was printed on the reverse of each of those Pay Discussion Guide documents. The claimant did not disclose the reverse of those documents and no longer retained the originals. However, a similarly sized, shaped and captioned block of 7 lines of text could be seen showing through from the reverse of the documents in the trial bundle, in particular on page 77. Although that text was not legible, I find that on the balance of probabilities it is more likely than not that it was the legal notice on page 78. That legal notice read:

The payments and/or awards listed in this guide may be subject to your continued employment and to you not having served (or having been served) notice of termination of employment, on or before the date of payment or award. This guide does not confer on you any rights in respect of any future employment or potential bonus payments. BP reserves the sole right and discretion to interpret the provisions of this presentation, interpret the provisions of any applicable reward plans, and to determine participation in the plans and the amounts of any payments made there under, and such interpretations and determinations will be final and binding. All grants and awards indicated in this document are strictly subject to the terms of the relevant plans, and any or all of which may be amended from time to time and/or terminated, solely at the discretion of the designated BP officials identified therein, and with or without notice to you.

12. The claimant asserted at paragraph 4 of her witness statement and again in her evidence before this hearing, that she had not seen any such legal statement. I find it probable that, the text having been printed on the reverse

of the statements in small lettering, the claimant did not notice or read the legal statement, but that it was present.

13. The claimant's evidence that she was not aware of BP ever exercising any discretion to annul bonus payments for employees who tendered their resignation was not challenged by the respondent.
14. Around the TUPE transfer, the respondent held several consultation meetings with employee representatives to discuss a range of related issues. On 10 September 2020 there was a meeting with representatives at which a PowerPoint presentation entitled 'Benefits/Remuneration/Annual Cash Bonus' (page 86 and 97 - 104) was shown, which was intended to be cascaded to all employees. On 1 November 2021 the respondent sent employees a letter entitled 'Notification of Changes – Employee Forum', (page 124), which identified a protected period of 1 January 2021 to 31 December 2021 for the purposes of changes to benefits and reiterated that the ACB was discretionary. It stated:

During the TUPE consultations held between 2nd September 2020 and 24th September 2020, all employees were notified that a number of BP discretionary benefits and policies, which were non-contractual, would be maintained during 2021 (the "protected period") and that no changes to these discretionary benefits would be made before 31 December 2021.

After a full review and internal benchmark, this letter is considered as due notification of the changes to those discretionary, non-contractual benefits, which will come into effect on 1 January 2022.

For confirmation, the end of the 12-month "protected period" is effectively 31 December 2021.

Overview of Changes Discretionary Annual Bonus

INEOS Acetyls offers a discretionary bonus scheme, and all employees will be eligible to participate. The discretionary bonus scheme offers the potential to receive an annual bonus opportunity of between 0-20%, (target 12%) of annual salary based on the performance of the business. This bonus opportunity is the same across all INEOS grades (below 'S' level) and across all Countries.

The changes to the discretionary bonus scheme will be effective from 1 January 2022.

2021 annual bonus payments will be made on the bonus framework in place during the "protected period".

15. The bonus scheme was discussed again during an employee forum on 23 November 2021 and the minutes recorded, in response to a workplace representative's question about payment of the 2021 Bonus, that:

Eligibility to participate in the INEOS Discretionary bonus scheme is only available to those colleagues who are a permanent employee of the organisation and are not working within their resignation period or have

submitted their intent to resign from the organisation at the time the bonus is paid.

16. The respondent says these minutes were usually printed and left in an area where the claimant worked. I accepted the claimant's evidence that she did not see the minutes.
17. The Claimant received a letter dated 25 November 2021 telling her she '*will be able*' to participate in the respondent's new ACB scheme from 1 January 2022 and confirming that it was entirely discretionary. The attachment to that letter repeated the wording from the Notification of Changes – Employee Forum document, identifying that the 2021 Bonus payments would be made on the bonus framework in place during the 'protected period'.
18. An email at page 139 shows the respondent planning to cascade information about the new ACB scheme to employees in the week commencing 13 December 2021, including a document entitled Ineos Acetyls Bonus 2021 European Plan (page 143). That document stated, amongst other principles, that the performance year was January to December, the bonus was discretionary, non-contractual, non-pensionable and subject to shareholder approval, that it was based on clear key performance metrics, and audited results. In particular it stated (page 144):

Qualifiers for Bonus:

- *Permanent employees*
- *Good Leavers, e.g. normal retirees*

Dis-qualifiers for Bonus:

- *Employees undergoing disciplinary sanction*
- *Bad Leavers, e.g. resignations. Individuals must be employed and **not under notice as of 31 March of payout year***
- *Industrial Action – taken against an INEOS business will impact the ability of that business to pay out any bonus in part or full [my emphasis]*

19. However, I accepted the claimant's evidence that she was absent from work on jury duty for the period 13 December – 28 December 2022, save for an overtime night shift on 24 December 2022, and was not aware of that document and missed any cascade of that information.
20. At page 156, the document reiterated that the ACB was entirely at the discretion of the respondent and specifically stated: *The bonus payment is subject to the employee, being employed and not under notice as at 31st March in year of payment (except for good leavers where pro rata payments may be made).*
21. I accepted the respondent's evidence (pages 157, 158 and 160) that team leaders were also intended to cover changes to the ACB with their teams in December 2021 and January 2022.
22. The claimant resigned from her employment in February 2022 (page 161) and her effective date of termination was 4 May 2022. It was not disputed that the respondent refused to pay her the 2021 Bonus on 29 April 2022, when it paid other employees, because she had given notice to terminate her employment. The letter accepting her resignation informed her: "*There will be no 2021*

bonus paid to you as you have resigned". I accepted the claimant's evidence that this was the first time she realized she would not receive the 2021 Bonus.

23. The claimant raised the bonus issue at an employee forum (page 164) and was told, "*The bonus is discretionary. The business has taken the decision it does not wish to make this discretionary payment to individuals who no longer wish to work for the company. Those leaving on good terms with the company (e.g. someone retiring at normal retirement age) are eligible for the bonus*".
24. It is agreed that the claimant did not raise the non-payment of the bonus in her exit interview, nor raise a grievance about the failure to pay it.
25. I find the claimant resigned believing she would receive the 2021 Bonus.

Law

26. Section 13 of the Employment Rights Act 1996 ("ERA") provides that:

- (1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
- (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
 - (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*
- (2) *In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
- (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
 - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- ...
- (3) *Where the total amount of wages paid on any occasion by the 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*
- ...

27. Section 27 ERA defines 'wages':

(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,

...

(3) Where any payment in the nature of a 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 the payment is made.'

28. Mr Morgan, in his submissions on behalf of the claimant referred me to the case of **Farrell Matthews & Weir v Hansen** [2005] ICR 509, 20 IRLR 160, EAT, in which it was held that a discretionary bonus which has been declared was a wage which was properly payable to an employee in terms of section 13(3) ERA. In that case the Employment Appeal Tribunal ('EAT') held that, until the discretion is exercised in favour of granting a bonus, no bonus is payable, provided the discretion is exercised properly. However, once an employer tells an employee that she is going to receive bonus payments on certain terms, there is a legal obligation on the employer to pay the bonus in accordance with those terms and the employee has a legal entitlement to receive it. This applies equally where the discretion to award a bonus is granted under contract, or by custom or practice or by an ad hoc decision. The bonus therefore falls within the definition of 'wages' in section 27(1)(a).

29. According to the EAT in **Hansen**, the proper interpretation of section 27(3) is that it applies only to non-contractual bonuses to which no legal entitlement or legal liability to pay arises. When they are paid, however, they are treated 'as payable' and the bonus is thereby deemed to have been a legal entitlement.

30. Thus, once the employer has exercised its discretion in favour of granting a bonus on certain terms, it comes under a legal obligation to pay it in accordance with those terms, at least until the terms are altered and notice of the alternation is given.

Determination of issues

31. Both counsel made oral submissions which I have considered with care but do not rehearse here in full.

32. I find that, although the BP bonus scheme is repeatedly stated in the contractual and other documentation to be entirely discretionary, that fact, in and of itself, does not answer the question of whether the 2021 Bonus was 'wages' payable to the claimant under her contract or otherwise, and whether the non-payment of the bonus was an unauthorised deduction.

33. Further, and separately, I find that, although BP retained the discretion to put in place a rule that employees who served notice before the payment date would not be entitled to payment of the bonus, (*"The payments and/or awards listed in this guide may be subject to your continued employment and to you not having served (or having been served) notice of termination of employment, on or before the date of payment or award"*, Legal Notice, page 78), there was no evidence of BP ever having exercised that discretion or put in place such a rule. The respondent was not able to contradict the claimant's evidence that BP had never exercised that discretion and the only exceptions to payment identified in the BP Policy did not relate to having served notice. In my judgment, once a bonus was declared, BP therefore expected to be legally obliged to pay that bonus to an employee who was in employment on 31 December, subject to the exceptions expressed in the BP Policy, irrespective of whether they had served notice of resignation before the date of payment.
34. I agree with the claimant that this case is similar on its facts to **Hansen**. The respondent exercised its discretion to declare a bonus (the 2021 Bonus) and there was therefore a commitment to pay the bonus. The question in this case is whether **Hansen** should be distinguished because there had been an agreed variation in the terms on which the 2021 Bonus payment would be paid.
35. The respondent accepts that the 2021 Bonus was calculated and declared for the 2021 performance year on the basis applied by BP. However, the respondent says that there was an agreed variation such that the respondent's new Ineos ACB Scheme rules ('the 2022 Rules'), were to be applied to the payment of the 2021 Bonus. In other words, although the 2021 Bonus was calculated on the 2021 performance year, the 2022 Rules would apply to its payment. The 2022 Rules provided that employees who had served notice before the payment date were among the exclusions and would not receive a bonus.
36. The evidence is clear that the respondent made a promise to maintain a 'protected period' for benefits, including the ACB, for the period of 2021. The question is this: Were the rules for payment of the 2021 Bonus part of the 2021 Bonus 'framework', and therefore protected and unchanged from the rules for payment under BP, despite the payment actually being made in April 2022? Alternatively, because the payment was made in April 2022 was it made under the 2022 Rules, applicable to the respondent's 2022 bonus scheme, despite the fact that it related to payment of a bonus for the 2021 performance year, calculated under a different 'framework'?
37. I have considered the consultation documentation and evidence of discussions at the employee forum regarding the new ACB. The Notification of Changes – Employee Forum' (page 124) stated that *"The changes to the discretionary bonus scheme will be effective from 1 January 2022. 2021 annual bonus payments will be made on the bonus framework in place during the "protected period"*. The terms 'scheme' and 'framework' are not defined and are potentially ambiguous. Are they intended to mean just the method of calculation or the whole of the bonus arrangements including the rules for payment and exceptions? The word 'scheme' in common English generally applies to the whole way in which something is organized. In my judgment it

must be intended to apply, not just to the method of calculation, but also to the manner of and rules relating to payment. The same, in my judgment, applies to the term 'framework'. The phrase "...*payments will be made on the bonus framework...*" implies no change to the way in which payments are made.

38. In my judgment the changes to the ACB (the 2022 Scheme) proposed by the respondent which were being cascaded to employees applied only to the arrangements relating to the bonus for the performance year 2022 onwards. There is no clear indication in any of the documentation the respondent has referred to that the 2021 Bonus was intended to be paid under the 2022 Rules. This interpretation is supported by the wording of the letter sent to the claimant on 25 Nov 2021 telling her she 'will be able' to participate in the respondent's new ACB scheme from 1 January 2022. The fact that the respondent was still cascading information about the 2022 Bonus Scheme in January 2022 also suggests that this was intended to relate only to the arrangements for payment of the bonus for the performance year 2022, not the way in which the bonus for the performance year 2021 was paid. Otherwise employees might be resigning in early January 2022 in the expectation of receiving the 2021 Bonus, before any changes had been communicated to them according to the respondent's timetable. The response to the claimant's query at the employee forum on p164 ("*The business has taken the decision...*") also suggests a recent change in approach rather than the repetition of a variation which had been consulted on and was widely understood.
39. In my judgment, the rules relating to the payment of the 2021 Bonus were part of the 2021 Bonus scheme or 'framework'. The Notification of Changes was not intended to notify employees that the rules for payment of the 2021 Bonus would be different than those applicable in previous bonus years and the 2022 Rules did not apply to the 2021 Bonus. On the contrary, the Notification of Changes confirmed that any changes would only apply to the bonus scheme relating to the 2022 performance year.
40. Once it had been declared, the 2021 Bonus was therefore payable under the BP Policy and those rules did not include an exclusion for those who had given notice. The claimant met the criteria for payment. The bonus was 'wages' under section 27(3), was properly payable to the claimant under section 13(3) ERA and she was entitled to payment. The respondent made an unauthorised deduction from her wages in failing to pay it to her.
41. The respondent did not dispute that, if the claim was successful, the amount of remedy would be £5,554.08 gross (page 170). I therefore find that the respondent shall pay to the claimant the sum of £5,554.08 gross.

EJ Bright
9 May 2023