EMPLOYMENT TRIBUNALS

Claimant: Mr K Hearn

Respondent: P Ducker Systems Limited

Heard at: Nottingham **On:** 9 &10 January 2017
13 & 14 March 2017

Before: Employment Judge Faulkner (sitting alone)

Representation
Claimant: In person
Respondent: Mr J Mellis (Counsel)

JUDGMENT

1. The Claimant was not entitled to be paid a bonus on 31 March 2016 for the Respondent's financial year 2015/2016. His claim of breach of contract therefore fails.

2. The Respondent was not in fundamental breach of the Claimant's employment contract. The Claimant therefore resigned in breach of that contract.

3. The Claimant is ordered to pay the Respondent the sum of £1,251.74 by way of compensation for losses arising from that breach.

REASONS

Complaints

1. The Claimant complained of breach of contract by the Respondent in respect of non-payment of a bonus.

2. The Respondent counter-claimed, alleging breach of contract by the Claimant, first in his termination of his employment without giving the required contractual notice and secondly in his alleged failure to comply with the implied duty to perform his duties with reasonable skill and care.

Issues

3. I identified the following as the issues to be decided, agreed with the parties at the outset of the hearing:

3.1 What were the terms of the Claimant's employment contract as to any entitlement to a bonus payment?

3.2 Was the Respondent in breach of any of those terms?

3.3 If so, is the Claimant entitled to compensation, and if so in what amount?

3.4 If the Respondent was in breach of any term relating to a bonus payment, was it a fundamental breach such as to repudiate the contract of employment? To that I add the question of whether the Respondent was otherwise in fundamental breach.

3.5 If so, did the Claimant resign in response to that breach?

3.6 If not, has the Respondent suffered loss as a result of the Claimant resigning in breach of contract?

3.7 If it has, what compensation is the Respondent entitled to?

3.8 Was the Claimant in breach of the implied duty to carry out his work with reasonable skill and care?

3.9 If so, has the Respondent suffered loss as a result?

3.10 If so, what compensation is the Respondent entitled to?

Facts

4. On day 2 of the hearing, the Respondent withdrew the second aspect of its counterclaim relating to alleged breach of the implied duty to carry out work with reasonable skill and care. Accordingly, it is not necessary for me to decide the issues identified at 3.8 to 3.10 above and I make no findings of fact in respect of them. The Respondent wished to emphasise that its decision to withdraw this counter-claim was not related to its view of the merits of the case. I therefore record briefly its stated reasons. These were that in cross-examining the Claimant on these issues, the Respondent concluded that there were or may be documents in its possession but not in the hearing bundle which demonstrated that some of the evidence given by the Claimant was inaccurate. Particularly in view of the earlier disputes in the case regarding documents (see below), the Respondent stated that it would not be proportionate to seek an adjournment of the hearing in order to address these matters before the Tribunal. It sought to reserve its right to address them by other means outside of this forum.

5. This hearing originally commenced on 14 November 2016 before EJ Solomons. As his formal note shows, that hearing was concerned solely with the question of disclosure and the contents of the hearing bundle. I do not need to replicate that note, except to say that it appeared that the disputes over disclosure were resolved, though leaving no time to commence consideration of the substantive case.

6. The parties produced an agreed bundle numbering 350 pages, which had

been substantively agreed by 14 November and was supplemented by an agreed number of additional pages thereafter. The Claimant produced a supplementary bundle of over 100 pages on day 1. Mr Mellis stated that the Respondent received documents from the Claimant on 14 December 2016, though I did not understand there to be any dispute about these as they were now part of the agreed bundle. Additional documents, now in the proposed supplementary bundle, had then been provided by the Claimant on 23 December 2016. Mr Mellis' position was that they added nothing to the case and that I should not consider them. The Claimant countered that he had prepared his statement, prior to 14 November, without having all agreed documents to hand, as he had not received all of the Respondent's documents until 5 December 2016. I made clear that he should identify for me in his evidence or cross-examination where in his view he would otherwise have referred to particular documents.

7. As to the further documents he said that he had disclosed only an additional 46 pages, but the Respondent had insisted on supplementing these to a total exceeding 100 pages. The Claimant said that most of the 46 pages concerned two issues, namely bonus payments he and colleagues had received before that now in dispute, and emails related to the handover of his duties. Mr Mellis was content for me to glance at these documents in order to decide whether to agree their inclusion as a supplementary bundle. I agreed to admit them for the following reasons:

> 7.1 Whether to do so was a case of ensuring fairness to both parties, taking a proportionate approach and being flexible, in accordance with the overriding objective.
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> 7.2 The Claimant's reason for the late disclosure of the supplementary documents was that he had not previously had time to search for them, though it is clear he had been advised by solicitors regarding the duty of disclosure, and, as noted above, the matter had been discussed at length with EJ Solomons.
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> 7.3 Having said that, EJ Solomons' note of the 14 November hearing did envisage that some further documents may need to be disclosed; Mr Mellis correctly accepted that the Respondent would suffer no prejudice by the supplementary documents being admitted, it having had sufficient opportunity to consider them; the Respondent itself had made further applications for disclosure (which were not granted nor reiterated) in the week before Christmas; the Respondent is clearly far better resourced than the Claimant; the documents appeared to have some relevance to the issues; and they would not add materially to the length of the hearing.
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> 7.4 I made clear I would not readily accept the addition of still further documents. On day 3, the Respondent introduced pages 228A and B, and on day 4 page 228C. These were no more than its calculations of the Claimant's bonus should he succeed in his claim, and its quantification of its counterclaim. The Claimant had no objection to their introduction.

8. That deals with documents. I made clear to the parties that I would not read every document in the bundle, only the pleadings, any document referred to in witness statements or oral evidence and any other document specifically

identified for my consideration. I read statements of and heard evidence from the Claimant, Mr Housley (the Respondent's Finance Director) and Mr Rose (the Respondent's Managing Director), and heard submissions from both parties. Having considered all of that material, I make the findings of fact that now follow. It is not a normal feature of Tribunal judgements to deal with every factual matter and dispute raised during a hearing, and it is unnecessary for me to do so in this case. Page numbers below refer to the main bundle; numbers prefixed with "S" refer to the supplementary bundle.

9. The Respondent is engaged in the provision of control and monitoring systems to clients working in a road tunnel environment. It employs around 40 employees. The Claimant was employed from 16 November 2011 until 31 March 2016, latterly as Finance Director. The majority shareholders retired from active participation in the business some time before the matters relevant to these proceedings. Mr Rose, and two other senior managers, each hold a minority shareholding. I refer to those individuals in these Reasons as the shareholder managers. The Claimant was at no point a shareholder himself. The Respondent's financial year is, and was at all relevant times, 1 April to 31 March.

Claim for bonus payment

10. In or around August 2013, shortly before his appointment as Finance Director took effect, the Claimant was verbally informed by Mr Rose during a management team meeting that he was to be part of a "management team scheme" in relation to profit-based payments. Mr Rose confirms that there was at this stage an aspiration that everyone on the management team would be rewarded in a similar way.

11. At pages 38 to 83A there is a standard contract of employment issued by the Respondent, signed by the Claimant on 11 September 2013. Clause 15.1 on page 57 says in relation to "Profit Share" that the Claimant is "eligible for entry into a Company profit share scheme. At the discretion of the Board a profit share equivalent to 5% of the declared Company profit is made available for profit share, and at the discretion of the Board this sum is divided across eligible employees rationalised according to performance based criteria and position". Clause 24.3 of the contract (page 69) says, "On termination of the Appointment howsoever arising the Employee shall not be entitled to any compensation for the loss of any rights or benefits under any profit sharing scheme operated by the Company in which he may participate".

12. At pages 87 and 88 is an "Employee Terms of Employment Form" which summarised the basic details of the Claimant's employment arrangements as at 11 September 2013, the date he signed the standard contract. In relation to "profit share", the document states "management team scheme" and also refers to clause 15.1. The Claimant asserts that this document, together with Mr Rose's comment in August, demonstrated that from this point he was part of a "management team scheme" in relation to profit-based payments. Although signed on the same day, the Claimant's case is that clause 15.1 of the generic contract document was superseded and rendered obsolete by the "Employee Terms of Employment Form", and Mr Rose accepts that any "management team mechanism" would have been outside of clause 15.1. His evidence was however that by some time in the Autumn of 2013 it became plain that it would not be

possible to agree a profit-related reward structure that would apply to all of the senior management team, despite several discussions following the conversation in August. The stumbling block appeared to be the unwillingness of the Claimant and his non-shareholder colleague to buy shares in the Respondent. This evidence was unchallenged, and I accept it as an accurate record of events.

13. The second document the Claimant relies on to support his claim for a bonus payment is an email sent to him, and other employees of the Respondent, by Mr Rose on 10 June 2015 (page 126), which I shall refer to as the page 126 email. The email is headed "Company Bonus calcs [sic]", and is sent to the other two shareholder managers and the Claimant. Its primary concern is financial year 2015/16, which was at that stage in its infancy. Its first main heading is "STAFF SCHEME" and under that heading it refers to a base element which applies to all staff proportionately to salary, and "adds up to the 5% company profit contribution". This is a clear reference back to clause 15.1. I shall refer to this as the all staff scheme or company-wide bonus. It then refers to an "enhanced element" for a small number of “key staff”, the details of which are not of concern here. The next main heading in the email is "TW/KH" referring to Tim Whitely, the other non-shareholder manager, and the Claimant. The email says that Mr Whitely's scheme stays, "as is". In relation to the Claimant, the email reads, "FD element: //'1.25% gross profit (PDD [Mr Ducker, one of the majority shareholders] email 7-12-14'?? OR ‘circa 1.5% of net company profit after corp. tax, based on 1.25% of net before tax + proportion of company 1% profit share’ - 16/10/15 i.e. not all funded from within the 5% pot". The email was not sent to Mr Whitely. The email makes no reference to profit-based payments to shareholder managers, nor any reference to a “management team scheme”.

14. The Claimant’s case is that the although the arrangements set out in the email were imposed on him without discussion, this was how his bonus was paid from that point onwards (see further below), and he could legitimately expect that this would be the case unless he heard to the contrary. Whilst accepting that the Board agreed the content of the email, Mr Rose says it created no guarantee that a bonus would be paid to the Claimant on any of its terms. Rather, he says, it remained open to the Board to decide what arrangement should apply, even to the point of saying that no bonus payment was due at all. No specific mention of this was made to the Claimant, Mr Rose relying on the discretions in clause 15.1 of the contract as creating a right for the Respondent to change things if the situation demanded it, page 126 being no more than a “framework” leaving a lot of detail undecided. Mr Rose also insists that there was the option to adjust the amount of the 1.25% or 1.5% calculations referred to in the page 126 email, to take account of the Claimant’s performance, but says this was never implemented in practice. He states that clause 15.1 was still relevant to the question of how the company-wide bonus was apportioned between employees according to performance and grade. This is a reference to the first part of the email that refers to the “base element” of the “Staff Scheme”.

15. The shareholder managers were paid salaries as one would expect and in addition received regular dividends, both “interim dividends” which it is agreed were guaranteed regardless of profit, and “final dividends” which were profit-based. At the heart of the Claimant’s case is that he was entitled to bonus payments aligned, as to amount and timing, to payments made to the shareholder managers by way of profit-based dividend. He accepted that there

was no document that set out any such entitlement, and that is clearly correct. Nevertheless, in addition to the material just surveyed, the Claimant also relies on what he was actually paid and when. I will deal with what was paid during the relevant years in turn, dealing separately with the question of timing.

16. For the year 2012/13, all senior managers, including the Claimant, were promised (and paid) a flat bonus of £10,000 each, not related to the Respondent's profit but payable if the Respondent broke even during what was apparently a difficult financial year for the business. The Claimant does not claim to have been part of any "management team scheme" at this point, as of course he had not received either Mr Rose's verbal communication in August 2013 or the written documents of September 2013.

17. For 2013/14, he was paid the same amount again, namely £10,000. The other members of senior management were paid £21,000 (by way of dividend) but the Claimant's case is that the payment due to him was reduced, without prior discussion with him, on the basis of alleged misconduct. It is not relevant for me to record the details of that matter, except that the Claimant denied any wrongdoing. Mr Rose said that the Claimant asked him once the matter had blown over – sometime in early 2014 – whether he could be "put back" on to a bonus arrangement. Mr Rose discussed the matter with the majority shareholder and they agreed the £10,000 figure. It was not based on any formula related to the Respondent's profits. The calculation of the payments to shareholder managers for this particular year is at pages S96 to 98. Payment was based on the Respondent's profit for the year, less its estimated tax liability, with all of the shareholders (not just shareholder managers) deciding to distribute 85% of the resulting amount amongst themselves in accordance with their shareholding proportions, leaving the balance for investment in the business.

18. For 2014/15 the Claimant was paid a bonus of £2,317.45 (gross), as evidenced by the payslip at page 237. At page 125 is a spreadsheet showing various bonus payments made for this year. Gross profit is shown as just over £300,000, but Mr Rose says that it was around this time that the Board realised that the true gross profit figure should take account of directors' remuneration, and so was considerably lower. Given this would have produced lower bonus payments than previously however £12,500 was put aside for bonus payments, to be shared out amongst all staff. The Claimant thus received, as shown on another spreadsheet at page 179, his share of the profit distributed amongst all staff in proportion to salary, namely £120.61, and a personal 1.25% of net profit, namely £2,196.84. The relation of the latter figure to the chosen gross and net profit figures for the year remains unclear to me, but the parties agree that this was a payment based on 1.25% of net, not gross, profit. The Claimant says this was a mistake, but he did not raise the point at the time because of what he regarded as the unfair way in which the Respondent had been treating him, including the decision on profit-related payment for 2013/14, and the fact that in his view the page 126 email had been imposed upon him without consultation. Mr Rose's evidence is that notwithstanding the page 126 email it was clear to all staff that the business paid bonuses on net, not gross profit. He said that the reference to gross profit was careless on his part. Whilst the Claimant was included in the spreadsheet at page 179, the shareholder managers were not. The Claimant says that this was simply because it was a record of bonus (as opposed to dividend) payments. Mr Rose accepts that the formula in the page

126 email was the "mechanism" used to pay a bonus to the Claimant for 2014/15, and says it would have been used in 2015/16 as well, had the Claimant not left his employment.

19. The payments made to shareholder managers in 2014/15 were as set out on page 328, an extract from the Respondent's bank statements. The total of £32,515 included an interim dividend as well as one that was profit-based as shown by the email from the Claimant to Mr Rose and the majority shareholders dated 6 July 2015 at page S30, which followed emails about the payments from Mr Rose and one of the majority shareholders. The profit-based dividend was £6,200 each. This was, Mr Rose said, a special calculation for that particular year, a figure the Respondent could live with at that time. It was, he said, based on a lower profit figure for the business (£150,000) than that used to calculate the Claimant's payment for the same period. That is clearly correct.

20. As to the timing of bonus payments the Claimant asserts that his payments always coincided with payment of profit-related dividends to the shareholder managers, an assertion contested by Mr Rose (paragraph 8 of his statement) who says there was "no policy" to that effect. Mr Rose agrees nevertheless that the profit-related dividends were generally paid in the same month as profit related bonuses in the summer following the year end, the former usually earlier in the month and the latter naturally being paid on the payroll date which was towards month-end.

21. For year ending 31 March 2013 the Claimant's flat rate £10,000 bonus was paid in August 2013. Payment was made to the shareholder managers on 6 August 2013 (page 296). At page S95 is a calculation of further profit-based payments for shareholders for financial year 2012/13, the shareholder managers being paid £6,000 each. The Respondent's bank statement at page 301 shows that this was paid in October 2013. The Claimant confirmed that there was no bonus payable to him in that month. The payments to the Claimant for 2013/14 and 2014/15 were paid in July 2014 and July 2015 respectively. He describes it as coincidental that bonus payments were made to employees generally at around the same time. The profit-related dividends for shareholder managers were paid earlier in those months (it appears from page 312 that in July 2014 it was just a day earlier), in accordance with the general picture described by Mr Rose. As I will describe in more detail shortly, the shareholder managers received profit-related dividends for year 2015/16 on 31 March 2016. No profit-related payment of any description had ever been made previously on that date. Mr Rose says that had the Claimant remained in the Respondent's employment, he would have received a 2015/2016 bonus in late July 2016.

22. On 19 January 2016 the Claimant gave the Respondent notice of termination of his employment – page 128 – as he had a new job to go to. He offered to transition out of the business on longer than his contractual 3 months' notice particularly because his departure would be shortly after year-end. The letter made no reference to bonus payments.

23. There followed a series of email exchanges between the Claimant and Mr Rose. At pages 140 to 141, Mr Rose indicated his agreement to an extended transition. Having commented on the impact on salary and other benefits of the Claimant gradually reducing his hours during that transition, Mr Rose stated, "I

believe you are aware of company practice that employees leaving lose right or access to profit share due for the period employed when leaving the business. If we can agree the following targets [related to tasks for the Claimant during the transition] for completion during your notice period I will ensure that you subsequently receive your profit share entitlement for year ending 31/3/16, and in the format you currently understand it (1.25% net profit etc)". As Mr Rose said in evidence, his view was that the Claimant was not entitled to any bonus payment in the light of clause 24.3 of the contract, the use of the word "entitlement" not being intended to convey the contrary.

24. On the same day, 20 January, the Claimant wrote back to Mr Rose (page 139 to 40), commenting on the various issues, and as to bonus/profit share stating, "I am not aware of such a written/official policy but understand the conditions for full bonus payment to 31.3.16. I would however ask these to be amended for reasons below ...". He then set out proposed modifications to Mr Rose's suggested transition requirements. When Mr Mellis suggested that the Claimant was accepting in this email that he had to be employed at the time the bonus was paid, the Claimant agreed. He then rowed back from that, stating that he did not believe he had to be in employment to be paid the bonus because his terms and conditions of employment did not say so.

25. Mr Rose replied to the Claimant, also on 20 January (page 138), stating "company practise has been that rights expire when staff leave, and as explained [the majority shareholders] have already decreed at a shareholder meeting that with immediate effect your scheme has changed (for which you can read halved). I am prepared to personally guarantee pay out and calculation method if you in return achieve my objectives or do every single thing in your power to attempt to achieve. If the best you can offer [i.e. in relation to the transition arrangements] is endeavour, then the best I can table is that I will endeavour to have it paid and endeavour that it be at the 1.25 rate ...". Mr Rose agreed that this was the first time the Claimant was made aware of any discussions about halving his bonus arrangement, though says it was not implemented as the Claimant was going to be leaving the business. In his witness statement at paragraph 27 he said that the decision was taken because of the majority shareholders' view of the Claimant's performance; in evidence however he said it was part of a broader discussion about simplifying bonus arrangements, based on employees' salaries and their impact on the Respondent's profits.

26. The Claimant replied again on 26 January (page 137), evidently after a discussion with Mr Rose. He stated that his offer to work an extended notice "was based upon the guaranteed bonus payment which I was due for the full year worked FY15/16 based on previous calculations", reiterating that he could find no policy to the effect that such payments are lost if an employee leaves. He added that the unilateral decision to halve his bonus was unfair, and withdrew his offer of an extended notice period.

27. Mr Rose's response on the same day (page 136) stated again that employees "fail to secure bonus payments once they have departed the business", this being "the company exercising its right 'at the discretion of the board'" as per the Claimant's written contract, adding "I believe they [the majority shareholders] see no benefit in seeking to reward or motivate an employee who has decided to make their way elsewhere". The email continued "//On reflection I

do now acknowledge that in your [extended notice] proposal you sought bonus on completion of the tasks, and equally I have explained the owner's stated position". He went on to reiterate what he had previously said he was prepared to guarantee if extended notice arrangements could be agreed, but although he did not understand the Claimant's reasoning, accepted that the Claimant was entitled to serve only his contractual notice requirement.

28. The final exchanges were on 27 January (pages 134 to 135), the Claimant sending a long email to Mr Rose, which in relation to bonus payments referred to the savings the Claimant had made for the business, such that the "bonus is well earned". The Claimant says that he was simply saying he was entitled to what he was entitled to. He added in the email that given his offer to help the Respondent through a transition to a new Finance Director, "I would have thought the board would have seen this as a positive situation and award the bonus as earned". He also referred to others having received bonus payments in the past while serving notice. As to Mr Rose's guarantee of payment, he stated "the Board as you state has the decision. PDS is my employer and therefore nothing could be guaranteed". The Claimant says Mr Rose's guarantee was worthless given that the Board had already halved what the Claimant saw as his entitlement and could clearly override whatever Mr Rose arranged. Mr Rose disputes this, saying that it was within his power, and that it would be for him to deal with the Board. In very short subsequent exchanges, the Claimant and Mr Rose agreed to draw the debate to a close.

29. The Claimant continued to serve his notice period, apparently without noteworthy incident. I will detail the process of his handing over his duties below, when dealing with the counter-claim. In the early hours of 31 March 2016, Mr Rose emailed the Claimant (pages 175 to 176) instructing him to arrange dividend payments to all shareholders on the same day. The Respondent's case is that the timing, being an earlier date for payment than usual, was due to a tax change on dividend payments from 1 April 2016. The Claimant noted in his closing submissions that the Respondent did not give this as the reason for the timing of the payments until the start of this Hearing, though he did not challenge the veracity of the stated reason during cross-examination of the Respondent's witnesses, Mr Rose giving it as the reason many times during his evidence. Mr Rose said that the payments were based on what the Board thought the Respondent's profits would be for that year. He emailed the Claimant again later in the day correcting some of his calculations (page 175).

30. Later on 31 March, the Claimant wrote to Mr Rose the letter which appears at pages 156 to 164 (substantively to page 158). It was dated 1 April. The Claimant had not handed over the letter by the time Mr Rose left the office. Mr Rose therefore picked it up the next morning. In the letter the Claimant explained that he had left the Respondent's employment and why. He referred back to his offer to work an extended notice "asking PDS to honour my contracted terms and conditions, namely a guarantee of my bonus payment. There was no obligation for either party to confirm this as it is a condition of my employment under notice that I am entitled to all terms and conditions that have been agreed and contracted to including bonus, however I felt the need to be assured of this". Much of the letter rehearsed the January email exchanges, and then went on to refer to the instruction to pay dividends on 31 March. In his evidence the Claimant stated that there was no discussion about the dividend payments he

was told to make, simply an instruction to make them. This was, he said, out of kilter with previous such instructions, such as that in July 2015 at page S30.

31. The letter continued, "Having made this payment of the dividend, which is performance based (bonus) … it only further cements the fact that a payment of my bonus should have been made whilst serving my notice period, given the basis of that payment being 1.25% of net profit demonstrated in last year's payment and in previous communications". He claimed entitlement to a bonus of £11,503.60 based on profits of £1,147,500, asserting that true operating profits were in the region of £1,500,000 if general reserves were taken into account, entitling him to a bonus of £14,429.38. He went on to say as follows:

> "Having now reached the 1st April 2016 on the basis that I have no guarantee of payment for my services [from then to 18th April] (usually in my role of Finance Director I have certainty as I perform payroll calculation and payments which I cannot assure as I will not be at PDS when this is carried out for the April 2016 salary payments), together with your assistance [sic] that PDS will not be making payment of the bonus a right under my terms and conditions giving further cause for my concern over payments for my services for the period above, I have to consider my position. Having done that I will be withdrawing my services under notice due to breach of my terms and conditions of employment with immediate effect on the grounds of 'Constructive Dismissal'. I have to maintain my income and maintain my livelihood and in order to do this I must take action as I see most appropriate".

32. The Claimant says that he decided to resign essentially because he was not paid a profit-based bonus on 31 March 2016, when the shareholder managers were paid their dividends; he believes he should have been so paid, given that he and they were part of the "management team scheme" for bonus purposes. He said he "knew there would be a problem with [his] bonus" (i.e. it would not be paid) because of what had happened before, which he said showed how the Respondent operates. This referred to the unilateral cut to his bonus payment (as he saw it) in 2013/14; the unilateral changing of the basis for calculation of his bonus in July 2015 (by the page 126 email); the statement in the January 2016 email exchanges (page 138) to the effect that the Claimant's bonus scheme had been unilaterally halved; and the failure of the Respondent to guarantee the Claimant a bonus payment in the discussions after he first handed in his notice. The fact of non-payment of the bonus to him on 31 March, and the absence of any discussion about it was, the Claimant says, a fundamental breach of his contract of employment. All of this led him to also conclude that the Respondent could not be trusted to pay his salary for April, as even had he served his full notice period the Claimant would not be present to ensure that it was paid.

33. Mr Rose was unsure whether he discussed with the Claimant that the payments were being made because of a change in the tax regime, though whether he did or not it is reasonable to conclude that as Finance Director the Claimant would have been aware of the change. Mr Rose asserts with more certainty that when he discovered an error in his initial instruction he went to speak with the Claimant before writing his second email, which I accept was likely given the significance of the payments, though it is clear this discussion did not include any explanation as to why the Claimant would not be receiving a

payment on this date. Mr Rose candidly says that he did not give this any thought, as no profit-based payment had ever been made on 31 March before, there were particular reasons why the shareholder managers were being paid on this occasion, and so in his view the Claimant could have had no reason to expect that he would be paid a bonus on the same date.

34. Mr Rose was due to be abroad from 1 to 10 April, though he went into the office on the morning of 1 April, read the Claimant's letter and composed a short reply – page 184 – which included the statement that the Respondent regarded the Claimant as being in breach of contract. The Claimant replied on 6 April (page 185) rejecting that contention. Mr Rose wrote again on 11 April, page 186, saying that the Claimant had failed to complete his handover and that his early departure had created problems with payments to suppliers and staff. There was further correspondence between the parties which it is not necessary for me to detail.

35. The Claimant referred to one employee (L Meakin) who left the Respondent and was still paid a bonus. That employee's departure date was 31 July 2015 and a bonus was paid that month, being the usual month for bonus payments to be made.

36. If the Claimant is entitled to a bonus as he claims, then it is agreed this should be calculated on the basis of 1.25% of gross or net profit for 2015/16. There was substantial dispute about the correct profit figures, and many calculations have been produced in the course of these proceedings. The Claimant's initial position was a gross profit figure of £1,147,500 on the basis that he says he is entitled to be paid on the same profit figure used to pay dividends to shareholder managers. The Respondent's initial position was that the figures should be taken from the audited accounts, namely £40,184 (see pages 227 and 289). By the end of the proceedings however there was a large measure of agreement between the parties. For various reasons I need not explain, the Respondent's final calculations are of gross profits of £1,120,491, and net profits of £751,318. To reach net profit it deducts from the gross figure corporation tax and directors' remuneration. 1.25% of this figure is £9,391. The Respondent also takes off an amount of 13.8% for the employers' NI that would be payable on the overall bonus pool available for payments to staff, and so reaches a figure of £8,253. When the Respondent adds the Claimant's share of the general staff profit share (£450), the total is £8,703 gross. The Claimant uses a calculation of 1.25% of net profit, but without taking off directors' remuneration, thus 1.25% of £906,978, namely £11,337.23. He adds a slightly higher figure of £513 for the general staff profit share to reach a total of £11,850.23.

Counterclaim

37. The essence of the Respondent's remaining counter-claim is that the Claimant's leaving without serving his required contractual notice meant that he did not complete the handover of his duties to colleagues. As such the Respondent says that it incurred costs that would not otherwise have been incurred, principally the costs of having to engage the services of Mr Housley to a greater degree than had been planned.

38. Clause 4 of the Claimant's contract of employment (page 46) relates to the

Claimant's duties. Clause 4.3(b) required the Claimant during his employment to "diligently … perform such duties as may from time to time be assigned to him by the Company together with such person or persons as the Company may appoint to act jointly with him". The Claimant does not accept that this meant he could be required to effect a handover to colleagues during his notice period.

39. Sometime after handing in his notice, an agreed handover plan (page 149) was created by the Claimant, setting out a range of tasks to be handed over from 8 March to 18 April 2016, 8 March coinciding with the appointment of Mr Housley as a new, part-time, Finance Director. I find that there were no material concerns about the handover as at 31 March when the Claimant left. The Claimant goes further than that, saying that by then the handover was completed, as planned. At pages S92 and 93 there is a table created by the Claimant for these proceedings, in which he asserts that most of the items of work scheduled for April were a "refresh" of what had already been done. Essentially, the Claimant says, the plan was for him to ensure everything was done correctly in April, the handover having been effected in March, and so if Mr Housley was required to work extra days, that was due to his and/or the Respondent's inefficiency. Mr Housley says that what was intended for April was in some cases the second part of something that had begun in March; in other cases, there were entirely new things to be covered.

40. Mr Rose points out that the agreed schedule does not state that April's work was a "refresh". What it does record is a number of tasks described as, for example, "Issue of budget", "Insurance Cover and process under renewal", "Close out ledgers", "Year Journals and Trial Balance Review, etc" and "Y/E WIP calculations". I will deal with a number of these in turn.

41. On 1 April, the schedule shows that Elise Borrington (the Respondent's Finance Manager and therefore one of the Claimant's close colleagues) was to be trained on payroll. The Claimant says that she had been trained before then, as he had started to hand payroll over to her in January after handing in his notice. Her email to Mr Rose of 29 February 2016 (page S36) makes clear however that payroll was one of several key handover items; she states that a short review "with possible input from [the Claimant]" would be advisable. The Claimant says that Ms Borrington was actually to run the payroll in April, the two of them having run it together in March; he says he should have removed this item from the schedule. Mr Housley's evidence was that the payroll training on 23 March was aborted. I do not accept that given that it is not mentioned in his witness statement and is clearly hearsay based on an account apparently given by Ms Borrington. Mr Housley did not accept that Ms Borrington had operated the payroll before he worked with her on April's payroll run, which he says took them approximately one day. He said that had the Claimant correctly completed this part of the handover he would not have been required to assist Ms Borrington in this way. Mr Rose's admittedly more tentative evidence on this point is that work was undertaken to train Ms Borrington, though he does not believe she ran the payroll in February as the Claimant asserts. That seems to me consistent with the email at page S36.

42. On 6 April, Mr Housley was, the Respondent says, to be trained or briefed by the Claimant in respect of insurance cover. The Claimant's case is that there was very little training to be given, and that this was therefore intended to be no

more than a brief discussion. Insurance is, logically, an issue attended to on an annual basis, and according to the Claimant requires little involvement from the Finance Director as it is led by the insurance broker. Mr Housley says the Claimant had not handed over calculations for the previous insurance renewal. He did not know, as the Claimant asserts, that they were in a cupboard in the Finance Director's office. Mr Rose agrees that he assisted with the 2014/15 renewal but insists that the Claimant did the detailed calculations. In Mr Rose's view, the insurance renewal would have required "towards a day's work" by Mr Housley.

43. On 7 April, Mr Housley and the Claimant were due to discuss what is known as PBA – the Respondent's "Project Booking Analysis". The handover schedule says, "PBA Purpose of and Reporting". The Claimant's case is that this had already been done on 22 March, where the schedule says, "Cashflow, WIP, PBA Overheads, WIP Retentions etc.". He says that this was part of the month end process and so what was scheduled for 7 April was a "refresh". In support of this, he refers to page S38, an email he sent to Mr Housley on 9 March 2016, the latter's first or second day in the business. The email had numerous attachments, the last of which related to the PBA and appears to be something called an "Efficiency Calculation" for the period 30 March 2015 to 31 March 2016. Mr Housley accepts he received the email but says that this did not constitute a handover. The multiple attachments were substantial, he says, with numerous reports and files in each. He agrees that he and the Claimant spent a good part of 9 March together, but estimates that he was required to spend 4 or 5 unscheduled days on this aspect of the handover because it was much harder to follow through the project information on his own than it would have been with the Claimant to guide him.

44. Mr Rose accepts that Ms Borrington was responsible for preparing some of the information produced by the Finance Department as part of the PBA system. He does not accept the Claimant's case however that Ms Borrington was responsible for inputting all financial information into project reports, although he had asked the Claimant sometime previously to ensure that much of this work was delegated to her. He also implicitly accepts that the handover of project work to Mr Housley did not need to be done project by project given the similarities between the project reports produced by Finance, but in his view on complex and important matters such as a project at Heathrow Airport (project S146), the Claimant's involvement remained essential both before and during the handover. Mr Rose stated that Mr Housley's ability to ask questions, understand where documents were and what contributed to a report were all impaired as a result of the handover being cut short. The fact that the 7 April schedule included the "purpose" of the PBA is in my view suggestive that this was intended to be considerably more than just a recapitulation of what had gone before.

45. Another handover item was the budget. It appears that there were discussions about this between the Claimant and Mr Housley on 8, 9, 10 and 30 March. The schedule at page 149 lists those days as being assigned to "Issue of Budget". Mr Housley says he had to pick this up himself after the Claimant left, and estimated that to do so was around 2 days' unscheduled work. He accepts that he received a budget report with the email of 9 March at page S38, but said that if the Claimant had remained for his full notice period, he would have used the Claimant's experience to assist him. Mr Rose accepted however that the

budget was “probably” agreed by 31 March and that the meetings on 4 and 5 April were to go through it with each department head. He accepted therefore that this did not appear to be handover work, though as it was scheduled as a joint activity he believed it must have had some value in being arranged as such.

46. Mr Housley does not accept that he received from the Claimant most of the financial control documents he needed, stating that he received nothing relating to project reporting (details of materials, labour and billing on each of the Respondent's projects, of which there could be 30 at any one time). The schedule at page 149 shows that meetings for looking at Work in Progress took place on 10 and 23 March. Mr Housley says these were only an introduction to what were substantial matters, more discussions being required to build up his knowledge, the Finance Director's role being to understand income and costs, and future liabilities, on each project. He accepts that the meetings scheduled in April would have been a refresher if ledgers had been completed correctly, but because they had not, he had to work through what had been posted in previous months, once the Claimant had left, and this took him 4 or 5 days which he had not planned to work. In respect of 12 to 14 April, the schedule at page 149 refers to "Close out ledgers", "Year journals and trial balance review etc" and "Y/E WIP calculations". Mr Housley says that all of these were crucial as all of the previous handover work flowed towards this.

47. Mr Rose accepts Mr Housley is an experienced professional but states that what was required was assistance to enable him to bring that expertise to bear on the particulars of the Respondent’s business. Ms Borrington, he accepts, had certain responsibilities – including a substantial amount of the work of providing financial data – and of course she remained employed to give guidance to Mr Housley on those matters. In essence however, Mr Rose relies on the fact that the planned audit had to be delayed as evidence that “things were not up to speed”, and that problems were encountered with arrangements to pay employees and suppliers, though his letter of 11 April (page 186) indicates that the latter was only a short-term problem. Mr Rose says that the delay in completing the audit from May to July was what led to Mr Housley having to work additional days all the way up to September, as other tasks got put back.

48. Mr Rose was not able to say what Mr Housley actually did on the additional days. As Mr Mellis pointed out that was primarily a matter for Mr Housley’s evidence, but Mr Housley did not give detailed evidence of what he actually did either. The Claimant says that the Finance Department was already in difficulty because of cuts in personnel. Mr Rose rejects the assertion that this explains the problems Mr Housley encountered, stating that he arranged for a part-time finance clerk to be appointed, decided that some of the tasks the Claimant had been carrying out could be done at a more junior level, and arranged for Ms Borrington to increase her hours (as opposed to reducing them as had previously been agreed).

49. In addition to the extra work he says he was required to do in relation to the agreed handover tasks that had not been completed, Mr Housley says (and Mr Rose confirms) that he spent a couple of days in the business immediately after the Claimant’s resignation, as Ms Borrington was “in a state”, and Mr Rose was on holiday. Mr Mellis concedes that Mr Housley’s time preparing for this Hearing could not be part of the counter-claim, being if anything an issue of costs. This

explains the two alternative summaries of the value of the counter-claim at page 228A.

50. At the most, the Claimant says, there were six full days and two half days of the handover plan that were left at the time his employment terminated. Page 228 sets out the 22 days the Respondent says Mr Housley would not have worked had the Claimant not left early. It was produced by Mr Rose, based on invoices submitted to the Respondent by Mr Housley which are not in the bundle but which I do not question were so submitted. It was updated on day 3 of this hearing, by the document at page 228A. As an alternative calculation of loss, Mr Rose worked out that 57% of the handover had been completed, meaning that Mr Housley was 43% "inefficient", that word being used to denote the time that he was spending on dealing with handover matters. The inefficiency thus defined is said to reduce over a period ending in September 2016, the reductions in inefficiency and the length of time over which it is calculated being based on Mr Rose's best judgment. On this basis, the Respondent claims for 16.66 days of Mr Housley's time multiplied by the £425 per day he is paid, making a total of £7080.50. It nets off the benefit of not having paid the Claimant's salary for 1 to 18 April, a total of £3,848.26, making a net counter-claim of £3,232.24.

The law

51. One of the key tasks in this case is to determine the terms of the Claimant's contract, specifically those relating to bonus payments, where it is argued (by the Claimant) that this is in part to be ascertained on the basis of custom and practice. There are numerous cases which consider how one should undertake this exercise. Mr Mellis referred to the Court of Appeal's decision in **Park Cakes Ltd v Shumba and others [2013] IRLR 800**, and therefore I have considered that case in detail. It concerned claims to enhanced redundancy payments. Mr Mellis referred to Underhill LJ's comment at paragraph 34 that (referring to an earlier case) "the essential object is to ascertain what the parties must have, or must be taken to have, understood from each other's conduct and words, applying ordinary contractual principles: the terminology of 'custom and practice' should not be allowed to obscure that enquiry". Albeit obiter (not central to his decision), Underhill LJ commented more broadly on contractual interpretation. It is worth referring to those comments in some detail.

52. At paragraph 35 it was said that the essential question in such a case is "whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered to the employee for his work … and the employee works on that basis". Then at paragraph 36 Underhill LJ set out what some of the surrounding circumstances may be (he was referring to enhanced redundancy cases but the examples he gives are of broader application, and I refer only to those of relevance to this case):

> 52.1. On how many occasions, and over how long a period, the benefits in question have been paid – the longer and more often, the more likely they are to be understood as paid as of right;

52.2. Whether the benefits are always the same – if there is a legal right, it must in principle be certain; inconsistency during the period relied upon is likely to be fatal;

52.3. How the terms are described – where an employer clearly and consistently uses language that makes clear benefits are offered as a matter of discretion or policy, it is difficult to see how employees could understand them as contractual, whilst the language of "entitlement" points to legal obligation;

52.4. What is said in the express contract – clearly no term should be implied, in whatever way, which is inconsistent with the express terms, at least unless an intention to vary the contract can be understood (it is also clear that an implied term can qualify an express term); and

52.5. The burden of establishing that a practice has become contractual is on the employee.

53. In summary therefore, what I am required to do is find and construe the express terms first – namely the written terms (their construction is a question of law) read together with any oral terms that I find to be established as a matter of fact. Where there remains ambiguity or the terms are incomplete, I am entitled to bring extrinsic evidence into the analysis. Whether a term should be implied into the contract is a question of law. As already indicated, the Claimant relies on custom and practice as to the amount and timing of his right to bonus payments. It is well-established that a custom and practice must be reasonable, notorious and certain. One is trying to ascertain the parties' intentions at the time the contract was agreed, whether that was at the outset of the employment relationship or at some later date.

54. There is also an extensive case law in relation to bonus payments specifically. The Claimant referred to **Chequepoint (UK) Ltd v Radwan,** an unreported Court of Appeal decision of 15 September 2000. The written contract in that case stated that the employer "may at its absolute discretion pay to all or any of its employees an annual bonus … The terms and conditions of any such bonus scheme to be notified to employees from time to time". The employee received a separate letter stating, "There will be a new bonus structure payable quarterly based on net operating profits achieved as compared with [an agreed budget]". The Court found that under the contract the employer was to notify the employee of the terms and conditions of any bonus scheme, and once that was done the employee became contractually entitled to a bonus on those terms, at least until the employer withdrew them. That is what the employer had done by its letter. May LJ said at paragraph 15, "If you tell an employee that he is going to get bonus payments on certain terms, you are or ought to be obliged to pay the bonus in accordance with those terms" until they are altered.

55. Mr Mellis referred to **Commerzbank AG v Keen [2006] EWCA Civ. 1536.** The relevant written terms in that case stated "You are eligible to participate in the [Bank's] discretionary bonus scheme. The decision as to whether or not to award a bonus, the amount of any award and the timing and form of the award are at the discretion of the [Bank]"; and "No bonus will be paid to you if on the date of payment of the bonus you are not employed by the [Bank] or if you are

under notice to leave the [Bank's] employment ...". There are two key points to emerge from the judgment. The one specific to the case was that as a matter of construction Mr Keen was not entitled to a bonus if, on the date of payment, he was not employed by the bank; there was nothing unusual about when the disputed bonuses were paid and Mr Keen was not employed when they were. Secondly, more broadly, the Court referred to the now well-known principle that where an employer has contractual discretions, described as very wide in this case given there was no established formula for determining the bonus, they can be challenged only where an employee can show that the discretion has been exercised irrationally, arbitrarily or capriciously. That high threshold does not have to be surmounted of course where an employee can show, on the basis of the general principles of interpretation referred to above that the employer has made a binding promise in relation to bonus payments which is sufficiently certain and quantifiable. It should also be noted that where there are employer discretions, they are not uniform in nature and need to be interpreted on their own terms.

56. It is necessary to establish whether the Claimant was, as he claims, "constructively dismissed". This is not because he is claiming unfair dismissal (though most of the authorities arise in that context), but because if he was, then the Respondent's counter-claim must fail. The test for establishing constructive dismissal is set out in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**. It is not necessary to refer to this and subsequent approving authorities in detail as they are very well-known. They make clear that there must have been a fundamental breach of contract by the Respondent, the Claimant must have resigned in response to that breach, and that if the Claimant affirmed the contract of employment after the breach constructive dismissal will not be made out.

57. The Claimant alleges breach by the Respondent of the terms of the contract (express or implied) relating to bonus payments, but it is also clear – though not put in this language, it is implicit in his resignation letter and in his explanation of the breaches he depends upon – that he relies on the implied term that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (**Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Malik v BCCI SA (in liquidation) [1997] ICR 606**). This is known as "the duty of trust and confidence". Any breach of the term is fundamental (**Morrow v Safeway Stores plc [2002] IRLR 9**), but whether there has been a breach has to be judged objectively: in **Woods** it was said that Tribunals must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it". The Tribunal's focus must therefore be on what the employer did, assessed cumulatively and overall. Whilst treating employees differently is not sufficient to demonstrate that discretion has been exercised irrationally (**Clark v Nomura International Plc [2000] IRLR 766**) it can in some cases be a breach of the duty of trust and confidence – **Transco v O'Brien [2002] ICR 721**.

58. A breach (whether of an express or implied term) can be anticipatory as well as actual. The Court of Appeal's decision in **Financial Techniques (Planning Services) Ltd v Hughes [1981] IRLR 32** concerned as it happens a dispute over the correct interpretation of a profit share scheme. The Court held that where

there is a genuine dispute over contractual terms, it will not usually be an anticipatory breach for one party to do no more than argue his point of view. Conversely, where there has been an actual breach the employer's mistaken belief regarding its contractual obligations would not prevent the breach from being fundamental.

59. It is also well-established that in such cases, the matter which finally results in the employee deciding to resign (often referred to as "the final straw"), need not itself be a fundamental breach of contract, nor even blameworthy behaviour by the employer at all. It must nevertheless be an act in a series whose cumulative effect is to breach the implied trust and confidence term, and must contribute something to that breach, however slight, although what it adds may be relatively insignificant; an entirely innocuous act will not be sufficient (**Omilaju v Waltham Forest London BC [2005] ICR 481**).

60. As noted, if a fundamental breach of contract is established, it must then be asked whether the Claimant resigned in response to it, or for some other reason. The issue here is to determine the effective cause of the resignation. It must also be considered whether the Claimant affirmed the contract after any breach, because if he did, any right to accept the Respondent's repudiation of the contract by resigning and claiming to have been constructively dismissed is lost in relation to that breach. Affirmation can be express, or it can be implied from conduct, where an employee acts in a way which is only consistent with the continued existence of the contract.

61. Finally, where there has been a breach of contract (by either party) compensation is intended to put the innocent party in the position he or it would have been in had the contractual obligations been performed. The innocent party must act reasonably in mitigating losses (though he or it not having done so is for the party in breach to establish), and the loss for which compensation is awarded must flow from the breach of contract and not be too remote. It is for the innocent party to prove his or its losses, though the fact that there is difficulty and an element of speculation in assessing those losses does not mean the innocent party is not entitled to compensation.

Analysis

Bonus claim

62. The analysis of the Claimant's claim turns as already indicated on a determination of the terms and conditions which governed any bonus (or profit-based) payment. At the heart of the Claimant's case is that his terms and conditions entitled him to payments matching those given to the shareholder managers both as to calculation and timing. On day 3 of this hearing the Claimant stated that his case before the Tribunal was therefore based on him having been still employed on the date when he says the bonus payment for 2015/16 was due, i.e. on 31 March 2016 when the shareholder managers received their profit-based dividend. He does not seek to persuade the Tribunal that if he was not entitled to be paid on 31 March he nevertheless remained entitled to be paid the bonus at some point thereafter.

63. At first glance the verbal communication from Mr Rose to the Claimant in

August 2013 fits with the Claimant's case. He was told that the intention was that all of the management team would be rewarded, at least as to the amount of profit-based payments, in the same way. Mr Rose's communication was in my view perfectly capable of amounting to a contractual commitment to this effect, though of course with all of the details of the "management team scheme" to be worked out and agreed or notified separately, though on its own, without more detailed express terms or terms which it is proper to imply, it would be wholly uncertain. I note however, as Mr Mellis submitted, that there was nothing in Mr Rose's verbal communication as to timing of payments, such as that the shareholder and non-shareholder managers would be paid at the same time.

64. There is no necessary inconsistency between any of Mr Rose's verbal communication, the subsequently signed generic contract and the employment form at page 88. Clause 15.1 of the contract could have been more clearly drafted, but what it does do is give the Respondent a wide discretion as to whether it should set aside 5% of profits for profit-share payments to employees, whether a different percentage of profits should be so set aside, and how to divide any profits amongst staff once they have been, this division to be made against two written criteria, namely employee performance and position. Contrary to Mr Mellis' submission, in my judgment the document at page 88, referring to the "management team scheme" does not have to fit with clause 15.1 as such given that the latter is part of a generic contract and the form at page 88 spells out any particular details for individuals. That is consistent both with the evidence of the parties that any management team scheme (which Mr Rose described as a "mechanism") would fall outside of clause 15.1, and with the fact that clause 15.1 clearly deals with the general staff profit-share scheme.

65. Taking all of this material together therefore, at this point, the contractual intention was that the Claimant would be part of a "management team scheme". Although clause 15.1 would not be applicable to any such scheme for the reasons just given, clause 24.3, related to bonuses and termination of employment, would apply both in respect of the general staff scheme and any other scheme. As to that clause, unlike the provision in **Keen** it does not to my mind make clear that rights to any bonus payment would be lost. What it actually provides is that if an employee has rights under any profit sharing scheme, and under that scheme rights and payments are lost on termination, no compensation is due for that loss. In other words, the position on termination is intended to be detailed in the particular profit-sharing scheme. Having said that, I can certainly see why Mr Rose concluded that the clause had a much wider effect, i.e. that of itself it deprived departing employees of bonus payments completely, and I have no doubt that this was a genuine interpretation of the contract on his part. In their initial email discussions in January, it was clear that this is what the Claimant believed the contractual position to be as well. I note that nothing in the written documentation to this point dealt with the timing of bonus payments.

66. It was not possible for the management team to agree an express "management team scheme" for profit-based payments. The Claimant knew that. As I have said, that was unchallenged evidence on Mr Rose's part. The Claimant's case rests on the fact that there was such an arrangement, and therefore as he appeared to accept in his verbal submissions he must depend on establishing an implied term to this effect based on custom and practice. I shall turn to that shortly. There is however one further piece of written material to

consider, namely the page 126 email. This was sent by Mr Rose in June 2015, and is the document the Claimant relies on as setting out the formula by which he says a bonus was due for 2015/16. The email left much detail to be determined, but whilst in the way I have just described it seems to me that clause 24.3 would remain in play in relation to the "FD element", I do not accept Mr Rose's case that the Respondent was free to remove or modify the arrangement unilaterally and that it was also dependent on the Claimant's performance. On its face, and as far as it went, the email set out a commitment to pay the Claimant a percentage of gross or net profits. Thus, as would have been the case with any management team scheme, it fell outside the terms of clause 15.1. In that sense therefore, this was an arrangement closer to the situation in **Radwan** than that in **Keen**. I agree with Mr Mellis that standing on its own, the "FD element" wording was inherently uncertain because it set out two possible options. In terms of contractual construction however, that uncertainty could be resolved by an assessment of what happened in practice, namely if one of the two options was selected and implemented. I will return to that presently.

67. All of that being said, what is essential to consider is whether page 126 helps to establish the Claimant's case that he was entitled to be paid in line with shareholder managers. By June 2015 it had been clear for more than 18 months that there was no express term detailing a "management team scheme". The question arises whether page 126 supports the Claimant's case that common management team arrangements nevertheless were expressly intended to apply. I conclude that it does not. The email referred to the general staff profit-share, to which as I have said clause 15.1 remained relevant, and then in relation to the Claimant referred to the additional "FD element". It did not in any sense refer to a management team arrangement, nothing is stated as to the arrangements for the shareholder managers at all, and the "FD element" is obviously specific to the Claimant. The email is therefore wholly consistent, to my mind, with the fact that the earlier discussions about developing an express management team scheme had proved fruitless. I note also that it contains nothing regarding timing of any payments. On the basis of the express terms alone, the Claimant's contractual position as at June 2015 was that he had an arrangement personal to him, based on the Respondent's profits, with details to be filled out including in the way I have suggested. The express terms do not establish a contractual right to match the shareholder managers either as to payment or timing. The Claimant's case before the Tribunal can only therefore succeed if he is able to establish these matters on the basis of a term implied by custom and practice.

68. A custom and practice must be reasonable, notorious and certain, and the burden is on the Claimant to establish it. As to the amount of any payment, it is agreed that although he received the same payment as shareholder managers for 2012/13, this does not assist his case, not least because it was prior to any agreement to develop a "management team scheme" and was specific to the circumstances of that year. It is clear that there was no express management team scheme in place for 2013/14 either, despite the Claimant's assertion that what he was paid for that year was not what he was expecting. It is impossible to discern with any degree of certainty or clarity based on the evidence before me what bonus arrangement, if any, applied to the Claimant at this point. That of itself is damaging to the Claimant's case. His bonus for that year did not match that of the shareholder managers. Moreover, theirs was based on the Respondent's profits; the Claimant's was not. For 2014/15, the Claimant was

paid a bonus that in principle reflected page 126, except as noted he was paid 1.25% of net, not gross, profit. The shareholder managers were also given profit-based payments, although based on a lower profit figure. They were clearly not paid in accordance or connection with any formula set out on page 126. The same would have been true in relation to 2015/16, assuming for the moment the Claimant had remained employed, though it may well have been that the same, or a similar, profit figure would have been utilised for both the Claimant and the shareholder managers. In summary, whilst in my judgment an implied term of the sort contended for by the Claimant would not contradict any of the express terms as I have found them to be, the evidence of what happened in practice simply does not evince an intention on the Respondent's part to reward the Claimant by way of profit-based payment that tracked or matched the profit-based rewards paid to shareholder managers. At best, there was one year in which what the Claimant was paid bore some resemblance to theirs, hypothetically two if one includes what may have happened for 2015/16. That is not sufficient in my judgment to establish a custom and practice. Even more importantly, the differences between the payments to the Claimant and those to the shareholder managers mean that there is not sufficient certainty to establish the implied term the Claimant relies upon.

69. It may have been possible for the Claimant's case to succeed without an implied term as to the calculation and amount of payments, if he were able to establish an implied term (there being no express term) as to timing. Again he bears the burden in this respect. Did the Respondent evince an intention to pay profit-based payments to the Claimant as of right at the same time, or at least in the same month, as such payments were made to shareholder managers? I conclude that it did not. For 2012/13, the shareholder managers were paid in early August 2013 and the Claimant on the payroll date, later that month; the shareholder managers were paid a further amount in October 2013 and the Claimant was not. For years 2013/14 and 2014/15, the shareholder managers were paid earlier than the Claimant but both he and they were paid in July 2014 and July 2015 respectively. At best therefore the Claimant can establish only two consecutive years for which the month in which payments were made to him matched the month in which payments were made to the shareholder managers. In truth this is little to go on. Moreover the timing of these payments is, in my judgment, wholly explicable by the fact that by July the accounts for the two financial years in question had been audited and the Respondent's profits were clear, an obvious time at which to make such payments, as shown by the fact that all other profit-based payments to employees were made at the same time. As Mr Mellis submitted, that could not sensibly mean that all employees were entitled to be paid at the same time as shareholder managers. In the absence of a management team scheme, the Claimant's position was no different to his non-managerial colleagues in this regard.

70. For these reasons, I conclude that the Claimant was not entitled, as he claims, to be paid a bonus, whether calculated in accordance with page 126 or otherwise, on 31 March 2016. I have noted the email reference by Mr Rose to the Claimant's "entitlement" to a bonus, but that is by no means sufficient to counter the weight of evidence as I have assessed it. Given the way in which the Claimant argued his claim for a bonus payment at the Tribunal Hearing, the claim must fail.

The Respondent's counterclaim: was it in fundamental breach of contract?

71. The Claimant relies on a number of matters cumulatively, or in relation to the last matter by itself, which he says amounted to a fundamental breach of his contract of employment. The first matter is the payment of the bonus for 2013/14, which was less than half of that paid to shareholder managers. I have already made clear that I have found no term, express or implied, which required the Respondent to make equivalent payments. Moreover, falling as it did many months after the failure to agree a management team scheme, and around a year before the page 126 email, the Claimant has not established the terms he relies on in respect of this alleged breach. I conclude therefore that there was no breach of any term of the contract relating to bonus payments at this point. Even if there had been, or even if the Respondent's actions could be said to have breached the implied duty of trust and confidence by in some way improperly singling out the Claimant, this was something which took place not far short of two years before the Claimant's resignation, such that he clearly affirmed the contract following it.

72. The second matter relied upon is the imposition of a new bonus arrangement by the page 126 email in June 2015. Again, based on my analysis of the contractual material, what page 126 introduced was not a revision to existing arrangements, it not having been possible to agree a "management team scheme" in previous discussions. Again therefore I conclude that no breach of any contractual term relating to bonus, nor any breach of the trust and confidence term, was established in this respect, though even if there was any such breach the Claimant accepted a bonus payment for 2014/15 essentially based on the email, and the email was also more than 9 months before he resigned, such that on both counts he again affirmed the employment contract.

73. We then come to the email exchanges in January 2016 after the Claimant handed in his notice of resignation. In those exchanges Mr Rose set out his view that the Claimant would forfeit any bonus for 2015/16 as a result of his forthcoming departure. If it was a breach of contract, it was of course anticipatory, in that it would not have taken effect until the effective date of termination or arguably thereafter. In any event I find that there was no breach of contract in this regard, for two reasons. First, the Claimant has not established his case that other employees were paid bonuses after termination, such that the Claimant was not being singled out, and it is clear therefore that Mr Rose was putting forward a genuine view of the terms of the employment contract at clause 24.3. I have made clear that I do not think it was the right interpretation, but it was clearly far from fanciful. Secondly, although he subsequently changed his comments, the Claimant's initial emails on this subject stated that he understood the terms of the contract relating to bonus and asked for them to be amended. At the very least, he was therefore acknowledging the force of Mr Rose's position in this regard.

74. Mr Rose's reference in the January 2016 exchanges to the Claimant's bonus arrangement being halved gives more pause for thought. It was certainly ill-advised, and somewhat carelessly expressed. I conclude however that although it was said to be effective immediately, as Mr Rose stated in evidence it was a decision that had no effect on the Claimant and clearly would not do so. In other words, I read Mr Rose's comment to this effect as part of the position he was

taking in the negotiation of terms for an extended notice period. For those reasons I find that, as unhelpfully as it was expressed, and whilst it was a tough negotiating position, the statement was not of itself a breach of the Claimant's employment contract, either any express term or the implied duty of trust and confidence. If it were necessary, I would also find that the Claimant again clearly affirmed the contract by remaining employed without protest or further incident, working normally, for more than another two months.

75. The key reasons the Claimant gave for his resignation on 31 March 2016 were the failure to pay him a bonus on that date, the fact that this was not discussed with him, and that he felt he had no guarantee that his salary would be paid up to the initial departure date of 18 April. I have found that it was not in breach of contract not to pay a bonus to the Claimant on that date. There is no need for me to repeat my reasoning. The timing of the payments to shareholder managers (and indeed the majority shareholders) was unique to that particular point in time, namely forthcoming tax changes and therefore the Claimant was not being singled out for improper treatment. The Respondent had no reason to bring forward the timing of payments to other employees, and did not do so, and had not unreasonably taken the view that the Claimant had no entitlement to a bonus in any event because of the termination of his employment. As for Mr Rose not discussing with the Claimant the fact that he would not be receiving a payment on this date, first I accept entirely his evidence that it did not cross his mind and for the reasons summarised in this paragraph, there was no reason it should. Secondly, the email exchanges for the payments to shareholder managers in 2015 (pages S30 and 31) bear a striking resemblance to those for 2016 at pages 175 to 176. The Claimant was not being treated differently regarding instructions to pay dividends than he had been before. Thirdly, as I have found, the Claimant knew, or should reasonably have known, the particular reasons for the timing of the 2016 payments.

76. Finally the Claimant resigned because he concluded there was no guarantee that he would be paid his salary, given that he would not be around to supervise payment. It is clear there were tensions in his relationship with the Respondent, particularly Mr Rose, as evidenced by their January email exchange. There is however a substantial difference between concluding that one's employer has taken an incorrect view of bonus arrangements (though I have noted that the Claimant's own view on this subject changed during the January exchanges) and concluding that an employer would renege on the commitment to pay an agreed salary. I have seen no evidence that the Respondent was in anticipatory breach of contract in this regard. The tetchy email exchanges were more than two months past. In summary, nothing that took place, either as to bonus or salary, on 31 March, the date on which the Claimant decided to resign, was anything more than innocuous conduct on the Respondent's part. For that reason too, I reject the Claimant's contention that he resigned in response to a fundamental breach of contract by the Respondent. He resigned in breach of contract.

The Respondent's counter-claim: financial loss

77. It is clear that the Claimant could properly be instructed by the Respondent to undertake a handover of his duties, whilst he remained in employment, under clause 4.3(b) of his contract. Having established that he was in breach of contract by leaving his employment before the end of his notice period, the final

question I have to determine is what, if any, compensation the Respondent should be awarded as a result.

78. I have accepted on the balance of probabilities the Respondent's evidence that it was required to engage Mr Housley to work on days additional to those it had initially contracted with him to perform, and that his daily rate was £425. The question arises whether those additional days were worked, and thus the Respondent's losses incurred, as a result of the Claimant resigning in breach. It is as I have noted for the Respondent to prove its losses, the Claimant asserting that it has singularly failed to do so, and I need also to consider whether it acted reasonably in mitigating its losses. The Claimant asserts that there was no documentary evidence of the work that was required, although he did not go so far as to question that Mr Housley did in fact work and was paid for the additional days asserted by the Respondent. It would however have been very difficult for the Respondent to produce meaningful documentary evidence of the additional work (though it could have included the invoices in the bundle), and so it was necessarily reliant on verbal testimony from Mr Housley and Mr Rose; that of itself clearly cannot rule out an order for compensation. The Claimant also criticised the fact that Mr Housley was unable to say precisely how many additional days' work he found it necessary to undertake. It is correct that Mr Housley was not able to be precise, but a degree of estimation seems to me almost inevitable in a case where, for example, no timesheet recording was required, and again cannot of itself rule out an order for compensation. In principle therefore, I am satisfied that the Respondent accrued losses as a result of the Claimant's breach of contract.

79. Those points being made, I do not find Mr Rose's "inefficiency" assessment of the Respondent's losses to be a helpful or reliable calculation. I have explained above what it was intended to show, but in my judgment it relies far too much on a crude assessment of the initial starting point (a percentage of inefficiency on the part of Mr Housley based on how much of the handover was completed by 31 March) and a personal assessment by Mr Rose as to when that percentage inefficiency reduced, to what level, and over how long a period in total. The fact that it projected the inefficiency forward nearly 6 months from the effective date of termination is a clear indication of the degree of speculation involved. It is the principle behind the Respondent's first alternative calculation which is therefore a better measure of its losses in my view, namely the additional days it was necessary for Mr Housley to work. In assessing the Respondent's case on this basis, I do not accept Mr Mellis's view that I am not entitled to say that some of the additional days flowed from the breach of contract and others did not. To do so seems to me a normal part of assessing contractual damages, much like one might allow some elements or heads of financial loss flowing from wrongful dismissal and not others. That is the approach I take to assessing the value of the Respondent's counter-claim. In doing so, I rely not on Mr Rose's chart of the additional days worked, some of which Mr Mellis conceded would not be allowable in any event, but on the Respondent's verbal testimony, that of Mr Housley in particular.

80. It is clear that Mr Housley was required to work an additional two days in the immediate aftermath of the Claimant's departure, which coincided with Mr Rose's planned absence. That was clearly a reasonable measure for the Respondent to take, in circumstances where Ms Borrington would otherwise have been left with

sole responsibility for the Respondent's Finance Department. It would not have been necessary had the Claimant remained employed. As to payroll, I am satisfied that Ms Borrington was trained in March, but conclude on the evidence assessed above that she did not run the payroll during that month. Whilst I have noted the degree of estimation in the Respondent's assessment of its losses, Mr Housley stated that he was required to work one extra day to ensure this was done, and I accept that – payroll is clearly a critical function for any business and the Respondent was rightly concerned that it be attended to.

81. In respect of PBA reporting, I accept that the Claimant sending an email to Mr Housley on 9 March attaching spreadsheets and reports was not of itself sufficient to enable him to assimilate all that he needed by way of taking on the aspects of PBA reporting that were the responsibility of the Finance Director. Equally, it is clear that Ms Borrington would have been of considerable assistance given her significant involvement in providing Finance Department input to the reporting processes, and it is also clear that as this was an aspect of the Respondent's work that was in many ways particular to its business, Mr Housley would have needed some time to get used to what was required whether or not the Claimant had served his full notice. The same analysis applies in my judgment to the handover of materials related to the Respondent's various financial controls. Both were clearly crucial to the effective functioning of the business and of the Finance Department in particular, it was reasonable for the Respondent to take steps to get Mr Housley up to speed as soon as possible, and it is reasonable to conclude that, whilst he would of course have continued the learning process beyond the Claimant's planned leaving date in any event, he was hampered in assimilating what was required of him as a result of the Claimant's premature departure. Mr Housley's evidence is that these two elements each required 4 or 5 days' additional work. Given the assistance he could have expected from Ms Borrington, and my judgement that there was in any event something of a continuing learning process in relation to both, I am inclined to allow 4 days for each rather than 5.

82. The evidence as to the handover of insurance renewal was that it required up to a day's work for Mr Housley. That may be somewhat generous, but it was both Mr Housley's and Mr Rose's evidence, and therefore I am prepared to allow it. Their evidence was inconsistent however in relation to budget handover, Mr Rose tellingly conceding that this did not look like handover work given that the budget was in fact completed by 31 March. It would no doubt have been helpful to have the Claimant sitting with Mr Housley during budget notifications to department heads, but I am not satisfied that Mr Housley doing so by himself would have required him to work any extra days, and therefore no claim will be allowed for that.

83. This analysis leads to a total of 12 additional days the Respondent has been able to evidence to my satisfaction were properly required of Mr Housley because of the breach of contract by the Claimant. At the daily rate of £425, that amounts to an overall loss of £5,100. When the agreed saving of £3,848.26 is subtracted, the total actual loss is £1,251.74. The Claimant is therefore ordered to pay the Respondent the sum of £1,251.74 by way of compensation for breach of contract.

Employment Judge Faulkner

Date: 6 April 2017
JUDGMENT SENT TO THE PARTIES ON

3 May 2017

FOR THE TRIBUNAL OFFICE