EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100661/17

Held in Glasgow on 5 July 2017 with written submissions having been considered by the Employment Judge (in Chambers) on 11 August 2017

Employment Judge: Mr C Lucas (sitting alone)

Mrs Emma Burrows	**Claimant** **In Person**
HomeLink Estate and Letting Agents Limited	**Respondent** **Represented by:** **Mr A Lord - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Claimant`s sole claim – (a claim based on the provisions of Section 13 of the Employment Rights Act 1996) - that she was owed bonuses that she was contractually entitled to receive from the Respondent has failed and is dismissed.

REASONS

Background

1. In a claim form ET1 presented to the Tribunal Office on 25 April 2017 – (hereinafter, "the ET1") – the Claimant named the Respondent as being her employer or the person or organisation she was claiming against.
2. The Claimant claimed at section 8.1 of the ET1 that the claim that she was making was that she was owed "other payments" by the Respondent but it

was apparent from the narrative contained at sections 8.2 and 9.2 of the ET1 – (and subsequently confirmed at commencement of the final hearing of her claim) – that the Claimant was basing her claim on Section 13 of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") – and that when referring to the Respondent's alleged failure to pay bonuses to her, her allegation was that the Respondent had made an unauthorised deduction from the wages properly payable by it to her and in so doing had breached the provisions of that section of that Act.

3. The Claimant alleged that as at the date of presentation of the ET1 she was owed £1,760 worth of bonuses by the Respondent plus "a January bonus which I have not been paid and cannot access the system to clarify the final amount".

4. No other claim was made by the Claimant in the ET1.

5. In a form ET3 received by the Employment Tribunal on 24 May 2017 – (hereinafter, "the ET3") – "Homelink Estate and Letting Agent" with an address at 18 Main Street, Coatbridge, North Lanarkshire – (the same address disclosed by the Claimant in the ET1 as relating to the Respondent) – was identified as being the individual, company or organisation responding to the Claimant`s claim as set out in the ET1.

6. It was contended that within the ET3 that "the Claimant contract states that bonuses set out in Schedule 1 of her contract will cease to be payable at date of termination of contract" and it was clear from the ET3 that the Respondent's position was that "all bonus claims submitted" by the Claimant had been paid "with exception of" claimed bonuses totalling £100 "which we believed were incorrect" and that the validity of the Claimant`s claim as set out in the ET1 was denied in its entirety.

7. A final hearing of the Claimant`s claim was scheduled to take place – (and did begin) – at Glasgow on 5 July 2017.

8. There had been no preliminary hearing.

9. On 5 July 2017 – (at a stage when preliminary discussions were taking place among the Claimant, the Respondent`s representative and the Employment Judge but prior to any evidence being heard) – the Tribunal noted that, notwithstanding what had been disclosed in the ET3 so far as the identity of the Claimant`s employer was concerned, there was by then consensus between the parties that throughout the period of her employment the Claimant`s employer had been HomeLink Estate and Letting Agents Limited, a company incorporated under the Companies Acts and having a place of business at 22 Main Street, Coatbridge. In other words, the respondent named by the Claimant in the ET1.

10. During that preliminary discussion prior to any evidence being heard on 5 July 2017 the Claimant confirmed that the sole claim that she was making against the Respondent was one based on Section 13 of ERA 1996, i.e. a claim that by failing to pay her bonuses to which – (she alleged) - she was contractually entitled the Respondent had made deductions from the wages of a worker employed by it, i.e. her, that such deductions were neither required nor authorised to be made by virtue of a statutory provision or the relevant provision of her contract and that she had not previously signified in writing any agreement or consent to the making of such deductions.

11. The final hearing of the Claimant`s claim proceeded on that basis, the events occurring on 5 July 2017 being hereinafter referred to as “the evidential part of the Final Hearing”.

12. During the course of 5 July 2017 evidence was heard from the Claimant and on behalf of the Respondent but – (partly because time did not permit it and partly in a deliberate endeavour on the part of the Tribunal to give the unrepresented Claimant the opportunity of reflecting on the evidence that

had been heard and of wording her closing submissions in light of that evidence) - the Employment Judge, after discussion with the Claimant and with the Respondent`s representative, of consent and acting in accordance with the general power conferred on him by Rule 29 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 – (hereinafter, "the Regulations") – both ordered the parties to present their respective final versions of submissions in respect of evidence heard at the evidential part of the Final Hearing and in respect of law to the Tribunal and to the other party not later than 4 August 2017 and directed the Tribunal Office to list 11 August 2017 as a "Hearing" date on which – (without the parties being present or represented) – the Employment Judge would, in Chambers, consider such submissions, review the evidence that he heard at the evidential part of the Final Hearing and seek to reach a decision on the merits of the Claimant` claim and, if appropriate, as to remedy.

13. Written submissions were received timeously from each of the Claimant and the Respondent`s representative and, disregarding only a reference made by the Claimant to evidence which had not been led during the evidential part of the Final Hearing, were taken into account by the Tribunal when it reached its determination and thereafter proceeded with the issuing of this Judgment.

Findings in Fact

14. The Tribunal found the following facts, all relevant to the Claimant`s claim as set out in the ET1, to be admitted or proved:-

15. The Respondent is a limited liability company which has a place of business at 22 Main Street, Coatbridge. Its managing director is Mr Ian A Lobban. Mr John Meldrum is another director of the Respondent company.

16. The Claimant was employed by the Respondent throughout the period which began on 1 March 2013 and ended on 24 February 2017. She had initially been employed as a sales negotiator but with effect from 31 March 2016 she had held the promoted position and status of "Senior Negotiator".

17. For at least part of the period which began on 1 March 2013 and ended on 24 February 2017 the Respondent had a place of business at 100 Merry Street, Motherwell.

18. Throughout the period which began on 31 March 2016 and continued to 24 February 2017 – (and, indeed, for some time prior to 31 March 2016) – the Claimant had worked for the Respondent at its Motherwell office.

19. The Claimant`s employment with the Respondent ended on 24 February 2017, a date which, where context permits, is otherwise hereinafter referred to as "the effective date of termination".

20. On or about 31 March 2016 the Respondent provided the Claimant with a document entitled "Full-Time Contract – Employee Terms and Conditions of Employment" and invited her to consider and sign it. That document – (hereinafter, where the context permits, "the 2016 contract") – referred to a "Schedule 1 of this contract". That Schedule 1 in turn referred to a "Schedule 2" but no such Schedule 2 was attached to the 2016 contract when it was presented to the Claimant for consideration and signature and no such Schedule 2 was provided to the Claimant until some time after 31 March 2016.

21. The 2016 contract was a replacement for a contract of employment previously provided by the Respondent to the Claimant in respect of her role as a (junior) sales negotiator. It, the 2016 contract, reflected the fact of the Claimant`s promotion to the role of "Senior Negotiator" and the increased salary and altered bonus arrangements that related to that promoted post.

22. The 2016 contract referred to the Claimant`s "rate of pay" as being "as defined on Schedule 1" and stated that such pay was "payable on or before the last day of each month".

23. The 2016 contract stated within the paragraph, headed "Pay and Benefits", which included reference to her rate of pay and date of payment of her pay that "all other benefits to which you are entitled are set out in Schedule 1, however, should your employment terminate for any reason, any/all accrued benefits will cease to be provided/payable at the date of notification of termination by either party".

24. In the ET3 the Respondent stated that "the Claimant`s contract states that bonuses set out in Schedule 1 of her contract will cease to be payable at the date of termination of contract" but the 2016 contract distinguished "pay" – (which, according to the definition contained in Section 27(1) of ERA 1996) - includes bonuses "referable to the employment" and payable under the contract "or otherwise") - from "other benefits" to which the Claimant may have been entitled when employed by the Respondent. It is to those "other benefits" and not to pay or wages that the 2016 contract is referring to when it makes reference to "any/all accrued benefits" ceasing "to be provided/payable".

25. Schedule 1 to the 2016 contract referred to a Schedule 2 when describing an "annual bonus scheme" as "Benefits" but no Schedule 2 was attached to the 2016 contract when it was provided by the Respondent to the Claimant for consideration and signature.

26. The 2016 contract bore to have been signed by both the Claimant – (using her maiden name of "Emma MacDonald") - and by Mr Meldrum on 31 March 2016. As signed by each of the Claimant and Mr Meldrum on 31 March it did not have a Schedule 2 attached to it.

27. A "Schedule 2" bearing the date "14/04/2016" was provided to the Claimant sometime after 14 April 2016 and, notwithstanding that it did not form part of the document signed by the Claimant and on behalf of the Respondent on or about 31 March 2016, is hereinafter referred to as "the Schedule 2 referred to in Schedule 1 to the 2016 contract".

28. The Schedule 2 referred to in Schedule 1 to the 2016 contract was never signed by the Claimant or on behalf of the Respondent but the Claimant accepts that sometime on or after 14 April 2016 she was provided with a copy of it and that it was intended by the Respondent to set out bonus structures that would apply specifically to her, as its Senior Negotiator – (the position to which she had been promoted on 31 March 2016).

29. The Schedule 2 referred to in Schedule 1 to the 2016 contract was headed "HomeLink Bonus Structure 2016". Neither in its heading nor in its content did that Schedule 2 refer to any specific period other than "2016". It did not refer to a period beginning on 1 April 2016 and ending on 31 March 2017. Nor did it refer to a period beginning on 6 April 2016 and ending on 5 April 2017. Nor did it refer to a period beginning on 1 January 2016 and ending on 31 December 2016.

30. The Schedule 2 referred to in Schedule 1 to the 2016 contract was annotated "page 1" but no page 2 – (or any page other than page 1) – was referred to in evidence.

31. The Schedule 2 referred to in Schedule 1 to the 2016 contract provided the Claimant with sales targets which were lower than those which had been provided to her in "the 2015 version" and therefore, as she perceived it, made it possible for her to earn a higher quarterly bonus.

32. Mr Meldrum has confirmed that the bonus structure in place in respect of "2015" was originally intended to cover the period beginning 1 January 2015 to 31 December 2015 but it is his, and therefore the Respondent`s, position that prior to 31 March 2016 the Claimant was told by the Respondent that that "2015" bonus structure was to persist throughout – (and apply to) - the first quarter of the 2016 calendar year.

33. The Respondent accepts that the bonus structure, including its targets, was contained in the Schedule 2 referred to in Schedule 1 of the 2016 contract but that that Schedule 2 – (and therefore the bonus structure notification) - was provided to the Claimant only "in or around April 2016".

34. The Claimant professes to the Tribunal that her perception was that the bonus structure referred to in the Schedule 2 referred to in Schedule 1 to the 2016 contract would be applied by the Respondent to retrospectively cover the first quarter of 2016 but that perception was contradicted by the fact that in an email which the Claimant sent to Mr Lobban on 13 April 2016 she included the statement with reference to the Schedule 2 referred to in Schedule 1 to the 2016 contract that, "I`m assuming that this will be the format as of this month".

35. At 17:23 on 23 May 2016, on the face of it in response to a bonus-claim form submitted by the Claimant to the Respondent in respect of the first quarter of 2016, Mr Lobban sent an email to the Claimant which included a question "What numbers are you claiming?" and the comment that ".. this is the last of the old system bonus ..".

36. At 17:51 on 23 May 2016 the Claimant responded to Mr Lobban`s email by stating:-

> "This is why I was confused with John last week ..

> There is a January, February and March target on a 2016 sheet with standard and stretched targets for quarter 1, so my conversation with John was why would I be reverting back to the old system/bonus sheet which was drawn up forecasting 2015 when he has given different targets and bonuses on the 2016 sheet?
>
> That doesn`t make any sense to me whatsoever … as my targets for January, February and March will count towards 2016 annual total, so why would it not count for Q1? This then makes my possible earnings per annum unachievable, as I would only be able to earn a maximum of 3 of the 4 stated quarterly bonuses under the new structure?
>
> If the targets don`t come into play until April, why have they always run January – December instead of April – April?"

37. At 09:02 on 24 May 2016 Mr Lobban replied, his email stating "It`s to bring the bonus system into line with the wage increases etc that always come into play with the start of the new tax year" and "so now everything is aligned."

38. That 09:02 response from Mr Lobban prompted an email reply to him from the Claimant which stated:-

> "But it`s not because the bonus sheet is January – December?
>
> Had the bonus sheet issued been April to April then that would`ve made sense .
> The bonuses on my claim sheet are payable for Q1 of this year as they hit and exceed the targets given for 2016."

39. At 09:58 on 24 May 2016 Mr Lobban responded by stating in an email to the Claimant: "Yes but you were then told this was the case which is why you made up the Jan/Feb/March tabs for 2016".

40. At 10:12 on 24 May 2016 the Claimant sent a further email to Mr Lobdan which included the statement: "I am not disputing a bonus monthly, I am disputing the quarterly one, as I have now been made aware of the quarterly targets and I met and exceeded them", a response which, in turn, led to Mr Lobban sending a further email to the Claimant at 10:20 on 24 May 2016 which included the comment that "… what I recall discussing with you when we met was that targets/bonus`s remained the same as last year until the new system came into being in April".

41. There was further email activity on 24 May 2016, one of the emails from Mr Lobban to the Claimant stating that:-

> "… any claim for Q1 is still under old bonus system pay levels as its for the 2015/16 PAYE year".

And:-

> "Both yourself and Tom were told that as targets were not going to be rolled out until March/April then to run on last years basis for Q1."

42. The Claimant admits that she raised both the apparent anomaly with regard to targets and the possibility that 2016 sales targets which were lower than those which had been provided to her in "the 2015 version" made it possible for her to earn a higher quarterly bonus with the Respondent. She admits, too, that in response to her query to it she was told by the Respondent that the targets set for her in the Schedule 2 referred to in Schedule 1 to the 2016 contract would only apply with effect from 1 April 2016 and not for the period 1 January 2016 to 31 March 2016.

43. The Claimant accepts that prior to being given the Schedule 2 referred to in Schedule 1 to the 2016 contract she had been told to use "the 2015 version" to claim any bonuses which she believed she had earned and had become contractually entitled to in respect of the first quarter of 2016.

44. Notwithstanding the £1760 claim made by her in the ET1, when giving evidence to the Tribunal the Claimant claimed that the bonuses to which she had a contractual entitlement amounted to £1,685 and alleged that "they just didn`t pay it". But the Claimant conceded in this context that that failure to pay bonuses to which she believed she was contractually entitled was a combination of "a bit of both" unauthorised deduction and administrative error on the part of the Respondent.

45. In April 2016, in respect of March 2016, the Claimant submitted a claim for a bonus of £400.

46. In May 2016 the Claimant submitted a claim for a bonus of £150 in respect of April 2016.

47. In June 2016 the Claimant submitted a claim for a bonus of £280 in respect of May 2016.

48. In July 2016 the Claimant submitted a claim for a bonus of £410 in respect of June 2016. The Claimant admits that when submitting a bonus claim form in July she "missed" the need to claim a quarterly bonus in respect of Quarter 2 of 2016.

49. In August 2016 the Claimant submitted a claim for a bonus of £135 in respect of July 2016. She had previously completed differing claim forms. One of these showed a bonus of £285 as being claimed whereas the other showed a bonus of £135 as being claimed. Only the second of these forms bears to have been signed by the Claimant as evidence of its submission to the Respondent. The Claimant professes to have been told by the

Respondent that she was not entitled to the difference, £150, but now admits that at the time she accepted that that was the case by effectively amending her intended claim form to reduce the claim to £135.

50. In September 2016 the Claimant submitted a claim for a bonus of £825 in respect of August 2016.

51. In October 2016 the Claimant submitted a claim for a bonus of £85 in respect of September 2016.

52. In November 2016 the Claimant submitted a claim for a bonus of £110 in respect of October 2016.

53. The Claimant admits that she never submitted a bonus claim form in respect of bonuses which she now alleges she was contractually entitled to in December 2016.

54. In respect of the April claim the Claimant was paid the £400 that she had claimed. Prior to submitting the claim in April in respect of March the Claimant had queried why she was expected to submit a claim for only £400 and had been told that the bonus structure referred to in the Schedule 2 referred to in Schedule 1 to the 2016 contract did not apply retrospectively and that the claim made by her in April 2016 in respect of March 2016 was a claim, the last claim, to be made "under the old structure". In paying the Claimant a bonus of £400 in respect of the April 2016 bonus claim the Respondent paid the Claimant what she claimed she was contractually entitled to receive.

55. In respect of the May claim the Claimant was paid the £150 that she had claimed.

56. In respect of the June claim the Claimant was paid £230. £50 of the £280 claimed by the Claimant in June 2016 was an amount to which the Claimant was not contractually entitled. She had not earned it.

57. In respect of the July claim the Claimant was paid the £410 that she had claimed. She now alleges that she was due a £500 bonus for Quarter 2 of the 2016 calendar year.

58. In respect of the August claim the Claimant was paid the £135 that she had claimed.

59. In respect of the September claim the Claimant was paid £775. The Claimant had claimed a bonus of £825 but on receipt of the claim form the Respondent determined that the £50 difference was in respect of a claimed payment to which the Claimant was not contractually entitled.

60. In respect of the October claim the Claimant was paid the £85 that she had claimed.

61. In respect of the November claim the Claimant was paid the £110 that she had claimed. This was paid to her by the Respondent one month later than expected by her. The delay was a consequence of administrative error on the part of the Respondent and the sum in issue was not outstanding as at the date of presentation of the Claimant`s claim as set out in the ET1.

62. The Claimant never raised any formal – (or even informal) - grievance with the Respondent about the bonuses paid to her in response to any claim made by her after 31 March 2016.

63. The Claimant has paid a total of £390 as lodging and hearing fees in respect of the Tribunal`s consideration of her claim as set out in the ET1.

The Issues

64. The issues identified by the Tribunal as being relevant to the determination of the Claimant`s claim as set out in the ET1 were:-

- Whether the Respondent had made deductions from the Claimant`s wages and, if so, whether such deduction was required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant`s contract or one to which the Claimant had previously signified her agreement or consent in writing.

- What sums were due by the Respondent to the Claimant as at the effective date of termination of her employment, this being a question which requires the Tribunal to give consideration to the Respondent`s argument that the claim brought by the Claimant falls under the description of "an accrued benefit" and that in that event Clause 5.3 of the 2016 contract applies and that sums claimed by the Claimant, being accrued benefits, "cease to be provided/payable" in the event that the Claimant`s employment had terminated.

- What remedy is it open to the Tribunal to award if the Respondent had made deductions from the Claimant`s wages which were not required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant`s contract or were deductions in respect of which the Claimant had not previously signified her agreement or consent in writing.

- What award or order is available to be made by the Tribunal against the Respondents and in favour of the Claimant so far as reimbursement of Tribunal fees is concerned if the Claimant`s claim is successful and the Tribunal makes a finding in her favour, this being a question which would require the Tribunal to give consideration to the implications of the decision of the UK Supreme Court in the case of **R (on the application of Unison) v Lord Chancellor 2017 UKSC51.**

The Relevant Law

65. The Law:-

(a) Legislation

- The Employment Rights Act 1996, particularly Sections 13, 27 and 230

(b) Case Law

- Robertson v Blackstone Franks Investment Management Limited, 1998 IRLR 376, CA.
- New Century Cleaning Co Limited v Church, 2000 IRLR 27, CA.
- Spectrum Agencies v Benjamin EAT/0220/09.
- Dean & Dean Solicitors v Dionissiou-Moussaoui, 2011 EWCA Civ 1331, CA.

Discussion

66. On the one hand, the claim made by the Claimant as set out in the ET1 is deceptively simple. She alleged that both as at the effective date of termination and still as at the date of presentation of the ET1 to the Tribunal Office she was owed £1,760 and "also a January bonus" by the Respondent – (although, by the end of the Claimant`s evidence in chief the sum alleged by her to be due to her by the Respondent had diminished somewhat and stood at a figure of £1,685 plus £390 of Tribunal lodging and hearing fees). Her claim was based on alleged breach by the Respondent of Section 13 of

ERA 1996, no alternative breach of contract claim having been expressed by her.

67. On the other hand, even the factual basis of the Claimant`s claim involves consideration of the bonus structure which applied to the Claimant's employment with the Respondent during a period which began on 1 January 2016 and ended on 24 February 2017. And it involves consideration of what claims for bonuses the Claimant made at any given time during or in respect of that period and of how the Respondent dealt either with the claims as submitted or with questions raised by the Claimant about what contractual bonuses she was entitled to claim at any given time during or in respect of that period.

68. Determination of the issues involved requires the Tribunal to consider, amongst other factors – (including the underlying law) - what claims for bonuses the Claimant actually made, i.e. as opposed to what bonus claims she thought about making or even what bonus claims she was persuaded not to make. It involves consideration of whether it was reasonable for the Respondent to predicate entitlement to and payment of bonuses on the Claimant actually making claims for bonuses rather than to spontaneously award bonuses to her without her having made any claim for them. And it requires the Tribunal to consider what sums the Respondent did pay to the Claimant as opposed to what sums the Claimant claimed in respect of any occasion or period and what the reasons for any differences between sums claimed and sums paid were.

69. This is not a case in which the Tribunal`s decision was heavily influenced by an assessment of the credibility of witnesses.

70. The Tribunal found the Claimant to be consistent and a strong believer in the case which she was putting forward. It had no reason to doubt her belief that what she told the Tribunal was true.

71. So far as the Respondent`s witnesses were concerned, the Tribunal was alerted to the fact that the Respondent`s Managing Director, Mr Lobban, had been ill and that his memory sometimes failed him but on the day it found remarkably little significant inconsistency between what Mr Lobban said in evidence and what the paper-trail of documentary evidence provided within the joint bundle indicated had happened at any given time.

72. The second of the Respondent`s witnesses, Mr Meldrum, gave evidence clearly and with an apparent willingness to concede that at times the Respondent`s business procedures and communication skills were not without fault. When comparing Mr Meldrum`s evidence to the paper-trail the Tribunal was satisfied that Mr Meldrum, too, was a credible witness.

73. All of which left the Tribunal with the task of interpreting evidence which was not really contradictory but was expressed by, variously, the Claimant, Mr Lobban and Mr Meldrum in differing ways and of taking what it could from that mass of evidence before putting it to the test of the relevant law, particularly the law underlying the whole concept of unauthorised deductions from wages as envisaged by Section 13 of ERA 1996.

74. The basis of the unauthorised deductions from wages claim being pursued by the Claimant is the wording of Section 13 of ERA 1996, legislation which states 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."

And:-

> "(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker`s wages on that occasion."

And:-

> "(4) Subsection (3) does not apply insofar as the deficiency is attributable to an error of any description on the part of the employer effecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion."

And:-

> "(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified."

75. It was clear from the evidence that the Claimant was a Worker – (in terms of Section 230(3)(b) of, and for the purposes of Section 13 of, ERA 1996) – who had carried out work for the Respondent within a time frame which included the period which had begun on 1 January 2016 and had ended on 24 February 2017. As such, the Claimant was entitled to receive payment for work carried out by her for the Respondent during that period.

76. In relation to a worker – (as defined) - Section 27 of ERA 1996 includes within its definition of "wages", ".. any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise …".

77. During the course of the final hearing of the Claimant`s claim, not least in the written submissions tendered on behalf of the Respondent, it was accepted that the "monies claimed" by the Claimant were monies which "fall within the definition of" Section 27 of ERA 1996 "in that they should rightly be regarded as wages".

78. The Tribunal bore it in mind that even if they do not become payable until after termination wages for work done before termination of employment fall within the definition contained in Section 27(1)(a) of ERA 1996.

79. The Tribunal took account of the guidance given by the Court of Appeal in the case of **Robertson v Blackstone Franks Investment Management Limited**, a case in which the Court of Appeal determined that in a circumstance where business was introduced by an employee but not completed at the date of termination of his employment commission was payable in respect of work done by the employee before his contract was terminated.

80. Section 27 of ERA 1996 refers to "wages" by defining them as "any sums payable to the worker in connection with his employment, including - .." but Section 13 of ERA 1996 is more precise in that at subsection (3) it refers to the wages properly payable by an employer to the worker. That reference to "properly payable" and the whole question of what wages – (as defined in Section 27 of the ERA 1996) - are properly payable to a worker – (in this case to the Claimant) - lies at the heart of the application of Section 13(3) of ERA 1996.

81. The Tribunal bore it in mind, too, that the bonuses which the Claimant claimed had been deducted from her wages without her authority would have to have been due to her, to be properly payable to her, in order for them to constitute wages as defined by Section 27(1)(a) of ERA 1996.

82. The Respondent`s representative has argued that any sums claimed by the Claimant in respect of any month during the period which began on 1 January 2016 and ended on the effective date of termination but which were not paid by the Respondent to her were, for one reason or another, not amounts, not wages, "properly payable" to her.

83. The Tribunal took account of the guidance given in the case of **New Century Cleaning Co Limited v Church** in which the Court of Appeal concluded that in order for a payment to fall within the definition of wages properly payable there must be some legal entitlement to the sum in question. The Tribunal bore it in mind that deciding whether or not an employee, in this case the Claimant, had a legal entitlement to the payment in question would involve an analysis of the factual basis of her claim.

84. In respect of a bonus claimed in April 2016, the Respondent`s representative argued that not only was the Q1 bonus the last bonus payable under the old structure but that the Claimant was fully aware that the new "2016" bonus structure was to be used only after 31 March 2016. His contention was that after taking advice from the Respondent the Claimant claimed only £400 bonus and that that full amount claimed, £400, was paid to her, a fact which, the Respondent`s representative contended, added weight to his submission that the bonus actually claimed, £400, was an accurate reflection of the bonus "properly payable" to the Claimant for the period in question and therefore that there had been no section 13 ERA 1996 deduction from wages properly payable to the Claimant on that occasion.

85. Referring to the June 2016 payment the Respondent`s representative accepts that on that occasion a "deduction" – (as he put it, "used loosely") – was made but contends that it was not a deduction from wages properly payable. He has argued that £50 of the overall bonus claimed by the Claimant on that occasion was not paid to her because the £50 in issue was a sum to which the Claimant was not contractually entitled, i.e. was not "properly payable".

86. So far as the Claimant`s allegation that she was entitled to £500 by way of a bonus for Quarter 2 of 2016 is concerned, the Respondent`s representative has argued that so far as the unclaimed £500 was concerned it was not "properly payable" both because the Claimant had not claimed it and because she was not contractually entitled to receive it.

87. The Tribunal has borne in mind that the Claimant has admitted that she never made a claim to the Respondent for any such bonus and that in so far as her claim to the Tribunal includes that £500 the Claimant has attempted to explain herself by saying that she "missed" the opportunity of doing so; in other words, that she forgot to do so.

88. In this context of entitlement to and payment of a bonus being predicated on a bonus claim being submitted, the Tribunal heard evidence on behalf of the Respondent to the effect that it was an industry-wide norm for bonuses or commission only to be paid if claimed and justified by the person claiming. And it is within judicial knowledge that in many walks of life monies which might well be considered by a worker to have been earned are only paid if claimed and justified. The Tribunal is not comfortable with that concept but that feeling of discomfort does not mean that the Respondent's argument is wrong!

89. In any event, from the evidence that it heard the Tribunal was satisfied that even although the Claimant had, at best, inadvertently failed to submit a bonus claim for the 2016 Quarter 2 the Respondent`s, unchallenged,

evidence was that so far as that quarter was concerned the Respondent's targets had not been met and no member of the Respondent`s staff was in receipt of any Q2 bonus.

90. The Respondent`s representative has referred to a £50 deduction from the Claimant`s wages in September 2016. There is no doubt that that deduction was made. But the Tribunal was satisfied from the evidence that it heard that the £50 in question was not a sum which was "properly payable" to the Claimant on that occasion.

91. The Respondent`s representative referred to the Claimant`s allegation that quite apart from bonuses that she had claimed – (or had forgotten to claim) – she should have been paid £500 by the Respondent in respect of December 2016 bonuses. This is another instance of the Claimant, for whatever reason, failing to submit a claim for a bonus to the Respondent.

92. The Respondent' position so far as that allegedly-due £500 bonus is concerned is that the Claimant had not claimed it, in which case it was not properly payable to her, but even more significant was the Respondent`s, unchallenged, evidence that in respect of the period to which the Claimant's allegation that she should have been paid a bonus of £500 is concerned the Respondent`s targets had not been met and that no member of its staff had become entitled to or had been paid a bonus.

93. Also in respect of that December 2016 period there was an additional £35 – (i.e. over an above an alleged £500 bonus entitlement) – claimed by the Claimant during the course of the Tribunal proceedings. But, as was pointed out by the Respondent`s representative, the Claimant led no evidence on what that £35 claim related to let alone as to why she considered that that £35 was an amount properly payable to her.

94. The Tribunal has taken it into account not only the principle that determination of what is "properly payable" on any given occasion will generally involve Employment Tribunals in the resolution of disputes over what a worker is contractually entitled to receive by way of wages but also that that is the case in respect of its determination of the Claimant's claim. It has acknowledged that determination of what wages were properly payable by the Respondent to the Claimant in the form of bonuses requires consideration of all of the relevant terms – (including any implied terms) - of the employee`s contract.

95. Any contract of employment may be made up of a variety of terms and conditions which set out, respectively, the obligations of the employee and the obligations of the employer, the simplest of these being what the employee is employed to do and what he or she earns and will be paid for doing it.

96. Contractual terms include those which are expressed either in writing or orally and agreed by parties – ("express terms") - and those which are not spelt out in so many words but are terms that the parties are taken to have agreed because they can be logically deduced from the conduct of the parties – ("implied terms").

97. If the express terms are wholly in writing, then deciding what they mean is a matter of interpretation of the document containing them – [which, in this case, was the 2016 contract – (including the Schedule 1 referred to in the 2016 contract and even the Schedule 2 referred to in Schedule 1 to the 2016 contract) - itself].

98. But the Tribunal has recognised that circumstances can arise where a written agreement mistakenly fails to reflect an earlier oral agreement, in which case the written agreement should be "rectified". It has recognized, too, that a party may allege that a written agreement has been replaced or revoked by a subsequent agreement.

99. The Tribunal has borne it in mind that in the case of a disputed contract term the contract should be interpreted not according to the subjective view of either party but in line with the meaning it would convey to a "reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract", that guidance having been given by the Employment Appeal Tribunal in the case of **Spectrum Agencies v Benjamin**. The case of **Dean & Dean Solicitors v Dionissiou-Moussaoui** is also relevant.

100. The Tribunal accepted that where a term of the Claimant's contract might have been ambiguous or did not cover all the matters on which the Claimant and the Respondent might reasonably be presumed to have agreed the Tribunal may take into account the surrounding circumstances when construing the terms of that contract. The Tribunal has borne it in mind that it is open to it to determine the true intentions of the Respondent and the Claimant not just from the written terms of the 2016 contract – (or of Schedule 1 referred to in the 2016 contract or of the Schedule 2 referred to in Schedule 1 to the 2016 contract) – but also by reference to inferences which might reasonably be drawn from what the parties said and did.

101. The Tribunal was satisfied from the evidence that it heard, not least from the email chains to which it was referred and which have been quoted earlier, that the Claimant had had opportunity – (and did take the opportunity that she had had) - to ask the Respondent what bonus structure was to apply to her in respect of the first three months of the 2016 calendar year, and that the Respondent gave clear and unequivocal responses to those enquiries.

102. The Tribunal was satisfied from the, uncontested, evidence given on behalf of the Respondent that there had been discussions between it and the Claimant even before the 2016 contract was entered into and that the substance of such discussions should have left the Claimant with no doubt that the, then proposed, new bonus structure would come into effect only after 31 March 2016.

103. In respect of other, alleged, unauthorised deductions the Tribunal was convinced by the evidence that it heard that the Claimant sought, and was given, explanation as to why sums claimed by her were not considered by the Respondent to be sums to which she was contractually entitled.

104. The Tribunal has also borne in mind that at no time had the Claimant raised any formal – (or informal) - grievance about any unauthorised deduction.

105. The Tribunal was satisfied that the Respondent had never made a deduction from wages properly payable by it to the Claimant, let alone any unauthorised deduction. It has found to the contrary, i.e. that all monies to which the Claimant was contractually entitled had been paid to her in so far as they had been claimed by her and that during the period which began on 1 January 2016 and ended on the effective date of termination the Respondent had not made any deduction from the Claimant`s wages, from wages of a worker employed by it, which was a deduction which had not been required or authorised to be made by virtue of a statutory provision or relevant provision of the Claimant`s contract or one in respect of which the Claimant had previously signified, in writing, her agreement or consent to its being made.

106. That determination having been reached by the Tribunal there is no need for the Tribunal to make a finding as to whether the Claimant was somehow barred from making a claim based on Section 13 of ERA 1996 simply because of what was said in Clause 5.2 of the 2016 contract – (i.e. the statement that, ".. should your employment terminate for any reason, any/all accrued benefits will cease to be provided/payable at the date of notification of termination by either party").

107. That said, however, the Tribunal does wish to record on an *obiter* basis that it would not been persuaded that that argument was valid. Had it been required to reach a finding it would have considered that the clause in question related to "all other benefits", i.e. to benefits other than "pay",

which arose from the Claimant`s employment, that subsection (6) of Section 13 of ERA 1996 would have operated to prevent that wording of the 2016 contract being considered to be agreement or consent signified by the Claimant and, generally, that there was no merit in the argument made by the Respondent`s representative that the statement that, ".. should your employment terminate for any reason, any/all accrued benefits will cease to be provided/payable at the date of notification of termination by either party" prevented the Claimant from making a claim based on Section 13 of ERA 1996.

108. As is set out earlier, the Claimant`s sole claim, a claim that she was owed bonuses that she was contractually entitled to receive from the Respondent has failed and is dismissed.

Employment Judge: Chris Lucas
Date of Judgment: 25 August 2017
Entered in register: 30 August 2017
and copied to parties