



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr P R Jamieson

**Respondent:** Phillips & Southern Ltd

**Heard at:** London Central

**On:** 19 July 2017

**Before:** Employment Judge D A Pearl

## Representation

Claimant: Mr A MacPhail (Counsel)

Respondent: Mr S Cheetham (Counsel)

## JUDGMENT

**1 The claim of breach of contract fails and is dismissed.**

## RESERVED REASONS

1 By ET1 received on 22 February 2017 the Claimant claimed bonuses for a number of years, that he said were unpaid. He was employed from 2007 until he resigned in August 2016. Subsequently it has become clear that he pursues his claim in contract. He quantifies the claim as a sum within the tribunal's monetary jurisdiction.

2 The issues are these. (1) What words were spoken between the parties before the Claimant commenced employment in 2007? (2) What is the contractual effect of such words as were spoken? (3) Is the Respondent in breach of contract for those years in which it paid no bonus to the Claimant? (4) If so, how is the claim to be quantified?

3 In resolving these issues, I heard evidence from the Claimant and Mr Phillips. I have studied a bundle of documents running to about 76 pages and some further documents produced at the hearing. At the conclusion of the evidence, I thought it best to request counsel to exchange closing arguments.

4 The Claimant is a chartered accountant. He worked part time for the Respondent from 2004. In 2007 Mr Phillips bought out the majority shareholder and asked the Claimant to work for him as an employee (which had not previously been the case.) He agreed to work as Head of Finance, 4 days a week. No written contract was drawn up. In about April 2007, on Mr Phillips's return from Hong Kong, they had a conversation. The Claimant's account is that Mr Phillips rejected a previous request that the Claimant could be a Board Director or become a shareholder; "*however I would receive an annual bonus as part of my employment package.*" The Claimant's contractual claim is based on these few words. He says that they obliged the Respondent to pay him a bonus every year. The Respondent, through Mr Phillips, denies making that promise. "We did not discuss any sort of bonus arrangement before he commenced employment ..."

5 The words above in italics, attributed by the Claimant to Mr Phillips, are to be found in the Claimant's witness statement. Mr Phillips's words cited above come from his witness statement. There is a stark conflict. In evidence, the Claimant accepted that he was not told in this conversation what the bonus would be or how it could be calculated. He seemed to accept that the amount was in the Respondent's discretion. The decision would be taken "principally" by Mr Phillips. He told me he expected (and trusted Mr Phillips to pay) £10,000 to £17,500 as a bonus.

6 In 2008, £2,500 was paid and the Claimant did not query the sum. "I suppose he took the view it was a reasonable sum ... I did not complain. I accepted the figure."

7 In cross examination he added a qualification. "The company could decide not to pay bonuses, even if it was doing well, but it was agreed I would get an annual bonus. I understood I would get one every year, regardless of circumstances. If there were exceptional circumstances or the company had done very badly, there could be no bonus." This embraces at least two possibilities. (1) The bonus would always be paid. (2) The bonus could only be withheld in exceptional circumstances. Elsewhere, he said that the bonus had, in any event, to be reasonable and 'significant'.

8 In the next 3 years (2009 to 2011, inclusive) a bonus of £4,500 was paid to him each year. Mr Jamieson and Mr Phillips spoke and the figure was agreed. He did not ask for more so as not to "rock the boat": "We had slipped into this amount I was receiving each year."

9 The slightly impressionistic nature of the Claimant's case is pointed up by the claim in paragraph 11 of the ET1 that the claim is for 5 years' bonus at £13,000 a year. This is incorrect, he said in evidence. The expectation was for £4,500 (as a minimum.) Any less would be a breach of contract. This also conflicts with his expectation in 2007 that he would receive £10,000 to £17,500 each year. The expected bonus has, therefore, been quantified in three ways.

10 There is no particular light thrown on matters by the documents. On 17 July 2011 the Claimant drafted an email to be sent to Mr Phillips, but did not send it. The reason was that he was unhappy with £4,500. His email starts as follows: "For the year ending 31 March 2011 you have offered me a bonus of £XXX.00. I am not happy with your offer. For the past two years I have received a bonus of £4,500 each year and I cannot see why this year's should be less ...in actual fact I was expecting to receive a higher bonus ..." This letter also says that in 2007 Mr Phillips said there "would be an annual bonus."

11 In 2012, on 9 July, the Claimant sent an email in which he made this last point. The reason for the email was Mr Phillips's decision not to pay a bonus that year. The Claimant's last paragraph reads: "I understand that a bonus in most companies is normally discretionary and driven by both personal and company performance, but we have no policy or measures in place ... by which to determine this type of award. I have therefore been entitled, and reasonably so in my view, to assume that our a verbal agreement of 2007 still stands and that I would receive an annual bonus. But this agreement has seemingly now changed and I would appreciate your view on this and the position going forward."

12 In his response Mr Phillips said that the Claimant was well rewarded "... and I am not prepared to grant you a bonus this year." He then referred him to a further email he had sent outlining the weaker financial position that the Respondent found itself in. He said that there was too large a gap between rental income and expenses and this was why there would be no further bonus. "I categorically contradict your 'recollections' of conversations about bonuses. There have only ever been informal arrangements, at my discretion, and to be perfectly clear there will not be any such formal arrangements in the future." Mr Phillips's evidence was that he had never said there would be an annual bonus paid.

13 Nobody was paid any bonus in 2012. A Christmas bonus was paid to employees, including the Claimant, in 2012 and 2015. Otherwise, between 2012 and 2016 the topic of an annual bonus was raised by neither party.

14 On the principal finding of fact, I am unable to accept the Claimant's account, as it has emerged during the litigation. That there was some mention of a bonus during the 2007 conversation is likely. In my view, the evidence is consistent with the Claimant being told that a bonus would be considered on an annual basis. The evidence does not support a finding that Mr Phillips entered

into a contract or binding promise to pay a bonus each future year. Such a promise would have made little commercial sense. It is important to note that even on the Claimant's account, there was no sum mentioned; and, as noted in paragraph 11 above, there was no agreed mechanism for ascertaining how much the bonus would be. This is further illustrated by the difference between the three sums set out in the ET1, the witness statement and oral evidence. The Claimant's case is, therefore, that an open-ended promise was made to pay a bonus, but that the amount of the bonus was unspecified and not capable of being ascertained by reference to the terms of the conversation. On my assessment of the evidence, the Claimant has come to believe that his annual bonus was an entitlement; and this has come to be elevated to a contractual entitlement, described in the closing submission as "a binding agreement to pay an annual bonus." I regard such an agreement as improbable. Nor do I find any relevance in Mr Phillips at the outset rejecting the suggestion that the Claimant be either granted shares or be made a director. There is no reason why rejection of these proposals should be linked to a promise to pay a bonus each and every year thereafter.

15 The Claimant's case relies on a finding that the open-ended promise of an annual bonus was made. As I consider that it was not made, that could be sufficient to dispose of the claim. However, I should also deal with some of the further argument, based on the contractual finding that the Claimant has unsuccessfully sought. Even on this alternative basis, I regard the claim as flawed.

16 Mr MacPhail says, first, that there were "implicit elements of the binding agreement." (a) the "precise sum" would be a matter for the Respondent's discretion, to be exercised in accordance with limits set by the common law. It is to be noted that the submission excludes *not* paying a bonus (or awarding nil) as a matter of discretion, because that would be in breach of the alleged agreement. (b) "Relevant factors" would include the respective performance of each party. (c) Unless there were exceptional circumstances, the amount of each bonus would have to be "of significance."

17 I am far from sure how these implicit elements are said to arise. Implied terms from custom and practice are not relied on. The difficulty for the Claimant is that this alleged agreement to pay a discretionary annual bonus is so uncertain and vague as to be unenforceable. In Clark v Nomura [2000] IRLR 766 the discretionary bonus scheme was detailed and set out in writing. This was not the case in Horkulak v Cantor Fitzgerald [2004] IRLR 942, although the agreement in clause 3(b)(ii) did provide for mutual agreement about the (discretionary) bonus. It has to be noted that the bonus claim there was for sums that the Claimant "would have received in respect of the period of his continued employment" for about 2 years after his resignation. It was a factual determination as to what would, hypothetically, have happened and, as the Court of Appeal judgment makes clear, very dependent on the general level of remuneration to other comparable employees (an exercise that cannot be undertaken here, as there are none.) This

is a very different situation from Mr Jamieson's and my broad conclusion is that he is, indeed, asking the tribunal (on this alternative ground) to assess a reasonable figure that ought to have been paid in years when he remained in employment and no bonus was paid. This involves the implication of terms which, in short, I do not consider are necessary to make the bare promise of a discretionary bonus workable.

18 Commerzbank AG v Keen [2007] IRLR 132 was, in terms of legal principle, slightly nearer to these facts, in that the amount of sizeable discretionary bonuses paid during 2 years of the Claimant's employment were challenged on the basis of perversity or irrationality. Paragraph 59, in the context of the City, includes this: "It would require an overwhelming case to persuade the court to find that the level of a discretionary bonus payment was irrational or perverse ..." But the factual backgrounds of Keen and this case are worlds apart. Even if I had been prepared to accept that there was a contractually binding promise to pay the Claimant a bonus each year, I lack the evidential basis for saying that there was a perverse or irrational exercise of the discretion. The Respondent maintains that the Claimant's performance in these years was lacking. The Claimant denies this, but his statement suggests that the relationship between the two men was poor: "Harold made my life as unpleasant as possible." (Paragraph 42.) He was plotting to work out a way of getting rid of him. (Paragraph 52.) He has spent some pages in the statement seeking to demonstrate dishonest or fraudulent conduct by Mr Phillips in the conduct of his business. These are serious allegations that have not been made out and the relevance of which is unclear; and I have no doubt that the evidence does not support findings of perversity or irrationality over the years after 2012 when neither man appears to have raised the question of an annual bonus with the other.

19 For these reasons, the claim fails. The words spoken were as I have found. There was no contractual obligation to pay an annual bonus and there is no breach of contract. If I were wrong about the words spoken, so that an obligation arose in contract, I would not be able to find a breach based on the perversity/irrationality argument.

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Employment Judge Pearl

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Date 13 October 2017