Appeal No. UKEAT/0077/17/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 October 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

EVALUE LTD — APPELLANT

MRS S SEATON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL TATTON-BROWN (One of Her Majesty's Counsel) Instructed by: Solomon Taylor & Shaw 3 Coach House Yard Hampstead High Street London NW3 1QF
For the Respondent	MS TALIA BARSAM (of Counsel) Instructed by: Signet Partners 2-3 Hind Court London EC4A 3DL

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The Employment Tribunal erred in finding that the Claimant had a contractual entitlement to a bonus of 30% of her salary, and to be paid her bonus while serving out a notice period. There was no express term to either effect. To imply a contractual right to bonus (based on custom and practice) was inconsistent with the express terms of the Claimant's contract of employment which were not properly considered or addressed. This was an insuperable hurdle for the Claimant.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This is an appeal from the Judgment of Employment Judge Hill sitting alone, promulgated on 9 January 2017, in which she held that claims for unlawful deductions from wages, based on bonus entitlements in the period 1 October 2014 to 8 February 2016, succeeded.

2. It was common ground before the Tribunal that the bonus clauses in the Claimant's contract did not expressly provide for an entitlement to a "minimum bonus" payment. Her case as pleaded and advanced at the Employment Tribunal hearing was rather, that she had an entitlement to a guaranteed minimum bonus implied into her employment contract as a matter of custom and practice. The Employment Judge accepted her case and concluded that the Claimant was entitled to an individual performance bonus set at 30% of salary as a matter of right under her contract. Moreover, the Employment Judge found that there was no express term in the contract that bonus would not be paid during a notice period, and that there was no implied term to that effect. Accordingly, the Claimant was also entitled to a bonus for the period 1 October 2015 to 8 February 2016 in the sum of £5,625, when she was serving out her notice.

3. There are two broad grounds of appeal advanced on behalf of Evalue Limited (referred to as "the Respondent" as below for ease of reference) by Mr Tatton-Brown QC. The Respondent also relies on a discrete point relating to the payment during the period in which the Claimant was serving her notice. In summary, it is said that the Employment Judge failed to determine whether the sums claimed were properly payable for the purposes of section 13(3) of

the **Employment Rights Act 1996** by misconstruing or failing to construe the relevant express terms of the Claimant's contract. Alternatively, if wrong about that and the Tribunal did address that question, it failed to take account of relevant factors in determining whether a term to the effect contended for by the Claimant was to be implied as a matter of custom and practice.

4. The appeal is resisted by Ms Talia Barsam on behalf of the Claimant. She submits, in summary, that the Tribunal made findings of fact that were open to it on the evidence, particularly in light of the way that the case was pleaded and advanced by the Respondent and those findings were not in error of law.

5. I am grateful to both counsel for the assistance they have given me in dealing with this appeal.

The Facts

6. I have not found it altogether easy to extract the findings of fact made by the Employment Judge because they are intermixed with her summary of the principles to be applied by reference, in particular, to the judgment of the Court of Appeal in **Park Cakes Ltd v Shumba & Others** [2013] IRLR 800 and also intermixed with her assessment of witnesses and her conclusions on certain issues along the way. Nevertheless, it seems to me, by reference to her findings, that the critical facts in summary can be taken as follows.

7. By way of preliminary, the Employment Judge made clear in a number of passages that she regarded the evidence of Mr Moss, on behalf of the Respondent, as unreliable and, where there was a conflict in the oral evidence as between the Claimant and Mr Moss, the

Employment Judge preferred the Claimant's evidence. She was also critical of the disclosure that had been provided by the Respondent and had serious concerns about certain documents, in particular a document at page 192 of the bundle, which she was not persuaded was a genuine document. However, in light of the arguments on this appeal, it is not necessary to delve into that matter any further.

8. The Claimant commenced employment with Towers Perrin which became Towers Watson, a predecessor of the Respondent. That employment commenced on 1 July 2005. Her employment contract dated 1 July 2005 (referred to hereafter as "the 2005 contract") contained a clause headed "*Individual Performance Bonus*". The Tribunal quoted the first two paragraphs of the bonus clause only. The full clause, clause 7, reads as follows:

> **"*Individual Performance Bonus***
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> **You will participate in our professional staff Individual Performance Bonus programme. Your annualised Individual Performance Bonus target is £23,750. This means your annualised targeted total cash compensation is £118,750.**
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> **Bonuses are based upon individual and unit performance, measured against pre-set, mutually agreed objectives and, if earned, are notified and paid in March in respect of the previous calendar year's performance subject to the guidelines, from time to time, in force. In order to be eligible to receive your Individual Performance Bonus for that year, you must be employed by Towers Perrin on the last business day of the calendar year and not working out a period of notice (given or received).**
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> **The actual bonus paid could be more or less than target, depending on the evaluation of your individual and unit performance, and will be pro-rated for your first year based on your start date."**

9. Following a transfer that fell within the terms of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") to the Respondent on 19 April 2011, the Claimant signed a new contract of employment. The new contract, which took effect from 1 February 2011 (referred to as "the 2011 contract"), dealt with a number of issues including bonus:

> **"*Individual Performance Bonus***
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> **4. All bonuses are discretionary. Your target bonus remains unchanged from your previous contract with Towers Watson."**

10. The Employment Judge described the Claimant's evidence at paragraph 19 as follows:

> **"19. The claimant's evidence was that throughout her period of employment, she had received a notification at the outset of the bonus year setting out what her 100% bonus target was. She said that in every year with the exception of 2012/13, she had received at least that figure identified as bonus target. The only exception was the year when she and other members of the management team received shares as part payment of that bonus."**

11. Further, at paragraphs 21, 22 and 23, the Tribunal held the following:

> **"21. The impact of this absence of paperwork means that I have evidence produced by the claimant that shows that on 1 April in any year, she was advised what her annualised bonus payment would be for the forthcoming bonus year and some 15 months later she received that amount. The respondents simply produced no evidence that countered this.**
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> **22. In order to decide if the bonus was discretionary or actually formed part of the contractual pay, I looked at how often a bonus payment might occur. The evidence was - in every year except for the year where shares were given. It was clear that the minimum amount was paid in almost every year without exception. No evidence has been produced that shows that other people did not receive what the claimant asserted was a fundamental 100% bonus payment.**
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> **23. I have considered the guidance given by Underhill LJ in *Park Cakes Ltd v Shumba* [2013] IRLR 800. At paragraph 35/6, guidance is given whether I could imply the basic payment into the contract. I am satisfied that every year the claimant received the minimum bonus payment with the exception of 2012/13 when she received shares, that the benefit was always set out as 30%, that it was made known to her in advance, described as her annualised target, and it had formed in the past the basis on which employees could seek to obtain a mortgage. I was satisfied that the claimant has shown she was entitled to this individual performance bonus as a matter of right under her contract."**

12. At paragraph 33, the Tribunal referred to a number of documents, three in total, within the bundle at pages 114 to 116. These were described by the Tribunal as showing:

> **"33. … the total cash compensation issued on 1 April 2011 for the bonus year 1 October 2011/12. There is a similar statement in a similar format for 2012. The claimant said she received nothing for the year 2012/13 but she received her bonus and additional monies in March 2014."**

There was then reference to the document at page 116 purporting to reflect the bonus period for October 2014/15 and for the first time splitting the bonus into personal and, separately, company bonus payments.

13. The first two of those documents (pages 114 and 115 of the original Tribunal bundle) contain tables. On the left-hand side of the table, under the heading "*Element*", the table identifies base salary together with car allowance, and then target bonus as a percentage for the

A period 1 October to 31 March (target bonus amount), target bonus as a percentage for 1 April to 30 September, and then a target bonus amount with a total annual target bonus amount referred to in the left-hand side of the table. On the right-hand side of the table headed "*Entitlement*" are the sums referable to those elements. The document at page 116 makes no reference to entitlements.

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14. There was some evidence before the Tribunal about other employees of the Respondent (and its predecessor) and their treatment so far as bonus payments were concerned. In particular, the Tribunal dealt with evidence about a handful of individuals who did not receive bonus as set out in their proposed target sheet at paragraphs 9, 11, 12, 13, and 20. Two, at least, of those individuals were undergoing performance improvement and others were under notice that had been served either by them or the employer. At paragraph 20, the Tribunal said this in relation to that evidence:

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> **"20. The respondent's evidence was that it was not the accepted norm that everyone would receive the bonus as set out in their proposed target sheet. Within another of the tiny printed schedules, they sought to demonstrate that certain people did not receive a bonus. The individual concerned, both sides agree was, undergoing a performance improvement process and the purpose of depriving him of a bonus was to get him to lift his game. He remains employed by the respondent as it apparently has had the desired effect. There was no paperwork before me showing what any individual who might have ultimately received a lower bonus was told in the first place and what he was told subsequently as to the reason for the reduced rate, if any. There simply was no paperwork produced to me that could help me."**

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15. As far as concerns the issue of entitlement to bonus during a notice period, having referred to clause 7 of the 2005 contract, the Tribunal concluded (at paragraph 8) that there was no express term under the 2005 contract on which the Respondent could rely to show that they did not have to pay bonus during a notice period; and the new terms and conditions in the 2011 contract were silent on the subject of what should happen to bonus payments following the giving or receiving of notice. Moreover, at paragraph 15, the Tribunal concluded that in the absence of any clear and unambiguous paper trail or oral evidence that there was an obvious provision that bonus would not be paid in the notice period, this was not a term that could be

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implied into the contract. The Tribunal accordingly concluded that in the period up to the end of the Claimant's employment, she remained entitled to receive her bonus payments.

16. Finally, under the heading "*What are the differences between the two sides?*", at paragraphs 32 to 56, the Employment Judge set out what, with respect to her, is a somewhat convoluted account of some of the documents and evidence and an analysis, culminating in conclusions about the quantum of what was owed at paragraphs 54 and 55. At paragraph 56, she concluded as follows:

> **"56. The respondents are liable to pay these monies to the claimant. It is clear that consistently during the period of her employment, the claimant was entitled to receive the bonus payments as set out in a statement made in advance. Failure to meet that payment by the respondents is a breach of the express term that she is entitled to an individual performance bonus. Although described as discretionary, the evidence points to the fact the full payment of the target bonus was a consistent pattern of behaviour. She is entitled to these payments."**

17. The issues identified by the parties were, first, whether there was a contractual right to a bonus payment and, secondly, if so, whether that right continued notwithstanding the service of notice. The Tribunal dealt with the second issue first, at paragraphs 8 to 17. It is implicit that the Employment Judge relied on clause 4 of the 2011 contract, instead of and to the exclusion of clause 7 of the 2005 contract. She held there was no express term relating to the payment of bonuses during a notice period in the 2011 contract. The Employment Tribunal concluded that the express term was in direct conflict with an implied term relied on by the Respondent that bonuses were not payable during a notice period.

18. The Tribunal then dealt with the first issue and whether the bonus payments were discretionary or paid as a matter of contractual right. The Employment Judge preferred the Claimant's evidence to that of Mr Moss, that she received a minimum bonus payment in every year except 2012/13, when she received shares instead, concluding ultimately that the Claimant

had shown that she was entitled to the individual performance bonus as a matter of right under her contract, by reference to the percentage target bonus (25% in the early years and 30% subsequently).

The Law

19. The legal principles are not in dispute. Rather it is their application to the facts of this case that causes controversy. Section 13 of the **Employment Rights Act 1996** provides:

> **"(1) An employer shall not make a deduction from wages of a worker employed by him unless -**
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> **(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**
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> **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**
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> **…**
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> **(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."**

20. Ms Barsam helpfully sets out in her skeleton argument the principles derived from **Park Cakes Ltd v Shumba**, about implying terms into employment contracts on the basis of custom and practice. It is important to recognise however, that the Court of Appeal in **Shumba** was dealing with a case concerning enhanced redundancy entitlements where neither the claimant's written terms and conditions of employment nor the employee handbook made reference to any entitlement to enhanced redundancy payments. In other words, there was no express contractual term to be considered. The Court made clear that the essential question is whether by the employer's 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 those employees an intention that they should enjoy that benefit as of right. If that is established the benefit becomes part of the remuneration for which the employees work. The Court made clear

A that it is critical to consider any communication made by the employer to the employees about the benefit in question.

B 21. The surrounding circumstances that might be relevant depending on the particular facts are: (i) the number of occasions and the length of time over which the benefits have been paid; (ii) whether the benefits are always the same; (iii) the extent to which those benefits are publicised; and (iv) the way in which they are described. Significantly for the purposes of this C appeal and as a matter of ordinary contractual principles, the Court of Appeal made clear that no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary the contract can be understood. D The Court of Appeal referred to **Solectron Scotland Ltd v Roper** [2004] IRLR 4 where the Appeal Tribunal (Elias P, as he then was) doubted whether a custom could ever have the effect of varying existing express contractual rights but held that even if it could, it would require very E long-established practice before it could be inferred that a party had by implication accepted the rights conferred by custom at the expense of more favourable rights.

22. At paragraph 22 in **Solectron**, the Employment Appeal Tribunal held:

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> **"22. The parties must be shown to be applying the term because there is a sense of legal obligation to do so. That will often be a difficult matter to prove. For example, if a practice is adopted because a party does so as a matter of policy rather than out of a sense of legal obligation, then it will not confer contractual rights: see *Young v Canadian Northern Railway Company* [1931] AC 32 (PC). Again the practice must be 'reasonable, notorious and certain': see *Devonald* v *Rosser & Sons* [1916] 2 KB 728 at 743, per Farwell LJ. In that case the employers contended that they could close their works where there was a lack of orders without making any payment to the employees. It was said that there was an established practice to that effect. The Court of Appeal rejected the argument. It met none of the criteria for a custom and practice. Farwell LJ said that:**
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> > **'It is neither reasonable nor certain because it is precarious depending on the will of the master.'"**

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H It is common ground that the burden of establishing that a practice has become contractual is on the party asserting it. If, viewed objectively, the employer's practice is equally explicable on

A the basis that benefits have been and are paid as a matter of discretion rather than legal obligation, the burden will not be discharged, as paragraph 22 of **Solectron** makes clear.

B 23. In the context of this claim, whether a bonus is properly payable depends on whether there was a contractual right to be paid the bonus, as the Employment Judge correctly identified. The Respondent's position was that bonuses were discretionary so that no unpaid sum could be described as properly payable.

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The Appeal

D 24. There is no dispute between the parties that the starting point for the Tribunal was to identify and construe any relevant express term relating to bonus. In this regard, the Claimant's case, as set out in the amended grounds of claim at paragraph 3, was that she was entitled to an individual performance bonus under the terms of her 2005 contract. She contended that the

E percentage of her salary, stated to be her annualised target, was in practice the minimum contractual sum that she was entitled to be paid.

25. The Respondent accepted that her 2005 contract remained in force after the **TUPE**

F transfer (see paragraph 5 of the amended grounds of response) and asserted that the annualised target of 30% was simply an annualised target rather than a minimum contractual entitlement. The Respondent's case was accordingly that bonuses were discretionary and reliance was

G placed on the fact that the Claimant had on occasion received less and indeed more than the target sum (see paragraphs 12 and 13 of the amended grounds of response).

26. Ms Barsam accepts that the Respondent made some reference to clause 7 of the 2005

H contract together with clause 4 of the 2011 contract. It is her contention, however, both before

A the Tribunal and before me, that clause 4 superseded clause 7 and that clause 7 had no relevance whatsoever to the issues the Employment Tribunal had to decide. Moreover, she contends that the Respondent, although making reference to both clauses, in fact did no more than refer to the middle paragraph of clause 7 dealing with payments during notice periods. In effect, she submits that the Respondent's case did not positively rely on that clause or indeed the 2011 contract. Ms Barsam accepts that the Employment Judge proceeded on the basis of clause 4 as the relevant clause to be construed without reference back to clause 7, but contends that there was no error in this approach. Given that clause 4 superseded clause 7, and given the ambiguity of clause 4, which does not make clear to what the discretion attaches, she submits that the Employment Judge was entitled to consider the surrounding facts and circumstances in order to determine the meaning of the words in the 2011 contract, "*all bonuses are discretionary*" as properly understood.

27. Ms Barsam relies for that proposition on **Small & Others v Boots Co plc** [2009] IRLR 328, a decision of the Appeal Tribunal (Slade J) that in construing the word "discretionary" in the context of the bonus scheme in that case, it was an error for the Employment Tribunal to fail to take into account all the relevant circumstances including the invariable practice of making payments over many years in deciding whether the discretion in the document was to be construed as having contractual content (see paragraph 28). Ms Barsam submits that the surrounding facts and circumstances in this case, like in **Small**, included evidence as to payments made over many years and other factors such as those listed above by reference to **Shumba**. Critically, however, she contends that the surrounding facts and circumstances do not include clause 7 of the 2005 contract which had been superseded.

28. While I accept the general principle relied on by Ms Barsam, as identified in **Small**, I do not accept her submissions as this applies to this case. The Claimant herself referred to the terms of the 2005 contract and to the fact of a **TUPE** transfer. The ET3 agreed that there had been a **TUPE** transfer and expressly pleaded that the 2005 terms remained in force. Moreover, at paragraph 6 of the Judgment, the Employment Judge expressly recognised that the Respondent was relying on clause 7 of the 2005 contract dealing with the individual performance bonus during the Towers Watson period. It was not open to the Tribunal to treat the Respondent as picking and choosing from parts of clause 7 that were relied on. The Respondent could not have proceeded on that basis. Either the clause was relied on in full or it was not and it seems to me that paragraph 6 of the Judgment makes clear that it was relied on by the Respondent. I note moreover, paragraph 2 of the Agreed Statement (prepared by both parties for the purposes of this appeal) acknowledging that the Respondent also "*expressly stated that the clause in question (clause 7 of the July 2005 contract) applied to the [Claimant's] contract of employment with the [Respondent]*".

29. Thus, it seems to me that even if the Respondent did not refer to **TUPE** (Regulation 4(4) in particular) the point was clearly in play on the facts. Clause 7 of the 2005 contract should have been set out in full. More importantly, it was not open to the Employment Tribunal to construe clause 4 of the 2011 contract without reference to clause 7 of the 2005 contract. That is particularly the case in circumstances where the Employment Judge construed clause 4 of the 2011 contract by reference to the custom and practice of making bonus payments throughout the period when clause 7 of the 2005 contract was undoubtedly in force, but without any regard to it. Any analysis of the practice of past payments by Towers Watson had to be carried out in the context of that clause. The practice that developed was undoubtedly in the context of clause 7 and the two cannot be divorced. Furthermore, clause 4 does not purport to vary the existing

bonus arrangement. Clause 4 expressly refers back to the Towers Watson contract in the performance bonus clause, making clear that the "*target bonus remains unchanged from your previous contract with Towers Watson*". It is clear from paragraph 8 and indeed paragraph 56 of the Employment Judge's Judgment that the terms and conditions of the 2011 contract, rather than the 2005 contract, formed the focus of her consideration. That was an error of law for the reasons I have just given.

30. Moreover, to the extent that clause 7 of the 2005 contract was considered, it seems that the Tribunal's consideration of it was inevitably flawed by the failure to consider the clause in full. I have already referred to the fact that the Tribunal omitted the third paragraph of the clause when quoting from it in The Judgment. The words omitted - "*The actual bonus paid could be more or less than target, depending on the evaluation of your individual and unit performance*" - were significant words and directly relevant to the Tribunal's task. Those words are inconsistent, to my mind, with the Claimant's contention that the clause gave rise to a guaranteed minimum entitlement to the annualised performance bonus target as a matter of right. If there was such a guaranteed minimum entitlement payable as of right, it is difficult to see how the actual bonus could be less than the target. Nonetheless, the words omitted by the Tribunal in quoting clause 7 make clear in express terms that this was a possible outcome, and it is not addressed anywhere in the Employment Tribunal's reasoning or analysis.

31. There is also, as Mr Tatton-Brown submits, other language in clause 7 that tells against the clause giving rise to an entitlement to a particular sum. The natural meaning of the words "target", "guaranteed" or "minimum" is a sum to be aimed at rather than an entitlement. The clause refers to bonus being notified and paid in March but only "if earned". It is also significant that clause 7 refers to eligibility to receive bonus being dependent on being

"*employed by Towers Perrin on the last business day of the calendar year and not working out a period of notice (given or received)*".

32. It seems to me that a proper consideration of clause 7 of the 2005 contract would have led to the conclusion that the Claimant was not contractually entitled to a minimum or guaranteed bonus (of 25% or 30% of salary) Rather, she was entitled to participate in an individual performance bonus programme. Under that programme, targets were set. Also under that programme, bonuses were based on individual and unit performance measured against pre-set mutually agreed objectives. If earned, those were to be notified and paid in March in respect of the previous calendar year's performance. The clause made clear that the actual bonus paid could be more or less than target depending on the evaluation of the Claimant's individual and unit performance. There was no entitlement to a particular sum by way of bonus payment and certainly nothing in clause 7, however generously construed, giving rise to an entitlement as of right to a minimum payment of 25% or 30% of salary.

33. Significantly, it seems to me, the express term contained in clause 7 is inconsistent with the implied term contended for by the Claimant. The express term relating to bonus indicated that a bonus of 30% of salary was a target not an entitlement, and that the actual bonus paid could be more or less than target. The implied entitlement to an annual bonus of 30% of salary contended for is therefore at odds with clause 7. To imply it as a matter of custom and practice is impermissible in the absence of any finding that the clause had been varied (**Shumba** [36(e)]).

34. The Claimant did not argue that clause 7 had been varied and there are no findings to support such a conclusion. The mere fact of a consistent pattern of payments is insufficient to

establish a variation, particularly in circumstances where the payments are equally consistent with an assessment of performance against mutually agreed objectives, based on individual and unit performance. The fact that the Claimant received more in some years than the target is consistent with the application of clause 7. Moreover, the fact that underperforming employees did not receive their purported contractual entitlements because of poor performance fatally undermines the Claimant's case that everyone received the target payment as a minimum contractual payment. It is no more than speculative to suggest that there might be documents that would have explained away lower than target (or zero) payments in those cases. It seems to me that the practice of payments evidenced by the Claimant was not shown to be inconsistent with clause 7, but was at least equally consistent with that clause being applied in her case. In the circumstances, this is an insuperable hurdle for the Claimant.

35. As far as communications from the Respondent are concerned, Ms Barsam fairly accepts that there were no communications about bonus beyond the notifications made that dealt with the annualised target. I have already referred to the documents at pages 114 and 115. Those documents do, as Ms Barsam submits, use the word "entitlement". They also use the word "target" in relation to bonus. It seems to me that properly understood those documents simply demonstrate that if the individual hits the relevant targets set, that individual will receive the sums reflected in the right-hand column. The entitlement, in other words, had to be earned and if the targets were not hit, it would not be paid.

36. Ms Barsam also refers to the finding that the minimum bonus formed the basis on which employees could seek to obtain a mortgage. That, with respect, misses the critical point because it does not address the extent to which, whatever understanding employees had when referring to past or anticipated future remuneration for the purposes of obtaining a mortgage, it

was based on communications from the Respondent. There is no evidence nor any finding that there were communications put out by the Respondent indicating that bonuses had become a minimum guaranteed amount and a contractual right, rather than something that had to be earned by reference to individual and company targets.

37. I have considerable sympathy for the Claimant, who was faced with a Respondent who did not provide the disclosure that might properly have been expected of it. Nonetheless it seems to me that the Employment Tribunal's failure to address clause 7 of the 2005 contract vitiates the exercise undertaken. Properly construed, that clause does not give rise to any contractual entitlement to a guaranteed sum based on 30% of salary. Clause 4 of the 2011 contract does not purport to vary clause 7 (even if such a variation could validly have been made). Clause 7 is inconsistent with the implied term found by the Employment Judge.

38. As far as the bonus during notice period issue is concerned, had the Employment Tribunal addressed clause 7 properly as it should have, the Employment Judge could not have concluded that there was no express clause dealing with notice. There plainly was. The second paragraph of clause 7 makes clear that in order to be eligible for the bonus programme, the individual must be employed by Towers Perrin on the last business day of the calendar year and not working out a period of notice (given or received). Clause 7 was not varied. The evidence about individuals not being paid their bonus if serving out notice serves to reinforce that this clause was applied or was at least not inconsistent with that clause being applied. Accordingly, the appeal succeeds in this issue too.

39. For all these reasons the appeal must be allowed and the Employment Tribunal's Judgment must be set aside. Clause 7 is inconsistent with the implied term relied on by the

Claimant in this case. As a matter of law as a consequence of Regulation 4(4) **TUPE**, it cannot have been superceded. There is no other arguable basis for concluding that it was superceded: clause 4 does not purport to vary clause 7. Rather, it purports to continue clause 7. It seems to me, in those circumstances, that the inevitable conclusion in this case is that the term implied by custom and practice relied on by the Claimant, however favourably one views the evidence, is inconsistent with clause 7. In those circumstances, there is no viable unlawful deductions case to remit and the claims must fail. The Claimant had no entitlement to a bonus of 30% of her salary, or to bonus payments during her notice period.

40. As far as concerns the alternative way in which Ms Barsam submits that the case can be advanced, it is difficult to see how that can fairly form the basis of an order for a remitted hearing. The alternative case now advanced was not argued. It is not a claim for an ascertainable sum that can be claimed as an unlawful deduction from wages. It is a claim for breach of contract in respect of the October 2014-2015 bonus, payable in March 2016. It can be pursued in the civil courts. If it is right that the Claimant was not considered for or paid bonus in the year before notice was served as she contends, and unless there is some proper basis for concluding that she is not entitled to any payment at all, it seems to me that the proper course is for the Claimant to pursue that case in the civil courts as a breach of contract claim. I reach that conclusion with no satisfaction because the Claimant has already incurred significant expense in seeking to establish her claim to unpaid bonus, but the alternative claim cannot be pursued as an unlawful deduction claim. I encourage the parties to adopt a reasonable approach and to consider some form of alternative dispute resolution to avoid this course if possible.