# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr R Bailey**

**Respondent:** **Fortem Solutions Limited**

**Heard at:** **Sheffield** **On: 22 August 2018**

**Before:** **Employment Judge Little**

**Representation**

**Claimant:** **Mr T Edge of Counsel (instructed by Pickerings solicitors)**
**Tamworth Ltd)**

**Respondent:** **Ms H Barney of Counsel (instructed by Mr J Law)**

# RESERVED JUDGMENT

I was obliged to reserve my judgment in this Claim because the one day allocated in the event only provided sufficient time for the evidence and submissions which were concluded at approximately 4.50pm.

**My judgment is that:-**

1. The claimant was fairly dismissed because the only challenge to the fairness (the non-existence of a redundancy situation in law) fails.

2. The complaints of breach of contract in respect of bonus and the Personal Learning Fund fail and are dismissed.

# REASONS

1. <u>The Complaint</u>

   In a Claim Form presented on 19 January 2018, Mr Bailey complained of unfair dismissal and breach of contract. The breach of contract complaint alleged 4 breaches of the contract of employment but by the time of this Hearing the only 2 live matters were:-

   - Whether the claimant was entitled to a payment under the respondent's staff incentive bonus scheme and/or

- Whether he was entitled to payment of an unused personal learning fund.

1.1 Breach of Contract

One of the 2 withdrawn breach of contract complaints was in respect of annual leave and there had been an employer's contract claim in which it was alleged that in fact, the claimant had been overpaid holidays. However, the counter claim was withdrawn in circumstances where the claimant also agreed not to pursue that aspect of his contract claim.

1.2 Unfair Dismissal

The respondent contended that the claimant had been dismissed by reason of redundancy or that there was some other substantial reason of a kind such as to justify the claimant's dismissal – a business reorganisation carried out in the interests of operational efficiency and economy. The claimant in the particulars of Claim contended that the requirement for his role (which was commercial manager) still existed although the role was now being referred to in the new structure as a managing surveyor. The essence of his complaint is captured in paragraph 13 of those particulars which reads:

> "The claimant believes that his role as commercial manager is not redundant, therefore his dismissal is unfair."

1.3 It follows that this is really a single, issue case as far as the unfair dismissal is concerned - was there redundancy as defined by the 1996 Act?
In these circumstances, it was of concern when Mr Edge's cross examination of the dismissing office appeared to be veering towards a case based upon the decision to dismiss being pre-meditated, or that consultation had been inadequate. At this point I reminded Mr Edge that there was an agreed schedule of issues and that made no reference to these matters. The claimant's witness statement had not sought to widen the issues, save that as Mr Edge pointed out, there was a reference in paragraph 39 to the redundancy exercise being a sham in order to reduce wages. In any event, there had been no application to amend and I considered that it was inappropriate to try to broaden the claimant's case at the stage of cross examination of the respondent's witnesses.

2. The Issues

I was given a schedule of issues at the beginning of the Hearing and told that this was agreed. I queried with Miss Barney paragraph 1.2 of that schedule as it made reference to whether the respondent had reasonably selected the claimant. I understood that there was no dispute about that aspect of the process. Miss Barney confirmed this to be the case and that although reference was made to Polkey, there was no argument that there had been procedural unfairness either. Accordingly paragraph 1.2 was intended to address general considerations in terms of any remedy under section 123 – the just and equitable consideration.

It follows that the relevant issues for me to determine are:-

Unfair Dismissal

2.1 Can the respondent show the potentially fair reason of redundancy?

2.2 Alternatively, can the respondent show that it's reason for dismissal was some other substantial reason such as to justify the dismissal of an employee holding the position which the claimant held?

2.3 If one of those potentially fair reasons was shown, was that actually fair under Employment Rights Act 1996, section 98(4). In particular, was there a genuine redundancy situation because the claimant's role was redundant within the meaning of the Employment Rights Act 1996, section 139? Alternatively was there actually a substantial reason – a business reorganisation?

2.4 If the claimant was found to be unfairly dismissed should compensation be reduced to reflect dismissal in any event?

Breach of Contract

2.5 Did the claimant have a contractual entitlement to a payment under the respondent's staff incentive bonus scheme in respect of the final relevant period of his employment?

2.6 If so, was the respondent in breach of contract by failing to make such payment to the claimant on termination of the employment?

2.7 If so, what bonus was the claimant entitled to and how should that be reflected in damages?

2.8 Did the claimant have a contractual right to be paid on termination a sum from the respondent's personal learning fund which had not been drawn down during the course of the employment?

2.9If so, was the respondent in breach of contract by not making that payment to him on termination of his employment?

2.10 If so, how should that be reflected in damages?

We should add that in Mr Edge's closing submissions he appeared to be suggesting that the bonus and personal learning fund payments were aspects of unfair dismissal compensation if that complaint succeeded. That would, he said, be on a "but for" approach. This was a surprise as the case had proceeded on the basis, that there were stand-alone breach of contract of complaints and even if Mr Edge's approach were to be adopted, there would still need to be an assessment of whether the claimant had the contractual right, although now in the slightly different context of whether he would have had that right had he not been dismissed.

On considering the claimant's schedule of loss (pages 231 to 232 in the bundle) to which I had not hitherto been referred, it was noted that the claimant was within that document claiming the disputed contractual benefits as part of the compensatory award. In fact, in the schedule of loss there was no reference to the stand-alone breach of contract complaints at all.

3. Evidence

The claimant has given evidence but called no other witnesses. The respondent's evidence has been given by Mr W G Kay, Commercial Director and the dismissing officer and by Mr M Gelder, Director of Operations and Appeal Officer.

4. Documents

The parties had agreed a trial bundle comprising 349 pages.

5. The Facts

5.1 The claimant's employment commenced on 20 September 2010. At that time, the respondent was known as Willmott Dixon Partnerships Ltd. From 1 January 2013 onwards following a promotion the claimant's job title was commercial manager based at Rotherham.

5.2 Willmott Partnership Ltd was a repairs and maintenance business operating under maintenance contracts for local government housing authorities and housing associations nationally.

5.3 In 2016, the Wilmott Dixon Group proposed to sell the business but that did not come to fruition. It was in those circumstances that the group decided to carry out a major corporate restructure. The business within which the claimant was employed was re-named Fortem Solutions Ltd. Its was intended to change the trading model of that business as to move from strategic long term repair and maintenance contracts towards a greater proportion of stand-alone projects.

5.4 Mr Kay led this process. He decided that it was necessary to review the structure of the business and subsequently the Board determined that this would involve' hubs' which would need the commercial resources to reflect the needs and requirements of the contracts which that hub was dealing with. Hubs were to be roughly geographical. One of those hubs was the northern hub, where the claimant was employed. Within what would be the northern hub the respondent had 3 commercial managers – the claimant (who at that time was responsible for a large contract with Rotherham Metropolitan Borough Council, a medium sized contract in Sheffield and a smaller contract for Derbyshire Police) ; Gemma Exley and Phil Leah.

5.5 Mr Kay decided that a more effective operating structure would be to have a single commercial manager for each hub.

5.6 With the assistance of the respondent's HR Department, Mr Kay put together a business plan for use in the consultation process. A copy of that is at page 102 in the bundle. That document indicated that there was a strategic aim to grow the business and that that was to be achieved through the reorganisation into regional hubs.

5.7 The claimant was invited to a consultation meeting which took place on 20 September 2017. The respondent's notes of that meeting are at page 106

to 107. The claimant also made his own note and that is at page 108. The meeting was conducted by Mr Kay. Mr Kay outlined the proposed restructure. He may have shown the claimant the copy of the business case document which appears at page 102 in the bundle, but in any event, that was enclosed with a letter which Mr Kay would subsequently write to the claimant. The claimant was informed that the selection criteria, for what would be one commercial manager rather than three, would be the completion of an assessment and interview. The claimant was informed that there were to be 2 new managing quantity surveyor roles (who would provide support to the sole commercial manager).

5.8 On 27 September 2017, Mr Kay wrote to the claimant and a copy is at page 117 to 118 of the bundle. It was confirmed that the claimant's role as commercial manager was a risk of redundancy and that a consultation period had commenced. A list of vacancies was provided together with the business case document (page 102).

5.9 The claimant attended an assessment/interview on 2 October 2017. The panel were Mr Kay, the respondent's Finance Director and a representative from HR. The claimant was required to give a presentation before being interviewed but he began by indicating that he had not prepared as well as he might have done. He believed that the responsibilities in the job description for the remaining sole commercial manager role had been significantly changed so that it was really a regional commercial manager role. The claimant considered that any increase in his responsibilities and travel would have a deleterious effect on his personal home life and there was no additional remuneration.

5.10 A copy of Mr Kay's notes and scores made during the claimant's assessment and interview appear at page 136 to 138. The claimant's own note appears at page 152 and it begins

> "Due to increased responsibilities and travel which would have affected my personal home life, I declared myself out from outset."

5.11 On 3 October 2017, there was a further consultation meeting and the respondent's note appears at pages 154 to 155. Again, this was chaired by Mr Kay. The outcome of the assessment/interview was not given on this occasion. From a note taken by the claimant (page 156) it appears that he asked Mr Kay to confirm that he had been unsuccessful, having declared himself out, but that confirmation was not given. The claimant asked what the managing quantity surveyor (MQS) salary would look like. He was not given that information. The claimant went on to set out 3 alternatives to redundancy – that he should take a sabbatical; that he could be employed as a MQS – hence the salary enquiry or whether it would be possible for the claimant to come back to do freelance work. The sabbatical and freelance suggestions were rejected by Mr Kay.

5.12 The results of the assessment/interview of the three existing commercial managers is set out on page 151. The claimant was the lowest

scorer with 47 per cent of the marks. Gemma Exley had top marks and in due course she was appointed to be the Commercial Manager.

5.13 On 5 October 2017, Mr Kay telephoned the claimant to inform him that he had been unsuccessful in obtaining the remaining commercial manager role. He went on to offer the claimant a QMS role. However, that would be at a reduced salary – some £8,000 per annum less.

5.14 On 10 October 2017, Mr Kay wrote to the claimant again (page 160). It was an invitation for the claimant to attend a final consultation meeting which was scheduled for 12 October 2017. The claimant was warned that if no viable alternatives to redundancy had been indicated before the meeting then the claimant's position might be declared redundant on that date.

5.15 The meeting duly took place and again it was chaired by Mr Kay. The respondent's note appears at pages 162 to 163. A note made by the claimant appears at page 164. Mr Kay confirmed that the claimant had been unsuccessful in the commercial manager's selection process. The MQS role remained on offer. The claimant said that the MQS role was not suitable alternative employment. Mr Kay said that that could be offered on a trial basis. The claimant declined. In evidence before me the claimant explained that the unsuitability of the MQS role was primarily the reduction in pay. The claimant was informed that he was being made redundant. The claimant enquired whether he would have to work his notice period, which was 3 months. Mr Kay explained that he would review the claimant's outstanding work and then decide whether it would be possible to release the claimant early with a payment in lieu of notice for the remaining period.

5.16 On 13 October 2017 Mr Kay wrote to the claimant and a copy is at page 165. That letter confirms that the claimant had been unsuccessful in securing the commercial manager role and that the alternative role of managing surveyor had been offered with the option of a trial period. It was confirmed that the claimant's role with the respondent was redundant with effect from 12 October 2017.

5.17 On 27 October 2017, the claimant's solicitors wrote to the respondent and a copy is at pages 189 to 190. That letter set out the claimant's grounds of appeal. It informed the respondent of the circumstances in which a redundancy situation would arise in law and contended that none of those applied in the circumstances of the claimant's case. The solicitors went on to contend that the two managing surveyor roles were fundamentally the same as the commercial manager role which the claimant had latterly being carrying out, although the former was at a lower remuneration. They contended that their client's role therefore still existed.

5.18 On 7 November 2017, Mr Kay sent an e mail to the claimant (page 194). He confirmed that the claimant's final working day would be 10 November 2017 and so for the balance of the notice period (due to expire on 11 January 2018) there would be a payment in lieu.

5.19 The appeal hearing took place on 14 November 2017 and the hearing manager was Mr Mark Gelder. Notes taken by a Ms Payne are at pages 202 to 205. The claimant reiterated his position that he believed that the MQS role was the same as his previous commercial manager role apart from the remuneration. The claimant confirmed that at the time of dismissal he had been looking after the large contract in Rotherham, a medium contract in Sheffield and a smaller contract in Derbyshire. The claimant confirmed that at one time he had also been responsible for the contracts in South Kesteven and a Together Housing contract. The claimant confirmed that those had been removed from him earlier.

I should add that in paragraph 11 of the claimant's witness statement he speaks of being given additional responsibilities in September 2016, namely South Kesteven, South Holland, Together Housing, WD4 Life Academy and Countrywide Contracts together with what the claimant described as the Sheffield Branch on top of his commercial manager role covering the Rotherham Branch.

In paragraph 12 of the claimant's witness statement he says that due to geographical issues and the level of workload that the WD Life Academy and Countrywide Contracts were given to another commercial manager. My understanding from the evidence was that this had been at the claimant's request because he was over worked and the travelling was too much.

Returning to the appeal hearing, after an adjournment Mr Gelder asked the claimant if the new structure and re-grading of roles had been explained to him. The claimant said that he did not think anything had been explained. Mr Gelder went on to state that the business had aspirations to grow and that moving away from one central hub in Hitchin so there would now be three areas, Northern, Southern and Midlands. That meant the commercial structure had to change, hence, a commercial manager role to look after each overall area, with MQSs dealing with things at branch level. Mr Gelder is quoted as going on to say

> "This has meant that your old role has been re-assessed and altered to an MQS role."

In his Witness Statement, Mr Gelder seeks to qualify that statement (see paragraph 13). There he says that that comment was on the basis of his understanding that there would only be one commercial manager and that managing surveyors would pick up some of the day-to-day activities performed by the commercial managers. However, he was not agreeing that the new role of managing surveyor was a like for like equivalent, the claimant's former role of commercial manager.

5.20 Mr Gelder's conclusion at the appeal hearing was that he could see the route which the business had taken and he was upholding the decision to dismiss.

5.21 On 22 November 2017, Mr Gelder wrote to the claimant (pages 209 to 210) confirming the appeal outcome. He wrote -

> "The Company re-evaluated the commercial manager's role to look after the overall area with the MQS working at branch level."

5.22 The job description for the commercial manager role as undertaken by the claimant is at page 33. The brief overview of the role is given as -

> "Ensuring appropriate commercial controls are in place and adhered to in order to secure the Company's full entitlement through the contract. Control the commercial aspects of the supply chain gearing maximum leaverage."

Under the heading of 'Management' reference is made to overseeing one large or several smaller branches.

5.23 The job description for the surveying manager (there is in the respondent's documents a certain interchangeability of terms between 'surveying manager', 'managing surveyor' and 'managing quantity surveyor') prior to the restructure appears at page 34. The brief overview of that role is identical to the one for the commercial manager. However, the key responsibilities are described as being based in one large branch overseeing and leading all commercial functions with very little/no need for checking, prompting and intervention.

5.24 The job description for the "new" commercial manager (as per the re-structure) appears at page 129. The brief overview of the roles is described as -

> "Responsible for the commercial function within a region/hub."

Under the heading 'Management' there is reference to being responsible for a single contract in excess of £30 million per annum or, a number of repairs contract and/or planned projects within a regional or hub structure up to £50 million in annual or total value.

5.25 The job description for the "new" surveying manager is at page 131. The brief overview of the role is given as -

> "Responsible for the commercial management of single or multiple repairs contracts in a region/hub reporting to the Commercial Manager."

Under the heading 'Management' there is a description of being responsible for one or more repairs contracts with an annual value of £10 million to £20 million or one or more planned projects with a value of £10 million to £20 million within a region/hub.

5.26 A copy of the claimant's statement of terms and condition of employment is in the bundle at pages 64 to 72. Clause 3, (page 65) headed "Staff Incentive Scheme" reads as follows:-

> "You may be offered the opportunity to participate in a staff incentive scheme which is not guaranteed and does not form part of your statement of terms and conditions of employment.
>
> The Company at its sole discretion reserves the right to amend, replace or withdraw the Scheme at any time and to determine qualifying employment dates for payment or pro rata purposes."

5.27 There is a further document which is headed "Operational Staff Incentive Scheme - Your questions answered." That document is at pages 57 to 63. Although the title would suggest it applied to operational staff only, a category into which the claimant might not fit, he confirmed in re-examination that these provisions did apply to him.

The document confirms that the scheme is "a non-contractual incentive, driven entirely by results and improvements to business performance".

Question 13 (on page 63 is "When will we receive payments?" The answer which follows is that it would be normally in the salary run for 31 May each year but that there was a backstop date of 31 July".

Question 14 is "What happens if I leave the group?" The answer given is -

> "To become eligible to receive payments under the scheme, you must be employed within the group on the day that the payments are made, unless expressly agreed by the Managing Director."

5.28 The respondent operates something called a Personal Learning Fund. If an employee has over 5 years' service funds up to an amount of £750 are made available to the employee to be spent on a vocational or non-vocational learning event of the employee's choice. Rules which apply are on page 31. There is no requirement for the new skill to be work related. The employee can undertake as many learning events as they wish up to the cost of £750 "during your career with us." Approval for the course had to be given. Further, it was provided

> "The Personal Learning Fund (or part of the Fund) will not be made available once a resignation has been received or if you have been given notice of termination. Please be aware that should you resign shortly after having received the payment from the fund, Wilmott Dixon may seek to recover this from your final salary".

5.29 On 9 December 2015, a Mr Williamson, the Managing Director of what was then Wilmott Dixon Partnerships Ltd, wrote to the claimant to congratulate him on reaching 5 years' employment. A copy is on page 90. Among other things the claimant was informed that he could now access the personal learning fund. In the event, the claimant did not in the remaining period of his employment seek any payment. His evidence to me was that he had planned to use the fund during 2017. He intended to take skiing

lessons. In cross examination the claimant accepted that the Scheme did not permit a cash payment as an alternative

6 The Parties' Submissions

The claimant's submissions

The business was growing and 2 businesses had been combined. There was a growth plan. The claimant said that there was no redundancy situation. The business plan had not been shared with the claimant. The role of commercial manager and managing surveyor had changed. It was a reorganisation not a redundancy but had not been presented as such to the claimant. Mr Edge accepted that Mr Gelder had explained the bigger picture to the claimant at the appeal but what he had said at the appeal hearing was not a justification of redundancy. Mr Edge described the structure chart on page 223 as being an elegant illustration of the absence of the redundancy but rather a restructure which had been pre-determined. The claimant's role had been allocated although it was accepted that there was an overlap between the two new roles. Mr Edge referred to the respondent's grounds of resistance, paragraph 15 where there was a reference to the respondent wishing to re-align its commercial team to better respond to the changed nature of its business. The job specifications bore that out. The claimant's observation was that the MQS job was the same as his old job but less pay.

As mentioned previously, Mr Edge's submissions in relation to what was thought to be the breach of contract complaint were presented as being part of unfair dismissal remedy, on the basis that 'but for' the allegedly unfair dismissal the claimant would have received the bonus and presumably have been able to claim the personal learning fund monies.

At the end of Mr Edge's submissions I indicated that I may need to consider the guidance given by the EAT in the case of Hannan v TNT – Ipec (UK) Ltd [1986] IRLR 165 on the issue of applying the right label to the grounds on which an employee had been dismissed. I invited written submissions by 29 August 2018 on this authority if either party felt that it was necessary. Ms Barney did not think it would be necessary as far as the respondent was concerned.

The respondent's submissions

Ms Barney handed up the authorities of Murray v Foyle Meats Ltd [1999] IRLR 562; Safeway Doors Plc v Burrell [1997] IRLR 200; Bowater Containers Ltd v McCormack [1980] IRLR 50 and Commerzbank AG v Keen [2007] IRLR 132. The unfair dismissal issue was narrow. Was there a fair reason to dismiss being either redundancy or some other substantial reason?

Ms Barney's primary case was that the definition of redundancy as set out in the Employment Rights Act 1996, section 139 and as illuminated in the Safeway Stores and Foyle Meats cases was met. The factors which could amount to redundancy were sometimes counter intuitive. The facts in Safeway were on all fours with the claimant's situation – that is a reorganisation and an alteration to duties. I was referred in particular to paragraph 57 of Judge Peter Clark's

judgment. There could therefore be a redundancy where that might not instinctively appear to be the case. In the instant case, the respondent wished to reduce the number of commercial managers from three to one. It considered that it only needed one commercial manager supported by three managing surveyors. Miss Barney accepted that the duties of the new commercial manager role had shifted somewhat but there had always been a understanding that a commercial manager's role was one of oversight. The claimant had done that in the last few years of his employment, hence his relatively high level of remuneration. Even if some work had been taken from him, that did not alter the presence of oversight. The Managing Surveyor was a lesser role because there was no oversight or at least not much. The respondent rejected the proposition that the new managing surveyor or QMS role was equivalent to the old commercial manager role.

The respondent's primary case therefore was that the situation fell within the definition of redundancy in section 139.

However, if it did not it was clearly some other substantial reason, namely, a reorganisation for good business reasons. There had been an amalgamation of two companies and there was now one board. A holistic view had been taken- there had been the abortive sale. The nature of the business of the respondent had fundamentally changed with the emphasis now being on projects rather than long term contracts.

In this context I was referred to the case of McCormack and in particular to paragraphs 14 and 15 of the judgment of Talbot J. The EAT considered that there was clear authority e.g. Hollister v National Farmers' Union for the proposition that there was a good substantial reason if the employee refused to undertake his part in the reorganisation of a business which was beneficial to the efficient running of that business. For these reasons the unfair dismissal complaint should fail.

Miss Barney observed that the respondent was taken by surprise today by the claimant's allegation that there had been a failure to share information during the consultation process. The reorganisation was operative at the time and even if there had been a failure at an earlier stage it was cured when Mr Gelder explained the position (again) to the claimant during the course of the appeal hearing. With regard to the statement by Mr Gelder as documented in the appeal minutes that the claimant's old role had been re-assessed and altered to an MQS role, I was reminded that he sought to qualify or explain that statement in paragraph 13 of his Witness Statement.

In relation to the breach of contract complaints, as far as the bonus was concerned this was discretionary. The claimant was not suggesting that there had been a capricious exercise of that discretion. Rules existed which the claimant was aware of, or at least he admitted having seen pages 58 and 59. The rules made it clear that it was necessary for the employee to be in employment at the date when the bonus would be payable. The claimant had not asked the respondent to expressly agree something different.

With regard to the personal learning fund claim, this was misconceived. No cash sum could be payable in the circumstances.

7 The relevant law

The Employment Rights Act 1996, section 139 defines dismissal by reason of redundancy as occurring if the dismissal is wholly or mainly attributable to a cessation of the business for the purposes of which the employee was employed or is wholly or mainly attributable to -

> "(b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish."

In Safeway Stores Plc v Burrell, Mr Burrell had been employed as a petrol station manager but after a reorganisation that post disappeared and a new post of petrol filling station controller was created. A new job description was issued for the petrol filling station controller role and that differed on paper to some extent from the previous manager's job description. Mr Burrell did not apply for the new post because it was at a significantly lower salary. He brought a complaint of unfair dismissal in which he alleged that the new position was exactly the same as his old job and so he was not redundant. Within his complaint he stated that in his opinion what had happened was just a cost cutting exercise, because his job was exactly the same, so the position was not redundant. By a majority decision the Industrial Tribunal found that the employer had not established a redundancy in these circumstances with the result, that Mr Burrell's dismissal was unfair. The Employment Appeal Tribunal allowed an appeal against that decision.

The Headnote in the report to which I have been referred describes the correct approach for determining what is a dismissal by reason of redundancy, under section 139(1) (b) as involving a 3 stage process –

(1) Was the employee dismissed?

If so,

(2) had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

If so,

(3) was the dismissal of the employee caused wholly, or mainly by that state of affairs?

Within the judgment of Judge Peter Clark it is noted that the term "redundancy situation" is a shorthand which is often used but it is an imprecise expression and it is not part of the statutory language. He warned that from time to time the mistake was made of focusing on a diminution in the work to be done, not the

employees who do it. It was impermissible to elide stages 2 and 3 of the approach which the EAT had identified.

Stage 2, required the tribunal to determine whether there was a diminution in the requirement for employees (not *the* employee) to carry out work of a particular kind. The only question to be asked at stage 2 was whether there was a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind or an expectation of such cessation/diminution in the future. At that stage it was irrelevant to consider the terms of the claimant employees' contract of employment. That would only be relevant, if at all, at stage 3.

At stage 3, the tribunal was concerned with causation. Was the dismissal attributable wholly or mainly to the redundancy?

The guidance given by the EAT in Safeway Stores was approved by the House of Lords in Murray v Foyle Meats Limited.

10 My Conclusions

10.1 Unfair Dismissal

As noted above, the claimant's case here is limited to the issue of whether there was a genuine redundancy reason for his dismissal. I have been referred by Ms Barney to the authority of Safeway Stores Plc v Burrell. Bearing in mind that the guidance given by the Employment Appeal Tribunal in that case was approved by the House of Lords in the case of Murray v Foyle Meats Limited that guidance obviously must be heeded when I consider the circumstances of the claimant's case. I observe that the facts of Mr Burrell's case have a distinct similarity with the facts in the case before me.

10.2 The claimant was dismissed and so the next question is whether the requirements of the respondent's business for employees to carry out work of a particular kind had diminished or were expected to diminish. I find that the respondent's requirements for employees to carry out the work of commercial manager in the new northern hub had diminished. Under the restructure, which led to the creation of the northern hub, the respondent concluded that it only needed one commercial manager whereas it had three. I bear in mind that the claimant contends that the "new" commercial manager of whom only one was required was in fact the former role of a regional commercial manager. He goes on to contend that the new managing surveyor role was the same job as his existing commercial manager role.

10.3 Ms Barney fairly accepts that the duties of the new commercial manager are not identical to the duties of the old commercial manager but she says that the commercial manager role is one which requires oversight, whereas the managing surveyor role does not require oversight, or at least not of the same degree expected for the commercial manager role.

I accept this submission and conclude that the work of a particular kind which had diminished which was the commercial manager role as characterized by the oversight element. It was recognised in Burrell (paragraph 33 of the judgment) that the fact of a reorganisation does not of itself answer this 'stage 2' question, one way or the other. However, my analysis is that in the case before me stage 2 is satisfied.

10.4 The next question is whether the claimant's dismissal was caused wholly or mainly by that state of affairs. I find that it was. The state of affairs led to the claimant being required to apply for the new commercial manager role in which he was unsuccessful. As a result of him declining one of the new managing surveyor roles there was no alternative but dismissal. In these circumstances I find that the respondent has shown the potentially fair reason of redundancy and that as a redundancy situation existed in law it was an actually fair dismissal.

10.5 The Contractual Claim – Bonus

The first issue here is whether the claimant had a contractual right to a bonus at all. Clause 3 of his statement of terms and conditions of employment (page 65) indicates that the claimant might be offered the opportunity to participate in the staff incentive scheme but that that was not guaranteed and it did not form part of his statement of terms and conditions of employment. The "Your questions answered" document reiterates that any payments received under the bonus scheme are a non-contractual incentive (see A2 on page 57). In these circumstances I conclude that the claimant did not have a contractual right to any bonus and so there could be no breach of contract when he was not paid a bonus in respect of his final period of employment. The claimant has not brought his case on the basis that there has been a capricious exercise of discretion.

10.6 If I should be wrong and the claimant was entitled to a contractual bonus in principle the next consideration is whether the applicable conditions had been satisfied. On the basis that the "Your questions answered" document are the rules of the scheme, it is clear from A14 (page 63) that the claimant would have to have been employed on the day that the payments were made. That date would usually be 31 May in any given year although there is a backstop date of 31 July.

The claimant's complaint is with regard to the bonus payment which he believes he would otherwise have received in May 2018. Obviously, the claimant was not employed by the respondent on 31 May 2018. When he was initially given notice of redundancy the effective of termination was to have been 11 January 2018, but by mutual consent that date was subsequently revised to 10 November 2017. As Ms Barney points out, the "Your questions answered" document does, at A14, permit the possibility that some different arrangement with regard to payment of the bonus could be expressly agreed by the managing director. However, that would only have occurred had the claimant made a request for some different type of arrangement to apply and in this case he did not.

10.6 The Contractual Claim in respect of the Personal Learning Fund

Again, the first question is whether in principle the claimant had a contractual entitlement to such a payment or draw down. It is not referred to in his terms and condition – for instance there is no reference to it under the other benefits heading in clause 10 (page 68). However, it is probably fair to regard Mr Williamson's letter to the claimant of 9 December 2015 (page 90) as effecting a variation in the claimant's terms. It certainly seems to have done that in relation to an additional annual leave provision, although that is not relevant now to this case. I therefore find that there was a contractual right.

However, again consideration needs to be given to the applicable rules. Those are set out in the document at page 31. I remind myself that reference is made to the respondent only funding up to £750 "during your career with us". Further the rules specifically provide that the personal learning fund will not be made available if the employee has been given notice of termination. Mr Gelder referred to this benefit as coming within the category of "use it or lose it". Unfortunately, the claimant did not use it during the course of his employment and I find that the rules that I have just referred to quite clearly mean that he had no contractual entitlement to be paid any part of the fund which he had not drawn down by the time notice of termination was given. Accordingly, I find that this contractual claim also fails.

**Employment Judge Little**

Date: 28th September 2018