EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102345/2018

Held in Glasgow on 2 May 2018

Employment Judge: Mr C Lucas

Mr Girish Jeeva	**Claimant** **Present** **Not Represented**
VSP8 Limited (t/a 'Greenmotion')	**Respondent** **Represented by:** **Mr I McLean** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is in five parts, namely:-

(1) The Claimant's claim that the Respondent failed to pay him in lieu of the notice to which he was entitled and therefore that he was wrongfully dismissed by the Respondent has been withdrawn and is dismissed.

(2) The Claimant's claim that he is owed notice pay by the Respondent has been withdrawn and is dismissed.

(3) The sums alleged by the Claimant to be "outstanding bonus sums" due to him in respect of August 2017 and September 2017 were not "wages" – (as defined in Section 27 of the Employment Rights Act 1996) – which were payable to him by the Respondent.

(4) The Claimant's claim that he is owed a balance of Two Thousand, Eight Hundred and Fifty Two Pounds and Sixty One Pence in respect of work

undertaken by him for the Respondent in August 2017 has failed and is dismissed.

(5) The Claimant's claim that he is owed a bonus payment of Two Thousand Five Hundred Pounds by the Respondent in respect of work carried out by him for it during September 2017 has failed and is dismissed.

REASONS

Background

1 In a claim form presented to the Tribunal Office on 7 February 2018 – (hereinafter, "the ET1") – the Claimant named "Greenmotion" with an address at St Nicholas Circle, Leicester as being his employer and the organisation he was claiming against, alleged that he had been unfairly dismissed by his employer and alleged that his employer owed him "other payments".

2 In a response form ET3 received by the Tribunal on 12 March 2018 – (hereinafter, "the ET3") – the individual, company or organisation who or which had employed the Claimant was identified as being "Greenmotion" with an address at St Nicholas Circle, Leicester.

3 Notwithstanding what was set out both in the ET1 and in the ET3 the parties now accept that throughout the Claimant's period of employment to which he has made reference in the ET1 his employer had been "VSP8 Limited" a limited-liability company which is incorporated under the Companies Acts and which trades as "Greenmotion".

4 The ET3 is deemed by the Tribunal to have been submitted by or on behalf of the Respondent.

5 In a Paper Apart annexed to – (and deemed by the Tribunal to form part of) - the ET3 the Respondent denied "any breach of the Claimant's contract of employment upon his dismissal to allow him to bring a claim of wrongful

dismissal" and alleged that the Claimant had been paid "his full 1 week notice period as stipulated within his contract of employment". It contended that the Claimant did not have "sufficient service in order to bring a claim of ordinary unfair dismissal" and that "the Tribunal has no jurisdiction to consider any claim of unfair dismissal" in which case "the Claimant's complaint of unfair dismissal before the Employment Tribunal is misconceived and should be struck out accordingly".

6 In respect of the Claimant's claim that he had not received bonus payments to which he was entitled, the Respondent alleged in the ET3 that "the bonus is discretionary" and that because the Claimant's "attendance and timekeeping" had not been "100%" in either August 2017 or September 2017 the Claimant had not met the "specified qualifications" which were preconditions of any discretionary bonus being paid to him for either August 2017 or September 2017.

7 On the direction of an Employment Judge a case-management-type, (closed), preliminary hearing was held by conference call on 6 April 2018 and is hereinafter referred to as "the Preliminary Hearing".

8 The note issued by the Employment Judge who conducted the Preliminary Hearing recorded that it had been confirmed by the Claimant, in person, at the Preliminary Hearing that he was not pursuing his unfair dismissal claim and it was agreed that that claim was withdrawn and should be dismissed and after the Preliminary Hearing the Claimant's claim that he had been unfairly dismissed by the Respondent was dismissed, a Judgment to that effect being registered and copied to the parties on 26 April 2018.

9 So far as the Claimant's claim that he was owed notice pay and had therefore been wrongfully dismissed was concerned, the note issued after the Preliminary Hearing also recorded that the Claimant accepted that he had been paid for all notice to which he was entitled but that claim had not been dismissed prior to commencement of the final hearing of the Claimant's claim.

10 Acting on the directions of an Employment Judge the Tribunal Office scheduled a final hearing of the Claimant's claim to take place at Glasgow on 2 May 2018. Such final hearing took place as scheduled and is hereinafter referred to as "the Final Hearing".

11 During the course of preliminary discussions at the Final Hearing, the stage prior to any evidence being heard, the Claimant confirmed that he was not pursuing any claim in respect of his dismissal from his employment with the Respondent and accepted that his previously-stated claim that he had been unfairly dismissed by the Respondent had been withdrawn and that a Judgment dismissing it had been issued to him.

12 During those preliminary discussions at the Final Hearing the Claimant also confirmed that all monies due to him as payment in lieu of notice had been paid to him and that his claim for notice pay, a claim which had otherwise been referred to as "wrongful dismissal", had been withdrawn and should be dismissed.

13 It was confirmed by the Claimant and acknowledged by the Respondent's representative that the only part of the Claimant's claim which was still outstanding and in respect of which determination was required by the Tribunal was the Claimant's claim that bonus payments which, he alleged, he was entitled to for work carried out by him in August 2017 and in September 2017 had been deducted from his wages by the Respondent and were due to him by it.

14 During those preliminary discussions at commencement of the Final Hearing, still at a stage prior to any evidence being heard, the Claimant sought to introduce screen prints of reviews posted on the web in respect of "Green Motion Car & Van Rental" and of social media pages. He argued that he should be allowed to refer to these as productions when giving evidence because, he contended, they showed that what the Respondent intended to argue in respect of his conduct when employed by the Respondent was untrue. The Respondent's representative objected to the lodging of these

documents at such a late stage in the proceedings but sought to reassure the Claimant and the Tribunal that the Respondent's defence to the Claimant's claim that he was owed bonus payments did not rely on any alleged misconduct, as such, but would refer to qualifying conditions for payment of discretionary bonuses. After full consideration and discussion the Employment Judge refused the Claimant's application to have the documents in question lodged as productions.

15 During the course of the Final Hearing the Claimant gave evidence in support of his claim and the Respondent led evidence from its area manager, Mr Aujla. Both the Claimant and Respondent's representative made oral submissions to the Tribunal after the evidential part of the Final Hearing had been concluded but neither referred to any legislation or case law.

Findings in Fact

16 The Tribunal found the following facts, all relevant to the Claimant's claim that he was owed bonus payments by the Respondent, to be admitted or proved:-

17 Throughout the period which had begun on 24 April 2017 – (not 14 April 2017 as alleged by the Claimant in the ET1) – and which had ended on 1 November 2017 – (not 2 November 2017 as alleged by the Claimant in the ET1) – the Claimant had been employed by the Respondent as a Customer Services and Sales Representative based at its Glasgow Airport Car-Hire Depot.

18 The Respondent provided the Claimant with a statement of main terms of employment – (hereinafter, "the Claimant's Contract") - on 8 June 2017.

19 Having been issued with the Claimant's Contract on 8 June the Claimant signed a copy of it that same day as acknowledgement of his receipt of it.

20 Under the hearing "Remuneration", the Claimant's Contract stated that, -

> "Your salary is currently £18,000.00 per annum payable monthly by credit transfer as detailed on your pay statement. Your salary is set at

such a level as to compensate for the need for occasional additional hours. We will ensure that you always receive no less than the National Minimum Wage."

21 Under the heading "Hours of Work" the Claimant's Contract stated that, - "Your hours of work are 45 each week. Actual days, start/finish times will be variable and in accordance with the published rota …".

22 Under the heading "Benefits", the Claimant's Contract stated that "Your position has a benefit of a company bonus scheme, details of which are shown separately".

23 Under the heading "Grievance Procedure" the Claimant's Contract stated that "Should you feel aggrieved at any matter relating to your employment, you should raise the grievance with the Area Manager … either verbally or in writing."

24 At or about the same time as the Claimant's Contract was provided to him the Claimant was provided by the Respondent with printed details of the Respondent's "company bonus scheme" as referred to in the Claimant's Contract. Those printed details are hereinafter referred to as "the Discretionary-Bonus-Details Document".

25 In the first paragraph of the Discretionary-Bonus-Details Document, immediately after the statement that "bonus will only apply if you have reached a minimum of £9.00rpd combined and combined total sales of £10,000" there was reference to "the qualifications listed below".

26 Later in the Discretionary-Bonus-Details Document were an exhortation to the Claimant which stated: "Please remember to do the basics too", an explanation that "The qualifications are listed below" and – (in bold, block capitals) - the statement, **"DO NOT IGNORE THIS OR YOU WILL NOT GET THE BONUS!!!**"

27 Under the heading "Qualifications", the Discretionary-Bonus-Details Document set out – (as criteria which must be met before an employee would be paid any bonus) - nine pre-conditions of varying kinds. One such pre-condition or criterion was stated to be "attendance and timekeeping must be 100% unless otherwise authorised by management."

28 The Claimant does not dispute that he was provided with and was aware of the content of the Discretionary-Bonus-Details Document.

29 Wages and any bonuses were normally paid by the Respondent to its employees on the tenth of each month. That meant that any bonus payable to the Claimant in respect of work carried out by him in August 2017 would be paid to him on or about 10 September 2017 and any bonus payable to him in respect of work undertaken by him during September 2017 would be paid to him on or about 10 October 2017.

30 The Claimant received bonus payments from the Respondent in respect of work undertaken by him for it during each of May, June and July 2017.

31 The Claimant has calculated – (and the Respondent does not dispute) - that subject to other criteria or pre-conditions as set out in the Discretionary-Bonus-Details Document being fulfilled the sales achieved by him for the benefit of the Respondent in August 2017 would have resulted in his being paid a bonus of £5,705.22.

32 When the Claimant received his wages and a bonus payment on or about 10 September 2017 he found that he had been paid only one half of the amount which he calculated should have been paid to him as a bonus, i.e. in respect of work undertaken by him for the Respondent in August, the sum received by him being £2,852.61 and not the £5,705.22 that he expected.

33 Notwithstanding that the Claimant claimed in the ET1 that he was entitled to a bonus of £2,500 in respect of the work undertaken by him for the Respondent in September 2017 the Claimant has been unable to precisely quantify what bonus might have been paid to him in respect of sales achieved

by him for the Respondent in September 2017 if the other pre-conditions/ criteria set out in the Discretionary-Bonus-Details Document had been met that month. That being the case, the Tribunal is unable to find as fact what bonus might have been paid to the Claimant in respect of work undertaken by him during September.

34 No bonus was paid by the Respondent to the Claimant in respect of the work undertaken by him for it during September 2017.

35 On 11 September 2017 the Claimant was told by a line manager at the Respondent's Glasgow Airport depot that he would be paid only 50% of the bonus which his achieved sales during August would otherwise have justified.

36 The Claimant's maintains that at that discussion his line manager referred only to an incident with a customer on 5 September. He purports to have no recollection of any explanation being given to him that his August bonus was being reduced because any of the "qualifications" set out in the Discretionary-Bonus-Details Document had not been met but he does not positively deny that that such an explanation had been given to him.

37 On 10 October 2017 the Respondent sent the Claimant an email which referred to the withholding of part of the August bonus to which he believed he was entitled. That email referred him to "the qualifications section of the bonus structure" i.e. to the Discretionary-Bonus-Details Document.

38 The 10 October email explained to the Claimant that "Gavin will sit down with you in person and go through the reasons" why "the commission has not been removed, but has been put on hold of 50% of the total amount". Reference was made to "… an ongoing investigation into the customer service you have afforded to several GM customers in August and September", to "an allegation against you from a customer, which we have spoken about" and to "… your attendance in August". The last, the reference to his attendance in August, was stated to be "one of the criteria for bonus".

39 The 10 October email reminded the Claimant in its concluding paragraph that "In regards to the bonus, this is not a given that you will get a bonus each month – especially when the criteria was not met" but that "As a goodwill gesture and due to the fact we believe you will be able to turn around the negatives into positives, we have released 50% of the due amount".

40 The Claimant accepts that in August he had failed to fulfil the attendance and timekeeping criterion set out in the Discretionary-Bonus-Details Document. He admits that he had been late for work on each of 11 August and 15 August, late on the first occasion by 40 minutes and on the second occasion by 10 minutes.

41 The Claimant accepts that during September 2017 he had failed to meet the attendance and timekeeping criterion set out in the Discretionary-Bonus-Details Document. He admits that he had been late for work on three occasions in September, i.e. late by respectively 16 minutes, 6 minutes and 125 minutes.

42 Following receipt of the 10 October email the Claimant met with his line manager, "Gavin", on 13 October 2017.

43 Notes of that 13 October meeting record that it was explained to the Claimant at the outset of the meeting that its purpose was to discuss "timekeeping and opening the station late", that evidence from the Respondent's "clock-in" system was provided to the Claimant, that the Claimant was told that "due to the constant timekeeping issue" the probationary period of his employment was to be extended by three months from 13 October 2017 to 13 January 2018 and that the Claimant was told both that he would be issued with a final warning and that if there were any further instances of lateness such instances could lead to the termination of his employment with the Respondent.

44 The notes of the 13 October meeting record that towards the end of that meeting it had been the Claimant, not Gavin, who had referred to part of his bonus being withheld "due to ongoing problems".

45 The Claimant now concedes that "timekeeping was mentioned" at that 13 October meeting but although he also now accepts that the 10 October email had also referred to his "attendance in August" as "one of the criteria for bonus" and that it had referred to it not being "a given" that he would receive a bonus each month "especially when the criteria was not met" he insists that "this was a meeting about bonuses".

46 Mr Bena Pala – (identified by the Respondent as the "Director" in charge of its Glasgow Airport depot) - is responsible for implementing the Respondent's bonus scheme as referred to in the Discretionary-Bonus-Details Document. It is he who decides on a month by month basis whether any particular employee has met the qualifications or pre-conditions criteria set out in the Discretionary-Bonus-Details Document.

47 As at conclusion of the Final Hearing of his claim the Claimant had received only £2,852.61 in respect of the bonus that he believes he was entitled to for August, i.e. one half of the bonus to which he argues he was entitled for work carried out by him for the Respondent during that month.

48 As at conclusion of the Final Hearing of his claim the Claimant had received no part of the unquantified bonus payment that he believes he was entitled to for September.

49 The Claimant is no longer employed by the Respondent.

The Issues

50 The issues identified by the Tribunal as being relevant to the determination of the Claimant's claim that the Respondent withheld payment of bonuses due to him for work carried out during the months of August and September 2017 were:-

- Whether the Claimant was entitled to be paid the bonuses that he alleges he was entitled to receive in respect of work carried out by him

for the Respondent in, respectively, August 2017 and September 2017 and, if so, what the basis of that entitlement was.

- If the Claimant was entitled to be paid the bonuses that he alleges he was entitled to receive in respect of work carried out by him for the Respondent in, respectively, August 2017 and September 2017, whether the Respondent deducted payments from his wages and, if so, what the basis of such deductions had been.

- If the Claimant was entitled to be paid the bonuses that he alleges he was entitled to receive in respect of work carried out by him for the Respondent in, respectively, August 2017 and September 2017 and the Respondent deducted payments from his wages, what the award that should be made in favour of the Claimant and against the Respondent is.

The Relevant Law

(a) Legislation

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

(b) Case Law

- Brogden & Another -v- Investec Bank PLC, 2014 IRLR 924.
- Campbell -v- Union Carbide Limited, EAT 0341/01.

Discussion

51 This is a case where the only two witnesses have given evidence, i.e. the Claimant and the Respondent's area manager, Mr Jag Deep Aujla.

52 Mr Aujla is based in Leicester and has only periodic involvement with the business carried on at the Respondent's Glasgow Airport depot. The Tribunal found Mr Aujla's evidence to be of very little, if any, help. He professed to

have left everything to do with the Respondent's bonus scheme – (as applied to, amongst others, the Claimant) - to his colleague Mr Pala. He insisted that he had never been involved in any discussions with Mr Pala or with anyone else with regard to bonuses due to or withheld from the Claimant. He professed to have had no involvement at the time when any bonus expected by the Claimant was not paid to him and he alleged that he had not been involved in any substantive way since then.

53 So far as the Claimant's evidence was concerned, the Tribunal perceived the Claimant to be selective in his recollection of what had been said to him, of when it was said and by whom it was said. It seemed to the Tribunal that he was reluctant even to admit that one of the qualifications criteria/pre-conditions set out in the Discretionary-Bonus-Details Document related to 100% timekeeping.

54 The Tribunal was charged with determining whether or not the Respondent had withheld payment of bonuses to which the Claimant was entitled in respect of work carried out by him for the Respondent during the months of August and September 2017. So far as that element of the Claimant's original claim was concerned, the Tribunal bore it in mind both that Section 27 of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") – defines "wages" as including any bonus – (whether payable under a contract or otherwise) – and that in terms of Section 13 of ERA 1996 an employer is not permitted to make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant decision of the worker's contract or is a deduction to which the worker has previously signified his or her agreement in writing.

55 There has been no suggestion made by the Respondent in this case that the Claimant had ever given any form of authority to make any deduction at all from his wages or that any deduction from his wages was required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract of employment. That is not the Respondent's defence to the Claimant's claim. The question which requires to be answered

is whether the bonuses claimed by the Claimant were – (or were not) – payable under his contract or otherwise.

56 The Tribunal accepts that bonuses can form an important part of an employee's remuneration and are often used as a means of incentivising performance and loyalty.

57 The Tribunal recognises that when issues about non-payment of bonuses arise in the context of an Employment Tribunal hearing the question of "entitlement" is likely to arise and calls into the questioning process whether there is an enforceable right to a bonus payment at all and, if so, whether there is a right to a particular amount, questions which will frequently lead to consideration of whether, on a proper construction of the employment contract and any ancillary bonus-scheme documentation, the employee has a contractual right to the bonus or whether, to the contrary, any bonus payment is at the discretion of the employer.

58 A discretionary bonus scheme is one where payment of a bonus or payment of a particular amount of bonus, lies within management prerogative.

59 The Tribunal recognises that employers who wish to ensure that any discretionary bonus scheme they offer is construed as such should insert a term in the scheme documentation stating that the scheme does not give employees a contractual right to a bonus payment.

60 The Tribunal has noted the guidance given by the High Court in England in the case of **Brogden & Another -v- Investec Bank PLC** to the effect that a "discretion" arises where, -

- A contract gives responsibility to one party for making an assessment or exercising a judgement on a matter which materially affects the other party's interests.

- The matter one about which there is ample scope for reasonable differences of view, and

- The decision is final and binding on the other party in the sense that a court will not substitute its own judgement for that of the party who makes the decision.

61 Against the background of that accepted law the Tribunal bore it in mind that the Discretionary-Bonus-Details Document set out very clearly that application of the bonus scheme to any employee, in this case to the Claimant, was subject to "the qualifications", pre-conditions which the Claimant was reminded by the Discretionary-Bonus-Details Document he should not ignore. One of those qualifications/pre-conditions was being that "attendance and timekeeping must be 100% unless otherwise authorised by management" and the Discretionary-Bonus-Details Document contained the specific wording, in bold, "DO NOT IGNORE THIS OR YOU WILL NOT GET THE BONUS!!!".

62 In his closing submissions the Respondent's representative argued that on the basis of the evidence, including the documents to which the Tribunal was referred, the Respondent was entitled to withhold payment of the bonuses claimed by the Respondent as being due to him. He reminded the Tribunal that the Discretionary-Bonus-Details Document contained criteria, "qualifications", and that those criteria clearly included reference to a 100% attendance and timekeeping record.

63 For his part, there has been no suggestion from the Claimant that the Respondent's management authorised anything short of 100% attendance and timekeeping so far as he and his entitlement to be paid any bonus was concerned but he argued in his closing submissions that he had met and exceeded – (and the Respondent knew he had met and exceeded) - all sales targets, that he had worked hard to do so and that it was only correct that he should be given the bonuses as a reward for his doing so.

64 The Tribunal was satisfied that in the case of the Respondent's bonus scheme – (as applied to the Claimant) - not only were the performance and/or sales targets relevant in that sales achieved, in particular the extent to which sales

targets had been exceeded, would affect the arithmetic behind the calculation of bonus payments but that there were other, perfectly reasonable, criteria to be met before any bonus would be paid. The Tribunal was satisfied, that these criteria included a 100% attendance and timekeeping record and that the Claimant knew that that was the case.

65 In the finding of the Tribunal the determination of whether or not the "qualifications" pre-conditions set out in the Discretionary-Bonus-Details Document had been met lay entirely within the discretion of the Respondent's Glasgow Depot Manager, Mr Pala.

66 Cleary, whenever exercising that discretion Mr Pala should not act perversely or irrationally, but the Claimant accepted that his timekeeping was far from 100% and at the 13 October meeting it had been demonstrated to him why it was that the Respondent had decided that his timekeeping fell short of what was required of him and there has been no argument put forward by the Claimant that when determining that he had not met the attendance and timekeeping qualification pre-condition Mr Pala had acted irrationally or perversely.

67 In reaching its decision as to whether the sums claimed by the Claimant were "wages" as defined by Section 27(1) of ERA 1996 the Tribunal took guidance from the case of **Campbell -v- Union Carbide Limited** in which the Employment Appeal Tribunal held that the expression "payable under the contract or otherwise" in Section 27(1)(a) of ERA 1996 requires a legal obligation to make the payment in question. In this context, the Tribunal was satisfied from the evidence that it heard, particularly from the documentation to which it was referred, that when it took the decision not to pay all of the August bonus to the Claimant and not to pay any September bonus to the Claimant the Respondent had not failed to make a payment to which the Claimant was contractually entitled but, to the contrary, had lawfully exercised its discretion.

68 Overall, the Tribunal was satisfied that when withholding payment of half of the bonus to which the Claimant felt he was entitled to for achieving the sales figures that he did in August 2017 the Respondent had reasonably exercised its discretion to do so because during the course of August 2017 the Claimant's timekeeping had fallen far short of its reasonably imposed 100% target.

69 The Tribunal was satisfied, too, that when choosing not to pay any bonus to the Claimant for achieving the sales figures that he did in September 2017 the Respondent had reasonably exercised its discretion to do so because during the course of September the Claimant's timekeeping had fallen far short of its reasonably imposed 100% target.

70 The Tribunal was satisfied that when it took the decision not to pay all of the August bonus to the Claimant and not to pay any September bonus to the Claimant the Respondent had not made a deduction of wages – (within the meaning of Section 13(3) of ERA 1996) – to which the Claimant was contractually or otherwise entitled for work carried out in, respectively, August 2017 or September 2017, the reasoning behind that determination being that the bonus claimed by the Claimant for August and the bonus claimed by the Claimant for September did not form part of the "wages" due to him for those months, i.e. as "wages" are defined in Section 27(1) of ERA 1996 as including "(a) any … bonus … referable to his employment, whether payable under his contract or otherwise". That being the case, both the Claimant's claim that he is owed a balance of £2,852.61 in respect of work undertaken by him for the Respondent in August 2017 and his claim that he is owed a bonus payment of £2,500 by the Respondent in respect of work carried out by him for it during September 2017 have failed.

Employment Judge: C Lucas
Date of Judgment: 18 May 2018
Entered in register: 29 May 2018
and copied to parties