EMPLOYMENT TRIBUNALS

Claimant: Mr R Ostilly

Respondent: Meridian Global VAT Services (UK) Ltd

Heard at: London Central **On:** 9 & 10 January 2019

Before: Employment Judge H Grewal

Representation

Claimant: Mr A Robson, Counsel

Respondent: Mr M Thomas, Counsel

JUDGMENT

1 The breach of contract claim is not well-founded.

2 The complaint of unfair dismissal is not well-founded

REASONS

1 In a claim form presented on 28 June 2018 the Claimant complained of breach of contract and unfair dismissal.

The Issues

2 It was agreed that the issues that the Tribunal had to determine were as follows.

Unfair Dismissal

2.1 Whether the Respondent's failure to pay anything by way of bonus, when there was no criticism of the Claimant's or his team's personal performance, was a breach of clause 8 of his contract of employment;

2.2 Whether the failure to pay any bonus, and the manner in which that decision was communicated to the Claimant, was a breach of the implied term of trust and confidence and in any event an irrational or perverse exercise of discretion;

2.3 If there was a breach as set out above, whether it was a repudiatory breach;

2.4 Whether the Claimant affirmed the contract by reason of any delay between the date of the breach and the date of his resignation and/or the Claimant waived any breach;

2.5 Whether the Claimant resigned in response to the breach;

2.6 If there was a dismissal, whether it was unfair.

Breach of Contract

2.7 Whether there was a breach of the contract as set out at paragraph 2.1 or 2.2 (above).

The Law

3 Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if the employee terminates his contract of employment in circumstances in which he is entitled to do so without notice because of the employer's conduct. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of contract - **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**.

4 An emphatic denial by the employer of his obligation to pay to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory – **Cantor Fitzgerald International v Callaghan [1999] IRLR 234**.

5 It is an implied term of any contract of an employment that an employer shall not without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term only arises if the conduct of the employer objectively viewed is such that it is likely to cause serious damage to the employer/employee relationship (**Malik v BCCI [1997] IRLR 462**. The breach of the implied term of trust and confidence may consist of a series of actions on the part

of the employer which cumulatively amount to a breach of the term although each individual incident may not do so. The "final straw" need not itself be a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term.

6 When considering whether an employer was in breach of contract in the exercise of a discretion in respect of a bonus award, the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in that way – **Clark v Nomura International plc [2000] IRLR 766.** In **Braganza v BP Shipping Ltd [2015] IRLR 487** Lady Hale (with whom Lord Neuberger agreed on this point) said that unless the court could imply a term that the outcome be objectively reasonable, it would only imply a term that the decision making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. Their view was that it should include both limbs of the *Wednesbury* formulation in the rationality test, i.e. (i) have the relevant matters (and no irrelevant matters) been taken into account, and (ii) is the result such that no reasonable decision-maker could have reached it. Whatever term may be implied will depend upon the terms and context of the particular contract involved. She also said that any decision-making function entrusted to an employer has to be exercised in accordance with the implied obligation of trust and confidence.

7 In **IBM UK Holdings Ltd v Dalgleish [2018] IRLR 4** the Court of Appeal held that in cases which involve the exercise of an employer's discretionary powers, whether express or implied, in order to decide whether the employer's act is or is not in breach of the implied duty, a rationality approach according to the *Wednesbury* test (including both its limbs) should be adopted, taking into account the employment context of the given case. In order to decide whether an employer's decision in a given case satisfies the rationality test, the court may need to know what the employer's reasons were and may also need to know more about the decision-making process, so as to assess whether all relevant matters, and no irrelevant matters, were taken into account. Reasonable expectations are a relevant factor to be taken into account, but they do not have an overriding significance over and above other relevant factors.

The Evidence

8 The Claimant gave evidence in support of his claim and Mr O'Riordan gave evidence on behalf of the Respondent. Having considered all the oral and documentary evidence, I made the following findings of fact.

Findings of Fact

9 The Claimant commenced employment with Meridian Vat Reclaim (UK) Ltd ("MVR") on 1 December 1998 as a Strategic Development Advisor. MVR was a sales and marketing subsidiary in the Meridian group which provided its clients with VAT reclaim and VAT compliance services. In 2000 the Claimant was promoted to Operations Manager.

10 In 2000 MVR was bought by The Profit Recovery Group which was based in the US.

11 The Claimant's contract dated 1 November 2000 provided that as from 1 January 2001 his pay would be £55,000 per annum and that he would have a fully expensed company car. Clause 8 provided,

> "*As from 1st January 2001 you will be entitled to a maximum annual bonus of 20% of your salary which will be tied to your own performance and that of your market region. Further details on the bonus system will be forwarded to you shortly."*

Clause 19 provided,

> "*The Company reserves the right to vary terms of your contract giving 1 months notice* [sic] *of such a change."*

12 The Claimant worked out of the London office. The different geographical areas in which the company operated at the time were known as "market regions". There was nothing in the Claimant's contract to indicate what his market region was. No further details of the bonus system were provided to the Claimant.

13 Between 2002 and 2006 the Claimant was promoted to a number of different positions at Director level. In February 2006 he was appointed Commercial Director of the Meridian Group, focusing on developing and commercialising new VAT products. The Claimant's salary increased during that period and by 2010 his annual salary was £90,177. His bonus payments increased from £28,000 per annum to £45,000 per annum.

14 In 2007 Averio Holdings Ltd (a company incorporated in the Republic of Ireland) acquired the Meridian Group in a management buy-out. The Directors and 'A' Ordinary shareholders in Averio were Mark O'Riordan (the CEO), Paul Dundon (the CFO) and Les Baer who was based in the USA and was President of the Meridian Group in North America. Following the management buy-out a number of key employees, including the Claimant, were offered 'B' Ordinary shares in Averio on very favourable terms. The Claimant became the largest 'B' shareholder with a shareholding of 10%. The B shares did not have any voting rights but had equal rights to participate fully in all the dividends that were declared. For tax reasons the Claimant's shares were held by a company established in Cyprus and wholly owned by a trust of which he was the direct beneficiary and the deemed settlor.

15 Between 2007 and 2012 the Meridian Group made significant profits and had significant reserves. For the years 2007 to 2011 the Claimant was paid a bonus of £45,000 for each year. The Claimant was not set any specific targets and the sum

awarded was not dependent upon whether he had met any targets. The sums awarded were considerably in excess of the maximum stipulated in clause 8 of his contract. Each year the Respondent had a bonus pool and senior managers decided how that pool was to be apportioned between the employees. The Claimant never questioned how his bonus was calculated because, in his words, it always seemed fair to him. The bonuses were paid in March for the preceding year.

16 In 2010 the Respondent decided to sell ERP software. This was specialist software which automated VAT processes in the SAP accounting systems. It is used by large scale global companies and retails at between £200,000 and £500,000 depending on a client's needs. The Claimant was put in charge of this new business line and was responsible for all strategic, commercial, operational and financial aspects of the business line.

17 Between 2011 and 2016 the ERP business grew. In its first year it generated very little revenue. Between 2012 and the end of 2016 its turnover/revenue grew from about 1.5 million euros to 3 million euros. Its profit margin (EBITDA) between 2012 and 2015 fluctuated between about 358,000 euros and 705,000 euros. In 2016 it was 1.78 million euros.

18 The Claimant was awarded a bonus of £45,000 for 2011 although ERP generated considerably less revenue and profit than the Claimant had provided as a budget figure to the Board. He was awarded £40,000 each year for 2012 and 2013 and £50,000 for 2014. For 2015, although ERP generated lower revenues and profits than the Claimant's budget figure, he was awarded a bonus of £50,000. For 2016 he was awarded £55,000. His salary between 2010 and 2014 was £90,177. In 2015 it was £92,431 and in 2016 £94,742.

19 In March 2017 Meridian sold its core VAT reclaim business to a company called VATIT. The employees who had been engaged on that business were not transferred to VATIT nor were they dismissed for redundancy. The employment of those working for MVR was transferred to Meridian Global VAT Services (UK) Ltd. The VAT reclaim business was sold for 14 million euros.

20 Around May 2017 the 'A' shareholders met to determine the level of dividends to be distributed. After much deliberation the majority (Messrs Dundon and Baer) determined that 11 million euros should be distributed. Mr O'Riordan voted against it because he felt that the distribution was too high given the circumstances of the company at the time. Dividends of 10 million euros were paid around June 2017. The Claimant as a 10% shareholder received 1 million euros.

21 Between 2011 and 2016 the Meridian Group made a loss each year. The losses ranged from 635,000 euros to 1.2 million euros. However, in 2017 the loss was significantly higher. It stemmed largely from the fact that although the Group had sold the VAT reclaim business it retained the costs of that business as it continued to employ the people who had worked on it. The company that had bought the business had not been able to provide all the services immediately and had contracted some of the business back to Meridian. That had generated a revenue of about 1.4 million euros. That was, however, an exceptional one-off payment and Mr O'Riordan's view was that it should be ignored when considering the financial health of the company. If that revenue was taken into account, the company had made losses of 1.8 million euros. If it was ignored, the losses were 3.2 million euros. The company made those

losses in 2017 notwithstanding the fact that the ERP business made a profit of about 1.68 million euros (which was considerably less than the 3.25 million euros that the Claimant had given as a budget to the Board). As at 31 December 2017 Averio Holdings had net assets of nearly 9 million euros.

22 Towards the end of 2017 the three Directors had discussions about the way forward. Mr O'Riordan's view was that if cost cutting strategies were put in place the business could be made viable. One of the cost cutting strategies that he proposed was closing the US office. That was opposed by Les Baer who was President of the Group in North America. The other two Directors favoured either selling the business or closing it down. At the end of 2017 the EU approved certain legislative changes which would have a significant negative impact on the Respondent's business.

23 In the week commencing 15 January 2018 the Directors had two meetings to discuss their options. They used as the basis of their discussion a document prepared by Paul Dundon, the CFO, entitled "Project Pinnacle – Alternatives". The paper started by saying that the prospects of the business were extremely poor with ongoing losses and cash burn and that the forecast was a loss of 4 million euros and a similar level of cash reduction. A sale process had been initiated towards the end of 2017 but it had not generated much interest. In summarising how the various divisions within the company had fared, it was recognised that ERP remained a valuable asset. Having set out the various options, Mr Dundon then set out the actions and items to consider associated with the option to close down the business. One of those was to consider what costs could be reduced immediately but his view was that ERP should be excluded form that. The reductions proposed included a pay freeze and not paying any bonuses. He also set out in the paper the costs of redundancy which came to a total of 9 million euros (2.6 million statutory payments, 4.6 million ex gratia payments (which were discretionary but had been paid in the past) and 1 million for notice pay).

24 On 19 January Mr Dundon sent that document to the Respondent's solicitors to get their input as to the things of which the directors needed to be aware in evaluating the options.

25 The solicitors gave some advice initially over the telephone and it was repeated at a meeting of the Board of Directors on 21 February 2018. The lawyers advised that the Directors could be personally liable for the debts of the company if they were party to the carrying of any business of the company in a reckless manner (known as reckless trading). However, the directors could avoid personal liability if they believed on reasonable grounds that the company would be able to pay its debts as they fell due. It was noted in the minutes of the Board meeting that the directors honestly believed that that the company was and would be able to pay its debts as they fell due albeit that that required some of the costs of the Meridian Group to be reduced. It was resolved at the end of the meeting that such cost reduction as the majority of the directors decided was prudent for the company would be implemented as soon as reasonably possible, an orderly wind down of the Meridian Global Group would be commenced and that the directors would further ascertain whether some or all of the business units could be sold.

26 There were about sixty employees who were expecting to be paid a bonus in March 2018. Fifteen of them had clauses in their contract relating to bonus payments that were similar the clause in the Claimant's contract. Seven of them had clauses

which provided,

> "*You shall be eligible to receive an annual performance bonus up to a maximum of* [10 or 30] *% of gross base annual salary and this will be based on meeting agreed performance targets."*

Two of them provided,

> "*You will be entitled to participate in the company bonus scheme/plan, details of which are attached."*

A further two provided,

> *"You will be eligible to participate in the company commission scheme details of which are attached."*

Three others provided respectively as follows,

> "*The* [redacted] *shall be eligible to receive an annual incentive payment as follows:*
>
Performance	*Payout*
Threshold	*10% of fixed salary earned during the year*
Target	*15% of fixed salary earned during the year*
Stretch	*20% of fixed salary earned during the year."*

> *"You are eligible to participate in the* [redacted] *with the following bonus measurements:*
>
Target	*35% of annual base salary*
Stretch	*50% of annual base salary*
Superstretch	*70% of annual base salary"*

> *"The* [redacted] *shall be entitled to receive an annual performance bonus which will be set to a maximum 35% of base salary depending on meeting agreed targets."*

27 In early March Mr O'Riordan offered a management buyout of the business. He was advised by the solicitors not to be involved in any communications relating to the business as it might give rise to a conflict of interest. Around 7 March the majority of the directors decided that in light of the precarious financial position of the company and the solicitor's advice relating to the duties of directors, the company would not award any bonuses in March.

28 Between 7 and 13 March onwards the Claimant tried to make contact with Mr O'Riordan to discuss the bonuses for him and his team for 2017 as payroll was about to process the payments for March. He sent him three emails and left him telephone messages. Mr O'Riordan was away from the office that week and was trying to organise the management buyout. He was also avoiding what he knew would be a difficult conversation. The Claimant was not the only one whom he avoided. Other senior managers also tried to contact him to discuss the bonus payments.

29 On 9 March Les Baer sent to the other two directors two draft options for communicating to the staff the decision that bonuses would not be paid. Mr

O'Riordan took issue with some of the phrases used in the draft as he felt they were misleading and untrue. He said that by saying that they were going to *"conduct a very serious business review and appraise everything"* and that they were going to "*begin a cost reduction programme imminently"* they were suggesting that there was a future and that they were downsizing the business when the reality was that they planned to close the business. He also said that saying that they had decided to divest the business suggested that they were just about to embark on that when in reality they had been trying to do so for five months without any success. He said that the reason that they were not paying the bonuses was because they had decided to close down the business and did not have sufficient funds to make full ex gratia redundancy payments to all. The other two directors did not agree with his comments. The decision not to pay bonuses applied to the directors as well.

30 The Claimant and Mr O'Riordan spoke on the telephone on 13 March. Mr O'Riordan told him that the Board was leaning towards not paying a bonus to anyone and that he was not allowed to speak to anyone about it. He had a similar telephone conversation with another senior manager.

31 Following that telephone conversation the Claimant sent an email to the directors. He said that failure to pay a bonus would be a "slap in the face" from the directors to those loyal employees who had broken their backs in the past year to deliver value to their clients and the company. He said that it would also send a clear message across the organisation that it's "lights off folks". He hoped that the Board had carefully considered the significant impact that it would have on the value of the business and the support that they needed from their key people as they positioned Meridian for sale.

32 On 15 March Mr Dundon sent the following email to the senior management team, which included the Claimant,

> "*… There has been disappointing revenue growth and major client loss in several areas of the business along with significant EU legislative enactment. We are conducting a very serious business review and appraising everything. We are looking at strategic options including sale of the whole business, sell off parts of the business and cost reduction programme. This process has been the focus of the Board for a significant amount of time now.*
>
> *In view of the above, one of the decisions that we have made is not to award a bonus. I realize that this may be highly disappointing to you. We want to stress that this is a corporate decision and does not in any way reflect dissatisfaction with the contribution that you or your team have made."*

33 On 16 March 2018, solicitors acting on behalf of the Claimant, wrote to Mr Dundon. They said that the Claimant's bonus entitlement was a contractual one and that no mention was made of discretion in clause 8 of his contract. They said that every year the Claimant had been notified by telephone what his bonus would be, and that for at least the previous ten years the 20% cap had been exceeded. They concluded by saying,

> "*Accordingly, based on the pattern of recent bonuses, Ryan's bonus entitlement is at least £55,000. This is a sum he is entitled to in contract and the failure to pay it is both a breach of contract and an unlawful deduction of*

wages. We look forward to hearing from you as to when the £55,000 bonus payment will be made. Please let us have your response within seven days so that no formal action need be taken."

34 The Respondent did not reply. The Claimant attempted to speak to Mr O'Riordan but he said that he had been advised by the lawyers not to speak to anyone. The Claimant attempted to speak to Mr Dundon twice, the last time being about the end of March/beginning of April, and Mr Dundon told him that their lawyers would respond to his lawyers.

35 The Respondent has a short grievance procedure. This provides that if a member of staff has a problem in respect of their employment he or she should first bring it to the attention of his or her line manager and attempt to resolve the matter through an informal discussion. If that fails to resolve the problem, the employee should present the grievance in writing to the next level manager who will arrange a grievance meeting with the employee and give him/her a decision in writing. The procedure also provides for an appeal from that decision. The Claimant did not raise a formal grievance under that procedure.

36 Paul Dundon left the company on 16 April and resigned on 17 April.

37 The Claimant continued working for the Respondent and did not raise any further issue about the failure to pay his bonus. On 25 April the Claimant travelled to the Respondent's Dublin office for business meetings with his team. While he was there Mr O'Riordan provided him with the summary balance sheet for Averio Holdings Ltd and a trading summary for Meridian. On the way to the airport the Claimant dialed in to participate in a senior management meeting. At that meeting Mr O'Riordan discussed the financial position of Meridian and the non-payment of bonuses. He explained that if they wanted to continue the company as a viable concern, it was important that any money available was channeled into it rather than paid out as bonuses. The non-payment of bonuses was a necessary sacrifice to avoid insolvency. He asked the senior managers to help him deliver that message to the employees and to handle staff morale as positively as possible. Nobody at that meeting, including the Claimant, disagreed with or challenged what he said.

38 On 26 April 2018 the Claimant sent Mr O'Riordan a copy of his solicitors' letter of 16 March to Mr Dundon. He stated that Meridian had not yet responded to the letter. He said that the non-payment of his bonus was a breach of contract and unlawful deduction of his wages, and that unless the mater was rectified within 14 days he would be forced to proceed with legal action.

39 Mr O'Riordan sent the Claimant an email on 2 May and asked him whether he was likely to be in Dublin soon so that they could meet to discuss the bonus and all his other issues. They were unable to find a time that was convenient for both of them to meet. Mr O'Riordan telephoned the Claimant on 10 May and asked whether they could have a "Without Prejudice" conversation. The Claimant asked him what he meant by that and Mr O'Riordan explained what it meant. The Claimant agreed to have a "without prejudice" discussion knowing what it meant.

40 Both the Claimant and Mr O'Riordan referred to the content of that conversation in their witness statements (the Claimant in detail, Mr O'Riordan to a limited extent). There was a dispute between the parties as to whether the conversation was

covered by the "without prejudice" rule and was admissible. The Claimant contended that it was not covered by the rule, the Respondent argued that it was. Both parties agreed at the outset that I should determine that issue at the conclusion of the hearing when making my decision on the substantive issues. They agreed that neither party would take any point about the fact that I had read the relevant evidence if I decided that it was not admissible.

41 It is clear that at the time the conversation took place there was a dispute between the parties as to whether the Claimant was contractually entitled to a bonus of £55,000 and that there was a reasonable contemplation of litigation if the dispute could not be resolved. The Claimant had instructed solicitors to raise the matter with the Respondent, and both he and the solicitors had threatened legal action if the Claimant was not paid the amount to which he believed that he had a contractual entitlement. I am also satisfied that the Claimant understood what a "without prejudice" conversation meant and that he agreed to take part in the conversation on that basis. I am also satisfied that there was a genuine attempt to resolve that dispute in that conversation.

42 It was argued on behalf of the Claimant that any privilege that might have attached to it had been waived. "Without prejudice" privilege can be waived but only if both parties to the negotiation agree to do so unequivocally, whether by words or conduct. In the present case, solicitors acting for the Respondent stated in a letter dated 14 June 2018 to the Claimant's solicitors that the conversation of 10 May was covered by the "without prejudice" rule and that the Claimant could not rely on the matters discussed in that conversation. The Claimant acknowledged that in his particulars of claim and the Respondent repeated that assertion in its response. It maintained that position before me. The fact that Mr O'Riordan referred very briefly to the content of the conversation to dispute what the Claimant alleged, in case I ruled that it was admissible, does not mean that the Respondent has waived privilege. The Respondent's position has been clear throughout, and it is that the conversation is covered by privilege. I concluded that the privilege had not been waived because the Respondent has never agreed to waive it.

43 On 14 May the Claimant sent by email his resignation letter to Mr O'Riordan. He referred to his solicitor's letter of 16 March and said that he had not received a written response to that. On 26 April he had resent the letter to Mr O'Riordan as a result of which the telephone conversation on 10 May had taken place. He referred to the content of that conversation, and concluded by saying,

> "*You and the Board have had ample time to pay my bonus and/or seek to explain why its non-payment must be justified, despite the clear terms of my contract. You and the Board have failed to do so.*
>
> *I consider the non-payment of my bonus to be a repudiatory breach of my contract and accordingly resign with immediate effect."*

44 Following the Claimant's resignation, the Respondent's solicitors replied to the letter of 16 March 2018 from the Claimant's solicitor. They said that the Claimant had not achieved his personal performance target for 2017 and, therefore, no bonus was payable. If the Claimant maintained that there was no discretion and that he was contractually entitled to a maximum of 20% of his salary, he had been overpaid from 2010 to 2017 in the sum of £222,969, and if he pursued his claim the Respondent

would seek to recover that sum.

45 On 17 May Mr O'Riordan sent the Claimant a copy of their grievance procedure. He said that at no time had the Claimant raised a formal grievance to complain about the Respondent being in breach of its legal obligations.

Conclusions

46 I considered first what the Claimant's entitlement was under clause 8 of his contract of employment. I construed the clause to mean that he was contractually entitled to a bonus but the amount payable was discretionary and could be anything between nil and twenty per cent of his salary. The amount awarded would relate to his performance and that of his market region. I do not accept the Claimant's submission that in exercising its discretion the Respondent could only take into account those two factors and nothing else. The company's financial circumstances (including its obligations to its creditors) are clearly a relevant factor that must be taken into account when exercising a discretion as to the level of bonuses to be paid. It was so obvious that it was a relevant factor that it did not need to be expressly set out in the clause. It is implicit in that clause. Furthermore, the way that clause 8 was operated in practice over many years made it clear that those were not the only two factors that determined the level of bonus. It was not clear whether the Claimant ever had a market region. He certainly did not do so from 2006 when he was appointed Commercial Director and was responsible for developing and commercialising new products. ERP was a business line and not a market region. In any event, the amount that he was awarded did not correlate with the performance of ERP. There was no evidence of the Claimant's performance being measured or how the bonus awarded was linked to it. If the "budget" provided by the Claimant to the Board was his and ERP's target, he was awarded in excess of the maximum bonus even when he and ERP did not meet that target. It is clear that the Respondent awarded the Claimant the sums that it did because it took into account other factors in addition to his and ERP's performance, including its financial circumstances. The Claimant was aware that other factors were taken into account in exercising the discretion and he never challenged that because that was what he expected.

47 I then considered whether the decision to award the Claimant nil bonus for 2017 was an irrational or perverse exercise of discretion or a breach of the implied term of trust and confidence. I do not accept (as I think that the Claimant has argued) that there is any distinction between a decision to award a nil bonus and a decision not to award any bonus. Nor do I accept that the Claimant was the only employee who had a contractual entitlement to a bonus. The fifteen employees (referred to at paragraph 26 above) had a similar contractual entitlement.

48 When deciding whether to award any bonuses for 2017 the Respondent took into account the following factors. The ERP business had made a profit of 1.68 million euros, less than the target of 3.25 million euros. Notwithstanding that the Respondent had made an unprecedented loss of 1.8 million euros. The forecast for 2018 was a loss of 4 million euros and a cash burn of the same amount. The parent company had net assets of nearly 9 million euros. The redundancy costs would be about 9 million euros. The Respondent would be able to pay its debts as they fell due if it embarked on a cost reduction programme. Once it is accepted that the company's financial circumstances (including its obligation to pay its debts) was a relevant factor that could be taken into account in exercising the discretion under

clause 8, it is difficult to see how the company could have come to any conclusion other than to make no awards of bonus. It certainly cannot be said that no reasonable employer in those circumstances could have reached that decision. I do not accept that the decision not to award the Claimant any bonus for 2017 was an irrational or perverse exercise of the Respondent's discretion or that it took into account any irrelevant factors or failed to take into account any relevant factors. Nor did it amount to a breach of the implied term of trust and confidence.

49 I next considered whether the way in which that decision was communicated amounted to a breach of the implied term of trust and confidence. I accept that the decision was communicated to senior managers at about the time that the bonuses were due to be paid and that the Claimant had been attempting in the previous week to speak to the directors about it. That having been said, the circumstances were unusual. The directors had two meetings in January 2018. There was disagreement between them as to the best way forward. Legal advice was sought and given to the Board on 21 February 2018. The decision not to make any bonus awards was made on 7 March. A draft of the communication was circulated on 9 March and there was some dispute about the wording. It was sent to the senior managers on 15 March. An explanation was given of the reason why no bonuses were being awarded. In all the circumstances, I do not think that the decision could have been communicated much sooner. I accept that the decision was unwelcome and disappointing, but it cannot be said that the manner of communicating it, objectively viewed, was such that it was likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

50 Thereafter, it is right that the Respondent did not reply to the Claimant's solicitor's letter of 16 March 2018. Mr Dundon told the Claimant twice that the Respondent's solicitors would respond to his solicitors. The last time that he did so was at the end of March/beginning of April. The Claimant did not pursue the matter or raise a formal grievance about it. He took no further action until 26 April when he sent Mr O'Riordan a copy of his solicitor's letter. Mr O'Riordan attempted to arrange a meeting with him and when that did not prove possible they spoke by telephone. The Claimant resigned on 14 May. The Respondent's conduct between 16 March and 14 May does not amount to a breach of the implied term of trust and confidence.

51 As I have not found that there was any breach of contract by the Respondent, that is the end of the Claimant's claim for constructive unfair dismissal. It follows that the Claimant was not dismissed and, therefore, the claim of unfair dismissal must fail.

52 If I am wrong in my conclusion at paragraph 46 (above) and by taking its financial circumstances into account the Respondent took into account an irrelevant matter, its irrational exercise of its discretion would amount to a breach of contract under **Braganza** and **IBM UK Holdings Ltd** (see paragraphs 6 and 7 above). I set out briefly below what I would have concluded in respect of the unfair dismissal if I had approached the matter in that way. The position remains that contractually the Claimant was entitled to no more than about £19,500. If the Claimant's budget for ERP was his and ERP's target, then in 2017 he and ERP had achieved just over 50% of that target. In those circumstances, if the Respondent had exercised its discretion properly it could have awarded him anything between nothing and £19,500 The Claimant's view was that he was contractually entitled to a bonus of £55,000. Under clause 8 of his contract, he was not. Even if I had found there to be a breach of the contract because the Respondent took into account an irrelevant factor, the

claim for constructive dismissal would not have succeeded for the following reasons. The Claimant would have resigned even if the Respondent had exercised its discretion rationally and awarded him a sum less than £19,500. He would have resigned because the Respondent had not paid him a bonus of £55,000 or a sum close to that. The failure to pay that sum would not have been a breach of contract.

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Employment Judge Grewal

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Date 12 February 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

13 February 2019

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FOR THE TRIBUNAL OFFICE