



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Wright

**Respondent:** Broadstock Office Furniture Limited

**Heard at:** Manchester

**On:** 3 October 2019

**Before:** Employment Judge McDonald  
(sitting alone)

## REPRESENTATION:

**Claimant:** Miss R Kight (Counsel)

**Respondent:** Mr R Coward (Solicitor)

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint that the respondent made unlawful deductions from her wages contrary to section 13 of the Employment Rights Act 1996 by not paying her a bonus fails.
2. The claimant's complaint that the respondent breached her contract of employment by not paying her a bonus fails.

# REASONS

1. The claimant's complaint is about a failure by the respondent, her former employer, to pay her a bonus. She says that failure is either an unlawful deduction from her wages in breach of section 13(1) of the Employment Rights Act 1996, or that the respondent committed a breach of her contract of employment by failing to pay her that bonus. Although the respondent had initially denied that there was a contractual bonus scheme, by the time of the hearing it was accepted that there was such a scheme ("the Scheme"). The central dispute at the hearing was about the

terms of that Scheme and in particular what targets the claimant had to meet to trigger a contractual entitlement to a bonus payment. The claimant also argued that the respondent had acted irrationally and in bad faith in not exercising a discretion to pay her some bonus even if she had not met the targets in the scheme.

2. At times in evidence and in places in the documentation the payment was referred to as “commission” rather than “bonus”. For the sake of consistency I have used “bonus” throughout this judgment.

3. The claimant was represented by Miss Kight of counsel and the respondent was represented by Mr Coward, a solicitor. I heard evidence from the claimant and from Mr Jon Stoney, the respondent’s Sales Director. Each witness had provided a written witness statement and was asked cross examination questions by Miss Kight and Mr Coward respectively. I also asked each witness some questions.

4. There was an agreed bundle of documents consisting of 82 pages. At the hearing a further document was added at pages 83-86. References in this judgment to page numbers are to page numbers in that bundle.

5. At the end of the evidence I heard oral submissions from Miss Kight and from Mr Coward. Miss Kight had also prepared a written skeleton argument, although some of the issues dealt with in that skeleton argument had fallen away during the hearing.

6. I am grateful to the parties and the representatives for their patience on the day of the hearing. Unfortunately the need to deal with another case listed at the same time and the initial underestimate of the time required to deal with this case meant that their stay at the Tribunal was slightly prolonged.

7. Having heard the evidence and submissions I reserved my decision.

### **The Issues**

8. By the start of the hearing the parties were agreed that the respondent operated a contractual bonus scheme. It was also agreed that if the claimant was entitled to a bonus the amount of that bonus was £2500 per quarter. The respondent accepted it had not paid the claimant any moneys by way of bonus in the bonus year 2018-19.

9. In her claim form (para 3) the claimant had said that she was due to be paid £7,500 “based on the percentage of her target achieved for [quarters 1-3 of the bonus year 2018-19].” In her witness statement (para 5) she explained that she based that on the fact that her “cumulative total for annual sales were 95% of the annual target”. Her statement cross-refers to a bonus scheme document titled “Southern Broadstock Summary by Account Manager – 04/03/19” (p.46) showing her sales to that date. The second column from the right shows the claimant’s “YTD target” as “95%”.

10. At the hearing the claimant said that she had understood that document to mean that she had met 95% of her sales target for the whole bonus year 2018-19 by the end of quarter 3. She therefore thought she was entitled to bonus for three

quarters on the “catch up” basis. She now accepted the document meant she had met 95% of her target year to date, i.e. to the end of quarter 3. She asked to amend her claim to plead in the alternative that even if she was not entitled to the full £7500 claimed in her claim form she was entitled at least to payment of £2500 for quarter 3. Mr Coward did not object to that amendment and I allowed it by consent.

11. The following issues were identified as those in dispute during the hearing and addressed by the parties in their submissions:

- (a) What were the terms (express or implied) of the Scheme. Specifically:
  - i. What targets did the claimant have to meet to trigger an entitlement to a bonus payment in each quarter of the bonus year?
  - ii. Did an employee forfeit the entitlement to a bonus payment (either in respect of the quarter when notice was given or for that and previous quarters) if they gave notice of termination of employment?
  - iii. Did an employee forfeit the entitlement to a bonus payment (either in respect of the quarter during which employment ended or for that and previous quarters) if their employment ended before the pay date for payment of a bonus in that quarter?
  - iv. Did the Scheme include a discretion for the respondent to make payments even if the Scheme targets had not been met (“the Residual Discretion”) and, if so, did that discretion have to be exercised rationally and in good faith.
- (b) Did the claimant meet the terms of the Scheme, entitling her to be paid a bonus in some or all of the quarters starting in July 2018 and ending on 30 March 2019?
- (c) Did the respondent fail to exercise the Residual Discretion rationally and in good faith?
- (d) If so, did that entitle the claimant to compensation for its failure to do so?

### **The Law**

12. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 (“ERA”) says:

**“(1) An employer shall not make a deduction from the wages of a worker employed by him unless-**

- (a) the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker’s contract, or**
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”**

13. S.27(1) of ERA says:

**"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-**

**(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"**

14. S.13(3) of ERA says:

**"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

15. in **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages".

16. In this case, there was no dispute that if I found that a bonus was payable to the claimant, it would fall within the definition of "wages" in s.27(1) and the respondent's failure to pay it would be an unlawful deduction from the claimant's wages.

17. When it comes to the relevant test in deciding the terms of a contract, Lord Clarke explained the relevant principles in this way in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14; [2010] 1 WLR 753**, para 45:

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. "

18. In **Blue v Ashley [2017] EWHC 1928** Leggatt J noted that where the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis.

19. When it comes to implied terms, The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

- a. the term is necessary in order to give the contract business efficacy: In **Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC**, Lord Hughes explained that: “A term is to be implied only if it is necessary to make the contract work, and this it may be if.....it is necessary to give the contract business efficacy.....The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”
- b. it is the normal custom and practice to include such a term in contracts of that particular kind: the custom in question must be reasonable, notorious and certain (see, for example, **Devonald v Rosser and Sons 1906 2 KB 728, CA**, and **Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA**). This means that the custom must be fair and not arbitrary or capricious; that it must be generally established and well known; and that it must be clear cut. But it should be borne in mind that neither custom and practice nor any of the other legal bases for implying terms into a contract permits the courts to displace specific express terms that deal fully with the same subject matter as that on which a party is seeking to imply a term.
- c. an intention to include the term is demonstrated by the way in which the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it, see **Mears v Safecar Security Ltd 1982 ICR 626, CA**.
- d. the term is so obvious that the parties must have intended it (known as the ‘officious bystander’ test). In **Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA**, affirmed by the House of Lords in **Southern Foundries 1926 Ltd v Shirlaw 1940 AC 701, HL** held that a term could be implied in a situation where ‘if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common “oh, of course”’. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.

20. In **Horkulak v Cantor Fitzgerald International 2005 ICR 402, CA**, the Court of Appeal held that where under the terms of a contract one party was empowered to exercise a discretion the court would read into the contract an implied term that there would be a genuine and rational exercise of that discretion.

21. Unlike in the current case, **Horkulak** concerned an express provision relating to payment of a discretionary bonus contained in a written contract of employment.

In the Court of Appeal's view that meant that the provision "was necessarily to be read as intended to have some contractual content" and contrasted that with "a mere declaration of the employer's right to pay a bonus if he wishes, a right which he enjoys regardless of contract" (para 46 of **Horkulak**).

22. Ms Kight at para 7 of her skeleton argument referred me to the case of **Chequepoint (UK) Limited v Hussein Radwan [2000] 9 WLUK 164**. The Court of Appeal held that once the terms had been notified the employee became contractually entitled to the bonus until such time as the employer had given notice that the scheme had been changed or withdrawn. That again was a case where there was an express term in a written contract of employment providing that the employer might pay a bonus "at its absolute discretion".

### **Evidence – Findings of Fact**

23. I will first set out my findings of fact based on the evidence I heard and on the documents I read.

#### *Agreed facts*

24. The respondent makes and sells office furniture. The contracts it undertakes range from selling one piece of office furniture for a home office to refitting large offices. In addition to making its own furniture, it sells some furniture manufactured by others. It makes a bigger profit on the furniture it manufactures itself. The Scheme therefore provides for a higher bonus where the sales consists of higher proportion of sales of respondent manufactured furniture (set out in the Bonus Matrix at p.82).

25. It was agreed that the respondent employed the claimant as a Business Development Manager from 8 January 2018. The claimant resigned on 22 February 2019. Her employment ended on 15 March 2019.

26. It was agreed that in the year 2018-2019 the respondent operated a bonus scheme. The Scheme year ran from July 2018 to June 2019. It was divided into quarters. The claimant therefore left just before the end of the third quarter of the bonus year. There is no dispute that the bonus was potentially payable each quarter. It was also agreed that it was linked to a target which was derived from the annual sales target set by the respondent for the claimant which was then divided equally between each quarter. It was agreed that the claimant was set a target of £750,000 in invoiced sales for the bonus year 2018-19. This was broken down into quarterly targets of £187,500.

27. The central factual dispute was what the Scheme terms were. There was nothing in the claimant's contract of employment or offer letter setting out the terms of the Scheme. The only reference to "remuneration" in the Contract of Employment (pp.59-71) is to the claimant's "basic rate of pay" (clause 7 on p.60). The offer letter dated 22 November 2017 (p.57-58) refers to basic pay and to the right to paid overtime (clause (a) on p.57). Neither document refers to a bonus or to the Scheme.

28. It was agreed, however, that there was a contractual bonus scheme and that the Scheme terms were discussed at the initial interview between the claimant, Mr

Stoney and Cark Munsch (Corporate Sales Director). Aspects of it were also discussed in a subsequent exchange of emails on 25-27 October 2017 (pp.30-31). I return to the evidence about the Scheme terms below. First, it is convenient to deal with the claimant's performance in the bonus year 2018-19.

*The claimant's performance in the bonus year 2018-19*

29. It was not disputed that the claimant failed to meet the targets in quarters 1 and 2. Her invoiced sales for those quarters were £84,297 (quarter 1) and £66,066 (quarter 2). That obviously means that she did not meet the year to date annual target for those first two quarters (£187,500 at the end of quarter 1 and £375,00 by the end of quarter 2).

30. It was also not disputed that the claimant did meet the "quarterly target" for quarter 3. Her invoiced sales in that quarter were in excess of £300,000 against a pro-rata target for the quarter of £187,500.

31. There was an apparent discrepancy in the documents about the exact amount of sales made by the claimant in quarter 3. In the bundle there were three documents which set out the relevant figures at different dates. Taking them in chronological order, the summary at 4 March 2019 (page 46) showed "actual/forecast" for quarter 3 of £385,603. The table for 14 March 2019 (pages 83-86) showed a "quarter 3 invoiced" figure of £330,603. Finally, the summary sheet dated 4 April 2019 (page 80) showed a "quarter 3 invoiced" of £342,764.

32. Miss Kight suggested that at best the figures were unreliable because of the discrepancies between the various sheets. At worst, she suggested that the respondent might have manipulated the quarter 3 figures by attributing some of the claimant's invoiced sales to other sales staff in order to reduce the sales attributable to her, with a knock-on effect on any bonus payable.

33. I heard evidence from Mr Stoney about the discrepancies. He said that there were two reasons for the discrepancies. The figure used for the 4 March document (page 46) included both actual and forecast sales. He gave unchallenged evidence that forecast sales included not only sales invoiced having been installed at the customer's premises, but also what were referred to as "prospects" and "definites". "Prospects" were instances where a quote had been given to a customer but there was no certainty that it would result in a sale. That could be, for example, because the respondent was just one of many firms who had given a quote to that customer and another firm might be chosen to provide the furniture. "Definites" were those cases where the respondent had been informed that they had won a tender or contract but had not as yet installed the goods and invoiced for them. Mr Stoney explained that even in those cases, a customer could sometimes change their mind and so they were not regarded as "actual" sales. Miss Kight, for the claimant, did not seek to challenge this evidence, and I accept it and Mr Stoney's explanation of the difference between "actual" and "forecast" sales. That does not explain the discrepancy between the 14 March and the 14 April documents, however, but Mr Stoney's evidence was that that discrepancy was down to some invoices coming in after the earlier sheet had been prepared. Again, I accept that explanation.

34. Ultimately, the discussion was academic because for the claimant, Miss Kight accepted that the “high water mark” of her client’s earning for the year was the £535,967 shown at page 46. If the respondent is correct that in order to receive a quarterly bonus the claimant needed to have achieved her annual target year to date then the claimant's claim must fail because she had not done so. If, on the other hand, the claimant is correct that the Scheme only required quarterly targets to be met (including by “carry back”) then even on the lowest figure of £330,603, the claimant exceeded two quarters’ target when that quarter 3 total is added to the actual sales in quarter 2 (£66,066 + £330,603 = £396,669 meeting the cumulative target for the two quarters of £375,000). On the claimant’s case that would entitle her to two quarters’ bonus.

*The parties’ submissions about how the Scheme targets worked*

35. Before turning to the evidence and my findings of fact on this issue, it is helpful to summarise how the claimant and then the respondent submitted that the bonus scheme worked.

36. The claimant’s case as set out by Ms Kight in her skeleton argument (para 12.3) was that the Scheme was a quarterly bonus scheme. If the claimant met the target for a particular quarter, she was entitled to be paid a bonus for that quarter. Applying that to the claimant’s actual performance in the bonus year 2018-19, Ms Kight submitted that because the claimant had earned more than the £187,500 target for quarter 3, she was entitled to a bonus of £2500 for that quarter, irrespective of her performance in previous quarters.

37. Ms Kight further submitted that the Scheme was a “catch up” scheme. If the claimant had failed to meet the target for a particular quarter, she could “catch up” by earning enough in a later quarter to meet the shortfall in the target for the earlier quarter. Applying that to her performance in the bonus year 2018-19, Miss Kight submitted that because the claimant had earned £385,608 in quarter 3, she had met the £187,500 target for that quarter and there was £198,108 “left over” which could be “carried back” to quarter 2. Adding that £198,108 to the £66,066 actually earned in quarter 2 gave a total for quarter 2 of £264,174. That meant the claimant had also met the £187,500 target for quarter 2 and was also entitled to be paid a bonus for that quarter.

38. The respondent says that the bonus scheme is an annual bonus scheme paid quarterly. In order to qualify for payment in any particular quarter, an employee has to be on track to meet their annual target at the end of that quarter. Applying that to the claimant’s case, the respondent says that in order to be paid a bonus for quarter 3, the claimant would have had to have met the cumulative target for quarters 1, 2 and 3, i.e. £562,500. Even on the claimant’s “best case” figure of £535,967 (see para 34 above) the claimant had not met that cumulative target when she left. She was therefore not entitled to any bonus payment.

39. The respondent agreed that the Scheme was a “catch up” scheme but disagreed with the claimant’s submission about what that meant. It agreed that if the claimant earned more than the target for a particular quarter, she could “carry back” sales in excess of that quarter’s target and apply them to meet previous quarter



targets. However, in order to trigger entitlement to any bonus, the “carrying back” had to mean the claimant had met her cumulative target for the year to date by the end of the current quarter. Applying that to the claimant’s case, the respondent submitted that on the claimant’s “best case” figure of £535,967 (see para 34 above) the claimant’s total sales by the end of quarter 3 did not meet the cumulative target at that point which was £562,500. She was therefore not entitled to any bonus payment.

*The initial interview*

40. It was agreed that the Scheme terms were discussed at the initial interview between the claimant, Mr Stoney and Carl Munsch (Corporate Sales Director).

41. Somewhat surprisingly given its significance, the claimant did not deal with what was said at the interview in her witness statement. When asked in cross examination by Mr Coward what she was told at the interview, the claimant’s evidence was that the issue of bonus was discussed at length at the interview. She said that there was a discussion about quarterly targets and an explanation that if a target was missed in one quarter she could “catch up” in subsequent quarters. She said that it was explained to her that if, for example, she missed the target in quarter 3 she could catch up in quarter 4. She denied that bonus was only payable if the annual cumulative target for sales was met. She said that if the quarter target was hit then the bonus was paid.

42. The claimant suggested in cross examination evidence that her offer letter (p.57-58) referred to bonus being payable. That was not consistent with what she had said in her witness statement which correctly noted that the offer letter did not refer to bonus being payable.

43. Mr Stoney gave evidence about the interview in his witness statement (para 5). His evidence was that he and Mr Munsch fully explained how the scheme worked to the claimant at the interview. He said he explained how the target was set through collaboration and the bonus scheme matrix. He confirmed that he’d advised that if the first quarter target was missed no bonus would be paid but there was an opportunity to “catch up” at the completion of the second quarter. If the claimant had a successful second quarter and by completion of the second quarter she was cumulatively on target, she would receive bonus payments for the first and second quarters. His evidence was that the claimant accepted this and seem to understand explanation of the Scheme. He said that she did not ask any questions at interview as to how the Scheme operated in detail. Mr Stoney’s evidence was that that meeting lasting for an hour and a half.

44. In his cross-examination evidence Mr Stoney denied mentioning a quarterly bonus. He was adamant that the Scheme is an annual scheme but split quarterly. He said that if it was genuinely a quarterly scheme he would have described it differently. Miss Kight put it to Mr Stoney that the claimant’s evidence was that he had not explained at the interview that the bonus scheme worked on an annual basis. Mr Stoney denied that and said that the Scheme was clearly explained to the claimant at the interview.

*The post-interview emails and other documentation*

45. There was very limited documentary evidence referring to the Scheme or its terms. There were no notes of that first interview. However, there was an email exchange between the claimant and Mr Stoney on 25-27 October 2017 (pp.30-31 and duplicated at pp.53-55). These are emails from the claimant to Mr Stoney asking for clarification on matters such as pay, working hours and holidays. The third bullet point refers to the bonus. The claimant said that she had not received the “bonus matrix” (which set out how much bonus could be achieved for various levels of sales) and goes on to say “at our meeting the first year target was discussed at £800K with 70% accounts and 30% new business (not a deal breaker) just clarifying expectations”. The relevant parts of Mr Stoney’s response (marked in red on the claimant’s email) are:

“we are about to change our financial year (New = July - June, OLD = Jan-Dec). Everybody’s target from January 2018 will be for six months (invoiced sales), following by a 12 month target from 1st July 2018 to June 2019. Your target for six months will be discussed and agreed with you when you join us and will be based on the accounts you will be handed and current activity/knowledge of those accounts. The way we will deal with the six month target is simple - we will look at a full year target (i.e. Jan to December) and pro rata this to 6 months. I fully expect your full year target from July 2018 would be £1.5million based on the accounts handed over and your ability to self-generate. The split is likely to be 50%/50% BUT nobody can predict the future – therefore this split may change!!!! On this basis your target for six months from January 2018 is likely to be around £600K (as the first half year is traditionally quieter than the second half) – your bonus ‘pool’ (paid quarterly if on target) will be based on the full year target of £1.5million – please see the bonus matrix attached which shows/demonstrates the bonus that can be achieved based on these figures. – Any questions – please contact either Carl or myself.”

46. Beyond that, there is no mention in the email exchange of how the Scheme targets work.

47. In his cross-examination evidence Mr Stoney suggested that the wording of that response to the claimant’s query supported his version of how the Scheme worked. In particular, he said that reference to the bonus pool being quarterly “if on target” was only consistent with the Scheme based on a cumulative annual target. If the bonus had been paid on meeting the quarterly target, he said he would not have used “on target” but would have said something like “if you have met the quarterly target”.

48. The bonus matrix (p.56 for 2017-18 with the version for 2018-19 at p.82) is in the form of a table with a left-hand column of “Annual Targets” and then a number of columns setting out how much bonus will be earned if that target is met under 4 “Bonus bands”. The difference between the Bonus Bands is the proportion of the respondent’s own products sold, with a higher proportion of those as a part of total sales generating a higher bonus. For each Bonus Band there are two columns, one

setting out a “Quarterly Bonus” under that band and the other an “Annual Bonus” under that band.

49. Miss Kight pointed out that the bonus matrix is headed “Quarterly Input Bonus Scheme”; that the sub-heading says it is “Based on reaching a quarterly target of invoiced sales”. She pointed out that, as I’ve noted, the first column of each bonus band relates to a “quarterly bonus”. As I’ve noted, however, the only target referred to in that bonus matrix is the “Annual Target” in the left-hand column.

50. The only other reference to the interview discussions are in the emails between the claimant and employees of the respondent on 8-9 April 2019 (pp.73-79). The majority of the exchanges are between the claimant and Ms Wood-Wright (an HR Business Partner at the respondent). In the final email on the 9 April (p.73) the claimant writes that “I had a three-hour interview with Jon and Carl, commission was discussed in depth”.

51. The email discussion focuses on whether the bonus was contractual or discretionary rather than on how the Scheme targets worked. Those emails also come after the claimant had resigned. They reflect the position of the parties after the event and so I need to treat them with caution when it comes to their value in deciding what was agreed about the Scheme terms some 18 months earlier.

52. Even bearing that in mind, however, I note that in the claimant’s email to Margaret Sheppard of the respondent (p.77) on 8 April 2019 at 15:51 (before the matter was passed to Ms Wood-Wright) the claimant writes that “according to the KPI form showing everyone’s figures I was 200% of target for Q3 and just before leaving 75% of the year’s target - based on that I believe I am owed commission”. That seems to me to support the claimant’s evidence that she genuinely believed when she left the respondent that she had met the year to date target for quarter 3. On the other hand, her reference both to the quarterly target “and” the annual year to date position provides some support for the respondent’s case that the claimant knew her bonus was based on year to date cumulative performance as well as performance in a particular quarter.

53. Ms Wood-Wright on 8 April 2019 at 16:12 (pp.76-77) says that she has “reviewed internally alongside [Mr Stoney]” and it was:

“concluded that no commission would apply on the following basis:

- Commission is not contractual; it is discretionary. Where commission/bonuses are discretionary, it is common practice that employers will not award this when someone is working out their notice; and
- In addition, you were not in employment at the end of Q3, which is when commission and bonuses are applied”.

54. I note that the respondent does not in that email suggest that the claimant is not entitled to a bonus because her target has not been met. Instead, as I’ve mentioned above, the focus is on whether the bonus was contractual or discretionary. This is despite Mr Stoney in his witness statement (para 13) saying

that when he discussed the claimant's email with Ms Wood-Wright "we considered that [the claimant] was not entitled to a bonus payment as she had not reached her cumulative target for quarters 1, 2 and 3". Mr Stoney's witness statement does not explain why Ms Wood-Wright did not include that point in the email to the claimant quoted above.

*Findings of fact about how the Scheme targets worked*

55. I need to decide as a question of fact what the terms of the Scheme were. The test is objective - evidence of the subjective understanding of the parties is admissible in so far as it tends to show, objectively, what the agreed terms were. Evidence of subsequent conduct is admissible on the same basis.

56. Miss Kight, when cross examining Mr Stoney, suggested to him that the Scheme as the respondent explained it was not fair and could provide disincentives for employees to work harder. As an illustration, she pointed out that an employee who earned a quarter's bonus by working hard and achieving their target only in the first quarter of the year would earn more bonus over the year than a colleague who over the course of the year generated significantly more sales for the respondent but fell short of the year to date annual target at each quarter's end. Mr Stoney accepted that that was the effect of the Scheme but did not accept that that was unfair. He said that from his experience in the sales industry that was the kind of scheme that was used and its aim was to incentivise sales staff throughout the year. In reaching my decision I have reminded myself that the question for me is not whether the bonus scheme in this case was fair or the one I might have chosen to implement. The question is what the terms of the Scheme were. The rationality of the Scheme's terms would only be relevant, it seems to me, if their effect in practice was so irrational (given the stated aim to incentivise employees) as to cast doubt on the plausibility of the respondent having agreed to those terms, I do not accept the Scheme as explained by Mr Stoney the respondent was so irrational as to render it implausible.

57. Turning to the relative credibility of the claimant and Mr Stoney, Mr Coward submitted that the claimant's credibility was undermined by the fact that up until the Tribunal hearing she had maintained that she was entitled to three quarters' bonus rather than only to payment of a bonus for quarter 3. As I've noted at para 9 above, the claimant at the start of the hearing said that she had misunderstood that the figure of 95% for year to date target (used in the far right column but one of the summary table at page 46) meant that she had achieved 95% of her target for the year, which meant that she was above the 75% target for the year to date which would entitle her to payment of the bonus for quarters 1, 2 and 3. The claimant said that it was only when she spoke to Miss Kight on the morning of the hearing that she realised that that was not correct and the 95% meant that she had not met the target for the year to date at the end of quarter 3.

58. Miss Kight submitted that there had been a genuine error and that the claimant had never had to think about claiming only for quarter 3 because she had been under the mistaken impression that she had earned enough in sales to be entitled to bonus for quarters 1, 2 and 3. Mr Coward suggested that the claimant was disingenuous when saying that she had made a genuine mistake about this. I prefer

Miss Kight's submissions on this point. The claimant's email to Margaret Sheppard on 8 April 2019 supports her evidence that she genuinely thought that she had met the target for the year to date. The claimant could be criticised for not realising her mistake sooner but that does not seem to me to impact on her credibility as a witness. I do accept, however, that there were some inconsistencies in the way the claimant had put her case. In particular, both in her email exchange with Ms Wood-Wright and in cross-examination she suggested that her offer letter referred to her right to a bonus, though this was not the case.

59. As I have noted above, there were also some inconsistencies in Mr Stoney's evidence. For example, it is not clear why he did not tell Ms Wood-Wright in April 2019 to tell the claimant that the respondent to reject the claimant's request for a bonus on the basis she had not met the cumulative target for the year, rather than only for the reasons given in the email on 9 April 2019.

60. As I have noted, the claimant did not in her evidence in chief (in the form of her witness statement) deal with what was discussed at the initial interview. She did deal with that in cross examination but on balance I preferred the oral evidence of Mr Stoney about what was said at that interview.

61. Turning to the documents in this case, I do accept the point made by Mr Stoney in his evidence about his use of "on target" in the email of 27 October 2017 (p.54) and also note that the email does refer specifically to the bonus "pool" being "paid quarterly". That seems to me to be more consistent with Mr Stoney's version of the Scheme as an annualised scheme but payable quarterly on a year to date basis rather than a quarterly scheme where bonus is paid per quarter regardless of year to date achievement. I also note that the discussion of targets in that email is in terms of an "annual target" or "6 monthly target" which is then apportioned rather than of quarterly targets. The same, it seems to me, is true of the Bonus Matrix (p.82). Although I accept the point that it refers to a "Quarterly input bonus" it seems to me to be predicated on an annual target potentially resulting in a quarterly bonus rather than a bonus paid exclusively based on a quarterly target.

62. Taking all that evidence in the round I prefer the evidence of Mr Stoney to that of the claimant's and find as a fact that the Scheme terms agreed between the claimant and the respondent did require that the claimant meet the year to date annual target at the end of a quarter in order to receive payment of a bonus for that particular quarter. That meant that to be entitled to any bonus for the year 2018-19 at the end of quarter 3 she would need to have met the quarter 3 cumulative target of £562,500.

*Findings of fact about the effect of notice on bonus entitlement*

63. The other disputed Scheme terms related to the impact on any entitlement to bonus if an employee had given notice or where their employment had terminated before the bonus was payable. The respondent in its email of April 9 gave the fact that the claimant had given notice of resignation and/or was not employed at the date when the quarter 3 bonus would be paid as a reason why she was not entitled to a bonus. In its Grounds of Resistance (at para 10.3 on p.24) the respondent states

that “Employees not in employment when the quarter ends are not entitled to bonus payments”.

64. Mr Coward submitted that the claimant's case was that she accepted that no bonus was payable during a notice period. He noted at paragraph 2 of the Grounds of Complaint attached to her Claim Form (page 13) that she said “..although no commission would be paid within a period of notice to terminate employment”. Miss Kight submitted that the claimant’s evidence at paragraph 9 of her witness statement clarified her position on this. In that paragraph, the claimant says that the respondent asserted that it was “common practice” that an employee would not be paid a bonus when working their notice. “However, there was no reference to such a rule or practice earlier and no documentary evidence was produced in support”.

65. In her oral evidence at the Tribunal, the claimant also clarified that what she meant was that she would not expect a bonus to be paid if an employee was under notice of dismissal, for instance due to misconduct. Her evidence was that she did not expect that rule to apply where someone was working their notice having resigned, which was her position. She gave evidence, which I accept, that with a previous employer in the same industry she had been paid her bonus pro rata up to the date of termination of employment.

66. I remind myself that the question I need to decide is what, as a matter of fact, the parties agreed were the terms of the Scheme at the initial interview. Mr Stoney did not in his evidence suggest that the claimant had been told at her interview that she would lose an entitlement to a bonus if she was working her notice or had left during a quarter. There was nothing in writing suggesting that was a term of the Scheme.

67. I find that the parties had not agreed that it was a term of the Scheme that an employee lost any bonus they had earned if they gave notice. I also find that there was no term in the Scheme which disentitled an employee to any bonus they had earned if their employment ended before the date when the bonus would ordinarily have been paid.

#### *Findings of fact - discretionary bonus payments*

68. For the claimant, Miss Kight also submitted that the respondent retained a discretion to pay a bonus even if an employee had not met the relevant target. In terms of evidence, Mr Stoney in cross examination confirmed that the respondent did retain a discretion to pay a bonus even if a target had not been met. He could not give any examples, but said that the process was that a sales employee’s manager could recommend to Mr Stoney that an employee should receive some or all of their bonus even if the target had not been met.

#### **Discussion and Conclusions**

69. Below I apply my findings of fact to the issues in this case. I deal first with the Scheme terms.

*What targets did the claimant have to meet to trigger an entitlement to a bonus payment in each quarter of the bonus year?*

70. I have made a finding of fact that the express Scheme terms agreed at her interview required the claimant to meet her cumulative annual target for the year to date in order to be paid a bonus. Although she had exceeded the sales of £187,500 attributable to quarter 3 of bonus year 2018-19, she would have had to have accumulated sales of £562,500 for the year to date before she was contractually entitled to any bonus at the end of quarter 3.

*Did an employee forfeit the entitlement to a bonus payment (either in respect of the quarter when notice was given or for that and previous quarters) if they gave notice of termination of employment?*

71. No. I have made a finding of fact that the express Scheme terms did not include such a clause. Had the claimant been entitled to a bonus she would not have forfeited it by giving notice.

72. For the sake of completeness I add that there was no suggestion by the respondent that it was necessary to imply such a term into the Scheme.

*Did an employee forfeit the entitlement to a bonus payment (either in respect of the quarter during which employment ended or for that and previous quarters) if their employment ended before the pay date for payment of a bonus in that quarter?*

73. No. I have made a finding of fact that the express Scheme terms did not include such a clause. Had the claimant been entitled to a bonus she would not have forfeited it by her employment coming to an end before the pay date.

74. For the sake of completeness I add that there was no suggestion by the respondent that it was necessary to imply such a term into the Scheme.

*Did the Scheme include a discretion for the respondent to make payments even if the Scheme targets had not been met (“the Residual Discretion”) and, if so, did that discretion have to be exercised rationally and in good faith.*

75. In her skeleton argument (para 11) Miss Kight referred to the case of **Horkulak**. I accept that case is authority for the proposition that an employer is obliged to exercise a contractual discretion rationally and in good faith. However, it seems to me that **Horkulak** applies where a contract contains a provision giving an employer a discretion on whether and what bonus to pay. The Court of Appeal’s view was that the provision in **Horkulak** “was necessarily to be read as intended to have some contractual content” and contrasted that with “a mere declaration of the employer’s right to pay a bonus if he wishes, a right which he enjoys regardless of contract.”

76. In this case there was no express contractual provision giving the employer a discretion to pay bonus. There is nothing on to which the **Horkulak** implied term can “bite”. Mr Stoney did accept that it might be that the respondent would exercise a discretion to pay a bonus even if the Scheme terms had not been met but that, it

seems to me, would be a case of the employer exercising the right to pay a bonus “if it wishes...regardless of contract.”

77. In case I have misunderstood Miss Kight's submissions I have also considered whether there was an implied term that the respondent retained a contractual discretion to pay a bonus outside the terms of the Scheme. It does not seem to me that any of the requirements for implying such a term apply. Given the express Scheme terms there was no requirement to imply a term out of necessity; there was no evidence that it was custom and practice to make such payments (Mr Stoney's evidence was that he did not recall a discretion being exercised in that way); the parties had not operated the contract that way; and the term was not so obvious that the officious bystander test is met.

*Did the claimant meet the terms of the Scheme, entitling her to be paid a bonus in some or all of the quarters starting in July 2018 and ending on 30 March 2019?*

78. No. Although she could “carry back” sales to previous quarters, it is not disputed that the claimant had not met the annual sales target year to date at the end of quarter 3. In those circumstances, I find that she was not entitled to receive a bonus under the terms of the Scheme.

*Did the respondent fail to exercise the Residual Discretion rationally and in good faith?*

79. No. I have decided that the Scheme did not contain a Residual Discretion which had to be exercised rationally and in good faith. However, in case I am wrong about that, I have gone on to consider the position if the **Horkulak** implied term of rationality and good faith applied to the respondent's “decision” (by omission) not to exercise its discretion to pay the claimant a bonus. Miss Kight submitted that at the very least the claimant should have been paid a bonus for quarter 3 on the basis that she had far exceeded the target for that specific quarter. She went further and suggested that the reasonable course for an employer to take would be to pay for two quarters' worth of bonus because by the time she had left the respondent's employment the claimant had met 50% of the annual year to date target.

80. For the respondent, Mr Coward submitted that it was in no way irrational or an unreasonable exercise of discretion for the respondent to refuse to pay the claimant anything. He submitted that the purpose of a bonus scheme is to incentivise employees and to encourage loyalty to an employer. In this case, those rationales for exercising a discretion in favour of paying a bonus were not in play because the claimant had already given notice and was therefore leaving the company. It was in no way irrational to decide that those aims would not be met and refuse to pay a bonus.

81. On balance, I prefer Mr Coward's submissions. I accept that on one side it could seem unfair that the claimant, having generated over £500,000 worth of sales for the year 2018/2019 would leave the company without any bonus recognising that work. However, I remind myself that the question I am deciding is not whether the respondent acted “fairly” but merely whether its failure to exercise a discretion to pay the claimant some bonus was irrational. I accept that other employers might have



decided differently. However I do not accept that no reasonable employer would refuse to pay the claimant a bonus when she was leaving the company. The respondent did not act irrationally when it failed to pay her a bonus.

*If so, did that entitle the claimant to compensation for its failure to do so?*

82. This question does not arise because of my findings above.

#### *Conclusions*

83. In light of my findings above, the claimant's claims of unlawful deductions from wages and/or breach of contract fail.

84. It goes without saying that these Tribunal proceedings might well have been avoided had the parties (and in particular the respondent) captured the Scheme terms in writing.

85. Finally, if I am wrong about the above matters and the claimant was indeed entitled to a bonus payment, I record that it was accepted by both parties that the amount payable to the claimant would have been £2,500 per quarter.

Employment Judge McDonald

Date: 28 November 2019

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

2 December 2019

FOR THE TRIBUNAL OFFICE

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