EMPLOYMENT TRIBUNALS

Claimant: **Mr N Iles**

Respondent: **Unilever UK Central Resources Limited**

Heard at: London South On: 01 and 02 August 2019

Before: Employment Judge freer

Representation
Claimant: Mr J Mitchell, Counsel
Respondent: Ms Y Genn, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's claim of breach of contract is successful, but no remedy arises and the claim of an unauthorised deduction from wages is unsuccessful.

REASONS

1. By a claim presented to the employment tribunals on 13 June 2018 the Claimant claimed breach of contract and an unauthorised deduction from wages.

2. The Respondent resists the claims.

3. The Claimant gave evidence on his own behalf.

4. The Respondent gave evidence through Ms Morag Lynagh, UK Employment Excellence Director and Ms Hannah King, Regional HR Business Partner.

5. The Tribunal was presented with a bundle comprising 177 pages and additional documents during the course of the hearing as agreed by the Tribunal.

The Issues

6. This is a claim by the Claimant for a bonus payment that he argues was payable to him upon his resignation from employment with the Respondent. He claims that payment either as damages for breach of contract or as a an unauthorised deduction from wages properly payable to him.

7. A list of issues was agreed between the parties and is in the tribunal bundle at page 39.

A brief statement of the relevant law

8. The right not to suffer an unauthorised deduction from wages is contained in section 13 of the Employment Rights Act 1996. In particular:

9. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of a worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

10. Section 13(3) provides that 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.

11. Section 27 sets out what amounts to wages and confirms this includes a bonus payment whether payable under a contract or otherwise.

12. What amounts to excepted deductions are set out in section 14.

13. Sections 1 and 4 of the Employment Rights Act 1996 set out provisions relating to a statement of initial employment particulars and a statement of any changes.

14. The construction of a contract is governed by common law and the Tribunal received submissions from the parties on authorities relevant to the circumstances, which have been fully taken into account together with other cases that set out well established principles.

Facts and associated conclusions

15. The Claimant was employed by the Respondent from 27 September 1999.

16. He was employed as a graduate recruit, then employed in a Work Level 2 ("WL2") position. He signed a new statement of terms and conditions of employment ("the contract") on 14 May 2010 in the role as User Experience Director commencing on 1 May 2010. That role was at Work Level 3 ("WL3") within the Respondent's structure.

17. The contract in clause 1 under the heading "Remuneration" refers to basic salary and then under the heading "Variable pay\bonus" states:

> "You will be eligible to participate in the Company's Variable Pay Scheme. The payment of Variable Pay is based on the performance of both the business and the individual. Growth targets for both volume and profit are set for the relevant business unit at the start of the year. The extent to which the business achieves or exceeds those targets determines the bonus pool that is available for distribution to individuals within the business.
>
> The amount of variable pay the manager, as an individual, receives is based on individual performance, i.e. what individual performance targets have been met, how they have been achieved and what the contribution to the team in relation to peers has been. In assessing individual performance, judgement will be exercised.
>
> Variable pay is an integral part of a manager's reward package and will deliver a bonus of between 0 - 60% of base pay dependent upon performance of both the business and the individual".

18. Under the heading of remuneration there is also a section on "Variable Pay in Shares" which states:

> "You may choose to participate in the Variable Pay in Shares scheme whereby you can convert a portion of your variable pay into shares. If you do exercise this choice Unilever will match them share for share on the condition that you stay with Unilever and hold onto the shares three years".

19. Immediately underneath that paragraph the contract provides:

> "The Company may change the terms of the scheme or any part of it or withdraw it completely at any time".

20. The Tribunal concludes that on a natural reading of the contract that paragraph naturally reads to be part of the 'Variable Pay in Shares' section and does not apply to the 'Variable pay/bonus section'. The paragraph refers to a singular "scheme" and is under a separate section with a title in bold type.

21. Clause 22 of the contract addresses the “Entire Agreement” and confirms that the terms in the document supersede all prior agreements and constitute the entire agreement between the Claimant and the Respondent.

22. Clause 24 under the title “Changes to these terms” provides: "The Company reserves the right at its sole discretion to make changes to those terms and conditions of employment. You'll be given at least one month's notice of any change". It was the evidence on behalf of the Respondent the during the entire process to which this claim relates the Respondent did not rely upon that clause in respect of its treatment of the Claimant and its consideration of the Claimant's terms and conditions, in particular payment under the ‘Variable pay/bonus’ section of the contract.

23. The Claimant’s evidence was that when he entered into the May 2010 contract he asked a Director for information on where he may find the rules relating to the variable pay scheme and the Claimant was referred to the Unilever HR Standard on Annual Bonus which is a page 140 of the bundle.

24. That HR Standard was effective from 1 January 2010 and had a new review date of 1 April 2011. Paragraph 2 of the Standard applies to: “All eligible employees at WL2 and above” and although it states: "it includes all regular permanent, full-time and approved "reduced hour" employees who are not eligible for a sales incentive award or another incentive plan, unless local legislation requires differently", it was not argued by either party that the HR Standard did not apply to the Claimant because of the terms of that paragraph.

25. The document sets out ‘standard descriptions’ relating to bonus opportunity, bonus payout, business performance and individual performance.

26. Under paragraph 3.4 on ‘individual performance’ it states: "The payment of a bonus remains discretionary and is not an automatic entitlement. There may be cases where despite the business resource generating a payout, an employee may be paid no annual bonus at all if his/her individual performance is deemed modest or poor".

27. Under the section entitled “Additional Information” and paragraph 5.8 addressing ‘Resignation’ it states: "Employees who resign and leave the payroll before the end of the calendar year: no annual bonus award unless local legislation requires differently. Employees who leave the payroll after the end of the calendar year: annual bonus can still be paid”.

28. The Tribunal has been taken to correspondence received by the Claimant notifying him of changes to his salary and location allowance, those documents relate to 2012, 2015 and 2016.

29. By an email dated 20 April 2016 the Claimant wrote to Ms King, Global HR Business Partner stating: "When the original decision to move bonus to be paid

in March was made, there was a statement that those who were pushed into different tax brackets will be compensated - I believe this impacts me, therefore could you confirm when this will be done as it was not done in this month's pay - not sure if it might be done in May?" The subject matter to that email is 'My bonus/salary'.

30. An e-mail dated 26 September 2016 from Ms King to the Claimant and others provides proposed details for performance ratings for 2016 and states "Note the requirement to perfectly balance to 3.0 has been removed this year. However, any deviation away from this will impact our ability to reward people correctly so we should still aim for a normal distribution of ratings whenever possible".

31. There is an update to the HR Standard on Annual Bonus effective from 1 January 2015 and under paragraph 3.4 relating to individual performance the paragraph relating to a payment of a bonus remaining discretionary and not being an automatic entitlement is repeated. Paragraph 5.9 addressing 'Resignation' is in the same terms as the earlier Standard.

32. There is a further update to the HR Standard on Annual Bonus effective from 1 January 2017. The paragraph relating to the bonus remaining discretionary has the additional words: "The Company reserves the right to amend or change this bonus standard at any time". Paragraph 5.8 dealing with 'Resignation' is also changed and cites three categories that may affect "payment of any annual bonus". The part referable to the Claimant is: "If an individual resigns and their employment ends after the end of the relevant calendar year but before the date on which any annual bonuses due to be paid (typically March payroll): no annual bonus will be paid", save for two exceptions that did not apply to the Claimant.

33. On 07 June 2017 Mr Peter Newhouse, EVP Global Head of Reward, sent a global email relating to the annual bonus plan under the subject matter 'Annual Global Bonus' and stated: "For 2017 we are making some changes to our Global Annual Bonus Standard* to further support our C4G ambition". The asterix refers to an addendum at the foot of the email that states: "This standard applies to all eligible employees at WL2 and above… Please review the Global Annual Bonus Standard to understand full eligibility". Under the description of "So, what changes?" it states: "Eligibility criteria for employees who resign - to be eligible to for bonus people must remain in employment with Unilever on the bonus payment date".

34. In an email dated 22 June 2017 from Mr Placid Jover, VP HR UK and Ireland, entitled 'Annual Global Bonus - UK Supplement' and addressed to 'UK&I colleagues' and received by the Claimant, more clarity was provided in respect of the email by Mr Newhouse. Under the heading 'UK Specifics' it states: "The UK will follow the global route for employees who resign and leave Unilever. In order to be eligible for an annual bonus for 2017, you must begin your employment on or before 1st October 2017 and must still be an employee on

the bonus payment date which we expect to be Wednesday 21st March 2018. Any employee who resigns and leaves before 21st March 2018 will not be eligible for a 2017 bonus. There will be no exceptions to this rule". With that email was attached the HR Annual Bonus Standard, which is been referred to above.

35. On 20 October 2017 the Claimant resigned on three months' notice from his post. His evidence confirmed that he resigned on this date in order to take advantage of receiving a bonus payment on the basis he would be in employment beyond January 2018.

36. By a letter to the Claimant dated 27 November 2017 from an HR Advisor as authorised by Liam Donoghue, under the heading 'Annual Bonus' it states: "Under the rules of the Annual Bonus scheme you are not eligible for any further bonus award".

37. In an email to Mr Donoghue, HR Advisor, on 18 December the Claimant states: "The question is can you confirm why the letter states I am not eligible for a bonus 'under the rules of the scheme' - as far as I can see I am eligible under the rules i.e. working past 31st December of the current year and have contributed fully to the business during my employment in the year?"

38. The Claimant was informed that the rules changed the beginning of the year to which the Claimant states: "When was this communicated -I don't see any change that I'm aware of – I would have expected such a material change to be properly communicated and appropriate consultation as it has a fundamental impact?"

39. In a further e-mail on that date the Claimant states: "As discussed I do not believe any consultation occurred on these changes, which is somewhat surprising as in my case the eligibility is a contractual term and removal through this change would mean that a change to my T&Cs has come to light - my contract as provided from 2010 which was signed in light of the bonus that was prevailing at the time makes no provision for changes to the scheme within its rules. You also confirmed that more recent new style WL2 and greater contracts do include a specific term that allows the company to make changes to the rules of the bonus scheme as it feels appropriate without affecting the T&Cs".

40. In a meeting between the Claimant and Ms King on 5 January 2018, recorded by the Claimant, there is an exchange as follows: Ms King: "Our view is that we are not changing the terms and conditions your contract, with changing the scheme rules and this isn't the first time that the scheme rules have changed since 2010. You're eligible, the eligibility to participate in the scheme is still there, the eligibility to pay out is what's changed and that's a scheme rule not a contractual entitlement", to which the Claimant replies: "Yes but let's just be clear the scheme rules are not referenced within my contract so if you rely upon

the scheme rules as your position which is obviously what you are trying to do there or what Morag is trying to do, I think there is two ways you can take that to be quite honest with you i.e. they are an implicit part of my terms and conditions in that context which I don't agree with by the way, in many ways, or they are not and that's the other argument so the change that Unilever has made to other contracts since I signed mine is obviously to eliminate the risk that we are now talking about in terms of somebody making a claim in relation to terms and conditions change because the scheme has changed and if you look at what it says in the context of my contract it absolutely line one sentence one in variable pay bonus is says you will be eligible to participate in the company's variable pay scheme and then goes on to define what that is and it makes no exclusions around eligibility in that context. So changing the eligibility which is a fundamental point of my grievance is a change to the terms and conditions".

41. It was the evidence of the Respondent that there was only one reward scheme, which was initially called 'Variable Pay Scheme' and in 2010 changed title to 'Annual Bonus'. The Tribunal has been referred to a 'Variable Pay Questions and Answers' document which confirms an end of calendar year term and is dated around 2009. The Tribunal was also referred to a 'Building a Performance Culture' document dated May 2010 that refers to "Annual Bonus". The Tribunal was also referred to a PowerPoint presentation called "Reward in 2009 Variable Pay" that refers to variable pay, shows a full year payment award calculation for 2009, a 'VP in Action Illustration' and performance measures. The Claimant in his evidence suggested that there were multiple reward schemes, but the Tribunal seen no evidence of that and accepts the Respondent's evidence that there has always only been one reward scheme that has been called the 'Variable Pay Scheme' and then was changed into the title of 'Annual Bonus Scheme'.

42. It is accepted by the Respondent that at the time of the Claimant's 2017 bonus payment had he remained in employment, neither the business performance nor the Claimant's own performance were such that no bonus would be payable.

43. With regard to the Claimant's performance rating for 2017, the Tribunal was taken to a transcript of a conversation between the Claimant and Jose Silva on 12 December 2017 (page 80 of the bundle) and an e-mail of the same date from HR Director Andy Waller to a number of individuals relating to 'IT W3 Talent Review' (page 83 of the bundle) with regard to the Claimant's rating and performance calibration. The Tribunal concludes that it was not guaranteed at that time that the Claimant would be given a 4 rating. The transcript is from a conversation covertly recorded by the Claimant and although he could direct the conversation knowing he was recording it, Mr Silva qualified his view of the Claimant scoring a 4 by saying: "I think". He also remarked that the Claimant's strong finish to the year was: "At least I would say the reason for a 4".

44. The term ‘calibration’ used by the Respondent was a generic term that addressed calibration between managers on what performance rating employees receive, as compared to ‘balancing’ which places that individual’s performance within a bell-curve distribution. The ‘balancing’ had been removed by 2017, but there was still the generic term ‘calibration’ when reviewing the individual performance ratings.

45. At the May 2017 Talent Pool consideration the Claimant is recorded as rated ‘backbone’ within a scale of ‘promotable’, ‘discover potential’, ‘backbone’, and ‘refresh’. On that basis a performance rating of three is more consistent with a talent pool rating of ‘backbone’, but it is possible that the Claimant could score a 4 under that category.

46. A computer screenshot of the Claimant performance reviews (page 98) refers to an end of year review rating of “3 (strong)” and also the Claimant's participation in the "Standard Bonus Plan". This screenshot was taken after the Claimant's termination of employment.

47. The Claimant suggested he was given a performance rating of 4 by Mr Silva in the conversation referred to above and the Company, on occasion, reconsiders the rating of those who have left employment in order to achieve a ratings balance. However, the Tribunal considers that the recording by the Claimant does not show that PR4 was guaranteed and that PR3 is consistent with the other documents of an assessment of ‘backbone’ in May 2017 and PR3 in the screenshot.

48. The Tribunal concludes on balance that had the Respondent paid the Claimant a bonus payment a PR3 would have been the correct rating to apply.

Conclusions

49. The Tribunal concludes that it was clearly an express term of the Claimant’s contract that he was eligible to participate in the Variable Pay/Bonus Scheme.

50. The Tribunal has found as fact above that there has always only been one scheme applicable to the Claimant, initially called the ‘Variable Pay Scheme’ and then renamed the ‘Bonus Scheme’.

51. The Tribunal rejects the Claimant’s principal argument that the terms of his statement of terms and conditions of employment can be understood and implemented as they are written. The Tribunal concludes that that the ‘variable pay/bonus’ term in the Claimant's contract of employment cannot operate simply on its own.

52. There is insufficient information within that section for it to have the certainty of being a stand-alone clause providing an entitlement to a bonus payment. For example there is no description on the extent to which the business achieves

its targets has an effect of determing the amount of the bonus pool; how the bonus pool is to be distributed to individuals within the business, such as the relevant business unit within which the Claimant works for bonus distribution purposes; how performance is rated; and how the bonus is distributed in line with performance rating.

53. Although the contract states that judgement is exercised in assessing individual performance there is no similar provision with regard to business performance.

54. Although the contract states that the Claimant *will* receive a bonus, that bonus payment can be between 0 and 60% dependent upon business and individual performance and as stated above, the clause is unclear on precisely how that is to be assessed.

55. Although there is reference to the business growth targets being set “at the start of the year” there is nothing in the clause to state when the bonus payment, or payments, become payable or the period over which the associated performances may be assessed. It could, for example, be the period from commencement of employment, or calendar year, or financial year, or shorter periods.

56. The key point is that it is simply not possible to calculate a liquidated sum from the terms of the clause.

57. Also, there are no provisions in the contract addressing the effects on a potential bonus payment of a change of job, transfer, promotion, retirement, leave of absence and resignation. For example, if the clause in the Claimant’s contract can be read as being an annual payment, what happens if any of the above events occur within the bonus year? There is no presumption that it would be pro-rated as that may depend on the period of performance assessment.

58. It follows that the nature of the contractual terms, if any, that apply to the Claimant are a matter of further contractual construction by the Tribunal.

59. It is the Tribunal's conclusion that at the time the contract was entered into it was anticipated by the parties that there were additional guidance/policy/rules to determine how the variable pay/bonus would be calculated.

60. The variable pay/bonus scheme rules were contained in the 2010 HR Standard. The contractual terms cannot properly be understood or implemented without reference to that HR standard.

61. The Claimant received the variable pay/bonus payment each year from 2010. It had been calculated using the HR Standard during that period and the Claimant was content to rely upon that method of calculation rather than rely only upon the terms of his contract.

62. This is self-evident, for example, from the Claimant's reliance upon the HR Standard in the email he sent to Mr Liam O'Donoghue, HR Advisor, dated 18 December 2017, immediately after being told that the scheme did not apply to his circumstances. The Claimant refers to it as the basis upon which he claims an entitlement to a payment because his employment continued after 31st December 2017. That provision is only contained in the Resignation section of the HR Standard. The Claimant also relies upon the HR Standard when calculating the remedy he is now seeking in these proceedings.

63. The Tribunal further concludes on the construction of the contract that the terms of the HR Standard are apt for incorporation (see, for example, **Hussain -v- Surrey and Sussex Healthcare NHS Trust** [2011] EWHC 1670, QBD and **Keeley -v- Fosroc International Ltd** [2006] IRLR 961, CA).

64. In **Fosroc** the Court of Appeal held:

> "Highly relevant, in any consideration, contextual or otherwise, of an 'incorporated' provision in an employment contract, is the importance of the provision to the over-all bargain, here, the employee's remuneration package – what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may be still be apt for construction as a term of his contract (providing it is not in conflict with other contractual provisions)" The Court of Appeal cited with approval the case in the same court of **Horkulak -v- Cantor Fitzgerald International** [2004] EWCA Civ 1287, an authority relied upon by the Claimant in the current case.

65. As the 'Objective' of the HR Standard states: "A bonus is an essential part of our performance culture and our 'pay for performance' reward philosophy. It is an annual award that recognises an individual's achievement of key goals that are aligned to the goals of their respective business area and our overall vision for the business". This is echoed in the Claimant's contract: "Variable pay is an integral part of a manager's reward package".

66. The bonus scheme is therefore a highly important provision to the contractual working relationship. It is an important part of the bargain struck between the Claimant and the Respondent.

67. The level of detail provided in the HR Standard is sufficient to assess the calculation of a bonus payment subject to ultimate business and individual performances, but these would both be known at the end of the annual bonus year such that, for example, an employee could take legal action over any sum due. The provisions are not vague or discursive but provide detail on how the scheme will operate in practice.

68. When considered in context, the terms of the HR Standard are not aspirational declarations. The HR standard addresses the stand alone subject of annual bonus and is not contained within other provisions or policies. It is workable and makes business sense.

69. It is not stated in the Claimant's contract or in the HR Standard that the terms of the 'variable pay/bonus scheme' are not contractual. By contrast, for example, the contract expressly confirms that the Sickness and Industrial Injury Benefit Scheme and disciplinary and grievance procedures are not contractual.

70. The Tribunal concludes that the terms of the HR Standard are apt for incorporation and are incorporated by the reference to the Scheme in the Claimant's contract and that variable pay is an integral part of a manager's reward package.

71. The terms of the HR Standard, now incorporated into the Claimant's contract of employment provide a qualified discretion set out under "Individual Performance": "The payment of the bonus remains discretionary and is not an automatic entitlement. There may be cases where despite the business resource generating a payment an employee may be paid any annual bonus at all if his/her individual performance is deemed modest or poor".

72. The Tribunal concludes that on a natural reading that paragraph does not provide a general discretion to the Respondent over the payment of a bonus but that the discretion is available when individual performance is modest or poor. The qualification does not say that it is by way of example and is under the separate heading of 'Individual Performance' and not within the general introductory texts on bonus opportunity or bonus payout.

73. As stated above, clause 24 seeks to reserve a unilateral discretion to make changes to the contractual terms and conditions of employment upon notice. However, the Respondent did not seek to rely upon that clause in respect of its treatment of the Claimant. Further, even if that clause is now relied upon by the Respondent, the Tribunal concludes that such a general reservation is not effective to unilaterally vary the specifics of the bonus scheme. Much clearer language is required to achieve such a result.

74. The Tribunal relies upon the established case of **Wandsworth LBC -v- Da Silva** [1998] IRLR 193, in which the Court of Appeal held:

> "The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a

> party to vary contractual provisions with which that party is required to comply. . . To apply a power of unilateral variation to the rights which the employee is given . . . could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result".

75. Save for clause 24 above, the Claimant's contract and the 2010 HR Standard do not expressly include wording that confirms that the terms of the scheme can be unilaterally varied by the Respondent without agreement from the Claimant.

76. The Tribunal also concludes that such a term cannot be implied into the Claimant's contract, particularly with regard to business efficacy, given that there is an discretion given to the Respondent with regard to individual performance within the HR Standard and the assessment of individual performance involves an exercise of judgement by the Respondent as further confirmed in the contract. Such an implied term was not so obvious that the parties must have intended it, as demonstrated by the inclusion of such a term in the 2017 variation.

77. The Tribunal concludes that although the Claimant accepted the variation to the HR Standard in 2015 when the payment date was moved and became tax efficient for him, that was not an indication by the Claimant or generally that the Respondent had a unilateral right to vary the terms. Even if that amounts to an acceptance of the 2015 HR Standard, the resignation clause remained the unaltered.

78. With regard to whether the Claimant had accepted the amended bonus scheme terms contained in the 2017 HR Standard, those changes to the HR Standard were introduced in January 2017 and communicated to the Claimant by the Global Head of Reward on 07 June 2017 and confirmed by the VP for UK and Ireland on 22 June 2017, both received by the Claimant and sent over four months before the Claimant tendered his resignation.

79. The Claimant's communication on 18 December 2017 querying his eligibility, demonstrated that the Claimant was not cognisant of the scheme changes despite two lengthy communications from very senior employees.

80. The Tribunal concludes that given the bonus changes on resignation had no immediate practical impact on the Claimant and he clearly had not taken the time to fully read the detail of the communications regarding the bonus scheme changes, the Tribunal finds that the Claimant did not agree to the variation by implication through his conduct, for example by his continued work without protest after the changes were communicated to him in June 2017 up to his notice of resignation in October 2017

81. The Tribunal refers to the established principles confirmed in **Solectron Scotland Ltd -v- Roper** [2004] IRLR 4 by LJ Elias whilst at the EAT:

> "The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct".

82. The Claimant's claim is one of an entitlement to an annual bonus payment at a particular level upon the event of his resignation and termination of employment. The event is specifically addressed in both the 2010 and 2015 HR Standards under the 'Additional Information' section and the sub-topic of 'Resignation'.

83. The provisions state that those employees who leave the payroll before the end of the calendar year receive "no" annual bonus. Those employees who leave the payroll after the end of the calendar year "can" still be paid. It further provides "when deciding on the eligibility for payment" the Respondent "should" consider the employee's overall contribution and attitude/behaviour during resignation.

84. The Tribunal concludes that on a natural construction of that clause it imports a discretion to the Respondent over eligibility to and amount of payment upon resignation after the end of the calendar year. The section does not say the employee "will" be paid or that the Respondent "will" consider the employee's overall contribution. The Respondent merely 'can' and 'should'.

85. The Tribunal concludes that even if the whole of the 2010 HR Standard is not apt for incorporation, the resignation provision is, by itself, apt for incorporation and relies upon the decisions in **Fosroc** and **Horkulak**:

> "Even if, which is not contended by Fosroc, the formula and/or amount when paid were entirely a matter for its discretion, *Horkulak* shows how far the courts will go to give practical effect to the reality of the bargain struck between employer and employee in an exchange of reward for labour, as a matter of construction of express terms or by way of

> implication. In that case, the issue turned on the effect of an express contractual provision for a discretionary loyalty bonus, the amount of which was to be agreed between the employer and the employee. The employer maintained that, as the contract expressly provided for payment as a matter of discretion and not of entitlement, the employer had no obligation to pay or even consider paying it. The Court held, not only that the provision should be read as providing a contractual benefit to the employee, but also, notwithstanding the lack of any expressed formula or point of reference for its calculation, as obliging the employer to assess rationally and fairly, and to pay, a sum due to the employee under the provision".

86. The Tribunal concludes that the Respondent adopting the principles set out in the 2017 HR Standard is not action that retrospectively falls as being exercised within the discretion afforded by the 2010 HR Standard once it has been established that there is no contractual right to unilaterally vary the 2017 version.

87. The Supreme Court in **Braganza -v- BP Shipping Ltd** [2015] UKSC 17, held that courts can look at process when considering the exercise of a discretion and not just the end result, which confirms that it is difficult for a party to a contract to argue a retrospective reliance on a contractual discretion that it had not considered at the time the act or omission under review was done.

88. Under the above contractual constructions the only argument available to the Claimant with regard to payment upon resignation is that the discretion contained in that specific clause should have been exercised by the Respondent and that it was not exercised at the relevant time.

89. In those circumstances the established authorities address what is to happen if a contractual discretion should have been exercised but has not. The Court of Appeal in **Socimer International Bank -v- Standard Bank London Ltd** [2008] EWCA Civ 116, considered that question had been answered by the Court of Appeal in **Horkulak.** As stated above, in that case an employee, who had been wrongly dismissed, sought compensation to include a discretionary bonus which he might otherwise have been awarded. It was held that the court's task in such a case is to put itself in the shoes of the decision-maker:

> "The judge having found in favour of the claimant in this respect, his second task was to assess the amount of the bonus likely to have been paid, bearing in mind the flexibility afforded by the contractual language. Thus the exercise would not permit the judge simply to substitute his own view of what would have been a reasonable payment for the employer to make, but required him to put himself in the shoes of those making the decision, and consider what decision, acting rationally, and not arbitrarily or perversely, they would have reached as to the amount to be paid."

90. The Tribunal concludes that in the circumstances prevailing at the time and from the evidence available, it is inevitable that the resignation discretion would have been exercised by the Respondent exactly in line with the anticipated 2017 changes that the Respondent sought to introduce when varying the terms of the HR Standard and for the business reasons it relied upon for doing so at the time, in particular to bring the UK in line with the global rule for bonus payments upon resignation.

91. As a matter of necessary implication, that discretion must not be exercised arbitrarily, capriciously or unreasonably.

92. When assessing reasonableness, the Respondent sent two detailed e-mails to the Claimant from two very senior individuals in the Respondent organisation with an instruction to consider the contents carefully. At that stage in June 2017 the Claimant had not tendered his resignation and therefore there was no immediate detriment to him by the notification.

93. The Tribunal finds as fact that the Claimant either did not read or did not pay sufficient attention to those e-mails. The Tribunal rejects the Claimant's contention that he considered that the proposals in the e-mails did not apply to him because he thought only the statement of his terms and conditions of employment applied. That position is wholly inconsistent with the Claimant's email to Mr Donoghue of 18 December 2017 referring to the rules of the scheme making him eligible for payment because he was to work beyond 31 December 2017 and the subsequent e-mail of the same date in which the Claimant stated: "When was this communicated – I don't see any change that I am aware of".

94. On this basis the Tribunal concludes that, although upon a construction of all the relevant contractual terms there was a breach of contract by the Respondent by failing at the time to exercise the discretion afforded to it under the resignation clause in the 2010 HR Standard, there is no remedy for breach of contract available to the Claimant on the ground that the Respondent would reasonably have exercised its discretion in a manner consonant with the 2017 HR Standard variations. In addition, by the same analysis, there is no sum properly payable to the Claimant under the statutory provisions relating to unauthorised deductions from wages.

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Employment Judge Freer
Date: 10 February 2020