



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

Mrs Donna Jonas

AND

**Respondent**

Openreach Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Plymouth

**ON**

2 March 2020

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person

**For the Respondent:** Ms K Gardner of Counsel

### JUDGMENT

**The Judgment of the Tribunal is that the Claimant's claim for breach of contract is dismissed.**

### RESERVED REASONS

1. In this case the claimant Mrs Donna Jonas brings a monetary claim for breach of contract against her ex-employer Openreach Limited. The respondent denies the claims.
2. I have heard from the claimant. I have heard from Mr Adrian Coward for the respondent.
3. There was a degree of conflict on the evidence. I have heard the various witnesses give their evidence and observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is an associated company of BT Telecommunications plc (BT). The claimant Mrs Donna Jonas lives in Plymouth. She was employed by the respondent as a Finance Analyst from 29 June 1981 until 30 June 2019. The termination of the claimant's employment followed a reorganisation. It was originally suggested that the claimant's employment might end on 31 January 2019, but at the respondent's request the claimant agreed to extend her employment until 30 June 2019 in order to complete some important assignments for the respondent. The claimant was offered alternative employment in Bristol but the claimant was unable to move or commute that far, and was offered and accepted an Enhanced Voluntary Leavers Package ("EVLP"). The EVLP payment was in excess of £86,000.

5. The respondent operates a discretionary bonus policy which is available to all employees. The policy is available to all employees on its internal Internet site, and explains the provisions relating to the bonus arrangements, including eligibility. The application of the scheme, the guidelines and how to make payments are all subject to the discretion of the respondent's Chief Executive. In practice senior managers take the decisions following discussions with the relevant Line Managers.
6. Both the bonus and performance years begin on 1 April and end on 31 March annually. Employees must still be employed as at 1 June in order to be eligible to receive any bonus payment for the previous year. Any employees working out their notice period as at 1 June will remain eligible for consideration for a bonus.
7. The relevant bonus scheme is referred to as the Reward Framework bonus plan and its "Global statement" records that it is: "At the discretion of the BT Group plc Chief Executive, unless there is a contractual region that says otherwise. Bonus payments depend on how much the business can afford, so BT Group might not pay any bonuses if it doesn't meet minimum performance targets ...". The provisions also state: "Eligibility for a bonus does not mean you're guaranteed to keep your job, to get an award for the entire performance year, or any specific time in the year." However, Line Managers and HR are instructed under the policy to: "Make sure bonus outcomes are consistent, fair and in line with our Inclusion Policy; ensure awards are based on how people have performed, their behaviour, and how they have contributed to BT's success."
8. There is a supporting document which is headed "UK BT Bonus 2018/2019" which gives details of how any bonuses to be calculated. There is a three-stage bonus process. The first stage is to take 10% of the employee's salary. For the second stage, this is then multiplied by a business performance score which depends upon BT's performance for the year, and the affordability of potential bonus payments, within a range of 0.0 to 2.0. The award for the year in question was a multiplier of 1.3. This was applied to all employees and the claimant does not challenge the accuracy or the reasonableness of that multiplier. The third stage is to multiply this sum by a personal performance rating, which again is a score between 0.0 and 2.0. The employee's Annual Performance Rating is the starting point for this third stage of the calculation.
9. Employees are rated within three bands of performance: Brilliant; Good Work; and Work to do. The claimant was given a rating of Good Work, and does not challenge this assessment. However, she does challenge the personal performance multiplier which was used. Those within the Good Work profile are then divided into Few (for whom the range is 0 to 0.4); Some (for whom the range is 0.4 to 0.8) and Majority (for whom the range is 0.8 to 1.2). The starting point for this third multiplier for the claimant was 0.8 (the top of the range for Some within the Good Work profile), but the respondent reduced this to 0.5 which was the actual multiplier used.
10. The claimant's bonus was therefore calculated as 10% of her salary, multiplied by the business performance multiplier of 1.3, which was then multiplied by the personal performance multiplier of 0.5. The claimant says the third multiplier should have been the higher figure of 0.8. The parties agree that this meant that the claimant's bonus was 6.5% of her salary rather than 10.4% of her salary which is an agreed difference of £1,800 gross.
11. Mr Coward has explained that the respondent exercised its discretion to make this payment based on the reduced third multiplier of 0.5 for the following reasons. In the first place the multiplier of 0.5 was within the range for Some employees rated for Good Work, which included the claimant, and was therefore within the correct range in any event. The respondent has a limited pot of money to be distributed within the bonus scheme, and it is up to the Line Manager how it is distributed. The claimant agreed today that there is a limited pot of money to make bonus awards, and it was reasonable for the Line Manager in question to use discretion to make these awards to be shared fairly amongst those who are eligible.
12. Secondly, the claimant agreed that it is fair for the Line Manager to seek to motivate staff going forwards. Following the reorganisation of the respondent's business the Line Manager wished to motivate those employees that had come through the reorganisation process and whose careers were continuing with the respondent. Many of them that had

- survived the reorganisation process had done so on the basis of agreed reduced salaries moving forwards. The respondent wished to motivate these employees by way of a bonus payment. There was no need to incentivise those employees whom the respondent knew were leaving in any event. The claimant complains that she was not leaving of her own choice, but in any event she agrees that the Line Manager was able to exercise discretion in favour of those who had survived the reorganisation process on reduced salaries and who were staying.
13. The third factor which the Line Manager took into account was the fact that the claimant had been awarded a generous redundancy package under the EVLP. Unlike the majority of the employees who were leaving under the respondent's reorganisation at that time, and who left in March 2019, the claimant was also eligible for the bonus when they were not (because they were not in employment as at 1 June 2019, when the claimant was). If she had not been asked to stay on past 1 June 2019, the claimant would have not qualified for the bonus in any event. As it was she stayed on for a further month during June 2019, and became entitled to a bonus payment as well as the generous EVLP. The claimant complains it was unfair that this was taken into account. She did not wish to leave her employment with the respondent after many years, and worked on in a committed fashion until such time as it was agreed she would leave. However, the respondent's policy makes it clear that the fact that those leaving employment might be eligible for a bonus does not mean that they are guaranteed the bonus.
  14. For all of these reasons, the relevant Line Manager exercised his discretion and used a multiplier of 0.5 at the third stage, rather than one of 0.8 which was possible under the scheme.
  15. The claimant complains that three people left at the same time. She and another woman were paid a bonus using a third stage multiplier of 0.5 (leading to a bonus calculated as 6.5% of the salary), whereas a man namely Marios was awarded a bonus using a third stage multiplier of 0.8 (leading to a bonus calculated at 10.4% of his salary). Mr Coward has explained that the reason for this was that Marios was awarded a higher performance rating and during the year his work had been rated under his Annual Performance Review as either Brilliant or Good Work throughout. That is why discretion was exercised in his favour to make the higher payment.
  16. The claimant also complains an employee namely Zoe Whittle received a bonus based on 11.5% of her salary despite the fact that she was on extended sick leave. Mr Coward explained that that was not the case. Rather, under the terms of the policy, she received a third stage multiplier of 0.8 which was within the normal parameters for her work which had been graded as Good Work until her extended illness, but that the actual bonus paid to her had been reduced pro rata to reflect the amount of absence caused by her sickness. This pro rata deduction was calculated by the HR Department in accordance with the provisions of the scheme.
  17. The decision taken by the Line Manager in connection with the bonus paid to the claimant was then reviewed by a second Line Manager who agreed with the decision. The decision with regard to the claimant's bonus was therefore doublechecked by two managers, and cannot be said to be an arbitrary decision of a single Line Manager.
  18. Having established the above facts, I now apply the law.
  19. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
  20. I have been referred to the following authorities namely IBM v Dalgleish [2017] IRLR 4 CA; and Clark v Nomura International [2000] IRLR 66.
  21. The claimant's claim is for breach of contract, and the burden of proof is on the claimant to establish that there has been a breach. In this case the relevant term of the contract is the implied term that an employer will not exercise its discretion in an arbitrary or capricious manner. Another way of looking at the test is to ask whether the respondent has made a decision which no reasonable employer might have made in the same circumstances.
  22. In my judgment the relevant bonus scheme is clearly discretionary. Following a business reorganisation during which a number of employees were made redundant, and others

- remained on reduced salaries, it was not surprising that there was a limited pot available to make bonus payments. The respondent is entirely justified in exercising its discretion in the light of all the circumstances, including these changing circumstances.
23. The calculation of the claimant's bonus was made within the agreed parameters of the scheme and so the question which arises is whether it was a breach of contract by the respondent to exercise its discretion to reduce the third stage multiplier from 0.8 to 0.5 (which was still within the same agreed parameters). The reasons given by the respondent for exercising its discretion in that way included the following factors: (i) there was only a limited pot of money available to make bonus payments to all eligible staff; (ii) there had been a reorganisation process in which many employees who remained with the respondent had done so on reduced salaries; (iii) the respondent wished to incentivise and motivate remaining employees, not least because many were on reduced salaries, and it was a more appropriate and reasonable use of the limited pot to reward these employees under the bonus scheme; (iv) the claimant had received a generous EVLP; and (v) many other employees who also received the EVLP had been made to leave in March 2019 and were not eligible to receive (and had not received) any bonus. The respondent concludes that in these circumstances the bonus actually paid to the claimant reflected a fair and reasonable exercise of its discretion.
  24. In my judgment it cannot be said that the decision to make the bonus payment to the claimant based on the calculations used was in any way a capricious or arbitrary exercise of the respondent's discretion. In my judgment it cannot be said that the decision was unreasonable, or otherwise was a decision which no reasonable employer might have taken.
  25. The burden of proof is on the claimant to prove that there has been a breach of contract by the respondent in the exercise of its discretion in this way, and in my judgment the claimant has not discharged that burden. I conclude that the respondent was entitled to exercise its discretion in the way that it did.
  26. Accordingly, there was no breach of contract, and I dismiss the claimant's breach of contract claim.

---

Employment Judge N J Roper  
Dated : 2 March 2020

.....