Appeal Nos. UKEAT/0017/20/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 30 April 2020
Judgment handed down
On 15 May 2020

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

RYAN OSTILLY — APPELLANT (Claimant below)

MERIDIAN GLOBAL VAT SERVICES (UK) LIMITED — RESPONDENT (Respondent below)

JUDGMENT

APPEARANCES

For the Appellant	MR ALEXANDER ROBSON (of Counsel) Instructed by: OGR Stock Denton 2nd Floor, Winston House, 2 Dollis Park, London N3 1HF
For the Respondent	MR MARK THOMAS (of Counsel) Instructed by: Machins Solicitors LLP 28 Dunstable Road, Luton LU1 1DY

SUMMARY

CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term
CONTRACT OF EMPLOYMENT – Damages for breach of contract
UNFAIR DISMISSAL – Constructive dismissal

The claimant brought a claim for breach of contract relying on non-payment of a bonus he said was due to him; and for unfair (constructive) dismissal, relying on his resignation in response to a repudiatory breach of his contract of employment. The respondent denied any breach and asserted that the claimant had affirmed his contract and had resigned, but not in response to any breach.

The employment judge had not erred in construing the bonus clause conferring a discretion to pay up to 20 per cent of salary each year. The clause did not, on its true construction, exclude the financial position and performance of the employer from the scope of permissible considerations relevant to the exercise of the employer's discretion. The judge correctly so decided.

The judge (as the respondent accepted) erred when assessing how close the claimant came to achieving the level of profit he had forecast for the year 2017, in respect of the part of the respondent's business for which he was responsible. She mistook the turnover figure the claimant had forecast (€3.25 million) for the profit figure (€1.79 million).

The actual profit in 2017 was €1.68 million. The claimant had therefore fallen €110,000 short of his profit target, i.e. he had achieved about 94.5 per cent of his target, not 51.6 per cent as the judge found. Although the respondent did not make the same error when considering whether to pay bonus, the judge's error was material to her conclusion that the respondent's exercise of its discretion not to pay any bonus in 2018 was rational and lawful, not perverse.

The judge found that if, contrary to her primary decision, the decision not to pay bonus was a breach of contract, the claimant was entitled to a maximum of £19,500 (20 per cent of salary) but would have resigned unless paid a sum close to £55,000, which he was demanding and believed he was entitled to. She reasoned that his unfair dismissal claim must therefore fail anyway because he would not have resigned in response to a breach of contract.

That finding was not justified on the pleadings and the evidence and (applying the principles in **Chen v. Ng** [2017] UKPC 27) was procedurally unfair. The respondent had not relied on the judge's proposition; it was contrary to the claimant's case and was not properly put to the claimant during his evidence, either by the respondent or the judge. Nor was it an obvious and permissible inference from the documents and evidence as a whole.

The claims for breach of contract and unfair dismissal would therefore be remitted for redetermination in the light of the EAT's judgment. It was appropriate to remit the issues to a different employment judge in view of the finding of procedural unfairness, but it was not necessary for all the evidence to be heard again.

THE HONOURABLE MR JUSTICE KERR

Introduction

1. The claimant appeals on four grounds against the decision of Employment Judge Grewal sitting at the London Central Employment Tribunal. She heard the claimant's claims for breach of contract and unfair constructive dismissal on 9 and 10 January 2019. Her reserved judgment with reasons was dated 12 February 2019 and sent to the parties the next day.

2. The claimant said the respondent had in repudiatory breach of contract not paid him any bonus in 2018, having in previous years paid him amounts well above the ceiling of 20 per cent of his salary provided for in his letter of appointment. He contended that the respondent could not take account of its financial position and performance; its bonus decision must be based only on the performance of the claimant and his part of the respondent's business.

3. The respondent argued that it had not acted in breach of contract, repudiatory or otherwise; it was entitled to decline to pay any bonus, taking account of its poor financial position in 2018, which threatened its solvency. Further, the respondent argued that the claimant had affirmed the contract and had not resigned in response to any breach; and, even if he had been dismissed, the dismissal was fair.

4. The claims failed. The judge found that the respondent's interpretation of the bonus clause was correct and that its decision not to pay the claimant (or any other senior manager) bonus in 2018 was a lawful exercise of discretion and not perverse; and that, if that was wrong, the claimant's unfair dismissal claim must fail because he would have resigned anyway, if offered £19,500 or less which was the maximum bonus amount, being 20 per cent of his salary.

The Facts

5. I omit much detail and mainly follow the tribunal's findings. The respondent and its predecessor and associated companies in the Meridian Group (for convenience, "the respondent" save where indicated) provided VAT related services to clients. The claimant worked for the respondent and a predecessor as a strategic business adviser and subsequently as a commercial director. His employment started in 1998 and he was promoted in 2000.

6. A letter of appointment dated 15 November 2000 set out his terms including some new terms that would apply from 1 January 2001. His salary would be £55,000 and he would have a fully expensed company car. By clause 8 of the letter of appointment:

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

7. No further details were, however, forwarded to the claimant. No documented bonus system was ever used. Ad hoc decisions on bonus were made each year. The geographical areas in which the respondent operated were called "market regions" but the claimant was not assigned to work in any specific market region. He was promoted several times and worked on developing and selling new VAT products.

8. He did well. His annual bonus payments increased from £28,000 to £45,000 by 2010, above the contractual "ceiling" of 20 per cent of salary which, by 2010, was £90,177. He was not set specific targets. He accepted his bonus allocation, as it seemed fair to him. In 2010, he was given the task of selling a product called "ERP" (Enterprise Planning Resource) software, a new VAT product which automated the VAT component of clients' accounting systems.

9. Between 2011 and 2016, the ERP business grew, eventually turning an annual profit which in 2012-2015 ranged from €358,000 to €705,000. The ERP business was not conducted on the basis of any geographical "market region". In 2016, the profit from ERP business rose to €1.78 million. By then, the claimant's salary was £94,742. His bonus for that year reached a zenith of £55,000. However, the Meridian Group as a whole made a loss each year during the same period, ranging from €635,000 to €1.2 million.

10. The claimant's employment transferred to the respondent in 2017. That year, the loss was higher and the Group faced substantial wage costs. The core VAT reclaim business of the Group was sold in 2017. The sale realised €14 million. The employees were not transferred. They were kept on and not made redundant. In June 2017, €10 million was distributed to shareholders as a dividend. The claimant, as a 10 per cent shareholder (since 2007) of the relevant holding company, received €1 million. The ERP business run by the claimant was profitable, but the Group's business as a whole was not.

11. By the end of 2017, there was an acknowledged need to cut costs substantially. The three directors of the respondent started a discussion on how to cut costs. On 19 January 2018, one of the directors, Paul Dundon, provided the others with a paper called "Project Pinnacle – Alternatives". The respondent's prospects had deteriorated further due to certain EU legislation. Mr Dundon acknowledged, however, in relation to the part of the business run by the claimant, that "ERP remains a very valuable asset"; and "[w]e need to nurture this business and ring-fence it from any actions that we take on the other businesses".

12. Aside from that exception, the prospects were bleak. One of the options under consideration was to make no bonus payments at all in March 2018, for the year 2017. About 60 employees expected bonus payments, of whom 15 had contract clauses which varied and were different from the claimant's bonus clause (the judge set them out in her decision) but which, at least, entitled them to be considered for a bonus payment.

13. Solicitors advised that the directors could be personally liable for the respondent's debts if they carried on the business in a "reckless" manner. To avoid liability, they must believe on reasonable grounds that the respondent could pay its debts as they fell due. The holding company had about €9 million of reserves but would incur redundancy liabilities of about that amount. There was no buyer for the business. The projected losses would be substantial if the respondent continued trading.

14. Mr Dundon and his colleagues, not surprisingly, considered seriously an orderly wind down of the business. The decision was taken to impose an immediate pay freeze and to pay no bonus in March 2018, either to the claimant or anyone else eligible. The claimant was told by telephone by another director on 13 March 2018 that the respondent was leaning towards paying no bonus to anyone.

15. On 15 March, Mr Dundon emailed about 40 senior managers, including the claimant, explaining the respondent's severe financial difficulties and informing them that:

> **"one of the decisions that we have made is not to award a bonus. I realize that this may be highly disappointing to you. We want to stress that this is a corporate decision and does not in any way reflect dissatisfaction with the contribution that you or your team have made."**

16. The claimant took issue and retained solicitors to demand what they said was a contractual entitlement to "at least £55,000", based on "the pattern of recent bonuses". The claimant did not raise a formal grievance. Mr Dundon resigned from the respondent in mid-April. The claimant and Mr O'Riordan, another director, tried to arrange to meet in Dublin but could not find a mutually convenient time. Attempts to settle the issue failed.

17. On 14 May 2018, the claimant resigned, saying Mr O'Riordan and the board had had "ample time to pay my bonus and/or seek to explain why its non-payment must be justified, despite the clear terms of my contract". He went on:

> **"I consider the non-payment of my bonus to be a repudiatory breach of my contract and accordingly resign with immediate effect."**

18. In subsequent correspondence, the respondent's solicitors pointed out that the claimant had not achieved his personal target for 2017 and that if the claimant thought he was entitled to 20 per cent of salary automatically, he had been substantially overpaid from 2010 to 2017 and would face a claim for repayment of that amount if he brought a claim. The claimant was undaunted and presented his claims. There was no counterclaim.

The Decision

19. In her reasons, the judge began by setting out, uncontroversially, the agreed issues: whether non-payment of bonus and the manner of communicating the decision was a breach of contract; whether the decision was rational or perverse; if there was a breach, whether it was repudiatory; whether the claimant had affirmed the contract or waived any breach; whether he resigned in response to the breach; and if there was a dismissal, whether it was unfair.

20. She then set out the relevant law, in terms not criticised by either party in this appeal. She covered the following topics, including citation of relevant case law: constructive dismissal, repudiatory breach by withholding pay due; the "trust and confidence" implied term; the test of irrationality, taking account of relevant considerations and disregarding irrelevant ones, where a contract confers discretion on an employer; the tests for implying a term into a contract; and the need to consider the decision making process when applying the *Wednesbury* (rationality and relevant considerations) test.

21. The judge then set out her findings of fact, covering the points I have already mentioned above, but in more detail than is needed for this appeal. She then proceeded to express her conclusions, from paragraphs 46-52 of her reasons. She began by considering clause 8 of the letter of appointment.

22. She found that the claimant "was contractually entitled to a bonus but the amount payable was discretionary and could be anything between nil and twenty per cent of his salary". The amount awarded would "relate to his performance and that of his market region."

23. However, she rejected the claimant's submission that the respondent "could only take into account those two factors and nothing else". She found that "the company's financial circumstances (including its obligations to its creditors)" were "clearly a relevant factor that must be taken into account when exercising a discretion as to the level of bonuses to be paid." That was "so obvious … that it did not need to be expressly set out … It was implicit in the clause".

24. She supported her analysis by reference to the practice of awarding bonus to the claimant over the years. The claimant had not clearly had any "market region" since 2006 when he was appointed commercial director. His bonus awards did not correlate with the performance of the ERP software business. ERP was a business line, not a market region. The claimant's performance was not measured. He received bonuses even when the ERP business failed to meet his target as per his predictions in the budgeting exercise.

25. The judge was pointing out, in effect, that during the good years the claimant received more than was warranted having regard specifically to his performance and clearly took account of the good performance of the respondent. The claimant was aware that other factors apart from his performance were taken into account when deciding on his bonus awards up to 2016. He had not complained about that.

26. The judge went on to consider whether the decision to award a nil bonus for 2017 was irrational and perverse. She concluded that it was not. There were other employees who had to be considered for an award of bonus. She went on to list the factors which, she found, the respondent took into account when deciding to award no bonus payment to the claimant for 2017. The factors taken into account were, she found, the following.

27. First, the ERP business had made a profit of €1.68 million, which was "less than the target of 3.25 million euros". I pause to note that the parties agree this was an error. The target profit figure was €1.79 million. The figure of €3.25 million was the turnover figure for the ERP business predicted by the claimant for 2017, not the anticipated profit figure. The judge had earlier made the same error when making her findings of fact (see paragraph 21 of the reasons).

28. The respondent took into account also, the judge found, that it had made an unprecedented loss, overall, of €1.8 million, despite the profits turned in by the ERP part of the business. Worse, the forecast loss for 2018 was €4 million together with "a cash burn of the same amount". The forthcoming redundancy costs were about €9 million, which was about equal to the respondent's net assets.

29. Once it is accepted that the financial position of the respondent and its obligations to creditors was a relevant factor to take into account, it was "difficult to see how the company could have come to any conclusion other than to make no awards of bonus". It was certainly not a decision that no reasonable employer could make. The respondent had not exercised its discretion irrationally, nor taken into account irrelevant considerations or failed to take account of relevant ones. Nor was there any breach of the implied term as to trust and confidence.

30. She then considered the circumstances in which the decision had been communicated to the claimant and rejected the suggestion that it was done in a way amounting to a breach of the trust and confidence term. Nor was the respondent's conduct after receiving the claimant's

solicitor's letter (of 16 March 2018) such as to breach the duty in respect of trust and confidence.

31. It followed that there was no breach of contract, the claimant was not dismissed and the claims must fail, the judge decided. She went on to say that if that was wrong and if, contrary to her decision, the respondent took account of an irrelevant matter (which must refer to the respondent's financial position), the respondent would be in breach of contract and on that analysis the claimant would be entitled to be compensated for the failure to award him a bonus which could, if the discretion had been exercised lawfully, have been an award in a range from nil to about £19,500, i.e. 20 per cent of the claimant's then current salary.

32. The judge then reasoned that in 2017 the claimant had achieved "just over 50 per cent" of his target for the ERP business. This was, as already noted, an error; the true figure was about 94.5 per cent. The respondent could have awarded anything from nil to about £19,500. However, the judge said at the end of her decision:

> **"The Claimant's view was that he was contractually entitled to a bonus of £55,000. Under clause 8 of his contract, he was not. Even if I had found there to be a breach of the contract because the Respondent took into account an irrelevant factor, the claim for constructive dismissal would not have succeeded for the following reasons. The Claimant would have resigned even if the Respondent had exercised its discretion rationally and awarded him a sum less than £19,500. He would have resigned because the Respondent had not paid him a bonus of £55,000 or a sum close to that. The failure to pay that sum would not have been a breach of contract."**

Grounds of Appeal

First ground: the meaning of clause 8

33. The first ground of appeal is that the judge erred in her determination of the meaning of clause 8 of the letter of appointment. Mr Robson submitted, as I understand it, that the judge correctly identified the only two permissible express considerations informing the employer's exercise of discretion under clause 8 (the claimant's performance and that of his market region) but then wrongly went on to imply a term into clause 8, namely the added permissible consideration of the employer's financial position and performance.

34. That, said Mr Robson, was untenable because the implication of the added term did not meet the rigorous requirements for implying contract terms (**Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd** [2016] AC 742 per Lord Neuberger at [16]-[25]; and **Ali v Petroleum Co of Trinidad and Tobago** [2017] ICR 531, per Lord Hughes at [7]). They are, as is well known, that the term is necessary to give business efficacy to the contract; that its inclusion is so obvious that it goes without saying; that it is capable of clear expression; and that it does not contradict any express term of the contract.

35. Mr Robson reminded me that the issue must be judged as at the date of the letter of appointment, not later (**Marks & Spencer plc** per Lord Neuberger at [23]). The judge, he said, applied only the test of whether the implied term was so obvious as to go without saying. She omitted to consider whether the contract would lack commercial or practical coherence and whether it was necessary to imply the term to make the contract work. She also overlooked the point that inclusion of the employer's financial position and performance among the list of

permissible considerations would "rewrite" the bargain and would be inconsistent with the express contract terms which did not include that consideration.

36. Mr Thomas submitted that (to quote his skeleton argument) the judge's interpretation was "perfectly reasonable" and that she was "correct to imply consideration of the employer's financial performance into the terms of the clause". He submitted that without considering the contextual matter of the employer's performance and financial position, the claimant's performance targets would be merely "arbitrary numerical targets."

37. He submitted that the test of necessity was not one of absolute necessity but what was necessary to make the contract work. It could not work, he said, if the employer had to exercise its discretion, irrationally, in a manner that would imperil the very survival of the employer. Without including consideration of the employer's position, the claimant's bonus clause made no commercial sense. Further, he had not complained when the employer's position had been taken into account during the good years, so as to inflate his bonus.

38. I have borne in mind the discussion in the authorities, including notably in Lord Neuberger's speech in the **Marks & Spencer** case, about the extent to which the process of construing a term and implying a term are different from each other. Both exercises, in a broad sense, involve construction in that they require the court to determine the true nature of the bargain between the parties. But in a narrower sense, construing the language of the clause comes first. As Lord Neuberger said at [28]:

> **"In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term."**

39. In my judgment, the judge did not misconstrue clause 8 of the letter of appointment. I think she was correct to find that the employer's financial performance was a permissible consideration when deciding how much, if any, bonus to award the claimant for a particular year. I would, for my part, regard that conclusion as flowing from the true construction of the language of clause 8 rather than from a process of implying a further term or further words into the clause.

40. At paragraph 46 of her reasons, the judge said that the company's financial circumstances, including its obligations to its creditors, was so obviously a factor that must be taken into account that "it did not need to be expressly set out in the clause". It was "implicit in that clause". Those words led the parties to make submissions on the basis that her analysis was to build in an additional implied term. If such it was, I do not think that was the right approach. But I consider that she reached the correct conclusion for the following reasons.

41. The fundamental issue is whether the employer, exercising its discretion under clause 8, can treat its own financial position and performance as a relevant consideration when considering the issue of bonus for the claimant. In my judgment, in the absence of clear contrary words, that proposition is to be regarded as inherent in the language of the clause. To displace it, I look for express words and find none.

42. The words "maximum annual bonus" confer a discretion which, as the next following words make clear, must be exercised having regard to the claimant's performance and that of

his market region (if he has one). But I do not agree that the phrase "tied to your own performance and that of your market region" must be read as requiring that discretion to be exercised as an abstract exercise, in a commercial vacuum.

43. I accept Mr Thomas' point that the strength of the claimant's performance in a particular year can only be measured by reference to the employer's financial health and standing. What would in year X be a mediocre performance could in year Y be a stellar performance, because of external factors such as favourable or unfavourable market conditions, the need to cross-subsidise other parts of the business and the extent to which the performance contributes, or not, to the respondent's overall performance and, in lean times, prospects of survival.

44. Mr Robson is correct to point out that the meaning of clause 8 must be ascertained as at 15 November 2000, when it came into existence. This was not a sophisticated letter of appointment. It set out basic terms in fairly sparse language. It appears to have been the intended precursor to a detailed bespoke written bonus scheme that never came. That points away from the language of clause 8 being exhaustive of the discretionary factors relevant to the claimant's bonus award.

45. I do not think the judge was right to have regard to the way in which the clause was in practice operated for the purpose of ascertaining its true meaning. She appears to have done so in the second part of paragraph 46. The fact that the claimant was awarded generous bonuses over and above his entitlement for several years cannot alter the meaning of the clause. The judge rightly noted that the claimant did not have a "market region", at least after 2006. That did not prevent the respondent having regard to his performance in running the ERP business. If the "market region" part of the clause became obsolete or was inapt from the start, that does not mean the meaning of the clause could change over time.

46. On balance and in the particular commercial context here, I think the words "tied to your own performance and that of your market region" meant that those factors could not be disregarded and were compulsory considerations for the respondent. But I do not think those words meant that other considerations that were inherently commercially relevant, such as market conditions and the employer's financial position and performance, must be excluded.

47. It is true that in other cases more sophisticated bonus clauses have been drawn so as to make express reference to the financial performance of the employer; for example, the clause at issue in **Keen v. Commerzbank AG** [2007] ICR 623 (see Mummery LJ's judgment at [7]). But in the present case the context of measuring the claimant's performance included considering market conditions. I accept Mr Thomas' argument to the effect that the financial health of the respondent was relevant to how good the performance of the claimant should be treated as being in a particular year.

48. The claimant's restricted interpretation would, in my judgment, be uncommercial and not in accordance with the well known principles of construction set out in Lord Hoffmann's speech in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, HL. In reaching that conclusion, I do not get as far as considering the question of whether any term can be implied into clause 8 of the letter of appointment. No added term needs to be implied beyond the exercise of attributing to the clause its true meaning, as a matter of construction in the narrower sense.

49. If I were wrong in my interpretation of clause 8 - i.e. if it bore the meaning that only the claimant's performance and that of his market region can be taken into account in deciding what bonus to award – then I would agree with Mr Robson that you cannot imply into the clause a further permissible consideration – the employer's position – because to introduce a third permissible consideration would contradict the finality of the closed list of two permissible considerations set out in the language of the clause.

50. If that interpretation were the correct one, the claimant's bonus entitlement would be part of the employer's financial obligations to its creditors in the same way as his fixed salary entitlement and that of all the other employees. The employer would be obliged to make an objective assessment of the claimant's performance and to award him an amount it considered, objectively, he deserved, irrespective of affordability for the respondent.

51. That is not an impossible construction but, as I have said, it is unlikely and if it were the true meaning of the clause, I would expect that meaning to be clearly expressed in the language of the clause.

52. I therefore agree with the judge's conclusion on the first ground of the appeal, though by rather different reasoning. For completeness, I should add that in oral argument in response to a question from me, Mr Robson contended that it would be a breach of contract, on his primary case, to pay the claimant only 20 per cent of salary by way of bonus for 2017; though his secondary case was that it would not be a breach to pay only 20 per cent, or even less, provided clause 8 was properly operated. That included consideration of the claimant's reasonable expectation of figure in the region of £40,000 to £50,000, based on previous years.

53. I do not accept that there could be any basis for an entitlement to over 20 per cent of salary. There would have to have been a variation of the terms set out in the letter of appointment. The fact that the claimant was paid more, in previous years, than the maximum of 20 per cent of salary provided for by the clause, does not of itself enlarge his entitlement to an amount above that 20 per cent threshold.

54. I therefore reject Mr Robson's primary contention relating to the claimant's contractual entitlement. The respondent was free to pay above the 20 per cent threshold *ex gratia*, as it did in previous years, but not obliged to do so. I agree with Mr Robson that to avoid a breach of contract the respondent had to operate clause 8 correctly in accordance with its true meaning, and properly taking account of relevant considerations and disregarding irrelevant ones. This is relevant to the second and third grounds of appeal, to which I now turn.

Second and third grounds: whether the judge erred in addressing breach of contract

55. The second ground of appeal is that, even if the judge was correct to conclude that clause 8 of the letter of appointment permitted the employer to have regard to its financial position and performance, the judge should have found that the respondent exercised its discretion in a perverse and irrational manner. The third ground of appeal is that the judge misunderstood the evidence about the claimant's performance: she thought he had achieved just over 50 per cent of his target for 2017; whereas in truth, he had achieved 94.5 per cent of it.

56. These grounds may be taken together. In relation to both grounds, Mr Robson's real point is that the judge impermissibly absolved the respondent of irrational exercise of contractual discretion; firstly (under ground two) because the respondent had manifestly

disregarded the relevant consideration that it made no criticism of the claimant's performance; and secondly (under ground three) because the judge's absolution of the respondent was informed by a misunderstanding of the evidence on how well the claimant had performed.

57. Mr Robson referred, as the judge did, to the law developed in **Clark v Nomura International plc** [2000] IRLR 766, QBD; **Braganza v BP Shipping Ltd** [2015] ICR 449, SC; and **IBM UK Holdings Ltd v Dalgleish** [2018] ICR 1681, CA. The respondent did not take issue with Mr Robson's paraphrase of the effect of those cases here: that in a case such as this, involving the exercise of a discretion, the test to apply is a rationality test equivalent to that set out in **Wednesbury** and both limbs of that test must be applied: the employer must have regard to relevant considerations and disregard irrelevant ones; and it must not reach a decision no reasonable employer could reach.

58. Mr Robson pointed out that in Mr Dundon's email of 15 March 2018 setting out the reasons for the respondent's decision, he had said he made no criticism of the claimant's (or anyone else's) performance. Mr Dundon said the decision was a "corporate" one and "does not in any way reflect dissatisfaction with the contribution that your or your team have made". The judge was therefore bound to find, said Mr Robson, that the respondent had disregarded the claimant's individual performance when deciding not to award him any bonus.

59. The judge, he submitted, also wrongly regarded as legitimate the consideration that other employees were in line for a discretionary bonus under their contracts of employment. The judge, he argued, wrongly thought the respondent had to award bonuses to all relevant employees or none. That was wrong: the claimant's position was unique and he could have been paid bonus even if no one else was. That would not have been unaffordable for the respondent. The bonus entitlement of others was an irrelevant consideration.

60. Furthermore, although the judge recognised that an employee's reasonable expectation of bonus was a relevant (albeit not overriding) factor, she failed to address the claimant's reasonable expectation founded on generous past bonuses of up to £55,000. He submitted that the judge had wrongly characterised the "unprecedented" (as she described it) loss of €1.8 million. That was wrong. A slightly higher loss had been made in a previous year.

61. For the respondent, Mr Thomas described the judge's error as "a typographical mistake in the figures recited." He submitted that the "inaccurate citation of ERP's underperformance" was immaterial to the judge's decision on the exercise of discretion, given the weight that had to be placed on the respondent's financial circumstances.

62. There was nothing wrong with the judge recognising the primacy given to that factor, Mr Thomas contended. That it outweighed other factors did not mean those other factors were not considered by the respondent. As the judge said, it was difficult to see what other decision the respondent could have made. She had made an unassailable finding of fact that the employer's decision was not irrational or perverse and therefore was not a breach of contract.

63. Mr Thomas argued that the judge did take account of the claimant's reasonable expectation of bonus. She considered it alongside that of the other employees whose contracts entitled them to be at least considered for a bonus. The judge was not bound to require the employer to give much weight to the claimant's reasonable expectation because his previous awards of bonus had far exceeded his contractual entitlement.

64. I think the judge's treatment of the contractual discretion issue gives cause for concern. Her misunderstanding of the figure of €3.25 million, believing it to be a profit forecast when in fact it was a forecast of turnover, was significant. She thought the claimant had achieved a little over half his profit target rather than nearly all of it. It was not a "typographical" error as Mr Thomas suggested, nor a drafting inaccuracy. Thus, at the end of her judgment, the judge remarked in a different context that "[i]f the claimant's budget for ERP was his and ERP's target, then in 2017 he and ERP had achieved just over 50% of that target".

65. The error may well have been material to the judge's assessment of the rationality of the respondent's exercise of its contractual discretion because the claimant's part of the business (i.e. the ERP business) was the only part of the business that was making good money. Mr Dundon had acknowledged as much in his paper in January 2018. That could have formed a basis for at least considering whether the claimant should be treated differently from other managers entitled (under differently drafted contract provisions) to be considered for bonus.

66. The claimant's argument for differential treatment was not considered by the judge in that light, as it should have been. And if there was a performance based case for differential treatment, exceptional payment to him of a bonus was not necessarily unaffordable even with the respondent's financial difficulties. Viewed in that light, the reasonable expectation of bonus based on previous awards - albeit above contractual entitlement - might have assumed greater significance in the judge's assessment of the *Wednesbury* reasonableness issue.

67. If the judge had properly understood that the performance of the ERP business stood out from that of other parts of the business, presumably run by other senior managers with an expectation of bonus, her discussion and analysis of the *Wednesbury* reasonableness issue might have proceeded differently. She might have viewed differently the fact that the respondent relied on a purely generic email which deliberately did not single out any one of the 40 or so senior managers for criticism or praise, but lumped them all together.

68. For those reasons, I have concluded that the contractual discretion issue must be remitted for further consideration. I uphold the second and third grounds of appeal, taken together. I will return to the question of remission of this issue after considering the fourth ground of the appeal.

Fourth ground: the finding that claimant would have resigned unless offered close to £55,000

69. The fourth ground is that the judge was wrong to find that, if her primary conclusions were wrong, the unfair dismissal claim (though not the breach of contract claim) would fail in any event because the claimant would have resigned unless offered a sum close to the £55,000 bonus he was demanding.

70. I referred the parties after the hearing to the Privy Council's decision in **Chen v. Ng** 2017 UKPC 27. The Board considered the position where a finding is made on a point that may not have been put, or adequately put, to a witness. At my invitation, the parties supplemented their arguments with further written submissions in the light of that authority.

71. Mr Robson made two main points: first, that there was no proper evidential basis for the judge's finding; and secondly, that it was procedurally unfair to make that finding without giving the claimant the opportunity to comment on the proposition that he would have resigned anyway, unless offered a sum close to £55,000.

72. In his written submissions, Mr Robson argued that the general rule approved by the Board in **Chen v. Ng** was engaged: "it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted". The claimant's pleaded case was that he resigned in response to the refusal to pay *any* bonus, not because he insisted on being paid the sum of £55,000 he had received the previous year.

73. Mr Robson also emphasised that the respondent had not pleaded in its defence the point taken by the judge, surprising everyone at the end of her reasons. There was therefore no need to consider the more nuanced exercise of examining the fairness of the hearing overall, in the light of the factors mentioned in the joint judgment of Lords Neuberger and Mance, at [55]:

> **"… the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."**

74. Mr Robson went on to submit further that, if those factors are considered, each points towards the course taken by the judge having compromised the fairness of the hearing. The point was fatal to the unfair dismissal claim. The respondent's questions to the claimant had not come near raising the point. The fact that he was demanding £55,000 did not mean he would not settle for less. Had he been asked about the point, it was highly probable that he would have given convincing evidence contrary to the judge's finding.

75. Mr Thomas sought to defend the fairness of the judge's finding. She was entitled, he said, to draw the inference that the claimant would have resigned if offered a sum less than £55,000 or thereabouts. The evidence was that the claimant was implacable in his demand for that sum as an entitlement. His solicitors articulated it strongly in writing. His emphasis was on the level of bonus not just the payment of something by way of bonus.

76. The judge was entitled to take that into account, Mr Thomas submitted. She had heard the evidence and had seen the demeanour of the claimant when he was giving evidence. The appeal tribunal should not interfere unless, which was not the case, the finding could be impugned, applying the usual high threshold of perversity.

77. In his further written submissions, Mr Thomas pointed out that the case was not one, like **Chen v. Ng**, where the witness's evidence was flatly disbelieved on a point not put to him. The judge had formed an opinion based on the evidence before her on what the claimant would have done if offered his highest contractual entitlement (£19,500) or less. It was not unfair of the judge to form that opinion, rather than to reconvene the tribunal, adding to the length and expense of the proceedings.

78. Further, Mr Thomas submitted that the pursuit of perfection in the exposition of factual findings by the tribunal was too high an aim, as pointed out in **Chen**'s case at [56], citing from Lord Hoffmann's speech in **Piglowska v Piglowski** [1999] 1 WLR 1360, 1372:

> **"If I may quote what I said in *Biogen Inc v Medeva Plc* [1997] RPC 1, 45:**

'... [S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'

'... The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed.'"

79. I have carefully considered those rival arguments. In my judgment, the judge's finding was not fairly reached. It is true that the finding did not of itself impeach the claimant's credit and did not mean his evidence was disbelieved. But it did mean the entire unfair dismissal claim was doomed on the basis of a point that had formed no part of either party's pleaded case and which had not been clearly and openly debated either in written or oral evidence, nor in closing speeches.

80. It is true, also, that the correspondence and the claimant's attitude to the impact of bonus payments in previous years pointed towards an uncompromising stance on his part. I recognise that the judge heard the evidence and was able to see first hand the demeanour of the claimant while he gave his evidence; and that findings of fact cannot be a complete expression of the judge's appreciation of the factors that influenced her.

81. But there were features of the evidence pointing the other way. An attempt was made to set up a meeting in Dublin between the claimant and Mr O'Riordan, a director of the respondent. There was evidence that a without prejudice encounter between the parties took place. The claimant's complaint in correspondence included his dissatisfaction with the respondent, expressed in his letter of 18 May 2018, about the respondent having failed either to pay his bonus or seek to explain and justify not paying it. That suggests he might have at least listened to any explanation offered.

82. Those pieces of evidence would need to be set against the claimant's implacability in demanding £55,000 or thereabouts. He was in receipt of professional legal advice. If the advice were sound, it could have included advice on the weakness of any argument that he was entitled to anything like £55,000. Even allowing for inevitable imperfections in the expression of factual findings, the judge does not appear to have considered these points and set them against the evidence supporting the proposition that the claimant's stance was uncompromising.

83. I conclude that the judge was not justified in drawing the inference she drew without the issue having been debated with the parties and considered, at least as a matter on which they could address her in submissions. If she had invited submissions on the issue, it is likely the claimant would have had to be recalled to deal with the point. I therefore uphold the fourth ground of appeal and that issue, also, will be remitted for further consideration.

Remedy

84. For those reasons, the appeal succeeds in part and the matter will be remitted for further consideration in the light of this judgment. I have considered whether the remission should be to the same tribunal or a different tribunal. Taking into account the points made by Burton P in **Sinclair Roche & Temperley v. Heard** [2004] IRLR 763, with all due respect to the

employment judge, I think it would be appropriate for the matter to be remitted to a differently constituted tribunal in view of the finding of procedural unfairness I have made in determining the fourth ground of appeal.

85. I do not think it is necessary for the whole of the evidence to be heard again. The primary findings of fact made by the judge, as set out in her decision, can stand and should not be retried. Much of the history set out in her judgment was not controversial and evidenced by documents which speak for themselves. Her ruling on the meaning of clause 8 was, for the reasons given in this judgment, correct and is binding on the parties. It may not be revisited.

86. The two issues that need to be reconsidered are, first, whether the respondent exercised its discretion rationally and lawfully, without any breach of the claimant's rights under his contract of employment; and secondly, if the issue is pursued by the respondent, whether the claimant would have resigned in any event unless paid a sum close to £55,000. A limited amount of further evidence on those issues would be appropriate and could be heard, together with the parties' submissions, comfortably within a single day.

87. To that extent, this appeal is allowed.