EMPLOYMENT TRIBUNALS

Claimant: **Mr M FENTEM**

Respondent: **OUTFORM EMEA LIMITED**

Heard at: by CVP

On: 22 September 2020

Before: Employment Judge Dyal

Representation:

Claimant: Mr Jackson, Counsel

Respondent: Mr Hodge, Counsel

JUDGMENT

1. The complaint of unfair dismissal is dismissed.

2. The complaint of unauthorised deduction from the Claimant's wages is dismissed.

REASONS

Introduction

1. By a claim form presented on 6 May 2020, the Claimant complains of unfair dismissal and unauthorised deduction from wages, the wages in question being a bonus in respect of the financial year 2019.

2. The parties produced an agreed list of issues for the tribunal's approval. I approved the list at the outset of the hearing (a minor modification that related only to remedy was agreed but is immaterial in light of the judgment).

3. For convenience I will repeat part of the list of issues here:

   Unfair dismissal

   a. Was the Claimant dismissed? It is accepted by the parties that the Claimant resigned but was this converted into a dismissal when the Respondent subsequently terminated the Claimant's contract in accordance with clause 19.5 of the Claimant's service agreement and paid him in lieu of the remainder of his notice.

   b. The Respondent says not and relies on:
      i. clause 19.5 of the Claimant's service agreement which is enforceable and not void; and
      ii. section 12.10 of Chapter 12, Volume 3 of the IDS Employment Law Handbooks which refers to *Marshall (Cambridge) Ltd v Hamblin 1994 ICR 362, EAT.*

   c. The Claimant says yes and relies on:
      i. clause 19.5 of the Claimant's service agreement being void by reason that it falls foul of section 203(3)(c) of the Employment Rights Act 1995; and
      ii. *John Brignell and Co (Builder) Ltd v Bishop [1974] Court of Appeal*

4. The agreed list of issues said this about the unauthorised deductions from wages complaint:

   Unlawful deductions from wages

   a. This claim was only pleaded by the Claimant if the Respondent's position was that they placed the Claimant on garden leave for the remainder of his notice. This is not the Respondent's position and so is not applicable.

5. Mr Jackson's position in his skeleton argument and orally was that he accepted that the claim must be dismissed if (as both parties contended) the effective date of termination was found to be 19 December 2019. However, he declined to withdraw the claim upon Mr Hodge's suggestion he do so. He explained that this was simply to avoid the possibility of prejudicing his client in the event that, in appellate proceedings, the Respondent were to argue that the Claimant's employment continued beyond 19 December 2019.

6. We agreed at the outset of the hearing that I would deal with liability first, deferring issues of remedy pending judgment.

The hearing

7. The hearing was held by video link using CVP. The technology worked extremely well and the hearing progressed very smoothly.

8. I received an agreed bundle running to 330 pages (316 as paginated). At the outset of the hearing I asked counsel which documents I needed to read for the purpose of dealing with liability. I was invited to read pages 1 – 90, which I did.

9. I heard evidence from the Claimant and from Mr Simon Hathaway for the respondent. Both were briefly cross-examined.

10. I also received a chronology from Mr Hodge which was agreed in the course of the hearing by Mr Jackson. Both counsel produced short skeleton arguments and made further oral submissions as summarised below.

Findings of fact

11. The Claimant's continuous employment began in October 1990. He rose quickly from the position of Financial Controller to Finance Director. His employment was the subject of several TUPE transfers as the years rolled by.

12. The Claimant entered a service agreement by deed dated 4 April 2017. At that time, the employer was CPI UK Limited. It was uncontroversial before me that the main terms of the Claimant's contract of employment remained as set out in this document. There were some amendments to his basic pay and to the basis upon which the quantum of bonus fell to be calculated but those changes are immaterial for current purposes.

13. The terms of the contract included the following in relation to notice:

> *3.1 This Agreement shall commence on the Commencement Date and will, subject to earlier termination below, continue unless and until it is terminated by either party giving to the other 9 months' prior written notice. The Executive's period of continuous employment commenced on 22 October 1990.*
>
> […]
>
> *19.5 Where the Executive serves notice to terminate his employment with the Company, the Company shall at any time during the period of notice be entitled to terminate the Executive's employment forthwith and in full and final settlement of the Executive's claims under this Agreement by paying to the Executive, the salary (excluding bonuses) to which he would have been entitled during the notice period or any part of it in lieu of such notice or any part of it.*

14. The contract made provision for both basic pay and for the Claimant to participate in a bonus scheme, including the following terms:

> *8.3 In addition to the salary referred to in clause 8.1 above, the Executive shall be entitled to participate in a bonus scheme. Details of the current bonus scheme are set out at Schedule 1.*
>
> *[…]*

Schedule 1

[…]

3. The Executive shall have no entitlement to bonus in respect of any Financial Year in which:
3.1 he is not in the full time employment of the Company for the entire duration of that Financial Year; or
3.2 he has been lawfully dismissed by the Company pursuant to clause 19 above or
3.3 he has given notice to terminate his employment on a date prior to the expiry of that Financial Year and does not serve out his full period of notice. For the avoidance of doubt, if the Executive does serve out such full period of notice he shall be entitled to bonus in respect of the Financial Year in which he gave notice strictly subject to the provisions of clauses 3.1 and 3.2 above.

15. It was uncontroversial before me that the financial year, at all relevant times, was 1 January to 31 December.

16. The Claimant's employment transferred under TUPE to the Respondent on 2 January 2019 from Valley CPI Limited. This transfer followed a period of some significant business change. The Claimant briefly explains this at paragraphs 8 to 13 of his witness statement and I accept that (unchallenged) evidence.

17. The Claimant resigned by letter dated 16 April 2019. The Claimant explained the reasons for his resignation briefly (this is not a criticism). He says this at paragraph 20 of his statement and I accept this (unchallenged) evidence: "*Following the change in ownership, infrastructure and working environment I determined in April 2019 that, after what would eventually be just over 29 years of loyal, dedicated and unblemished service, and in the final few years of my career, the new arrangement was not necessarily something I desired."*

18. He gave nine months' notice and in the meantime continued to work. The Claimant, however, indicated that he was willing to be flexible since his employment would be terminating so close to the financial year end.

19. On 16 October 2019, Mr Hathaway, Managing Director, wrote to the Claimant apologising that it had taken so long to "confirm" the Claimant's resignation and to accept it. He noted that the Claimant's last day of employment, in accordance with his notice, would be 16 January 2020. Mr Hathaway thanked the Claimant for his flexibility and said *"… I note and appreciate the flexibility around this date you have indicated, due to the financial year end. I therefore propose to review this with you closer to the time when we have a clearer idea of the input required".*

20. On 19 December 2019, the Claimant was called to a meeting with Mr David Joyce, Chief Operating Officer, who was his line manager. Mr Joyce told him that the Respondent was exercising its discretion to pay him in lieu of the remainder of his notice period, bringing his employment to an immediate end. The meeting

was followed up with a letter on the same day which said, among other things, as follows:

> *Your notice was due to expire on 16 January 2020. However, in accordance with clause 19.5 of your service agreement dated 4 April 2007, in circumstances where you serve notice to terminate your employment, the company has the right to terminate your employment with immediate effect at any time during your notice period by making a payment in lieu of your salary only in respect of any part of your notice period not worked.*
>
> *Your employment therefore ends today (19 December 2019) […]*

21. The Claimant was subsequently paid his salary in lieu of the remainder of his notice period.

22. The Claimant was surprised by this approach but he did not protest to the Respondent.

23. I agree with the parties, and find, that the effective date of termination was 19 December 2019. Not least that is because the Claimant was told in clear and unequivocal terms that his employment was to come to an immediate end on that date.

Was the Claimant dismissed?

24. In order to complain of unfair dismissal the Claimant must have been dismissed. Dismissal in this context is defined as follows:

> *95 Circumstances in which an employee is dismissed*
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection*
> *(2) …only if)-*
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*
> *(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if-*
> *(a) the employer gives notice to the employee to terminate his contract of employment, and*
> *(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;*
> *and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.*

Respondent's position

25. Mr Hodge's submissions were set out in his skeleton argument which he spoke to. In essence his submission was that the Claimant resigned and resignation was not converted into a dismissal. He accepts as a general proposition that where an employee resigns on notice and the employer unilaterally brings forward the date of termination that will ordinarily amount to a dismissal. However, he submits that the position is different where there is a term of the contract of employment that permits the employer to terminate the contract and make payment in lieu of the remainder of the notice period. In those circumstances he submits that the resignation is not converted into a dismissal. In this regard Mr Hodge relies upon *Marshall v Hamblin* [1994] ICR 362. Mr Hodge submits that it fairly and squarely deals with the situation in this case. He submits that it was correctly decided, but in any event submits that whatever I may make of it, it is a decision of the Employment Appeal Tribunal so it is binding on me.

Claimant's position

26. Mr Jackson also produced a skeleton argument. He developed his position significantly in oral submissions and I can fairly summarise his position as follows:

    a. *Hamblin* did not decide what Mr Hodge says it did. On the contrary; the EAT in *Hamblin* regarded the case before it as one in which the employee had resigned and had then effectively been placed on garden leave by the employer until the end of the notice period throughout which the contract continued. It was for that reason that the EAT concluded that there was no dismissal. He submits that *Hamblin* was not a case in which the employer's refusal to allow the employee to work had brought the contract to an end before the end of the notice period given by the employee.
    b. In any event, Mr Jackson submits that I am not bound by *Hamblin* because it is inconsistent with two earlier decisions which I ought to follow: *British Midland Airways v Lewis* [1978] ICR 782 and *John Brignell & Co v Bishop* [1974] IRLR 157;
    c. Further, Mr Jackson submits that I am not bound by *Hamblin* because it was criticised by a different division of the EAT in *McLoughlin v Sutcliffe Catering (UK) Ltd* EAT/0932/01;
    d. The principle of law is simply that if an employee resigns on notice and the employer unilaterally brings forward the date of termination to a point in time earlier than the expiry of notice as given, that is a dismissal. Accordingly the Claimant was dismissed.

27. I should note for completeness that:

    a. Mr Jackson withdrew the submission made in his Skeleton Argument: "*Section 95 (2) Employment Rights Act 1996 ("ERA") provides for precisely the circumstances that exist in this case and deem them to be a dismissal for the reason that the Respondent shortened the period of notice."* As Mr Hodge pointed out (and Mr Jackson on reflection accepted),

s.95(2) ERA deals with the situation in which the *employer* gives notice and the *employee* foreshortens the notice period. He therefore did not pursue the argument intimated in his skeleton argument that in *Hamblin* the EAT had wrongly focussed upon the common law test for dismissal rather than the statutory one.

b. Mr Jackson indicated that he did not pursue the averment previously made by the Claimant (e.g. in the Particulars of Claim and List of Issues) that clause 19.5 of the service agreement was rendered void by the provisions of s.203(3) Employment Rights Act 1996. This was surely a wise concession, among other things because the contract clearly did not purport to compromise any claim to which s.203(3) applies.

What did Hamblin decide?

28. In my view, Mr Jackson's submissions as to what the EAT decided in *Hamblin* are untenable on a careful analysis. However, I acknowledge that there is the odd phrase here and there which, taken in isolation, may appear to support his position.

29. *Hamblin* was decided by a majority. The majority started by quoting from (the now famous) speech of Lord Browne-Wilkinson in *Delaney v. Staples (trading as De Montfort Recruitment)* [1992] I.C.R. 483 at 488-9. I will quote part of the passage that the EAT did:

> *The phrase 'payment in lieu of notice' is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories.*
>
> *(1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called 'garden leave') there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.*
>
> *(2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract' provided that he makes the payment in lieu. But the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.*
>
> *(3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing*

summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.

(4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. If follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment.

30. The majority of the EAT in *Hamblin* then go on as follows at 367C-H:

Had the employer given notice, the present case would have fitted within the second category as defined by Lord Browne-Wilkinson in Delaney *[1992] IRLR 191. Does the fact that the employee gives notice affect the position? This raises the problem whether such a term of a contract can be utilised in order to cut short the period of notice already given by the employee.*

The approach of the industrial tribunal was that the employer could not waive a notice which had already been given by the employee. With respect we do not consider that this is a correct analysis of the situation. Until such time as the employee's notice expires, the contract of employment continues. <u>The employer is entitled to utilise a term of that contract to bring the employment to an end at an earlier date than the date of the expiry of the employee's notice</u> [underlining added]*. The waiver of the employer is in relation to the period of notice (provided he pays the appropriate sum in lieu). In spite of some considerable hesitation we have come to the conclusion that in a contract of employment which gives the employer the option to make a payment in lieu, there is no right in the employee to work out his notice.*

We therefore agree with the contention of the employers that, if this does not fit precisely within the analysis of the <u>second</u> category outlined by Lord Browne-Wilkinson in Delaney v. Staples (trading as De Montfort Recruitment) [1992] I.C.R. 483, 488-489, we regard it as a further category with <u>the same attributes as that</u> category, save only that the employee has given notice [underlining added]*. It was urged on us that any other approach to the problem would result in the employee being in a position to "blackmail" the employer by forcing him to retain an unwanted employee in his service.*

We find some support for our view that the employer has a right to waive a period of notice and, where it is specified in a contract, to make a payment in lieu, in the terms of section 49(3) of the Employment Protection

(Consolidation) Act 1978, as amended by Schedule 2 to the Employment Act 1982. This provides:

"Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more shall have effect subject to the foregoing subsections, but this

31. I think it is clear from these passages that the majority of the EAT in *Hamblin* regarded the case before it as one in which the employee had given notice and that the employer had brought forward the date of termination. It did not, as Mr Jackson contends, regard the case before it as one in which the employee had remained in employment until the end of the notice period he had given. I think this is clear from the above passage and judgment as a whole, but draw particular attention to the following:

    a. The majority of the EAT said this: "*The employer is entitled to utilise a term of that contract to bring the employment to an end at an earlier date than the date of the expiry of the employee's notice*". There would have been no reason to say this unless it was the majority's analysis of the case before it.

    b. The majority of the EAT agreed with the employer that the case before it was comparable to the second category outlined in *Delaney* or (given that it was the employee that had given notice) a further category with the same attributes. In the second category outlined in *Delaney* the contract is terminated summarily with a payment in lieu of notice. This is distinct from the first category in which the employee is placed on garden leave for the notice period throughout which the contract continues.

32. The conclusion of the majority in *Hamblin,* was that the employee was not dismissed. In light of the above, that conclusion was not reached for the reason that Mr Jackson gives (that the employee's employment continued until the end of the notice he had given, albeit that he was on garden leave for the latter part of it). It was reached because in the majority's view:

    a. there was a contractual term that permitted the employer to waive or shorten the period of notice which the employee had given;
    b. the effect of the employer exercising that term was to bring forward the date of termination;
    c. as a matter of law, in those circumstances, the termination remained one by reason of resignation and not by reason of dismissal.

    In my view that reasoning was central to the majority's decision to allow the appeal and as such forms part of the *ratio decidendi* of the case.

Is the employment tribunal bound by Hamblin (1)?

33. Mr Jackson submits that even if the above analysis of *Hamblin* is right, I am not bound to follow it because it is inconsistent with *British Midland Airways v Lewis* [1978] ICR 782 and *John Brignell & Co v Bishop* [1974] IRLR 157.

34. I respectfully disagree. First and foremost, neither of those two cases were cases in which there was a contractual term that purported to permit the employer to terminate the contract and pay the employee in lieu of notice in the event of the employee resigning upon notice. The existence of such a term was a central part of the reasoning for the decision in *Hamblin*. It distinguishes that case from both *Lewis* and *Brignell* and this is a sufficient basis to reject Mr Jackson's submission.

35. I acknowledge, of course, that an appellate court might decide that *Hamblin* is wrong and that even where there is such a contractual term the employer cannot exercise it without converting the resignation into a dismissal. But that is a different point: it is not about the law of precedent it is about the substantive law. It is not open to *me* to change the substantive law; I must follow binding precedent.

36. Secondly, on careful examination, even disregarding the point of distinction I have noted above (the existence of a contractual term allowing the employer to bring the contract to an end in the event of notice being given by the employee) I do not think at their appellate stages, either *Lewis* or *Brignell* actually decided anything inconsistent with *Hamblin.* This is important because I am being asked to depart from *Hamblin* on the basis that it is inconsistent with these authorities.

    a. In *Brignell*, the employment tribunal found that the employee had been dismissed. It found that he had resigned with a week's notice but that the employer had then dismissed him with immediate effect. It awarded him compensation including six weeks pay. On appeal to the NIRC the employer argued for the first time that compensation should have been limited to one week's pay because even if he had not been dismissed the Claimant's employment would have terminated within a week in accordance with his notice. The NIRC agreed with that argument in principle but held that the Claimant had not in fact resigned, he had merely indicated that he wanted to leave at the end of the week. The Court of Appeal dismissed the employer's further appeal. It held that the employee had resigned on a week's notice as the tribunal had found. However, it considered that it was too late for the employer to argue that remedy should be limited to a week's pay on account of the fact that the Claimant had resigned on a week's notice before being dismissed. Of significance to the present: the appellate proceedings were limited to issues of remedy only. They did not revisit the issue of whether or not the Claimant had been dismissed. This is pretty clear from the law report of the CA proceeding [1974] IRLR 157 and crystal clear from the law report of the NIRC proceedings which I referred myself to (see 8 ITR 420). In short, the appeals were just about quantum. There was no appeal against the tribunal's finding that the Claimant had been dismissed.

    b. In *Lewis,* the employee expressed a desire and intention to leave the employer's employment. However, no agreement could be reached as to

> when his employment would end. The employee was not content to give the notice he was told was due as he anticipated starting a new job more swiftly than that and *did not* give that notice. There was an unfinished negotiation as to when his employment would terminate. The employer then unilaterally told him that his employment would end upon very short notice. He did not agree. A swift termination was imposed by the employer. The ET considered the employee had been dismissed and the EAT agreed. In the EAT, so far as the law report reveals, the employer sought to overturn the conclusion that the Claimant had been dismissed as follows (785H-786E). It argued that there had been a variation to the Claimant's contract such that the parties had agreed that the Claimant's employment would terminate when proper and convenient arrangements could be made to replace him. It appears that the employer characterised this as a termination by mutual agreement or a resignation. The EAT rejected the argument (as the ET had) on the simple basis that no such agreement had been reached. When the employer imposed a termination this amounted to dismissal rather than a termination pursuant to the supposed variation (since that variation did not in fact exist). This alone is the basis of the EAT's decision (see 786A-E). I do not think that any principle of law can be extrapolated from *Lewis* that means I am free to depart from *Hamblin.*

37. I wish to be very clear about the relevance of the preceding paragraphs:

    a. I do not in any way doubt the proposition that where an employee resigns and the employer unilaterally brings forward the date of termination that will usually amount to a dismissal. Mr Hodge accepted that proposition too. His point, and now mine, is that on the authority of *Hamblin* the analysis is different where there is a contractual term permitting the employer to bring forward the termination date in the event of the employee resigning upon notice;

    b. Further, going beyond the simple point that *Lewis* and *Brignell* do not deal with the situation in which there is such a contractual term, there is in any event nothing in the authority of either case that would give me any basis to depart from *Hamblin* if *Hamblin* is otherwise binding.

Is the employment tribunal bound by Hamblin (2)?

38. The decision in *Hamblin* has been the subject of adverse comment in *Harvey on Industrial Relations.* In the current edition the authors say this:

> *Where the employee resigns and the employer wishes to terminate the employment before the notice has expired, he can do so only by agreement. If an earlier termination is imposed on the employee, it will constitute a dismissal.*
>
> *'British Midland Airways Ltd v Lewis [1978] ICR 782: L informed the company of his 'desire and intention to resign' and the company insisted on three months' notice. L informed them that he must leave some four weeks*

early and the interview ended there. A few days later the company, having arranged a replacement, told L that he had to leave almost immediately. L left under protest and successfully claimed compensation for unfair dismissal. The EAT observed that the earlier date insisted on by the company had not been mutually agreed and could not 'be forced upon the employee, unless he agreed … there was motive on both sides for some kind of compromise or arrangement … but no such agreement had ever been made.' L was therefore dismissed and the fact that the company had engaged a replacement did not constitute some other substantial reason which justified his dismissal.'

In Marshall (Cambridge) Ltd v Hamblin [1994] IRLR 260 the EAT (Judge Hargrove presiding) held by a majority that where the employer had a contractual right to make a payment in lieu of notice, he could, by making the payment unilaterally, advance the effective date of termination without converting the resignation into a dismissal. Two points may be made about this decision. First, if a power to shorten the notice given by the employee is to be relied upon, it should be stated in clear and unambiguous terms; in this case it was not. Second, even where a power exists contractually to pay in lieu in respect of notice given by the employee, it is submitted that the exercise of that power constitutes a termination by the employer. He is then choosing, albeit lawfully at common law, to bring the contract to an end earlier than it would otherwise have done. (Of course, in most circumstances where he does this it will not be difficult to satisfy a tribunal that any dismissal is fair in all the circumstances.)

39. *Harvey* is of course a leading textbook and the views expressed in it carry some weight. Nonetheless, the short point is that I cannot depart from an otherwise binding precedent because of views expressed in a textbook and Mr Jackson of course acknowledges that.

40. However, Mr Jackson relies also upon *McLoughlin v Sutcliffe Catering (UK) LTD* EAT/0932/01 and submits that I can and should depart from *Hamblin* on the basis of it. With respect, I disagree.

41. In my view all *McLoughlin* decided is that the employment tribunal was correct to conclude that in the case before it the employee had not been dismissed. This was on the basis that she had resigned, was not required to work her notice period, her employment had continued to the end of the notice period and she had simply been paid in lieu of actually working (i.e., she was on garden leave for the notice period).

42. It is true that there is a passing adverse comment on *Hamblin* in *McLoughlin.* This requires some examination.

43. In *McLoughlin,* the EAT cited a passage from *Harvey* which was critical of *Hamblin.* The passage cited is the then current version of the passage from *Harvey* that I have cited above at my paragraph 38. Mr Jackson submits in his skeleton argument that this criticism of *Hamblin* was “adopted” by the EAT in *McLoughin.* However, that is not right. The passage from *Harvey* was simply

referred to in order to explain what the appellant's submissions were (see paragraphs 8 and 9). The EAT in *McLoughlin* then went on to conduct *its own* analysis of the authorities referred to in the passage from *Harvey* it had quoted and these included *Hamblin.*

44. So I must next turn to the analysis of *Hamblin* by the EAT in *McLoughlin.* In order to do that it is essential to set out a little more of the judgment in *Hamblin.*

45. In *Hamblin,* the majority of the EAT also quoted from *Harvey.* In its then current edition *Harvey* said this:

> *"Note, however, that where the employee resigns, if the employer imposes a termination of the employment before the expiry of the notice given this will amount to a dismissal: British Midland Airways Ltd v. Lewis [1978]* ***I.C.R.*** *782."*

46. The majority of the EAT in *Hamblin* went on to say this at 369A-B:

> *"we have considered British Midland Airways Ltd. v. Lewis [1978] I.C.R. 782 and in so far as the entry in Harvey indicates that any termination during a period of the employee's notice will amount to a dismissal, there is no support for that proposition in the case cited and, in our view, the passage in Harvey is misleading."*

47. Turning back to the *McLoughin* division of the EAT's analysis of *Hamblin,* it said this:

> *"13. It seems to us that that rejection of the content of the note in Harvey may be too sweeping."*

48. That is the start and finish of the criticism of *Hamblin* in *McLoughlin.* It is a passing, *obiter,* remark. It does not suggest that *Hamblin* was wrongly decided or come close to even implying the same. It just suggests that an observation made in *Hamblin* about a textbook "may" have gone too far. That does not provide any basis upon which I could regard myself as free to depart from *Hamblin* and I think it would be an error of law for me to do so.

Discussion and conclusions

49. In this case the Claimant unequivocally resigned upon notice on 16 April 2019 to expire on 16 January 2020.

50. There was a term of his contract which on the face of it permitted the employer to bring forward the date of termination paying the Claimant salary in lieu of notice or any part of the notice period. Clause 19.5 provided as follows:

> *19.5 Where the Executive serves notice to terminate his employment with the Company, the Company shall at any time during the period of notice be entitled to terminate the Executive's employment forthwith and in full and final settlement of the Executive's claims under this Agreement by paying to the*

Executive, the salary (excluding bonuses) to which he would have been entitled during the notice period or any part of it in lieu of such notice or any part of it.

51. At one time the Claimant challenged the Respondent's right to rely upon this clause on the basis that it was void by reason of s.203(3) ERA. That challenge has wisely been dropped.

52. The Respondent exercised the power it was given by clause 19.5. It notified the Claimant it was doing so at the meeting of, and then in the letter of, 19 December 2019. The contract was therefore brought to an end on 19 December 2019. The Claimant was paid salary in lieu for the remainder of his notice period i.e., 16 January 2020.

53. Applying *Hamblin* the analysis of these facts is that the Claimant was not dismissed. He resigned on notice. The date of his termination was brought forward in accordance with the terms of his contract. According to *Hamblin* that is not a dismissal.

54. For the reasons set out above I consider that I am bound by *Hamblin.* It follows that I must find that the Claimant was not dismissed and dismiss his unfair dismissal claim.

55. I have considered whether it would be useful for me to express my own view as to whether *Hamblin* was or was not correctly decided in case his matter goes further. I have come to the view that there would be little purpose in me doing so:

    a. I can see respectable arguments either way but they are arguments which I think will be at least as obvious to the appellate courts as they are to me;
    b. I have heard this case alone. If I had been sitting with members I may have taken a different view as the appellate courts are often assisted by knowing the views of an industrial jury.

Wages

56. I have found that the effective date of termination was 19 December 2019. In those circumstances it is the parties' shared position that the wages claim must fail.

57. I agree it must fail. In short the Clamant did not meet the criteria for payment of the bonus at clause 3.1 or 3.3 of schedule 1 to his service agreement.

Conclusion

58. The fact that the Claimant worked for the vast majority of his notice period before the Respondent rather suddenly exercised its power under clause 19.5 is not lost on me. However, for the reasons I have given, I must dismiss the claims.

_____

Employment Judge Dyal

_____

Date 22.09.2020