EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. 4110703/2019 (V)

Final Hearing held remotely on 10, 11, 12 and 13 August 2020

Employment Judge A Kemp

Mr A Roy	**Claimant** **In person**
Loganair Limited	**Respondent** **Represented by:** **Mr B Mitchell** **HR**
Director	

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent was in breach of contract with the claimant in its assessment of his contractual bonus for the financial year 2018/19, and he is awarded the gross sum of FOUR THOUSAND FOUR HUNDRED AND NINETY TWO POUNDS THIRTY TWO PENCE (£4,492.32) payable by the respondent less any statutory deductions properly due, provided that the respondent intimates any such deductions in writing to the claimant in writing and remits the sum deducted to Her Majesty's Revenue and Customs.

REASONS

E.T. Z4 (WR)

Introduction

1. This was a Final Hearing held remotely in accordance with the arrangements made at the last Preliminary Hearing. It was for a claim of breach of contract, which the respondent opposed. The claim was for a bonus for the 2018/19 financial year, with the parties agreeing that all bonuses for previous financial years were not in dispute. For the avoidance of doubt, no claim was made for the short period of time during which the claimant worked in the 2019/20 financial year.

2. The hearing took place in accordance with the orders made at the Preliminary Hearing. The hearing itself was conducted successfully, with all parties, representatives and witnesses attending and being able to be seen and heard, as well as being able themselves to see and hear. I had a paper copy of the Bundle of Documents. There were occasions when the audio quality was poor, but it was adequate to hear the question and answer. There were a number of breaks taken during the evidence. I was satisfied that the arrangements for that hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list. I was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence before me.

Evidence

3. Evidence was given by the claimant, who also called Mr Peter Simpson, and Mr Jonathan Hinkles and Mr Maurice Boyce for the respondent. The parties had concluded a Bundle of Documents, and a Statement of Agreed Facts. Not all of the documents in the Bundle were spoken to in evidence.

Facts

4. I found the following facts established:

5. The claimant is Ashley Roy.

6. The respondent is Loganair Limited. It is a company incorporated under the Companies Acts and has a place of business at Cirrus Building, 6 International Drive, Dyce Drive, Aberdeen AB21 0BH. It had a principal office in Glasgow. It operates aircraft within the United Kingdom.

7. The respondent is a wholly owned subsidiary of Airline Investments Limited ("AIL"). Also wholly owned subsidiaries of AIL were three companies with the BMI Regional brand. The respondent and BMI were part of the AIL Group. The two majority shareholders of AIL are, and were at material times, Mr Stephen Bond and Mr Peter Bond.

8. The claimant had worked for Mr Peter Bond in various roles for about twenty years. In 2015 he asked the claimant to act as consultant to appraise the charter division of the respondent, and its ability to generate more work particularly in the oil and gas market. The claimant prepared a report.

9. The claimant was thereafter approached by the respondent to be employed as Director of Charter Services. At that stage the claimant had an offer from another company. Discussions took place around remuneration offered, and the claimant was offered a salary of £105,000 and bonus amounting to up to 25% of salary. The details of that bonus were not specified, and were to be discussed between them.

10. He accepted the offer, and shortly afterwards accepted the terms of a contract of employment as offered to him. He commenced to work for the respondent from 1 June 2015. The claimant was based at the office in Aberdeen.

11. The claimant was employed under a contract of employment dated 27 May and 1 June 2015 ("the contract of employment"). The contract of employment had a provision as to bonus as follows:

> "You will be entitled to a personal performance related bonus, which will be capped at 25% of your basic salary. The details of this will be discussed with you in greater detail and confirmed in writing."

12. The respondent did not specifically confirm further details of the performance related bonus in writing in the months after he started, although the claimant sought that from the respondent periodically during his employment. The managing director of the respondent then was Mr Stuart Adams.

13. The role of the claimant was to sell charter flights to customers, who were mainly companies in the oil and gas industry, but also to other customers and potential customers. The purpose of the role was to generate revenue from the charter market for the respondent.

14. The charter market involves the leasing of an aircraft for one or more days to a customer. Much of the market for such work was in the oil and gas industry, centred around Aberdeen, in particular for a fixed wing flight from Aberdeen to Sumburgh from where a helicopter flight took workers to installations situated in the northern North Sea.

15. The large majority of the respondent's work was for scheduled services, with aircraft flying passengers on advertised flights.

16. The respondent's financial year started on 1 April. The claimant worked for 10 months of the 2015/16 financial year accordingly. That financial year ended on 31 March 2016. Mr Adams did not at that stage make proposals for bonus.

17. In or around June 2016 Mr Adams left the respondent's employment, and was replaced by Mr Jonathan Hinkles who commenced as managing director of the respondent that month.

18. The claimant sought to progress the bonus with Mr Hinkles on a number of occasions thereafter. On 10 April 2017 he wrote to Mr Hinkles with proposals to do so. By then the 2016/17 financial year had ended. The claimant made comments about bonus for each of the two financial years.

19. On 11 April 2017 the claimant met Mr Hinkles, and they discussed the bonus arrangements for the two financial years. They discussed the bonus in relation to four areas – (i) the financial performance of the Charter division (ii) Company profitability (iii) Operational delivery and customer

satisfaction and (iv) Team dynamic. Mr Hinkles had prepared a matrix document for the 2016/17 financial year using those areas, and allocating percentages of 7,4,4, and 2% respectively to each of them, leading to a total percentage of salary of 17%. Mr Hinkles did not prepare a similar document for the 2015/16 financial year which had concluded before he joined the company.

20. On 5 May 2017 Mr Hinkles replied with comments. He had had discussions about the bonus principles, described as a matrix, with Mr Peter Simpson then the Group Chief Executive Officer, and Mr David Harrison, then the Chairman. Mr Hinkles reported to Mr Simpson. He stated that the bonus must be based on contribution (being revenue less variable costs) rather than revenue alone, and that at least part of the bonus must relate to company profitability.

21. Mr Hinkles commented on the 2015/16 financial year, noted that contribution was at 73%, profitability was materially behind budget at £3.6 million against budget of £6.2 million. He proposed a bonus of 66% of the maximum, which equated to 14% of salary.

22. He commented on the 2016/17 financial year. He noted that Charter contribution was 9% ahead of budget, and was likely to remain at that once March accounts were finalised. Company profitability was he stated down against budget, with profit before tax before exceptionals less than 50% of budget. He proposed a bonus at 80% of maximum.

23. He concluded as follows –

> "We do need to finalise the structure for 2017/18 to ensure that the bonus is a calculable figure based on an objective set of numbers. I had a fairly clear view on a proposal but this afternoon's news about Total has thrown the basis of the proposal out somewhat: I was intending to relate a portion of the bonus to securing future work as you had suggested, but given that the targeted major prospect for this year has moved backwards I do not wish to appear unfair by tying the achievement of your bonus to something which may now be impossible to achieve! If you believe there is a

reasonable prospect of Total still coming through, I'd be happy to table this but would welcome your views on that before I do.

As noted above, I hope that this will enable us to close out this question in a way which is acceptable to both you and Loganair, and move forwards with an agreed and defined structure to provide clarity for all into the future."

24. On 8 May 2017 the claimant responded to Mr Hinkle's email of 5 May 2017. He accepted the proposal as to 66% against maximum budget for 2015/16 but proposed a change to the calculation of the salary figure used for that, leading to a sum for bonus of £14,762.25. That sum equated to a bonus at 14% of annual salary. The claimant proposed 88% of maximum potential for 2016/17, leading to a figure of £23,797.52. That sum equates to a percentage of bonus at 22% of salary.

25. The 2016/17 bonus had not specifically been allocated between the four areas, but had that been done the percentages against each would have been, respectively, 8,6,4 and 4%.

26. No detailed discussion took place in relation to the allocation of the 2015/16 bonus against the individual areas, but had that been done the percentage against each is likely to have been, respectively, 4,3,4 and 3%.

27. The respondent did not reply to confirm agreement to those figures specifically, but they were paid to the claimant, subject to statutory deductions, in or about June 2017.

28. The respondent made a loss of about £9 million in the financial year 2017/18 and Mr Hinkles did not initially agree to pay a bonus for the financial year for any member of staff. In or around November 2018 Mr Hinkles informed the claimant that no bonus would be paid to him for that financial year.

29. The claimant submitted a grievance in relation to his not receiving a bonus on 22 November 2018, and in early December 2018 presented an Employment Tribunal Claim in relation to that.

30. The grievance hearing took place on 5 December 2018. It was heard by Mr Peter Simpson the Group Chief Executive Officer, and Mr Hinkles' line manager. A minute of that meeting was taken and is a reasonably accurate record of it.

31. At the meeting the claimant was frustrated at the position, and in an agitated state, such that at one point Mr Simpson expressed the opinion that the claimant was being "quite rude". He considered that the claimant was not answering reasonable questions and was not behaving in a professional manner. The claimant stated for example that Mr Simpson knew matters that Mr Simpson did not. The claimant had done so in light of emails from Mr Hinkles which stated that he, Mr Hinkles, had spoken to Mr Simpson about the claimant's bonus arrangement.

32. The grievance was upheld by Mr Simpson by letter dated 18 December 2018, he deciding that the claimant was entitled to a bonus but not its amount. Mr Simpson attached to his decision letter a document in relation to the 2016/17 Financial Year in relation to the claimant, and expressed his understanding that a copy had been given to the claimant earlier.

33. Mr Simpson stated in relation to the documentation for the bonus that:

> "There has been significant dialogue between yourself and Jonathan Hinkles, Managing Director, on the topic of your bonus and what the principles of its calculation should take in to account. We had discussion about the matrix document and that past payments to you were rooted in that document, albeit that there was a degree of additional negotiation thereafter. I am satisfied that the bonus matrix, which does have a weighting for overall company profitability, has been discussed with you and that it has become the foundation of the bonus."

34. The document he attached had four Areas, and headings for criteria, maximum bonus as a percentage, achieved percentage, and assessment. It had in its heading the 2016/17 financial year.

35. Under "Charter Sales budget" as the Area, the form stated under Criteria "Charter contribution budget met – 2%. Above budget, 1% of bonus will

be payable for each full 5% increase in charter contribution earned (per management accounts) up to a maximum of 8% bonus for charter contribution 30% ahead of budgeted levels." The maximum percentage was 8%, 7% was stated as achieved and on assessment was stated "Contribution 26% ahead of budget per December 15 management accounts – calculation to right."

36. Under "Overall company P&L target" as the Area, the form stated under Criteria "Nil below £3m PBT. At £3m PBT, a 3% bonus is payable, increasing by 1% for each full £1m of PBT achieved up to a maximum of 7%". The maximum percentage was 7%, the achieved percentage was 4% and the assessment "PBT of £4m expected in FY 16/17". PBT is a reference to profit before tax.

37. Under "Operational delivery & customer satisfaction" as the Area, the form stated under Criteria "Management assessment of individual contribution towards operational delivery of contracts secured ("making it happen") and managing relationships with our key customers". The maximum percentage was 5%, the achieved percentage was 4% and the assessment stated "Delivery of Enquest, Fairfield and Shell contracts meeting customer KPIs. Strong and positive involvement when facing AOG/operational disruption. Some customer relationship management challenges in Babcock".

38. Under "Team Dynamic" as the Area, the form stated under Criteria "Management assessment of contribution as a member of the senior management team to the airline, working relationship with peers and overall motivation of Loganair's employee group". The maximum percentage was 5%, the achieved percentage was 2%, and the assessment stated "Works well with immediate team in ABZ but significant investment in working relationships in GLA team needed to foster better understanding of their roles and challenges they face."

39. The document showed as a total achieved score the percentage of 17%. That was not the agreed final percentage figure for the 2016/17 financial year which was 22%. Mr Simpson considered however that the matrix

document was the one that had been provided to the claimant, and that its principles set out how the bonus would be assessed each year.

40. Mr Simpson had been involved in discussions with Mr Hinkles and Mr Harrison about the principles for the matrix, but not at any stage with applying it to the claimant. Any change to that matrix required his approval.

41. The claimant sought to appeal the decision by email dated 14 January 2019, as he did not accept that the matrix produced with that document was correct, or had been agreed with him. The appeal hearing took place before Mr David Harrison, the Group Chairman. An appeal hearing took place on 21 January 2019. No minute of that meeting was produced by the respondent. The discussion became heated, and it was adjourned. After the adjournment Mr Harrison reversed an earlier comment he had made that the claimant could not appeal. He sent a decision on 28 January 2019. He encouraged the claimant to have a discussion with Mr Hinkles "by way of reaching an amicable conclusion".

42. The claimant sent an email to Mr Hinkles on 8 February 2019 proposing a meeting, and that was arranged for 15 February 2019.

43. On 11 February 2019 the claimant intimated his resignation from the respondent on a period of notice of three months.

44. Mr Hinkles did not produce a matrix document with completed figures, and an assessment, as had been done for 2016/17, at any time for the 2017/18 Financial Year, but kept his own handwritten notes of their discussion as to bonus.

45. There was a discussion at the meeting between the claimant and Mr Hinkles on 15 February 2019 on the basis of the Areas set out in the matrix document attached to Mr Simpson's letter. The claimant had exceeded revenue forecast, and contribution as budgeted. The budget for contribution was £7.764 million, and the actual contribution was £8.157 million. The company had not made any profit, but a loss of £9 million. They also discussed customer relationships, and team dynamics. The claimant had produced a set of notes for that meeting, which referenced £298,000 of cash he had identified, over £200,000 of which was in respect

of departments other than his own, which would not have been recovered had he not intervened. They included unbilled handling charges, unbilled meal vouchers, incorrect billing, and unbilled de-icing charges.

46. Initially Mr Hinkles proposed 14.5% of salary as the bonus as an overall figure, without that being specifically broken down into percentages for the individual areas. After discussion that was increased by agreement to a bonus of 15.5% of basic annual salary. That equates to a percentage against the maximum bonus of 25% of 62%. It was not broken down into individual areas. Had it been, it is likely that the respective percentages for each of the four areas would have been 7 for area 1, 0 for area 2, 4 for area 3 and 4.5 for area 4.

47. Also at the meeting the claimant and Mr Hinkles discussed his resignation. Mr Hinkles initially proposed that the claimant go on gardening leave, but that did not occur. The claimant continued to work for the respondent throughout the notice period until his termination date of 11 May 2019.

48. On 16 February 2019 BMI ceased trading, and later went into administration. About fourteen aircraft which had been operated by BMI were acquired thereafter by the respondent. The respondent had earlier acquired two aircraft from them and was in the process of branding them, and making arrangements required to fly them. The opportunity afforded to the respondent by its sister company going into administration required a substantial amount of work, particularly for Mr Hinkles. About 140 staff were taken on by the respondent from BMI, parts and spares were purchased, and new routes commenced for scheduled services.

49. Following the agreement that was reached about the bonus for the financial year 2017/18 for the claimant payment of bonus was made in March 2019, subject to statutory deductions, and the claimant withdrew his Employment Tribunal Claim.

50. The amount of the bonus, and the amount of the basic salary at that time, together with the percentage of bonus to salary, which were paid to the claimant prior to the financial year 2018/19 was as follows:

Financial year	Bonus(£)	Salary(£)	Percentage
2015/16	14,726	107,100	14
2016/17	23,797	108,171	22
2017/18	17,186	110,875	15.5

51. The claimant worked as normal during his notice period.

52. The respondent had a contract with a company named Babcock to provide flights which supported its customer Enquest. Under that contract the respondent had the right to increase charges on a set basis, called escalation. Babcock had equivalent terms with its customer Enquest. Enquest did not agree to pay the escalation charges, and unpaid invoices built up over a three year period. During that period the claimant, whose contract it was to manage, reported to the Executive Board of the respondent that it was likely to be paid.

53. On 25 February 2019 the claimant and Mr Peter Bond attended a meeting with Enquest. The terms of the meeting were confirmed in a letter the claimant wrote to Enquest that day, drafted with Mr Bond. It set out the understanding that Enquest would resolve the letter by 11 March 2019. They did not however do so. The claimant liaised with the legal department of the respondent thereafter, leading to a letter sent by the respondent's solicitors demanding payment of £411,812.23 by 8 April 2019, which failing they anticipated instructions to present a winding up petition.

54. After the claimant left the respondent's employment it was discovered that there were errors in the invoices submitted. They required to be recalled, and new invoices submitted.

55. The work that the claimant carried out included seeking a contract with a customer for charter work between Aberdeen and Kerry. In order to secure that work, the customer required an audit of the respondent to be carried out at short notice in around April 2019. The claimant sought to arrange that with colleagues in the Glasgow office, who found that difficult for the proposed dates as they were busy on other work. The claimant was forceful in addressing that. He emailed Mr Hinkles, sent a copy to Mr Peter Bond, and sought to resolve the issue using Mr Bond's influence. The

contract was successfully awarded, and led to income of over £1.2 million at a contribution of about 60%.

56. During the 2018/19 Financial Year the claimant obtained VAT advice that was to the effect that the respondent had been charging VAT on its charter work when that was not required, and that it should be zero rated. That was contrary to the position that the respondent had adopted to date, on advice from Mr Harrison a chartered accountant. The claimant was strident in his criticism of the previous position, stating that it was pricing the respondent out of the market as competitors did not charge VAT. Following that advice the respondent offered work without charging VAT, and the claimant materially increased the non oil and gas charter work brought in to the company. In December 2018 the level of that non oil and gas charter work was over £120,000. The work on that aspect of the claimant's role continued during his notice period. In March 2019 the level of that non oil and gas was over £55,000. These matters were reported to Mr Hinkles and other members of the Executive Team by the claimant's monthly reports.

57. The claimant sought to agree a bonus with the respondent for the 2018/19 financial year during the period of his employment with them, and after the year end on 31 March 2019, but the respondent did not discuss that with him. The respondent had produced a set of management accounts for the period to February 2019. That showed a forecast contribution of £6,407,610, and an actual performance of £6,342,348. The claimant wished to finalise a new contract with a customer, which required an audit to be carried out before awarding the contract which would generate about £1.2 million of revenue. The claimant was not able to agree a date with the prospective customer and colleagues of his in the Glasgow office, and on 4 April 2019 he emailed Mr Hinkles to seek to secure his support. He copied Mr Peter Bond when doing so, and emails were exchanged by those three parties on that date in relation to the matter, in one of which Mr Hinkles refused to intervene without more information and stated that this was an example of the claimants "appalling management style".

58. On 24 April 2019 Mr Jonathan Hinkles the Managing Director of the respondent wrote to the claimant in relation to a meeting request to state

that he was not in a position to have the discussion, as the March 2019 management accounts were not available and a rate review request from a major customer, Enquest, remained outstanding. He also wished to have legal advice as to whether the resignation affected the entitlement to bonus.

59. The claimant continued to seek a bonus after his employment terminated on 11 May 2019. He relocated to Australia to commence new employment, having had the last week of his employment with the respondent on annual leave.

60. The claimant commenced early conciliation on 9 July 2019.

61. On 10 July 2019 Mr Hinkles sent him an email explaining that the bonus remained an open issue for the respondent, but that they had not finalised the 2018/19 accounts, and a major outstanding issue was a rate review for one customer, Enquest, which would have a major impact on the performance of the Charter sector of the business, and the profit and loss position of the respondent as a whole.

62. The audit for the 2018/19 accounts for the respondent was completed on 28 July 2019.

63. New invoices were sent to Enquest in August 2019. The claimant had commenced early conciliation on 9 July 2019.

64. The Certificate for early conciliation was issued on 9 August 2019.

65. The present Claim was presented to the Tribunal on 9 September 2019.

66. Mr Hinkles decided to award the claimant a bonus totalling 5%. He then sent an email to Mr Brian Mitchell, the HR Manager of the respondent, on 7 October 2019 stating

> "Further to your note last week, I have referred to my notes from our meeting with Ashley Roy in February 2019 to re-acquaint myself with the criteria that we agreed at that time for payment of his bonus relating to the 2017/18 Financial Year. I have taken these and have applied the same criteria to the calculation of a bonus for

the 2018/19 Financial Year, for which the statutory accounts have now been filed. On this basis, I am content to proceed with the payment of a bonus to Ashley of 5% of his basic salary for the year, and I'd ask that you make arrangements accordingly."

67. The respondent paid a bonus to the claimant of £5,615.25 for the 2018/19 financial year. The payment was made on or about 31 October 2019, subject to statutory deductions. It represents 5% of basic annual salary, which at that time was £112,308, or 20% of the maximum bonus.

68. Mr Hinkles prepared a document for the bonus calculation for the claimant for that financial year. It had a heading for the claimant's bonus calculation, the maximum score, the 2017/18 evaluation, the 2018/19 evaluation, and a rationale for the 2018/19 evaluation.

69. For the first Area, which he titled "Charter sales budget met", a maximum score was given of 10%, the 2018/19 evaluation was nil, and the rationale provided was "Charter revenue of £1.1m versus forecast of £1.4m - shortfall of £300k to forecast, which itself represented a reduction from the original budget following loss of Statoil work during the year. Enquest had debt provision included for escalations not agreed/paid relation to previous years and write off in relation to CHC outstanding amounts also taken".

70. For the second Area "Company P&L achieved" the maximum score was 5%, the evaluation for 2018/19 was nil, and the rationale provided was "Profit of £1.011m reported versus forecast of £3.221m".

71. For the third Area "Operational delivery & customer satisfaction" the maximum score was 5%, the evaluation for 2018/19 was 4% and the rationale provided was "similar performance on customer metrics achieved to that in previous year."

72. For the fourth Area "Team Dynamic" the maximum score was 5%, the evaluation for 2018/19 was 1% and the rationale provided was "Interaction with colleagues at Exec Board level remained materially lacking and behaviours toward other Directors including Peter Simpson and David Harrison were unbecoming of a senior executive. No appreciable work undertaken outside of Aberdeen O&G market in relation to other

business". Although Mr Hinkles did not state it in writing, he took into account the said emails of 4 April 2019.

73. The total of the evaluations was 5%, which is 20% of the maximum bonus.

74. Mr Mitchell set out the basis of Mr Hinkle's decision in a letter to the claimant sent on Mr Hinkles' behalf dated 17 October 2019.

75. The figure for Charter revenue was affected by the taking of a bad debt provision in relation to Enquest. The total of the invoices then outstanding was £477,000, and one half of that figure, £237,000, was taken. That reduced the income of the Charter department.

76. The claimant replied on 22 October 2019 stating that he did not accept any payment made by the respondent "as being in full and final settlement until such time that the Employment Tribunal rules or a mutual agreement is reached."

77. On 21 November 2019 the claimant contacted the respondent and sought to settle the claim for £14,500. He did not state to them that he was unable to travel to the Tribunal for a Final Hearing scheduled to take place on 22 November 2019. He had been informed by the regulator of aviation in Australia by letter of 15 November 2019 that he was required to attend a meeting on 21 November 2019. He sought to make arrangements to travel to Aberdeen following the meeting but could not do so in time, and he emailed the tribunal on 21 November 2019 with regard to that.

78. The claimant did not set out his proposals for what a bonus should be until a letter sent to the Tribunal and copied to the respondent on 21 November 2019. In that he sought a total bonus calculated at 22% of annual salary. On 6 December 2019 he sent an amended proposal, which also had a total bonus calculated at 22% of annual salary.

79. In about November 2019 the respondent resolved its dispute with Enquest over escalation terms, and recovered a sum of £400,000. There were about £30,000 of legal fees incurred in doing so. That was a receipt in relation to the bad debt provision referred to.

80. The respondent's accounts as filed at Companies House for the 2018/19 financial year showed profits on ordinary activities of £1.011 million. There were items related to introductory costs for Embraer aircraft it acquired from BMI which was insolvent. It was a connected company to the respondent. The amount of that item was £3.07 million. The accounts also showed a profit from the sale of four Saab aircraft by the sale price less book value of £1.785 million. A note to the accounts stated that the pre-tax profits before one-off introductory costs relating to Embraer aircraft was £4.08 million.

81. The claimant had a brusque management style on occasion. He was strident in expressing himself, and had a reputation amongst some of the senior management for being difficult to deal with. Mr Hinkles and Mr Simpson had had a discussion in early 2019 as to whether to terminate his employment in light of that.

82. There was no disciplinary action taken against the claimant at any stage.

83. Mr Hinkles was aware that the claimant had a close working relationship with Mr Peter Bond, which affected how Mr Hinkles managed the claimant.

84. The dates on which the respondent published its audited accounts are as follows:

Financial year	**Date**
2015/16	4 November 2016
2016/17	29 December 2017
2017/18	28 June 2018
2018/19	25 July 2019

85. During his employment with the respondent the claimant was the only member of the senior management team with a bonus scheme in place.

Submission for claimant

86. The claimant made a brief initial oral submission, and was permitted to provide a written supplementary submission by 17 August 2020 which he did. The following is a brief summary. He argued that he was entitled to a bonus, and that the respondent had assessed that for 2018/19 irrationally

and perversely. He argued that the accounts showed that the purchase of about 14 Embraer aircraft was exceptional, and that he had previously been scored excluding exceptional items. He argued that had the figure been addressed properly the company would have met the budget (this being the second area). He argued that the budget for the Charter Division was not properly set, that there had been double penalising for the loss of the Statoil contract, and that no workable matrix was set for the 2018/19 financial year. He referred to the absence of evidence properly for scoring the fourth area and noted the basis of the arrangement he had with Mr Peter Bond. Finally he invited the Tribunal to issue a "fine" for what he termed "continuous aggravation to employees", which I take to be a reference to a penalty under section 12A of the Employment Tribunals Act 1996.

Submission for respondent

87. Mr Mitchell made a more lengthy oral submission, of which the following is a brief summary. He argued that there had been no breach of contract. He argued by reference to the cases of ***Braganza*** referred to below and ***Humphreys v Norilsk Nickel International UK Ltd [2010] IRLR 976,*** a decision of the High Court in England***.*** He argued that Mr Hinkles had been entitled to come to the decision he had. On the first area he argued that the Charter Division had seen a reduction in its turnover, and that the budget had not been met. He argued for the second area that the accounts were clear, and that the claimant could not cherry-pick the accounts as had been described by Mr Hinkles, but that even if aircraft purchases were regarded as exceptional account also must be taken of sales, and the net effect was still £1 million below budget. On the fourth area he said that there was much evidence of the claimant being difficult to manage and not being a team player, and that the test in ***Humphreys*** was met. He further argued that if the claimant argued that no matrix was agreed the bonus was unenforceable. Mr Mitchell had an opportunity to make a supplementary written submission to answer that of the claimant and provided a written note that largely repeated the oral submission made. It also sought an order for expenses.

Law

88. The Employment Tribunal has jurisdiction for a claim for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.

89. What is payable in relation to a bonus where there is an element of discretion has been addressed in authority. In the case of ***Clark v Nomura Limited [2000] IRLR 766***, the case law was reviewed and Mr Justice Burton concluded as follows:

> "My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."

90. That test was adopted by the Court of Appeal in a number of cases dealing with discretionary decisions including ***Mallone v BPB Industries Ltd [2002] IRLR 452, Horkulak v Cantor Fitzgerald International [2004] IRLR 942*** and ***Commerzbank AG v Keen [2007] IRLR 132***.

91. In ***IBM UK Holdings Ltd v Dalgleish [2018] IRLR 4*** the Court of Appeal adopted the reasoning of the Supreme Court in ***Braganza v BP Shipping Ltd [2015] IRLR 487*** in which Lord Hodge said the following, after quoting with approval the remarks from ***Clark*** referred to above:

> "Like Lady Hale, with whom Lord Neuberger agrees on this matter (paragraph 103), I think that it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter. While the courts have not as yet spoken with one voice, I agree that, in reviewing at least some contractual discretionary decisions, the court should address both limbs of Lord Greene's test in ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 233-234.***
>
> In my view it is clearly appropriate to do so in contracts of employment which have specialties that do not normally exist in

commercial contracts. In ***Johnson v Unisys Ltd [2001] IRLR 279*** (at paragraph 20) Lord Steyn stated:

> 'It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract ...'

Similarly, in ***Commerzbank AG v Keen [2007] IRLR 132***, Mummery LJ stated (at paragraph 43):

> '... Employment is a personal relationship. Its dynamics differ significantly from those of business deals and of State treatment of its citizens. In general there is an implied mutual duty of trust and confidence between employer and employee. Thus it is the duty on the part of an employer to preserve the trust and confidence which an employee should have in him. This affects, or should affect, the way in which an employer normally treats his employee.'"

Observations on the evidence

92. I considered that all the witnesses were seeking to be truthful.

93. I considered that the **claimant** was generally reliable, but not in all respects. He made on occasion allegations which were serious, and not adequately based. An example was an allegation that income for one contract for Statoil was included within budget improperly as it was known that it was at high risk, and that it had been so included to make the figures look better to the bank. That was rejected by Mr Hinkles and Mr Simpson, and I do not accept that the allegation had foundation. It ought not to have been made. The claimant alleged improper motives by Mr Hinkles and Mr Simpson, saying that they were irked by challenges to them, that Mr Hinkles moved the goalposts, and that Mr Hinkles did not like the bonus arrangement and sought to disadvantage the claimant. Whilst Mr Hinkles did not do all that might have been done I do not consider that the criticisms are justified or fair.

94. I did consider that there was something in the criticisms of the claimant's interaction with colleagues. He could be brusque, direct and so

challenging that others found him extremely difficult to work with. He seemed focussed entirely on what he wanted, not on what others were doing. On the other hand, it was not disputed that he moved the division from underperforming to making a material contribution, he did increase the ad hoc work at least partly by a new VAT strategy, and he identified unbilled income amounting to nearly £300,000 in the 2017/18 financial year. No disciplinary action was taken against him at any stage. That is hard to understand if matters were as alleged by Mr Hinkles. The only explanation tendered was that Mr Peter Bond in effect protected him, but for such a large commercial organisation I do not find that persuasive. Mr Hinkles was its managing director.

95. The respondent made various allegations against the claimant in relation to his honesty in dealing with various matters. It is true that he sought to settle the claim shortly before a hearing that had been fixed, and sent an email to the Tribunal very late in the day to say that he could not attend not having told the respondent about that. There was a lack of candour by him in relation to that, but I do not consider that that was indicative of a lack of honesty. The allegation was evidence of how seriously relationships had broken down however. In cross examination other issues were explored in relation to honesty, but answers were given and no evidence tendered in the respondent's evidence on those points.

96. **Mr Simpson** I found a particularly impressive witness. He is a senior manager with substantial management experience, and I accepted his evidence in its entirety. He had been involved in discussions internally about the matrix for the bonus, but not how it would be applied, or what figures would be awarded. The claimant did not believe that, and the basis for that belief were some ambiguous emails from Mr Hinkles, but Mr Simpson was very clear in his evidence on that. Mr Simpson had very properly allowed the claimant's grievance, and on the basis of his understanding that the matrix document for 2016/17 had been provided to the claimant earlier, which in the event I did not find to have been the case, in any event attached that to his decision letter.

97. **Mr Hinkles** clearly found the claimant a difficult person to manage. He came into position during a difficult time for the respondent, and had a

large number of difficult issues to address. Despite that context, I was concerned at some aspects of his evidence. Firstly, there was no documentation at all about the 2015/16 bonus. Whilst that arose for a period after he became managing director it was clear that a bonus structure was required, and it fell to him to document it. No real explanation was ever put forward for that not being done.

98. There was a document prepared for the 2016/17 financial year, which Mr Hinkles said he tendered at a meeting with the claimant, but the claimant denied that, and I preferred the claimant's evidence. No reference to it was made in any of the emails following the meeting on 11 April 2017, particularly that of 5 May 2017 when the context made that more likely if it had taken place. It was also stated in Mr Simpson's letter to have been prepared in 2016, information clearly coming from Mr Hinkles, but it was most likely prepared in April 2017 at the earliest.

99. No document was prepared to confirm the 2016/17 agreed position, and no document issued which confirmed the structure of the bonus going forward save for the email from Mr Hinkles on 5 May 2017. When it came to 2017/18 Mr Hinkles made a broad decision not to award bonus, which did not indicate any serous consideration of the position reached in May 2017. Mr Simpson corrected that in his decision. At that stage the company's position that this was the matrix was at least clear. The claimant appeared to consider that he could dispute that, but for reasons I shall come to I do not consider that that is correct.

100. The 2017/18 bonus discussion did not however appear to be based directly on the 2016/17 matrix document attached to Mr Simpson's letter. That was not properly explained in evidence. The increments based on the Charter division performance in that document were not applied. Instead, a form of compromise was reached. Again, however, it was not documented.

101. All that is not consistent with good corporate governance. There was a lack of clarity. The responsibility for that lies I consider with the respondent.

102. There were occasions when Mr Hinkles made allegations of "mendacity" against the claimant. Again that was not I considered justified but it was evidence of how seriously the relationship between them had broken down. There was I consider a mind set against the claimant and giving him a bonus on the part of Mr Hinkles, partly evidenced by the unwarranted refusal of bonus in 2017/18 but partly from his other evidence.

103. I also add that some material matters were not put to the claimant in cross examination. In particular, it was suggested latterly in Mr Hinkles' evidence that the claimant had been at fault in not taking action to obtain charter work for an aircraft available when a contract with the end user Statoil was terminated. What had been put to him was that the loss of that contract would lead to the loss of revenue from it, and there was a discussion about the budget in relation to that. What was not however suggested in cross examination was that after that loss of contract the aircraft was idle and that the claimant should have done more to find new work for it. Mr Hinkles said that he did that work, and was doing the claimant's job for him. Not only was that not put, there was not one document produced in relation to that. The only reference in the Bundle to this issue was in the respondent's pleadings, but that is not evidence. Mr Hinkles said that there were emails and other documents about it, but they had not been included within the Bundle. Where documentation existed but which was not produced, and where the matter was not put to the claimant in his evidence, I did not consider that the evidence given orally by Mr Hinkles was sufficient, and I did not accept it. In similar vein the claimant was not cross examined on the suggestion that Mr Hinkles made in evidence that the claimant had been at fault for not setting up contracts properly with the finance department, with that being alleged to be the reason for matters being missed which the claimant later identified. Not only was that not put, no documents were in the Bundle about it, and Mr Boyd accepted on cross examination that some of the contracts had been set up before he, and the claimant, had commenced with the respondent. No invoices in relation to Enquest, later resubmitted with changes, were included in the Bundle, nor were emails or letters to lead to that settlement although the respondent sought to make arguments about that in its case.

104. **Mr Maurice Boyle** gave relatively brief evidence in relation to working with the claimant. I considered that he was a reliable witness, very moderate in his language, and I accepted what he said.

Discussion

105. I address certain further aspects of the law first of all. It is not without a level of controversy. It was stated in ***Keen*** that if the employer has paid some form of meaningful bonus then the onus of establishing that the employer had acted in a way which was perverse would be "a very heavy one". That is not however consistent with the other authorities, in my opinion, particularly with ***Dalgleish*** in which the following was stated:

> "… in cases which… involve the exercise of an employer's discretionary powers, whether express (as in many of the bonus cases, and in ***Braganza***) or implied, then, in our judgment, the effect of the recent case law is that, in order to decide whether the employer's act is or is not in breach of the implied duty, a rationality approach equivalent to the Wednesbury test (including both its limbs) should be adopted, taking into account the employment context of the given case. Such an approach is required because the court does not and must not substitute its own decision for that of the decision-maker, in these cases the employer."

106. The burden of proof in such cases lies with the claimant, as ***Dalgleish*** confirmed, but the following was added:

> "If… the claimants show a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality. However in all cases the legal burden of proof rests on the claimant."

107. The decision in ***Humphreys*** by the High Court is of limited relevance, and was decided prior to the cases of ***Braganza*** and ***Dalgleish,*** decided by higher courts. The Court of Appeal cases are decisions that are not binding in Scotland, although they are highly persuasive, and the speech of Lord Hodge in ***Braganza*** was by a Scottish judge, who did not make any comment to the effect that the law in Scotland was any different. The body of law emanating from ***Clark*** is clear and I consider that the law in Scotland is as set out in ***Braganza***, and as then applied in ***Dalgleish***. I consider that the principles are consistent, in that no reasonable employer would leave out of account a material matter, or take into account a matter that was irrelevant, when exercising a discretion under a contract of employment.

108. I turn to the facts. This is not a simple case. That is at least partly as the respondent did not set out clearly in a document what the bonus arrangement was, and then did not apply that consistently. It was only when Mr Simpson made his grievance decision that a document was provided to the claimant with regard to the bonus, and he did not accept it, appealing that decision with inconsequential outcome. There was a lack of clarity in the evidence as to what the position was in relation to the first area, and how each of the areas would be scored. It is understandable in light of that failure to produce a document setting out such matters clearly, and the initial refusal of a bonus in 2017/18, that the claimant became frustrated.

109. The bonus for the first year was agreed nearly a year after it might have been expected to be. It required a measure of negotiation on very limited foundations as the respondent had put nothing in place. Mr Hinkles had inherited an absence of written documentation on bonus arrangements from his predecessor, but did not seek to correct that.

110. The 2016/17 financial year's bonus was discussed at the meeting on 11 April 2017, and then negotiated by a series of emails, and saw a considerable increase from the proposal made by Mr Hinkles of 17% to the final position of 22%. The breakdown of that total of 22% had not been done but was spoken to by Mr Hinkles in evidence, who made it clear that the document produced for the previous financial year was not applied in

the terms there stated in 2017/18. Mr Hinkles was more generous than that form indicated.

111. There was a lack of documentation of that outcome however, and of how the bonus would operate in future.

112. The 2017/18 bonus had initially been rejected, on a basis that was not warranted despite the significant loss that had been incurred, and required a grievance which succeeded. The letter of outcome for the subsequent appeal by the claimant did not directly address the point made by that appeal. Whilst Mr Hinkles in effect accused the claimant about lying in relation to the revised bonus arrangements even on his own evidence he did not apply the matrix sent with the grievance letter as it stood for the 2017/18 financial year. He gave an outcome that was more generous than its strict application would have warranted.

113. At the very least the claimant had a reason from his perspective to challenge the accuracy of that document, which he said had not been provided and agreed, and Mr Simpson's letter wrongly stated that it had been drafted in 2016. Mr Hinkles said that it had been changed in 2017/18 at the claimant's instigation by increasing the maximum score for the first area to 10% and reducing that for the second to 5%, which he accepted had not received Mr Simpson's approval. Mr Simpson had said in evidence that his approval was required for a change. This was all in the context of the respondent not sending the claimant any letter or email with a document confirming the bonus arrangement for the current or next financial year, and not having documented fully the decisions taken in respect of bonus and how the totals were allocated between the various areas.

114. On the other hand, the claimant had been sent the matrix document for 2016/17 by Mr Simpson's letter, and at least by that point had a document setting out how the bonus was intended to operate. That is what the contract of employment required. If the claimant had wished to have a determinative say on that the bonus structure was to be used he may have been well advised not to have signed the contract of employment until that bonus arrangement had been confirmed in writing, but he did not. The

requirement from the contract was to have a discussion about bonus, then document that. Ms Simpson's letter did so. The matrix document set out a scheme for the bonus which I consider a reasonable employer could have done, and it is a reasonable scheme of itself. That was evidenced at least in part by the claimant using the same areas in his written arguments for bonus. I agree with Mr Simpson that these areas did form the basis of the assessments carried out previously. I do not consider that the claimant can argue successfully that a different bonus arrangement was in place, as there is no real evidence of that to a standard such that it would be operable. If there was an agreement to discuss or negotiate about the bonus that is unenforceable in law, and nothing would be awarded to the claimant. I consider that the base line is the decision by Mr Simpson that the claimant should have a bonus in 2017/18 on the basis of the general scheme set out in the document for the preceding financial year. That base line is based on documentation, and developed by what the parties did. It gives the arrangements efficacy, and I consider is the starting point for the assessment of the claimant's claim of breach of contract.

115. I have come to the conclusion in relation to the 2018/19 bonus that the decision by Mr Hinkles was in breach of contract in relation to those arrangements. No reasonable employer would have done as he did. He did not apply the matrix that had been provided in relation to the first area. He left out of account material matters that all reasonable employers would have taken into account in the fourth area. He further proceeded on incorrect information for the first area, did not follow the practice of making proposals and having a discussion, took into account irrelevant material, and did not take account of relevant material in making his decision. I shall address each area of the bonus in turn.

116. In the **first area**, the 2016/17 document attached to the grievance letter was at least clear that it was based on whether the budget figure for contribution had been met, and where exceeded by how much. Where there had been an absence of documentation before that financial year (2016/17) at least there was at this point. For 2018/19 therefore where that document was the basis of the consideration what was needed was knowledge of (i) what the budget for contribution for the Charter division

was for that financial year, and (ii) what its performance on contribution had been in the financial year. It was striking that that is not what Mr Hinkles assessed. He assessed revenue. That is not what the document required. The Bundle of Documents did not have the figures for (ii) at all. The documentation for that was in the hands of the respondent. That it failed to produce them was not adequately explained, if at all. What there was in the Bundle was a set of management accounts for the period to February 2019. That showed a forecast contribution of £6,407,610, and an actual performance of £6,342,348. The difference between those two figures is £65,262. That is a variance of about 1%. The figures for March 2019 were not therefore provided, and it is not possible to know what the overall outcome for the financial year for this Area was as the respondent did not produce the figures for that. I infer from all the evidence, and the lack of evidence that the respondent could have produced, that the Charter Division did meet that budget for contribution that financial year.

117. The respondent referred to the cases of ***Humphreys*** and ***Braganza.*** The latter is dealt with above. The former is not I consider in point in respect of this area. It concerned a discretionary process in very different circumstances. Here the first Area ought to have been addressed at least initially on a simple basis applying mathematics to company figures. It was not discretionary but objective. Quite simply entirely the wrong basis was used by Mr Hinkles who referred to revenue figures.

118. I next address the issue of a bad debt provision for sums eventually payable by Enquest. It is of limited relevance as the principal evidence as to contribution for the financial year was not produced by the respondent, but there was much time taken in evidence on the point. The documentation in relation to that was only produced to a very limited extent, being a letter sent by the claimant to Enquest on the day of a meeting and a letter the respondent's solicitors to Enquest on 2 April 2019. The invoices as submitted initially, and then as resubmitted latterly, and documentation about the discussions over them held after the letter from solicitors was sent, the resolution of the dispute and eventual payment, were not produced. They were in the hands of the respondent and it would have been simple to have provided them in the Bundle.

119. In his email of 24 April 2019 Mr Hinkles said that he needed to wait for the Enquest issue to resolve as one of the reasons for not then calculating the bonus at that stage. Mr Simpson in his evidence supported him in that. He did initially wait, but then decided bonus whilst discussions to resolve it continued, and were near completion. That resulted in a bad debt provision of £238,000 being one half of the invoices said to have been submitted totalling £477,000, spoken to by Mr Simpson, although the solicitor's letter of demand had sought £411,000. Documentation about that was not provided by the respondent. The outstanding sum, the precise amount of which is not proved as the documentation about it was not produced, was largely realised not long after his decision with agreement the following month and payment of £400,000 in December 2019. Against that background it is not established whether the bad debt issue would have made any difference to the calculations and if so what, and I do not consider that it affects the conclusion reached that the budget for contribution was met.

120. Had Mr Hinkles made a proposal, awaited comments, and the resolution of that matter, as Mr Simpson also accepted was the correct course of action, the outcome could have been different. The difficulty however is ascertaining from the evidence what that is likely to have been.

121. The criteria used in the 2016/17 form were not directly applied in that year, nor in the following financial year. In practice what happened was a form of discussion over how the budget had fared, the other criteria were discussed, and there was a degree of flexibility in an overall outcome. That had been the position most fully in 2015/16 when the budgets for the division and company had not been met, but a 66% of maximum bonus figure nevertheless agreed. In 2017/18 had the 2016/17 document been used, the bonus could not have been awarded as it was if its terms were applied, as the outcome was 22%, including 8% for the first area. Had it been applied as the document provided, the figure would have been 3% as Mr Hinkles accepted.

122. It was also far from clear what target was used, whether of revenue, or contribution, or a combination. I consider that the evidence indicates that it was intended at least by Mr Simpson to be based on contribution, that

being the evidence he gave and also the terms used in the 2016/17 document referred to, which had criteria referred to as areas that the claimant referred to in his own documentation. As I stated, I do not consider that the claimant can challenge that, even if he did not agree that it set out the terms of the bonus arrangement generally.

123. In light of all the evidence, I consider that any reasonable employer having regard to the history of how the bonus had been resolved in previous years and Mr Simpson's outcome letter would have made a proposal, awaited comments from the claimant, checked the figures, and then made the decision. That decision would have been informed by the accounting figures, and then be subject to negotiation. For the reasons given above I consider from the evidence before me and the inferences I have drawn that the minimum position was that budget was met. The negotiation may have led to a higher sum by agreement, but that is speculation. An agreement to agree is not enforceable. The conclusion I have reached is based on the 2016/17 form Mr Simpson provided in his decision, and the evidence for the 2018/19 financial year that I have described, incomplete though it is. The respondent is responsible for that evidence not being complete, as it had the documentation for contribution. I do not consider that there is an evidential basis to make any award above that minimum level. That results in a 2% of annual salary bonus award.

124. The position for the **second Area** of company profitability is I consider more clear. In an email of 5 May 2017 Mr Hinkles did refer to "PBT (profit before tax) before exceptionals", but that was in the context of his earlier comment that profitability was down against budget; it is also not a part of the 2016/17 documentation which simply refers to profitability, and minimum levels of profit before tax. That document does not mention excluding exceptional items. There is not I consider a sufficient evidential basis to hold that it was a contractual term that the profit was to be calculated disregarding exceptional items. Mr Hinkles was right to point out that the accounts for 2018/19 did not refer to the Embraer aircraft as exceptional items in any event. That is an accountancy term with a particular meaning, as he spoke to in evidence, which the accountants chose not to use. The claimant tried to argue that words such as

"extraordinary and unprecedented" meant that this was an exceptional matter, but I do not consider that they do. Those words were used in the context of a comment about effort and the recruitment of about 140 staff. In his written submission the claimant gave a different meaning for exceptional items but that had not been provided in any evidence, and requires to be disregarded. The audited accounts showed a figure for profit on ordinary activities of a little over £1 million. There were aircraft acquired, and costs incurred for them, but with income being generated from their deployment as well. The accounts did show figures before and after the Embraer start up costs, and if they were taken out the profit figure was £4.085 million, but the fact that they were shown in that way does not mean that they were exceptional matters. I am satisfied that the profit on ordinary activities was properly stated at £1.011 million, that that was the figure provided by the audited accounts, and that it is the correct figure to base an assessment of bonus on for this area. It also seems to me that an airline acquiring aircraft, and selling some others, is not in itself exceptional in the ordinary and non-technical sense of that word. The number of aircraft may have been reasonably high, but that does not of itself make it an exceptional item. I further do not accept any of the suggestions made by the claimant that the accounts were not properly prepared or otherwise inaccurate. I also do not accept any suggestion that they were deliberately and improperly delayed to seek to prejudice the claimant. Separately there had been a sale of Saab aircraft which generated a profit of about £1.785 million as the price received was greater than book value. If acquisition costs for aircraft acquired are to be discounted for this purpose, and I do not consider that they can be, then on that hypothesis receipts for sales of aircraft disposed of also require to be discounted. That exercise would reduce notional profit from £4.085 million to £2.3 million, and that is still about £1 million less than budget. In short, I consider that Mr Hinkles is correct to say that the claimant cannot unpick the accounts in the way he proposes, choosing the cherries he likes and disregarding others. I also reject his suggestion in evidence that the budget was not properly set, but increased to present a better picture to third parties such as the respondent's bankers, or that the accounts had

been unduly delayed for improper reasons. Neither suggestion had any foundation.

125. I consider at the very least that a reasonable employer could conclude that the company profit was a little over £1 million, far short of the target, and even if that was not the case and the unusual position from the sale and purchase of aircraft did fall to be considered, the effect overall could not have been sufficient to reach the budgeted figure. I conclude that the respondent was entitled to hold that the second area was not met, and no bonus fell to be awarded for that area accordingly.

126. The **third area** is not disputed, and is effectively agreed at 4%.

127. The **fourth area** is team dynamic. It is more of a subjective assessment. The award was 1%. I was satisfied that some of the criticisms of the claimant's conduct were appropriate, in particular that he could be brusque, challenging, and somewhat hectoring. Mr Boyle gave evidence on that which I considered moderate and balanced. But that needs to be considered in the context of a lack of any disciplinary action, his being effective in generating income and cash, his grievance about being refused a bonus being justified, and his concern at the lack of proper documentation for the bonus scheme, only remedied after his grievance and not addressed in his appeal, are such that his agitation and less than perfect behaviour at some points is understandable. Mr Simpson in his evidence did not give the impression of being greatly put out by the claimant's behaviour at the grievance hearing, although he thought it unprofessional, and no evidence was given by Mr Harrison. I consider that the remarks that Mr Hinkles entered on the form for this area in this respect are exaggerated. Whilst he may have thought that the claimant's management style was appalling, as he put it in evidence, and it was certainly challenging, it is instructive that Mr Boyle when asked a leading question by Mr Mitchell as to whether relationships with the claimant had completely broken down replied that he did not agree. I can easily understand why Mr Hinkles found it frustrating that the claimant had a direct line of communication to one of the shareholders of the parent company, such that his own scope for action was perceived by him to be more limited, but Mr Hinkles could have acted formally under the

disciplinary policy, and chose not to. it is undisputed that the claimant was generally successful in improving the standing of the Charter division very materially, increasing its contribution significantly. He had also been successful in identifying matters not invoiced and recovered not inconsiderable sums, and the suggestion that this was his fault for not setting up the contracts with accounts in the first place was not put to him in cross examination such that I reject it, together with identifying an issue with VAT treatment. Whilst he may well have handled such matters without any sensitivity towards Mr Harrison who appears to have set up the original scheme, a degree of robustness is to be expected at senior management levels, and the original scheme appears to have been in error.

128. What is I consider also clear is that Mr Hinkles was simply wrong to write in the matrix that there was no appreciable work undertaken outside of the Aberdeen oil and gas market. He had the evidence that there was, being the monthly reports of income generated, which was not insubstantial being £120,000 in December 2018 and £55,000 in March 2019, and arose after the VAT change that the claimant initiated. Mr Hinkles did accept latterly in his evidence that that income was appreciable. He argued that it was to be seen in the context of the failure to address the loss of the Statoil contract, but that was, as noted above, not documented in the Bundle and not addressed in cross examination, and I do not consider that it was established in the evidence in light of that.

129. Mr Hinkles spent much time in his evidence on documents relating to arrangements for an audit for a potential new customer which the claimant sought to make, with a series of email messages on 4 April 2019. He argued that this was evidence of the claimant not being a team player, and indicative of his appalling management style, as his email put it. He took that into account in his decision to make a 1% award. But that evidence was based on emails on 4 April 2019, which is not in the 2018/19 financial year, which ended on 31 March 2019. Mr Hinkles took into account matters that were not relevant to the financial year in question, as they happened after it had ended. No reasonable employer would have done so.

130. I consider that Mr Hinkles had become so dissatisfied with the claimant's style, and his ability to contact Mr Peter Bond outwith normal line management, that he became somewhat blind to what the claimant achieved, explaining the first sentence of the matrix for this area, and focussed on the perceived deficiencies when carrying out his assessment, including those outwith the relevant time period. No reasonable employer would have done so.

131. I consider that Mr Hinkles materially over-stated the position critical of the claimant's interactions with colleagues where the company benefited financially and he, Mr Hinkles, had not taken any disciplinary action to remedy it. I note that in the two earlier financial years the claimant would have been awarded a 4 and 4.5 had that been specifically apportioned, which are not assessments that support the claimant having an appalling management style as was contended. These facts alone take the case far away from those in ***Humphreys,*** and for the reasons given above it is not binding, and I do not consider in any event that that case has what is a correct statement of the law in Scotland in light of the remarks of Lord Hodge referred to***.***

132. I might add that the focussing on material outwith the financial year at issue was not confined to Mr Hinkles. The claimant spent a great deal of time on a document he prepared for the meeting that led to agreement on the 2017/18 financial year, particularly invoicing that was issued from what he had discovered, but the important point is that agreement was reached on the bonus for that period, and that evidence did not directly assist me with the issue of whether there was a breach of contract in the 2018/19 financial year bonus.

133. Having considered all the evidence I consider that a reasonable employer could have reduced the award from the earlier years, but that no reasonable employer would have awarded less than 3 for this area for the 2018/19 financial year.

134. Overall therefore I consider that the respondent did act perversely and irrationally in that it made a decision on the disputed bonus that no

reasonable employer would have reached, and in so doing was in breach of contract.

135. The assessment above leads to scores for each area as 2,0,4 and 3 respectively, in each case as a percentage of annual salary, leading to a total score of 9%, a score of 5% was given, leading to a difference of 4%. The annual salary was £112,308 and the award for damages for breach of contract is therefore 4% of that figure, being the sum of £4,492.32.

Conclusion

136. The respondent was in breach of contract in that it made a decision that no reasonable employer would have made on the determination of the claimant's bonus. The total bonus would have been no less than 9%, 5% was awarded and the damages for the breach of contract are quantified at the sum of £4,492.32. That sum is awarded to the claimant subject to any statutory deductions properly payable. It is possible that there are none as the claimant resides in Australia, but no evidence was led on that and the position will require to be ascertained by the respondent if it seeks to make a deduction.

137. I do not consider that this is a case where the financial penalty provided for by section 12A of the Employment Tribunals Act 1996 should be imposed. There are not the aggravating features that that provision requires for such a penalty to be imposed.

138. The respondent made an application for order for expenses, which in light of the decision made is refused.

Employment Judge	**Alexander Kemp**
Date of Judgement	**21 August 2020**
Date sent to parties	**24 August 2020**