



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Richardson and others
Respondent: Fenwick Limited
Heard at: Newcastle Hearing Centre via CVP
On: 28, 29, 30 & 31 July 2020
Before: Employment Judge Jeram (sitting alone)

Representation

Claimant: Mr Richardson on his own behalf and representing all claimants
Respondent: Mr S Bloch QC

Covid-19 statement

This hearing was held via CVP which was not objected to by the parties. A face to face hearing was not held because of the Covid-19 pandemic and all issues could be determined at a remote hearing.

JUDGMENT having been sent to the parties on 14 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. This is claim brought by 96 claimants who each claim entitlement to an annual bonus which the respondent did not pay in 2018. Eleven of those claimants subsequently withdrew their claims and they were dismissed by order of Employment Judge Johnson. Mr Richardson represents the remaining 85 claimants.

The Issues

2. In advancing a claim of unlawful deduction from wages, was the respondent's annual bonus 'properly payable' because it had been incorporated into the claimants' contracts of employment through custom and practice?
3. Mr Richardson confirmed at the outset of the hearing, it having been canvassed with him at previous case management hearings, that it was not being suggested by the claimants that in the event that the bonus was found to be discretionary, that that discretion had been exercised in a manner that was capricious or perverse.

The Evidence

4. I had before me a bundle comprising of 389 pages including recent additions to that bundle.
5. I heard from:
 - a. Mr Richardson, the lead claimant, who was employed since 2000 at the Fenwick store in Newcastle as an electrician in the maintenance department;
 - b. Mr Brian Joicey, a claimant who has been employed since 1990 and a Porter;
 - c. Ms Jean Browne, a claimant, who has been employed since 1987 as shop floor staff and works currently in the toy department;
 - d. Ms Liz Cooke, called by the respondent, commenced employment in 1987 as an Assistant Personnel Manager; in 2000 she occupied the role of Head of HR & Training; she took on the role of Group Personnel/HR Manager in 2008 during which time she was responsible across 11 stores and associated warehouses. From September 2018 Ms Cooke occupied the position of Head of HR and Training until she left employment in April 2020.

6. This case does not to any significant extent turn on the credibility of the witnesses and I have no difficulty in finding that all of the witnesses were doing their best to convey their understanding of the position. I accept, however, that Ms Cooke gave her evidence in a direct fashion and that I have been given no reason to reject her evidence. I note that her direct experience of the respondent's practices spanned the whole of the period of time that the claimant witnesses were employed, that between 2008 and 2018, her principal responsibility was in relation to the Group Store Guide, and furthermore, I note that she left employment in April 2020 which suggests she has no particular or enduring investment in the outcome of this case.

Findings of Fact

7. Fenwick Limited is a department store founded in the nineteenth century. Since that time, it has been owned and, until very recently in its history, also run by the Fenwick family. Of its stores the largest is located in Newcastle upon Tyne; there are a number of stores that Ms Cooke describes as 'medium sized', located at Bond Street in London, Kingston-upon-Thames, Brent Cross, Tunbridge Wells, Colchester and Canterbury; smaller stores are located at York, Bradford, Winsor and Leicester (albeit the stores at Leicester and Windsor have more recently closed).
8. At its height, the Newcastle store directly employed approximately 1,000 employees although it currently employs in the region of 500 to 600 people directly with others employed by concessions. The Newcastle store is divided into departments including the shop floor, the restaurant, delicatessen, hairdressing, portering, maintenance, the display department, offices, the cleaning section and, described as sitting slightly separately to the rest of the store, the warehouse.
9. In summary, the bonus scheme that the respondent has operated has been enjoyed by those directly employed by Fenwick continuously since 1979. The structure of the scheme has in that time, been such that in order to be eligible for a bonus payment at all, an employee must be continuously employed for one 'Fenwick year' i.e. one complete year to 1 December. After completing one Fenwick year, an employee is eligible to receive one weeks' basic pay by way of bonus; an employee who has completed three Fenwick years would be eligible for two weeks' basic pay; five Fenwick years would mean a bonus equivalent to three weeks' basic pay and an employee who has completed ten Fenwick years would be eligible for a bonus based on four weeks' basic pay.

Recruitment

10. I have no doubt that the recruitment practices of the respondent will have evolved significantly since 1979, but I accept the following facts, advanced by Ms Cooke, who commenced as Assistant HR Manager in 1987 and not substantially disputed by Mr Richardson.
11. Jobs advertised by the respondent both historically and currently are likely to make reference to the bonus scheme as a benefit of employment; I heard no satisfactory evidence about how the scheme was described in those advertisements.
12. When applicants attend interview, they are told about their remuneration package, if successful, including reference to the bonus, which is described as being discretionary.
13. When a person is employed by the respondent, he or she will receive their terms and conditions of employment. Of the two versions contained in the bundle, neither made reference, expressly or otherwise, to the bonus scheme. It was not suggested that there had been or are in existence, any terms and conditions which do make express reference to the bonus scheme.
14. Since at least 2004, prospective employees of the respondent receive, together with their offer letter, a 'Schedule of Benefits'. The Schedule includes information about a number of matters including; the contractual notice period, a short description of the pension scheme, details about holiday entitlement and sick pay, the employee's eligibility for staff discounts. It also makes reference to the bonus scheme. It is described thus:

"From time to time you are eligible to receive an annual bonus based on length of service. Bonus payments are discretionary, it is an overriding condition of all Fenwick Limited bonus schemes that company has complete discretion on all matters relating to the schemes, including decisions on participation or continued participation. Receipt of bonus payments does not establish a right to future bonuses." (Emphasis added)

15. At the end of the Schedule of Benefits, appears the following text:

"Benefits details in [paragraphs relating to the staff discount and the bonus scheme] are non-contractual and as such can be reviewed or withdrawn at the Company's discretion." (Emphasis added)

Induction Process

16. A new employee of the respondent is required to undergo a formal induction process, which includes attending a set presentation at which the employee's attention is drawn to the existence and contents of the Induction Handbook.
17. One section of the Induction Handbook pertains to 'Pay and Benefits'. The section commences with an explanation of how wages are paid, contains explanation about overtime working, the following section provides the opening hours of the wages department, there follows a section about annual salary reviews (described as 'not automatic'), after which a paragraph, headed 'Bonus Payments', states:

"From time to time, discretionary payments may be made. You will be notified of any bonus payments applying to you. The Company can vary the terms of bonus arrangements at its discretion. Receipt of any payments(s) does not establish a right to future bonuses. Bonus arrangements can be varied or ended without any breach of contract." (Emphasis added)

Group Store Guide

18. The Group Store Guide is what might otherwise be described as an employee handbook; it applies, as the name suggests, across the various stores operated by the Respondent. The introduction to the Store Guide describes the contents of that handbook as containing both terms of the employee's contract as well as policies and practices.
19. A physical copy of the Group Store Guide is kept in each department of the store. For example, in the maintenance department, the Store Guide is kept in the office of the manager, Mr Gordon Nicholson and is available on request. In the portering department, I am told by Mr Joicey that there are copies in the loading bay, the stockroom, the general portering section and the fashion receiving room. Since approximately 18 months ago, the Store Guide has also been available on the intranet.
20. When aspects of the Store Guide are updated or amended, all employees are required to sign to confirm that they have received (or possibly had their attention drawn to) those changes. In addition, each store has a HR Manager, with whom any queries, including those about the bonus scheme, can be raised.

21. The extract of the Group Store Guide that relates to the payment of bonuses, reproduces the same paragraph that appears in the Induction Handbook.
22. There are other, passing references to the payment of bonuses in the Guide. For example, according to the sickness notification and absence policy, an employee's eligibility for the 'discretionary bonus payment' is adversely affected if he or she has a live final written warning and employees are 'reminded of this at the written warning stage'.

Mortgage Applications

23. Mr Richardson gave evidence that bonus payments were considered by prospective lenders as part of employees' income for the purpose of mortgage offers. In cross-examination when asked whether he told the lender that his bonus was guaranteed, he responded "*well I tell them I get it every year*" which, of course, until 2018 was factually entirely accurate. However, Mr Richardson also accepted that "*they never tell you if things have been corroborated*". I accept Ms Cooke's point that whatever elements of pay a prospective lender may choose to take into account is a matter for it, but that when approached by a lender the Respondent would only ever describe the bonus as discretionary.

Tax and National Insurance

24. Mr Richardson properly accepted, when it was put to him, that the fact that bonus payments made by the Respondent were subject to income tax and national insurance deductions, did not assist in the identification of whether those bonus payments were contractual in nature, or discretionary.

Internal Communications

Group Personnel Committee minutes

25. I have been taken to a set of minutes that relate to the Group Personnel Committee in respect of meetings that took place in Bond Street on 7 April 2009, Colchester on 21 April 2009 and Newcastle on 15 June 2009. Mr M A Fenwick was the Chairman; Ms Cooke was also in attendance. At each of these meetings, discussion was had

about bonus payments. The bonus is not a standard feature of the Group Personnel Committee meetings, but it was discussed this particular year because of affordability concerns, following the financial crash of 2008. Although not minuted identically, the thrust of each discussion was the same i.e. that the bonus was discretionary; the paperwork pertaining to the bonus described it as so; and that it was understood to become contractual only once the fact of payment was communicated to its employees. In the Bond Street minutes, it is noted that *'although all written documentation clearly states that the bonus is discretionary, it was agreed that reasonable notice should be given of any changes'*. I accept Ms Cooke's evidence that the phrase reasonable notice was intended only to be a question of good practice to provide early warning of a non-payment of a bonus before employees commit their finances based on past experience, in the main because it strikes me as a responsible approach, and further because the minute expresses the qualification *'although in written documentation . . .'*

26. Despite concerns about difficult sales figures, the payment was made to employees in December of 2009; there was no overall pay increase made that year, however.

Consultative Committee minutes

27. The second set of minutes relate to Consultative Committee meetings. This is a forum where employee representatives can raise queries directly with management as a means of facilitating dialogue.

28. The minutes of the Consultative Committee meeting at the Colchester store on 21 April 2009 state;

"It was confirmed that Fenwick operated a discretionary Christmas bonus. Employees are notified as to whether a bonus will be paid at the appropriate time. It was also confirmed that the company can vary the terms of bonus arrangements at its discretion."

29. I find that that minute was likely to have been made pursuant to a query raised by one or more concerned employee representative. Both employees and the respondent were alert to the potential impact of the 2008 economic crash on profitability including concerns such as the impact of potential restructures on jobs.

30. From 2017 Brian Joicey represented both the portering and the maintenance sections in the meetings for the Newcastle store. He described his attendance at

these meetings as being approximately 4-5 times a year, albeit sometimes they were cancelled. He described his suitability for the role as being by reason of him being the 'gobby one'.

31. Mr Joicey was in attendance at one such meeting on 30 September 2009, as one of seven employee representatives, from a cross section of other departments i.e. Lingerie, Sports, Warehouse, Menswear, Marketing and Creative and the Food Hall. The relevant minutes of that meeting are brief:

"It was confirmed that the decision regarding a Christmas bonus would be made on 1 December."

32. The minutes of that Consultative Committee meeting, as with other minutes of that Committee, were posted on the main staff notice board.
33. I accept that people approached the Ms Cooke on both occasions about their concerns the financial welfare of the company and how it might adversely affect their jobs. I accept that no one approached Ms Cooke either formally or informally, for example by raising the matter with her in passing, to query the suggestion contained in those minutes that the payment of the bonus that year was yet to be decided upon.

Remuneration Committee report

34. Mr Richardson drew my attention to this document (pages 83A and B); he was able to say only that it was left in an envelope in his pigeon hole at work by a person unknown, some months ago, he presumes in the knowledge that this claim was being pursued by him.
35. The document appears to be a paper presented in December 2017 by the HR Director, who is not identified; Ms Cooke could shed no light upon it. It is addressed to the Remuneration Committee.
36. The introduction to the paper describes the annual bonus as one paid to permanent employees, based on length of service and continues "*there is currently no link to either company or personal performance*" (emphasis added). The rest of the paper relates expressly to senior executives.
37. The document raises more questions than it answers; it is unclear whether the document is complete; whether it was in fact submitted to the Remuneration

Committee, if it was, whether its contents were endorsed by the Committee, what, precisely, was meant by the word 'currently', whether the phrase extracted above is specific to senior executives, or could be said to be true more generally.

Annual Notices

38. There is one main staff notice board which displays important information for all staff in all departments.
39. On or around 1 December every year, a notice is displayed about the annual Christmas bonus. Unlike routine notices, this particular notice is displayed on parchment paper, bearing the Bond Street address.
40. I accept that the posting of the notice is generally met by the Respondent's employees with what might be described as a mixture of excitement and relief. I accept that the suggestion that the news would likely '*spread like wildfire*' would be an apt phrase to use in such a situation (page 82A). The responses to a straw poll conducted by the Respondent during its investigation of Mr Richardson's grievance demonstrate that the posting of the annual notice was an important event in the calendar.
41. The contents of the notice have not varied to any significant degree across the years 2012 – 2017 in respect of which notices appear in the bundle (pages 80-83).
42. Taking the notice that was given in 2017, the most relevant extracts state:

"We will be paying a bonus to all permanent full time/part time members who joined the company before 1 December and who remain in employment at the date of payment.

The bonus will be the equivalent of 1, 2, 3 or 4 weeks' basic salary according to the following period of continuous service:

Before 1 December 2007 – 4 weeks

Before 1 December 2012 – 3 weeks

Before 1 December 2014 – 2 weeks

Before 1 December 2016 – 1 week"

(emphasis added)

43. The notice is not left on the staff notice board for an indefinite length of time; it is removed on or around the payment date for wages in the month of December.
44. Again, when pressed in cross-examination, Mr Richardson accepted, again perfectly appropriately, that the posting of the notice might not simply amount to 'clarification' of an element of his pay as he contended, but also the conveying of the outcome of a decision-making process, which could be to either pay the bonus, or alternatively, to not pay the bonus. He understood that a decision would be made at a senior level, likely by the Chairman or CEO.
45. Ms Browne suggested that it was necessary to display a notice every single year since the qualifying years would change each year. Whilst that suggestion has its attractions, I do not accept it because, in respect of all the years that I have seen (2012 – 2017), the number of Fenwick years an employee must have worked to be eligible to receive the relevant bonus have not changed (and nor was it suggested it had before 2012); so, for example, an employee has in each of those years, needed to have completed 3 Fenwick years, in order to be eligible to receive a bonus equivalent to two weeks' basic pay. Taking Ms Browne's argument to its logical extreme, the respondent would not need to post any notice at all, since the number of Fenwick years on the evidence before me, at least, have historically remained unchanged.

Company Financial Performance

Accounts

46. The Respondent's explanation for the non-payment of the bonus in 2018 was the financial welfare of the company. I was taken to the financial accounts.
47. Comparing the company accounts for the financial years ending January 2017, January 2018 and January 2019, there is a clear and significant downward trajectory in the company's financial performance, with what appears to be a position of £23 million profit to a loss of £46 million.
48. The specifics of that financial wellbeing is less significant, since the issue for me to decide is not whether any discretion (if found) was exercised in a way that was capricious or otherwise perverse.
49. In those same years, there was a significant change to occupation of the most senior

roles in the company. Although historically, the roles had been occupied by members of the Fenwick family, in May 2017 Mr Pennycook was appointed Chairman and in January 2018, the role of CEO was taken up by Mr Robbie Feather.

50. Mr Richardson gave evidence that the *'word on the ground'* was that Messrs Pennycook and Feather were either determined to, or alternatively instructed to, *'turn the company around'* in approximately 3 years. On that basis, I find that there was a broad understanding amongst its employees that the financial performance of the company was of concern.

2018 Restructure

51. In or around April 2018, there was a restructure in the retail operation of the Newcastle store. The Respondent produced a briefing paper, the contents of which were to be delivered to sales advisers (page 83(ii)).

52. A number of matters are raised in that briefing script including changes to pay, a reference to *'avoiding duplication'* and at page 83(jj):

"I also just want to confirm that the economic climate and our current sales performance, a bonus will not be paid. We appreciate that you will be disappointed to hear this, but I am sure you can appreciate that making sure our business is in great shape for the future is critical for all of us."

53. That was the first occasion since 1979 that the respondent's employees were informed that a Christmas bonus was not going to be paid to them. Its announcement happens to accord with the ambition expressed by the Personnel Committee in 2008 i.e. that early notice should be given to employees in the event of a decision not to pay bonus.

54. In May and June 2018 there were consultations with the staff about potential restructures. The HR department prepared responses to frequently asked questions (FAQs) by the staff during those consultation meetings. Extracts of those documents (page 83LL) highlight that the non-payment of a bonus that year was a concern to staff. They asked why the company had not consulted about the *"removal of the bonus, it has been part of our salary for a considerable period of time"*, to which the answer was that it was not guaranteed and therefore no consultation was required. A further question was *"May the bonus be reviewed in the future if trade improves?"*

to which the answer was “yes”.

55. It appears from these FAQs that whilst a significant number of employees were of the view that the bonus was ‘automatic’, whilst other employees understood the bonus to be related to the financial performance of the company.

The Cleaners

56. Mr Richardson gave evidence that a group of cleaners were ‘TUPE transferred’ about this time to a third-party company, ISS. Mr Richardson said that he heard that ISS were persuaded that the bonus that the cleaners received whilst being directly employed by the Respondent was accepted as one which was paid as a matter of custom and practice, with the result that they continued to receive it whilst in the employment of ISS.

57. Ms Cooke gave evidence that ISS were told no more or less than that contained in the Store Guide i.e. that the bonus scheme was discretionary, and she was not able to shed any further light on the matter.

58. On the assumption that those cleaners did receive a bonus in 2018, I am not persuaded that ISS made that payment because it was satisfied that the bonus had acquired contractual status, and I have no evidence before me to base any findings as to why they might have been so satisfied.

The Grievance Process

59. Mr Richardson submitted a grievance in January 2019. There is not, before me at least, any issue that he submitted it, on behalf of a number of employees, a grievance on 25 January 2019 (page 86) asserting that the non-payment of the 2018 bonus was impermissible because it had been incorporated into their contracts of employment by way of custom and practice. On 29 January 2019 he submitted a further grievance in his own name (page 94) essentially repeating the same point.

60. The grievance was chaired by Mr Bliss, the Retail Operations Manager. As well as interviewing Mr Richardson, the respondent decided to interview a number of employees about the bonus scheme. It interviewed Ms Cooke (who at the time was still working as Head of HR and Learning) and the store HR Hub Manager. At random, it selected seven other employees at the Newcastle store. Three of those

employees were from the maintenance department i.e. the department in which Mr Richardson works; a joiner, an electrician and the maintenance section manager. Two people worked on the shop floor i.e. the department in which Ms Browne works; in the menswear and furniture sections. Finally, two employees from the restaurant section were interviewed. The methodology of the straw poll was not criticised, save for the fact that no one from the portage section (where Mr Joicey works) was interviewed; the same observation could equally be made about, for example, the lack of representation from employees working in the hairdressing department; I accept the survey was a reasonable cross section of employees.

61. In his interview, Mr Richardson stated he was told nothing when he started his employment about the bonus being discretionary and that in relation to the notice that went up every December he had not really seen it or noticed for himself the terms of the Store Guide. He could not recall the contents of his offer letter and said that the first he had heard of the bonus scheme being discretionary was in a letter from Robbie Feather in April 2018 (which may or may not have intended to be a reference to the meeting in April 2018).
62. All three interviewees who worked in the Maintenance Department (and therefore worked alongside Mr Richardson) confirmed that they believed the bonus was discretionary, of which two confirmed that they were told as much from the outset of their employment (the third response being ambiguous). The maintenance manager was noted as saying *"It's always been paid, you think you are going to get it but until the notice appears there is still a fraction of doubt around it"*. More generally, he stated that he did not think that the announcement that no bonus would be paid caused a feeling of surprise in his team.
63. Of the two employees working on the shop floor, one employee could not recall when the bonus he first learned of the bonus but stated that *"there was always a discussion in the store as to whether it was going to be paid"* and that whilst it was *"never guaranteed"*, *"it was nice to have it confirmed at the beginning of December"*. He did not think it was company performance related. The employee in menswear *"always looked at it as a bonus"*, said that it was *"a shame"* not to have received it but *"understood why"* and that *"if the company starts to improve and is successful then the bonus could come back"*.
64. Neither restaurant employee considered the bonus to form part of their terms and conditions of service.
65. The HR Hub Manager stated that the bonus was, in her view, non-contractual.

66. On 4 March 2019, a detailed response, rejecting the grievance was sent to Mr Richardson. He appealed on 10 March 2019, reiterating his belief that the bonus had been incorporated into his contract by reason of custom and practice.
67. The grievance appeal meeting was held on 26 March 2019 and conducted by Store Director Mr Milton. Mr Richardson was in attendance and accompanied by Mr Joicey. In that meeting “*commercially sensitive information*” was shared with Mr Richardson in order “*to give more context*” to the decision to withhold bonus payments. Mr Richardson stated that he understood that business costs had continued to rise, but stated that the non-payment of the bonuses “*equated to an 8% decrease for most people*”. It was put to Mr Richardson that business costs had not only continued to rise, but that profits continued to fall and he was reminded that during the restructure in 2018, 119 colleagues had been made redundant. Mr Richardson stated that he “*couldn’t argue with the numbers and pointed out that this information hadn’t been shared with them before*”.
68. The grievance appeal was rejected in a detailed letter dated 1 April 2019.

The Law

69. Section 27(1) Employment Rights Act 1996 provides:
*In this part ‘wages’, in relation to a worker, means any sums payable to the worker in connection with his employment, including –
Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.”*
70. Section 13(3) provides:
“where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to a worker on that occasion (after deductions), the amount of that deficiency shall be treated of the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasions”
71. Section 23(1) provides a worker with the right to present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of section 13.
72. The worker or employee must show that there is some legal entitlement to the sum

in question, although the entitlement need not necessary arise from an express term in the contract. Examples of a sum payable otherwise than under a contract could include, for example, customary bonus payments without express provision being made in the contract of employment: per Bedlam LJ at [62] New Century Cleaning Co Ltd v Church [2000] IRLR 27.

73. Where it is said that the entitlement arises from the implication of a term of the contract by reference to custom and practice, helpful guidance on identifying the potentially relevant considerations to the determination of whether such a term should be implied is provided by Underhill LJ in Park Cakes Ltd v Shumba & Oths [2013] EWCA Civ 974.

34. . . The essential object is to ascertain what the parties have, or must be taken to have, understood from each other's conduct and words. . .

35. Taking that approach, the essential question in a case of the present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evidenced to the relevant employees an intention that they should enjoy that benefit as of right. . .the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are, or should reasonably have been, aware of it.

36. In considering what, objectively, employees should reasonably have understood about whether a particular benefit is conferred as of right, it is. . .necessary to take account of all the circumstances known, or which reasonably have been known, to them. I do not propose to attempt a comprehensive list of the circumstances which may be relevant, but in a case concerning enhanced redundancy benefits they will typically include the following:

(a) On how many occasions, and over how long a period, the benefits in question have been paid. Obviously, but subject to the other considerations identified below, the more often enhanced benefits have been paid, and the longer the period over which they have been paid, the more likely it is that employees will reasonably understand them to be being paid as of right.

(b) Whether the benefits are always the same. If, while an employer may invariably make enhanced redundancy payments, he nevertheless varies the amounts or the terms of payment, that is inconsistent with an acknowledgment of legal obligation; if there is a legal right it must

in principle be certain. Of course a late departure from a practice which has already become contractual cannot affect legal rights (see Solectron); but any inconsistency during the period relied on as establishing the custom is likely to be fatal. It is, however, possible that in a particular case the evidence may show that the employer has bound himself to a minimum level of benefit even though he has from time to time paid more on a discretionary basis.

- (c) *The extent to which the enhanced benefits are publicised generally. Where the availability of enhanced redundancy benefits is published to the workforce generally, that will tend to convey that they are paid as a matter of obligation, though I am not to be taken as saying that it is conclusive, and much will depend on the circumstances and on how the employer expresses himself. It should also be borne in mind that "publication" may take many forms. In some circumstances publication to a trade union, or perhaps to a large group of employees, may constitute publication to the workforce as a whole. Employment tribunals should be able to judge whether, as a matter of industrial reality, the employer has conducted himself so as to create, in Leveson LJ's words, "widespread knowledge and understanding" on the part of employees that they are legally entitled to the enhanced benefits.*
- (d) *How the terms are described. If an employer clearly and consistently describes his enhanced redundancy terms in language that makes clear that they are offered as a matter of discretion – e.g. by describing them as ex gratia – it is hard to see how the employees or their representatives could reasonably understand them to be contractual, however regularly they may be paid. A statement that the payments are made as a matter of "policy" may, though again much depends on the context, point in the same direction. Conversely, the language of "entitlement" points to legal obligation.*
- (e) *What is said in the express contract. As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood.*
- (f) *Equivocalness. The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation. This is the point made by Elias J at para. 22 of his judgment in Solectron.*

74. Although the case is specifically concerned with the question of entitlement to

enhanced redundancy payments, it is helpful in the determination of contractual entitlements more generally: Bluestones Medical Recruitment Ltd v Swinnerton UAEAT/0197/18/BA.

75. Mr Richardson drew my attention to Small & Oths v The Boots Co Plc and Boots UK Ltd UAEAT/0248/08/MAA in which the EAT held that all the relevant circumstances, including a practice of making payments over a number of years, will be relevant to deciding whether the discretion in the documentation is to be construed as having some contractual elements.

Discussion and Conclusions

76. In determining the essential question, i.e. what have the parties understood, or be taken to have understood, I consider first what the respondent in making available a the bonus over many years, in the context of all the surrounding circumstances, has communicated to its employees.

77. On the unchallenged evidence before me, from at least the point at which an employee is offered employment, the respondent, in its Schedule of Benefits communicates to the prospective employee using language which points away from a sense of entitlement: *'from time to time'* and *'eligibility'*.

78. The express description of the scheme as well as the receipt of payments under the scheme is one that does not evince contractual intention: *'benefits details . . . are non-contractual'* and *'receipt of bonus payments does not establish a right to future bonuses'*.

79. The terms and conditions of employment, which are likely to follow, rather than precede, the offer letter, are silent on the issue of bonus; no mention is made at all. Mr Bloch accepts that there is nothing in the contract of employment that would be inconsistent with the implication of a term that confers a contractual obligation to pay a bonus.

80. The Store Guide essentially replicates the wording of the Induction Booklet by undermining any expectation that past receipt of bonus does not inform the making of, nor the status of, future payments: *'receipt of bonus payments does not establish a right to future bonuses'* (emphasis applied).

81. As Mr Richardson accepted in cross examination, the suggestion that the

Respondent would *'notify'* its employees of *'any'* bonus payment conveys a decision-making process which might equally result in the making of a payment as much as it does the decision to not make a payment. That decision, is one that, he accepted, would be taken at senior level (*'chairman or CEO'*).

82. The Newcastle and Colchester Consultative Committee minutes adopt consistent terminology i.e. the conveying of a determination to be made as to whether to operate a bonus scheme.

83. The posting of the annual bonus on the staff notice board, printed on parchment paper bearing the Bond Street address, in early December conveys, as Mr Richardson accepted in cross examination, information. I find that it conveys information about: the decision to operate the scheme (*'we will be paying a bonus'*) as well as the determination of the eligibility criteria (*'the bonus will be . . .'*). Its removal around the date of the payment of the December wages indicates the repetitive nature of the decision-making process that Mr Richardson himself accepted was likely to take place at senior executive level.

84. I attach no weight to the contents of the Group Personnel minutes when considering what the Respondent communicated to its employees; what it understood subjectively is irrelevant and there is no suggestion that employees should have been reasonably aware of the contents of those meetings.

85. For similar reasons I attach no weight to the content of the report to the Remuneration Committee. I do not accept that the document negatives the claimed link between the performance of the company and the payment of all employees' bonus (I have found that the document is insufficiently reliable on the point), but even if I were to make that assumption, the anonymised method of delivery of that document to Mr Richardson suggests the opposite of that information being communicated to its employees or, for that matter, what its employees should reasonably have understood or been aware of.

86. The use of the word *'discretion'* is not determinative in and of itself. But the word is defined by the respondent, in its Schedule of Benefits, Induction Booklet and Group Store Guide. I find that the term *'discretionary'* has been used so as to convey that it is unfettered in that it includes the discretion to provide a bonus scheme at all (*'on all matters'*, *'can be . . . withdrawn'*, *'can be . . . ended'*), as well as a discretion as to whether to operate a bonus scheme each year (*'from time to time'*, *'continued participation'*, *'you will be notified'*, *'can be reviewed'*), and includes the method of calculation of the bonus (*'from time to time, you are eligible'*, *'continued*

participation', 'can be reviewed', 'can be varied').

87. I turn to consider what, objectively, employees of the Respondent should reasonably have understood about whether the bonus is conferred as of right.
88. Turning first to those factors specifically identified in Shumba.
89. The bonus scheme has been operated continuously from 1979 to 2018 without exception, on an annual basis. It is not suggested and I am satisfied that during that time, the basis of the scheme in that 39-year period has been unchanged. Based on past conduct, the expectation on the part of the employees that it would continue in that vein is plainly a reasonable one.
90. The annual bonus scheme has, understandably, been a prominent feature of the benefits that the Respondent offers. It is not in dispute that the *existence* of the annual bonus is one about which there is widespread knowledge and understanding.
91. It is not sufficient to simply find that the industrial reality was that payments were made for a significant period, and therefore that they should be continued to be made. The question for me is to consider whether the respondent, viewed objectively, has conducted itself so as to create a widespread knowledge and understanding on the part of the employees is *such that they are legally entitled to the benefit*.
92. Employees are told, certainly by the interview stage, of the scheme, and which point it would be described as discretionary. What 'discretionary' means is conveyed at the point at which they are offered employment in the Schedule of Benefits and subsequently in the Group Store Guide. Not only, therefore as a matter of law, but also as a matter of fact, the scheme is described to employees in terms that negatives contractual intention e.g. *'Receipt of bonus payments does not establish a right to future bonuses.'*
93. I was not taken to a single instance, verbal or written, in the documentation produced by the respondent where the mention of this bonus scheme was not preceded by the word 'discretionary'; see, for example, the absence policy, or where the respondent had adopted language that expressed, or for that matter implied, an entitlement on the part of its employees to a bonus.
94. That it was an employee representative who raised the query about payment of the bonus in the 2009 consultative committee is significant, as is the fact that no query

whatsoever was made of Ms Cooke in relation to the minutes of that committee in 2018. Had there been a wider held sense of entitlement to the bonus, I would have expected there to be evidence of further discussion or disagreement about either event.

95. In addition, there was a lack of surprise in the maintenance team about the announcement of the decision to not pay bonus in 2018. That was done in April 2018. The first evidence of any discontent about that decision features in the FAQs to the restructure and redundancy exercise. There was a popular query about the lack of consultation about the *“removal of the bonus, it has been part of our salary for a considerable period of time”*. That FAQ suggests that there may have been some understanding of a legal entitlement to the bonus, but it only to the extent that that understanding arises from the mere fact of historical payment, rather than any other conduct or language attributable to the respondent.
96. Equally the other relevant FAQ, asking whether the payment of the bonus might be *‘reviewed in the future if trade improves?’* suggests another cohort of employees who understood the scheme to be non-contractual.
97. Furthermore, the years 2008 and 2018 in this case have one feature in common; a concern about the financial performance of the company. In 2008 the financial performance of the respondent was affected by the global economic crisis, and in 2018, the ‘word on the ground’ that the company needed to be ‘turned around’. I find, therefore, and consistent with the latter FAQ, that there was a link, in the employees’ mind, between the decision as to whether to pay a bonus at all and the financial performance of the company.
98. I therefore find that not only did the respondent express itself in a manner that negatives an intention to be contractually bound, its conduct was also received as such.
99. I am therefore not persuaded that the respondent has created a widespread knowledge and understanding on the part of its employees that they were legally entitled to the bonus in any particular year.
100. I am fortified in that conclusion by two matters. First, of the straw poll taken, no employee, other than Mr Richardson who had submitted the grievance that led to the taking of the poll, suggested that they believed the bonus was one that was to be paid as of right. Second, Mr Richardson suggested in evidence that an employee who did commence employment would not be entitled, by reliance on the custom

and practice that had developed over the preceding decades, to the bonus as of right; he suggested that it was only once an employee had personally been employed for a significant period of time, he suggested five Fenwick years, did the payment become one as of right for that individual. Whilst the suggestion has the attraction of being a reasonable position to adopt, it does serve to underscore Mr Richardson's own perception that employees of the respondent do not commence work, or remain in work, for at least five years on his own case, with any reasonable or objective knowledge or understanding that they are legally entitled to the bonus. For the avoidance of doubt, there was nothing to suggest that a discretionary entitlement converted to a contractual entitlement; on the claimants' own case, nothing changed, as the annual notices of 2012-2017 demonstrate.

101. The express contract of employment does not contain any reference to the bonus scheme; Mr Bloch accepts that there are no other terms of the contract that would be inconsistent with the implication of a term by custom and practice.
102. Finally, in relation to the Shumba factors, at least, is the question of equivocalness. The burden of proof rests with the claimants to satisfy me that there was, on the balance of probabilities, conduct from which the parties have, or must be taken to have, understood that there was a contractual entitlement to the bonus. As Elias J (as he then was) remarked in the Solelectron case, that will often be a difficult matter to prove; *'for example, if a practice is adopted because a party does so as a matter of policy rather than out of a sense of legal obligation, then it will not confer contractual rights'*.
103. This is, essentially, Mr Bloch's position; that the respondent ought not be held prisoner to the fact that, historically, through good times as well as some very hard times, financially speaking, striven to make the bonus payments to its employees.
104. I agree with that submission, not simply because the claimants have failed to discharge the burden of proof upon them, but also because there is significant evidence to support that proposition. No employee, other than Mr Richardson, in the straw poll conducted by the respondent considered that the receipt of the bonus was pursuant to a contractual entitlement, and perhaps most illustrative summary of that poll was the response *"It's always been paid, you think you are going to get it but until the notice appears there is still a fraction of doubt around it"*. The comment also suggests a sense of faith on the part of its employees, that the respondent will do what it can to continue with its long-standing practice of making bonus payments.
105. But, ultimately, this is an exercise rooted in the identification of contractual

obligations. Parties are ultimately free to agree terms as they wish. I find that the respondent, through its conduct, was clear that bonus payments were not to be regarded as a contractual entitlement and that it could not, objectively viewed, be taken as otherwise. I have no doubt at all that the long history of payment of that bonus gave rise to a reasonable expectation on the part of its employees that the payment would continue to be paid in years to come, and I further accept that the decision taken in 2018 to not pay that bonus, was one that will have been received with heartfelt disappointment by many, but applying the test as I must do, and taking into account all the circumstances known, or reasonably should have been known to the employees of the respondent, I do not accept they could reasonably have understood that the bonus payment was one conferred as of right.

106. The Shumba factors are not exhaustive and, depending on the facts as found, other factors it may be necessary and relevant to consider. For the reasons set out in my findings, I do not consider it necessary to consider those matters raised by the claimants relating to information gathered by mortgage lenders, the tax and national insurance position of the bonus payments, or the benefits enjoyed by cleaners now employed at ISS.

107. The claims are dismissed.

Authorised by Employment Judge Jeram

Date: 14 December 2020

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