



# EMPLOYMENT TRIBUNALS

**Claimant:** Louise Overton

**Respondent:** Hearcentres Limited

Heard at: London South Employment Tribunal  
On: 25<sup>th</sup> January 2021

Before: Employment Judge A. Beale

Representation

Claimant: Ms J. McElvey (lay representative)

Respondent: Mr J. Ormerod (lay representative)

## **JUDGMENT**

1. The Respondent made unauthorised deductions from wages and acted in breach of contract by failing to pay the Claimant her annual bonus for the financial year 2018/2019.
2. The Respondent is ordered to pay to the Claimant the sum of £3,000 being the gross sum deducted, or alternatively being damages for that breach.

## **REASONS**

1. This is the Claimant's claim for unauthorised deductions from wages and/or breach of contract arising out of a failure by the Respondent to pay her £3000, which she says she was owed as a bonus payment in respect of the financial year 2018/19. The claim was brought by way of an ET1 submitted on 24 February 2020, following a period of early conciliation lasting from 7 – 29 January 2020. The Respondent resists the claim.
2. I was provided with an unpaginated bundle containing 47 documents. This was produced by the Respondent. The Claimant's representative confirmed that she and the Claimant had the bundle index and the documents, although not in the same hard copy format as my version of the bundle.

3. I heard evidence from the Claimant and five other witnesses on her behalf:
- Dave Ashdown (formerly employed by the Respondent as an Audiologist from September 2011 – May 2014);
  - Lorna Sharpe (formerly employed by the Respondent as a Practice Manager at its Barnes Centre between January 2015 and October 2020);
  - Surinder Sagoo (formerly employed by the Respondent as Finance Manager from 2011, although I do not have the date on which her employment ended);
  - Sarah-Jane Brown (formerly employed by the Respondent as a Registered Hearing Aid Dispenser between June 2015 and October 2018, and again between February 2019 and October 2019); and
  - Jon McCarthy (formerly employed by the Respondent as a qualified Hearing Aid Dispenser between 2016 and 2018).
4. On behalf of the Respondent, I heard from Jonathan Ormerod, Managing Director, and Claire O'Connor, HR Manager.
5. The Claimant was represented by her wife, Ms McElvey. Mr Ormerod represented the Respondent. Both Mr Ormerod and Ms McElvey made brief submissions at the conclusion of the hearing, summarising their respective cases.

## **DOCUMENTS AND WITNESS STATEMENTS**

6. At the outset of the case, Mr Ormerod raised a concern that some of the witness statements provided on behalf of the Claimant raised irrelevant issues. He further contended that the Respondent had been placed at a disadvantage as it had been unable to respond to the evidence contained in those statements, or to produce witnesses to respond to them, because the Claimant had insisted on simultaneous exchange. In response, Ms McElvey raised a concern that a number of documents had been disclosed by the Respondent very late in the day, only just prior to the date for exchange of witness statements.
7. I explained to Mr Ormerod that it was the usual practice for witness statements to be exchanged simultaneously, and that this was what had been ordered by Employment Judge Andrews in case managing the present case. I explained that I would, and during the course of the hearing, I did, allow the Respondent's witnesses to give oral evidence on points arising out of the statements produced by the Claimant that had not already been dealt with in their own witness statements. However, I also explained that I would not be taking into account, and would disregard, any evidence I considered to be irrelevant to the matters at issue.

8. I also explained to Ms McElvey that I would allow the Claimant's witnesses to add to their witness statements any oral evidence they wished to give arising out of the documents that had been disclosed at a late stage, insofar as those documents had not already been dealt with in their witness statements.
9. Both parties were content to proceed on this basis.
10. In the event, it proved to be the case that some of the witness statements with which I was provided, and some of the documents in the bundle, contained evidence which was not relevant to the issues I had to decide in this case. I do not criticise either party for this, as they prepared for this hearing and attended without the benefit of legal representation. As I indicated to Mr Ormerod at the outset of the hearing, I have disregarded evidence that I did not consider to be relevant to the issues in the claim.

## ISSUES

11. The issues in the case were agreed with the parties at the outset, and are the same regardless of whether the claim is advanced as a claim for unauthorised deductions from wages, or breach of contract:
  - 11.1 Was the Claimant entitled to be paid a bonus in respect of the 2018/19 financial year?
  - 11.2 If so, in what sum?

## THE LAW

### Unauthorised Deductions from Wages

12. Section 13 of the Employment Rights Act 1996 provides as follows:
  - (1) An employer shall not make a deduction from wages of a worker employed by him unless –
    - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
    - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
  - (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –
    - (a) in one or more written terms of the contract, of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

- (b) in one or more terms of the contract (whether express or implied, and if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
  - (3) Where the amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
  - (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
  - (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
  - (6) For the purposes of this section, an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
13. An employee has the right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to section 23 of the Employment Rights Act 1996.
14. "Wages" are defined in section 27 of the Employment Rights Act 1996 as meaning any sum payable to a worker in connection with his or her employment, including at subsection (1)(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

### **Breach of Contract**

15. A claim for breach of contract may be brought in the Employment Tribunal by virtue of article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, where the claim arises or is outstanding on the termination of an employee's employment.
16. The burden of proof in respect of both claims lies on the Claimant.

### **FINDINGS OF FACT**

17. My findings of fact below deal with uncontentious issues, or issues where any difference between the parties was straightforward to resolve by reference to the documents before me. I also set out the evidence on the central factual

points in dispute. My findings on those central points of dispute are set out in my conclusions section.

18. The Claimant was originally employed by Ascent Investments UK Ltd as a Hearing Aid Audiologist/Centre Manager, from 1 June 2007 (doc 001). In September 2011, Ascent was sold to the Respondent, and the Claimant's employment transferred to the Respondent. The transfer was one to which the TUPE Regulations applied (doc 002).

19. The Claimant's contract with Ascent continued on the same terms as regards salary and bonus/commission when she transferred to the Respondent. Her salary was £50,000 and her bonus/commission was to be paid in accordance with the following clause:

*"You are entitled to commission based on the following criteria:*

- *£1 - £350,000 net new hearing aid sales revenue per annum at a rate of 3.5%*
- *£350,001 and above net new hearing aid sales revenue per annum at a rate of 5%*

*All invoiced sales must be shown as paid in full. Hearing aids that are returned for credit will be deducted at the same rate of commission at which paid and shown on the commission statement as cancelled orders. This will be paid annually at the end of the financial year via the regular payroll."*

20. From 1 May 2013, the Claimant was appointed to the role of Business Development Manager for the Respondent in addition to her existing role as Hearing Aid Audiologist at Barnes Hearing Centre (doc 003). Her role in this respect was to develop the business further. Her salary was increased to £60,000 per annum and her sales commission was to cease.

21. Thereafter, however, new bonus arrangements were entered into between the Claimant and the Respondent. I set out below the documentation I have seen in relation to the Claimant's bonus thereafter, and what she was paid in respect of each financial year. I note at the outset that the Respondent's financial year runs from 1 October to 30 September.

21.1 Document 004, headed "Annual Review 2014", sets out the performance bonus payable for the financial year October 2013 – September 2014 as being £2,000. All parties are agreed that this was payable and paid, although the basis on which it was payable is not set out in a document. It appears to have been paid in the 2014/15 tax year.

21.2 The same document goes on to record that the Claimant's package for the 2014/15 financial year was "*Basic salary of £60,000 per annum to continue, Plus Performance Bonus payments as follows:*

- *Additional bonus payments of £1000 payable when Barnes Hearing Centre turnover reaches £150,000; a further £1,000 payable if turnover reaches £200,000 and a further £2,000 if turnover exceeds £250,000.*
- *Additional bonus payments of £1,000 payable if Banbury Hearing Centre turnover reaches £150,000, a further £1,000 payable if turnover reaches £200,000 and a further £2,000 if turnover exceeds £250,000.*
- *Additional bonus payments of £1,000 payable if Bournemouth Hearing Centre turnover reaches £150,000 and a further £1,000 payable if turnover reaches £200,000."*

21.3 There is then a further document (005) which is headed Annual Review 2015 and sets out an identical bonus structure for the financial year 2015/2016. The Claimant's evidence, which was not disputed by the Respondent, and which I accept, was that she had not seen this document before it was disclosed for the purposes of this hearing. The Claimant records in Appendix 1 to her witness statement, which was produced for these proceedings and is not contemporaneous, that she was paid £5,000 in respect of the 2015/16 financial year: £2,000 in respect of Barnes and Banbury respectively and £1,000 in respect of Bournemouth. Although the Respondent records (in another non-contemporaneous document at 045) that only £4,000 was paid in respect of the 2015/16 financial year, I do not think this is correct. £5,000 was paid in the 2016/17 tax year, i.e. before 6 April 2017, as recorded in the Claimant's P60 for that year (doc 044). Any sums payable in respect of the Respondent's 2016/17 financial year (i.e. October 2016 – September 2017) are unlikely to have fallen due by that point. I therefore find that the £5,000 paid in the 2016/17 related to the 2015/16 financial year.

21.4 Finally, document 006 is headed Annual Review 28<sup>th</sup> November 2016. It refers to a "New package from 1<sup>st</sup> Oct 2016 to 30<sup>th</sup> Sept 2017". The Claimant's salary remained the same. Although this document is in very similar terms to the previous document 004, with the bonus section headed "Plus bonus payments based on business turnover targets being met", it sets out a new structure for the Claimant's turnover-based bonus payments. £1000 was payable when the Barnes Hearing Centre turnover reached £150,000, £200,000 and £250,000 respectively. In addition, £1000 was payable when the new Central London Hearing Centres in Harley Street and Harrods reached turnover figures of £100,000, £150,000 and £200,000, and £2000 was payable when those centres reached turnover of £250,000. There were still bonuses payable in respect of Banbury and Dorchester, but

these were limited to £1000 on reaching £200,000 respectively. The amount paid and the basis for any payments in respect of 2016/17 is in dispute and I shall come to it later.

22. There are no further documents relating to the Claimant's bonus entitlement.
23. The way in which bonus was structured within the Respondent was not uniform. I heard evidence from a number of former employees of the Respondent, all of whom appeared to receive bonus in a different way. Based on this evidence, I am able to make the following findings.
- 23.1 There were several different bonus schemes in operation. Three employees from whom I heard (Mrs Brown, Miss Sharpe and Mr McCarthy) had benefited from both a monthly bonus scheme and an annual bonus scheme. The bonus scheme applicable to Mrs Brown differed between her first period of employment with the Respondent and her second period of employment.
- 23.2 There was evidence that some employees (notably Mrs Brown, following her return to the company in February 2019) were expected to inform payroll that they had reached their turnover target before receiving their monthly bonuses. However, Mrs Brown said that in her first period of employment with the Respondent, her bonuses had simply been paid without the need to inform payroll. Mr McCarthy said the same. The Claimant's evidence was that she had never needed to "claim" her bonus or inform payroll that her turnover target had been met before receiving it; it was simply paid as part of her salary, although not necessarily at the same time each year.
- 23.3 I had before me two versions of Miss Sharpe's written performance bonus scheme, attached to her witness statement and at document 010 in the bundle. The scheme for 2016/2017 set out an annual bonus scheme, and the scheme for 2017/18 a monthly bonus scheme. Miss Sharpe gave evidence, which was not disputed, that she had been paid her performance bonus in accordance with the 2017/18 scheme in 2018/19 and 2019/20 without any further written document, even though that scheme is stated to be a "New package from 1<sup>st</sup> Oct 2017 to 30<sup>th</sup> Sept 2018".
24. A meeting took place between the Claimant and Mr Ormerod on or around 10 August 2017. The parties agree that at this meeting, there was a discussion of an incident where the Claimant had agreed a digital marketing deal in respect of the Barnes Centre, which Mr Ormerod considered to be a scam. The Claimant emailed Mr Ormerod on 6 August 2017, offering to waive £1,000 of her bonus in respect of Barnes (doc 008) and the parties agree that Mr Ormerod took her up on this offer.

25. The Claimant's case is that at the same meeting, there was a discussion about whether the performance of the Banbury and Dorchester Centres should be included in her performance for bonus purposes, and it was agreed that they should not, both in retrospect for 2016/17 and going forward, because the Claimant's involvement in those centres had decreased significantly since her performance targets were set. That is supported to some extent by the witness evidence of Mrs Brown, who says that the Claimant was asked to step back from Banbury, Dorchester and Bournemouth in early 2017, to develop the Central London clinics. Mr McCarthy says that the Claimant's time in Dorset decreased once he became independent in March 2017. The Respondent's position is that any discussion about Banbury and Bournemouth, if it took place at all at this meeting, was not retrospective. I will explain my findings on this point in my conclusions section.
26. The Claimant's case is that the Barnes clinic turned over £256,000 in 2016/17, entitling her to a bonus of £3,000; however, as she had waived £1,000 owing to the "scam" issue, she was paid only £2,000. Mr Ormerod records in document 044 that the payment made was £1,000, but in his oral evidence he was not fully clear on this point, and he did not dispute the Claimant's turnover figure. I therefore find that a £2,000 payment was made in respect of Barnes' performance in the 2016/17 financial year in the 2017/18 tax year, as shown on the Claimant's P60 (doc 044).
27. It is agreed by all parties that a meeting took place on 4 April 2018 between the Claimant and Mr Ormerod. It is also agreed that a payment of £2,000 was made to the Claimant in the April payroll, so on or around 30 April 2018, in the 2018/19 tax year. It was Mr Ormerod's evidence that the payment of £2,000 was made in respect of Banbury and Dorchester performance targets for 2016/17, and that it had been withheld prior to that point because of the "scam" issue. It is the Claimant's case that Mr Ormerod told her at the meeting that he would be paying her a slightly early performance bonus of £2,000, based on the projected performance for Barnes for the upcoming quarter, which she had projected to exceed £200,000. This payment was in line with the amounts set out in the 2016/17 bonus scheme.
28. There are no contemporaneous notes of the meeting itself; however, Mr Ormerod has produced some handwritten notes (document 009) which he says were made prior to the meeting for his own benefit.
29. The first page of the notes, written in black pen, reads *"04/04/18 LO - £2K owed in bonuses? (Ban/Dor) – pay in April payroll."*
30. The second page, this time written in blue pen, reads:

"LO



*Current Basic Salary - £60,000 plus bonus scheme....*

*3 x £1,000 for Barnes T/O 150K, 200K and 250K – paid?*

*1 x £1000 when Banbury T/O reaches £200,000 (£203,298 on Cycle but JO/OB did not deduct a Sept credit so really below £200k)*

*1 x £1000 when DOR T/O reaches 200K – T/O £230K so £1000 due.*

*What does LO think she is currently owed?*

*\*Bonus of (?) £1,000 forfeited for mess up with the TVs in GP surgeries...?"*

31. There are then two pages of notes under the heading "Going forward", which read as follows:

*1 Priorities: BARNES, HARLEY STREET, HARRODS (London Triangle)*

*2 Title – BDM? or ? "Senior Audiologist"? or ?*

*3 What can we do to motivate her to develop London clinics ? HJA/HHC? – financial? Bonus scheme?*

*4 Basic salary of £60K high compared to rest of company. Barnes T/O (+ profitability) now overtaken by Horsham + Bedford!*

*5 Looking for LO to do more to justify cost – e.g. increase Barnes T/O (+ profitability) to £300 + start producing business in HSA (£100K+?) and Harrods (£?)?*

*6 How does LO see her role developing going forward?*

*\*JO + LO to discuss and then meet again after giving her thoughts and aims some consideration.*

32. There is a subsequent email from the Claimant to Mr Ormerod dated 9 April 2018 (doc 011), in which the Claimant thanked Mr Ormerod for coming to Barnes and talking to her and to Miss Sharpe. She noted that Miss Sharpe was happy with her new bonus scheme and continued: "*Personally I would also like to thank you too, for talking things through with me. You have alleviated a lot of the frustrations and concerns that I have had over the last few months. To reassure you, I am looking forward to working with you, to continue in helping grow and make HearCentres even more of a success.*" The email goes on to set out the Claimant's plans for developing the Harley Street Hearing Centre, and anticipates that she will be developing an action plan with Mr Ormerod for the Respondent as a whole.

33. The Respondent's evidence is that after this meeting there were no further discussions of bonus at all.

34. The Claimant's evidence is that the conversation on 4 April 2018 confirmed that the 2016/17 bonus scheme continued to apply, save that she had previously waived any bonus for Banbury or Dorchester. Based on turnover, she gave evidence that she was due a bonus of £3,000 in respect of the Barnes Hearing Centre for the financial year 2017/18, so £1,000 more than the "early" payment

- made on 30 April 2018. The Claimant said she mentioned this to Mr Ormerod, who said he would deal with it. She said she did not subsequently raise the underpayment with him as he could be “quite argumentative” when points such as this were brought up.
35. The Claimant further gave evidence that she raised the issue of her 2018/19 bonus with Mr Ormerod at a one to one meeting on 21<sup>st</sup> June 2019, by which time Barnes would certainly have passed at least one of the 2016/17 bonus trigger points on the basis of the monthly figures given by Mr Ormerod in document 046 (turnover to the end of May 2019 was £189,009, and to the end of June, £220,493). The Claimant’s evidence about this meeting was not entirely clear. She said that she had told Mr Ormerod she was due bonus payments. Her account of his response was that he asked her to wait until the end of the financial year, at which point he said she would receive “any bonus payment due”, or (slightly differently, as related at another point in her evidence) receive her bonus payment. The Claimant said she understood that meant she would receive the payment on 31 October 2019, because that was the normal date for end of the financial year payments. On either account, Mr Ormerod had not disputed her entitlement to bonus payments. Mr Ormerod said he did not recollect this discussion of bonus at all, although his diary confirmed he was in Barnes on that date.
36. On 1 August 2019, Mr Ormerod sent an email to the Claimant and Ms Sharpe congratulating them on a record month at Barnes and commenting “Very impressive and we definitely now need to go and have lunch across at Rick Stein” (doc 014).
37. On 20 August 2017, the Claimant resigned from her employment with the Respondent, giving 3 months’ notice (doc 017). There was immediately thereafter correspondence from Mr Ormerod asking the Claimant not to discuss her resignation with anyone else, restricting her access to Sycle and stating she was only authorised to fit Audibel hearing instruments from that point onwards (doc 019). It is clear that the relationship between the Claimant and Mr Ormerod deteriorated from that point onwards, although it is not necessary for me to make findings about the precise events that occurred.
38. On 17 September 2019 (doc 022) the Respondent’s HR manager, Claire O’Connor, wrote to the Claimant, accepting her resignation and setting out various administrative matters relating to her departure. The letter stated “*your final salary, less normal deductions of tax and NI contributions will be transferred into the bank account into which your wages are normally paid, by 30<sup>th</sup> November*”.
39. On 2 October 2019 there was a friendly exchange between the Claimant and Mr Ormerod regarding the new office décor (doc 023), and Mr Ormerod

- congratulated the Claimant on breaking the £300K turnover for the Barnes centre.
40. Later that month there were exchanges between the Claimant and Mr Ormerod regarding the deletion of certain items from the Claimant's computer, and concerns on Mr Ormerod's part about databases that had been downloaded by the Claimant (doc 024, 025). I do not make any specific findings about these incidents, save to note that the relationship had clearly deteriorated once again by this point.
  41. On 31 October 2019, the Claimant received her pay as usual, but it did not contain the £3000 bonus she was expecting in respect of the achievements of the Barnes centre. She emailed Ms O'Connor about this on 5 November (doc 026), and again on 11 November (doc 028). On 11 November (doc 029), Ms O'Connor responded, stating that there was no current bonus scheme in place on the Claimant's employee file. She advised the Claimant to speak to Mr Ormerod if she had a different understanding. The Claimant contacted Mr Ormerod on 13 November (doc 030), and again on 15 November (doc 031). When she heard nothing, she raised a grievance in respect of the £3,000 bonus figure by email dated 19 November 2019, which was to be her final day at work (doc 032).
  42. A meeting took place on 19 November 2019, with Mr Ormerod, which the Claimant had understood to be intended as a handover meeting on her final day of employment; however, it was followed by a meeting with Ms O'Connor at which there was an attempt to explore the Claimant's grievance. The Claimant was aggrieved by this because (as is agreed) she had not been given any notice that her grievance was to be discussed. There are notes of the meeting produced by Ms O'Connor at doc 039, which are disputed. I do not consider that I need to make any findings in relation to those notes for the purposes of the dispute between the parties.
  43. On 20 November 2019, the Claimant sent an email to Mr Ormerod and Ms O'Connor (doc 033) in which she set out the details of her grievance to be pursued formally. She states in that email that, following on from the written bonus scheme agreement in 2016/17, she subsequently had frequent conversations with Mr Ormerod where he said that the 2016/17 bonus scheme would continue to be honoured. She stated that she was entitled to £3000 in respect of the Barnes Centre performance in 2018/19, and that she had chosen to waive the monies due in respect of Banbury and Dorchester.
  44. The Respondent offered the Claimant a further opportunity to discuss her grievance, with a colleague present, in an email dated 27 November 2019 (doc 037). The Claimant responded on 29 November 2019 (doc 038) stating that she did not wish to attend a further meeting in view of the way the previous meeting had been conducted, and said she had nothing further to add. Ms O'Connor

then produced a grievance outcome dated 4 December 2019 (doc 039), in which she stated that she had decided to take no further action.

45. Under the heading “Investigation” on page 2 of her grievance report, Ms O’Connor made the following findings:

*“Ms Overton subsequently received a further bonus payment of £2000 in April 2018 which related to the 2016/17 year and represented payments for turnover achievements in Banbury and Dorchester. At that point in the year, the Barnes Hearing Centre had not reached any of the turnover targets set in the previous year so this payment could not have been for the 2017/18 year.*

*No further bonus payments were ever paid for the years 2017/18 or 2018/19 and no bonus scheme was in place for these years. At no stage were any claims made for any bonuses in either of these years by Ms Overton. If Ms Overton believed that a scheme was still in place, why did she not claim any bonus payments when the turnover “targets” at the Barnes Hearing Centre were reached in either year?”*

46. In her conclusions, Ms O’Connor wrote:

*“The Company have found no evidence of any bonus scheme ever being in place or discussed with Ms Overton since the 2016/17 year. This is not surprising as her role changed significantly after that year. Her title of “Business Development Manager” for the Company involved her in assisting to develop new business in several of the Company’s hearing centres (as detailed in her bonus scheme for 2016/17). However, from the year 2017/18, her title applied only to developing new business in a Harley Street clinic set up by the Company and a clinic in Harrods set up by the Company. No business was ever “developed” in either of these locations and so no further discussion was ever had about bonuses. She had no further involvement in either the Banbury or Dorchester clinics and was solely employed as a Hearing Aid Audiologist working at Barnes. For this she continued to be paid a very high basic salary of £60,000 for working in one location.”*

## **Conclusions**

47. I have not found this case easy to decide. Unfortunately there is little documentation available pertaining to the central issues and the parties have at times given diametrically opposed recollections of events. I should be clear at the outset that I do not consider that anyone has deliberately told an untruth to me during the course of the hearing. These events occurred some time ago, and it appears to me that memories may have faded over time.

48. It is not in dispute that the Claimant was paid bonuses in respect of the financial years 2013/14, 2015/16 and 2016/17. That is so even though she was only given a written bonus scheme in 2014/15 (although in the event no bonus was paid to her that year, and she did not pursue it) and 2016/17. The written bonus schemes with which she was provided were absolute in their terms and were not discretionary, and I find that they created a contractual entitlement to the bonus payments referred to within them if the Claimant met the turnover targets described.
49. I find that the Respondent had a practice, evidenced both by the Claimant's experience in 2015/16, and Miss Sharpe's bonus payments in 2018/19 and 2019/20, of "rolling over" contractual bonus schemes applicable to the previous financial year without producing a new written scheme.
50. The central dispute in this case surrounds the meetings of 10 August 2017, 4 April 2018 and 21 June 2019, and the question of whether the payment made to the Claimant on 30 April 2018 was made for the reasons given by the Claimant or the Respondent. It is easiest to start with consideration of the events of April 2018, as that is the point in time in respect of which I have most information.
51. I have had regard to Mr Ormerod's notes at doc 009. These notes demonstrate that, prior to the meeting on 4 April 2018, he was unclear about what was owed to the Claimant under the bonus scheme and what had already been paid. They indicate that he considered that a payment in respect of the Dorchester turnover in 2016/17 might be due, but also that he did not consider a payment in respect of Banbury to be due because the £200,000 target had not been met. Mr Ormerod was also querying what would be the appropriate way to define the Claimant's role, remunerate and motivate her in future. In particular, he wished to motivate the Claimant to drive to a certain level of turnover in Barnes, and the Central London centres.
52. On his own evidence, Mr Ormerod's notes all pre-date the meeting. There are no notes taken during or post-dating the meeting. There is, however, an email from the Claimant indicating that the meeting had been productive and setting out her plans for business development activities.
53. I consider first the purpose of the payment made on 30 April 2018. Taking both Mr Ormerod's notes and the witnesses' evidence into consideration, I find on the balance of probabilities that the £2000 paid to the Claimant was not, as the Respondent contends, in relation to the Dorchester/Banbury turnover achievements in 2016/17. I have reached this conclusion for the following reasons:
- 53.1 Although Mr Ormerod seems to have begun (in his notes in black ink) by thinking that £1,000 was payable to the Claimant in respect of each of

Dorchester and Banbury, his own later notes in blue indicate that he concluded no payment was owing in respect of Banbury.

53.2 Mrs Brown and Mr McCarthy both gave evidence of the Claimant's limited involvement in Banbury and Dorchester in 2017, which supports the Claimant's evidence that she agreed that she would not receive a payment in respect of those centres in August 2017. Although this would have been a partially retrospective discussion, it is apparent from the date on Miss Sharpe's 2017/18 annual review (4 April 2018, in respect of the financial year October 2017 – September 2018) that decisions about bonus packages were often made much of the way through the Respondent's financial year.

53.3 There appears to be no reason why payments in respect of 2016/17 performance would have been made so late, six months after the end of the relevant financial year. No other employee could think of an occasion when payments had been made so long after the end of the financial year. Mr Ormerod's explanation was that the payments had been withheld for a period because the Claimant had fallen for a "scam" in relation to digital advertising in August 2017, as noted above. I do not consider that to be a plausible explanation. The Claimant had already forfeited £1000 of her Barnes bonus for this reason, as referred to in her contemporaneous emails and recorded in Mr Ormerod's notes at doc 009. As the alleged "scam" related to Barnes, not Banbury or Dorchester there was no reason why those monies should have been withheld when the remainder of the Barnes bonus was paid.

54. On the balance of probabilities, I consider that the reason for the payment of £2,000 in April 2018 was that given by the Claimant, namely that Mr Ormerod informed her that he was paying an "early" bonus based on the existing and projected good performance of Barnes in that quarter. The Claimant gave evidence that she had projected that Barnes would achieve £200,000 turnover in the April – June quarter, as indeed Mr Ormerod's figures at doc 046 confirm it did. That would have triggered a payment of £2,000 under the 2016/17 bonus scheme. Such an "early" payment is consistent with Mr Ormerod's noted desire to motivate the Claimant to achieve higher turnover and profitability in Barnes.

55. There is also some evidence that Mr Ormerod made a similar gesture in the case of another employee, Mrs Brown, when he paid her a £750 annual bonus although she was not entitled to that bonus under the terms of her agreement, as she had not worked a full year at the time. I accept Mrs Brown's evidence that she requested this amount based on her performance during the year to date, making it clear that she was not contractually entitled to it, and that Mr Ormerod nevertheless paid it. I do not accept, as Mr Ormerod contends, that the payment was made in error.

56. I find further supportive evidence for my conclusion on this issue in the positive email the Claimant sent Mr Ormerod on 9 April 2018. Neither this email nor Mr Ormerod's notes at doc 009 support Ms O'Connor's grievance conclusion, to the effect that the Claimant effectively had no or a very limited business development role after 2017. On the contrary, Mr Ormerod's notes suggest that the Claimant was expected to play a greater part in business development in Barnes (pushing to a £300,000 turnover, which she in fact achieved in 2018/19) and the Central London centres, and the Claimant's email demonstrates that she continued to be heavily involved in business development activity. Had there been a possibility at the meeting on 4 April that the Claimant's role would change and she would lose her bonus entitlement, I do not believe that she would have sent the positive email of 9 April. Further, had it been the case (as the Respondent alleges) that the bonus was left in doubt indefinitely, I find that the Claimant would have approached Mr Ormerod to finalise the position.
57. I find that by agreeing to pay the Claimant £2,000 as an "early" bonus in respect of Barnes based on projected turnover of £200,000, Mr Ormerod confirmed that the existing contractual bonus terms from 2016/17 had "rolled over" to 2017/18, in a similar way to previous written bonus schemes applicable to the Claimant. I accept the Claimant's evidence that she did ask Mr Ormerod about the additional £1,000 she should have received in respect of the 2017/18 financial year, but that she did not pursue it because she wanted to avoid confrontation at a time when she remained in the Respondent's employment. I accept the Claimant's evidence that Mr Ormerod could be argumentative about certain issues, as demonstrated by the tone of some of his emails following the Claimant's resignation.
58. Working back from this conclusion, I accept the Claimant's account that she had agreed to waive her bonus in respect of Banbury and Dorchester during the meeting on 10 August 2017, retrospectively for the financial year 2016/17, as well as prospectively. The Claimant struck me as a fair and honest individual, and I find it consistent with her evidence generally that she would have accepted that, as she had ceased to play such a significant role in those centres, she should not receive bonus payments in respect of them.
59. It is clear from Mr Ormerod's notes prepared prior to the meeting on 4 April 2018 (doc 009) that he was not clear about what had or had not been paid, and about what was or was not owing, to the Claimant, in respect of the financial year 2016/17. This is perhaps unsurprising in view of the wide variety of different bonus arrangements in operation within the Respondent, not all of which were recorded in writing from year to year. I find the most plausible explanation of Mr Ormerod's pre-meeting notes regarding Banbury and Dorchester is that he had forgotten about the Claimant's waiver of this part of the 2016/17 bonus during the August 2017 meeting, and that the position was subsequently clarified at the meeting.

60. I therefore find that the bonus arrangement that “rolled over” from 2016/17 to 2017/18 did not include any payments in respect of Banbury or Dorchester, and the Claimant was not entitled to such payments. For the avoidance of doubt, those payments have not been claimed by the Claimant in these proceedings.
61. Against that background, I also accept the Claimant’s account of the meeting she had with Mr Ormerod on 21 June 2019, in that I accept that she asked Mr Ormerod about the bonus payments she was due in respect of Barnes in accordance with the terms of the 2016/17 agreement, and Mr Ormerod confirmed that any bonus due would be paid at the end of the financial year. Although the words “any bonus due” could be regarded as ambiguous, I find that the ambiguity related to the amount of bonus that might ultimately be due (which could not be ascertained on 21 June), rather than the entitlement to, or terms of, the bonus arrangements. In reaching my conclusions in relation to this meeting, I took into account Mr Ormerod’s evidence that he could not remember the meeting, although he candidly agreed that his diary showed him to have been in Barnes on that day. I find that the Claimant was more likely to recollect a meeting of this type, as she was concerned only about her own bonus, whereas Mr Ormerod had a number of employees to deal with, all of whom had different bonus schemes.
62. In short, I find that Mr Ormerod had a practice of “rolling over” written contractual agreements as to bonus through oral conversations, and that in the Claimant’s case, he agreed in April 2018 to pay a bonus in respect of Barnes on the terms set out in the 2016/17 arrangement, and that he did the same in June 2019.
63. There is no dispute that the correct amount payable, if a bonus was payable at all, is £3,000 as Barnes exceeded £250,000 turnover in 2018/19.
64. I therefore find that the Respondent made an unauthorised deduction from the Claimant’s wages in the sum of £3,000 on 31 October 2019, and acted in breach of contract in failing to pay the Claimant that same sum on the same date.

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Employment Judge A. Beale  
Date: 21<sup>st</sup> February 2021