EMPLOYMENT TRIBUNALS

Claimant: **Mr P Fitzgerald**

Respondent: **Production Plus Limited**

Heard at: **Nottingham (via CVP)**

On: **26 March 2021**

Before: **Employment Judge Smith (sitting alone)**

Representation
For the Claimant: In person
For the Respondent: Mr J Gunnion (Solicitor)

JUDGMENT

1. The Claimant's claim for breach of contract in relation to bonus in the year 2019 succeeds.

2. The Respondent is ordered to pay damages to the Claimant, assessed in the sum of **£2,786.85**.

3. The Claimant's claim for breach of contract in relation to expenses is dismissed.

REASONS

Introduction

1. This has been a remote which has been not objected to by the parties. The form of remote hearing was V: video whether partly (someone physically in a hearing centre) or fully (all remote). A face to face hearing was not held it was not practicable and all issues could be determined in a remote hearing. The order made is described below.

The issues

2. Other than the standard orders which were made on issue there had been no active case management in this case. Having read the respective pleadings I therefore, at the outset of the hearing, set out for the parties what I understood to be the issues in the case. This suggested list of issues was agreed between the parties and the hearing proceeded on that basis. Those issues, and the parties' respective starting positions, are set out as follows:

   2.1. *Was there a term of the Claimant's contract entitling him to a bonus payment?*

   The Claimant contended that this term was an express term set out in an email from Mr Andy Miller, the Respondent's Managing Director, dated 26 February 2018. The Respondent denied that there was a term at all, contending instead that any bonus arrangement was purely, and absolutely, discretionary.

   2.2. *If so, did the Respondent breach that express term by not paying the Claimant a bonus?*

   It was common ground that the Claimant was not paid a bonus for the calendar year 2019. If there was such a term of his contract, the Claimant contended that it had been breached. He contended that his entitlement to bonus had crystallised upon the qualifying turnover at the Respondent's St George's Park site having surpassed £250,000 in that year. The Respondent contended that the Claimant's qualifying turnover had not surpassed that threshold figure because, at the Respondent's absolute discretion, it had excluded certain components of turnover from the computation.

   2.3. *If there has been a breach of the express term, what losses are attributable to the breach?*

   The Claimant contended that qualifying turnover for the calendar year 2019 had been £296,459 and that as a consequence, his bonus payment should have been 1% of that figure: £2,965. As that payment had not been made, the loss that was contended to flow from the alleged breach was that sum. The Respondent denied that the Claimant had sustained any loss, based on its assertion that St George's Park had not achieved qualifying turnover and that as a consequence there had been no breach in any event.

3. At all material times the formal legal burden of proof to establish the requisite components of this breach of contract claim fell on the Claimant.

4. The Employment Tribunal has a limited jurisdiction to consider complaints of breach of contract by virtue of **arts.3** and **4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** ("the **Order**"), arising or outstanding on the termination of employment. The Claimant's claim did not fall into one of the excluded categories of claim (**art.5**) which would otherwise have removed jurisdiction, and was presented within the time limit prescribed by **art.7**.

5. In its ET3 (paragraph 1) the Respondent raised a jurisdictional issue, stating that it was treating the Claimant's claim as one of unauthorised deductions from wages under **s.13 Employment Rights Act 1996** and that as a result, the claim was presented beyond the time limit for such claims under **s.23(2)** and should be struck out. At the start of the hearing I discussed whether this was still a live issue with the parties. It seemed very clear to me from the Claimant's ET1 that whilst he had not applied any formal legal label to his claim, the nature of his complaint was about an alleged breach of contract in not being paid a bonus. He had always represented himself. The Tribunal was not bound by the Respondent's characterisation of the claim and if it were properly identified as a breach of contract claim, the time point would not arise because the sum claimed was outstanding on the termination of employment and the claim had been brought within three months of termination (the **art.7** time limit). I gave Mr Gunnion the opportunity to take instructions on the point and, having done so, he confirmed that it was no longer pursued by the Respondent.

6. The Tribunal then proceeded to hear the claim. I heard evidence from the Claimant on his own behalf and from Mr Miller and Mr Stephen Adkins (the Respondent's accountant and Chief Financial Officer) on behalf of the Respondent. The Respondent's witnesses had produced statements for use at the hearing but whilst the Claimant had not, there had been no order made for the exchange of witness statements. The parties were content to proceed on the basis that the Claimant's evidence in chief could be taken from the narrative in his ET1 together with the contents of two letters he had written (dated 14 and 25 January 2021), both of which appeared in the bundle and of which Mr Gunnion had had prior sight. The bundle itself amounted to 74 pages.

Findings of fact

7. The Claimant commenced employment on 20 June 2016, as an in-house Technical/Project Manager. His place of work was the Hilton St George's Park hotel near Burton-on-Trent, Derbyshire, where the Respondent carried out operations.

8. The Respondent's business is in live events. It supplies sound and lighting services and equipment to venues such as the Hilton St George's Park hotel for use at events organised at those venues.

9. At appointment the Claimant's initial salary was £32,000 and he was issued with a statement of employment particulars later in 2016, a copy of which he signed on 18 November 2016. I was shown that document. It did not include any provision in relation to bonus, whether under the section headed "Pay" or indeed anywhere else.

10. In 2017 the Respondent's directors decided to explore ways by which they could incentivise the Claimant to maximise sales opportunities and increase turnover at the Hilton St George's Park venue. It already had an incentive scheme in place in respect of other managers in commensurate positions at its other venues.

11. In early 2018 the directors agreed to introduce what Mr Miller described in his witness statement (paragraphs 5 and 7) as a "discretionary" and "non-contractual" bonus scheme for all project managers, this time including the Claimant. The proposal was set out in an email sent by Mr Miller to the Claimant, dated 26 February 2018 (page 45). The email appeared to arise out of a discussion between the two regarding the Claimant's remuneration. There was no question that as the Managing Director of the Respondent, Mr Miller had the authority to communicate with the Claimant on matters relating to his remuneration.

12. On the subject of remuneration Mr Miller's email said the following:

> *"What is being proposed is an increase on your basic salary to £35,000 and this will be backdated too Jan 1st 18.*
>
> *On top of this* [meaning the basic salary increase] *will be a bonus structure based on turnover. It is 1% on turnover, e.g. if SGP* [meaning the Hilton St George's Park hotel venue] *turnover £325,000.00 with us on our services (based on yours & Jacks sales) you will receive a bonus of £3250.00, if you do more you get more. To qualify turnover needs to be above £250,00.00, the bonus is not any rigging but all other services, excluding staff party's or jobs where we are not making normal margin. We will reserve the right to exclude an event from bonus calculations if it is under-priced, however it is not our intention to exclude anything. The bonus period will run from Jan 1 until 31 Dec each year with the bonus paid at end of March following end of bonus period."*

13. The "Jack" referred to in that email was Mr Jack Hayes, a junior colleague employed by the Respondent at Hilton St George's Park hotel, essentially as an assistant to the Claimant. In evidence Mr Miller conceded that Mr Hayes would not be responsible for any sales himself, and that therefore the reference to *"yours & Jacks sales"* was a reference to the overall sales at Hilton St George's Park and the fact that the Claimant was solely responsible for them.

14. The email itself made no mention whatsoever of the proposed scheme being discretionary in the sense that there might be circumstances in which the Respondent could decide to withhold payment entirely, nor did it mention that the Respondent retained a discretion to decide which elements of turnover – save for rigging, staff parties, *"jobs where we are not making normal margin"*, or events which had been under-priced – would fall to be included within the calculation of turnover for bonus purposes.

15. Following his receipt of the email of 26 February 2018, the Claimant continued working as normal. On 9 March 2018 Mr Miller sent an email to two of his fellow directors – Ms Sarah Rees and Mr Julian Rees – concerning the proposed changes to the Claimant's remuneration package (page 46). That email was not sent to the Claimant but it included the following text:

> *"He* [meaning the Claimant] *will also be on the bonus scheme, to qualify his turnover needs to be £250,000.00 from Jan 1 2018 to Dec 31 2018 he will get 1% bonus.*
>
> *The bonus will be paid at the end of March 2019. We need to reserve the right to exclude a job if it is under-priced, staff party's and rigging will not be subject to the bonus scheme. The bonus is only payable if Paul is still employed at end of March following the end of the bonus period we will not pay a bonus if he leaves mid-way through the year.*
>
> *Can you please put a letter together."*

16. A letter was duly drafted and sent to the Claimant, dated the same day (9 March; page 47) and under the authorship of Mr Miller. The letter referred to the increase in basic salary and then dealt with the bonus scheme, stating as follows:

> *"**Bonus Scheme 2018***
>
> *For a bonus on 1st January – 31st December 2018 turnover the following criteria applies. Turnover must be over £250K to qualify:-*
>
> *£250K – and above= 1% Gross*
>
> *Sample Calculation turnover £310K = £310,000 x 1.0% = £3,100.00*
>
> *The bonus will be paid at the end of March 2019 and we reserve the right to exclude a job if it is under-priced, or any staff parties/events, and rigging events will not be subject to the bonus scheme. Please note that any bonus achieved will only be paid whilst you have continuous employment up to the end of March 2019."*

17. Whereas the 26 February 2018 email had set out what the Respondent proposed to do, Mr Miller's letter of 9 March 2018 set out the formal terms. Following his receipt of this letter around that time, the Claimant continued to work as normal.

18. Unfortunately, in the calendar year 2018 the Hilton St George's Park hotel venue's turnover did not exceed the £250,000 threshold. The Claimant accepted that under the terms of the scheme as he understood them, he was not entitled to a bonus in respect of that year and for this reason it was not a feature of his claim to the Tribunal.

19. Towards the end of 2018 it became apparent to Mr Miller that the revenue being generated from the Hilton St George's Park venue was decreasing. He raised the problem with the venue, who informed him that they wanted the Respondent to continue operating from the site and indeed that they wanted the Respondent to provide weekend cover, expanding the existing arrangement between them. The venue agreed that the revenue being generated for the Respondent from the site could not be supported by the levels of cost to the Respondent at that time.

20. With a view to reaching solutions to the problems of decreasing revenue and the venue's need for weekend cover, in January and February 2019 a number of meetings took place between Mr Miller and the Hilton St George's Park hotel management. Some of these meetings included the Claimant, although it was unclear which ones precisely and nothing turns on that: it was accepted that the Claimant had some involvement in the discussions even though Mr Miller was leading them on behalf of the Respondent.

21. The result of those meetings was that by April 2019 an agreement had been reached between the Respondent and Hilton St George's Park hotel. The nature of that agreement was that the latter would pay what was described as a *"fixed cost contribution"* ("FCC") to the Respondent in order to cover the drop in revenue and the provision of weekend cover. The FCC was £4,166.66 and was payable monthly to the Respondent.

22. On 28 May 2019 Mr Miller met with the Claimant and Mr Hayes's successor (Mr Keith Barlow) at the Hilton St George's Park site. At paragraph 14 of his witness statement Mr Miller said that at this meeting he informed the Claimant that the FCC would not form part of the bonus scheme as it was *"far below our normal charge"*. Initially the Claimant could not remember this meeting, but when asked about it he stated in cross-examination that he remembered *"with precision"* what Mr Miller said to him at its conclusion. He said that Mr Miller's precise words to him were, *"Well done in securing this additional revenue. It will go some way to getting you your bonus this year."*

23. In cross-examination by the Claimant, and in answer to my inquiry, Mr Miller said that in this conversation the Claimant had asked what impact the FCC arrangement would have on his bonus entitlement. Mr Miller said he then told him that it would not be included, but that he believed the Claimant would *"still smash his bonus anyway"*. Mr Miller also said that the Claimant did not respond to this and that he neither indicated his agreement nor his disagreement with what Mr Miller had told him. Mr Miller's evidence was that this meeting was about an hour long and taken over a coffee. He said that during the meeting *"quite a few topics"* were discussed and some were unrelated to the Claimant's bonus.

24. In my judgment Mr Miller's account of this meeting is to be preferred. His oral account was broadly consistent with the account he had given in his witness statement. By contrast, I found it surprising that initially the Claimant could not remember this conversation but was then able to say, in his words, *"with precision"* what was said in the concluding part of it. Given that the Claimant had been given a copy of Mr Miller's statement in advance of the hearing and was therefore on notice as to what he intended to say about this meeting in evidence, I found that the Claimant's evidence on this specific point lacked credibility.

25. Following the 28 May 2019 meeting the Claimant continued to work as normal. During the course of the year the Respondent continued with its Hilton St George's Park hotel operations and revenue was generated as a result. There was a dispute between the parties about what revenue was actually generated, and the parties submitted competing schedules pertaining to the 2019 calendar year. Page 49 was compiled by the Respondent and included handwritten

annotations apparently made by Mr Rees. Page 50 was compiled by the Claimant on the basis of what he told me was a document he routinely completed and submitted to Mr Miller mostly on a weekly basis.

26. Although I preferred the Claimant's consistent evidence in relation to the origin of page 50, the origin of that document seemed to me to be of little relevance. It is clear that on a comparison between the two documents, they are readily reconcilable: the first column on page 50 bears the same total figures from the first and second columns on page 49, added together. The remaining columns are identical in both description and in content. The revenue generated by the Hilton St George's Park site in the year 2019 was therefore:

AV Gross	£62,128.94
Of which, the FCC component	£37,499.94
Production	£207,076.50
Rigging	£27,253.50
"Non-SGP"	£9,480
Total	**£296,458.94**

27. The "Non-SGP" amount referred to in the table above was a sum paid to the Respondent in respect of it having run an event at a hotel around the corner from Hilton St George's Park. It was an agreed fact that this sum fell to be included within turnover for the Claimant's bonus calculation purposes because he had generated that particular sale through an existing client of his.

28. The Claimant continued to work as normal into the early part of 2020. On 24 January 2020 he emailed Mr Miller asking for confirmation as to whether he had or had not achieved his turnover target in the year 2019, expressing confidence that he had done. Mr Miller did not respond. It was not clear why.

29. In March 2020, with the onset of the Covid-19 pandemic and the widespread cancellation of live events the Respondent's business faced an emergency situation. On 23 March 2020 the Respondent placed its employees on the Coronavirus Job Retention Scheme (CJRS, better known as the "furlough" scheme). The Claimant was furloughed from that date and ultimately remained on the scheme and away from work until the termination of his employment.

30. The Claimant was given notice of termination on 25 September 2020 at a meeting with Mr Miller and Mr Rees. The reason for his dismissal was redundancy.

31. On 7 October 2020 (during his notice period) the Claimant emailed Mr Miller enquiring about his bonus for the year 2019, informing him that turnover had amounted to *"£296.5k"* for that year and that as a result he was entitled to a bonus in line with the scheme. On 12 October 2020 Mr Miller replied, stating that:

> *"… I have re looked at your bonus as per our conversation.*
>
> *Unfortunately with the current circumstances of Production Plus being in survival mode due to the government restrictions and a collapse in business we are not able to pay your uncontracted bonus, we are not paying any bonus's.*
>
> *Had we not been in this situation we would have discussed your bonus, however there would have been a calculation done to arrive at the final amount prior to any bonus being awarded."*

32. The Claimant's employment came to an end on 31 October 2020 when his notice expired.

Submissions

33. Prior to the parties making submissions I drew their attention to the case of **Hershaw & others v Sheffield City Council [2014] IRLR 979**, and invited them to consider their positions in respect of whether there had been a contractual variation in the Claimant's case. In **Hershaw** the EAT (at paragraph [18]) stated,

> *We are all clear – and* [the EAT lay members] *are especially emphatic – that where an additional benefit is offered for the foreseeable future to an employee, with no apparent downside, the parties will be taken to have agreed that thenceforth that is to be a term of the contract, and the employee will readily (and usually) be taken to have accepted it as such, merely by his continuing to work. Nothing formal is required by way of acceptance: for instance, it is completely artificial to suggest that if a pay rise (for instance) is offered to employees they remain bound to accept the previous lower pay, and the employer entitled to revert to it, unless and until the employee signifies formal acceptance of the new terms. Such a pay rise will take effect the moment that an employee with notification of it continues in the work he has been doing previously. The need for an exchange of letters or the like would impose a completely unnecessary and unrealistic burden on business or employees' organisations.*

34. In submissions the Mr Gunnion made a concession that the email from Mr Miller to the Claimant on 26 February 2018 varied the Claimant's contract so as to create an entitlement to a bonus so long as the conditions were met. However, Mr Gunnion submitted that the Respondent retained a complete discretion to decide what would or would not be included in the Claimant's target, and to decide which jobs were under-priced or were not at normal margin. That discretion, he said, was tempered only by the need to exercise it honestly and in good faith, and not arbitrarily, capriciously, or unreasonably. He relied upon **Abu Dhabi National Tanker Company v Product Star Shipping Limited (No.2)**

[1993] 1 Lloyd's Rep 397 (Court of Appeal) and the authorities in the employment field as set out in **Small & others v The Boots Co Plc & another [2009] IRLR 328** (EAT) in support of his proposition.

35. Mr Gunnion submitted that the Respondent's intention in introducing the bonus scheme was to reward the Claimant in respect of his sales, and the FCC agreed in April 2019 could not properly be deemed part of the Claimant's sales. This, he said, was for three principal reasons:

    35.1. It had been Mr Miller who concluded the FCC agreement with the management of Hilton St George's Park Hotel, not the Claimant;

    35.2. The FCC fell to be excluded in any event because by its very nature it was below margin: the Respondent was not making a profit on that element; and,

    35.3. Because it was at cost, the FCC fell to be excluded in the same way as the rigging element of turnover fell to be excluded.

36. A fourth reason unrelated to sales was also advanced by Mr Gunnion as a reason why no bonus was payable. It was submitted that the conversation that took place on 28 May 2019 had the effect of varying the Claimant's contract so as to exclude the FCC from the calculation of turnover for bonus purposes. The Claimant's acceptance of this variation was to be inferred from his silence.

37. The Claimant's submissions were straightforward. He contended that the terms of the bonus scheme were clear and that in the year 2019 he had achieved more than the £250,000 turnover threshold and that his entitlement was 1% of the turnover figure. He did not accept that the Respondent had a general discretion to decide which elements of turnover would or would not fall to be included in any calculations of bonus; any elements that could be excluded were defined in the 26 February 2018 email and not subsequently varied.

38. In submissions I explored with the Claimant how the FCC could properly be characterised as sales for the purposes of calculating his bonus. He explained that the FCC was as much a service as a sale: the FCC was introduced in order that the Respondent could viably provide cover on weekends and also cushion any lower revenue the Respondent would experience. The Claimant accepted that the FCC was implemented to replace sales that weren't there, but only to a point. He explained that the FCC, when taken together with other sales such as equipment, would have been a generator of profit for the Respondent.

Analysis and Conclusions

39. The rules governing contractual interpretation are well established and I have reminded myself of them by reference to the speech of Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896** (House of Lords). In relation to the agreed issues set out in the introductory paragraphs of these Reasons, my conclusions are as follows.

Was there a term of the Claimant's contract entitling him to a bonus payment?

40. Despite its pleaded case, the Respondent – through Mr Gunnion – conceded that upon his receipt of the 26 February 2018 email and his continuing to work, the Claimant's contract of employment had been varied so as to include a term relating to bonus. It was a concession I could not accept in relation to this email because, as I have found at paragraphs 11 and 12, the bonus scheme was expressed as a mere proposal – in the sense of an idea – and not in final terms. However, as I found in paragraph 16, the letter of 9 March 2018 from Mr Miller to the Claimant did set out the final, precise term relating to bonus and constituted the Respondent's offer.

41. The issuance of the 9 March 2018 letter produced a **Hershaw**-type situation, where an additional benefit had been offered by the Respondent to the Claimant, with no apparent downside. The introduction of the bonus was not a trade-off for some kind of disadvantage to the Claimant (the **Selectron Scotland Ltd v Roper [2004] IRLR 4** category of case); it was clear from the letter that the Claimant was not being required to sacrifice a benefit he previously enjoyed or accept some other kind of imposition to his disadvantage. In my judgment – and consistent with the concession made by the Respondent – the Respondent's offer to vary the contract was accepted by the Claimant by his continuing to work after 9 March 2018.

42. I then turned to consider the term itself. Properly interpreted from the concise and unambiguous language used by Mr Miller in his letter, in my judgment the natural and ordinary meaning of that term was the following:

    42.1. The Respondent would pay to the Claimant a bonus if the Hilton St George's Park Hotel venue achieved turnover of £250,000 or more within the calendar year.

        42.1.1. "Turnover" for this purpose was not defined other than to expressly exclude rigging events.

        42.1.2. The Respondent retained a discretion to exclude from "turnover" staff parties and any event that was under-priced.

43. The only mention of the Respondent being afforded any discretion in relation to the bonus was specifically in relation to these two final matters: staff parties and under-priced events. That did not accord with the proposal as set out in the 26 February 2018 email. Also, the letter made no mention of *"jobs that we are not making normal margin"* as being an exclusory category, either absolutely or at the Respondent's discretion. Thirdly – and negating Mr Gunnion's first submission – the scheme did not refer to an individual's sales, only to turnover. The reason why these differences appear was not explained. Nevertheless, I remind myself that the task for the Tribunal is to consider the wording of the contract itself, not their previous negotiations or indeed their subjective intent (**Investors Compensation Scheme**). My focus is on the 9 March 2018 letter.

44. Returning to the contract itself, whilst there was no mention of any discretion being retained by the Respondent in relation to other matters outside this specific instance at all, nor could one reasonably be inferred from the unambiguous language Mr Miller used in the email. A reasonable person in the position of the parties would not have deduced from the wording of the term that the Respondent retained a wide, general discretion to decide what would or would not be included in the Claimant's turnover target. I could not, therefore, accept Mr Gunnion's submission that the Respondent possessed such a discretion. Sensibly, he did not submit that the Respondent retained a broad discretion as to whether to pay a bonus at all; that would plainly have been unsustainable on the text of the letter.

45. On the face of the unambiguous wording of the 9 March 2018 letter, for bonus eligibility purposes there was no qualification to what would be *included*, only as to what would be *excluded*, from turnover. It is clear from the chronology of events as found (and as Mr Adkins admitted in paragraph 2 of his witness statement) that the FCC element was not in existence when the bonus scheme was introduced. The questions for the Tribunal then are whether the contract was either subsequently varied so as to expressly exclude it, or if not, whether it would have fallen to be excluded through one of the existing exclusions.

46. In relation to the first of those questions:

    46.1. My finding (at paragraph 22) was that the Claimant did not indicate his agreement to Mr Miller having told him that the FCC element would not be included within turnover, for bonus purposes. The Victorian case of **Felthouse v Bindley (1862) 142 ER 1037** (Court of Common Pleas) established that silence cannot amount to acceptance and that general principle has withstood the test of time, so the question then was whether acceptance could be inferred from the Claimant continuing to work.

    46.2. Where the putative contractual variation is disadvantageous to the employee – rather than wholly advantageous, as in **Hershaw** – his continuing to work does not necessarily amount to acceptance. As the Court of Appeal made clear in **Nottinghamshire County Council v Abrahall & others [2018] IRLR 628**, continuing to work could infer acceptance but if doing so is reasonably capable of a different explanation it cannot be treated as such: *"It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt."* Excluding the FCC element from turnover, for bonus purposes, would have been wholly disadvantageous to the Claimant. This is therefore a situation akin to **Abrahall**.

    46.3. No suggestion was made to the Claimant in cross-examination that the only, or even the main, reason he had continued to work after the meeting of 28 May 2019 was to indicate his agreement to the FCC component being removed from the scope of turnover, for bonus purposes. Looking at the matter realistically, that would be a strange conclusion to infer. As I found at paragraph 22, the discussions in that meeting were not solely about the FCC

or the Claimant's bonus. As to the other topics for discussion, I was not told what they were or what was resolved. It was wholly unclear to me whether the purpose of the meeting itself had been for Mr Miller to raise with the Claimant the subject of his bonus and the FCC component not being included.

46.4. In my judgment, following both **Abrahall** and **Solectron Scotland**, the Claimant should have the benefit of what I consider to be a significant doubt. His continuing to work could not be referable only to an agreement on his part to the contract being varied so as to exclude the FCC component from turnover.

47. Therefore, I did not accept Mr Gunnion's submission that the effect of the 29 May 2019 conversation between Mr Miller and the Claimant had the effect of varying the contract so as to exclude the FCC element from turnover, for bonus purposes. The original term as set out in the 9 March 2018 letter retained contractual force between the parties beyond 28 May 2019.

48. In relation to the second question:

48.1. Plainly, the FCC did not come within the (absolute) exclusion of rigging events or the (discretionary) exclusion of staff parties.

48.2. As to the discretionary, *"any event that was under-priced"* category of exclusion, in my judgment the FCC did not appear to properly fall into its scope. It is necessary to interpret the word *"event"* in context. A reasonable person in the position of the parties would have been unlikely to understand the FCC to amount to an *"event"*: the FCC arrangement was a customer paying a regular contribution to the Respondent's costs. To me, the natural and ordinary meaning of *"event"* in the context of the Respondent's operations at Hilton St George's Park Hotel meant an event organised at that venue, and managed by the Claimant. The FCC was not an event as such, or at all.

48.3. In addition, the evidence concerning the FCC pointed away from it being referable to any particular event or events. In his unchallenged evidence Mr Miller (at paragraph 14 of his witness statement) explained that the purpose of the FCC was to enable the Respondent to provide weekend cover, cover costs, and essentially to ensure a minimum level of service to the Hilton St George's Park site. In my judgment, for this further reason the character of the FCC did not come within the ambit of the *"under-priced event"* exclusion.

49. It follows that there was a contractual term entitling the Claimant to a bonus in the year 2019. The FCC was not apt for exclusion from the Claimant's turnover figure for the year on any absolute or discretionary ground.

If so, did the Respondent breach that express term by not paying the Claimant a bonus?

50. It was an agreed fact that the Respondent paid no bonus to the Claimant for the year 2019. Given the conclusions I have reached in relation to the first issue, it is clear to me that such non-payment would in principle amount to a breach of the express term of the Claimant's contract, had the Claimant been eligible for a bonus. Whether non-payment did in fact amount to a breach depends on my findings as to the qualifying figure for "turnover" for the calendar year 2019.

51. For the reasons expressed above, the FCC was not apt for exclusion from the Claimant's turnover figure for the year on any absolute or discretionary ground. The effect of this conclusion is that the FCC component remains within the figure for *"AV Gross"* as per my findings at paragraph 26. Excluding the figure for rigging (£27,253.50), the Claimant's turnover for bonus purposes in 2019 amounted to £278,685.44. That total figure exceeded the £250,000 threshold set in the letter of 9 March 2018, and further meant that the Claimant was entitled to a bonus payment representing 1% of that figure. As nothing has been paid by the Respondent, it has breached the Claimant's contract of employment.

If there has been a breach of the express term, what losses are attributable to the breach?

52. Given the analysis that has preceded it, this question now answers itself. 1% of qualifying turnover for 2019 amounted to £2,786.85.

53. The Respondent did not run any argument that the Claimant had failed to mitigate his loss. It would have been difficult to conceive of a method for doing so whilst he remained in the Respondent's employment, as he did until late 2020.

54. The Respondent is therefore ordered to pay damages in the sum of **£2,786.85** to the Claimant.

Postscript – Expenses

55. Within box 9.2 of his ET1 claim form the Claimant intimated that he also wished to recover expenses *"to Letchworth to receive redundancy notice"*, as a breach of contract claim.

56. In evidence the Claimant accepted that at no time had the Respondent agreed to reimburse him in relation to travel expenses for travel to Letchworth. He also accepted that he had not submitted an invoice or a receipt in relation to any such travel expenses, which he conceded he would need to have done before any obligation was placed upon the Respondent to reimburse him for travel expenses generally. The Claimant did not put forward to the Tribunal a specific figure claimed in respect of damages.

57. On the basis of these concessions, the Claimant could not establish that the Respondent had breached a term of his contract of employment relating to expenses. Accordingly, this discrete breach of contract claim fell to be dismissed.

_____
Employment Judge Smith
Date: 5 May 2021

Sent to the parties on:
7 May 2021
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For the Tribunal:

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