EMPLOYMENT TRIBUNALS

Claimant: Mr M Wilson

Respondent: GCH Corporation Limited

Heard at: London South Employment Tribunal (by CVP)
On: 31 March 2021

Before: Employment Judge Abbott (sitting alone)

Representation
Claimant: Mr C Allen, solicitor, of Blacks Solicitors LLP
Respondent: Ms L Veale, counsel, instructed by Kennedys Law LLP

JUDGMENT

1. The claim for breach of contract is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant, Mr Matthew Wilson, was employed by the Respondent, GCH Corporation Limited, as Group Finance Controller from 1 September 2014 (with a short period in 2018 as Group Finance Director). His terms of employment were set out in an executive service agreement of around the same date. His employment ended on 30 August 2019 by reason of resignation.

2. The Claimant brought a claim for breach of contract in that the Respondent failed to pay in full a bonus payment that the Claimant alleged was due to him. The sum sought by the Claimant is £16,250. The Respondent denies liability for this sum, or for any further bonus payment at all.

3. The case came before me for Final Hearing on 31 March 2021. The hearing was held fully remote through the Cloud Video Platform. The Claimant was represented by his solicitor, Mr Chris Allen of Blacks Solicitors LLP, provided a witness statement and gave oral evidence. The

Respondent was represented by counsel, Ms Laurene Veale instructed by Kennedys Law LLP, and called evidence from Ms Cassie Hutchings, the Group CEO of the Respondent, who provided a witness statement and gave oral evidence. I was also provided with a 70-page Bundle of Documents.

Issue for determination

4. At the outset of the hearing, I agreed with the parties that there was, in effect, a single issue for me to decide: namely, what terms applied to the bonus payment that was agreed between the Claimant and the Respondent in February 2018. The Respondent submitted that the bonus payment was subject to the conditions of the Claimant's contract of employment dated 1 September 2014; the Claimant submitted that the bonus agreement in February 2018 varied the contract of employment. Whether or not the Respondent is liable as claimed turns on this single question of interpretation.

Findings of fact

5. The relevant facts are, I find, as follows. Where it has been necessary for me to resolve any conflict of evidence, I indicate how I have done so at the relevant point. References to "[xx]" are to page numbers in the Bundle of Documents. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. I have not referred to every document I have read and/or was taken to in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.

6. The Claimant began employment with the Respondent on 1 September 2014 in the role of Group Financial Controller. His role was to monitor the finances of the Respondent's group, which comprises 9 subsidiaries.

7. The Claimant's employment was governed by an Executive Service Agreement (***ESA***) entered into on or around the commencement of his employment (pages 31-50). Insofar as is relevant to this claim, the terms of the ESA included:

(1) Clause 4 (Salary)

4.1 Your basic annual salary is £75,000. This accrues daily and is payable in equal monthly instalments in arrears on or before the last working day of each month.

4.2 Your salary will be reviewed not less than annually by [the Respondent] acting by the Board. We are not obliged to increase it.

[…]

(2) Clause 5 (Bonus)

5.1 You are eligible for a discretionary bonus. Any payment under the scheme is discretionary and there is no contractual right to receive it

unless any performance criteria are met and you remain in employment with [the Respondent's Group] and are not serving any form of notice. Any bonus is not to be treated as part of your contractual remuneration for pension purposes or otherwise.

5.2 No bonus is payable if your employment has terminated before the payment date or if you are under notice of termination given by either party for any reason at the payment date. This applies regardless of whether the notice has been given lawfully or unlawfully; how your employment terminated or why it terminated. Bonus does not accrue pro rata.

(3) Clause 17 (Notice)

17.1 […] your employment will continue unless either we or you terminate this agreement by giving to the other at least six months' written notice.

8. After a year of employment, the Claimant's basic annual salary was increased to £78,000.

9. After the end of his second year of employment, the Claimant was in discussions with the Respondent concerning a further salary increase and bonus. The Claimant sought a bonus of £26,000 in respect of claimed cost savings of £261,000). It was ultimately agreed that the Claimant's basic annual salary be increased to £83,572, and the Claimant was awarded a bonus of £13,000. The Respondent informed the Claimant that this bonus was the largest bonus ever paid by the Respondent (page 51).

10. After the end of his third year of employment, the Claimant and Respondent again began negotiations regarding compensation. An important factor in these negotiations was that the Claimant claimed responsibility for savings in the region of £1.7m, including rate savings of around £1.25m. In respect of the rates savings, the Claimant recognised that an application needed to be made by the end of March 2017 and researched what needed to be done. He then engaged Knight Frank to prepare the application. The savings realised are, in effect, guaranteed through to the next business rates revaluation which will be no earlier than 2022.

11. A meeting was held on 7 February 2018 between the Claimant and the directors of the Respondent (Cassie Hutchings and Greg Hutchings). The Respondent offered to increase the Claimant's salary to £90,000 and a bonus totalling £30,000, £18,636 for 2017 and the remainder split equally over the following five years, in view of the fact the rates saving was split over an eleven year period (pages 52-53).

12. This offer was not acceptable to the Claimant, who followed up with an alternative proposal by email on 11 February 2018 (pages 56-57). In this email, the Claimant proposed a basic annual salary in the region of £105,000 to £110,000 and a bonus payment of £75,000 (with £50,000 to be paid immediately and the remaining £25,000 deferred to next year).

13. Ms Hutchings explained in a telephone call with the Claimant on 16

February 2018 that the Respondent could not meet the Claimant's demands. In particular, she pointed to the overall performance of the Respondent's group being generally rather poor. Instead, the Respondent offered a bonus of £25,000 payable now, with £5,000 each year for the next 5 years provided that the cost savings were actually realised (pages 58-59). Ms Hutchings confirmed this by an email dated 19 February 2018 (page 63):

"…the way we have structured it, you know you'll get an annual payment of £5k for each of the next five years, provided of course the rates remain the same. […] We are also pleased that you will in addition be receiving a £25,000 bonus for 2017 (30% of salary)."

14. The bonus was therefore expressly conditional on "*the rates remain[ing] the same*". The reference to "*30% of salary*" was a reference to the comparator that Managing Directors in the Respondent's group are subject to a maximum bonus being 30% of salary. This had been mentioned by Ms Hutchings in the 7 February 2018 call. The Claimant suggested that the Respondent was imposing such a cap on him notwithstanding that the ESA does not include such a cap – I do not accept that was the case, and find (consistent with Ms Hutchings' evidence) that the Respondent was simply using this as a reference point for the calculation of an appropriate bonus. Had the Respondent regarded it as a true cap, Ms Hutchings would have said as much in response to the Claimant's requests for a higher level of bonus.

15. Ms Hutchings also confirmed that the Claimant's basic annual salary would be increased to £100,000 effective 1 January 2018. This was also relayed in an email from Ms Hutchings to payroll also on 19 February 2018:

"As from 1st January 2018, please could you increase Matt Wilson's salary to £100,000pa.

Please could you also pay him £25k for his bonus for YE Dec 2017.

For year ends Dec 2018 to Dec 2022 he will receive £5k bonus each year – please make a note. […]"

16. The Claimant was paid the sum of £25,000 in February 2018 in respect of the agreed bonus.

17. The Claimant was promoted to Group Finance Director in May 2018, but did not successfully complete his probationary period in that role and was reverted back to Group Finance Controller in September 2018.

18. The Claimant was paid the sum of £5,000 in February 2019 in respect of the agreed bonus. Shortly after receipt of this payment, the Claimant gave notice to terminate his employment, in accordance with clause 17.1 of the ESA.

19. During the Claimant's notice period, there were various exchanges regarding the remaining instalments of the Claimant's bonus. The Claimant argued that he was entitled to the remaining payments; the Respondent

considered that any further payments were conditional upon the Claimant's continuing employment, as per the terms of the ESA. The dispute was not resolved before the end of the Claimant's employment, though the Respondent did agree to pay £3,750, being the *pro rata* equivalent of the bonus for the current year through to the end of the Claimant's notice period (page 70).

20. The Claimant's employment ended on 30 August 2019.

21. The Claimant presented his claim to the Tribunal on 28 January 2020.

Relevant law and conclusions

22. The Tribunal has a limited jurisdiction to hear claims in breach of contract under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. I am satisfied that the claim falls within the scope of the Order – in particular, it is undisputed that the Claimant was an employee, and it is clear that (if the Claimant is correct in his argument) the claim was outstanding on the termination of his employment. The claim was presented in time and the Tribunal has jurisdiction to hear it.

23. The Tribunal has jurisdiction to construe the terms of contracts of employments governing remuneration: *Agarwal v Cardiff University and anor* [2018] EWCA Civ 2084. The general principles of contractual interpretation are well-established and I shall not unnecessarily lengthen this judgment with detailed coverage of the authorities. In summary, the starting point is to identify the intention of the contracting parties. This is an objective test: I must identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*" (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at [14] per Lord Hoffmann). In ascertaining the objective meaning of a contractual provision, I must look to both the language of the provision and the commercial context in which it was drafted (*Wood v Capita Insurance Services Limited* [2017] UKSC 24).

24. Ms Veale drew my attention to the Court of Appeal decision in *Locke v Candy and Candy Ltd* [2011] ICR 769 as being of potential relevance to the circumstances of this case. In *Locke*, the claimant had been engaged as a director for a large building project, with his employment commencing on 17 September 2007. Clause 4.2 of his contract of employment provided that he would receive a guaranteed bonus of £160,000 after 12 months' employment. The last sentence of that clause stated that "*you must be employed by the company in order to receive the bonus*". Clause 7.1 of the contract provided that the respondent could terminate the claimant's employment by giving six months' notice, and clause 7.5 provided that the respondent reserved the right to make a payment in lieu of notice. On 8 September 2008, shortly before the 12-month anniversary of his employment, the claimant's employment was terminated and he was paid six months' salary in lieu of notice, but no bonus. By a majority, the Court of Appeal held that the claimant had been dismissed lawfully at a time before his entitlement to the bonus had crystallised. Accordingly, the last sentence

of clause 4.2 could not be ignored and had to be applied. Whilst the claimant had thereby been deprived of a bonus to which he would have been entitled had he remained in employment for a further two weeks, that was the consequence of what the parties had agreed. The claim was therefore dismissed. The decision in *Locke* is interesting in that the relevant contractual term is similar but, ultimately, I have to interpret the applicable terms in the factual context of this case.

25. Clause 5.2 of the ESA is clear in its terms: no bonus is payable if the employment has terminated before the payment date. Whether the agreed bonus is framed as being solely in respect of work done in 2017 or in respect of savings realised and to be realised over several years, the "*payment dates*" for the final four instalments of the agreed bonus fall after the termination of the Claimant's employment. The Claimant's case can therefore only succeed if what was agreed in February 2018 varied the ESA such that the agreed bonus was not subject to clause 5.2.

26. I find no basis for such a variation. I do not accept the Claimant's submission that what was agreed in February 2018 was a "bespoke" bonus arrangement – it is plain that it was all part-and-parcel of the annual compensation review. I have found above that the Respondent did not vary the ESA to introduce an annual bonus cap (see paragraph 14 above). It is correct that Ms Hutchings did not expressly refer to clause 5.2 / continuation of employment as a condition applicable to the bonus. However, I do not find that surprising – one would not expect the parties to need to make express reference to the terms of the ESA in every annual discussion regarding compensation. I do not accept the Claimant's submission that there was a lack of good faith on the part of the Respondent in not expressly mentioning the ESA terms during the compensation discussions – the Claimant was a senior executive and should have been aware of the terms of his ESA without need for prompting.

27. It is plain that the bonus was being considered as part of wider discussions regarding the Claimant's employment, including the Claimant's promotion to Group Finance Director and his basic annual salary. I find that a reasonable person in the position of the parties would have understood the terms of the ESA still to apply to what was being agreed in respect of compensation going forward.

28. I must also look at the commercial context, and agree with the submission of the Respondent that there would be little business sense for the Respondent to agree to pay sums in respect of bonuses to the Claimant after the termination of his employment, particularly in view of the generally poor financial performance of the Respondent's group as a whole. Ms Hutchings was firm on this in cross-examination, and I accept her evidence. It matters not that the Respondent will continue to benefit from the considerable cost savings that the Claimant takes credit for securing. Clauses like clause 5.2 are far from unusual (as demonstrated by the *Locke* case).

29. I therefore find that the Claimant was not entitled to any further bonus payments after he tendered his resignation. Accordingly, there has been no

breach of contract. The claim is dismissed.

Employment Judge Abbott

Date: 1 September 2021