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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Nos: 4104739/2020 and 4104740/2020**

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**Held on 30 March and 6 May 2021 (By CVP)**

**Employment Judge: R King**

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**Paula Louise Currie**

**First Claimant  
In Person**

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**Conner Regan**

**Second Claimant  
In Person**

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**Monarch Transport Ltd**

**Respondent  
Represented by  
Miss Hatch -  
Barrister**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the respondent did not make unauthorised deductions from the claimants' wages and that their claims are therefore dismissed.

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## REASONS

1. The claimants claim that the respondent made unauthorised deductions from their wages by virtue of its alleged failure to pay them their contractual bonus.
- 5 2. Both claimants gave evidence and the respondent led evidence from Derek Anderson, one of its directors and joint owners. A joint bundle of documents was lodged. By consent the hearing took place by video.

### Findings in Fact

3. Having heard evidence the Tribunal considered the following facts to be  
10 admitted or proved:

### The claimants' roles

4. The first claimant, Miss Currie was employed by the respondent from 4 April 2018 until 10 July 2020. The second claimant, Mr Regan was employed by  
15 the respondent from 4 April 2018 until 3 July 2020. During their employment they were employed as Traffic Account Managers, based at the home they share in Alicante.
5. The respondent's business is to act as a broker between customers who require their freight to be moved and haulage firms who provide the necessary  
20 road transport. The respondent in turn makes its profit from the difference between the price paid by the customer and the price paid to the haulier.

### The claimants' original bonus payment terms

6. Although both claimants had individual contracts of employment their bonus pay arrangements were linked by virtue of an identical clause in each of their  
25 contracts.
7. In Miss Currie's contract the relevant clause stated:-

**“ 6. Bonus**

5 *6.1 The Company has agreed to pay you bonus at the end of each year in December. This will be combined bonus with Conner Regan and yourself and will be paid 20% of net profit after a deduction of yours and Conner Regan's yearly salary of £26,000 each. This will then be split equally between you and Conner Regan. This will be reviewed year on year."*

8. In Mr Regan's contract the relevant clause stated: –

**"6. Bonus**

10 *6.1 The Company has agreed to pay you bonus at the end of each year in December. This will be combined bonus with Louise Currie and yourself and will be paid 20% of net profit after a deduction of yours and Louise Currie's yearly salary of £26000 each. This will then be split equally between you and Louise Currie. This will be reviewed year on year."*

**The year to December 2018**

15 9. For that part of the year to December 2018 during which they were employed, both claimants received their bonus pay in December in line with the bonus conditions set out in paragraph 6.1 of their respective contracts of employment.

**The year to December 2019**

20 10. While the basis of the claimants' bonus calculation for the year to December 2019 remained the same, the respondent proposed to them a variation to the frequency of payments. It did so because it wished to revert over time to the bonus payment arrangements that had existed under the company's previous owners who had paid bonuses to employees on a quarterly basis throughout the year. It therefore proposed to them a twice yearly payment, which was  
25 intended to be a temporary measure until the respondent was sufficiently financially secure to be able to afford to introduce quarterly bonus payments.

11. Both claimants agreed with the respondent to vary their bonus payment arrangements to the effect that, instead of receiving one single bonus payment in December, they would receive two payments; the first on 30 June

2019 and the second on 30 December 2019. This variation was agreed verbally between the parties but the claimants' written contracts of employment were not varied to reflect that agreed change. In due course their 2019 bonus payments were made in line with the agreed variation to the payment dates; a bonus of £2,479 in June 2019 and a bonus of £4,932 in December 2019.

**The variation to Miss Currie's contract in August 2019**

12. In August 2019, the respondent increased Miss Currie's salary from £26,000 to £29,900 per year. This increase was made specifically to cover the increased electricity and internet costs associated with the claimants running their business from their home in Alicante. In common with the previous variation to Miss Currie's contract, this variation was agreed verbally but her written contract of employment was not varied to reflect that agreed change. There was no corresponding increase to Mr Regan's salary.

**The year to December 2020**

13. Towards the end of 2019 the respondent introduced a new business strategy with the aim of adapting its business model from one that relied on high volume customers with low profit margins to a model based on lower volume customers with higher profit margins. To that end, the respondent engaged an external sales team, Premium Sales, to both reconnect with the respondent's former high margin customers and to seek out new higher margin customers within the haulage industry.
14. At the same time the respondent decided that new bonus terms and conditions should be introduced for its Traffic Account Managers in line with this change to its business model, its aim being to incentivise employees to increase their salary and their bonus as they grew its business under that model.

**The respondent's discussions with the claimants**

15. In order to obtain their agreement to the proposed new bonus arrangements the respondent's Derek Anderson and John Weir spoke directly to both of the claimants. Initially they spoke to them in December 2019 with Miss Currie in person (as she was visiting the Glasgow office) and Mr Regan joining by telephone from Thailand. During this conversation both claimants expressed reservations about the proposed new bonus arrangements.

16. On 9 January 2020 the respondent's John Weir sent an email to all of its Traffic Account Managers in which he set out the proposed new bonus structure, which had previously been explained to the claimants:

*"Hi All,*

*Please find below a breakdown of new wage/bonus/Pay Rate structure*

***SALARY..... PAY RATE BREAKDOWN***

*Less than £10,000.00 gross profit per month consistently over 1 quarter will lead to a consultation period/review.*

*Between £10,000 gp and £15,000 gp will be accepted but no bonus will be paid as you will be under the qualification band.*

*Rate 1*

*Monthly Gross Profit figures*

*£25,000 per year salary*

*Between - £15,000 & £17,500*

*Rate 2*

*£30,000 per year salary*

*Between - £17,000 & 20,000*

*Rate 3*

*£35,000 per year salary*

*Between - £22,500 & £25,000*

*Rate 4*

*£40,000 per year salary*

*Between - £27,500 & £30.000*

*All monthly gross profit figures must be hit consistently over a 12 month period before you move up a pay rate.*

**BONUS STRUCTURE**

5 *Bonus will now be calculated quarterly but paid on your first wage after the end of the completed quarter, an exception to this will be in December when it will be included that month's pay.*

10 *The bonus Tariff of £72,000 gross profit then 7% of everything thereafter will be now be divided by 4 to run in conjunction with the new quarterly payment structure, meaning 7% of all gross profits generated over £18,000 within the three month period (quarter) will apply minus the usual credits or customers going bust*

**BONUS QUALIFICATION**

15 *To qualify for the above individual targets have now been set on each book, these targets must be met each month to qualify for that months 7%, if not met then the bonus payment will be less any months where targets were not hit.*

*Each individual target has been based on what is achievable from the available customer base, with potential for growth over and above said target"*

17. Following this e-mail both claimants met with Derek Anderson and John Weir  
20 at the respondent's Glasgow office on or around 22 January 2020 to discuss again the proposed variation. Despite repeating their initial reservations about the proposed variation both claimants eventually agreed to them, having accepted the respondent's assurance that it would provide them with higher margin business that would allow them to increase their overall earnings.  
25 Initially, under these new terms, both claimants fell within the Rate 1 bracket.

18. In common with the bonus payment dates variation for 2019 and Miss Currie's subsequent pay increase, this variation was agreed verbally between the parties but the claimants' written contracts of employment were not amended to reflect that agreed change.

**The events of 2020**

19. At the beginning of 2020 the respondent had anticipated that at the end of the first quarter the bonus payments would cover the period from 14 December 2019 to 31 March 2020 - the previous quarter's bonus having been calculated up to 13 December in order that payments could be calculated and made in time for Christmas.
20. Unfortunately, as a result of the Covid pandemic, many of the respondent's customers began closing their businesses throughout March and April 2020. As a result, the respondent faced great uncertainty as to how much of the £1.2 million of business it had not yet been paid for would ultimately be paid and, if so, when. In an attempt to safeguard its business and the jobs of its employees the respondent decided to keep as much cash as possible in the business in the short term by paying only basic salaries to employees and fees to subcontractors. As part of that strategy its intention was to honour all bonus payments but to defer those payments until it could afford to pay them.
21. On or around 15 March 2020 the respondent consulted with its employees about its intention to defer their bonus payments because of the uncertain trading conditions. It did so in a face to face meeting with employees in the Glasgow Office and by telephone to the Nottingham office and to the claimants in Alicante. It assured every employee that it intended to pay their bonus payments in full when the business could afford to make those payments. As a result of that consultation, the respondent reached agreement with all its employees, including the claimants, that their bonus payments would be deferred until it could afford to pay them but they would all be honoured.

**Early payment of the claimant's 2020 bonus**

22. On 19 June 2020, Miss Currie sent a text to John Weir in the following terms:-
- “hey, how’s you? Is there any word on the bonus getting paid to us at the end of month yet? were just trying to work our finances out”.*

Mr Weir replied as follows:-

5 *“Still not in a position financially to pay bonus Louise so it's frozen for everyone as of March until we reach a point where the business can afford it again, we will pay Jan and Feb as soon as we can then we just for business to pick up before the business starts again unfortunately”*

23. On the back of this text message there were also various telephone calls between the claimants and Mr Anderson. During these calls the claimants made plain the financial difficulties they were in, including their difficulty in paying for their wedding. Mr Anderson assured them that their bonus was simply deferred and that they would get it eventually.

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24. However, recognising the difficult personal financial situation that they had described to Mr Anderson, the respondent decided to make a bonus payment to each of the claimants for the period between 14 December 2019 and 23 June 2020 based on business closed off to date.

15 25. Applying the new bonus formula to those sales, the respondent calculated that the claimants' joint bonus would have been £837.55 as they had only met their bonus target in March 2020. However, in view of the claimants' financial difficulties, it decided to adopt a sympathetic view and therefore did not apply in its calculation at this time either the £18,000 tariff or the amount of any credits that fell to be repaid to customers. The respondent's intention was that those elements would however be applied at year end to the final annual sales figures and an appropriate adjustment made to any final bonus payment to balance the effect of the concession it had made.

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26. As a result, applying the bonus calculation to business closed to date, but disapplying the tariff element and credits, the respondent calculated that the claimants were due a joint bonus of £2,538. Both claimants therefore received a bonus payment of £1,269 in their June 2020 salary. No calculation was provided to the claimants to accompany the payments and explain how the figure had been reached.

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27. Shortly after these bonus payments were made, both of the claimants resigned; Mr Regan on 3 July 2020 and Miss Currie on 10 July 2020. It was part of their reason for resigning that they interpreted Mr Weir's reference in his text to bonus payments being 'frozen' as meaning that they were cancelled and would not be paid. The respondent was unaware of the claimants' intention to resign when the bonus payments were made.

**Final year bonus calculations**

28. At year end the respondent's made its final calculations taking into account income from business won by the claimants that had not been closed off in June and also applying all elements of the bonus calculation formula.

29. Applying the 2020 bonus formula to the final year's figures the claimants' joint bonus for 16 December 2019 to 31 March 2020 was -

Gross Profit - £39,304

Tariff to be subtracted - £18,000

Profit to be applied - £21,304

Bonus at 7% of profit - **£1,491**

30. Applying the 2020 bonus terms to the final year's figures the claimants' joint bonus for 1 April to 30 June 2020 was –

Gross Profit – £32,590

Tariff to be subtracted – £18,000

Profit to be applied – £14,590

Bonus at 7% of profit - **£1,021**

**Total bonus - £2,512**

31. This final year calculation therefore confirmed that the claimants' joint bonus payment for the period between 16 December 2019 and 30 June 2020 should have been £2,512 and that the claimants had been overpaid by £26.

### **Submissions**

5 Claimant's submission

32. Mr Regan submitted that the respondents position throughout had been constantly changing. He referred to its having provided seven different versions of the calculation of the disputed bonus. The respondent's narrative had constantly changed and was unreliable.

10 33. Miss Currie also submitted that the respondent was unreliable. It had initially asserted that their bonus had been discretionary but had then backtracked when it could not prove that assertion. She maintained that both claimants had never stopped working throughout the pandemic and had continued to try to bring as much business in as possible for the respondent. As far as the  
15 claimants were concerned they were due a payment of £9,406.94 in respect of the bonus payment they were due in terms of the original bonus arrangement, which had never altered.

Respondent's submission

20 34. Miss Hatch submitted that the bonus arrangement agreed in the claimants' original contracts had been applied to the letter of the contracts during 2018. However there had subsequently been a number of variations to the claimants' original contracts.

25 35. The first variation had been in 2019 when both claimants agreed to vary the bonus arrangements in one respect only. That variation was to the effect that rather than the respondent paying one bonus payment in December 2019 it would split the bonus payment into two six monthly payments; the first in June 2019 and the second in December 2019. That variation was never confirmed in writing. This was the start of a pattern of behaviour characterised by variations being agreed verbally, but not confirmed in writing. It was no

coincidence that the respondent's directors had no HR support. Further to that variation, the respondent subsequently paid both claimants a gross bonus of £2,479 in June 2019 and a gross bonus of £4,932 in December 2019.

- 5 36. A second variation was agreed in August 2019, but this time only in relation to Miss Currie's contract to the effect that her salary would increase from £26,000 to £29,900 per year to cover the increased electricity and internet costs associated with the claimants running their business from their home in Alicante. Again there was no written record of that variation, but the increased salary was applied.
- 10 37. The third variation of the claimants' contracts took place in 2020. That variation had been made in order to bring the respondent's employees' bonus arrangements in line with its revised business plan in terms of which it intended to move its business focus away from high volume/low margin work towards higher margin work.
- 15 38. The proposed new bonus arrangements had been set out in Mr Weir's e-mail of 9 January 2020. Miss Hatch invited the Tribunal to accept that the Directors had met with Miss Currie in December 2019 and with both claimants in January 2020 and had agreed with them that their bonus arrangement would be governed by the new scheme set out in the 9 January 2020 email. While  
20 the claimants had initially been apprehensive about the new proposal, they had eventually agreed to the changes to their bonus arrangements, as set out in Mr Weir's email.
39. Miss Hatch referred to Mr Anderson's unchallenged evidence that the respondent expected that all of the Traffic Account Managers would earn  
25 more under the system.
40. While the respondent had not sought any written agreement from its employees to the new scheme this followed a pattern of its agreeing variations to contracts without recording them in writing. In the circumstances, it was not significant that there was a lack of formal written confirmation that the  
30 claimants had accepted the new bonus arrangements. Miss Hatch submitted

that both claimants were vociferous and very able to express themselves and it was inconceivable that they would not have recorded in writing their disagreement to the new bonus scheme if that had truly been their position.

5 41. Having agreed the new bonus arrangements, the Covid pandemic had intervened and affected business globally. As a result the respondent had to react to the changed circumstances and, in an attempt to keep as much cash as possible in the business, it had decided to defer payments of bonus until later in the year. This was a fourth variation to the claimant's contracts that was agreed but not committed to writing.

10 42. Nevertheless the respondent had been sympathetic to the claimants when they learned of their financial problems, particularly as they were paying for a wedding and it had agreed to make a bonus payment to them in June 2020 for the period between 14 December and 26 June 2020. Each claimant had therefore been paid a gross bonus of £1,269, which had been calculated by  
15 reference to the new scheme as set out in Mr Weir's e-mail, with the exception that the £18,000 tariff was not applied because doing so would have meant that no bonus was due for December 2019 or January and February 2020.

43. Had the new bonus arrangements been applied strictly to the June 2020 payments they would only have been entitled to a shared bonus of £837.55.  
20 However the respondent realised that this was not enough to sustain the claimants through a period of financial hardship and had thus removed the tariff from its calculation. When it paid the June 2020 bonus payments the respondent did not anticipate that the claimants were on the verge of resigning.

25 44. Had this June 2020 bonus been calculated by reference to the old bonus scheme it would have produced a bonus of £9,515.49. If the Tribunal found that the claimants were entitled to insist on the bonus arrangements set out in the original contracts of employment then the sum due to them was  
30 £9,515.49 less the £2,538 paid in June, which would leave £6,981.46. However the respondent's primary position was that there no further monies

owing to them because the new bonus arrangements had been agreed properly applied and the bonus that they were paid in June met its contractual liability to the claimants.

- 5 45. Miss Hatch submitted that the terms of Mr Weir’s 19 June 2020 text had made it clear that the bonus payments were being deferred. It was unreasonable for the claimants to interpret the word “frozen” as meaning that the payments had been cancelled.

10 **The Law**

Pay and bonuses

46. Section 13 of the Employment Rights Act 1996 provides as follows:

**13 Right not to suffer unauthorised deductions.**

- 15 (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.*
- 20 (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*
- 25 *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.*

47. Section 27 1(a) of the 1996 Act provides that “wages” includes:

5                   “(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise

### **Discussion and Decision**

10 48. The first question for the Tribunal was whether the bonus terms set out in Mr Weir's 9 January 2020 e-mail were binding on the claimants, even though they had not provided their written agreement.

15 49. The claimants asserted in their evidence that the June 2020 payment of £2,538 was equivalent to the payment they would have received for January and February 2020 under the original bonus terms. They believed that this was proof that the original bonus conditions still applied in 2020. However it was clear that the actual payment under the original terms for those months would have been £2,160.41. While Mr Regan asserted that the difference of £377.59 was the amount of bonus still unpaid for December 2019 he produced no evidence in support of that figure. The Tribunal could not therefore accept that assertion. Nor could it accept the claimants' assertion that the respondent's position had repeatedly changed. There had been no evidence led during the hearing in relation to those alleged inconsistencies and none of them was ever put to Mr Anderson in cross examination.

25 50. In a number of respects the claimants' position lacked credibility. In their evidence they stuck robustly to their position that the reference in Mr Weir's text to bonus payments being '*frozen*' meant they had been '*cancelled*'. However, that was not a credible position, having regard to the respondent having actually made such a payment in June. During her evidence Miss Currie also repeatedly refused to accept that a bonus based on 7% of profit

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could ever be higher than a bonus based on 10% of profit, even if the profit figure for the 7% calculation was a higher one.

51. As for the respondent, the Tribunal found that Mr Anderson's evidence was  
5 both internally consistent and consistent with the agreed evidence. Furthermore, both claimants' bonus terms had been specifically made subject to yearly review and it appeared that this was precisely what *had* happened each year in line with the respondent's initial intention to restore a previous practice of paying quarterly bonus payments and subsequently to vary its  
10 business model.

52. The absence of the claimants' written agreement to the change to the bonus terms for 2020 was also entirely consistent with the way in which the parties always dealt with contract variations, which had only ever been agreed  
15 verbally and not committed to writing. This in fact happened on three separate occasions that were undisputed; the initial agreement to vary the 2019 bonus payment dates, the increase to Miss Currie's salary in 2019 and the agreement to vary the 2020 bonus payment dates. The Tribunal therefore accepted Mr Anderson's evidence that the claimants had agreed to the 9  
20 January 2020 bonus terms during the 22 January 2020 meeting.

53. In all the circumstances, on balance, the Tribunal concluded that the claimants' contractual arrangements in relation to bonus had been varied with their agreement and that the bonus arrangements set out in the Mr Weir's  
25 email of 9 January 2020 were those that had been agreed would apply to them during 2020.

54. Having accepted that the bonus formula to be applied during 2020 was that set out in Mr Weir's e-mail, the next question for the Tribunal is whether the payment that was made in June 2020 was in line was that bonus formula.

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55. On balance the Tribunal accepted that that the bonus payment made to the claimants in June 2020 was calculated as described by Mr Anderson; that is by applying the 2020 bonus formula to sales closed to date but without applying the tariff or deducting credits.

56. The Tribunal also accepted the respondent's evidence that applying the bonus formula to the claimants' final year's sales figures resulted in a joint bonus of £2,512 and that the payment of £2,538 made in June 2020, albeit  
5 calculated at that time without applying certain elements of the formula, therefore met in full its contractual obligation to the claimants.

57. In all the circumstances the Tribunal therefore finds that the respondent did not make unauthorised deductions from the claimants' wages and their claims  
10 are therefore dismissed.

15 Employment Judge: Robert King  
Date of Judgment: 21 June 2021  
Entered in register: 21 June 2021  
and copied to parties

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