EMPLOYMENT TRIBUNALS

Claimant: Mr A Hill

Respondent: Morrison Data Services Ltd

Heard at: **Bristol (by video-CVP)** **On:** **23 & 24 November 2021**

Before: **Employment Judge Livesey**

Representation
Claimant: Mr Green, counsel
Respondent: Mrs Henning, solicitor

JUDGMENT having been sent to the parties on 14 December 2021 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claim

1.1 By a claim form dated 17 December 2020, the Claimant brought a complaint of unlawful deductions from wages.

2. Evidence

2.1 The Claimant gave evidence in support of his claim. The Respondent called no oral evidence.

2.2 The following documents were produced;

- C1; tthe Claimant's counsel's closing submissions;
- C2; a List of Issues;
- C3; a revised Schedule of Loss;
- R1; a hearing bundle of documents;
- R2; the Respondent's solicitor's written closing submissions.

3. Issues

3.1 Employment Judge Bax had discussed and recorded the issues which fell to be determined at the hearing in a rather lengthy manner within his Case Management Order of 12 August 2021. Those issues were revisited with the parties at the start of the hearing and it was agreed that they boiled down to the following matters once it had been agreed that the term which was at the heart of the claim was contractual;

3.1.1 How did the term operate and, in particular, did it give the Respondent the power to vary or suspend the incentive scheme?;

3.1.2 Was that power and/or discretion lost?;

3.1.3 If not, could an implied term help the Claimant, either the implied term of custom and practice or some other term implying how the discretion was to have been exercised?

3.2 It was agreed that an issue concerning a Collective Agreement was something of a red herring, as explained below.

3.3 In relation to the transfer, it was agreed that the term transferred under TUPE and that the purported variation to the term would have been void under regulation 4 (1) or (2) but for regulation 4 (5)(b) *only.* The Respondent did not rely upon regulation 4 (5)(a) and/or 4 (5B) as initially suspected.

4. Facts

4.1 The following findings of fact were made on the balance of probabilities and were restricted to matters which had to be decided in order for the issues to have been determined. Page references within these Reasons are to pages within the hearing bundle R1 and have been cited in square brackets.

4.2 The Claimant started work for Scottish and Southern Energy ('SSE') as a meter reader in January 2007. His contract [43-50] contained an incentive scheme [44];

> "*You will be required to participate in the Company's current meter reading incentive scheme (as varied from time to time). Under this scheme, the terms and conditions relating to your hours of work and pay will be as follows.*
>
> *You will receive a fixed basic salary (not subject to incremental progression) based on £14,038 per annum (£1,169 per month) and under the current incentive scheme you will have the opportunity to enhance your earnings, depending on your performance. Your manager will provide you with details of how payments are calculated under this current scheme.*
>
> *The company reserves the right to vary or suspend any of its current incentive schemes in the light of experience and/or changes in customer/business requirements.*"

4.3 The scheme itself was then described in a separate document which contained a calculation which enabled employees to earn bonuses directly referable to the amount of work which was done [51-2].

4.4 A new contract was issued 2008, but the clause which referred to the incentive scheme was identical [53-7].

4.5 The Claimant received regular bonus payments which constituted about a third of his overall salary, approximately £51.50 per day.

The Collective Agreement

4.6 In 2018, SEE reached an agreement with the unions which were recognised for collective bargaining purposes, Unite, Prospect, the GMB and UNISON [58-88]. The Claimant was a GMB member. The Agreement did not refer to or seek to replace the incentive scheme. As a consequence, the parties

agreed that the Collective Agreement was irrelevant to the issues in the claim.

Transfer to OVO

4.7 The Claimant's employment transferred to OVO (S) Metering Ltd ('OVO') in January 2020.

4.8 He continued to receive regular payments of bonus after that date, albeit on payslips which still showed SSE's name [194-203]. When the bonus was not paid correctly for a period, it was corrected without any suggestion that it was discretionary [100]. Further, when the Claimant was furloughed in 2020, the bonus payments continued to form the basis of the 80% calculation of his furlough pay [197-9]. Yet further, when OVO came to transfer the Claimant's employment to the Respondent, it identified the "*Incentive Award Entitlement*" as a "*Contractual Pay Element*" in the due diligence documentation [131]. He continued to receive the payment up to and including his last payslip [203].

4.9 By the autumn of 2020, the Claimant believed that he was the only one of his colleagues left on the incentive scheme. Some, who had joined SSE after he had, were on other schemes and others, who had been on the same scheme as him, had left by July or August 2020 through redundancy. Accordingly, even though others were placed onto less advantageous schemes, his arrangement was not altered.

Transfer to the Respondent

4.10 The Claimant's employment transferred to the Respondent on 1 November 2020. Prior to the transfer, there was correspondence and consultation meetings at which information was provided to the transferring employees.

4.11 An initial information letter stated that the Collective Agreement was to have transferred "*on a static basis*" [91], which was also confirmed later [108]. There was, however, an initial meeting in September 2020 and a further meeting by telephone on 6 October at which the Claimant was informed that the incentive scheme was discretionary and that the Respondent was not going to have operated it post-transfer. On 15 October, a 'measures' letter was sent to him which indicated that there were likely to have been some changes [106-111], which included the following [108];

> "*Any allowances that are non-contractual will not continue post the transfer date. Any contractual allowances will continue to be honoured. Any non-contractual bonus/incentive schemes will cease at the date of transfer. Employees will be eligible to participate in a non-contractual discretionary bonus scheme which MDS may have available from time to time.*"

4.12 There was a meeting on 19 October at which another benefit (travel time allowance) was discussed. It was clarified that that too would not transfer and/or continue because it was said to have been non-contractual [114-5].

4.13 'Meet and Greet' and One to One Meetings were held on 22 and 23 October at the Hilton Double Tree in Newbury and at the Crown Plaza in Gatwick respectively. The Claimant was on leave on 22 October and he considered that Gatwick had been too far from his home in Blandford Forum, Dorset. He did not therefore attend in person, but by telephone [117-120]. He

brought up the incentive scheme which the Respondent agreed to investigate [118]. Ultimately, the response was that the benefit was not going to transfer [158].

4.14 There was a further meeting on 30 October at which the scheme was not covered [159] and a final 'measures' letter dated 30 October was written in substantially the same terms as the previous one of 15 October [160-5].

Changes post-transfer

4.15 The Respondent's case was that the Claimant's role changed post-transfer.

4.16 First, his job title changed from that of 'Meter Reader' to 'Metering Representative'. That was agreed.

4.17 Secondly, it argued that the Claimant no longer read just SSE and OVO meters, but all of the Respondent's clients meters. The Claimant contended that he had read meters for other providers before (for example, Npower and EDF).

4.18 Thirdly, the Claimant was provided with a new handheld device, an 'HHU'. He pointed out, however, that he had had a variety of different handheld devices over the years which have been gradually upgraded. The Respondent's device was no different in terms of what it did and in terms of the information which the Claimant had to put into it.

4.19 In broad terms, to the extent that it was relevant, I accepted the Claimant's evidence on those issues, that his job did not change substantially or materially. It was the only evidence.

Grievance

4.20 The Claimant issued agreement on 9 October, when he had still been at OVO, but in anticipation of the transfer [101].

4.21 A grievance hearing was due to take place on 17 November but the hearing officer did not attend because he was apparently called to an operational emergency. The Claimant's GMB representative complained about his treatment [105]. Some form of collective grievance was launched but those processes and any outcomes were not explored in cross-examination or developed in argument.

The Respondent's bonus scheme

4.22 The Respondent operates its own Bonus Incentive Scheme [133-156]. The documentation, however, gave only a very broad overview and did not provide any specific figures, calculations or entitlements. The Claimant stated in evidence that he had received some payments under the Scheme but they had been less generous than those received during his time at SSE and OVO. Mr Green's written submissions, C1, at paragraph 29, set out the Claimant's comparative receipts; he had previously received monthly sums of nearly £1,000 under the old scheme but, under the new one, he had received two payments only over the year since the transfer, of £15.26 and £54.04.

4.23 Another scheme was in the process of being introduced at the date of the hearing in November 2021 because the Respondent seemed to have

accepted that the one which it was operating was '*not fit for purpose*' [187]. The metrics of the new scheme were still unclear at the date of the hearing [192].

5. Conclusions

5.1 The first issue to address was how the term operated and, in particular, whether it gave the Respondent the power to vary or suspend the incentive scheme. That question elided with the second; whether any power and/or discretion was lost?

5.2 A great deal of the documentation appeared to have been aimed at addressing whether the term was contractual or non-contractual. That was misleading. The term was clearly part of the contract. It was *in* the contract. The real question was whether it created a scheme which was discretionary or non-discretionary. Did the term contain, within it, the ability to change or vary the incentive scheme?

5.3 The IDS Handbook on *Contracts*, paragraph 3.11, was a useful starting point;

> "*The written terms of the contract of employment sometimes seek to confer on the employer the right to vary the terms of the contract unilaterally. If not contained in the written contract itself, such clauses may be found lurking in staff handbooks and policy documents that are incorporated into employees' employment contracts. Provided that the particular variation sought to be made falls squarely within the scope of the power set out in the variation clause, then - subject to certain restrictions imposed by statute or common law - the contract will become legally varied whenever the power is exercised….*
> *A court or tribunal faced with an argument that a contract has been validly varied pursuant to an express variation clause will invariably scrutinise the clause carefully to determine both its ambit and whether it has been legitimately exercised in the circumstances. This construction exercise frequently arises in the context of constructive dismissal, breach of contract and protection of wage claims in the employment tribunals and in cases concerning bonus entitlements ..*"

5.4 In her closing submissions, R2, Mrs Henning cited the case of *Wandsworth London Borough Council-v-D'Silva* [1998] IRLR 193, paragraph 31, more recently approved in *Bateman and others-v-Asda Stores Ltd* [2010] EAT;

> "*The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort.*"

5.5 In my judgment, the term contained within it the employer's right of variation or suspension (see paragraph 4.2 above). Any change, however, had to have been affected in accordance with that term. The next question, therefore, was whether the Respondent acted in accordance with the power reserved to it?

5.6 The term allowed for "*variation*" or "*suspension*". The latter implied a period of temporary cessation. The Respondent did not purport to freeze the term for any finite period in this case. The real question, therefore, was whether the Respondent's actions amounted to a 'variation'.

5.7 The Claimant argued that the Respondent's actions did not constitute a variation in accordance with the reserved power within the term for the following reasons.

5.8 First, he argued that, as a discretionary term, it must have been varied in a manner which was not irrational, capricious or arbitrary. That was, in effect, a facet of the implied term of trust and confidence as discussed in *Small and others-v-Boots Co plc* UKEAT/0248/08 at paragraphs 31 to 33. Here, not only was the sum which the Claimant received following the variation significantly smaller than under the old scheme, but the new scheme was recognised as being 'not fit for purpose' and unworkable (see paragraph 4.23 above).

5.9 Further, there was also the implied term of under the officious bystander test to consider which often overlapped with that of business efficacy; in providing a new scheme by purporting to vary the old one, the Respondent had to keep an eye on its duty under cases like *Star Newspapers-v-Jordan* EAT 344/93. In that case, an employee was paid on a salary and commission basis and the employer proposed to reduce the geographical area from which the commission element could have been earned. The Tribunal found that there was an implied term that some agreement would have been reached so as to have avoided the resulting loss of income because, had the matter been put to the parties at the start of their relationship, they would have said 'well of course there ought to have been an examination of the financial effects upon commission and earnings in such a situation'.

5.10 Secondly, the Claimant argued that the nature of the term had changed during the operation of the contract. It may have started as a discretionary term, but it became non-discretionary in the manner in which it was operated. Mr Green relied upon the decision in *Park Cakes Ltd-v-Shumba and others* [2013] EWCA Civ 974, at paragraphs 35 and 36;

> "*35. Taking that approach, the essential question in a case of the present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered to the employee for his work (or, perhaps more accurately in most cases, his willingness to work), and the employee works on that basis. (The analysis by reference to offer and acceptance may seem rather artificial, as it sometimes does in this field; but it was not argued before us that if the employer had indeed sufficiently conveyed an intention to afford the benefits claimed as a matter of contract he would not thereby be bound.) It follows that the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are, or should reasonably have been, aware of it.*

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

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

(b) Whether the benefits are always the same. If, while an employer may invariably make enhanced redundancy payments, he nevertheless varies the amounts or the terms of payment, that is inconsistent with an acknowledgment of legal obligation; if there is a legal right it must in principle be certain. Of course a late departure from a practice which has already become contractual cannot affect legal rights (see Solectron); but any inconsistency during the period relied on as establishing the custom is likely to be fatal. It is, however, possible that in a particular case the evidence may show that the employer has bound himself to a minimum level of benefit even though he has from time to time paid more on a discretionary basis.

(c) The extent to which the enhanced benefits are publicised generally. Where the availability of enhanced redundancy benefits is published to the workforce generally, that will tend to convey that they are paid as a matter of obligation, though I am not to be taken as saying that it is conclusive, and much will depend on the circumstances and on how the employer expresses himself. It should also be borne in mind that "publication" may take many forms. In some circumstances publication to a trade union, or perhaps to a large group of employees, may constitute publication to the workforce as a whole. Employment tribunals should be able to judge whether, as a matter of industrial reality, the employer has conducted himself so as to create, in Leveson LJ's words, "widespread knowledge and understanding" on the part of employees that they are legally entitled to the enhanced benefits.

(d) How the terms are described. If an employer clearly and consistently describes his enhanced redundancy terms in language that makes clear that they are offered as a matter of discretion – e.g. by describing them as ex gratia – it is hard to see how the employees or their representatives could reasonably understand them to be contractual, however regularly they may be paid. A statement that the payments are made as a matter of "policy" may, though again much depends on the context, point in the same direction. Conversely, the language of "entitlement" points to legal obligation.

(e) What is said in the express contract. As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood.

(f) Equivocalness. The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation. This is the point made by Elias J at para. 22 of his judgment in Solectron."

5.11 Dealing with those factors in turn, the Claimant argued that, as to length, (a), he had benefited from the bonus for over 13 years. As to consistency, (b), the benefits were calculated in exactly the same way over that period. As to awareness and publicity, (c), the scheme was well known to those who benefited, namely the Claimant and others before July or August. As to the description of the term, (d), OVO described it as equivalent to a contractual entitlement when the Claimant had been paid incorrectly in September 2020 [100]. When he was transferred, the bonus was identified in the due diligence documentation as a "*contractual pay element*" [131]. When furloughed, the Claimant was paid 80% of his salary *including* his bonus. The Government guidance on the Job Retention Scheme said this under the heading 'Past Overtime, Fees, Commission, Bonuses and non-cash payments';

> "*You can claim for any regular payments you are **obliged** to pay your employees. This includes wages, past overtime, fees and **compulsory** commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded.*" (emphasis added).

Accordingly, OVO were calculating the Claimant's furlough pay on the basis that the incentive scheme was non-discretionary, which was important.

5.12 As to (e), the retained power to vary was readily understood from the contract, but not the Respondent's conduct. Finally, as to (f), the Claimant argued that it was not equally explicable that the discretion remained in light of his employers' conduct over such a period of time.

5.13 There was a further factual point which the Claimant asserted stood in his favour. If there was a power to vary or change the scheme which the employer retained power to exercise, why, he asked, did he not have his bonus changed by SSE? Other employees were engaged after him on less favourable terms as the incentive bonus scheme was changed. He argued that his entitlement was regarded as an historic contractual anomaly which could not have been swept away (see also *Small-v-Boots, supra*, paragraphs 27-9).

5.14 The Claimant's third and final argument was that, because his bonus was such a substantial part of his overall pay and had been designed to incentivise him and maximise the Respondent's output, it was not necessary for him to establish irrationality for the term to have been preserved. In that respect, he relied upon the decision in *Horkulak-v-Cantor Fitzgerald* [2005] ICR 402.

5.15 In *Horkulak*, the Court of Appeal held that, even though the employee's contractual clause suggested that his bonus entitlement was purely discretionary, since it was part of his remuneration structure and was designed to motivate and reward him, it was necessarily to have been read as a contractual benefit as opposed to a mere declaration of the employer's

right to pay a bonus if it wished. He was entitled to recover damages as a reflection of the value of his likely entitlement but for his dismissal.

5.16 In my judgment, the Claimant's arguments were right for the reasons set out above. The incentive scheme was not suspended, nor was it varied in the proper sense; it was cancelled. The discretion within the term was lost (*Park Cakes*). There was a further argument which was not really addressed by Mr Green. The term permitted a variation "*in the light of experience and/or changes in customer/business requirements*". Did the Respondent demonstrated that those were the circumstances in which a variation was purportedly made? It did not. It called no evidence about the circumstances which led to the replacement of the incentive scheme. It called no evidence at all.

5.17 For the sake of completion, it was unnecessary to answer the third question (whether an implied term could help the Claimant, either the implied term of custom and practice or some other term implying how the discretion was to have been exercised) since no help was required in the circumstances beyond that set out above.

5.18 Mrs Henning's closing arguments had been chiefly aimed at the TUPE and transfer issues. The TUPE issue was a non-point. Contractual terms were preserved by the Transfer of Undertakings (Protection of Employment) Regulations 2006. That was the purpose of regulation 4 (1) and (2). The Respondent sought to rely upon regulation 4 (5)(b);

> "*Paragraph (4) does not prevent a variation of the contract of employment if –….*
> *(b) the terms of that contract permit the employer to make such a variation.*"

5.19 However, a variation would only be permitted if it was in accordance with contract law. In other words, the law that has been examined above. As has been said, the Respondent's power to vary was lost. Further and in any event, this was not a variation, but a cancellation. Yet further, the variation was not in accordance with the term of trust and confidence and would fail.

6. Remedy

6.1 The parties were unable to agree a figure for remedy following the delivery of the judgment on liability. Further argument was therefore heard.

6.2 The calculation of loss in the case presented difficulties. Under the old scheme, the Claimant was awarded bonus with reference to the percentage of the target number of meters he read which he achieved. For example, if his target was 100 meters and he read 85 of them, he got an 85% bonus, equivalent to £53.06 on the scale [52].

6.3 Under the Respondent, its new scheme was not understood by either it or the Claimant [187]. More importantly, the basis upon which he worked under the Respondent was not the same as he had done before; he described it as an 'ever refilling soup bowl' because, when the jobs on the top of his list were done, the list simply was refilled from the bottom. There were no daily or weekly targets given to him.

6.4 The Respondent *could* have produced the numbers of meters which the Claimant had read since the transfer which could then have been compared with the numbers which he had read pre-transfer in order to argue for a lower percentage figure than claimed, for example. It had not, however, disclosed any of the documents which it may (or may not) have had to have been able to run such an argument. But even if it had, there was another factor at play; the Claimant's geographical area had changed and a larger proportion of the meters which he had to read were in rural areas, meaning a longer travelling time between each reading and a reduction in the overall numbers.

6.5 The Claimant's counsel suggested an approach which was based upon the methodology in *Horkulak,* above; see paragraphs 27 to 29 of Mr Green's submissions, C1. He suggested that an assessment should have been made on the basis of the Claimant's probable performance and how, in practice, the employer would have fulfilled its obligation to provide a fair and rational bonus assessment on the basis of that performance. Since there was no evidence from the Respondent to suggest otherwise, it was reasonable to assess the loss on the basis that the Claimant would have continued performing in the same way and earn bonus at the same daily rate, he argued.

6.6 The difficulty with that approach was that the assessment of loss in *Horkulak* was an assessment undertaken in a different cause of action. The claim was brought as a breach of contract claim. The bonus was entirely discretionary and based upon no metrics or finite performance targets, as it was here (see paragraph 11 of *Horkulak*). That was not the same approach which ought to have been adopted to an assessment of loss under section 13 of the Employment Rights Act.

6.7 Under s. 13, an assessment had to be undertaken of the deductions which had been made which had left the Claimant short in terms of his contractual entitlement. Nevertheless, in the absence of any performance targets, an exercise in calculating the losses with reference to the scheme was rather difficult, if not impossible [52].

6.8 Despite the differences between this case and that of *Horkulak*, Mr Green nevertheless suggested that it represented the only pragmatic approach that could have been taken in the circumstances. Ultimately, it appeared that Mrs Henning agreed. She said that she did not object to the mathematical formula set out by the Claimant in the revised Schedule of Loss which had been presented at the start of the second day of the hearing, C3. She said, very frankly, that it was the only way to undertake the calculation. No doubt, there would have been a further extensive disclosure exercise which would have had to have been performed if that was not the case.

6.9 Accordingly, and effectively on the party's agreement, I approached the calculation on the basis of the revised Schedule of Loss, C3. What was done within it was very simple; a figure of loss of £51.55 per day was used because it represented the Claimant's average incentive bonus payments, as illustrated by other documents (the calculation when the Claimant had to be compensated for an underpayment in respect of his bonus [100]). The

figure was somewhere between the incentive achievements of 84% and 85% [52].

6.10 Mrs Henning argued that that figure was too high. She referred to the Claimant's witness statement (paragraph 38) in which he had adopted a lower figure, £43.88. She argued that that figure ought to have been used in the revised Schedule instead.

6.11 In my judgment, the best evidence that could be found of the Claimant's work and the bonus that he received was the *actual* bonus that was paid to him and reflected in his payslips [194-203]. There was a missing payslip for the month of October but I was told that the bonus payment on that occasion was £2,165.07. It had been high because of a missed payment that occurred earlier on in the year. For those 11 months, the average figure was £1,106.34, which was very close indeed to the bonus actually claimed in the revised Schedule.

6.12 Faced with the choice of a calculation undertaken on the basis of Mr Green's approach or on the basis of the payslips, Mrs Henning chose Mr Green's.

6.13 That left one final matter, the month of November 2021. It was agreed that the claim was limited to the end of October and, Mrs Henning having indicated that the Respondent would comply with the terms of the bonus incentive scheme going forward, the Claimant had an expectation that he would receive the November payment when it accrued. If he did not, of course, a further claim might then be issued.

6.14 The loss set out in the revised Schedule was £13,436.80 and that was the sum awarded in the Claimant's favour in the Judgment.

Employment Judge Livesey
Date: 15 March 2022

Reasons sent to parties: 30 March 2022

FOR THE TRIBUNAL OFFICE