EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Nick George	**v**	N & C Glass Limited

Heard at: Bury St Edmunds (Remote) **On:** 25th August 2022

Before: Employment Judge R Wood

Appearances
For the Claimant: In Person
For the Respondent: Miss N Webber, Counsel

JUDGMENT

1. The Claimant was fairly dismissed on the grounds of redundancy.

2. The claim for breach of contract is dismissed.

STATEMENT OF REASONS

Claims and Issues

1. This is a claim which involves an allegation of unfair dismissal and breach of contract. In relation to the unfair dismissal claim, it is alleged by the claimant that the respondent engaged in a sham redundancy, and that there was some other reason for the dismissal, possibly related to the claimant's performance. The claimant also submits that the process adopted by the respondent was, in any event, unfair, because he was not properly consulted about the proposed redundancy; he was unfairly 'pooled' in in a group of one; and he was not made reasonable offers of alternative employment. In relation to the alleged breach of contract, the claimant states that it was an express verbal term of his contract of employment that he was entitled to 10% of the net profit of the company, to be paid on an annual basis.

2. For it's part, the respondent states that it moved to reorganise it's business, including the sales department, in part due to difficulties caused by the pandemic. This resulted in the claimant being put at risk of redundancy, and

subsequently being selected for dismissal on the ground of redundancy. The respondent asserts that the policy it adopted was fair throughout and that the claimant was fairly selected for redundancy. In relation to the alleged breach of contract, it asserts that the claimant was not entitled to a proportion of the profits of the company, and denies that such a term was ever incorporated into the claimant's employment contract.

Procedure, Documents and Evidence Heard

3. The Hearing took place on 25th August 2022. The claim was heard as a remote hearing in Bury St Edmunds. From the respondent, I heard evidence from Mr Matthew Seymour (acting managing director), and Mr Nicholas Flack (owner). I also heard from the claimant, Mr Nick George. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. In addition, Mrs Deborah George (the claimant's wife) produced a witness statement dated 11th August 2022, the contents of which were not challenged by the respondent. I also had an agreed bundle of documents which comprises 443 pages. At the conclusion of the hearing, I reserved my decision and invited the parties to make any submissions in writing. They have both taken the opportunity to do so: Miss Webber's submissions are dated 30th August 2022, and Mr George's document is dated 2nd September 2022. Both sets of submissions were considered and helpful.

Legal Framework

4. Section 98 of the Employment Rights Act 1996 ("ERA 1996") is the statutory basis for unfair dismissal and reads as follows,

> "General
>
> (1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show–
>
> (a) the reason (or if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it-
>
> (a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……"

5. Redundancy in the context of this case has the meaning assigned to it by section 139 of the Act, which states as follows:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to -

……

(b) the fact that the requirements of that business-

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

6. The agreed questions for me to decide in relation to the unfair dismissal case were as follows:

(i) What was the reason given for the decision to dismiss?

(ii) If redundancy, was there a redundancy situation as defined by section 139 of the Employment Rights Act 1996?

(iii) If so, was the claimant's dismissal wholly or mainly attributable to that fact; and

(iv) Did the employer act fairly within the meaning of section 98 above?

7. In the context of this case, it is for the respondent to prove the reason for dismissal was on the grounds of redundancy i.e. a potentially fair reason. It must do so on a balance of probabilities. The respondent must also establish that the dismissal was fair in the circumstances of the case, again to the civil standard.

Findings

8. As stated, the claimant was employed by the respondent as a surveyor in 2015. He was promoted to sales director with effect from 30th October 2018. The claimant's contract of employment appears at page 72 of the bundle. There is little disagreement about the written terms. Of course, there is a pivotal disagreement as to any verbal agreement relating to the payment of a profit related bonus.

9. The claimant alleges that he was contractual entitled to be paid 10% of the respondent's net profit at the end of each financial year, which in this case was July-June. He further asserted that he was paid £800 per month as a down payment in respect of this bonus. These payments, he states, went onto a 'CaptureHub' prepaid debit card, in the claimant's name. The payment of £800 represented a gross figure of £1,000. I find that the claimant was, as a matter of fact, in receipt of this payment of £800 each month, from the date of his appointment as sales director. I accept the content of the documents at pages 414-417 of the bundle to this effect.

10. What is more difficult to ascertain is the status of these payments in terms of the contract of employment, and whether these were down payments in respect of a broader entitlement to a profit related bonus. The terms of the contract are, in so far as they relate to remuneration, are at page 88 of the bundle. There is no dispute that the contract makes no mention at all of a profit related bonus, or payments to the 'CaptureHub' account. I also find that the claimant never made a claim for a profit related bonus, or received any such payment (in addition to the 'CaptureHub' payments), during course of his employment with the respondent. There is no indication in the contract as to how these payments would have been calculated, or when they became due. The claimant suggested that they were due once the accounts had been finalised at the end of the financial year. He accepted that prior to the commencement of the redundantly process, there had never been any discussion about payment of this bonus. Further, he agreed that it was never specifically raised at either of the consultation meetings.

11. It was alleged by the claimant that there was a discussion with Mr Flack in or around October 2018, whereby Mr Flack promised to pay the profit related bonus to the claimant. As I have already observed, this alleged agreement did not find its way into a written contract, which is surprising given it's importance to both parties. I accepted Mr Flack's and Mr Seymour's evidence that no other directors received a profit related bonus. This was not challenged. I also find that although the claimant sought disclosure of the respondent's accounts during the consultation process, the overriding purpose of the requests appeared to be to provide ammunition to challenge the justification for the restructuring of the business, and not with a view to recovering unpaid bonus entitlement.

12. I also find that the claimant and the respondent came to an agreement as to the claimant's notice payment, his holiday pay, and the redundancy payment, all due upon his dismissal. This is notwithstanding that the

payments do not have regard to the alleged profit related bonus, to which the claimant now asserts he was contractually entitled.

13. To return to the chronology of the case, the claimant commenced his role as sales director in October 2018. He was part of a relatively small business. He was a director, along with the owner, Mr Flack, Mr Seymour, the acting managing director and operations director, and Mr Galliard, who was a non-executive director who did not draw a salary from the business. Mr Flack had been seriously ill for a significant period by the time of the matters relevant to this claim. It was for this reason that Mr Seymour had assumed the role of acting managing director. I accept that Mr Flack had, in large part, withdrawn from the daily running of the business, for perfectly understandable reasons, and that Mr Seymour made many, if not all, of the important decisions relating to the operation of the company.

14. Within the sales department, and in addition to the claimant, were 3 other members of staff at the relevant time. These were all sale representatives and/or estimators. Each were much less senior than the claimant, and were in receipt of significantly smaller wages. Two of these members of staff had been employed in April/May 2021. Another member of staff, Mr Moore, had left the department in early 2021. There were other departments within the company. These included installation and Glazing, account and trade. I will return to these shortly.

15. In or about May 2021, the respondent decided to reorganise the business. I accept that this change was motivated by the pandemic and the need to reduce overheads. I accept that it was likely that the respondent's core business, the installation of domestic windows, was negatively impacted by the pandemic, and that there was a genuine need to reduce the running costs of the business to make it more profitable. Mr Seymour identified that redundancies were a likely part of this process. The claimant was not included in any of the discussions associated with the proposed restructuring of the business, notwithstanding that he was a board member. However, I find that the claimant was not a habitual attendee at board meetings. Rightly or wrongly, it was apparent that he was not regarded in the same way as other directors in this context. It was my view that he was largely treated as a senior sales manager, rather than a director. His title, given the reality of his day to day duties, was in my view something of a misnomer. It was common ground that the claimant spent much of his day to day life visiting customers. This was clearly not consistent with the role of a director. For the above reasons, I do not agree that the claimant's exclusion from the discussion about restructuring is in itself sinister. In my judgment, in part, it is the result of the fact that he was thought likely to be at risk of redundancy by Mr Seymour, although he would not say as much. This does not mean that the restructuring was motivated by a desire to remove the claimant, or that his dismissal was predetermined.

16. I accept that the genuine reason for the dismissal was redundancy. In truth, there was very limited evidence to the contrary. When asked, the claimant found it difficult to come up with another reason for his dismissal. He did not

challenge either Mr Flack or Mr Seymour when they suggested that they had a good relationship with the claimant. At one point, the claimant relied upon an extract from Mr Seymour's witness statement, at paragraph 6, which he argued supported a suggestion that the restructure was motivated by concerns about his performance. Both Mr Seymour and Mr Flack denied this suggestion. I accept their evidence. It was my opinion of paragraph 6 that what was really being said was that it became apparent, post the restructuring of the business, that the sales department began to perform much better. Mr Seymour felt that this vindicated his belief that there was a need for change within the company as a whole.

17. Further, I find that there is nothing significant to be derived from the limited written material generated by the restructuring. The respondent is a relatively small company. At the relevant time, Mr Seymour has in sole control of the company. He did not need to persuade anyone of the wisdom of the proposed changes. He was given free rein by Mr Flack. It might well be fair to describe what written notes there are as being "on the back of fag packet". For the purposes of an employment tribunal, a more formal recording of the reason for change may well have been prudent. However, I accept the evidence of Mr Seymour on this point, that he had access to company records as a whole, and it was upon these that he placed reliance. Otherwise, the plan was in his head. Given the size and nature of the undertaking, I found this to be an entirely plausible explanation, and consistent with the Tribunal's understanding of such matters.

18. On 19th June 2021, the claimant commenced annual leave. He did not return to work until 5th July, at which time he was presented with the letter at page 307 of the bundle. The claimant urged me to have regard to the fact that the date of this letter, being 2nd July 2021, was in some way significant. I am afraid I cannot agree. I have no doubt that it would have been given to him on 2nd July if he had been at work. As it was, he was asked into a meeting shortly after his arrival on 5th. I accept that he was given no notice of this meeting. Again, I find that this was largely the result of him being on annual leave. In any event, this was not one of the consultation meetings. It's purpose was simply to put him on notice that he was at risk of redundancy. I appreciate and understand that the claimant harbours a sense of grievance about being excluded from the discussions about possible restructuring, but I have already dealt with this issue. I find that it was reasonable in the circumstances.

19. Albeit in brief terms, the letter set out the reasons for the consultation process, and the form it would take. In many ways, it is a letter which is typical of it's genre. I do accept that claimant's point that the original timetable for the process (as set out in the letter), was very tight. If the respondent had insisted on keeping to that time table, I would have questioned whether it was consistent with concepts of fairness. However, this is an academic argument. The respondent demonstrated significant flexibility as to when meetings were held, due in large part of a desire to accommodate the claimant's availability. The first consultation meeting was not held until 13th July, and the second and final meeting on 16th July. He

was dismissed by letter dated 20th July 2021. I find that this was a timetable which, in terms of the opportunity it afforded the claimant to consider the respondent's proposal, and to formulate his own ideas, was within a band of decisions that a reasonable employer might take.

20. The claimant was placed in a pool of one. It was the claimant's submission that other members of the sales team should have been placed at risk along with him. He argued that in practical terms, his day to day duties were far more consistent with a sales representative, than they were a director of the company. As I have already said, there was some common ground between the parties on this issue. Mr Seymour had observed that the claimant spent too much time visiting customers, when he ought to be engaged in directorial or managerial duties at the office. In fairness, Mr Seymour blamed the structure of the company for this, at least in part. He explained that this was why they had taken on two sales representatives in April/May, in order to relieve the pressure on the claimant to be out of the office.

21. I have already found that the title of sales director was, to some extent, misleading. That being said, the claimant held a senior management position, and was paid accordingly. His duties under his contract of employment, placed him significantly apart from other members of the sales team, for the purposes of a redundancy pooling process. Accordingly, the decision to place the claimant in a pool of one was one that was very much open to a reasonable employer.

22. On 5th July 2021, it is the claimant's recollection that he received a phone call from a colleague who suggested that he had heard that the claimant had been made redundant. From this, the claimant had deduced that the respondent had already made up it's mind that he was to be dismissed. I find that it is more likely than not that the claimant had a conversation with someone from the company. However, it is not an infrequent occurrence that people talk about staff being made redundancy when what they really mean is that they are at risk of redundancy. In other words, there is considerable scope for misunderstanding, either in terms of the language used by the other person, or in the way it is understood by the recipient of the message.

23. Moreover, it is impossible to get to the bottom of what was said or meant in this case. For understandable reasons, the claimant has opted to keep the identity of the caller to himself. This has the effect that the respondent has not been able to challenge this evidence to any reasonable extent. I have not heard from the member of staff. For instance, I have no idea where they got their information from. It may have come from Mr Flack or Mr Seymour. It may also have been second or third hand hearsay. It is difficult to know what weight can be reliably placed on this aspect of the claimant's case, and I treat it with extreme caution. I find that it is insufficient evidence that the respondent had already come to a decision to dismiss the claimant as of 5th July 2021.

24. I also find that the claimant was excluded from certain IT systems from 2nd July onwards. I accept Mr Seymour's evidence about this, namely that he was concerned that as a former owner of a window company, there was some risk that the claimant might take the opportunity to acquire the details of the company's clients, once he was aware that his position was at risk. I can readily appreciate that the claimant would have taken offence at such a measure. I note that there were no restrictive covenants in the claimant's contract of employment, which might have otherwise protected the respondent in this regard. In my view it was a prudent business decision which was not indicative of any pre determination of the consultation process.

25. The notes of the meeting on 13th July 2021 appear at page 314 and 319 of the bundle. The claimant took very limited issue with accuracy of the notes of what was said at the meeting. The claimant had been permitted to attend with his wife, as he was at the subsequent meeting. I find that the purpose of the meeting was properly explained and that the proposed restructure was set out. It was explained that his role as sales director would be absorbed by Mr Seymour, and that the day to day sales function would be redistributed to the sales representatives. It was the claimant's argument that he was far more skilled and experienced than the sales representatives, and was lead performer in terms of sales. He therefore questioned the logic of the proposed changes.

26. I find that there was a discussion at the first meeting as to the possibility of the claimant applying for a fitters post. It was offered by the respondent. However, I accept that, consistent with the note, that the claimant refused this, stating he was too old. It is the claimant's position that he understood that the offer was made as a joke, and that he treated it as such. I am afraid I do not accept this recollection. Even if I did, I would have to question the wisdom of treating any job offer in the circumstances as a joke. I find it to be much more likely that given the claimant's age, experience, and seniority in the business, that the role of fitter would have been regarded by him as wholly inappropriate. Indeed, this is what the note records the claimant as saying at the time, which I accept is broadly accurate.

27. The process was adjourned until 16th July 2021. The claimant's notes of the meeting appear at page 353 of the bundle; the respondent's at page 355. I find that there was a discussion about the possibility of the claimant being appointed to the role of sales representative. This followed on from a previous discussion at the first consultation meeting, at which the claimant had proposed becoming a sales representative on a commission only basis. He had suggested that he would probably earn more on such a package. At the second meeting, Mr Seymour had made clear that the company would not employ him on that basis, as the purpose of the exercise was to cut costs. The claimant then questioned whether there would be a a fair distribution of sales leads, and whether there would be sufficient leads to justify three salesman. According to the minutes, it was left that Mr Seymour and Mr Ryan (external Human Resources) were to discuss this issue after

the meeting.

28. In relation to the alternative position of sales representative, it is the respondent's case that the claimant had made clear that he did not want this role, as he did not feel he would get sufficient leads. The claimant suggests that he asked on numerous occasions, in both meetings, if he would accept the role if it was offered, and he said he would. However, the role was never offered. The claimant further states that he would have needed more detail as to the terms of any role, before he could make an informed decision.

29. In my judgment, neither of these two positions represents the reality of the situation. Whilst there was an extended discussion, and the respondent made clear that it was prepared to consider this as a suitable alternative, it was never offered. I also find that the claimant did not state that he would be prepared to accept an offer, if made. There is no mention of this being said in the notes, not even the claimant' own notes which appear at page 353 of the bundle. I find that what happened was that the claimant demonstrated a lack of enthusiasm for the role, at which the point the discussion was ended, with a view to further discussions between Mr Seymour and Mr Ryan after the meeting. I find that this left open the possibility of further consultation with the claimant, if either party thought it worthwhile. It is common ground between the parties that neither raised this issue again.

30. In my view, the respondent could have structured this aspect of the discussion better. Mr Seymour was indecisive as to the package that might be available to the claimant if he accepted the role of sales representative. I accept the claimant's point to some extent, that it is difficult to accept a job without knowing the terms and conditions of the role. Having indicated that he was to have further discussions after the meeting, it would have been better if Mr Seymour had returned to the issue, either in the context of another meeting, or by dealing with it (one way or the other) in the dismissal letter dated 20th July 2022. That it was left 'up in the air' leaves a little to be desired. However, it is also fair to observe that consultation is a bilateral process. By demonstrating a lack of enthusiasm for the likely terms and conditions of the role, I find that the claimant was sending out a message to the respondent (whether deliberately or inadvertently) that this was an avenue which was unlikely to be worth further investigation. In part, this explains the way in which the matter was left by the respondent.

31. It is not in dispute that the claimant was made at least one formal offer of alternative employment. It came in the redundancy letter on 20th July 2021, when he was offered the role of assistant installations manager. The claimant makes three points about this. First, he says that it was not a genuine offer; it was a new position for which there was no real requirement; it did not exist. Further, he states that the offer should have been made during the consultation process, and not in the dismissal letter. He also submits that the timing supports the suggestion that it was not a genuine job

offer, and that the offer came with insufficient detail.

32. The respondent maintains that it was a position created as a result of the removal of the glazing manager post, and the broadening of the installation manager's role. Further, that the claimant was invited in the letter to ask for further details about the role if he was interested. It is not disputed that the claimant made no further enquiry, even after two further prompts by the respondent (pages 369 and 375).

33. I am afraid I found the claimant's evidence on this aspect of the case to be less than straightforward. He told me that the post lacked seniority, given his previous role as sales director, and that consequently, it would not have been acceptable. I completely understand this attitude. It would have been difficult to have returned to the 'ranks' having had a position on the board. In my judgment, this is the reason why he did not ask for further details. I dismiss the suggestion that it was not a genuine role. Mr Seymour explained to me how other departments had been restructured. The creation of the assistant installation manager role was entirely consistent with that. I can see insufficient grounds for suggesting that the position, and the offer of the role, was a sham. In a general sense, I regard the claimant's attitude towards the various discussions relating to possible alternative employment in this context as unhelpful.

34. I do accept the claimant's argument that it would been better if this offer had been openly discussed with him at a meeting. It would have been better to have delayed dismissal until consultation about suitable alternative roles had been reasonable exhausted. However, I find that the offer was made, and if the claimant had wished to explore the possibility, there was a reasonable opportunity for him to do so. Indeed, he was asked by the respondent if he wished to do so on two further occasions (on 28th July (page 369) and 30th July 2021(page 374). I am satisfied that the respondent's persistence, even after the dismissal letter, neutralises any unfairness that might have been associated with the initial timing of the offer, and was within a range of reasonable actions. It is simply not correct to suggest that the claimant only had a few hours to decide whether to accept the offer, as he has suggested.

35. As already stated, the claimant was dismissed by letter dated 20th July 2021 (page 360 of the bundle), to take effect on 21st July. He lodged an appeal on 23rd July 2021 (363), the grounds of which are set out at page 367. The appeal was considered on paper, without the benefit of a hearing. This was because the only person more senior than Mr Seymour within the company was Mr Flack, who was seriously ill, and did not feel able to participate in a meeting without compromising his health. This was not the subject of any criticism by the claimant. For the avoidance of doubt, I find that deciding the appeal on paper was reasonable in the circumstances, albeit somewhat unusual in the context of employment law principles.

36. Mr Flack produced his decision on 17th August 2021, which appears at page 380 of the bundle. I am satisfied that it demonstrates that the claimant's

points were considered by Mr Flack, albeit that he found against him. The claimant took issue with the lack of a signature at the end of the document. I was not clear what point he sought to make. It clearly has Mr Flack's name on it. Mr Flack confirmed at the hearing that it was his document, and that the lack of a signature was an oversight. I accept his evidence on this point. I accept there was some delay during the appeal process. Again, this was understandable in the context of Mr Flack's health, and was not, in any event, inordinate.

37. The claimant received his redundancy payment, notice payment and outstanding holiday pay, on 31st August 2021. There is no dispute about these payments. He lodged his claim with the employment tribunal on 20th October 2021.

Decision
Unfair dismissal
(i) What was the reason given for the decision to dismiss?

38. As I have already stated, I am satisfied that the genuine reason for dismissal was redundancy. I accept the evidence of Mr Seymour and Mr Flack on this point. It is, to say the least, plausible that a company fitting domestic and trade windows might have been detrimentally and significantly impacted by the pandemic. The claimant did not appear to dispute this. I am also satisfied that there were other aspects to the restructuring of the business. It was not a case of the claimant being the sole casualty of the changes, although I accept that no-one else was made redundant. This was because there was some natural wastage, and others agreed to be redeployed in the company. It is clear from the discussions that took place during the consultation that restructuring was the motivation behind the redundancy. This was the consistent theme. When the claimant was asked to provide some other reason for his dismissal, he was vague. The claimant did not challenge the evidence of both Mr Flack and Mr Seymour that they had had a good relationship with him prior to these matters arising. Accordingly, I find that redundancy was the reason for the claimant's dismissal.

(ii) Was there a redundancy situation as defined by section 139 of the Employment Rights Act 1996?

39. For all of the reasons sweet out above, I am satisfied that there was a redundancy situation. As a result of the restructuring set out by Mr Seymour, there was a cessation in the requirement for staff to carry out the role of sales director. This was because the role was to be absorbed into the operations director role, and amongst the other sales representatives within the department. This was clearly a money saving exercise, as so many redundancy process tend to be. The claimant questioned the wisdom of losing the company's most senior member of the sales team. He may well have a point. However, it is not for the tribunal (or a member of staff) to

dictate to a company how it should make strategic business decisions, as long as they are genuine. Once the Tribunal is satisfied that this is a situation which falls within the scope of section 139 of the 1996 Act, then there is very limited scope for the tribunal to go behind the rationale of the decision. Having said all this, the rationale for making the claimant redundant was clear. He was by far the best remunerated member of the team, and that by dismissing him, they would be saving in excess of £40,000 per annum. From the claimant's perspective, it is a harsh logic, but it is one that holds up to scrutiny on the evidence I have seen.

(iii) If so, was the claimant's dismissal wholly or mainly attributable to that fact

40. It follows from what I have already said, that this dismissal was wholly attributable to the redundancy situation I have outlined above.

(iv) Did the employer act fairly within the meaning of section 98 above?

41. I turn then to consider whether the dismissal was fair as defined by section 98 of the Act. In doing so, I must be careful not to substitute my own view for that of the respondent. I must also look at the process as a whole in deciding whether it has met the necessary threshold of fairness. For the dismissal to be fair, it must fall within a range of decisions that a reasonable employer might have taken if presented with the same circumstances.

42. Having regard to all of the matters discussed above, I find that the overall process was fair as defined. There were some shortcomings in the process adopted by the respondent. In particular, the offer of suitable alternative employment could have been dealt with in a more comprehensive and measured way. The exploration of the possibility of the claimant been offered a sales representative role was not properly crystallised by the respondent. It would have been more advisable to have made a well defined offer, and to have sought the claimant's views in unequivocal terms.

43. Similarly, with the offer of the post of assistant installation manager, the timing of the offer, and the lack of any discussion during the consultation meetings, in my view fell short of what could properly be regarded as a fair process. However, as I have stated above, this unfairness was largely rectified by the persistent attempts by the respondent to pursue the claimant's view about the offer post the dismissal letter. Strictly speaking, this was outside of the consultation process. Nonetheless, I am satisfied that this was a genuine offer, which remained capable of acceptance by the claimant as late as 30th July 2021. As I have also found, the claimant's attitude to offers of alternative employment was, at times, unhelpful, and was in part the cause of some of the difficulties which arose in this regard. In my judgment, the claimant had decided to turn his back on the company, and that it was this which dictated his response to the various attempts to assign him some other roles within the business.

44. Taking a broad overview of the process, I am satisfied that the claimant was adequately consulted, in that he was given a fair and proper opportunity to

understand fully the proposal being put forward by Mr Seymour, and to express his views about it. This is evident from the notes of the meetings and associated correspondence in the bundle. There was, on any view, an exchange of views.

45. I am further satisfied that the pooling of the claimant was fair. In a very small department, I find that the claimant was in a unique position, as sales director. His duties and his remuneration placed him in a wholly different category of employee from the other members of his department, who were fair more junior, less experienced, and non-managerial. The claimant's argument that, in practical terms, he spent a significant proportion of his time doing work which was more in keeping with one of these junior roles does not assist him to any great extent to my mind.

46. In summary, it is my judgement that the Claimant was fairly dismissed on the grounds of redundancy and that the process that the Respondent adopted was reasonable and fair in the circumstances. On other words, the Claimant was fairly dismissed.

Breach of Contract

47. I turn now to deal with the alleged breach of contract. The respondent submits that this claim is out of time in the sense that in seeking contractual payments going back to 2018, that the claim falls outside the jurisdiction. It further argues that any claim for breach of contract in relation to payments before 8th July 2021 would be outside the 3 month limitation period.

48. On balance, I decided to hear the claim. In my judgment, it was inappropriate to strike out the claim for want of jurisdiction. The claim appears to be in relation to series of payments, dating back to 2018, paid annually, all of which remained unpaid. On this basis, the claim fell within the Tribunal's jurisdiction.

49. Looking at the substantive merits of the this part of the claim, and as a result of all of the matters set out above, I reject the suggestion that the claimant was contractual entitled to a profit related bonus. At the heart of this issue is whether there was a discussion between Mr Seymour and Mr George in or around October 2018 to the effect that the latter would receive a profit related bonus. My primary difficulty with this is that there is nothing in the contract of employment about it. There is an annex which specifically deals with remuneration, which is also silent. This is surprising, not least because of the significance of the bonus in monetary terms, when the wage package is looked at as a whole. The claimant has helpfully estimated the payments he says he were due under the alleged term at paragraph 7.1 of his witness statement. In 2018/19, the bonus was worth £19,342.22. In 2019/20, it was worth £15,022.20, of which £10,000 was paid via the CaptureHub card. For 2020/21 (pro rata), it would have been worth £15,022.20, with £12,000 being paid via the card.

50. In other words, the bonus constituted up to nearly a half of the claimant's overall income. In those circumstances, it does not seem plausible that it was not mentioned in the contract. Moreover, it is even more remarkable that the claimant never sought to claim his entitlement until he was dismissed. The claimant told me that it was customary for the directors to leave the bonus in the company. However, I have not been shown any acknowledgement that the claimant was entitled to the bonus but had left it in the company for investment purposes. Neither have I seen any accounting for it in the company records.

51. In fairness to the claimant, I find that he was receiving £800 per month via CaptureHub, and this is not mentioned in the contract either. I therefore accept that there are matters between the parties which are not expressly dealt with in the written contract. However, the CaptureHub money is of a different nature in my judgment. I accept the evidence of the respondent that this was more in the nature of a "perk". It was a benefit/loyalty programme and not designated as wages. The respondent denied that this was a down payment on the bonus, and I accept this. I also accept that none of the other directors received a profit related bonus. This was not challenged directly but the claimant in cross-examination.

52. The money paid onto the CaptureHub card was done so regularly and with a degree of expectation on the part of the claimant. I accept that there may well have been some legal obligation on the respondent to make these payments to the claimant. As to whether these were contractual payments or not, I am not required to make a decision. The payments onto the 'CaptureHub' card continued to be made by the respondent up to the date of the claimant's dismissal. There is no claim relating to these payments. In effect, the alleged breach of contract relates only to the balance of the bonus.

53. In general terms, I found the claimant's evidence on this issue, when looked at in context, to lack consistency and plausibility. I found the evidence of the respondent to be more credible. It was their submission that such an important clause would have appeared in the written contract. I agree with this submission, at least on a balance of probabilities. I am afraid that the claimant has failed to establish that there was an express oral term of his contract of employment, which entitled him to a profit related bonus.

54. The claims are therefore dismissed.

Richard Wood

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Employment Judge R Wood

Date: 6th September 2022

Sent to the parties on: 18.09.2022
For the Tribunal Office: GDJ