EMPLOYMENT TRIBUNALS

Claimant: Mr I Phillips

Respondent: Applied Corrosion Monitoring Ltd

Heard at: Manchester **On:** 7 March 2023
5 May 2023
(in Chambers)

Before: Employment Judge McDonald (sitting alone)

Representatives
For the claimant: In person
For the respondent: Mr R Gill (Managing Director)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that the respondent made an unauthorised deduction from his wages in breach of section 13 of the Employment Rights Act 1996 ("ERA") fails and is dismissed.

2. The claimant's claim of breach of contract succeeds. His contract with the respondent entitled him to "cash in" his bonus bonds in the event of his employment terminating prior to retirement. The respondent's refusal to allow him to do so in response to his request on 19 January 2022 was a breach of contract.

3. A remedy hearing will be listed.

REASONS

Introduction

1. This is my reserved decision in relation to the final hearing of this case. This was a claim by the claimant for unauthorised deduction of wages and/or breach of contract against his former employer, the respondent.

2. There was a bundle of documents consisting of 197 pages ("the Bundle"). References in this judgment to page numbers are to pages in the bundle. For the claimant, I heard evidence from the claimant, Shirley Turner, Nicholas McGovern

and Marie Wilson. I heard evidence from Raymond Gill, ("Mr Gill") for the respondent. I heard oral submissions from the claimant and Mr Gill. By the time we finished it was late in the afternoon and so I reserved my decision.

3. The parties were given an opportunity to provide written submissions by 28 March 2023. The matter had originally been listed for an "in chambers" hearing for me to make my decision on 17 April 2023. That hearing had to be postponed which meant that the "in chambers" hearing did not take place until 5 May 2023. Both parties provided brief written submissions.

4. I have taken into account the oral and written submissions made by the parties. I have not repeated those submissions in this judgment but refer to specific points made in those submission where relevant to decisions I made.

Summary of Case

5. The claim is about whether the respondent acted unlawfully by refusing to allow the claimant to "cash in" 58660 bonus bonds which he holds. He accumulated those bonds during his employment with the respondent.

6. The claimant says the failure to allow him to cash-in those bonds is an unauthorised deduction from wages and/or a breach of contract.

Preliminary matters

7. By the time of the hearing, the claimant was seeking payment of £58,660 by way of damages for breach of contract, i.e. £1 per bond. At the start of the hearing I explained to him that if the breach of contract claim succeeded, the compensation I could award was limited to £25,000. I explained that other courts with jurisdiction to hear a breach of contract claim can award in excess of that limit. The claimant confirmed that he wanted to proceed on the basis that his claim for damages for breach of contract would be limited to £25,000.

Relevant Law

<u>Unauthorised deductions from wages</u>

8. In relation to a claim for deduction from wages, s.13(1) of the Employment Rights Act 1996 ("ERA") says:

> **"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-**
>
> **(a) the deduction is required or authorised to be made by virtue of a statutory provision of 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."**

9. S.27(1) of ERA says:

> **"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-**

> **(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"**

10. S.27(2) of ERA excludes from the definition of "wages":

> **"…..(e) any payment to the worker otherwise than in his capacity as a worker".**

11. This exclusion applied in **Nosworthy v Instinctif Partners Ltd EAT 0100/18** where the EAT rejected the claimant's claim that shares and loan notes were "wages". Although payable in connection with employment, they were deferred consideration for the claimant's sale of shares to the respondent and so were provided to the claimant in her capacity as a vendor of shares, not as a worker.

12. S.13(3) of ERA says:

> **"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

13. In **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages".

14. When it comes to the relevant test in deciding the terms of a contract, Lord Clarke explained the relevant principles in this way in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14; [2010] 1 WLR 753**, para 45:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. "

15. In ***Blue v Ashley*** **[2017] EWHC 1928** Leggatt J noted that where the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis.

16. When it comes to implied terms, The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

a. the term is necessary in order to give the contract business efficacy: In **Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC**, Lord Hughes explained that: "A term is to be implied only if it is necessary to make the contract work, and this it may be if…..it is necessary to give the contract business efficacy……The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

b. it is the normal custom and practice to include such a term in contracts of that particular kind: the custom in question must be reasonable, notorious and certain (see, for example, **Devonald v Rosser and Sons 1906 2 KB 728, CA**, and **Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA)**. This means that the custom must be fair and not arbitrary or capricious; that it must be generally established and well known; and that it must be clear cut. But it should be borne in mind that neither custom and practice nor any of the other legal bases for implying terms into a contract permits the courts to displace specific express terms that deal fully with the same subject matter as that on which a party is seeking to imply a term.

c. an intention to include the term is demonstrated by the way in which the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it, see **Mears v Safecar Security Ltd 1982 ICR 626, CA**.

d. the term is so obvious that the parties must have intended it (known as the 'officious bystander' test). In **Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA**, **affirmed by the House of Lords in Southern Foundries 1926 Ltd v Shirlaw 1940 AC 701, HL** held that a term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.

17. In **Horkulak v Cantor Fitzgerald International 2005 ICR 402, CA,** the Court of Appeal held that where under the terms of a contract one party was empowered to exercise a discretion the court would read into the contract an implied term that there would be a genuine and rational exercise of that discretion.

18. **Horkulak** concerned an express provision relating to payment of a discretionary bonus contained in a written contract of employment. In the Court of Appeal's view that meant that the provision "was necessarily to be read as intended to have some contractual content" and contrasted that with "a mere declaration of the employer's right to pay a bonus if he wishes, a right which he enjoys regardless of contract" (para 46 of **Horkulak**).

19. The amount payable must be capable of quantification. In **Coors Brewers Ltd v Adcock and ors 2007 ICR 983**, the Court of Appeal made it clear that Part II of the ERA 'is designed for straightforward claims where the employee can show that they have not been paid quantified or quantifiable sums properly due to them under his contract'.

Breach of Contract

20. Under Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order"), a claim of breach of contract can be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum f -

> **(a) the claim is one to which section 3(2) of the Employment Tribunals Act 1996 applies; and**
>
> **(b) the claim is not one to which article 5 applies; and**
>
> **(c) the claim is arising or outstanding on the termination of the employee's employment.**

21. Article 5 of the 1994 Order does not apply to this case.

22. Article 10 of the 1994 Order provides that the Tribunal shall not in relation to a contract claim order the payment of an amount exceeding £25,000.

Findings of Fact

23. The respondent is a small business incorporated in 1985 having been founded by Mr Gill and his brother Dr John Stuart Gill ("John Gill"). At the relevant time, it manufactured electrical instrumentation for corrosion monitoring and wrote the software that controlled the instrumentation. It also manufactured cables and probes and other accessories. The claimant joined the respondent on 17 July 1989, initially on a Job Training Scheme. At the end of the scheme, he was taken on as a permanent employee. By the time his dismissal for redundancy took effect on 3 March 2022 he had worked for the respondent for over 30 years.

24. The respondent had around 5 employees. Mr Gill viewed it as a close-knit family or tribe and the payment structure which he devised aimed to reward loyalty and commitment to the business. It is clear that relationships unravelled into acrimony at the end of 2021/beginning of 2022 when Mr Gill and his brother decided, in effect, to retire from the business and the employees (barring one) declined the offer to take it on. I heard some evidence about the events at the end of employment. I have only made findings of facts about those incidents to the extent that they are relevant to the issues I need to decide.

Events from April 2020 onwards

25. From April 2020 most of the employees and John Gill and Mr Gill were furloughed due to the COVID-19 pandemic.

26. In mid to late November 2021 the claimant says the employees were given an ultimatum by Mr Gill. Mr Gill told them he wanted to retire and wanted the

employees to buy the company otherwise they would be made redundant. John Gill and Mr Gill were already semi-retired from about 2010. The initial proposal was that the employees would buy the company for £200,000 and also pay the directors 5% of the business's turnover for life. The respondent's premises would be included in the sale but on condition that it could not be disposed of. The offer was not put in writing and no lawyers were involved.

27. A few days later Mr Gill asked the claimant for his decision on the offer. The claimant asked for a full week to make an informed decision. Mr Gill initially agreed but later scheduled a meeting on the following Thursday which was less than a week afterwards. The claimant looked into the possible financial implications of buying the respondent but was unable to obtain a bank loan and did not want to use his house as collateral. He decided not to be involved in purchasing the company. The other employees had no interest in buying the company other than an employee called Andrew Haworth.

28. At that first company meeting in November 2021, which was attend by John Gill, Mr Gill, Andrew Haworth, the claimant, Shirley Turner, Marie Wilson and Nick McGovern, the claimant informed Mr Gill and John Gill that he did not want to purchase the company and the rest of the employees said the same. Mr Gill's response was angry. He suggested that as young man he would jump at the chance to buy his own company. He spoke in terms which left Marie Wilson and Shirley Turner very upset. Mr Gill made clear the alternative to the employees purchasing the company was redundancy. He said that the value of each of the employees' bonds was less than the redundancy payment they were entitled to so they should just accept their redundancy payout. Mr Gill also said the bond and share scheme was to be terminated. Mr Gill initially said that he would be leaving "today" but later calmed down.

29. There were further meetings over the next two weeks. The directors dropped the requirement of a payment of 5% of turnover for life. The premises was removed and was to be retained by Mr Gill and John Gill but would be available to rent for the next 10 after which it would be sold to the employees for £1, with rent will be payable for a further 5. There was later a proposal that the premises would be available rent free until the end of 2022. These deals proposals were never put in writing but made orally. The meetings were at times acrimonious.

30. On 3 December 2021 Nick McGovern, Marie Wilson and Shirley Turner were given letters making them redundant. Shirley Turner and Marie Wilson were required to work their full notice while Nick McGovern was to leave before Christmas.

31. On 9 December 2021 Andrew Haworth and the claimant were given their redundancy notices. Their last day of employment was to be 3 March 2022 and they were required to work their notice.

32. On 20 December 2021 Mr Gill handed Andrew Haworth a handwritten note rescinding the redundancy notices (page 178). By that point Nick McGovern had already left the respondent. After seeking advice from Citizens Advice the claimant advised Mr Gill that a scribbled note did not constitute a rescinding of the redundancy notices, but they would wait to see what new scheme he came up with in the New Year.

33. On 6 January 2022 Mr Gill emailed new options for consideration. In that note Mr Gill said the value of one million bonds was £200,000 i.e. 20p per bond. He stated that since the claimant's redundancy pay would be greater than the value of his bonds, the claimant would be paid whichever was the greater sum.

34. On 19 January 2022 the claimant sent Mr Gill a written request that he wished to cash in his shares at 20p per bond. Marie Wilson and Shirley Turner did the same. At that point the claimant believed (he accepts mistakenly) that he held shares in the respondent company whereas in fact that had not been the case since Mr Gill cancelled the share scheme as a result of the HMRC meeting in 2009.

35. Andrew Haworth then decided he would buy the respondent company. The claimant said he did not know the details of the transaction or the money involved.

36. On 11 February 2022 Marie Wilson's employment terminated by reason of redundancy.

37. On 25 February 2022 Shirley Turner's employment terminated by reason of redundancy.

38. On 3 March 2022 the claimant's employment terminated by reason of redundancy.

39. The claimant was handed a handwritten note by Mr Gill showing how his redundancy payout and holidays etc. had been calculated. He was given two options – the first was to go down the Employment Tribunal route and receive less money. The second was to receive an extra month's pay of £2,448 if he did not go down the Tribunal route. The claimant chose option one i.e. accepting the lesser sum and in no way compromising his right to bring a claim to the Tribunal. For the avoidance of doubt, there was no evidence to suggest that the claimant had contracted out of his right to bring a claim to the Tribunal in circumstances falling within s.203(2) of the ERA.

40. The claimant was told to wait until 8 March 2022 to get paid because Mr Gill would be away until that time. On that date the claimant had to go to the respondent to show Mr Gill and Andrew Haworth how to do the payroll so they could pay him his redundancy pay. That was because Shirley Turner used to do the payroll and accounting and had by then left the respondent's employment.

41. On 26 May 2022 the claimant started ACAS early conciliation. The early conciliation certificate was issued on 6 July 2022. The claimant started his employment claim on 2 August 2022.

<u>The Company Structure</u>

42. The respondent initially had a share capital of four shares. Two shares were issued to John Gill and one share to Mr Gill. They are both directors and Mr Gill is the Company Secretary. The fourth share was issued to Mr Gill's wife, Dawn. On 17 October 2006 the respondent increased its share capital from four shares to one million shares. That was to facilitate a company distribution scheme. Prior to any distribution to employees, John Gill had 500,000 shares, Mr Gill had 250,000 shares and Dawn Gill had 250,000 shares.

43. As I explain below, the respondent operated a scheme whereby employees could both buy and sell shares (later "bonus bonds"). By March 2009 the claimant had a share total of 17,871 shares. From 2006 (or at the latest by 27 April 2008) the shares purchased by the employees were held (according to the respondent's annual return at Companies House by the "Pension Pension Scheme/ACM" (which I will refer to as the "ACM Pension Scheme". By 27 April 2009 the ACM Pension Scheme held 59,711 shares. However, by 22 May 2010 the ACM Pension Scheme held zero shares with the share capital once again being wholly divided between Stewart Gill (500,000), Ray Gill (250,000) and Dawn Gill (250,000).

44. I find that happened as a result of a meeting which Mr Gill had with HMRC which I describe below. The position from May 2010 at the latest, therefore, was that the ACM Pension Scheme did not actually hold any shares in the company.

45. From that point, "bonus bonds" were allocated instead of shares. Mr Gill described those bonds as "tokens".

The meeting with HMRC

46. On 24 November 2009 HMRC Pension Scheme Services held a meeting with Mr Gill and John Gill about the respondent's share scheme. The notes of the meeting were in the Bundle at pages 128-136. The claimant was not aware of that meeting and what happened at it until August 2022.

47. The discussion was about whether the share scheme met the criteria to be a registered pension scheme and so entitled to beneficial tax treatment. Mr Gill explained to HMRC why he said it was a pension scheme, albeit there was also an intention that the shares would gradually be transferred to employees so they could eventually take over 100% of the respondent company. HMRC's view was that the scheme was not a pension scheme which complied with the relevant legislation. That had tax consequences. HMRC explained that the options for taking the matter forward were either raising a series of unauthorised payment tax charges in connection with the share purchases, or the deregistration of the scheme. The tax charges would have been very substantial. HMRC said they would be referring the matter to their senior management team to consider the deregistration of the scheme. It was as a result of this that the scheme was converted into the bonus bond scheme.

48. The notes of the HMRC meeting also provide some evidence about the intentions of Mr Gill and the respondent in relation to the scheme as it then was. Mr Gill was asked by HMRC about the position when somebody who had been a member of the scheme for 10 years died. What would happen to their dependents? Mr Gill's answer was that the member's shares could be sold and the money transferred to their heirs, alternatively the shares could be passed to the heirs. HMRC asked how the scheme could pay benefits where a member had serious ill health. Mr Gill said the member would have a wad of shares available for sale via fire sale to the other employees or members of the scheme.

The claimant's contract of employment and the respondent's pay system

49. The claimant's Contract of Employment (pp. 164-172) was dated 21 August 2013.

50. The claimant was tasked to prepare written contracts of employment for himself and colleagues by Mr Gill after the respondent was involved in a Tribunal claim brought by a former employee. The claimant found a template contract of employment online. He altered and tweaked a few things but left the section on "the ACM Instruments Pay Scheme" in its entirety for Mr Gill to write.

51. Above the signature the contract states that "It is the responsibility of the employee to understand the terms of this contract. Please ask questions about any terms in this contract if you have any queries." The claimant and Mr Gill both signed the contract on 21 August 2013.

52. The contract is idiosyncratic. It does not set out the claimant's wage or pay in the usual way. Instead, there is a section of the contract headed "The ACM Instrument Pay Scheme" (pp.165-167). It said:

> "ACM Instruments Pay Scheme
>
> At ACM we operate a distribution scheme that uses mathematics to evenly spread the distribution amongst the present employees and various stages of retired employees. The word pro rata can be applied to pretty much every aspect of this scheme in order to make it fair for all. The scheme is designed to encourage commitment and a long term care attitude to the company, rewarding long term employees and their present wife / husband with significant income in retirement. In many respects, ACM Instruments may be considered as your best friend, which if treated well will look after you and your spouse for a long time if not throughout your lives.
>
> When all is running well at ACM Instruments we use simple mathematics to distribute money. Basically money is shovelled into a wage engine and that money is distributed using a series of mathematical tools. An accurate distribution for the year can only be made at the end of the holiday year in mid February for final distribution in March, though estimates are made for each month of the year. The method of paying employees is believed to be similar if not the same as an Annualized Hours Contract.
>
> In a normal distribution, 50% of the distribution is paid in the form of wages and 50% of the distribution is used to purchase bonus bonds. At ACM Instruments we endeavour to make this system as accurate as possible and work it to maximize the employee's income. Mistakes can and do occur, however to minimize disruption these can only be rectified up to six months after the financial year end. These rules have modified and advanced with the passing of time, however they remain true to the original scheme started in 2006 with only minor tinkering in order to cope with developments as they occur. Acceptance of this scheme will be assumed if you continue to receive income from ACM without cause for concern.
>
> NB. Some employees who are still serving a Probationary period might be paid a fixed monthly wage. Once their employment becomes permanent then the employee will join the ACM Instruments Pay Scheme."

53. I have not in this judgment set out in detail how the respondent allocated the bonus bonds to each employee. The claimant does not raise any complaint about the number of bonds he was issued. The key question is what happens to the bonds on an employee being made redundant.

54. There is no specific term in the contract dealing with this other than under the heading "Loss of Employment" where the contract provides that "Employees that have worked for the company for less than 20 years lose all their bonus bonds upon leaving. These bonds are redistributed among the owners of the firm" (p.165). It is accepted that term does not apply to the claimant, who was employed in excess of 20 years.

55. Although Mr Gill did at points suggest that the claimant had lost his bonus bonds during the course of proceedings, he ultimately accepted that was wrong. The claimant still holds the bonds. The question is what his rights are in relation to them when made redundant. Specifically, can he cash them in all at once. The contract is silent on that.

56. There are terms in the contract which address what happens to bonds when employees retire or die.

57. Under "Bonus Bonds" the contract provides that "To enable people to dispose of all of their bonus bonds in retirement, 4% of their maximum ever holding can be offered to the scheme each year."

58. It also provides that "Upon death, the benefits from the remaining bonus bonds can be transferred only once to the bonus bond earners present wife or husband, otherwise they are redistributed to the owners of the company."

59. Finally, under that same heading, it states that "Money earned from bonds could be seen as unearned income and if the Inland Revenue approves it, payments from Bonus Bonds may in the future attract a lower rate of tax, perhaps without the addition of National Insurance."

<u>Evidence about treatment of leavers in practice/how the bonds scheme was intended to work</u>

60. There was some evidence about what had happened in practice when employees who were bondholders had left the respondent.

61. In early 2014 an employee named Maxine Wilkinson was dismissed. Her bonus bonds reverted back to the directors. It is not clear whether she had been employed for 10 years. Her dismissal was not due to redundancy.

62. In 2020 an employee named Adam Thistlethwaite left the firm after 9 years and his bonds reverted back to the directors.

63. Shirley Turner's evidence was that she was told by John Gill and Mr Gill in a meeting on 3 December 2021 that she was to receive a redundancy payout of £13,155, her bonus bond scheme money of 31,985 shares at 20p per share of £6,396.60 and her final wage pay. She had worked for the respondent for more than 10 years. However, on 6 December 2021 Mr Gill came into the assembly workplace

and said in a jovial mood that he had made an error and that she was not entitled to the bonus bond share scheme money. On 25 February 2022, when her redundancy took effect, Mrs Turner asked Mr Gill about her bonds. Mr Gill told her that they were now worthless bit that Mr Haworth might buy them for £10 or £100.

64. On 21 November 2022, some 9 months after her employment ended, Mr Gill sent Mrs Turner a text message saying he had made a mistake and the bonus bonds system would continue to function. He said that if the respondent company was sold, Mrs Turner would get a fair share based on her bond holding. He said she would also continue to receive funds via the bonds system with the intention being to distribute funds received from rental income less costs. On 23 November 2022 Mr Gill send her a cheque from the respondent for £146.60 with a covering handwritten note saying it was "in relation to sale of bonus bonds". It did not specify how many bonus bonds had been sold or at what rate. Mrs Turner did not cash the cheque.

65. Nick McGovern worked for the respondent for over 16 years. He was told by Mr Gill and John Gill during his dismissal meeting on 3 December 2021 that if he worked his 12 weeks' notice he would retain his shares. Alternatively, in exchange for not working his notice period he could surrender all claims to the bonds but "effectively get paid for the bonds". At no point during the meeting or subsequently was he given a statement of bond ownership nor was a value attributed to his share. The last available information he had about the number of bonds he held was 53,215 shares as of year 2021 which did not include any shares which would have been accrued during the year 2021/2022. However, based on the calculation that his 12 weeks' notice pay was equivalent to the value of his bonds he calculated his bonds would be would be valued at £11,331 divided by 53,215, valuing each share at 21 pence.

66. Marie Wilson had 11 years' service. She believed she did not have an entitlement to participate in the share/bond scheme because she had not been employed for 20 years or more. She was led to believe by Mr Gill that after 20 years' service she would have been entitled to benefit from the scheme.

Discussion and Conclusions

67. In this section of my judgment I set out my findings about the terms of the contract relating to the bonus bonds and then my conclusions in relation to each of the issues identified by Employment Judge Feeney.

<u>The terms of the contract relating to the bonds</u>

68. I find that the contract did not provide for an employee to surrender their bonds where they left the respondent's employment after more than 20 years. The claimant was entitled to retain the bonds post-employment.

69. The scheme does not make express provision for what happens when an employee is made redundant after 20 years other than it is clear that they retain their bonds.

70. I find it is necessary to imply a term to address the situation where a bondholder is made redundant. I do not consider that the situation is analogous to retirement, where the contract expressly provides that a bond holder is entitled to cash-in/redistribute up to 4% of their maximum bondholding every year. A

redundancy dismissal is a very different situation. It means the association between the employer and employee comes to an end pre-retirement.

71. A redundancy situation is also a different situation to a dismissal due to misconduct or capability when I find the bonds would revert to the respondent. In those cases the termination of employment can be said (at least to some extent) to be due to the employee's actions. In contrast, in a redundancy situation the employee finds themselves dismissed because of the decision of the respondent/the position of the employing business rather than any misconduct on their part. They find themselves out of work and in need of funds through no fault of their own.

72. I find an officious bystander (para 16(d) above) would take the view that in those circumstances the employee would be entitled on dismissal for redundancy to opt to "cash in" the whole of their bond-holding at once on giving notice to the respondent that they wished to do so. The claimant elected to do so by his written notice to the respondent on 19 January 2022.

1. Unauthorised deductions

1.1 Did the respondent make unauthorised deductions from the claimant's wages in that:

1.1.1 There was a legal obligation to pay the claimant for the bonus bonds he had accumulated;

1.1.2 The bonus bonds were emoluments connected with employment within the definition of section 27(1) of the Employment Rights Act 1996;

1.1.3 Were these deductions quantifiable?

73. I have found it necessary to imply a term into the contract between the claimant and the respondent that he was entitled to opt to cash-in all his bonds in one go rather than merely continue to receive an income from them limited to 4% of his maximum holding of bonds per annum.

74. However, I find that the payment for those bonus bonds were not "wages" because the payment would be made to the claimant in his capacity as a bond holder rather than in his capacity as a worker. The circumstances of this case are slightly different to that in **Nosworthy** in that the Bonds were initially allocated to the claimant by way of a "bonus" in his capacity as a worker through the bonus bonds scheme. I accept that a failure to award the bonus by a failure to award bonus bonds in a year in which the calculation showed the claimant was entitled to them would fall within the definition of wages. However, once the bonus bonds have been issued, it seems to me that payment in relation to a cashing in or "redistribution" of those bonds was a payment made to the claimant in a capacity other than that of a worker. It is therefore a payment excluded from the definition of "wages" by s.27(2)(e).

75. If I am wrong about that, I would not have found the deductions "unquantifiable". The calculation of the bond values is not, it seems to me, straightforward but it is not unquantifiable. The number of bonds issued is known and

the sum due can be quantified (as proposed by Mr Gill) by identifying the total value of the respondent business at the relevant time.

2. Breach of Contract

2.1 If the claimant cannot pursue a claim of unlawful deductions the Tribunal will consider whether the claimant has a breach of contract claim.

2.2 Did this claim arise or was it outstanding when the claimant's employment ended? The parties agree that if there is a claim it was outstanding when employment ended.

2.3 Did the respondent do the following:

2.3.1 Fail to pay the claimant a market rate for his bonus bonds.

2.4 Was that a breach of contract?

76. I have found that there was an implied term entitling the claimant to opt to cash in his bond-holding in one go if made redundant. The respondent failed to allow the claimant to do so in response to his notice of 19 January 2022. That was a breach of contract. The claimant's claim of breach of contract succeeds.

2.5 How much should the claimant be awarded as damages?

77. I have considered whether I can calculate the damages due to the claimant based on the information I have. That involves calculating how much the claimant should be paid if he cashes in his bonds in one go. Should there, for example, be a discount applied – the "fire sale" price referred to by Mr Gill in the HMRC meeting? Should the value be determined by the value of the business as a whole at the time of the election to "cash-in"? Should the bonds be valued as the proportion of the value of the business which the claimant's holding bears to the whole of issued bonds? Should the valuation take into account past bond sale values which the claimant submits has never been below £1 per share? I have decided that further submissions from the parties are needed on this issue. I have listed a remedy hearing and today made case management orders for preparation for that hearing. It may be the parties are in a position to resolve the issue between them to avoid the need for that further hearing.

Employment Judge McDonald

Date: 4 August 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 August 2023

FOR THE TRIBUNAL OFFICE

Annex
List of Issues

1. Unauthorised deductions

1.1 Did the respondent make unauthorised deductions from the claimant's wages in that:

1.1.1 There was a legal obligation to pay the claimant for the bonus bonds he had accumulated;

1.1.2 The bonus bonds were emoluments connected with employment within the definition of section 27(1) of the Employment Rights Act 1996;

1.1.3 Were these deductions quantifiable?

2. Breach of Contract

3.1 If the claimant cannot pursue a claim of unlawful deductions the Tribunal will consider whether the claimant has a breach of contract claim.

3.2 Did this claim arise or was it outstanding when the claimant's employment ended? The parties agree that if there is a claim it was outstanding when employment ended.

3.3 Did the respondent do the following:

3.3.1 Fail to pay the claimant a market rate for his bonus bonds.

3.4 Was that a breach of contract?

3.5 How much should the claimant be awarded as damages?