EMPLOYMENT TRIBUNALS

Claimant: Karen Deans

Respondent: Agra Freeze Limited

Heard at: London South (by video) **On:** 26 and 27 May 2023

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: Mr Varnam, Counsel
Respondent: Ms Moss, Counsel

JUDGMENT

1) The claimant was constructively dismissed. Her claims of unfair and wrongful dismissal succeed, but a Polkey reduction of 40% is made to any compensatory award for unfair dismissal.

2) The respondent acted in breach of contract and made an unauthorised deduction from wages when it paid the claimant a bonus of £42,813.45 instead of a bonus of £58,788.45. The respondent is ordered to pay the claimant £15,975 (gross) as damages/ the amount deducted in breach of section 13 of the Employment Rights Act 1996.

3) Other remedy issues will, if necessary, be decided at a future hearing.

REASONS

Preamble

1. The claimant's employment with the respondent ended by her resignation on 9 October 2020. On 20 January 2021 she presented a claim to the Tribunal. That claim was heard on 26 and 27 May 2023. There was insufficient time for deliberations and so I reserved my decision. I apologise to the parties for having taken eight weeks to reach a decision and to prepare these reasons for it. I had a

lengthy hearing immediately following the one to which this decision relates, followed immediately by three weeks of annual leave.

2. The parties had agreed a bundle prior to the hearing containing 363 paginated pages, to which a number of pages were added by agreement. The claimant had prepared a schedule of loss.

3. The parties had prepared and exchanged the following witness statements:

    3.1. Two witness statements for the claimant (a main and a supplemental witness statement);

    3.2. A witness statement for Ms Jo Densley, who had done work for the respondent via a Marketing Agency;

    3.3. A witness statement for Mr David Cryer, a director of the Respondent.

4. The claimant, Ms Densley and Mr Cryer all gave oral evidence, in that order.

<u>The issues</u>

5. The issues to be decided were agreed to be as follows at the beginning of the hearing:

1. Unfair dismissal

1.1. Was the claimant dismissed? The Tribunal will consider:

1.1.1. Did the respondent do the following things:

1.1.1.1. Pay the claimant a bonus of £42,813.45 on 16 September 2020 (instead of a bonus of £58,788.45) (this is the most recent allegation). It is accepted that the Respondent did pay a bonus of £42,813.45, but not that this was a breach of contract;

1.1.1.2. Wrongly exclude the claimant from involvement in the management of the respondent between September 2019 and the termination of her employment in that she was:

1.1.1.2.1. Excluded from (and so not involved in) the initial meetings (believed by the Claimant to be in the first half of 2020, although the Claimant was not involved in the meetings so cannot give exact dates) with Big Fish, Pier Marketing, and an adaptive agency, Impakt, that had been identified to help with the rebrand of the respondent and a change in marketing strategy;

1.1.1.2.2. Not involved in the decisions as to who to appoint as the branding agency and the marketing PR company and so only met Big Fish, Pier Marketing, and an adaptive agency, Impakt,

after they had been decided upon and appointed by the shareholders;

1.1.1.2.3. Not involved in the decision to create a new brand role (in-house marketing manager) within the respondent because the shareholders and the consultant Lucy Howe decided to create such a role without discussing it with her.

1.1.2. Did the payment of the bonus of £42,813.45 (instead of a bonus of £58,788.45) breach either an express term of the claimant's contract of employment or a term implied by custom and practice?

1.1.2.1. If so, was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.1.3. Alternatively, did the matters set out at 1.1.1 above breach the implied term of trust and confidence taking into account also the manner in which the bonus figure of £42,813.45 was arrived at (the claimant contending that this reflected a late change of approach carried out in the face of the claimant's protests)? The Tribunal will need to decide:

1.1.3.1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.1.3.2. whether it had reasonable and proper cause for doing so.

1.1.4. If so, did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.1.5. If so, did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.2. If the claimant was dismissed, what was the reason or principal reason for dismissal, i.e. what was the reason for the breach of contract? The respondent contends it was its loss of trust and confidence in the claimant as set out in [38] of the grounds of resistance.

1.3. Was it a potentially fair reason?

1.4. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

2. Remedy for unfair dismissal

2.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

2.1.1. What financial losses has the dismissal caused the claimant?

2.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.1.3. If not, for what period of loss should the claimant be compensated?

2.1.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.1.5. If so, should the claimant's compensation be reduced? By how much?

2.1.6. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

2.1.7. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.1.8. Does the statutory cap of fifty-two weeks' pay or £89,493 apply?

2.2. What basic award is payable to the claimant, if any?

2.3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Wrongful dismissal

3.1. Was the claimant constructively dismissed as set out at 1.1 above?

3.2. If so, how much should the claimant be awarded as damages? The claimant contends she is due 23 weeks' pay.

4. Breach of contract (bonus)

4.1. Did the respondent act in breach of contract when it paid her a £42,813.45 on 16 September 2020?

4.2. If so, how much should the claimant be awarded in damages? The claimant contends she should be awarded £15,975.

4.3. The maximum total amount that the Tribunal could order the payment of in respect of the claimant's breach of contract claims in respect of wrongful dismissal and breach of contract (bonus) is £25,000 (pursuant to article 10 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).

5. Unauthorised deductions (in respect of bonus)

5.1. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? In particular:

5.1.1. What sum was properly payable to the Claimant by way of bonus? The Claimant contends that she was entitled to receive £58,788.45.

5.1.2. Was the sum paid to the Claimant less than was properly payable to her?

5.2. The claimant contends that the respondent made an unauthorised deduction of £15,975 from her wages when it paid her a bonus of £42,813.45 on 16 September 2020.

6. It was agreed that, so far as the unfair dismissal claim was concerned, I would deal with Polkey and contribution at the same time as liability issues but that other remedy issues would be left for a separate hearing. So far as the wrongful dismissal claim was concerned, it was agreed I would deal with liability only. It was further agreed that I would deal with liability and remedy for the breach of contract claim (in respect of the bonus) and the unauthorised deduction claim.

The Law

Constructive dismissal

7. In order for there to be a constructive dismissal there must be a fundamental breach of contract by the employer. That is to say a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more essential terms of the contract.

8. If the employee relies on a breach of the implied term of trust and confidence, this is a term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is an objective one. Any breach of the implied term of trust and confidence is a fundamental breach.

9. A single act or omission by the employer may of course comprise a fundamental breach of contract. However a course of conduct can also cumulatively amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal after a "last straw" incident, even though the last straw alone does not amount to a breach of contract and may not in itself be blameworthy or unreasonable. However the last straw must contribute something to the breach, even if relatively insignificant.

10. So far as the link between the fundamental breach of contract and the employee's resignation is concerned, it is not necessary for the employee to show that the breach of contract was the only cause of the resignation. It must however be one of the factors.

11. Overall, therefore, when considering whether an employee has been constructively dismissed for the purposes of an unfair dismissal claim, the Tribunal must consider: (1) whether there has been a breach of contract by the respondent (2) whether any such breach was fundamental (3) where the employee resigned in response to the breach; and (4) whether the employee affirmed the contract notwithstanding the breach.

12. The same issues must be considered in the context of a wrongful dismissal claim, except that in such a claim the claimant does not need to establish that their resignation was in response to the repudiatory breach of contract (Rawlinson v Brightside Group Ltd [2018] ICR 621).

Unfair dismissal

13. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed. In order to bring a claim of unfair dismissal, the employee must first show that they have been dismissed. The circumstances in which an employee is dismissed are set out in section 95 of the 1996 Act. The burden of proof to show a dismissal has taken place is on the employee. Section 95(1)(c) provides that an employee is dismissed when they terminate the contract with or without notice in circumstances such that they are entitled to terminate it without notice by reason of the employer's conduct (i.e. when there is a constructive dismissal).

14. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it is a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee. Under section 98(1)(b) "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" is a potentially fair reason.

15. If the employer persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

16. In considering this question the Tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the employer. Rather it must decide whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

17. If an employee was unfairly dismissed, section 123 of the 1996 Act deals with compensation: It provides:

Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

18. The Tribunal should therefore consider whether the compensation awarded should be reduced to reflect the chance that a claimant might have been dismissed fairly at a later date or if a fair procedure had been used or, indeed, if they might themselves have terminated their employment.

19. Turning to contribution, section 123(6) of the 1996 Act requires the Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that the claimant caused or contributed to their dismissal. In addition, section 122(2) of the 1996 Act requires the Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the conduct of the claimant prior to dismissal.

Breach of contract generally

20. A breach of contract occurs when a party to a contract fails to fulfil an obligation imposed by the terms of a contract. A term of a contract may be agreed expressly between the parties or be implied. The circumstances in which paying a particular amount in particular circumstances may give rise to an implied term were authoritatively set out in Park Cakes Ltd v Shumba [2013] IRLR 800. Underhill LJ identified the essential question as being:

    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… It follows that the focus must be on what the employer has communicated to the employees… In considering what, objectively, employees should reasonably have understood about whether a particular benefit is conferred as of right, it is… necessary to take account of all the circumstances known, or which should reasonably have been known, to them" (paragraphs 35-36)

21. A breach of contract gives the innocent party the right to sue for damages, i.e. for financial compensation for losses flowing from the breach. The general principle which applies to all types of claim for breach of contract is that damages should return the innocent party to the position they would have been in if there had been no breach. A claim for damages for breach of contract may be pursued in the Employment Tribunal when it arises, or is outstanding, on the termination of employment, but not otherwise.

Unauthorised deductions

22. Section 13 of the 1996 Act provides that an employer may not make a deduction from the "wages" of a worker unless the deduction is required or authorised by

virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.

23. Section 27 of the 1996 Act defines "wages". Section 27(1) provides that:

    … "wages" in relation to a worker, means any sums payable to the work 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.

24. The key question in relation to a bonus is therefore whether it was properly payable. Farrell Matthews & Weir v Hansen [2005] IRLR 160 is authority for the proposition that once a bonus has been "declared" the sum declared is properly payable for the purposes of an unauthorised deduction claim, whether or not it was also a contractual entitlement.

Findings of fact

25. These findings of fact do not of necessity refer to all of the evidence which was before me but I have taken it all into account.

26. The respondent is a relatively small family-owned business. It was established in the late 1970s by Mr Richard Cryer and Mrs Ann Cryer. It was with Mr R Cryer that the claimant primarily dealt when initially appointed. Following the death of Mr R Cryer in 2006, his children became more involved in the management of the business. Mr C Cryer was the Chairman of the respondent from around that date until around 2018 when his sister Ms A Cryer took over. She was then succeeded by Mr D Cryer, the current Chair, who took over from his sister in September 2019. Mr C Cryer, Ms A Cryer and Mr D Cryer are all directors of the respondent. Their mother, Mrs A Cryer also remains a director but she is now in her 80s and does not play an active part in the business.

27. The claimant was employed by the respondent from 1 October 2001. She was appointed managing director with effect from 1 January 2004 and remained in this role until her employment terminated.

The bonus scheme

28. The question of bonus payments is at the heart of the claim. Clauses 7.2.1 and 7.2. of the claimant's contract of employment as managing director (page 70) provided:

    7.2.1 The company will also set up a "Staff Incentive Participation Scheme" (SIPPS), details of which are attached.

    7.2.2 The scheme will be reviewed after 12 months. Any bonus scheme applicable thereafter may be reviewed at the complete discretion of the Company.

29. No details were attached to the contract. However the claimant and respondent have both given evidence about an agreement reached in relation to a bonus scheme by the claimant and the then Managing Director, Mr R Cryer (the father of Mr D Cryer). The claimant said (paragraph 11 of her main witness statement) "a bonus scheme was agreed whereby I received 15% of net profit in the management accounts over an agreed threshold. The threshold rolled from year to year". Mr D Cryer said something similar (paragraph 6 of his witness statement): "The bonus scheme was structured to be triggered at the rate of 15% of net profit above a variable net profit threshold. The percentage and initial threshold was agreed between my father Richard Cryer and Karen at the time".

30. I find, therefore, that pursuant to clause 7.2.1 a SIPPS was established in the form of a bonus arrangement ("the bonus arrangement") which was not reduced to writing pursuant to which the claimant would be paid 15% of net profit in the end of year management accounts over an agreed threshold ("the formula"). I have found that the relevant accounts were the management accounts because (1) that was the claimant's evidence; (2) the schedule prepared by the respondent at page 353 showed that for the period 2010/2011 to 2018/2019 it was the net profit as shown in the relevant management accounts that was used in the formula (although discussions might result in amounts being added back in). The relevant management accounts are between pages 304 and 329.

31. Subject to [32] below, I find that the relevant net profit figures in the management accounts, the threshold, the bonus resulting from the application of the formula, the bonus actually paid and the marketing spend for the period 2010/2011 to 2018/2019 were as follows. (This table largely replicates the table prepared by the respondent at page 353.)

	Management accounts net profit ("NP")	**Threshold value**	**Formula & resulting bonus**	**Bonus actually paid**	**Marketing spend**
2010/2011	£322,085.18	£209,700	15% x (NP-threshold value) Resulting bonus figure: £16,857.78	£18,822.90	£13,100 Added back in
2011/2012	£134,325.45	£209,000	15% x (NP-threshold value) Resulting bonus figure £0	£7,500	£41,122.50 Not added back in
2012/2013	£255,701.58	£215,270	15% x (NP – RPI adjusted threshold) Resulting bonus figure	£6,064.74	£12,950.27 Not added back in

			£6,064.74		
2013/2014	£258,374.09	£220,015.61 [an error by the claimant]	15% x (NP – RPI adjusted threshold) Resulting bonus figure £5,753.77	£5,753.77	£20,932.86 Not added back in
2014/2015	£320,061.20	£210,000	15% x (NP- threshold value) Resulting bonus figure £16,509.18	£16,502	£26,648.35 Not added back in
2015/2016	£333,837.53	£210,000	15% x (NP- threshold value) Resulting bonus figure £18,575.63	£18,575.55	£17,287.80 Not added back in
2016/2017	£269,732.84	£210,000	15% x (NP- threshold value) Resulting bonus figure £8,959.93	£10,452	£18,701 Hamish Renton exp for last 2 years added back in (£5k + £4952 = £9951)
2017/2018	£184,494	£210,000	15% x (NP- threshold value) Resulting bonus figure £0	£2,703	£33,153.48 “Normal” sales added back in
2018/2019	£339, 961.04	£210,000	15% x (NP- threshold value) Resulting bonus figure £19,494.16	£19,494.16	£34,305 Not added back in

32. I find that the figure for 2013/2014 in the table is not the figure actually paid. That figure is taken from the calculation contained in an email at page 237. However I find that from this year onwards the threshold was actually set at £210,000 (see paragraph 32 of Mr D Cryer’s statement) and that the bonus paid in this year was actually calculated as a result of a keying error by the claimant on the basis of a threshold of £220,000 being used in the formula. Further, I find that in addition to the resulting figure she was paid an ex-gratia amount of £3,000 to recognise the

effective way she had dealt with a settlement agreement (the email at page 335 refers to this).

33. **Variations to calculation of bonus:** I therefore find that for the period 2010 to 2019 (the period focused on by the parties) the calculation of the bonus was in each year carried out by using the net profit figure shown in the management accounts less a threshold amount multiplied by 15%. However, the final bonus paid varied in the following ways:

    33.1. **Variation of threshold figure:** it was agreed from 2007-2008 that the threshold value would be indexed to inflation but this ceased as a result of representations made by the claimant and from 2013/2014 the threshold value was £210,000.

    33.2. **"Adding back in" of certain costs:** in 2010/2011, 2016/2017 and 2017/2018 certain costs were "added back in". The result of adding a cost back in is to increase the figure by reference to which bonus is paid. In 2010/2011 the amounts added back in were costs associated with a rebranding exercise. In 2016/2017 the amounts added back in were costs for that and the previous year associated with a consultant, relating to marketing. The "adding back in" for 2017/2018 was to generate a bonus when otherwise no bonus would have been payable (see [33.3] below). I find that amounts were sometimes added back in at the request of the claimant when in her view the net profit figure in the management accounts would produce too low a bonus. In his oral evidence Mr R Cryer accepted that adding an amount back in did not boost the net profit figure for the management accounts, but did increase the bonus payable.

    33.3. **When the formula resulted in no bonus being payable:** in 2011/2012 and 2017/2018 the application of the formula would have resulted in the payment of no bonus, because net profit did not exceed the threshold value. However, in both years the respondent paid a bonus as set out above. In 2017/2018 the amount of £2,703 was arrived at by adding back in "normal sales" for the period. The claimant proposed this and Anna Cryer agreed to it in an email of 11 September 2018 (page 243) in which she stated: "As a one off gesture, I will agree to this but I wish the bonus incentive to continue – it is in all our interests".

34. **Negotiations:** I find that the claimant believed that the bonus arrangement generally did not sufficiently reward her in light of her own assessment of her contribution to the respondent's business. Consequently, I find that during that same period there were on a number of occasions proposals by the claimant to vary the way in which her bonus was calculated. For example:

    34.1. **2009/2010:** There is little documentation relating to the calculation of the claimant's bonus in the early years. However, Mr Charles Cryer wrote to the claimant on behalf of the shareholders (page 233) apparently in reply to issues she had raised concerning her remuneration stating: "With regard to the Bonus, as you know it is currently calculated as 15% of Net Profit (before tax and bonuses) – Previous Threshold (inflated each year at annual UK

inflation rate RPI)). The Bonus is there to provide a reward and incentive for profitable growth… We still feel that is valid, therefore the bonus structure will remain as it was for the 2009 year".

34.2. **2011/2012:** The email of the claimant to Mr C Cryer and his response clearly show that the claimant had attempted to negotiate a bonus higher than the £7,500 the respondent had offered when the threshold value was not exceeded (page 235).

34.3. **2012/2013:** The email of Mr C Cryer to the claimant of 21 March 2013 (page 236) shows that the claimant had tried unsuccessfully to negotiate a different bonus structure: "As I wrote to you last week, the structure will remain as it has in previous years. There is no need for further discussion on this issue at this time."

34.4. **2013/2014:** The email of Mr C Cryer to the claimant of 16 September 2014 (page 237) makes clear that she had tried to negotiate a higher amount ("I am not clear what exactly you propose for this year as far as reallocating some of JB's bonus to you?").

34.5. **2014/2015:** The email of Mr C Cryer to the claimant of 16 September 2014 makes clear that the claimant had suggested an alternative way of calculating her bonus in the 2014/2015 year (its numbered point 5). However, her attempts were unsuccessful, with Mr C Cryer writing to her after the end of the year on 13 October 2015 stating "After some discussion the bonus structure for this year will be calculated in line with the existing formula" (page 238).

34.6. **2017/2018**: The claimant was clearly unhappy with the application of the normal formula in this year which produced a bonus of zero (her email of 12 September 2018 at page 244) and was seeking an alternative arrangement.

34.7. **2018/2019**: The claimant again proposed an alternative bonus structure but this was refused. Ms A Cryer wrote to the claimant on 6 March 2019 (page 248) stating: "The other shareholders and I have spent alot [sic] of time considering your request for a change to your bonus structure. We have considered a range or proposals, including yours, and have decided after taking into account historical data, where the company is now, and the uncertainties of the Brexit climate, that the company is best served by sticking to the current arrangement".

35. I further find that the reference point for such negotiations was the formula. The respondent's reaction to attempts by the claimant to negotiate different and more favourable arrangements was often to refer to "the current arrangement" or words to that effect and to say that they would remain in place. The attempts by the claimant to introduce an entirely different basis for calculating bonus payments and so permanently replace the bonus arrangement were always unsuccessful.

36. **Annual process of finalising the claimant's bonus:** I find that the following process was in broad terms followed each year before the bonus figure was finalised and paid to the claimant:

    36.1. Having seen the net profit figure in the end of year management accounts (or having some idea of what it would be) the claimant might ask for a higher bonus than that provided for by the formula (by having amounts added back in) or might ask for a bonus to be paid even though the formula produced a zero figure.

    36.2. The respondent would consider what the claimant said and might decide to pay a bonus although the formula did not result in one (as it did in 2011/2012 and 2017/2018) or to add back in certain expenditure (as it did in 2010/2011 and 2016/2017) so that the amount payable was higher than that produced by the formula. It would not however necessarily accede to the claimant's requests.

    36.3. The claimant would finalise the bonus figures for herself and other employees and have them formally approved by the respondent before they were paid. For example, in the claimant's email of 12 September 20017 (page 230) to Mr C Cryer she attached a spreadsheet with proposed bonuses and wrote: "…My bonus calculation has been included and used the agreed system which I trust you find acceptable. I would be grateful if you could have a look through the calculations and let me know if you agree/have any comments". A further example is the email of the claimant to Mr C Cryer on 24 August 2017 (page 239) in which she stated "Please find attached the calculations for the annual profit share bonuses. I would be grateful if you could confirm you are happy with my staff allocation and the calculation for mine so that these can be paid in the September salary run (15th September) as is our usual practice".

37. **How the parties described the bonus arrangement:** as set out above, clause 7.2.2 provides for a review of the SIPPs after 12 months and gives the respondent a discretion to review it annually thereafter. The respondent repeatedly referred to the bonus arrangements as discretionary. For example in the email of 6 September 2012 Mr C Cryer wrote to the claimant "Bonus payments are discretionary however for the last three years your bonus has been calculated on a formula of a set percentage of the profits above a specific threshold inflated by RPI on an annual basis." (Page 234). In his email to the claimant of 13 October 2015 he stated "As before the bonus allocation remains discretionary" (page 238). Mr D Cryer in his email to the claimant of 8 July 2020 stated "I believe I am right in saying that the bonus payments are all discretionary, not contractual" (page 255). Mr C Cryer wrote in his email to the claimant of 30 July 2020 "I think it is important that ultimately all bonuses remain discretionary, as they always have been" (page 198).

38. **How the respondent viewed the bonus arrangement:** although Mr D Cryer was in his evidence keen to describe the bonus arrangement as "discretionary", he accepted that the bonus arrangement agreed between the claimant and his father had been based on net profit, that it was always the net profit figure as set

out in the management accounts (not the year end accounts) that was used, that there was "no issue" in relation to paying 15% of net profit less the threshold amount in years where the threshold was met, and that any deviations from that calculation prior to 2019/2020 had resulted in higher bonus figures than those payable by an application of the formula. So far as 2019/2020 was concerned, his position was that the formula had been correctly applied because the Big Fish costs and the refunding of the covid grant were items that had reduced net profit for the purpose of the management accounts. There had been "no intention" not to follow the formula.

39. **The 2019/2020 bonus:** to focus more closely on the 2019/2020 bonus, on 1 July 2021 Mr D Cryer emailed the claimant saying that "we should load as much cost as we can into this year to reduce the profit and therefore tax for this year. I'm sure we can put the Big Fish and associated costs into 19/20, might there by anything else?" (page 172). The claimant responded on 2 July noting that this would have "a considerable and detrimental effect on the staff bonuses. If this does occur I feel it would be prudent, for staff morale having worked incredibly hard, to add back the BF costs for the bonus calculations 19/20". She then emailed him again on 6 July 2020 stating that "The bonus structure has always been based on the NP for the year… To bring forward costs planned for the next fiscal year, that will diminish the profit and reduce the bonus payments is unfair and inappropriate" (page 176). Mr D Cryer replied "In response to your email below I am not proposing bringing forward costs, merely reflecting them in the year they are incurred. However it may be appropriate to smooth the profit, within reason and the rules, and I may choose to do that in future" (page 176).

40. Mr D Cryer was in early July therefore showing an intention to included certain costs in the management accounts for 2019/2020 in order to reduce profit (and so the tax payable). What then do the management accounts provided by the respondent show? In fact they do not show that such costs were ultimately included in the management accounts. The management accounts at page 213 show net profit at £601,923. These were apparently attached to an email dated 31 August 2020 from Mr D Cryer to Mr Eldridge in relation to a "new bonus structure" for the 2020 to 2021 and it is of course entirely possible that these were not the management accounts in their final form. However, the management accounts included with all the other management accounts between at page 332 of the bundle also showed a net profit figure of £601,923.31. When Mr D Cryer was asked about the lack of any management accounts showing a lesser net profit figure he answered that "we did not produce another set but we knew that these were not the correct numbers that we were going to use".

41. In light of this evidence, I find that the management accounts for 2019/2020 contained a net profit figure of £601,923.31. However the formula was applied to that figure less £96,500 of Big Fish expenditure and £10,000 in respect of a covid grant that was repaid.

The question of exclusion

42. I turn now to the question of whether the claimant was excluded from "performing her role as managing director in certain fundamental respects" as Mr Varnam put it in his closing submissions. The period in question is September 2019 (when Lucy Howe of Goshawk was appointed) until the claimant's employment terminated in 2020.

43. I find that the context for findings of fact in relation to this issue is that the respondent is a relatively small family-owned business in which family members who are directors have often played significant day-to-day roles.

44. I find that during the period in question generally, and particularly from the onset of covid in early 2020, the claimant was exceptionally busy at work. She herself commented that she was "crazy busy" (25 March 2020, page 272), "flat out" (20 April 2020 page 156) and noted "the workload is increasing" (2 July 2020, page 171). This is entirely understandable: the covid pandemic created multiple day-to-day difficulties for businesses (remote working, social distancing etc) and yet the respondent's business flourished during covid with the demand for its products (frozen food) increasing rapidly. Consequently, the claimant as the respondent's managing director, had to not only deal with the complications that all businesses faced as a result of covid but had also to cope with increased demand for the respondent's products. It is of course this increased demand (and so increased profits) which underly the dispute about the bonus arrangement.

45. I find that against this background the claimant was less involved in the decision to create a new brand role of in-house marketing manager and in the decision of whom to appoint as the branding agency and the marketing PR company than she might have been in less busy times. Equally, I find that she was not invited to initial meetings with Big Fish, Pier Marketing and Impakt. However I also find that she was not *excluded* from involvement in any of these matters. I find that she was kept reasonably informed and that to some extent her involvement was invited. I find that at no point did she ask for further involvement only to be told that this would not be permitted. Further, I find that as a director she was involved in the board meeting on 4 June 2020 at which the decision to engage Big Fish was formally taken. Indeed she was invited to speak first at that meeting. I do not accept, as she suggested in her evidence, that the reason she did not ask for further involvement in these matters was that it had been made clear to her that the intention was not to involve her. Numerous documents in the bundle make plain that the claimant is – as one would expect from someone holding the role of managing director – very able to stand her ground and make her views clear when she feels that it is appropriate to of so. Rather I find, taking the evidence in the round, that she did not pursue a greater degree of involvement in these issues because she was extremely busy.

<u>The termination of the claimant's employment</u>

46. The respondent paid the claimant a bonus of £42,813.45 on 16 September 2020. The claimant subsequently resigned on six months' notice on 21 September 2020 (page 220). She referred to the last year as "the final straw" and said that she had taken legal advice in relation to the underpayment of her bonus for "the financial year end 31st July 2020". Her solicitor then wrote to the respondent on her behalf

four days later on 25 September 2020 (page 354) stating "My Client has set out the legal position in the open letter of today's date. My Client will leave either on 30 September 2020 and make a legal claim for breach of contract, unfair dismissal and payment of the outstanding bonus or if the outstanding bonus is paid before 30 September 2020 she will leave on 31 October 2020 and make a legal claim for unfair dismissal. In either event she does not consider herself as bound by her contract of employment". (The parts of this letter included in the bundle had agreed by the parties not to be privileged. Other parts of it were redacted.)

47. There was no "open letter" of the same date included in the bundle. However I find that it said what is stated at paragraph 59 of the claimant's witness statement: that she would "bring forward her resignation to 30 September 2020 unless the outstanding sum of £15,975 had been paid by then" (that is to say the amount in dispute in relation to the bonus arrangement). The parties agree that following this correspondence the claimant's employment ended by her resignation with effect from 9 October 2020 (see the claim form and response).

48. I find that the main reason for the claimant's resignation with effect from 9 October 2020 was her dissatisfaction with the calculation of her bonus for the year 2019 to 2020.

Polkey findings

49. The claimant is now 55 (so 52 when her employment ended). Since the claimant's employment ended, she has not sought further employment. Rather she has invested capital in the redevelopment of commercial premises (paragraph 70 of her witness statement). She also notes: "I have been taking art lessons with a view to commercialising my article. I am now at that stage". She goes on to say that she would be exhibiting certain pieces at an event in June this year and explains that she has taken art classes both via Kent Adult Education and via a private art group.

50. In answer to question asked in cross-examination the claimant accepted that she had had a "career change". She denied that a desire for such a change was the real reason for her resignation (and I have found above that it was not the main reason).

51. Taking this evidence in the round, I find that the radically different nature of the claimant's work since leaving the employment of the respondent reflects a desire for a change in direction which existed to some significant extent prior to the events which resulted in her employment terminating. Further, it is clear that her relationship with the Cryer family had had its difficulties over the years – she felt that she was not adequately remunerated, they thought that she was too eager to maximise her own bonus. When these two things are combined, there is clearly a significant chance that if her employment had not ended by her resignation when it did for the reason that I have found at [48] above, it would have ended in any event either around the same time or in the following period.

Submissions

52. The parties produced lengthy written submissions – the respondent's ran to 15 pages and the claimant's ran to 21 pages. Each representative also made oral submissions. I do not summarise their submissions here. However, in their submissions both representatives began by considering whether the respondent had breached the contract of employment of the claimant by paying a bonus of £42,813.45 rather than £58,788.45 on 16 September 2020 before considering the list of issues agreed as set out above and so I follow the same approach.

Conclusions

What were the express terms (if any) in relation to the bonus arrangement?

53. I conclude that the express terms in relation to bonus arrangements were (1) clauses 7.2.1 to 7.2.2 of the contract of employment; (2) an agreement between the claimant and Mr R Cryer dating back to 2006 that the amount payable would be 15% of the amount calculated by deducting an agreed threshold figure from net profit as shown in the management accounts. The threshold figure in 2020 was £210,000 (and had been fixed at that figure from no later than 2013/2014).

54. The matters I have taken into account in reaching this conclusion include the following:

    54.1. Clauses 7.2.1 imposes an obligation on the respondent to set up a SIPPs ("…will also set up"). Clause 7.2.2 of the contract of employment quite clearly gives the right to review the bonus arrangement after 12 months and thereafter at its discretion. However, the respondent did not review the bonus arrangement (other than to increase the threshold figure on several occasions). Indeed, the claimant sought on a number of occasions to *replace* the bonus arrangement with a scheme that was more favourable to her, but on each occasion the respondent declined to do so, as reflected in my findings at [34] above. As such the bonus arrangement remained in place up to and including the termination of her employment.

    54.2. The respondent submitted that the evidence demonstrates that "all elements of the bonus were up for grabs" – that is to say that there was an annual negotiation of the amount payable. I reject this contention and conclude that the net profit figure shown in the management accounts was always the basis for the bonus calculation. The claimant never received less than the amount calculated on this basis prior to 2019/2020. The formula was fixed (subject to the threshold variations noted above). However, as a result of discussions, on occasion at its discretion the respondent paid the claimant more than she was entitled to under the bonus arrangement:

        54.2.1. In 2011/2012 and 2016/2017 when certain costs were added back in;

54.2.2. In 2011/2012 and 2017/2018 when net profit in the management account did not reach the threshold figure and an *ex-gratia* bonus payment was made.

This of course reflected the evidence of Mr D Cryer as summarised at [38] above: there was no question of paying the claimant less than 15% of net profit in the management accounts less the threshold in 2019/2020 or in any other year. The thrust of his evidence in this respect was simply that in 2019/2020 net profit in the management accounts was less than the figure relied upon by the claimant.

54.3. The respondent submitted that the fact that there was an annual negotiation was also reflected in the claimant putting forward a "proposal each year". However, as my findings at [36] set out, there was not an annual negotiation of the kind suggested by the respondent. Rather there was a process following the calculation of net profit in the management accounts which led ultimately to the directors signing off on the bonuses to be paid.

54.4. The fact that on occasions the respondent paid the claimant more than her entitlement under the bonus arrangement does not detract from the existence of that entitlement.

54.5. Finally, although this point was not relied upon the by respondent, clause 17.3 of the contract of employment did not prevent the respondent from being bound as the claimant contents. The clause says that no variation to the contract of employment "will be of any effect unless it is agreed in writing and signed on behalf of both parties…". However the bonus arrangement was not a variation to the contract of employment but rather the implementation of its clause 7.2.1.

Implied term

55. In case I am wrong about the existence of an express term as set out above, I have also considered whether a term should be implied as a result of custom and practice.

56. The parties agreed that I should consider this question by reference to Park Cakes Ltd. Having regard to the factors which Lord Justice Underhill set out at paragraph 36 of the judgment as being potentially relevant:

56.1. **On how many occasions paid and over how long a period have the benefits in question been paid:** although the parties concentrated on the period in respect of which there is a table at [31] above, the bonus was paid on the basis of the formula between 2006 and 2019. I so concluded because even in years when a higher amount was paid, the starting point was nevertheless the formula. As Mr D Cryer accepted in his evidence, there was no question of the claimant being paid less than 15% of the amount by which net profit exceeded the threshold.

56.2. **Whether benefits were always the same:** as the claimant submitted, there was no occasion during the period when the claimant received a bonus of less than the 15% of the amount by which net profit exceeded the threshold in the management accounts. As noted above, on four occasions she was paid more than that figure.

56.3. **The extent to which the enhanced benefits are publicised generally:** I conclude that this factor is of little relevance when the bonus in question is to be paid to one person only. However, the claimant and the directors of the respondent referred to the formula regularly in correspondence. There was certainly no mystery about it. It was "publicised" between those it concerned.

56.4. **How the terms are described:** there were relatively imprecise references to the bonus being "discretionary" in correspondence. For example, at page 234 Mr C Cryer said to the claimant in an email "Bonus payments are discretionary" before going on to say "however for the last three years your bonus has been calculated on a set percentage share of the profits above a specific threshold inflated by RPI on an annual basis". There is other correspondence which strongly suggests that it went without staying that the claimant would receive a bonus of 15% of the amount by which net profit exceeded the threshold. Properly understood, the fairly loose references to the bonus being "discretionary" are when taken as a whole references to the right of review in clause 7.2.2.

56.5. **What was said in the express terms of the contract:** clauses 7.2.1 and 7.2.2 of the contract are set out above. It is clear that the action of paying a bonus is referable to the existence of a contractual obligation (i.e. that contained in clause 7.2.1). Clause 7.2.2 gives the respondent the right to alter the formula by reviewing the scheme but the respondent does not contend that this is what it did in 2020. There is no inconsistency between the implication of a term that 15% of the amount by which net profit in the management accounts exceeded the threshold would be paid to the claimant and clause 7.2.2.

57. Overall, taking into account these various matters, and considering the "essential question" identified by Lord Justice Underhill, I conclude the respondent did evince an intention that the claimant should enjoy the benefit of right unless and until the bonus arrangement was reviewed. Indeed, although Mr D Cryer referred to what he regarded as the discretionary nature of the bonus entitlement in his witness evidence, that did not really reflect the substance of his evidence in cross-examination as set out at [38] above.

58. Finally, even if I am wrong about there being an implied term, and the bonus arrangement remained entirely discretionary, I would have concluded that in the year in question the respondent had exercised that discretion and had agreed to pay a bonus of 15% of the amount by which net profit in the management accounts exceeded the threshold. Again, the evidence of Mr D Cryer would support this analysis: he did not ultimately suggest in his evidence that the claimant was not entitled to a bonus of 15% of the amount by which net profit

exceeded the threshold as shown in the management accounts. Rather, he said that net profit for the purpose of the management accounts was not what she said it was.

Whether there was a breach of the express (or alternatively implied) term as to the amount of bonus

59. I have found at [29] and [30] above that the express agreement reached was that the claimant would be paid 15% of net profit in the end of year management accounts over an agreed threshold. I therefore conclude that by calculating the claimant's bonus by reference to a figure which was £106,500 less than that figure the respondent acted in breach of contract.

60. In these circumstances, it is not necessary for me to consider the parties' respective arguments about how net profit should be calculated. The question for me is simply what was net profit in the management accounts in the year in question and the answer is £601,923. The respondent had produced no management accounts showing a smaller figure and, indeed, Mr D Cryer did not in the end contend that any such accounts had been produced.

The list of issues

61. I turn now to the list of issues agreed between the parties. The issues are set out in italics and my conclusions in relation to them follow in normal text.

Unfair dismissal

Was the claimant dismissed? The Tribunal will consider:

Did the respondent do the following things:

- *Pay the claimant a bonus of £42,813.45 on 16 September 2020 (instead of a bonus of £58,788.45) (this is the most recent allegation). It is accepted that the Respondent did pay a bonus of £42,813.45, but not that this was a breach of contract;*

- *Wrongly exclude the claimant from involvement in the management of the respondent between September 2019 and the termination of her employment in that she was:*

    - *Excluded from (and so not involved in) the initial meetings (believed by the Claimant to be in the first half of 2020, although the Claimant was not involved in the meetings so cannot give exact dates) with Big Fish, Pier Marketing, and an adaptive agency, Impakt, that had been identified to help with the rebrand of the respondent and a change in marketing strategy;*

    - *Not involved in the decisions as to who to appoint as the branding agency and the marketing PR company and so only met Big Fish, Pier*

Marketing, and an adaptive agency, Impakt, after they had been decided upon and appointed by the shareholders;

- *Not involved in the decision to create a new brand role (in-house marketing manager) within the respondent because the shareholders and the consultant Lucy Howe decided to create such a role without discussing it with her.*

62. I conclude that the respondent did not wrongly exclude the claimant from involvement in the management of the respondent as alleged.

- *Did the payment of the bonus of £42,813.45 (instead of a bonus of £58,788.45) breach either an express term of the claimant's contract of employment or a term implied by custom and practice?*

- *If so, was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.*

63. I conclude that the payment of the bonus of £42,813.45 breached an express term of the claimant's contract of employment (or, if I am wrong about that, a term implied by custom and practice).

64. I conclude that given the size of the underpayment, and the fundamental importance of remuneration in any employment relationship, the breach was a fundamental one, i.e. it was so serious that the claimant was entitled to treat the contract as being at an end.

- *Alternatively, did the matters set out at 1.1.1 [of the list of issues] breach the implied term of trust and confidence taking into account also the manner in which the bonus figure of £42,813.45 was arrived at (the claimant contending that this reflected a late change of approach carried out in the face of the claimant's protests)? The Tribunal will need to decide:*

    - *whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and*
    - *whether it had reasonable and proper cause for doing so.*

65. I conclude that the non-payment of the bonus of £58,788.45 breached the implied term of trust and confidence as well as breaching an express or implied term of the claimant's contract of employment, taking into account also that the decision to pay a lower bonus than that calculated by reference to the management accounts was made right at the end of the financial year in question.

- *If so, did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.*

66. In light of my findings of fact above, I conclude that the breach of contract was a reason (in fact the main reason) for the claimant's resignation.

- *If so, did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.*

67. In light of my findings of fact above, I conclude that the claimant did not affirm the contract before resigning. Although the correspondence following the payment of the bonus on 16 September 2020 was perhaps complicated by the involvement of legal advisers, it is clear that the claimant did not choose to keep the contract alive after the breach. The claimant was therefore constructively dismissed.

- *If the claimant was dismissed, what was the reason or principal reason for dismissal, i.e. what was the reason for the breach of contract? The respondent contends it was its loss of trust and confidence in the claimant as set out in [38] of the grounds of resistance.*
- *Was it a potentially fair reason?*
- *Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?*

68. The respondent contended that the reason for the breach of contract was that it had lost trust and confidence in the claimant – i.e. that the reason it withheld the full bonus was that it had lost trust and confidence in the claimant. Realistically, this does not reflect the evidential case that the respondent put forward, which was to the effect that it had paid the claimant what she was due. Consequently I conclude that the respondent has not proved any reason for the dismissal. Further and separately, the respondent has not proved a potentially fair reason. Further and separately, I conclude that in all the circumstances the respondent did not act reasonably in (constructively) dismissing the claimant. It was fundamentally unreasonable for it to withhold part of the bonus that was contractually due to the claimant.

Remedy for unfair dismissal

- *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

69. In light of my findings of fact at [49] to [51] above, I find that there is a 40% chance that the claimant's employment would have ended by her resignation in any event and that accordingly any compensatory award should be reduced by that percentage.

- *If so, should the claimant's compensation be reduced? By how much?*

70. I conclude it should be reduced by 40%. The amount (if any) to be awarded will be decided at a remedy hearing. I should note in this respect that the respondent observed during the hearing that it had points to take in relation to the Acas code when it came to remedy concerning the grievance procedure. Ms Moss said that she would prepare an amendment to the list of issues setting out the point. No

such amendment was produced during the course of the hearing but the point may be argued in any event at the remedy hearing. The respondent should set out the issue clearly by a proposed amendment to the list of issues before the remedy hearing so that the claimant can attend prepared to deal with it.

- *If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?*

71. I conclude that the claimant did not cause or contribute to her (constructive) dismissal by blameworthy conduct.

Wrongful dismissal

- *Was the claimant constructively dismissed as set out at 1.1 above?*

72. It follow from my conclusions above that she was.

- *If so, how much should the claimant be awarded as damages? The claimant contends she is due 23 weeks' pay.*

73. To be decided at a remedy hearing.

Breach of contract (bonus)

- *Did the respondent act in breach of contract when it paid her a £42,813.45 on 16 September 2020?*

74. Yes.

- *If so, how much should the claimant be awarded in damages? The claimant contends she should be awarded £15,975.*

75. The respondent agreed that, if there had been a breach of contract, this was the amount due.

Unauthorised deductions (in respect of bonus)

- *Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? In particular:*
    - *What sum was properly payable to the Claimant by way of bonus? The Claimant contends that she was entitled to receive £58,788.45.*
    - *Was the sum paid to the Claimant less than was properly payable to her?*

76. I conclude that the respondent made an unauthorised deduction of £15,975 from her wages when it paid her a bonus of £42,813.45 on 16 September 2020 because the amount properly payable was £58,788.45.

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Employment Judge Evans

Date: 22 July 2023