EMPLOYMENT TRIBUNALS

Claimant: Mr I Phillips

Respondent: Applied Corrosion Monitoring Ltd

Heard at: Manchester

On: 13 November 2023 and in chambers on 11 December 2023

Before: Employment Judge McDonald (sitting alone)

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

RESERVED JUDGMENT ON REMEDY

The judgment of the Tribunal is that the respondent is ordered to pay the claimant £15,398.65 in damages for breach of contract within 14 days of the date of this judgment.

REASONS

Introduction

1. This was the remedy hearing in this case. My liability Judgment was sent to the parties on 21 August 2023. This judgment should be read alongside that.

2. In the liability judgment I found that the respondent was in breach of contract. I found that the claimant's contract with the respondent entitled him to "cash in" his bonus bonds under the ACM instruments Pay Scheme ("the 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. The remaining issue was how the bonds should be valued in such a "cash in" situation.

3. I had given directions that the parties prepare written submissions (and submissions in reply if they wanted to). For this hearing I had a remedy hearing bundle consisting of a total of 103 pages ("the Remedy Bundle"). That included the parties' submissions dated 8 September 2023 and the claimant's response to the respondent's submission which was dated 22 September 2023. I had a small supplementary bundle headed "Written Representations for Consideration Bundle" which included the respondent's response to the claimant's submissions ("the Supplementary Remedy Bundle"). In this judgment I refer to the Bundle used at the liability hearing as "the Liability Bundle".

Relevant Law

4. There were no express contractual terms governing how the Bonus Bonds should be valued in such a "cash in" situation. To determine the appropriate remedy, it is necessary to imply a term into the contract.

5. 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. (There was no suggestion in this case that any such custom and practice had been established).

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.

6. 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.

Findings of Fact

7. I heard evidence from the claimant and from Mr Raymond Gill ("Mr Gill"). I set out below my findings of fact relevant to remedy.

The Bonus Bond scheme

8. As I said at paragraph 45 of my liability judgment, from 2010 onwards the claimant held "bonus bonds" in the respondent rather than shares. There were a total of 1,000,000 Bonus Bonds. As at January 2022 over 78% of those were held by the respondent's directors. The remainder were held by the respondent's employees. As at that date, the claimant had 58,660 Bonus Bonds representing 5.87% of the total bonds.

9. Employment Judge Feeney had ordered that the respondent provide an explanation of the workings of the ACM Instruments Pay Scheme. Mr Gill had provided an explanation and examples in writing. They were at pages 61-72 of the Liability Bundle. I base my findings about how the Bonus Bond scheme worked on that, on the evidence I read and heard at both hearings and on the parties' written and oral submissions.

10. I find that calculation of the amount distributed to bond holders per month during any particular year began with Mr Gill deciding how much money should be put into what he called the "Wage Engine". I understand that to be a notional "pot" of money used to calculate wages and the Bonus Bond distributions, rather than an actual separate pot of money, e.g. held in a separate pension fund or bank account. Mr Gill would decide how much money to pay in to the Engine based on the respondent's financial position and the funds it had available for distribution in the relevant period.

11. By 2022 each of the respondent's employees was paid a guaranteed "minimum" wage. That should not be confused with the National Minimum Wage – the claimant's "minimum" wage was significantly more than the NMW. The total of the employees' "minimum wage" was deducted from the money put into the Wage Engine. Of the balance after that deduction, half the money put into the Wage Engine was paid out to the employees by way of enhanced wages additional to their "minimum" wage. There was a formula for calculating what proportion of that enhanced wage pot each employee was entitled to. This case is not concerned with that enhanced wage payment.

12. The other half of the Wage Engine money was used to buy Bonus Bonds from the bondholders. A maximum of 40,000 bonds (4% of the total) would be "traded" in any one year. That maximum figure would be reduced if there were insufficient funds in the Wage Engine to buy bonds during any part of the year. If, for example, the bonds were only traded in 9 months of the year, the maximum traded in that year would be 30,000 bonds (i.e. 9/12 of 40,000 bonds). There could be years where no bonds were traded because there was, in Mr Gill's judgment, insufficient money available to be put into the Wage Engine. That happened in 2018-19, 2020-21 and 2021-22. In years in which the Bonus Bonds were traded, the bonds "bought" were then redistributed to the employees and the directors of the respondent in proportion to their wage.

13. The mechanism by which the "trading" or "buying" and "selling" of Bonus Bonds took place was unclear to the claimant. Doing my best with the evidence I heard and read, I find that there was no paperwork documenting the "buying" and "selling" of the Bonus Bonds beyond the records of the transaction in the Register of Shareholdings book (pp.106-127 of the Liability Bundle). There was, for example, no evidence of a process equivalent to the transfer of share certificates when Bonus Bonds were bought and sold. I find that although the bondholders were paid when their bonds were "bought", they did not have to pay to acquire bonds when they were redistributed.

14. The respondent's directors' wages were low but they had very large bondholdings. When there was money in the Wage Engine to buy bonds, the directors received by far the largest proportion of the money distributed to bondholders to "buy" the bonds. However, because their wages was low compared to the other employees, they received proportionately fewer Bonus Bonds when the purchased bonds were redistributed. Because the total number of Bonus Bonds was fixed at 1,000,000, the long-term effect was that the directors' Bonus Bonds were very gradually being redistributed amongst the other employees.

<u>The value of the Bonus Bonds</u>

15. The amount paid to the claimant when he "sold" Bonus Bonds depended ultimately on the amount put into the Wage Engine when they were bought. Mr Gill's calculation was that the average value of each bond traded by the claimant in the period 2013-2022 was £3.88 (p.72 of the Liability Judgment). The claimant submitted that was too low. He submitted (p.4 of the Remedy Bundle at para 15) that for the 6 years 2006-2012 the average paid per bond was £6.03. I find that fails to take into account the fact that no bonds were traded at all in some years subsequent to that.

16. The latest payment of Bonus Bond distribution in November 2022 was based on a distribution pot of £10,000. That resulted in a payment to the claimant of £268.95 which Mr Gill's covering note said was "for the year" (p.78 of the Liability bundle). The claimant did not cash the payment made by cheque. However, the respondent then paid it to the claimant by direct transfer on 9 December 2022 (p.80-81 of the Liability Bundle).

17. I find that holding the Bonus Bonds did not guarantee the claimant a payment for them in any particular year. Their value was dependent on there being enough money in the respondent's business to put into the Wage Engine and on that money

being more than the money needed to cover the employees' minimum wages. That meant that the past performance was no guarantee of future performance when it came to Bonus Bond related distributions. Whether or not there would be distributions in future dependent on the ability of the respondent to keep paying into the Wage Engine. That requires me to make findings about the state of the respondent's business and assets as at 2022.

The state of the respondent's business as at 2022

18. In broad terms, Mr Gill's case for the respondent was that by 2022 it was a business in decline because it was not continuing to innovate. Based on the respondent's accounts for the year ending 31 March 2022 (pp.74-81 of the Remedy Bundle) I find that in that year it made a loss of £172,003). I find that that figure is distorted to some extent by the redundancy payment of around £75,000 made to its former employees. However, those accounts also show its turnover had reduced from £188,774 in the year to 31 March 2021 to £146,517 in the year to 31 March 2022.

19. The claimant submitted that there was evidence to suggest the respondent was still a viable liquid business. He pointed out that Mr Gill in his email dated 6 January 2022 (pp.180 of the Liability Bundle) referred to the respondent as having "recently had about £150,000 of orders". However, Mr Gill goes on in his email to say, "the consensus is that there is no hope of any more". There was a possible increase in sales due to the high price of oil but I accept Mr Gill's evidence that the long term prospect was not of sustained increases sales.

20. The claimant also referred to quarterly sales figures for 2022 (p.28 of the Remedy Bundle) which he submitted showed an upturn in sales. Those figures were incomplete, missing the last quarter for 2022. I prefer the evidence in the end of year accounts filed by the respondent. I find the respondent's turnover was in decline and, as at 2022, the position was that it seemed unlikely to see a significant upturn in the future.

21. In November 2022, the respondent sold its business for £1 to ACM Instruments Ltd, a company operated and owned by Andrew Haworth, another former employee of the respondent. The sale agreement (pp.72-73 of the Remedy Bundle) included goods sold since 6 April 2022 less £4,999 together with all remaining stock and business equipment, excluding some "nominal pieces of furniture". It provided for liabilities to pass to ACM Instruments Ltd (except for those relating to this Tribunal claim) and for assistance to be provided both in terms of help and technical advice and use of the respondent's premises. The premises itself at Station Road, Cark In Carmel ("the Premises") was not included in the sale. The sale agreement notes that the sale had been intended to take place in April 2022.

22. Taking the evidence in the round, I prefer the respondent's case that the respondent's business was in decline and find that its turnover levels were more likely to continue to decline than recover. That does not amount to a finding that the respondent's business was not a viable one. Based on the evidence I heard the business remains viable, albeit on a smaller scale than when it was flourishing in the years up to around 2015-2016. I note the downturn in sales pre-dated COVID and could not be attributable to that pandemic. My finding also seems to me consistent

with the findings of fact made in my Liability judgment about the decision to make redundancies. I find that by early 2022 the directors had decided to put the business into "retirement mode".

23. I find that after the sale of the business, the respondent lost its primary source of income. There had been a suggestion by Mr Gill that it could derive a new source of income from renting out the Premises but that did not happen. From that point on in early 2022, the only money available for paying in to the Wage Engine would be those generated by realising the respondent's assets.

The respondent's assets

24. There was a dispute of fact about the value of the respondent's remaining assets after the business was "retired" in early 2022. I find there were 4 primary assets/categories of asset.

25. The first was moneys owed by customers. There were unpaid invoices totalling around £92,007 for 2021-2022 (p.22 of the Remedy Bundle) including one for £50,318.55 which Mr Gill was confident would be paid. I find the directors were also chasing up older invoices, some of which would not be recoverable (or at least not in full), e.g. because of the insolvency of the customer (p.26 of the Remedy Bundle). The respondent's accounts for the year ending March 2022 (p.17 of the Remedy Bundle) recorded a figure for debtors of £62,177. Allowing for the possibility that not all outstanding invoices shown in the sales ledger would be recoverable, I find that the most reliable figure for this asset.

26. The second asset was cash in the bank. The respondent's accounts show a figure of £27,564 (p.80 of the Remedy Judgment). The claimant submitted that the figure was higher. The extract from the respondent's current business account dated 4 March 2022 showed £89,947.16. He suggested that the respondent also had a savings account but there was no evidence on which I could find that was the case. The bank statement extract does not extend to 31 March 2022. The accounts post-date it and I find that as at 31 March 2022 the respondent had £27,564 cash in the bank. That was the figure after payment of redundancy payments.

27. The third asset was stock. The claimant said that the respondent had a significant amount of parts for the monitoring equipment it installed. His evidence was that it would be very expensive to replace and was therefore inherently valuable. In response to Mr Gill's cross examination question, however, he accepted that if that equipment was sold on eBay (for example) it would be worth only pennies in the pound. I find the most reliable valuation is that in the respondent's accounts. It values the respondent's stock in hand at £5000. However, I find that stock was included in the sale to ACM Instruments Limited and so should not be included in calculating the realisable assets of the respondent.

28. The fourth asset was the Premises. It is a former residential property which had been used by the respondent for office use. The claimant said that it had initially been valued at a fair market rate of £315,000. He said that the property had dropped in price by about 20% to £250,000 after a WhatsApp conversation he had had with Mr Gill. The respondent's case is that there are various impediments to the property being sold at the full market rate. It does not currently have a bathroom,

would need planning permission to convert into domestic property and (as a sale of a commercial property) would be subject to deduction of various taxes which would not necessarily apply to residential property. On that basis, Mr Gill's evidence, which I accept, was that the respondent was seeking to reach agreement with a third party to convert the property pre-sale to maximise its value on the property market. The sale particulars of the property adjoining the Premises showed it as being on the market for £465,000 (pp.55-62 of the Remedy Bundle). I find that property is larger than the Premises, and unlike it had an annex and a fully installed bathroom and kitchen. It was already in use and decorated as a residential property when put on the market. On balance I prefer the respondent's case that were the Premises already converted for use as residential premises the valuation of £315,000 might be achievable but that the valuation of £250,000 reflects the value it is likely to achieve in its unconverted state. I do not find it plausible that the respondent would reduce the sale price of the Premises by £65,000 purely in response to the claimant's WhatsApp messages. That would be to cut off its nose to spite its face given that Mr Gill and the other directors would also benefit from the higher sale price. I find that the net proceeds of the £250,000 sale price would be reduced by the costs involved in the sale including estate agent fees, costs for works to make the premises saleable and legal fees (including potentially those relating to planning permission for conversion to a residential property). It seems to me reasonable to reduce those net proceeds by £10,000 to take into account those costs, giving a net value for the Premises of £240,000.

29. The respondent's accounts show current liabilities of £44,373 (p.80 Remedy Bundle). There would also be a need for the directors to be paid while they worked to realise the assets. Based on p.5 of Mr Gill's written submissions (p.68 of the Remedies Bundle) I find the directors were paid a combined figure of £960 per month. The Premises have not been sold so there is a continuing need for the directors to be paid up to and beyond the remedy hearing. I find that allowing a period of 24 months' pay to the directors from 31 March 2022 to realise the assets is reasonable. That amounts to total combined wages to the directors over that period of £23,040.

30. Taking all those figures into account, while accepting there is inevitably a degree of speculation involved in the exercise, I find that the best estimate of the net realisable value of the respondent's assets less liabilities and the costs of realisation is £262,328. That is based on my findings of total assets of £329,741 less liabilities and directors wages together totalling £67,413.

Discussion and Conclusions

31. In the absence of an express term in the claimant's contract governing how the Bonus Bonds are to be valued when cashed in in a redundancy situation, I find it is necessary to imply such a term to give the contract business efficacy. As to what that term should be, I bear in mind that the case law says that the fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion.

32. In deciding what the implied term should be, I need to take into account of the purpose of the Bonus Bond scheme and how it worked. The intention was to provide a regular distribution of funds proportionate to the bondholding during employment. It

was also intended to provide an income in retirement, with the respondent "buying back" the bonds at the rate of 4% of the total holding per annum. If the claimant had continued in employment and on into retirement, he would not have received the distribution by way of a lump sum in one go. He would, however, have received a continuing income from the Bonus Bonds.

33. I bear in mind that there was no guarantee of a regular Bonus Bond distribution, with a distribution being dependent on a decision by Mr Gill that there was enough money to allow a payment into the Wage Engine. That was a discretion exercised by Mr Gill. Applying **Horkulak**, I find he was required to exercise that discretion genuinely and rationally. He could not randomly decide not to put money into the Wage Engine if the respondent had sufficient available to do so. There could well be circumstances, however, where the position of the business meant it would be rational not to put money into the Wage Engine, e.g. if it was necessary for the respondent's business to invest in new plant or machinery leaving no "spare" funds available to be put into the Wage Engine.

34. The position is complicated by the fact that the respondent company was (to use the wording of the sale agreement at p.72 of the Remedy Bundle) "going into retirement mode". I find that in this case, the relevant implied term needs to address the position where the respondent is no longer continuing with its core business but instead realising its assets. I find that in those circumstances, the implied term which best fits with the purpose of the bond scheme and fairness and equity is that the claimant should be entitled to 5.87% of the net realisable assets of the respondent. I have considered whether that figure should be discounted to reflect the fact that the claimant was receiving a lump sum rather than receiving an income from the bonds over time. I find it should not. Set against any benefit from accelerated receipt is the detriment to the claimant of not receiving a continuing income from the Bonus Bonds. He has, in effect, lost his pension. Even allowing for the non-guaranteed nature of the income from Bonus Bonds I find, balancing all the factors, that 5.87% of the net realisable assets of £262,328 is the appropriate sum payable to the claimant.

35. Based on my finding that the net realisable value of the respondent is £262,328 that means the amount payable to the claimant is £15,398.65. (For the avoidance of doubt, if the claimant has not returned the payment of £268.95 made in November 2022, that amount should be deducted from the amount payable).

36. I need to deal with 3 submissions made by Mr Gill which he said should result in the sum payable to the claimant being reduced.

37. First, Mr Gill submitted that the claimant should not receive anything because he had committed misconduct by failing to follow instructions while employed. There was no suggestion that the claimant was the subject of any disciplinary process or was in receipt of a disciplinary warning. He was dismissed for redundancy not misconduct. In those circumstances I do not accept the submission that the claimant should be treated as a "bad leaver" and forfeit his Bonus Bonds.

38. Second, Mr Gill submitted that the way the Wage Engine worked meant that only half the value of the realisable assets would be distributed to Bonus Bond holders, the other half being paid as wages. I reject that submission. In the context of a realisation of the respondent's assets there were no wages to pay to employees

because there were none (other than the wages to the directors for which I have already accounted). I find that in that context, the appropriate implied term would be that all the net realisable assets would be distributed between the bondholders. The directors would not lose out because they would receive the vast majority of those moneys because of the size of their Bonus Bond holdings.

39. Third, Mr Gill submitted that the costs of redundancy payments (which he rounded up to £75,000) should be offset against the realisable value of the respondent. However, I have already taken those payments into account in calculating the value of the respondent's assets. It would be double counting to offset it. For the avoidance of doubt, I do not accept Mr Gill's argument that the claimant benefited unfairly by getting both a redundancy payment and a payment for his Bonus Bonds. The entitlement to a redundancy payment is a statutory right as an employee. The payment for the Bous Bonds recognises the claimant has lost a source of income and, in effect, his pension. They are distinct and separate things.

40. In those circumstances, my decision is that the amount payable to the claimant by way of damages for breach of contract is £15,398.65.

Employment Judge McDonald
Date: 2 February 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
9 February 2024

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2405912/2022**

Name of case: **Mr I Phillips** v **Applied Corrosion Monitoring Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 9 February 2024

the calculation day in this case is: 10 February 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.