



EMPLOYMENT TRIBUNALS

Claimant: Mr A Reeve

Respondent: Tradelink Direct Limited

Heard at: Cambridge by a hybrid hearing

On: 8 August 2023

Before: Employment Judge Davey

Representation

Claimant: In person

Respondent: Mr Kohanzad (Counsel)

Judgment having been sent to the parties on **14 September 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Request for reasons

1. The request for reasons was made on 15 September 2023. I did not receive that request until 31 January 2024. A copy of the paper bundle and witness statements used in the hearing were not made available to me until mid-March 2024. Consequently, there has been a delay in providing these reasons and I apologise to the parties for the inconvenience caused.

Introduction

2. By a claim form dated 24 December 2021, the claimant, Mr Andrew Reeve, presented a claim for unauthorised deductions from pay (pertaining to unpaid bonuses totalling £900 for the period September 2021 – November 2021).
3. By a defence form dated 20 March 2022, the respondent resisted these claims. The respondent's position was that the relevant bonus scheme was entirely discretionary and as such, it was entitled to suspend the scheme and/or withhold bonuses.
4. There was a case management preliminary hearing on 6 October 2022, before EJ Leverton. The claim was amended to include unauthorised deductions from pay with reference to bonus payments between March

2020 and July 2021. The list of issues was agreed and standard case management orders provided.

The hearing

5. At the outset of the hearing, Mr Kohanzad sought to reverse the amendment of the claim granted by EJ Leverton on 6 October 2022, at the preliminary hearing. The Record of a Case Management Hearing, sent to the parties on 23 October 2022, does not expressly deal with the amendment application. However, the list of issues includes the period between March 2020 and July 2021 and the respondent was given permission to amend its response, both indicative of the granted amendment.
6. Mr Kohanzad's argument for seeking to reverse the amendment was that the claimant had waived his rights to any bonus prior to the reintroduction of the scheme so essentially, this claim was bound to fail.
7. The claimant resisted this application and wanted the full claim, as amended, decided on the evidence at the hearing.
8. I refused to reverse the amended claim and agreed the full claim should be heard on the evidence. Applying the principals in ***Selkent Bus Company Limited v Moore***, I considered the injustice and hardship to the claimant in allowing the respondent's application to reverse the amendment verses the injustice and hardship to the respondent in refusing it. I concluded the balance of prejudice weighed in favour of the claimant. The respondent has been represented throughout and had an opportunity to resist the amendment application at the case management hearing or challenge the decision to allow the amendment soon thereafter. Further, the claimant has prepared his case based on the amended claim.
9. There were no other preliminary issues. The respondent did confirm that contrary to what is noted on the tribunal file, there has been no amended ET3.

The issues for the tribunal to decide

10. The issues were agreed by the parties at the preliminary hearing on 6 October 2022 and are as follows:
 1. Was the respondent's bonus scheme contractual? If so, what were the terms (whether express or implied by custom and practice) relating to the amount payable each month, the suspension of the bonus scheme, and the withholding of bonus payments for individuals.
 2. Was the respondent in breach of any of those terms by:
 - 2.2 Suspending the scheme from March 2020 to August 2021.
 - 2.3 Withholding the claimant's bonus payments for September and October 2021.

3. If the bonus scheme was wholly discretionary, or, if there was a discretion to the amount payable under it, the suspension of the scheme or the withholding of payments, was the respondent in breach of any implied term of trust and confidence or the duty not to exercise its discretion in a manner that is irrational or perverse by:

3.1 Suspending the scheme from March 2020 to August 2021.

3.2 Withholding the claimant's bonus payments for September and October 2021.

4. Do any deductions that took place more than three months before the claim was submitted form part of a series of deductions?

5. If there have been unauthorised deductions from wages, how much is the claimant owed? The claimant argues that his personal targets under the scheme were varied and that as a result he would have received the full bonus amount of 10% during the relevant period.

Applicable law

11. S13 Employment Rights Act 1996 (ERA) provides as follows:

S13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) 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.

12. S23(3) ERA provides as follows:

S23 (3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

13. S27 ERA provides as follows:

S27 Meaning of “wages” etc.

(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...

14. *Coronavirus Act 2020 Functions or Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction* was made on 15 April 2020. This set out the directions for how the Coronavirus Job Retention Scheme (CJRS) would operate.

15. ***Selkent Bus Company Limited v Moore [1996] ICR 836*** the Employment Appeal Tribunal (EAT) set out the test to be applied by a tribunal in deciding whether to exercise its discretion to grant an amendment. It said the tribunal should consider all the circumstances of the case and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

16. ***Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) 1998 1 WLR 896, HL*** held that contractual terms relating to bonuses should be interpreted to convey the meaning given by ‘a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’.

17. ***Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA 2010 IRLR 715, CA*** is a Court of Appeal case relating to a formula based bonus arrangement. The employer held the scheme to be discretionary, but the Court of Appeal (CA) disagreed, in the CA’s view, the bonus clause reflected the language of entitlement, as seen from phrases such as ‘you will... be eligible’ and ‘the above table is applicable to your 2008 bonus’.

18. ***New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA*** involved distinguishing between contractual and discretionary payments. The CA held that for a payment to fall within the definition of wages ‘properly payable’ there must be some legal entitlement.

19. ***Murphy and ors v Enterprise-Liverpool Ltd ET Case No.2101706/06*** confirmed that if bonus entitlement is contractual and payment is based on performance based targets, then the worker is entitled to payment if the targets are met.

20. ***Clark v Nomura International plc 2000 IRLR, 766, QBD*** if a bonus is discretionary, the test is whether the employer acted irrationally or perversely in exercising its discretion.

21. ***Pendragon plc v Jackson (No.2) EAT 108/97*** it was held a discretionary bonus scheme was non-contractual because it was clearly stated in a term of the scheme.
22. ***Abrahall and others v Nottingham City Council and another [2018] IRLR 628, CA*** dealt with unilateral variations. To continue to work following a contractual pay reduction could constitute acceptance of the variation to the contract, but continuing to work would not always be treated as acceptance. Whether there was acceptance to a variation would depend upon the inferences that could be drawn from the circumstances of the case.
23. ***Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT*** implying a variation is a 'course which should be adopted with great caution' the judgment went on to say 'if the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed.'

Evidence

24. There were three witness statements (the claimant, Mr Peter Ginns and Mr Gary Kempster). The claimant confirmed Mr Kempster was not attending so I gave his witness statement limited weight.
25. I heard oral evidence from the claimant and Mr Ginns, finance director at the respondent.
26. I had a paper bundle numbering 262 pages. Where I have referenced documents in the bundle, I have used the relevant page number.

Finding of facts

27. The relevant facts are set out below. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. Most of the factual issues were not disputed.
28. The claimant was employed by Tradelink Direct Limited as an IT notes and Web Developer between 5 September 2016 until 31 October 2021. The claimant tendered his resignation on 4 October 2021 and worked a 4 week notice period.
29. The respondent is a manufacturer of windows and doors and is based in Cambridgeshire.
30. The claimant's annual salary on commencement was £32,000. This was increased to £35,000 following the satisfactory completion of a 13 week probation period. In addition, he was entitled to participate in a performance pay scheme providing a maximum of 10% of his annual salary. This was payable monthly.

31. The performance pay scheme was referenced in the claimant's offer of employment letter dated 12 August 2016 (28):

'Performance pay: After an initial 13 weeks, and the completion of a satisfactory probationary period you will be entitled to participate in a performance pay scheme equivalent to a maximum gross monthly reward of 10% of your basic salary'

32. The claimant's statement of terms and conditions of employment dated 5 September 2016 under the heading 'remuneration' states (33):

'Your salary is currently £32,500 per annum payable monthly in arrears. We pay by BACS. We will provide you with a detailed pay statement each month.

The company also operates a bonus scheme, subject to certain conditions which you will be eligible for after satisfactorily working your initial period of probationary service. Details will be provided to you separately.'

33. The claimant received a letter dated 2 December 2016, with the subheading 'End of 13 week initial probationary period' (50). With reference to his probation, he was told:

'I am pleased to inform you that this has been successful and your position with Tradelink will become permanent with effect from the 5th December 2016. In accordance with our offer letter your salary will be increased to £35,000 with effect from the 5th December 2016 and you will be entitled to participate in a performance pay scheme equivalent to a maximum gross monthly reward of 10% of your basic salary.'

34. The company operated a number of bonus schemes applicable to different categories of staff which included factory staff, sales staff and management (44). The '3 KPI' scheme applied to 18 members of senior staff and management, including the claimant. The 3 KPI scheme was based on three elements (three key performance indicators), 2 of which were based on company performance and one on personal performance. The claimant was told the three KPI targets for each month at the beginning of that month. He was usually told if those targets had been achieved at the beginning of the following month and the percentage payable which would be paid at the end of that month e.g. an award for September would be paid at the end of October. Between December 2016 and November 2019, the claimant received monthly bonuses varying from 1.3% to 10% (51). The claimant told the tribunal that it was the respondent's prerogative to set the 3 KPI targets each month.

35. The claimant's salary was increased to £36,000 per annum in January 2018.

36. On or around September 2019, the claimant requested a pay rise from his line manager Mr Gary Kempster. In November 2019, the claimant was told this request was refused by Mr Peter Ginns. In lieu of a pay rise, the claimant's performance targets for bonus were amended by Mr Kempster to three personal targets to make it more achievable for the claimant to get a full 10% bonus. The new terms applied from November 2019 (with any bonus awarded being payable from December 2019). The claimant

received a 10% bonus each month between December 2019 and February 2020 (51). The respondent's position is that this was an agreement between the claimant and Mr Kempster and unknown to the respondent. I do not accept this, Mr Ginns, the finance director, would have had oversight of all bonuses paid to staff.

37. The government introduced the first national lockdown measures on 23 March 2020 to deal with the impact of SARS-Cov-2 infections in the community. Consequently, the respondent closed all operations and all staff, including the claimant, were placed on furlough. Mr Ginns told the tribunal that while there was no formal decision to suspend the scheme at this time, it happened naturally because all operations ceased and you cannot have a performance based scheme if there is no performance. He also confirmed there were no board meetings between February 2020 and September 2021 and that discussions about the respondent's bonus schemes were done at management level between him and Mr James Moody, the then managing director of the respondent. The respondent conceded that communications could have been better during this period.
38. It was common ground between the parties that the claimant received bonus payments as part of his furlough pay which was capped at £2,500 per month in accordance with the terms of the Coronavirus Job Retention Scheme. The claimant's oral evidence was that he was paid 80% of his monthly pay (£2,400) plus an average of his annual commission capped to £2,500.
39. The respondent reopened in May 2020, with some employees returning from furlough. The claimant remained on furlough until 1 November 2020.
40. Following the claimant's return from furlough on 1 November 2020, he asked Mr Kempster about the 3 KPI scheme and was told the respondent had ceased its bonus schemes with no time scale for reintroduction. The claimant told the tribunal that the bonus payments that had been detailed on his pay slips during furlough disappeared from December 2020 (his October 'bonus' while on furlough appearing on his November pay slip). The claimant conceded that other than a few verbal conversations with Mr Kempster he did not follow up the suspension of the 3 KPI bonus scheme until August 2021.
41. By an email sent to Mr Ginns on 9 November 2020, the claimant raised a grievance regarding underpayment for five bank holidays during furlough. The respondent paid these at 80%. The claimant contended he was entitled to be paid 100% for the five bank holidays. The grievance followed an unsuccessful attempt to resolve the matter informally. The claimant then sought legal advice which confirmed his entitlement and so he raised a grievance. Mr Ginns responded on 10 November upholding the grievance and confirming the outstanding balance of £115.38 would be added to his pay for November (69).

42. The claimant's oral evidence to the tribunal was that the respondent suspended his bonus payments from December 2020. He received his last bonus for October 2020 (while on furlough leave) in November 2020. The claimant said "I did not object to the suspension of the bonus at that time". He also stated, with reference to the suspension "I was unhappy, but willing to accept it, I thought everybody was in the same position, if I had known employees were being treated differently, I would have taken a different line much earlier".

43. When asked why he did not challenge the suspension at an earlier stage, he stated he feared raising entitlement at the time due to retaliation from the respondent. He also said he did not realise he had a contractual entitlement to a bonus at the time.

44. By an email dated 28 April 2021, the claimant was informed he would receive a one-off bonus of £500 (46). An extract of the letter stated:

'During the last 12 months our business has faced tremendous challenges and disruption. Certain members of staff have played a pivotal role in our recovery, by working from our premises at times of uncertainty and/or going the extra mile. Unfortunately, the pressures we face from the wider floundering economy had not afforded provision for staff related performance pay in the usual way.

I confirm you are considered one of these individuals and we would like to acknowledge your hard work and dedication in the last 12 months by making a special payment of £500. This has been added to your April 2021 salary and is subject to statutory deductions. The one-off payment is simply meant as a thank you recognition of a job well done.'

45. It is common ground between the parties that the April 2021 bonus was discretionary.

46. Around July 2021, the claimant saw an advertisement for HGV drivers with the respondent and noticed there was a reference to a bonus scheme as part of remuneration.

47. By an email to Mr Ginns dated 6 August 2021 (71), the claimant stated:

Hi Peter

I'm sure I'm not the first to ask, but please can you enlighten me on the company's plans to resume bonus payments.

Thank you

Andrew

48. The claimant did not receive a reply so on 13 August 2021 (72), he raised a grievance:

Hi Peter

I'm disappointed that you have not even acknowledged my email of last Friday regarding the company's plans for resumption of bonus payments. In the circumstances I feel that I have little option other than to use the company's formal grievance procedure.

Andrew

Mr Ginns responded (72):

Hi Andrew,

I did not receive your e-mail and have requested an answer for you. To date I have no update to give you but I expect I will have one soon.

Kind regards,

Peter G.

49. The claimant attended a grievance hearing on 15 September 2021 and was told by Mr Ginns at the hearing and in a letter dated 22 September 2021, that the 3 KPI scheme would be reintroduced, with some modifications, from 1 September 2021 (75). The claimant did not appeal the outcome. The scheme was re-introduced, at the same time for all 18 employees included in the 3 KPI scheme.

50. By an email dated 16 September 2021, the claimant was sent details of the three KPI targets that had to be achieved in September 2021. Two of these targets were company based and one was personal to the claimant (76-77).

51. By an email dated 30 September 2021 (76), the claimant was told:

I am pleased to advise you that the two company targets were achieved and having achieved your personal KPI targets you will receive a bonus of 10% of your September salary with your October pay.

The email went on to set the three KPI targets for October.

52. The claimant conceded in evidence that at no point during his period did he seek to get his bonus backdated and the language used was one of reinstatement and/or resumption of the 3 KPI scheme.

53. Mr Ginns told the tribunal that to promote efficient production the respondent started to reintroduce the different bonus schemes from May 2020. The 3 KPI scheme, affecting 18 employees, was the most expensive and was the penultimate scheme to be reinstated and the reason was the cost and requirement to get production levels to full capacity. Mr Ginn's evidence was that the schemes were only gradually reintroduced due to the economic uncertainty caused by the pandemic. He conceded that this did not impact significantly on the respondent albeit this was not evident at the time decisions were taken and only with the benefit of hindsight.

54. The majority of the respondent's bonus schemes, including the 3 KPI scheme were reintroduced between June and September 2021 (44). The

last scheme to be reintroduced, was in January 2022. Mr Ginn's evidence, which I accept, was that this scheme applied to only a small number of employees. The reintroduction of relevant bonus schemes commenced at an earlier stage for lower paid staff with a graded system of reintroduction for staff on higher salaries (44).

55. The claimant submitted his resignation on 4 October 2021 (56), this expired on 31 October 2021 and his last working day was 29 October 2021 (a Friday).

56. On or around 11 October 2021, Mr Ginns informed the claimant that support for the intranet systems was being contracted to an external company and the claimant would be expected to support a handover during his notice period. The claimant's evidence, which I accept, was that he had four handover meetings with the external company and had updated relevant documentation. There was a final meeting planned which the external company kept postponing until the only time he could do the meeting was the morning of his last day, which was 29 October (having booked annual leave in the afternoon).

57. On 28 October 2021, the claimant received his P45 and final pay slip. The claimant did not receive his bonus for September. The claimant thought this was deliberate. The respondent's position was this was an error. To the extent it is relevant, I prefer the evidence of the claimant because the respondent provided no contemporaneous evidence to support the alleged error.

58. The claimant left the respondent early on 29 October 2021, without doing a final handover and sent an objectionable acrostic email saying goodbye to some colleagues (57). The email read as follows:

First, thanks for the good memories even if they are a lot fewer recently
Under pressure, not any longer
Change is constant, and only going to get more frequent
Karma is an interesting concept
Tell them what you really feel, don't hold back
Ride off into the sunset, like at the end of a good western
Acrostics are fun
Don't pay attention to what they say, only what they do
Expect the unexpected, like not getting paid properly in your last salary
Life, whilst it may feel a long, it was only five years
I'm not a number, I'm a free man (google it, youngsters)
No looking back, always move forward, it will be for the best
Kindly turn out the lights if you're the last one to leave

59. Following this conduct, the respondent said it would not pay the September bonus. By a letter dated 1 December 2021, the claimant was told he had qualified for the full 10% in October but that this was also being withheld and that the respondent was entitled to do this because the scheme was 'discretionary' (65). This was the first time the respondent described the 3 KPI scheme as discretionary in written correspondence.

Submissions

60. The claimant's position is that the 3 KPI scheme, though performance based, was contractual and consequently, the suspension of the 3 KPI scheme from March 2020 was unlawful. The claimant argues that he would have achieved a full bonus of 10% following the change to his targets in November 2019. The claimant's position is that the respondent made unauthorised deductions to his pay equivalent to £300 per month between March 2020 and September 2021. Following the reinstatement of the 3 KPI scheme from 1 September 2021, the claimant contends he was entitled to a full 10% bonus for September and October (payable in October and November) because the performance based targets were achieved in full and the respondent made an unauthorised deduction from his pay by withholding the bonus payments due to his conduct on 29 October 2021.
61. The respondent's position was that the scheme was wholly discretionary. As such the exercise of its discretion was limited to whether it acted irrationally or perversely in exercising its discretion by suspending the 3 KPI scheme between March 2020 and August 2021 and withholding payment from the claimant following the reinstatement of the scheme in September 2021, due to his conduct on 29 October 2021. The respondent further contended if the claimant did have a contractual entitlement to bonus, he had waived his rights by his acquiescence.

Conclusions

Was the respondent's bonus scheme contractual? If so, what were the terms (whether express or implied by custom and practice) relating to the amount payable each month, the suspension of the bonus scheme, and the withholding of bonus payments for individuals.

62. I find that the 3 KPI bonus scheme was contractual. My reasons are based on the following findings:
- a. The 3 KPI scheme is referenced in the claimant's offer of employment letter and in his particulars of employment. The language used in the claimant's offer letter and particulars of employment is one of entitlement (*Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank*). The relevant documents state 'you will be entitled to participate' (offer letter) and 'you will be eligible for' up to 10% of your annual pay (particulars of employment).
 - b. The terms of the scheme were performance based and fixed inasmuch as there were three key performance indicators (KPIs), which themselves were subject to shifting targets which were set by the respondent, in writing, at the beginning of each month. Confirmation of whether the targets had been achieved and at what percentage was also

confirmed monthly. If those targets were met, then the bonus was payable (*Murphy and ors v Enterprise-Liverpool Ltd*).

- c. There was no reference in any of the respondent's documentation to the scheme being 'discretionary' until after a decision was made to withhold the claimant's bonus in November 2021. Mr Ginns confirmed this in his evidence to the tribunal.

Did the respondent breach those terms by suspending the scheme in March 2020 until August 2021?

March 2020-October 2020

63. The government Coronavirus Job Retention Scheme (furlough) operated between 1 March 2020 until 30 September 2021. In accordance with the terms of the scheme, furlough pay was capped at £2,500 or 80% of wages (whichever was the lower). The claimant was on furlough between 23 March 2020 and 31 October 2020.
64. It was common ground between the parties (notwithstanding the dispute about the contractual status) that the 3 KPI scheme was performance based. The claimant's evidence, which I accepted, was that the scheme was varied by the respondent in November 2019, resulting in three KPIs which were personal to his performance. The claimant was not capable of performance under the 3 KPI scheme between March and October 2020 because he was on furlough.
65. The claimant earned £36,000 gross per annum, plus bonus. This equated to £3,000 gross per month, plus bonus. During furlough, the claimant was paid 80% of his wages (£2,400 gross) plus an average of annual commission (bonus), capped at £2,500 gross per month. The respondent did not 'top up' the claimant's wages while he was on furlough so the claimant's monthly income was £2,500. The claimant received the maximum entitlement to pay under the Coronavirus Job Retention Scheme while he was on furlough. His last bonus payment from this period was paid in his November 2020 salary.
66. In conclusion, I find that the respondent did not make an unauthorised deduction from the claimant's wages between March and November 2020 because the claimant was not performing under the scheme (as was a requirement of the 3 KPIs applicable at the time) and was paid his full entitlement to wages, being £2,500 which included bonus (a percentage of annual commission) during his furlough which ended on 31 October 2020. He received his bonus payment (from October 2020) in November 2020.
67. Turning to whether the respondent breached the terms of the 3 KPI scheme between March 2020 and October 2020 by suspending the scheme. Mr Ginns told the tribunal the scheme was automatically suspended due to the conditions of the pandemic. At the commencement of the first national

lockdown, the respondent closed and all of its staff were furloughed. The respondent reopened in May 2020. The claimant remained on furlough. My finding is that the 3 KPI scheme was fairly suspended for the claimant while he was on furlough because he was absent so not capable of achieving the 3 KPIs. Further, he was paid a portion of his bonus (based on a percentage of annual commission) as part of his furlough pay.

November 2020 – August 2021

68. I have found that the 3 KPI scheme was contractual. From the claimant's return on 1 November 2020, I find that the respondent breached the terms of the scheme by suspending it without the express agreement of the claimant. This was a unilateral variation of the contractual 3 KPI scheme.
69. The language used by the parties was that all the bonus schemes, including the 3 KPI scheme, were suspended, not terminated. So the breach is one of suspension and not termination.
70. The claimant's evidence was that the suspension of the scheme was first formally confirmed to him verbally by his line manager, Mr Kempster when he returned from furlough in November 2020. I accept this to be the case. The issue for me to decide is whether the claimant accepted the unilateral breach, being the suspension of the 3 KPI scheme, by his actions or lack of them thereof.
71. In the absence of an express agreement, the next question is whether agreement was implied between the parties taking into consideration all the circumstances of the particular case (***Abrahall and others v Nottingham City Council and another***). There is more likely to be an implied agreement where the impact of the variation is immediately felt, for example, where it relates to wages (***Jones v Associated Tunnelling Co***).
72. There was a conflict in the claimant's oral evidence about the reasons he did not challenge the suspension of the scheme earlier than August 2021. He stated he:
- was concerned about asserting his rights due to potential retaliation from the respondent,
 - was not aware of his rights at the time,
 - accepted the suspension (albeit this was subject to his presumption that the suspension of the bonus schemes applied to everybody).
73. I do not accept that the claimant feared retaliation, as evidenced by the fact he raised a grievance on 9 November 2020, for outstanding holiday pay after seeking legal advice. This was around the same time he discussed the suspended 3 KPI scheme with Mr Kempster. He also raised a grievance on 13 August 2021, when he did not receive a response to his earlier email

about the reinstatement of the 3 KPI scheme. This is not the behaviour of an employee that feared retaliation.

74. I do not accept the claimant did not know his rights. The claimant told the tribunal he accepted the suspension of the scheme at the time which suggests he understood he had a right to do this. He was also capable of obtaining legal advice (which he did in relation to his holiday pay) and raising grievances. I find the claimant was, on the balance of probability, aware of his contractual entitlement to bonus at the material time.
75. I find there was implied agreement on the part of the claimant to the suspension of the 3 KPI scheme. I have considered 'all of the circumstances of the present case' (***Abrahall and others v Nottingham City Council and another***) in my reasons set out below.
76. The claimant's evidence to the tribunal was that he accepted the change, albeit on a temporary basis. The scheme was suspended and not terminated so the change was temporary and not permanent.
77. If the claimant did not agree to the variation to the suspension of the 3 KPI scheme, he would have formally raised it with the respondent in November 2020, potentially via a grievance (as he did the holiday pay issue).
78. Following his return from furlough, the suspended 3 KPI scheme would have had an immediate practical effect on his pay, reduced by up to £300 per month (***Jones v Associated Tunnelling Co Ltd***). This was much more than the payment for the underpaid bank holidays of £115.38, which he did challenge. There was no reason why the claimant would have delayed raising an objection to the suspension of the 3 KPI scheme if he did not agree to it given the monthly reduction in his pay following his return from furlough.
79. The claimant received a discretionary bonus in April 2021. The letter confirming this bonus had been awarded made specific reference to the ongoing suspension of the bonus schemes. This was the first time the respondent had put anything in writing about the suspended schemes. The claimant could have raised his concerns about the ongoing suspension then but chose not to. This confirms that he still accepted the ongoing suspension in April 2021.
80. At no point between November 2020 and his email and grievance in August 2021, did the claimant protest about the suspension of the 3 KPI scheme.
81. Around July 2021, the claimant saw roles with the respondent for HGV drivers advertised with bonuses. He stated 'I realised that the company had reintroduced bonuses for at least some employees'. The claimant follows this up in two emails in August 2021. The language used by the claimant in his emails dated 6 and 13 August is to the 'resumption' of the 3 KPI scheme.

82. The claimant's evidence was that when he learned the respondent had reinstated some of its bonus schemes, his position changed, and he no longer supported the suspension. I accept that, in August 2021, he reconsidered his position in terms of the suspended 3 KPI scheme. My finding is that the claimant's reconsideration was that he no longer agreed with the ongoing suspension and wanted the 3 KPI scheme reinstated and not that the scheme, or bonus payments, should be backdated. His grievance, which followed on 13 August, is brief, it makes no reference to the other schemes which he suspected had already been reinstated. Crucially, it makes no assertion that the 3 KPI scheme should be backdated in line with the reinstatement of other schemes. The focus is lack of communication in relation to his email dated 8 August and reinstatement of the 3 KPI scheme only.
83. The claimant attended the grievance hearing and was told the 3 KPI scheme would be reinstated from 1 September 2021. This is confirmed in the grievance decision sent on 22 September 2021. The claimant did not appeal this decision and seek for the 3 KPI scheme to be backdated in line with other schemes operated by the respondent. My finding is that once the scheme was reinstated, he accepted this and moved on.
84. After the claimant left the respondent, he submitted a claim to the tribunal for bonus payments between September 2021 and November 2021. This is further evidence that he still accepted the suspension of the 3 KPI scheme between March 2020 and August 2021. The claimant first raised the issue of backdated bonus payments, at the case management hearing on 6 October 2022.
85. My finding is that the claimant accepted that the scheme was suspended between March 2020 and August 2021 from the time he learned about the suspension in November 2020 and throughout the remainder of his employment.
86. The above circumstances confirm there was implied agreement to the variation of the contractual 3 KPI scheme and that the claimant accepted, as he told the tribunal, the variation to the terms of the scheme, i.e. the temporary suspension of the scheme 'at the time' it happened (***Investors Compensation Scheme Ltd v West Bromwich Building Society [No.1]***). Having affirmed the contractual variation to suspend the 3 KPI scheme at the material time, it is not open to the claimant to change his mind after he left the respondent. The claimant has waived his rights in this regard.
87. The respondent did not make an unauthorised deduction from the claimant's wages between November 2020 and August 2021.

Did the respondent breach those terms by withholding bonus payments in September and October 2021?

88. The 3 KPI scheme was reinstated on 1 September 2021. The respondent confirmed in writing on 30 September 2021, that the claimant was entitled to a bonus of 10% because the three KPI based targets for September 2021, had been achieved. The respondent further confirmed in writing on 1 December 2021, that the claimant would have been entitled to a bonus of 10% as he achieved his targets in October 2021, but for his conduct.
89. There is nothing in the claimant's terms and conditions of employment or any other documentation that entitled the respondent to withhold the claimant's bonus following his conduct on 29 October 2021.
90. The 3 KPI scheme was 'contractual' and was based on formula linked performance targets. As the targets were met in September and October 2021, the respondent is liable to make payment in accordance with the terms of the scheme (*Murphy and ors v Enterprise-Liverpool Ltd*).
91. The respondent made an unauthorised deduction from the claimant's wages by failing to pay the full amount of wages earned between 1 September to 31 October 2021 (payable in October and November 2021). The claimant is entitled to unpaid wages totalling £600 gross.

Employment Judge E Davey

25 March 2024
Date _____

JUDGMENT SENT TO THE PARTIES ON

3 April 2024

FOR THE TRIBUNAL OFFICE

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>