EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR J BAILEY	AND	INDUSTRIAL CLEANING EQUIPMENT LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 21ST JUNE 2024

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR S WYETH (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

The claimant's claims of :

i) Breach of contract;

ii) Unlawful deduction from wages;

Are not well founded and are dismissed.

Reasons

1. By a claim form submitted on 11th December 2023 the claimant brings a claim of unlawful deduction from wages and / or breach of contract in the failure to pay a performance related bonus of £10,000 relating to the calendar year 2021.

2. The tribunal has heard evidence from the claimant, and for the respondent from Mr Mark Bresnihan CEO of the respondent. There are very few disputes of fact between the parties, and the determination of the claim depends principally on the dispute of interpretation, and application of the legal principles to those facts.

Facts

3. The claimant was employed by the respondent from 4th May 2021 as Head of Major and Key Accounts, which changed to Head of Key Accounts and Environmental, Social and Governance (ESG) in January 2022. As such he was part of the Senior Leadership Team (SLT). He resigned on 3rd July 2023 giving three months' notice to 3rd October 2023.

4. The respondent has a bonus scheme policy which applies to all staff below senior leadership level. This scheme provided for the payment of discretionary bonuses provided both the individual and company hit their respective financial targets. It is not in dispute that this did not apply to the claimant, or any other member of the SLT. There was no contractual scheme or policy that applied to any member of the SLT, and any bonus paid to any member of the SLT was entirely non-contractual and discretionary.

5. In mid-January 2022 Mr Bresnihan and the claimant met for his annual review, during which it was orally agreed that the claimant would receive a bonus of £10,000, made up of a 2021 Q4 bonus of £6,000, and £4,000 annual performance bonus. In late January 2022 the claimant asked for this to be put in writing for the purposes of a mortgage application, and it was confirmed by a letter dated 1st February 2022, which stated that it would be paid in the February payroll. The bonus was not paid in the February payroll, nor at any other point prior to the termination of the claimant's employment.

6. The respondent's evidence, which is not disputed, is that after the meeting in January queries were raised about the accuracy of the 2021 accounts which resulted in Daniel Chown (Head of Finance) sending an email on 28th March 2022 stating that there were concerns that the 2021 figures were not accurate, and that no 2021 bonuses would be paid until the 2021 accounts were finalised in April.

7. In fact the final accounts showed an approximately £1 million shortfall against budget targets, which resulted in a deal for the sale of the business (Project Tulum) not proceeding. The respondents' evidence is that as a result the SLT agreed that no

bonuses would be paid for 2021. In support of this they have adduced an email from Lee Owen, confirming that this was his understanding and that the position had been agreed at a Leadership Team Meeting (LTM) in 2022, but that he could not remember which one; and an email from Julie Kitchener to the same effect. A reply was not received from Ricky Smith, and by that point Daniel Chown had left the business. The respondent asserts that as a member of the SLT the claimant either agreed with this decision, or at least acquiesced in it, in that at no point between January 2022 and September 2023, when the claimant first raised the issue in an email with Mr Bresnihan, did the claimant ever raise the issue of the 2021 bonus, or assert any right still to receive it.

8. The claimant does not accept this. He contends that there is no record of any formal agreement in the monthly LTMs that no bonuses would be paid for 2021. His understanding was that payment was deferred until such time as the respondent was in a position to pay the bonus, but not that it had been decided never to pay any bonuses for 2021. If it had, he had never agreed to it.

9. There is no evidence before me, that the agreement of the SLT not pay any bonus for 2021 is recorded or evidenced in writing. Equally however the claimant has not called Ricky Smith or Daniel Chown, and there is no evidence supporting the claimant' s position that there was no such agreement. In respect of Mr Chown, the claimant cross-examined Mr Bresnihan on the basis that after Mr Chown left the business there was litigation which resulted in a settlement, which included payment of the 2021 bonus. Mr Bresnihan's position was that he couldn't answer as the agreement included a confidentiality clause. As I indicated to the parties orally, even if the claimant is correct this is not something from which I could draw any inference. Firstly it is clear that Mr Chown was not paid a 2021 bonus whilst he was still in employment, and secondly settling litigation involves considerations which go beyond the exercise of a discretion to pay a bonus to the SLT. In the end on the basis of evidence before me, it is clear that the respondent is correct, and that no member of the SLT received a 2021 bonus, at least whilst in the respondent's employment, and before the termination of the claimant's employment in October 2023.

10. The respondent also relies on the fact that the claimant received a £5,000 bonus in October 2022, and an agreed bonus of £15,000 for 2022 which was paid in early 2023. The respondent submits that it must have been clear at least early 2023, even if the claimant had not understood it before, that bonuses for 2021 were not going to be paid and that the respondent had moved on to 2022. If the claimant genuinely thought that the 2021 bonus was still outstanding at either point, it submits that it is inexplicable that he did not raise it at either point.

11. The claimant accepts that he did not raise the issue until September 2023, but states that there was nothing about which to complain. He had a concluded agreement for the payment of the bonus, and was just waiting for the businesses cash flow to improve sufficiently to pay it.

Issues

12. At the commencement of the hearing it was agreed that the claim raised the following issues:

i) Did the oral agreement of January 2022, as recorded in writing in February 2022, create a binding contractual agreement to pay a £10,000 bonus;

ii) If so was that agreement varied by consent by the claimant's agreement to and / or acquiescence in the decision not to pay a 2021 bonus to any member of the SLT;

iii) If there was no binding agreement, but simply agreement as to the amount of any discretionary bonus; did the respondent lose the discretion to subsequently pay a smaller or no bonus?;

iv) And/or if it retained a discretion, was the discretion exercised irrationally or perversely?

Binding Contractual Agreement.

13. The respondent submits that there cannot have been, and the claimant could not have reasonably understood that, there was any binding concluded agreement to pay the £!0,000. Firstly the claimant accepted in cross-examination that that any previous employer would only have paid a bonus based on the audited finalised annual accounts. Given that the accounts had not, at the stage of his meeting with Mr Bresnihan, been audited or finalised it follows automatically that there cannot have been, and the claimant cannot have believed there to have been, any binding contractual agreement. Secondly the claimant does not dispute that he had no contractual right to any bonus at all. He cannot, and he could not reasonably have believed that he had acquired a contractual right to a bonus, or a bonus of any particular amount simply because of his discussion with Mr Bresnihan. Finally, at best it is a unilateral offer, and on a classical contractual analysis, whilst there may have been offer and acceptance, there was no consideration and the discussion cannot have resulted in a contractually binding agreement.

14. The claimant asserts that there was a binding contractual agreement. Firstly, whilst he accepts that his previous employers would not have paid a bonus before having the audited accounts, that did not stop the respondent from doing so, and is precisely what Mr Bresnihan agreed. As is evidenced by the letter, the bonus would have been paid in January if the meeting had been held earlier, and the respondent knew that he needed the letter for the purposes of a mortgage application, and confirmed that it would be paid in February. Both dates were prior to the auditing/finalising of the accounts, which necessarily means the respondent had agreed to pay the bonus prior to that point. He had, therefore a concluded agreement to pay the bonus prior to the finalising of the accounts, which was not dependant on the accounts being finalised, and the respondent did not retain any discretion not to pay the bonus.

15. There are a number of authorities as to the question of consideration for a unilateral variation of contract. The position was summarised in GAP Personnel Franchises Ltd v Robinson UKEAT 034/2007 in which HHJ Clark stated "*In my view it is generally*

accepted law that consideration for a variation in the terms of a contract of employment is mutually provided by the employer continuing to employ the employee and the employee continuing in that employment." However, the context in that and other similar cases is that the unilateral variation is to the employee's detriment, whereas in this case the variation the claimant relies on is a one off payment by the respondent to his benefit. However, I cannot see any reason why different principles should apply, and it follows that the respondent is bound in the same way an employee would be. If this is correct it follows that on classical principles there was offer, acceptance and consideration and the claimant had acquired a contractual right to be paid an agreed bonus of £10,000 in February 2022.

Variation of Contract

16. If that is correct, and there was a contractual variation in the claimant's favour, that automatically leads to the question of whether there was a subsequent variation in favour of the respondent. The question, is as set out by Elias J in Selectron Scotland Ltd v Roper 2004 IRLR where he held that the fundamental question was whether "*the employee's conduct by continuing to work is only referrable to his having accepted the new terms imposed by the employer*" and "*That may sometimes be the case. For example if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either to refuse to implement it, or make it plain that by acceding to it they are doing so without prejudice to their contractual rights*" (My underlining)

17. In addition in Abrahall v Nottingham City Council 2018 IRLR 628 Underhill LJ held: "*First and foremost the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in Selectron used the phrase "only referrable to". That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively clearly eventually evinces the intention to do so. To put it another way the employees should have the benefit of any (reasonable) doubt*." *(My underlining)*

18. The question for me therefore is whether the claimant by his conduct has, "viewed objectively clearly evince(d) an intention" to accept a significant diminution of his contractual rights, and that in assessing that question the claimant must have the benefit of any reasonable doubt.

19. The respondent submits that the claimant must be taken to have agreed to the contractual variation. As a member of the SLT he must have agreed to the subsequent decision not to pay the bonus. Alternatively he must at least have acquiesced in it as he at no point raised the issue despite two subsequent bonuses being paid. The only explanation for that must be that claimant knew full well that a decision had been taken not to pay a 2021 bonus and had accepted that position.

20. In my judgment the respondent must be correct about this. Firstly there is no dispute that the bonus related to the mutually understood achievement of the 2021 targets, which subsequently proved incorrect. The bonus was, therefore, an agreed bonus for the achievement of specific targets which had not in fact been achieved. It appears to me to follow, and is certainly on the balance of probabilities the best explanation for the claimant's failure to raise the issue at any point prior to September 2023, that the claimant understood that the right to that payment had been lost. It follows that there had been a contractual variation by which the contractual right to that payment had been lost. Just as with the creation of the contractual right the consideration was that identified in paragraph 15 above.

21. Even if I am wrong about that, on any analysis the contract had been varied in that the claimant, on his own evidence, accepted that he had lost the contractual right to receive the payment in February 2022, and had agreed that it would be paid at an indeterminate date in the future when the respondent was able to, and considered it appropriate to do so. The evidence is clear that the respondent had never taken the decision to pay a 2021 bonus to any of the SLT. If this is correct the right to receive the payment, had on the claimant's own evidence not eventuated; and it follows automatically that there can have been no unlawful deduction from wages at any point between February 2022 and September/October 2023; and equally that there was no contractual breach outstanding on termination. On either basis the claim is bound to fail.

22. In my judgment, the only basis on which the claim could succeed, even on the claimant's case is that the agreed contractual variation was that the payment was deferred either until the respondent considered it was able to, and it was appropriate to pay, or the contract of employment came to an end, whichever was sooner. The difficulty for the claimant is that there is no evidence of, and nobody suggests that there was, any such agreement.

23. For the reasons given above the claim is bound to fail as a claim for either breach of contract and/or unlawful deduction from wages on the basis that the claimant had no contractual right to receive the payment.

Irrational / Perverse Exercise of Discretion

24. In my judgment if the issue has assumed contractual force, and was the subject of contractual variation which for the reasons set out above in my judgment it had, it follows that the question of the exercise of the discretion falls away; as the question no longer involves the exercise of a discretion. However, in the event that I am wrong in the analysis set out above I will go on to consider the situation on the basis that there was no contractual agreement and/or variation, and on the assumption that the payment of the bonus was and remained wholly discretionary.

25. The first question is whether, having agreed to pay a bonus in principle, and agreed the amount and a payment date, the respondent retained a discretion not to pay the bonus. In my judgment on the assumption that a concluded binding agreement had not been reached (which for the reasons given above I will assume in considering the claim put on the basis that it was still a discretionary bonus) the respondent must have retained a

discretion. In my judgment if the bonus remained discretionary, and did not achieve contractual force then the respondent necessarily retained a discretion not to pay the agreed amount.

26. However, even where a bonus is entirely discretionary, the exercise of the discretion must not be irrational or perverse (see *Clark v Nomura International plc 2000 IRLR 766, QBD*,. and *Horkulak v Cantor Fitzgerald International*). However the test is not one of reasonableness (See *Humphreys v Norilsk Nickel International (UK) Ltd 2010 IRLR 976, QBD*). In this case the claimant did not seek payment of the bonus until September 2023 and does not contend that the decision not pay it was irrational or perverse prior to that point. It appears to me that that must be correct. The reason given for the withdrawal of the bonus is clearly rational, in that the basis upon which it was agreed transpired to be wrong, and related to an understanding as to the company's financial performance which turned out to be incorrect.

27. It follows, in my judgment, that the issue is whether it was irrational or perverse not to pay the bonus upon the claimant giving notice. In other words that it was irrational or perverse not to pay in circumstances in which if it were not paid the claimant would lose any right ever to receive it. Although the claimant contends that he was not aware of it, the respondent submits, and as set out above, there is evidence in support in the bundle, that it had taken a decision not pay any 2021 bonus as the conditions which led to the decision to award a bonus no longer applied. I accept Mr Bresnihan's evidence that this decision had been taken, and the reasons for it are clearly not perverse or irrational.

28. It follows that even if I am wrong in the contractual analysis set out above, and it remained a discretionary payment, the decision not to pay the bonus was not perverse or irrational; and that a claim based on the exercise of the discretion would also necessarily fail.

29. It follows that in my judgment, however it is put, the claimant's claim must be dismissed.

Employment Judge Cadney

Dated: 8th July 2024

Judgment entered into Register

Copies sent to the parties on
26 July 2024

Jade Lobb
For Secretary of the Tribunals