EMPLOYMENT TRIBUNAL

Claimant: Mr. A. Anastasiou

Respondent: Fullers Family Law Ltd.

Hearing: Final Hearing

Heard at: London Central ET (via video/CVP)

On: 27 September 2024

Before: Employment Judge Tinnion

Appearances: For Claimant: Mr. S. Harding, Counsel
For Respondent: Mr. J. Feeny, Counsel

JUDGMENT

1. The Claimant has not established that his employment contract (a) contained a term requiring the Respondent to calculate the contractual bonus referred to in clause 11.1 of his employment contract by reference to the Respondent's financial year (1 April – 31 March), or (b) properly construed, required the Respondent to calculate any contractual bonus entitlement by reference to the Respondent's financial year.

2. The Claimant's claim under s.13 of the Employment Rights Act 1996 that the Respondent made an unauthorised deduction from his wages by not paying him on or around 30 April 2024 a bonus in the sum of £9,607.86 calculated using the reference period 1 April 2023 – 31 March 2024 is not well founded and is dismissed.

REASONS

Claim

3. By an ET1 and Particulars of Claim presented on 17 July 2024 [4-18], the Claimant (by then a former employee of the Respondent) presented a complaint alleging (a) the Claimant's entitlement to a contractual, non-discretionary "*team leader fee earner*" bonus under clause 11.1 of his employment contract was calculable by reference to the Respondent's financial year (1 April – 31 March) (b) applying that period, in the financial year 1 April 2023 – 31 March 2024 the Claimant had earned a contractual bonus in the sum of £9,607.86 (based on his billing target and billing income that year) which, in breach of contract, the Respondent had not paid him when due on 30 April 2024 (first wage payment date after end of that financial year).

4. By its ET3 and Grounds of Resistance [23-33], the Respondent accepted clause 11.1 of the Claimant's employment contract set out a contractual, non-discretionary bonus scheme which had been in place since he joined its employment on 12 December 2022. The Respondent denied the correct reference period for this bonus (**Bonus Reference Period**) was its financial year, contended the correct reference period was the Claimant's annual work anniversary (12 December – 11 December), contended that the Claimant had not exceeded his billing target to receive that bonus using that reference period (12 December 2022 – 11 December 2023), and on that basis denied a bonus was due to him. The ET3 also raised a jurisdiction/time point.

5. Quantum in this case was not in dispute: the Respondent accepted if the Claimant was right about the Bonus Reference Period (1 April 2023 – 31 March 2024), the Claimant had earned and was entitled to be paid a bonus of £9,607.86 which it had not paid him (and no time point arose); the Claimant accepted that if the Respondent was right about the Bonus Reference Period (12 December 2022 – 11 December 2023), the Claimant had not earned the contractual bonus in that period, and even if he had, any claim for it had been presented out of time.

Final Hearing

6. The final hearing was on 27 September 2024. Both parties were legally represented. The Claimant gave evidence, as did Respondent witness Ms. J. Green (Respondent's Operations Director since August 2020). The Tribunal was satisfied both sought to assist by giving their honest, best recollection of events. A bundle of approximately 640 pages was relied upon (references in square brackets are to that bundle). Both parties submitted skeleton arguments, supplemented by closing oral submissions. Judgment was reserved.

Findings of fact

7. The Tribunal makes the findings of fact below and any contained in the other sections of this Judgment on the civil balance of probabilities.

8. The Respondent is a solicitors firm based in London which specialises in family law. The Claimant is a qualified solicitor, who had previously worked for the Respondent as a locum solicitor between October 2017 and July 2018.

9. In the summer of 2022, the Respondent approached the Claimant to join it. They negotiated [35-36] and agreed a contractual bonus scheme for the Claimant equating to a payment representing 30% of all fees received over 3 times the Claimant's annual salary [43]. During those negotiations, the Claimant established that the Respondent's financial year ran from 1 April to 31 March. The Claimant and Respondent neither discussed nor agreed what 12 month reference period would be used to calculate the Claimant's potential annual contractual bonus entitlement.

10. In October 2022, the Respondent sent the Claimant a 21-page written employment contract [45-66] containing 48 clauses, which the Claimant signed on 27 October 2022 [66] and a representative of the Respondent signed on 15 November 2022 [65].

11. Clause 2.1 of that contract stated the Claimant's start date and period of continuous employment began on 12 December 2022. Clause 2.23 contained an 'entire agreement' clause. Clause 2.4 stated its terms and conditions superseded any previous arrangements whether oral or written between the Claimant and the Respondent. Clause 3.1 stated the Claimant's job title was Associate Director/Team Leader. Clause 10.1 stated the Claimant's salary was £90,000 per annum, which clause 10.2 stated would normally be paid monthly in arrears. Clause 14.1 stated the Respondent's holiday year ran from 1 April to 31 March.

12. Clause 11 of the Claimant's employment contract set out the terms of two bonus schemes the Respondent operated, one having contractual effect, the other a non-contractual discretionary bonus, in the following terms:

    "*11.1. As part of your remuneration, you are entitled to be included in an annual team leader fee earner bonus scheme which is intended to reward your contribution to the Firm. This will be based on an attributable paid fee income target of 3 x your salary. You will receive 30% of income you bring in above this target threshold.*

    11.2 We may also at our discretion operate a non-contractual profit related bonus scheme that may be withdrawn or be changed at any time and does not form part of your contract of employment or imply any future obligation to make further bonus payments.

    11.3 Under no circumstances will you receive any discretionary or fee earner bonus should you either be working out your notice or leave our employment for any reason, prior to the date notified to you of any such payment.

    11.4 Any bonus payments will be subject to PAYE and National Insurance deductions."

13. On 12 December 2022, the Claimant started working for the Respondent as a solicitor running his own caseload. It is not in dispute that in his first year of employment (12 December 2022 to 11 December 2023) the Claimant did not generate a fee income in excess of 3 times his annual salary (ie, above £270,000). It is not in dispute that he did not raise the issue of a potential annual bonus payment under clause 11.1 in December 2023, nor did the Respondent raise that issue with him then (eg, to tell him he had not earned the contractual bonus in his first year of employment because his fee income had not exceeded the target).

14. By letter dated 22 May 2023 [67], the Respondent notified the Claimant that the outcome of his salary review was that his salary would remain £90,000 per annum.

15. On 11 June 2023, the Claimant successfully passed his 6 month probationary period.

16. By email on 30 July 2023 [70-71], the Respondent notified the Claimant he would be paid £877.93 under its non-contractual bonus scheme for the quarter April to June 2023.

17. By email dated 15 December 2023 [73], the Claimant made inquiries regarding when updated reports would be available for October and November 2023, in response to which information regarding the Claimant's billings and receipts in October and November 2023 was provided by reply [72]. The Tribunal declines the Respondent's request to infer that these inquiries meant the Claimant knew at the time that his contractual bonus was calculated based on his receipts in his first year of employment – inquiries of this type were unremarkable, and in this case were equally consistent with the Claimant checking to see if he was 'on track' to generate a fee income in excess of £270,000 in the period 1 April 2023 – 31 March 2024.

18. On 15 January 2024 [75], Ms. K. Sayers (Respondent HR advisor) sent an email to Mr. A. Kendall (Respondent Finance Manager) in which she asked him to "*run the figures*" for three fee earners for bonus (including the Claimant), which stated (in relevant part): "*Alex – 12/12/2022 – 11/12/2023 his bonus is based on an attributable paid fee income target of 3 x your salary. You will receive 30% of income you bring in above this target threshold … Moving forward, I have asked [redacted] to add this to Bob, so we should be alerted at the year anniversary*." By email that day [74], Mr. Kendall replied (in relevant part): "*Alex – target £285,000 – attributable fee income paid £250,165 – no bonus payable*."

19. The Tribunal finds that this email exchange, which the Claimant was unaware of, set out the Respondent's genuine understanding and practice at the time regarding the method of calculating fee earners' contractual bonus entitlements, which was to calculate that bonus using a 12 month reference period starting from the relevant fee earner's start date. The Tribunal accepts the Respondent's evidence set out in the table at [353-355], which, broadly speaking, corroborates its case that it has historically calculated and paid solicitor and fee earner contractual bonuses (when due) based on a 12 month calculation period starting from the start date.

20. By February 2024, the Respondent had started an internal review of its bonus schemes to ensure they were fit for purpose and aligned with commercial incentives [76-81, 83-86]. On 15 February 2024, the Claimant was given an update of the review [82]. Those internal review discussions continued into April 2024 [96-99].

21. On 8 March 2024, the Claimant requested a breakdown of his fees billed since 1 April 2023 to date including receipts [90]. Information was provided [88] showing he had billed £271,668 and been paid £264,642. On 26 March 2024, the Claimant requested a further update [91].

22. On 26 March 2024, the Claimant sent an email stating he believed he had achieved his contractual bonus for the current financial year [92]. On 2 April 2024, Ms. Sayers sent an email to Mr. Kendall [103-104] asking him to run the figures for the Claimant's start date 12 December 2022 to 11 December 2023, stating she did not believe he had achieved the bonus in this period. By reply email [102], Mr. Kendall confirmed no bonus would be payable. By reply email [101], Ms. Sayers asked whether the Claimant would have been entitled to a bonus based on the Respondent's financial year. By reply email [100], Mr. Kendall stated the bonus payable would be £9,607.89.

23. On 18 April 2024 [106], the Claimant chased a response to his 26 March 2024 email. He queried whether it made sense for fee earner performance to be based on the

Respondent's financial year but for fee earner bonuses to be based on an entirely different time period.

24. On 26 April 2024, the Claimant was sent a copy of his final appraisal, which covered the period April 2023 to March 2024 [109-117].

25. On 7 May 2024, the Claimant sent a further email chasing a response to his 26 March 2024 email [118]. On 8 May 2024, the Respondent (Ms. J. Green) finally replied, stating the Respondent's working practice since it was established was to calculate the contractual bonus on the anniversary of the start date for individuals, and on that basis the Claimant had not met the threshold for a bonus to be paid since his fee income target in the period 12 December 2022 – 11 December 2023 was £285,000 (this was an incorrect figure) whereas the attributable fee income paid equated to £250,165.

26. The Claimant was dissatisfied with that response, and by email on 9 May 2024 raised a grievance [123]. On 16 May 2024, the Respondent corrected its error regarding the Claimant's fee target, noted it was £270,000, but noted the Claimant had not met that figure hence did not meet the threshold for a bonus to be paid [127]. On 21 May 2024, the Claimant raised a further grievance [138-142]. Following a grievance meeting on 28 May 2024 [153-177], Ms. Green sent the Claimant a grievance outcome letter [236-243] which stated (in relevant part) that the bonus reference period for solicitors and fee earners was calculated annually on the anniversary of their employment, and the Claimant had not been able to identify a specific term in his contract which the Respondent had breached [239-241]. The Claimant appealed [244-248], but his appeal was rejected [327-337].

Issues

27. The only issue in this case – which decides both the merits and whether the claim was presented in time - is narrow: was it a term of the Claimant's employment contract or the proper construction of that contract that the calculation of the Claimant's contractual bonus entitlement under clause 11.1 use the Respondent's financial year, which it is common ground was 1 April – 31 March?

Relevant law

28. Per Lord Neuberger in Arnold v Britton [2015] AC 1619 at paras. 15-22 (internal citations omitted):

> *15. When interpreting a written contract, the Court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" … And it does so by focussing on the meaning of the relevant words [ ] in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the*

time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions ….

16. *For present purposes, I think it is important to emphasise seven factors.*
17. *First, the reliance placed in some cases on commercial common sense and surrounding circumstances [ ] should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*
18. *Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.*
19. *The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made….*
20. *Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*
21. *The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.*

22. *Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention ….*"

29. The burden of proof rests on the Claimant to establish, on the civil balance of probabilities, a prima facie case. If, and only if, he does so, the burden of proof shifts to the Respondent to rebut that case.

Discussion / Conclusions

30. For the reasons set out below, the Tribunal finds that the Claimant has not established a prima facie case that a term of his employment contract (and/or the terms of that contract, properly construed) required the Respondent to calculate the relevant contractual bonus using its financial year as the bonus reference period.

31. First, it is important to note at the outset that neither party contended the Claimant's employment contract had been varied in any relevant respect after the Claimant joined the Respondent's employment in December 2022. So far as the Respondent's contractual obligations to the Claimant regarding the payment of this bonus were concerned, both parties accepted those obligations had not changed between December 2022 and April 2024. Hence what matters is what the parties agreed (or reasonably and objectively understood the other party by their words and conduct to have agreed) in 2022. Events after 2022, although not irrelevant, are at best of only limited assistance in construing the parties' original contractual intentions in 2022.

32. Second, it is not in dispute – and the Claimant accepted - that before he entered into his employment contract and commenced employment with the Respondent, he did not have any discussion with someone from the Respondent in which they (a) discussed the Bonus Reference Period for this bonus, or (b) agreed to use the Respondent's financial year as the reference period. This is not a case where there is any suggestion of a collateral contract regarding the Bonus Reference Period, nor is it a case in which there is any suggestion that the Respondent somehow misled the Claimant about the Bonus Reference Period – the issue was simply not discussed before the Claimant joined the Respondent.

33. Third, reviewing the Claimant's employment contract from beginning to end [45-66], it is clear that there is no express term in it which states the Bonus Reference Period is the Respondent's financial year or requires the bonus to be calculated over that period. It is common ground that there is no express term in the Claimant's contract which sets out any specific Bonus Reference Period for the bonus, an undoubted defect in the drafting on which the Claimant places reliance (see para. 40 below).

34. Fourth, it is not the Claimant's pleaded case that his employment contract contained an implied term requiring the Bonus Reference Period to be the Respondent's financial year. Had it been, that case would have faced difficulties: leaving aside the fact that the contract contained an 'entire agreement' clause potentially excluding all implied terms, while there clearly had to be a consistent 12 month reference period to calculate any annual bonus entitlement, there was no reason that reference period had to be any particular 12 month period (it could have been the Respondent's

financial year, it could equally have been the Claimant's annual work anniversary, it could equally well have been calendar year 1 January – 31 December).

35. Fifth, the Tribunal is satisfied that at the time the Claimant and Respondent negotiated and agreed the terms of the Claimant's contract in October 2022, the Respondent's practice was to calculate contractual bonuses using a 12 month reference period based on solicitor and fee earner start dates [353-355]. This fact was known by the Respondent, was not known by the Claimant, but was information reasonably available to him at the time – had he asked the question, he would have been told that, and there is no reason to think that if he had been told that, he would have been dissatisfied with that answer, or sought to renegotiate that part of the contract to provide for a different reference period.

36. Sixth, the Tribunal regarded the Claimant's contractually specified holiday year of 1 April to 31 March as irrelevant to the question of whether the parties had agreed that the reference period for the contractual bonus would be 1 April – 31 March. These are two different subject-matters.

37. Seventh, for similar reasons, the Tribunal was also unpersuaded that the Respondent's agreement to pay the Claimant the non-contractual, discretionary bonus referred to in clause 11.2 of his employment contract over particular periods was or might be probative or suggestive of an agreement to calculate the contractual bonus referred to in clause 11.1 based on the Respondent's financial year. These were two very different types of bonus scheme.

38. Eighth, the Tribunal concluded there was little probative value in the evidence that fee earners N. Ullah and M. Gohil-Patel had understood in 2024 that the reference period for their contractual bonus entitlement was the Respondent's financial year. It is relevant to note that neither fee earner had met their income targets to entitle them to a contractual bonus, so the issue was not 'tested' in either case.

39. Ninth, in April 2024 the Claimant placed weight upon the oddity of conducting the Claimant's annual performance review based on his performance over the Respondent's financial year but calculating the Claimant's contractual bonus over a different period, implicitly suggesting the two should go 'hand in hand'. The Tribunal would have accepted this point had the bonus in dispute been the discretionary bonus, however the bonus in dispute was contractual. The Respondent's duty to pay it had nothing to do with subjective assessments of the Claimant's performance over a period, and was solely based on an objective comparison of the financial targets set for the Claimant versus the financial outcomes reached.

40. Tenth, the Tribunal finds there is no ambiguity in the drafting of clause 11.1 or the other terms of the Claimant's employment contract – nothing in those terms arguably states or implies the bonus reference period is 1 April – 31 March.

41. Eleventh, applying the foregoing, the Claimant's claim for a bonus has not been presented in time as the date for any contractual bonus payment due would have been on or around 29 December 2023, the last working day that month.

42. It will be of no comfort to the Claimant, but the Tribunal accepts the dispute which has arisen is entirely of the Respondent's own making, arising from its failure to notify

the Claimant in writing at the outset of his employment what the contractual bonus reference period would be.

Signed (electronically): Employment Judge Tinnion

Date of signature: 27 November 2024

Date sent to parties: 3 December 2024

For the Tribunal Office: