

Neutral Citation Number: [2026] EAT 73

Case No: EA-2024-001049-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1st June 2026

Before:

BRUCE CARR KC
DEPUTY JUDGE OF THE HIGH COURT

Between:

MR P CHANDRASHEKARAPPA

Appellant

- and -

WIPRO LIMITED

Respondent

Fergus McCombie (instructed by Hatton James Legal) for the **Appellant**
Edmund Beaver (instructed by Eversheds Sutherland (International LLP) for the **Respondent**

Hearing date: 3 February 2026

JUDGMENT

SUMMARY

Unlawful deduction from wages

The Claimant appealed against a decision of the Employment Tribunal rejecting his unlawful deductions claim relating to a “kitty bonus” that had been introduced by the Respondent in March 2020. At the time of its introduction, the terms of the entitlement were explained to the Claimant as being up to 1% of the revenues from “new logo invoicing against first 12 months.... based on [Sector Lead] approval”. In due course, the Sector Lead approved a proposal from the Claimant’s line manager that he should receive the full 1% from a contract with John Lewis Partnership. After this had been done, the Sector Lead then indicated that he needed approval from higher up the management chain. In addition, the Respondent sought to apply a cap of \$150,000 on the Claimant’s entitlement.

The Tribunal accepted the Respondent’s argument that there was no legal entitlement created at the point at which the Sector Lead had first approved the bonus in full and that there was no entitlement until the actual declaration of a lower bonus based on the application of the cap.

The Tribunal erred in law in treating the Sector Lead’s view that further approval was required as determinative of the question of entitlement to the kitty bonus and by concluding that the cap could belatedly be introduced. On a correct analysis of the position, the Respondent had put forward terms under which the discretionary bonus would be awarded and which terms had been satisfied by the Claimant. It was not open to the Respondent to then ‘move the goalposts’ by attaching further conditions to his entitlement *after* the original terms had been outlined to him and after those terms had been satisfied.

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. I will refer to the parties using the titles that they held in the Employment Tribunal (“ET”).
2. The Claimant appeals from the Reserved Judgment of the Reading ET, sent to the parties on 24 June 2024. Under the terms of that Judgment, all of the Claimant’s claims against his former employer were dismissed. This appeal however relates to only one of those claims, namely that based on an alleged unlawful deduction from wages. The basis of that claim was that the Claimant contended that he was entitled to what was described as a “kitty bonus” as part of a Variable Pay Plan (“VPP”) which had been announced to staff at a presentation by the Respondent in March 2020. Whilst he had been paid a bonus, he alleged that he was entitled to a much greater sum.
3. The Claimant submitted a Notice of Appeal to this Tribunal on 12 August 2024. The appeal was considered at the sift stage by Mr John Bowers KC who, in a decision dated 4 December 2024, concluded that the matter should proceed to a full hearing as the grounds raised in the Notice of Appeal appeared to him to be properly arguable.

The claim brought in the ET

4. In his Particulars of Claim, presented to the ET on 4 January 2022, the Claimant alleged that in March 2020, the Respondent had made a presentation to him and his sales colleagues at which they had been told the terms of their bonus entitlement for the financial year April 2020 to March 2021. On his case, the sales team were told that they would receive in August 2021, a bonus of 1% of the year’s fees that had been invoiced to a relevant client over the course of the financial year. His case was that on 26 June 2020, a deal was completed with a particular client, John Lewis Partnership (“JLP”) and that as a consequence he became entitled to 1% of the invoice value for that customer.

5. The Respondent resisted the claim on the basis that consideration for a kitty bonus was entirely discretionary and was in any event capped at a figure of \$150,000, which amount was paid to the Claimant in February 2021.

The facts as found by the ET

6. The Claimant was at the relevant time, employed by the Respondent as a Practitioner Sales Farmer in the Respondent's Cloud and Infrastructure Services ("CIS") Division. The ET found that incentive arrangements for the Respondent's staff were set out for each financial year in what was known as the "Variable Pay Plan" ("VPP"). The VPP encompassed "Sales Incentive Policies" ("SIPs") providing for varying bonus entitlements as between occupations and individuals. Following each VPP, SIP's were then sent out on an individual basis. In addition, the Respondent also paid ad hoc bonuses that were not subject to any documented scheme or process. Incentive payments were calculated in US dollars but then paid in the relevant employee's local currency.

7. In March 2020, the Claimant attended a general VPP presentation. Prior to him doing so, he was told by his line manager, Manish Garg, that there was to be a new "kitty bonus" that would be available to individuals such as himself and that if he "won the [JLP] business [he] would be getting this bonus and it would probably make him one of the highest-paid sales people globally."

8. At the VPP presentation itself, the Respondent's plans were presented in the form of a slide deck, one of which slides contained a footnote ("the Footnote") which read as follows:

"A kitty of up to 1% of new logo invoicing against the first 12 months can be paid to Practitioner Sales Hunter/Hunter manager contributing to deal win based on SL [sector lead] head approval. Available to DOP and CIS role holders."

9. The start of the VPP presentation (i.e. on the first of the slides comprising the deck) contained a disclaimer which read as follows:

"This document serves to provide a broad overview and support an oral presentation."

It is not a substitute for the policy document and cannot be considered complete or accurate without reference to the policy document. The presentation is only for information. The final policy document will overrule this presentation in the event of conflict.”

10. The JLP deal was signed on 26 June 2020. Within one week of that, on 1 July 2020, Mr Garg wrote to Kiran Desai regarding the payment of bonus to the Claimant based on the JLP deal. Mr Desai was employed as “Senior VP and Global Head – Cloud & Infrastructure Services” and therefore appears to fall within the scope of those described in the footnote as a Sector Lead Head. Mr Garg’s email to Mr Desai read as follows:

“Kiran, I would like to propose [the Claimant’s] name for the 1% commission on the JLP deal. This needs your approval as per the policy below. As you know, he has contributed significantly towards this win and deserves this.

Requests your approvals

Pls see policy below in the highlight.”

11. He then set out the extract contained in the Footnote. Mr Desai’s reply was almost immediate – he responded to Mr Garg saying “*I am ok. Go ahead.*” Mr Garg then forwarded this correspondence to Mr Ateet Khosa, the Respondent’s Head of HR along with a message saying “*pls inform the relevant folks.*” The Claimant’s unchallenged evidence thereafter was that he received a phone call from Mr Garg in which the latter had said that Mr Desai had “*provided his approval immediately and without hesitation*” albeit that there was no mention at that point of the amount of the bonus as the first year’s invoicing from JLP was not yet known.

12. On 14 July 2020, Mr Garg wrote to Mr Khosa and Mr Desai with suggested wording to go into a congratulatory email from the latter to the Claimant, which email would accompany the payment of the kitty bonus. Mr Desai responded that he would “*only send when the gods [i.e. more*

senior managers] approve that this is approved.” Mr Khosa’s reply was that he was “getting the details on mechanics of the payout so that we can set clear expectations.”

13. The next day, 15 July 2020, Mr Khosa asked a colleague to prepare a specially formulated email of congratulations to go to the Claimant. He also wrote to the head of the Respondent’s HR section that dealt with compensation and benefits, Ms Sukanya Ramachandran, asking her to “*share the approach*” so that they could send the email to the Claimant.

14. Ms Ramachandran responded later the same day as follows:

“Here is the note:

- 1. 1% of invoiced revenue is a discretionary reward from Practitioner sales hunter in CIS/DOP for hunting deals that are largely SL led.*
- 2. The reward is based on approval from Nag – Head of DOP&CIS*
- 3. Since this is a discretionary bonus, it is paid out as a one time bonus at the end of the years based on 12 month revenue invoiced *1%*
- 4. The cap applied on the payout is USD 150K p.a similar to hunting account cap.”*

15. This was the first point at which it had been suggested that approval from “Nag” – the Head of Global CIS and DOP was needed for the award of the kitty bonus, rather than it simply being a matter for Mr Desai. It was also the first reference in the context of the kitty bonus, to the existence of a cap of \$150,000. Up to that point, Mr Garg, Mr Desai and Mr Khosa had all apparently been proceeding on the basis that there was no cap on the bonus and that it would be a matter for Mr Desai alone to decide on the level of it. The ET also found that none of the three were aware of any governing or overarching document setting out the terms of the kitty bonus other than that which appeared as a footnote to one of the slides presented back in March 2020. The ET was also not shown any document that referred to anyone else being the appropriate person to determine the level of the bonus or that referred to a cap which might be applied to the amount otherwise payable.

16. Mr Khosa's response to this was to write to Ms Ramachandran as follows:

“Sukanya – I don't think this is right, if we had such caps we should not communicate it communicated (sic) upfront while policy was getting communicated. If in past cap has not been hit that does not mean we have different cap for SL hunters and vertical hunters.

With such approach employee feel short changed. I remember during our sales incentive calls we had specific question on hunting commission at that time it was informed that it will be aligned to hunting policy except for it 1% for 1 year.”

17. Ms Ramachandran then replied on 17 July 2020 as follows:

“I have discussed with Sunit [Govil – Head of Compensation and Benefits]. The cap will continue to be 150k.

Rationale being that this is as discretionary award and also the employee will get ACV [Actual Contract Value – this being a reference to the conventional incentive payment under the terms of the SIP] for the same amount.”

18. On 8 September 2020, Mr Garg wrote to Mr Khosa and Mr Desai asking them to “close the JLP bonus” and stating that “we need confirmation on [the Claimant] 1% commission as well.” He wrote again on 16 September 2020 stating that “my recommendation is that we should not cap it in this instance as it won't be fair to the employee.” He wrote again on 21 October 2020 suggesting that a cap of \$300,000 be applied to the bonus – to which Mr Khosa responded on the same day:

“I do not think we will get sign off on a payout of 1% with a cap of 300k. For this deal the commission has already gone over 750k as against a typical deal where the commission is around 300k USD. In my view we should try to cover [the Claimant] in large deal bonus which will cover another 25-30k USD.”

19. Mr Garg's reply was to suggest that they should “park this for \$150k for now”

20. The previous day, 20 October 2020, the Claimant had received draft figures for the calculation of his bonus but which contained nothing to indicate that there was a cap of \$150k which might apply to it. The first that he heard of this was on 23 October 2020 when for the first time he was able to access the new H2 SIP Plan and which contained the following:

“Practitioner sales hunter and practitioner sales hunter manager role holders in CIS and DOP can also receive up to 1% of invoiced revenue for hunting account. The maximum payout under this scheme is USD150k p.a. The payout of this bonus is subject to approval from SL Head of CIS and DOP.”

21. The ET found that this was the first time that the two provisos which had been identified by Ms Ramachandran in her email of 15 July 2020 (which of course the Claimant had not seen) had been recorded in a document to which the Claimant had access.

22. Nothing more was said about the cap at that time. The next relevant piece of correspondence was in the form of an email from Mr Garg to the Claimant dated 15 December 2020 which read as follows:

“I am very please (sic) to let you know that, basis your extraordinary contribution towards winning JLP deal, management has approved discretionary bonus of 1% commission of the monthly invoicing for the first 12 months. This amount will be paid to you in line with the monthly invoices and capped at \$150k.”

23. Mr Garg had also emailed the Claimant the day before saying that “...you can rightly take pride in making the JLP deal happened (sic).....as a token of our appreciation we are rewarding you with a bonus of USD41,000.” The Tribunal found that this appeared to be a follow up to the suggestion that Mr Khosa had made in his email of 21 October 2020 referred to above that a “large deal bonus” might be paid and which might make up some of the shortfall that the Claimant was facing as a result of the imposition of the \$150,000 cap on his kitty bonus.

24. The Claimant took the decision not to raise the question of his entitlement to the kitty bonus at that stage and did not in fact do so until July/August 2021. This was notwithstanding that the bonus (on the basis of the capped sum of \$150,000) was paid to him in February 2021, somewhat earlier than he had expected this to happen.

25. Given that the JLP revenues for the first year were not known until December 2021, it is perhaps unsurprising that the Claimant was not expecting to receive a bonus referable to it in February 2021. It is not in dispute that if the Claimant was entitled to 1% of that figure, this would come to £516,082, instead of the \$150,000 which he was paid.

The ET's analysis

26. The conclusion reached by the Tribunal on this aspect of the Claimant's claims can be summarised as follows:

- a. At Reasons, paragraph 109, the Tribunal noted that the kitty bonus claim had been brought within the framework of unlawful deductions rather than as a claim for breach of contract. They went on to acknowledge however that the bonus was capable of falling within the scope of an unlawful deductions claims as long as it could properly be described as “wages that were properly payable to the Claimant.”
- b. They then went on to record, at Reasons, paragraph 116, that given the acceptance by Mr Beever, Counsel for the Respondent, that section 27(3) Employment Rights Act 1996 (“ERA”) applied to the payment, the fundamental question was whether the Claimant had a legal entitlement to payment of the kitty bonus in an amount that was higher than that which he actually received.
- c. The key point was then set out at Reasons, paragraph 118, whether “the kitty bonus had crystallised into a quantifiable legal entitlement, subject only to calculating the amount of the invoicing, on Mr Desai approving a 1% payment on 1 July 2020.”

d. As to that, the Tribunal's conclusions were then set out in the following three paragraphs as follows:

“119. Our finding is that it did not. If this was all that was required to crystallise the entitlement it does not make sense that Mr Desai is later talking about “the Gods” giving approval. Although Mr Desai seems to have been willing to give his own approval, he did not think he had the last word or that it was within his authority to authorise the payment. He may at that point have had no reason to think that the payment would be refused, and as we have seen, other managers were surprised that full approval was not forthcoming and that the cap was identified, but he considered that approval of higher managers was necessary for the payment.

120. Mr Beever's reliance on *Farrell Matthews & Weir v Hanson [2005] IRLR 160* in these circumstances is correct, with the legal obligation to pay in this case only arising on the formal declaration on 15 December 2020 of the amount of the kitty bonus.

121. There was no legal entitlement to be paid a quantified or quantifiable amount until it was formally communicated to the claimant that the decision had been made and that he had such an entitlement. This was done on 15 December 2020 and the payment that was communicated at that time was one that was subject to the cap. There was nothing more that was “properly payable” and the failure to pay an uncapped kitty bonus to the claimant did not amount to an unlawful deduction from wages.”

The Grounds of Appeal

27. The Grounds of Appeal take three points as follows:

- Ground 1 – that the ET misidentified what was properly payable to the Claimant by way of kitty bonus. Under this ground, the Claimant criticised the findings at

Reasons, paragraph 119 on the basis that first, the Tribunal had relied on approval criteria that had occurred to the Respondent and were communicated to the Claimant *after* the announcement of the bonus parameters and *after* Mr Desai had approved the bonus in accordance with the original parameters. Secondly, it was said that the ET erred in the same paragraph in focussing on Mr Desai's subjective view of what was required by way of approval rather than on what had objectively been announced and agreed by the Respondent.

- Ground 2 – it is said that the ET “mischaracterised the legal nature of the discretion available to the Respondent in awarding the kitty bonus.” The argument here is that once the discretion to award 1% was exercised by Mr Desai had written with the words “Yes, go ahead” in direct response to Mr Garg’s email requesting approval of a 1% bonus to the Claimant, the Respondent retained no residual discretion to then impose additional conditions on the amount to which the Claimant was entitled.

- Ground 3 – under this ground, the Claimant sought to argue that the ET had “failed to identify the nature of the Respondent’s discretion around the award of the kitty bonus.” The Claimant’s contention is that rather than focussing on whether there was a quantifiable legal entitlement by reference to the award that was made to the Claimant, the ET should first have identified what the terms of the bonus discretion were and then asked the question of whether the Respondent had acted within those terms.

28. There is clearly a significant degree of overlap between the three grounds advanced by the Claimant. In summary his case is that he had a legal entitlement to a quantifiable sum on 1 July 2020 at the point at which Mr Desai approved Mr Garg’s recommendation that he receive the full 1% referable to the JLP revenues. Even though the revenue had not at that point been calculated, the Claimant’s entitlement to 1% of whatever that number might eventually turn out to be, had crystallised at the point of approval by Mr Desai and there was no means by which the Respondent

could put up further obstacles either by way of the exercise of a further level of approval or by imposing a cap (of \$150,000) which had not been part of the scheme as originally communicated to the Claimant in March 2020. Notwithstanding that degree of overlap I shall attempt to deal with each of the three grounds advanced by the Claimant but before doing so, I should set out the relevant legal framework as to which there was limited, if any dispute between the parties.

Legal Framework

29. The starting point is the relevant provisions of the ERA. Section 13 of the Employment Rights Act 1996 provides:

“(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. ...

(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 ...”

30. Section 23 ERA deals with the making of a complaint and provides that:

“(1) A worker may present a complaint to an employment tribunal:

(a) that his employer has made a deduction from his wages in contravention of section 13 ...”

31. Section 27 ERA contains the definition of “wages” and provides as follows:

“(1) ... “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including:

(a) any fee, bonus, commission ... or other emolument referable to his employment, whether payable under his contract or otherwise ...”

32. The reference at section 13(3) ERA to wages being “properly payable” means that the employee must have a legal entitlement to the amount claimed, albeit that that entitlement need not necessarily be what one might call a conventional contractual one – see New Century Cleaning v Church [2000] IRLR 27.

33. In Coors Brewery v Adcock [2007] ICR 983, the Court of Appeal found that the jurisdiction under the ERA in relation to unlawful deductions from wages, did not extend to bonus claims under which the ET was required to quantify the amount due under the terms of a bonus scheme. The key question is whether the amount claimed as an unlawful deduction is quantifiable. Wall LJ’s Judgment in *Coors* states as follows, at paragraphs 55-56:

“55. The fact is that the claimants were unable to quantify the breach, and required the tribunal to do so. That, in my judgment, renders the claim one for damages for breach of contract, as opposed to a quantifiable claim for unlawful deduction of wages.

56. Part II of the Employment Rights Act 1996, as I read it, is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure. Of course such claims would throw up issues of fact. The example canvassed in argument was of an employee being paid piece work, and asserting that his employer had deducted sums properly payable to him for work undertaken on the grounds that some of the items produced by the employee were defective. *Delaney v Staples* [1992] ICR 483 provides another example. Such a dispute would not take the case outside Part II of the Act.”

34. Even though the claim advanced in these proceedings was not “quantifiable” at the point at which the alleged deduction was made, this does not mean that it necessarily falls outside the ET’s jurisdiction. As to that, it is clear from the decision of the Court of Appeal in **Mouradian v Tradition Securities and Futures SA** [2009] EWCA 60 that a section 23 claim can be advanced in the ET based on an alleged underpayment of a bonus entitlement where that entitlement is based on the exercise of a discretion in circumstances in which the Claimant is able to show that the discretion has been exercised and the bonus declared and quantified. The potential difference in this case is that as of 1 July 2020, the level of kitty bonus could not be quantified as the JLP figures were not yet known. If however, the only matter that were left to be done was to calculate the amount due once those figures were known, it does not mean that a claim could not be advanced based on an entitlement to a future sum having been established on 1 July 2020. The fact and extent of any deduction would of course only be capable of being identified at the point at which those figures were quantified.

35. Neither of these cases therefore quite address what seems to me to be the issue in this case which is whether, having informed the Claimant on 1 July 2020 that he was to receive the full 1% of the JLP revenues for the year, the Respondent was entitled, prior to the point at which the payment was subsequently due to be made (i.e.. after the relevant JLP figures had been determined) to change the basis of the calculation from that which had been communicated in July 2020. In other words, although the level of the payment could not on any view be determined prior to December 2021 (when the JLP were first known), was the Respondent able to apply conditions to the bonus arrangements after 1 July 2020 and before December 2021?

Ground 1 – the ET misidentified what was properly payable to the Claimant

36. The Claimant’s argument is in essence a straightforward one – he says that the entitlement to the kitty bonus had been defined in the presentation to the sales team that took place in March 2020. That entitlement was based on the exercise of a discretion by Sector Head, Mr Desai – he had to approve the bonus. This he then did, says the Claimant, on 1 July 2020. Although the figure could

not at that stage be calculated (as the JLP revenues were not known) the method of calculation of the Claimant's bonus based on those figures had been set and it was not open to the Respondent to introduce different parameters at a later date to those that had been set in March 2020 ("the March 2020 Parameters").

37. In response, Mr Beever for the Respondent suggests the language used by the Claimant under this ground is "the language of contractual entitlement" and that this ground of appeal is therefore flawed as the ET did not find that there was as contractual entitlement as at March 2020 – he suggests that as the "parameters" that were set out at that date were not found by the ET to be contractual, it was fully open to it to then find that the Respondent was entitled to introduce new "parameters" after the statements made in July 2020 by Mr Desai.

38. The key passage in the ET's reasoning is at paragraphs 118-119 in which they say that there was no legal entitlement (subject only to quantification based on the actual JLP figures) based on the subjective view of Mr Desai as to what his authority was in terms of approval of the kitty bonus. The ET's reasoning is effectively that, as Mr Desai thought on 14 July 2020 that "the gods" needed to approve the kitty bonus, then it must follow that this was in fact the case and the March 2020 Parameters and his own decision on 1 July 2020 were not determinative of the final position. Whilst it may be implied into the ET's reasoning that there was no contractual entitlement that had arisen as at 1 July 2020, it does not seem to me that their decision turns on that point. The route by which the ET reached its conclusion was more simple than that in that they concluded that Mr Desai's subjective state of mind was in fact determinative of the position.

39. It seems to me that the ET took too narrow a view on its analysis of the Claimant's entitlement in July 2020. I do not see that Mr Desai's subjective views or his conduct can be determinative of that question. What is absent from the key part of the ET's analysis is consideration of what the Claimant's entitlement was based on first, the presentation in March 2020 and secondly, the apparent

exercise of discretion by Mr Desai on 1 July 2020. Even if Mr Desai took the view some two weeks after his initial approval of the recommendation made by Mr Garg as the Claimant's line manager and even if in some circumstances it *might* be relevant to consider that conduct as part of the exercise of considering what the position was at the point at which he had first agreed to Mr Garg's recommendation and this had been communicated to the Claimant, it is hard to see how that could be the end of the story. At the point at which he had approved Mr Garg's recommendation, the terms under which it was being sought had been communicated to him and his approval was entirely consistent with the application of the March 2020 Parameters. Furthermore, whilst Mr Desai may have belatedly taken the view that additional approvals were required over and above that which had been set out in the March 2020 presentation, there were clearly others who disagreed with this and with the suggestion that the award should be subject to any sort of cap. If Mr Desai's views were relevant, why did this not apply also to Mr Garg and Mr Khosa, who was then the Head of HR for the Cloud and Infrastructure division in which all of the relevant individuals worked?

40. In addition, there is the issue of the cap which was ultimately the basis on which the Claimant's entitlement was reduced by the Respondent to \$150,000. The existence of a cap is, it seems to me, distinct from the question of whether "the gods" should approve Mr Desai's decision to award 1% to the Claimant. As to that, the ET found that this had been first introduced as a limiting factor by Ms Ramchandran on 15 July 2020 – not even Mr Desai appears to have been proceeding on the basis that there was a cap that might be applied to the kitty bonus arrangements. The ET did not, it seems to me, identify the basis on which the terms that were put forward as a bonus scheme in March 2020, should be subject to change by the subsequent introduction of a cap even after the relevant manager (Mr Desai) appears to have approved the entitlement pursuant to the March 2020 Parameters.

41. Instead of focussing on Mr Desai's subjective view as at 14 July 2020, the ET should, in my view, first have analysed the position as at 1 July 2020. Had they done so, and had they concluded that once Mr Desai had exercised his discretion in accordance with the March 2020 parameters, the

Claimant's entitlement to the bonus had arisen and was then subject only to quantification once the JLP revenues were calculated, then any attempt by Mr Desai (or Ms Ramchandran) to change that by introducing potentially limiting factors such as higher level approvals or the imposition of a cap, would have been ineffective in altering the Claimant's entitlement to future payment once the relevant revenue figures were known to the Respondent.

Ground 2 – mischaracterisation of the legal nature of the discretion available to the Respondent

42. As I have already indicated, there is a substantial degree of overlap between the points raised by the Claimant. Under this ground, the Claimant argues that the ET was wrong to find that his case was a “*Farrell-type*” of ad hoc bonus arrangement. The reference to **Farrell** is to the decision of the EAT in **Farrell Matthews & Weir v Hansen** [2005] IRLR 160. In that case, the Claimant was employed as a salaried partner in a firm of solicitors and was told that she would be paid a bonus of £12,000, payable in 12 monthly instalment. However, after payment covering the first three months of that period, her employment was terminated after she resigned in circumstances in which the ET found that she had been constructively dismissed. She brought a claim in the ET seeking the balance of £9,000 as an unlawful deduction from her wages. She succeeded on the basis of a finding by the ET that once the bonus entitlement of £12,000 had been declared, it fell within the definition of “wages”. Her employers took the matter on appeal to the EAT and sought to argue that a discretionary bonus could not be deemed “wages” unless a payment had actually been made. The EAT rejected the appeal on the following basis as set out in the Judgment of Nelson J:

“38. We have come to the clear conclusion that the appellant's interpretation of s.27(3) is incorrect and that the respondent's bonus, once she had a legal entitlement to it, became a wage properly payable to her under s.13(3) ERA.

39. A bonus may be payable by reason of the terms of a contract of employment, or in some other way. As Beldam LJ said in *Church* at paragraph 62:

‘For wages to be “properly payable” by an employer, he must be rendered liable to pay,

either under the contract of employment or in some other way. Section 27 contains some examples of sums which may be payable, either under contract or because for some other reason the employer is liable to make payment as an addition or supplement to “wages”. An example of a sum properly payable otherwise than under contract would be a minimum wage payable by order of a wages council. Nor is it difficult to see how a fee, bonus, commission, holiday pay or other emolument referable to employment may be payable otherwise than under the contract of employment. Such payments may be customary or required by collective agreements without express provision being made in a contract of employment.'

40. Each of the above examples of non-contractual bonuses fall within s.27(1)(a) '...payable under his contract or otherwise'. What brings them within this definition is the fact that there is a legal obligation upon the employer to pay the bonus and a legal entitlement to receive it on behalf of the employee. In the case of a discretionary bonus, whether contractual or by custom, or ad hoc, the discretion as to whether to award a bonus must not be exercised capriciously (see *United Bank Ltd v Akhtar* [1989] IRLR 507 and *Clark v Nomura International plc* [2000] IRLR 766). But until the discretion is exercised in favour of granting a bonus, provided the discretion is exercised properly, no bonus is payable. Once, however, an employer tells an employee that he is going to receive bonus payments on certain terms, he is, or ought to be obliged to pay that bonus in accordance with those terms until the terms are altered and notice of the alteration is given (*Chequepoint (UK) Ltd v Radwan* CA 15 September 2000). This situation applies equally where a discretion to award a bonus is granted under contract, as in *Chequepoint*, or by custom or by ad hoc decision. Mr Scott was right to concede that once the appellant had declared the bonus it could not be withdrawn. Whilst there was no contractual entitlement to a bonus within the appellant's firm, bonus payments were made, or offered subject to targets being achieved.”

43. The ET's reliance on the decision in **Farrell** is found in paragraph 120 of their Reasons in which they say that the legal obligation to pay in the present case arose only at the point at which a formal declaration of the amount of the kitty bonus was made on 15 December 2020. In his submissions, Mr McCombie accepts that if the ET was correct to find that this was a "*Farrell*-type of ad hoc bonus that was only payable once announced to C then his case must fail." He asserts however that the ET failed to distinguish between a *Farrell* case and one like the present in which he argues that in fact this was one in which a discretionary bonus was controlled only by the two factors noted by the ET – up to 1% of JLP revenues and appropriate approval (from Mr Desai). Mr Beever argues that the ET was right to treat the case as falling within the scope of **Farrell** with the consequent finding that the bonus was not wages "until the communication of 15 December 2020."

44. It seems to me that the controversy surrounding the application of **Farrell** and the ET's reliance on it as meaning that the obligation to pay only arose at the time of the 15 December 2020 announcement is slightly misplaced. **Farrell** is a case in which the employer was seeking to argue that notwithstanding the announcement of an ad hoc bonus, this did not create an entitlement which could be enforced when the payment was then not made at a later date. In the present case, the issue is more one of looking back rather than forward in that the real question is whether, notwithstanding the announcement in December 2020, there was an earlier point at which the Claimant became entitled to a sum which was capable of being quantified at a later point at which the JLP revenues had been determined.

45. It does not appear to me to be arguable that there was any entitlement to a *quantified* sum at any earlier date than December 2020 when the capped bonus was communicated to the Claimant or indeed prior to the JLP revenues being known in December 2021. Whilst it is right that the Respondent made its own quantification of the kitty bonus as at that date – and capped it at \$150,000 – the real issue is whether they were entitled to limit it to that figure and effectively 'move the goal posts' from where they had been positioned on 1 July 2020 when Mr Desai on the face of it, approved

the full 1% kitty bonus for the Claimant. The ET's conclusion at paragraph 120 of its Reasons, is clearly contingent on its earlier finding at paragraph 119 to the effect that Mr Desai's view on the need for approval from "the gods" meant that no entitlement had crystallised on 1 July 2020. However, for the reasons that I have already set out under Ground 1, I do not think that that contingency is sustainable. Once the contingency falls away, so does the ET's reliance on *Farrell* as being determinative of the Claimant's entitlement. It then follows that the bonus declaration and quantification made in December 2020 was one that the Respondent was not entitled to make. It is in my view clear that, as at 1 July 2020, the Claimant had an entitlement to a sum equalling 1% of the JLP revenues. That sum would be payable only once quantification could be made which in turn would be only once those revenues were known which, on the ET's findings was in December 2021.

46. Although I regard the reference to **Farrell** as something of a distraction, it does seem to me that the overarching point under Ground 2 – namely that the ET mischaracterised the legal nature of the discretion open to the Respondent – is correct. In my view, the ET was wrong to proceed on the basis that after 1 July 2020, the Respondent was entitled to revisit the payment/level of the kitty bonus and to belatedly introduce a cap which, as Mr Khosa put it in his email to Ms Ramachandran referred to at paragraph 16 above, should have been communicated "up front" when the policy was introduced and explained to the workforce.

Ground 3 – failure to identify the nature of the Respondent's discretion around the award of the kitty bonus

47. Under this ground, the Claimant argues that the ET "in effect reasoned backwards from the award that was ultimately made to what the entitlement was to receive it" and had erred in putting Mr Desai's 15 July 2020 action at the centre of their analysis. The Claimant suggests that the ET should first have identified the Claimant's entitlement to a kitty bonus and the elements of discretion that attached to it before then going on to consider the impact of Mr Desai's actions. I do not see that this adds anything to Grounds 1 and 2 – the essential point remains that the ET have used Mr Desai's

actions as determinative of the scope of the Claimant's entitlement when, for the reasons that I have stated above, they should not have done so.

Disposal

48. Mr McCombie argues that I have the factual material to identify the legal nature of the kitty bonus and that, if the appeal succeeds, I should substitute a finding that the Claimant is entitled to recover as an unlawful deduction, the difference between the \$150,000 that was paid to him and the figure that represented 1% of the JLP year one revenues. Mr Beever suggests that the matter should be remitted to the same ET to determine the question of whether the March 2020 presentation and circumstances created a contractual obligation and also the issue of whether any contractual discretion parameters had in fact been exhausted. The matter is said to be one that should go to the same ET in part because they "need not hear any or any substantial amount of new evidence." That point in my view tends to indicate that I should determine the matter myself. The issue is in essence a simple one, namely whether the Claimant had a right to a payment which fell within the scope of section 27(3) ERA of wages equal to 1% of the JLP revenues and no further evidence is needed to determine that issue. There are only 2 possible answers to this – either he did or he did not and one of those answers is correct and the other is not. I do not see that there are any additional factual issues which need to be explored given the full findings that have been made to date by the ET and as indicated by the Court of Appeal in **Jafri v Lincoln College** [2014] IRLR 544, where there is only one correct outcome which could legitimately be reached by an ET, the EAT itself should determine that outcome and substitute the appropriate finding. On the facts as found by the ET, I take the view that the only correct outcome in this case is that once Mr Desai had accepted the proposal made by Mr Garg that the Claimant should receive a 1% bonus in accordance with the terms that had been set out in March 2020, the Claimant had a legal entitlement to be paid 1% of the first year revenues resulting from the JLP deal which he had been instrumental in securing. After Mr Desai's acceptance of Mr Garg's recommendation, it was not open to the Respondent to add further conditionality to that entitlement

whether it be by seeking approval at a higher level within the business or by belatedly applying a cap as was done in this case.

49. For those reasons, I substitute a finding that the Claimant was entitled to 1% of the JLP year one revenue less the sterling equivalent of \$150,000 that was paid to him.