Neutral Citation Number: [2023] EAT 37

Case No: EA-2021-001265-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 March 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Ms G THOM	**Appellant**
- and -	
HOBART REAL ESTATE PARTNERS LIMITED	**Respondent**

- -
- -

STEPHEN BUTLER (instructed by RWK Goodman LLP) for the **Appellant**
GILES POWELL (instructed by Ince Gordon Dadds LLP) for the **Respondent**

Hearing date: 14 February 2023

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JUDGMENT

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The employment judge did not err in law in concluding that the employment tribunal did not have jurisdiction to consider the claim for a discretionary "performance fee" as an unlawful deduction from wages.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Heath holding that the employment tribunal did not have jurisdiction to hear the claimant's claim for unauthorised deductions from wages. The hearing was held from 14 to 16 June 2021. The judgment and reasons were sent to the parties on 10 September 2021.

The facts

2. I take the facts from the employment tribunal judgment.

3. The respondent, Hobart Real Estate Partners Limited, is a company involved in the management of commercial real estate properties in the UK. The respondent is owned by KB Real Estate Ltd and Hobart Partners Ltd. There are a number of Hobart companies in addition to the respondent. The respondent is managed by Mr Bhadra and Mr Harris, its two directors, who are also involved in the other Hobart companies.

4. The claimant is a Chartered Surveyor. The claimant started working for the respondent on 1 October 2016. She entered into a consultancy agreement dated 21 November 2016. The claimant took up employment with the respondent on 12 December 2016. The claimant was employed as Director of Asset & Development Management.

5. The parties negotiated a contract of employment that was eventually signed on 12 June 2018. Paragraph 6 of the contract of employment provides:

> 6. PERFORMANCE FEES
>
> 6.1 You **will** receive 15% of the Company's performance fee (subject to income tax and national insurance contributions) from the completion of the acquisition of the leasehold property known as Barnard's Inn, 78 to 81 and 86 and 87 Fetter Lane, London EC4A 1EN registered at the Land Registry under title number NGL812267 provided you remain in employment with the Company and are not working under notice at the time the performance fee is paid.
>
> 6.2 You **may** receive **a minimum 10%** of **the Company's performance fee** (subject to the appropriate deductions) from future investments where you are the designated Asset Manager. **The terms and percentage of each performance fee will be negotiated with you and agreed in advance of each project** provided you remain in employment with the Company and are not

> working under notice at the time the performance fee is paid.
>
> 6.3 The sums on clauses 6.1 and 6.2 will be [sic] within 2 months of the date of the Performance Fee being paid to Hobart. [emphasis added]

6. The respondent managed two sites; at Barnard's Inn and Worship Square. The properties relevant to this appeal were those at Worship Square. In 2017, Hobart Worship Street Ltd ("HWSL") was incorporated to develop Worship Square. In around August 2017, HWSL entered into discussions with Bridges Property Alternatives Fund IV LP, acting by its manager Bridges Property Alternatives Fund IV (General Partner) LLP ("Bridges") with a view to investing in Worship Square. Bridges arranged for a special purpose vehicle ("the SPV"), Shoreditch QT Guernsey Limited to be incorporated. On 6 October 2017, HWSL and Bridges entered into an LLP Members Agreement ("the LLP Agreement") in respect of the SPV. The LLP agreement contained a definitions and interpretation section which provided for a "Promote Fee" and for distribution of the profits of the venture. The SPV purchased Worship Square in late 2017. On 6 October 2017, the respondent entered into an Asset Management Agreement that set out services the respondent was to provide in respect of Worship Square and provided that the respondent would receive an annual management fee of £158,000. The claimant worked on managing and developing Worship Square.

7. On 23 February 2019, the claimant sent an email to Mr Bhadra and Mr Harris raising a number of concerns. She proposed that she should receive a "profit share on Worship Square" of 25%. On 25 February 2019, the claimant met with Mr Bhadra and Mr Harris and discussed the "profit share". No agreement was reached.

8. On 6 March 2019, Mr Harris sent an email to the claimant in which he stated:

> "**We have allocated to you a 10% profit share** from the Worship square investment, which is subject to the performance fee calculation agreed with Bridges". [emphasis added]

9. In response to the claimant's proposal for a 25% share, he responded in red:

> "We allocated to you **a 10% profit share** from the Worship Square investment. Going forward, we will continue to share with you profit in future office deals, given your participation in the asset management plan". [emphasis added]

10. In a further email on 24 April 2019, the claimant added a response in green:

> As discussed, the minimum profit share from the projects is 10% and the employment contract states that this is negotiable between the parties. I have no idea where we are on profit for this at present but 10% for 5 years of work might be a very low reward so as far as I'm concerned, until we know the future of the project and what the outcome might be I think that this should be parked for now and discussed at a later stage

11. Mr Harris replied on 29 April 2019 saying that he and Mr Bhadra would be available to discuss matters later in the week. He went on to state:

> "**We allocated to you a 10% profit share** from the Worship Square investment. We believe this decision is appropriate".

12. The discussion rested there. It is worth noting that clause 6.2 of the contract of employment referred to the claimant receiving a percentage of a "performance fee", whereas the emails referred to a "profit share". No "performance fee calculation" was "agreed with Bridges".

13. In July 2019, planning consent for the development of Worship Square was granted. At about this time a decision was taken by the LLP to sell Worship Square. The LLP agreement was terminated on 29 November 2019. The sale of Worship Square completed on 27 February 2020. An Advisory Services Agreement ("ASA") was entered into between the SPV and HWSL that provided for a "Success Fee" to be payable to HWSL following the disposal of Worship Square.

14. On 12 March 2020, HWSL was paid £546,114 in respect of "Advisory fees in relation to disposal of shares" and a success fee of £3,181,971.89. The employment tribunal referred to an email that stated that a sum of £3,814,435.27 had been paid to "Hobart", which was said to include repayment of outstanding equity of £86,349. The claimant was not told about the payments.

15. On 7 August 2020, the claimant was given three months' notice of termination of her employment by reason of redundancy. She was paid a "redundancy payment" of £2,421, but no sum as a percentage of any "performance fee" received by the respondent.

The pleadings, list of issues and case advanced at the employment tribunal

16. The claimant submitted a claim form that was received by the employment tribunal on 19 November 2020. The claimant claimed a redundancy payment and arrears of pay. The claimant

pleaded that:

> 2. The Claimant had a legal entitlement to the performance fee, the performance fee having been negotiated and agreed between the Claimant and the Respondent pursuant to an express term of the Claimant's contract of employment.
>
> 3. The Claimant denies (if it be so alleged) that the Respondent had a discretion to refuse to pay the performance fee after it had been agreed. If and to the extent that the Respondent alleges that, in refusing to pay the Claimant, it has exercised any such discretion as the Tribunal finds to exist, the Claimant claims that the Respondent has exercised its discretion unlawfully and, consequently, the refusal to pay constitutes an unlawful deduction from the Claimant's wages.

17. The claimant asserted that there had been an agreement to pay a 10% performance fee in the exchange of emails set out above. The claimant also pleaded:

> 32. If and to the extent that the Tribunal finds that there was an applicable discretion in relation to the payment of the Claimant's Performance Fee, the Claimant avers that lawful exercise of the discretion (i.e. exercise which was not unreasonable and/or capricious and/or arbitrary and/or perverse and/or irrational and/or not in good faith) would have resulted in the Claimant being paid the Claimant's Performance Fee. Consequently, even any such discretionary right as the Claimant might have had was sufficient to constitute a legal entitlement to the payment capable, and so Claimant's Performance Fee is constitutes wages within the meaning of section 13 ERA, even if the Tribunal concludes that the right was a discretionary right.

18. The respondent in its response pleaded that it "did not and has not exercised its discretion to pay the Claimant any performance fee or profit share". It was asserted that any payment of a performance fee to the claimant was entirely discretionary and that:

> 35. Pursuant to the AS Agreement on 12 March 2020 HWSL (not the Respondent) was paid an advisory fee of £546,114 (gross of tax and expenses) and a success fee of £3,181,972 (gross of tax and expenses) on the disposal of the shares, for marketing the share sale, the disposal of the shares and assisting in the completion of the sale of the shares. It did not receive share of the profits from the development of the Worship Square properties or a Promote Fee, as had been intended and anticipated pursuant to the LLP Agreement.

19. The claim was initially listed for a one-day hearing on 13 April 2021. The hearing was converted into a preliminary hearing for case management. Applications for strike out or a deposit order were dismissed. Various case management orders were made and the final hearing listed. In the lead up to the final hearing attempts were made to agree a list of issues. At the outset of the final

hearing there was still some disagreement as to the issues that was resolved by the employment judge. The finalised issues started with the heading "Jurisdiction – Substantive":

> 1. Does the Tribunal have jurisdiction to determine C's claim under s. 13 EAR 1996?
>
> > a. Is C's claim for a performance fee a claim for "wages" within the meaning of ss 13 and 27 ERA 1996? (Issue 13 below)
> >
> > b. Is it a claim for an unquantified discretionary bonus or payment of a sum which is not an identifiable sum? If so, does this mean that the Tribunal does not have jurisdiction to determine C's claim?
> >
> > c. Is C's alternative claim for a performance fee [Paragraphs 3, 14, 29 and/or 32 of the Grounds of Claim] a claim for an unquantified discretionary bonus or payment of a sum which is not an identifiable sum? If so, does this mean that the Tribunal does not have jurisdiction to determine C's claim?

20. Issue 13, to which Issue 1a cross referred, provided:

> Is C's entitlement (on the basis and terms determined by the Tribunal) an entitlement to "wages" which were "properly payable" within the meaning of ss. 13 and 27 ERA 1996? In particular:
>
> > a. is the Claimant's Performance Fee "sums payable to" C; and
> >
> > b. are those "sums" payable "in connection with [C's] employment", including being either "any fee, bonus commission … or other emolument referable to [C's] employment, whether payable under [C's] contract or otherwise"?

21. The issues were not entirely clear. It appears that the claimant's primary case was put on the basis that a 10% performance fee had been agreed during the email exchange in March and April 2019. The alternative claim was that any discretion to pay the performance fee should be exercised in a manner that was not "unreasonable and/or capricious and/or arbitrary and/or perverse and/or irrational and/or not in good faith" as pleaded at paragraph 32 of the grounds of complaint. It is not clear from the pleadings and issues whether this possible exercise of discretion was referred to in a general sense, or only in circumstances where there had been a prior agreement as to the percentage performance fee that was to be payable.

22. In the claimant's skeleton opening it was asserted:

> C claims that 'Company's performance fee' means the sums received by

> either R or Mr Bhadra or Mr Harris or any other entity controlled or operated by or for the benefit of R or Mr Bhadra or Mr Harris, whether directly or indirectly, by way of sale proceeds or profits or other payment resulting from (or contingent upon) the disposal the Worship Square Property, regardless of the specific label given to such a payment. R disputes this and says that, if there was an agreement (which R denies), C's payment was to be calculated only by reference to payments made directly to R and which were specifically labelled as 'performance fees' or 'success fees. …
>
> Alternatively, C claims that she had a discretionary entitlement to the Claimant's Performance Fee and that any refusal by R to pay the Claimant's Performance Fee in the circumstances is outside the scope of R's discretion, and amounts to an unauthorised deduction from C's wages.

The decision of the employment tribunal

23. The employment tribunal gave a careful self direction as to the law concerning unauthorised deduction from wages and contractual interpretation.

24. EJ Heath started by construing the contract:

> 81. Standing back somewhat, and not getting too involved in the detail or relevant background at this point, the reasonable person would no doubt form the general impression that the parties were seeking to set out a practical clause relating how the respondent would remunerate the claimant. It is a profit sharing arrangement that seeks to set out the scope of her participation in money that the respondent makes from investments where the claimant has been the designated Asset Manager.
>
> 82. The reasonable person would conclude that this was a clause that was not geared towards one particular transaction or investment, but was a clause to set out how the parties would approach transactions/investments in general, including ones as yet unidentified. Indeed, it expressly talks about "future investments". The parties had agreed a profit-sharing arrangement whereby the claimant "may" receive a minimum percentage of the respondent's "performance fees" in deals where she was the designated asset manager, but the fine detail, as to terms and final percentage, would be negotiated and agreed with her prior to each particular transaction.
>
> 83. How, then, would the reasonable person understand the language "You may receive…"? (Emphasis added). First, there is nothing within the written contract that specifically helps understand this apparent retention of discretion by the respondent. On the face of the contract, and not delving into any background, it would appear that the respondent is seeking to retain a discretion as to payment, but not circumscribing in any way how that discretion is to be exercised, either in terms of whether to pay at all, or what amounts to pay, subject to the minimum 10%.
>
> 84. However, I do not focus on this sentence in isolation, but read it with the sentence that follows. The parties envisaged that that there would be negotiation and agreement as to the precise percentage (over and above 10%)

> and terms of each investment. I find that the respondent retained a discretion to pay a minimum 10% of a company performance fee, that would crystalise into a contractual entitlement once the terms of the individual future deal was negotiated and agreed.
>
> 85. I find the discretion retained by the respondent is narrow in scope but nonetheless significant. The respondent has not sought to circumscribe it, and I find that the respondent had a discretion as to whether to pay or not and what it negotiated and agreed with the claimant, such discretion not to be exercised unreasonably, capriciously, arbitrarily, perversely or irrationally. This, I find, is the unambiguous meaning of the clause.
>
> 86. The real difficulty I have had with this case is what happens if the parties fail to agree (for whatever reason) under Clause 6.2. The contract envisaged agreement, but did not provide for what would happen if there was none. I will return to this matter below after considering the Worship Square investment.

25. EJ Heath concluded that the email exchange between the parties did not result in a concluded agreement. He then went on to consider whether there was an entitlement to a 10% performance fee as a minimum sum that could result from a rational exercise of the discretion provided by clause 6.2:

> 96. Clause 6.2 of the contract of employment says that the terms and percentage of each performance fee "will be negotiated with you and agreed in advance of each project". The contract does not say what will happen if there is no agreement. What, therefore, happens when the parties have failed to agree percentage and/or terms?
>
> 97. As indicated above, I find that the first sentence of clause 6.2 sets up a discretion to pay a sum which crystalises into a contractual entitlement on further negotiation and agreement. The way I understood Mr Butler's case in closing is that even in the absence of agreement the employer could be rendered liable to pay the 10% through the exercise of discretion. This must be right. The second sentence of clause 6.2 has fallen away in the absence of agreement, but the first sentence still bears meaning standing alone. The claimant may receive a minimum 10% of the company's performance fee.
>
> 98. Mr Butler submitted that the respondent said what it was going to do, i.e. pay the claimant a minimum of 10% of a company performance fee; it said that it had allocated it; it did not vary this. Mr Butler submitted that this was on all fours with Hansen, and that it was a perverse exercise of any discretion the respondent retained for it to refuse to pay a 10% performance fee.
>
> 99. I found a superficial attraction to this argument. However, while I am inclined to accept that it was a perverse exercise of the respondent's discretion to refuse to pay the claimant anything at all, I found it difficult to find that it was a perverse exercise of a discretion to refuse to pay the claimant a sum based on a percentage that she had expressly not accepted (see paragraph 31 above). I cannot therefore find that the rational exercise of any discretion would inevitably lead to an ascertainable sum.

> 100. Additionally, what was put forward on 6 March 2019 by Mr Harris was *"We have allocated to you a 10% profit share from the Worship square investment, which is subject to the performance fee calculation agreed with Bridges"* [emphasis added]. In the ensuing correspondence the claimant did not address the Bridges calculation aspect of the proposal, perhaps because the percentage was the key stumbling block. It may be the case that the claimant had no difficulty with this aspect of the proposal, but it is simply not addressed by her. This compounds the difficulty in finding that the parties had agreed terms that would allow for the calculation of an ascertainable sum in respect of the Worship Square investment.

26. EJ Heath then set out his overall conclusion:

> 101. The tribunal only has jurisdiction to hear an unauthorised deductions from wages claim in respect of a quantifiable sum. **I have concluded that the parties did not reach agreement under clause 6.2** of the contract of employment as to the percentage of the company's performance fee that would be paid to the claimant in respect of Worship Square. It follows that any claim in respect of such a sum would be a claim for an unquantified and unidentified sum. **I have further concluded that in the absence of agreement, there would be a discretionary entitlement under the first sentence of clause 6.2. However, as I concluded that it would not be a perverse or irrational exercise of any retained discretion for the respondent to fail to pay her something she had expressly not accepted**, **I also conclude that this would be a claim for an unquantified and unidentified sum.** In respect of both claims, **I consider that the absence of agreement to the "calculation agreed with Bridges" further prevents the sum from being quantifiable.** In all the circumstance I conclude that the claimant's claims, however she puts them, are for unquantified sums.
>
> 102. It follows that I do not have jurisdiction to consider the claimant's claims. I have determined Issue 1 in the Amended List of Issues against the claimant. As I have found at this stage that I do not have jurisdiction to consider the claim I will not proceed to determine the remaining issues. The claimant's claim is dismissed.

The appeal

27. The appeal was brought on a series of unhelpfully overlapping and repetitive grounds. The primary ground is the first, which effectively summarises the appeal:

> Ground One. The Employment Judge erred in law in that he found that the Employment Tribunal did not have jurisdiction to determine the claim.
>
> 26. For the reasons set out in this Notice of Appeal and Grounds of Appeal, it was an error of law for the Employment Judge to conclude that the Employment Tribunal did not have jurisdiction to determine the claim.
>
> 27. The sum claimed was "identifiable" and/or "quantifiable" (and "properly payable") on the basis of the Respondent's exercise of its discretion in

> deciding on the allocation of the Claimant's performance fee in 2019 (see paragraphs 21 to 22 above). Additionally, the sum claimed was in fact identified before and during the FMH. The sums claimed were "wages". There was and is no additional requirement for the amount of the performance fee to have been "agreed" or "accepted" by the Claimant.
>
> 28. The Employment Judge erred by finding otherwise and by concluding that the sum claimed was not "identifiable" or "quantifiable" because the amount of the performance fee had not been ‘'agreed" or "accepted" by the Claimant (e.g. ¶101).

28. At the hearing of the appeal the focus of the claimant’s argument was that the respondent had unilaterally declared a 10% performance fee and that “the performance fee calculation agreed with Bridges” was a term that could, and should, be construed to determine the sum due, and meant 10% of the sum paid to HWSL in March 2020.

The Law

29. The right not to suffer an unauthorised deduction from wages is provided by section 13 **Employment Rights Act 1996** (“**ERA**”)

> 13. 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.
>
> (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. Wages are defined by section 27 **ERA**:

> 27. 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**, …

> (3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—
>
> (a) be treated as wages of the worker, and
>
> (b) be treated as payable to him as such on the day on which the payment is made.

31. Where a claim for unauthorised deduction from wages is based upon a contractual term the starting point will be to construe its meaning. The general approach was considered by the House of Lords in **Investors Compensation Scheme LTD. v West Bromwich Building Society Same v Hopkin & Sons (a firm) and Others** [1998] 1 W.L.R. 896. Per Lord Hoffmann at 912:

> The principles may be summarised as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to 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.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning"

> reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:
>
> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

32. For a sum to be claimed as wages, there must be an entitlement to payment: **New Century Cleaning Co Ltd v Church** [2000] IRLR 27 per Morritt LJ [43]:

> The word 'payable' clearly connotes some legal entitlement. The adverb 'properly' is also consistent with a legal requirement, but is not necessarily limited to a contractual entitlement. This is confirmed by the provisions of s.27(1)(a), which show that the wages 'properly payable' may not be due under the contract of employment. But the words 'or otherwise' do not, in my view, extend the ambit of 'the sums payable to the worker in connection with his employment' beyond those to which he has some legal entitlement. With the exception of the 'bonus' referred to in s.27(1)(a), all the subparagraphs of that subsection refer to sums to which the employee has some legal entitlement. The case of a bonus is specifically dealt with in s.27(3), which provides that the amount of the bonus paid is to be treated 'as payable'. The bonus is thereby deemed to have been a legal entitlement. In my view, the provisions of s.27(1) and (3) confirm that 'the wages properly payable by him [sc. the employer] to the worker' are sums to which the employee has some legal, but not necessarily contractual, entitlement.

33. Beldam LJ stated [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.

34. In **Farrell Matthews & Weir v Hansen** [2005] I.C.R. 509 Nelson J, sitting in the EAT, reviewed the authorities concerning claims for bonus payments as unauthorised deductions from wages:

40. Each of the above examples of non-contractual bonuses falls within section 27(1)(a) of the 1996 Act "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* (unreported) 15 September 2000; Court of Appeal (Civil Division) Transcript No 1743 of 2000. This situation applies equally where a discretion to award a bonus is granted under contract, as in *Chequepoint (UK) Ltd v Radwan*, or by custom or by ad hoc decision. Mr Scott was right to concede that once the respondent had declared the bonus it could not be withdrawn. Whilst there was no contractual entitlement to a bonus within the respondent's firm, bonus payments were made, or offered subject to targets being achieved.

41. There may also be situations in which a payment, which could properly be regarded as a bonus, is paid on an ex gratia or one-off basis. Such a payment may be made where there is no obligation by contract, custom or practice to make such a payment but where the employer chooses to make it. In such circumstances it may well be that there is no legal liability on the employer to make such a payment. Section 27(3) of the 1996 Act in our judgment is designed to cover situations where such a payment has in fact been made.

42. We see no reason to construe section 27(3) as meaning that all non-contractual bonuses as opposed to fees or commission, cannot fall within the definition of "wages" unless they are actually paid. Such a construction limits the inclusion of bonuses as wages under the Act in a manner which is inconsistent with the terms of section 27(1)(a) and the purpose of the Act. It also has inconsistent consequences for a bonus fully paid, and a bonus partially paid but declared.

43. The proper interpretation of section 27(3) is not that it applies to all bonuses thereby limiting the application of section 27(1)(a) but only to non-contractual bonuses to which no legal entitlement or legal liability to pay arises. When they are paid, however, they are, as Morritt LJ said in *New Century Cleaning Co Ltd v Church* [2000] IRLR 27, 34, para 62, treated "as payable". The bonus is thereby deemed to have been a legal entitlement.

44. Section 27(3)(b) is not inconsistent with this interpretation; its effect is to deem the legal entitlement, i e "payable", to be the day on which the ex gratia payment is made.

45. Neither the decision in *New Century Cleaning Co Ltd v Church*, nor the obiter dicta deal precisely with the point under consideration in this case. We have considered in particular the dicta of Morritt and Beldam LJJ and do not consider that either of them is inconsistent with our conclusion. In so far as *Kent*

> *Management Services Ltd v Butterfield* [1992] ICR 272 is concerned, again, Wood J did not in his obiter dicta deal with the point at issue in this case.

35. An employment tribunal may have to construe contractual provisions to determine wages due:

Agarwal v Cardiff University and another Tyne and Wear Passenger Transport Executive (trading as Nexus) v Anderson and others [2018] EWCA Civ 2084, [2019] I.C.R. 433:

> 18. The approach required to a claim based on section 13 of the 1996 Act, in the light of the analysis of the predecessor provisions in *Delaney v Staples*, can be sufficiently summarised for our purposes as follows.
>
> (1) The first question is whether there has been a deduction within the meaning of the section. That depends on subsection (3), and specifically on whether the sum claimed was "properly payable" (on the relevant occasion and "after deductions"). It may prima facie seem odd to start there rather than with subsection (1), which formally enacts the obligation on the employer not to make the deduction; but that is in essence the point addressed by Nicholls LJ in *Delaney v Staples* —see para 16 above. It was not in dispute before us that "properly payable" means payable pursuant to a legal obligation. Such an obligation will typically arise under the contract of employment, though it need not do so: see *New Century Cleaning Co Ltd v Church* [2000] IRLR 27, para 43, per Morritt LJ.
>
> (2) If there is a question, of any character, as to whether the sum in question is "properly payable" that question must be resolved by the employment tribunal. That is stated explicitly by Nicholls LJ in the sentences which I have italicised in the passage quoted at para 15 above. That necessarily means that it will need, in a case where this is the issue, to resolve any dispute as to the meaning of the contract relied on: Nicholls LJ expressly rejected the statement by the Employment Appeal Tribunal in the *Alsop case* [1990] ICR 378 that it had no power to do so.

36. There must be an obligation on the employer to pay the employee a quantifiable sum: **Coors Brewers Ltd v Adcock and others** [2007] EWCACiv 19, [2007] ICR 983 per Wall LJ:

> 46 In my judgment, the underlying facts of *Delaney v Staples* are a paradigm of the circumstances in which Part II of the Employment Rights Act 1996 is designed to operate. The employee complains that there has been an unlawful deduction from his wages. He has not been paid an identified sum. He makes a claim under Part II. The employer may have a number of defences. Those defences may raise issues of fact. Those issues will be for the tribunal to determine. But the underlying premise on which the case is brought is that the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him. That, it seems to me, is the proper context both of *Delaney v Staples* and Part II of the 1996 Act.

37. The fact that a complex calculation may be required does not necessarily prevent a sum being quantifiable: **Lucy v British Airways plc** UKEAT/0033/08/LA:

> 36. While I agree with Mr Gilroy that the number of different allowances which the Claimants might have received, had they continued to be rostered for flying duties, and the different criteria which applied as between the various allowances would or might have made the correct calculation of the present claims very difficult, I conclude that such difficulties did not, of themselves, have the effect in law that the Tribunal had no jurisdiction to hear these claims, brought as they are under Part II of the 1996 Act. If they were unquantifiable, save in terms of the loss of a chance, as was the claimed loss in *Coors*, I would of course take a different view; but they are not unquantifiable; they are merely potentially very difficult to quantify.

Analysis

38. As EJ Heath noted, the analysis of the claim turned on the contractual provision:

> 6.2 You **may** receive **a minimum 10%** of **the Company's performance fee** (subject to the appropriate deductions) from future investments where you are the designated Asset Manager. **The terms and percentage of each performance fee will be negotiated with you and agreed in advance of each project** provided you remain in employment with the Company and are not working under notice at the time the performance fee is paid.

39. EJ Heath correctly held that the word "may" meant that the provision was discretionary. If the discretion to make a payment was to be exercised two things needed to be fixed: (1) the "terms" of the performance fee and (2) the percentage. Put the other way round, the multiplier and multiplicand have to be fixed, or in the case of the multiplicand a method for its calculation set out, to ascertain any sum payable to the claimant. The Company was defined to be the respondent, rather than any of the other "Hobart" companies. Any sum to be paid to the claimant would be a percentage of the "Company's performance fee".

40. I consider that EJ Heath was correct to conclude that the email exchanges, in March and April 2019, did not result in an agreement being reached as to the basis on which any performance fee to be paid to the claimant was to be calculated. There was no agreement of a performance fee that would be payable to the respondent, or the percentage of such a fee that would be paid to the claimant. The appeal as developed in submissions was not put on the basis that there was an agreement. The email correspondence ended with the parties still at odds.

41. The focus of the appeal was that the respondent had unilaterally declared that the claimant would receive a 10% "profit share" and that, relying on **Hansen**, "once the respondent had declared

the bonus it could not be withdrawn". I consider that there are a number of problems with this submission. It was not the way in which the claim was put in the employment tribunal. Before the employment tribunal it was asserted that there was an agreement that allowed the sum payable to the claimant to be calculated and thereafter any residual discretion arising from the use of the word "may" in clause 6.2 could not be exercised in a manner that was "unreasonable and/or capricious and/or arbitrary and/or perverse and/or irrational and/or not in good faith". I do not consider there is a proper basis for fundamentally changing the nature of the claim on appeal.

42. Further, even if the matter could be properly argued as a "declared" bonus, at best the percentage had been declared, but not of what. The multiplier the respondent intended to apply had been set out, but not the multiplicand. The reference to a "profit share" in the emails did not explain how the "profit" would be calculated. In his email of 6 March 2019, Mr Harris referred to any figure being "subject to the performance fee calculation agreed with Bridges". No such performance fee was agreed with Bridges. The arrangement with Bridges was terminated. I do not consider that there was an agreement that the claimant would receive 10% of the sums that were eventually paid to HWSL, rather than the respondent, in March 2020. It is unclear whether the sums paid to HWSL were then paid to the respondent, but even if they were, I do not consider that the claimant can establish that the total sum paid was a performance fee. The contract provided for negotiation of the percentage and terms of any performance fee payable to the claimant. It was not a case in which the performance fee could be ascertained by construing the contract or conducting a complex calculation. The terms under which a performance fee would be calculated had not been agreed.

43. I consider that EJ Heath was right to conclude that there was no sum that the claimant could establish was properly payable. There was no specific sum that could be calculated as being payable to the claimant. Nor was there a sum it might be argued any proper exercise of the discretion under the contract would necessarily result in being declared. Even if it might be argued that any rational exercise of the discretion would result in a multiplier of 10%, there was no multiplicand that necessarily would be arrived at by a rational exercise of the discretion. The terms of any performance

fee had not been agreed. In the circumstances, the claim was correctly dismissed. The claim was for an unliquidated sum and there was no jurisdiction for the employment tribunal to consider the claim as an unauthorised deduction from wages. There was no "identifiable" or "quantifiable" sum that could be shown to be "properly payable" to the claimant. The appeal is dismissed.