



# EMPLOYMENT TRIBUNALS

**Claimant**  
Mr. P. Richardson

**Respondent**  
Grays Dry Lining Ltd

v

**Heard at:** Watford  
**Before:** Employment Judge Heal

**On:** 21 November 2017

## Appearances

**For the Claimant:** in person  
**For the Respondent:** Mr. T. Perry, counsel

## JUDGMENT

The claim, whether expressed as one of unauthorised deductions from wages or as breach of contract, is dismissed.

## REASONS

1. Written reasons are provided at the request of the claimant.
2. By a claim form presented on 21 August 2016 the claimant made a complaint of an unpaid bonus.
3. I have had the benefit of a bundle produced by the respondent which runs (witness statements aside) to 62 pages.
4. I have also heard oral evidence from:

The claimant, Mr Paul Richardson,

Mr Marc Gray, Director and primary shareholder in the respondent.

5. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement and then the witness was cross examined and re-examined in the usual way.
6. Other witness statements were provided in the bundle but Mr Perry did not apply for me to accept them in evidence in the absence of the witnesses themselves. After discussion about those witnesses at the outset, Mr Perry elected to call Mr Gray who attended at short notice.
7. A witness statement from Mr Silver provided by the claimant was also in the bundle. The claimant did not propose to call him in person because he had misunderstood the terms of the case management order. He thought that order 5 envisaged that witnesses would give their evidence on paper and had missed the significance of the words '*oral* evidence in chief...' He tried to secure Mr Silver's attendance by making a call to him this morning, but Mr Silver could not come at such short notice. I did accept Silver's evidence on paper therefore, subject to the weight which it was appropriate to give it in the circumstances.

### **Issues**

1. The issues were identified by Employment Judge Hyams at a preliminary hearing held on 3 November 2016. The claimant has today confirmed to me that he does not make a claim for any failure to give notice. Mr Perry confirmed that his case based on a claim for an overpaid car allowance was not a separate claim for restitution but a defence of set off to be exercised in the event the claimant succeeds in the primary claim.
2. The issues are:
  - 11.1 Did the claimant's contract of employment contain an enforceable agreement that he would be paid a bonus?
  - 11.2 If so, what were the terms of that agreement?
  - 11.3 Was the claimant entitled to be paid a bonus?
  - 11.4 If so, to what sum was he entitled?
3. We agreed to deal with the first two issues as a preliminary issue. I have resolved that issue in the respondent's favour and have not continued therefore to hear evidence about the claimant's actual performance and whether he would have qualified for any bonus.

### **Facts**

4. I have made findings of fact on the balance of probability.

5. The claimant was employed by the respondent as a Construction Director from 28 September 2015. He had re-located from Australia in order to accept this role.

6. His offer of employment was contained in a letter dated 13 August 2015. So far as is relevant, it contains the following:

*'Basic salary: £80,000 per annum minus relocation costs of c £10,000 (actual costs to be confirmed on receipt of your invoice). You will have an On Target Earnings potential of circa £100k subject to 3 months initial review of project values and potential.'*

*'Car allowance: £5,000 per annum, although it is agreed that we will provide you with a suitable vehicle for your first three months and review the situation towards the end of this period (you will still be paid your car allowance during this initial 3 month period).'*

7. The claimant's written contract of employment is a separate document.

8. At clause 9 it says,

*'Bonus: If you are entitled to bonus the details / terms will be in the box below.'*

9. In the box is written:

*'You will have on target earnings of £100,000 (inc basic salary). Terms TBC'*

10. Thereafter, there was no further correspondence on what would be the terms of the bonus clause.

11. Mr Richardson was the only employee to have a bonus provided for in his contract. The respondent had no experience of dealing with a bonus: Mr Richardson was the only employee for whom they had seen the need to incentivise.

12. No 'three months initial review' took place.

13. On a day between the claimant's start date and Christmas 2015, there was a conversation between the claimant and Mr Gray. Just because there are substantial differences between the two accounts does not mean that either witness is being dishonest. What they describe to me may well be two different perceptions of a conversation which is now many months ago and of which no-one took notes or saw the full significance at the time. What is clear is that it was not a meeting set up to confirm the details of the bonus. There was no agenda and no previous email or letter to the claimant. The flavour of the meeting was that of an informal and unscheduled discussion about company performance. It seems to me quite likely that even if he has now forgotten it, Mr Gray may have mentioned bonus because if he had genuine

concerns about the claimant's performance, then mention of bonus might help to improve that performance. At its highest however and even on the claimant's case, he said,

*'I want you to achieve. I want to pay your bonus. I want every job to achieve 16% profit.'*

14. That confirms what Mr Gray has told me: that he did want to incentivise the claimant and intended to pay a bonus. However, I do not think an objective observer would construe those words to mean: your bonus will be payable *if* you achieve 16% of profit. The two statements are simply separate assertions of what Mr Gray wanted. He wanted to pay the claimant a bonus. He also wanted 16% profit. He did not make one dependent on the other.
15. The claimant did not confirm in writing to the respondent at any time that he thought that the terms of his bonus had been agreed. Nothing more was ever said verbally or in writing on the subject. No bonus was paid, whether monthly, at the year end, or at all. The respondent has said, and I accept, that it was concerned about the claimant's underperformance and therefore the terms of a bonus to be paid if he performed well had simply fallen away as an issue.
16. Ultimately on 17 June 2016 the respondent terminated the claimant's employment.

### ***Concise statement of the law***

17. Parties to a contract sometimes provide that certain terms are to be agreed later, or from time to time. Such a provision may make the agreement so uncertain that it cannot be enforced. It may be appropriate to infer that, in leaving the details to be finalised later, the parties did not intend to be bound until those details were in place.
18. I note that the relevant words in this case are 'TBC' (to be confirmed), not 'to be agreed' but it seems to me that that only means that the respondent perhaps retained the capacity to tell the claimant what the terms would be, rather than necessarily to negotiate and agree them with him. I do not think the use of the word, 'confirmed' instead of 'agreed' would make a situation any the less vague or uncertain.
19. It does not follow that a clause will never be enforceable where it is vague. It will depend on the circumstances and whether, for example, it can be saved by an inference of reasonableness.

## **Analysis**

20. I have found that the words used by Mr Gray only amount to an expression of desire to pay a bonus, if appropriate. I have found that those words do not amount to an expression of the terms of the bonus: the bonus was not conditional on the claimant achieving profits of 16%.
21. Therefore, the terms of the bonus are only those set out in the offer letter and the contract of employment. Those documents give no detail at all as to how the bonus would be calculated, when it fell due, or how entitlement was to be decided.
22. Even if the words used by Mr Gray do indicate the terms of the bonus, I consider that there is nonetheless too little clarity for the term to be enforceable. Was the claimant to achieve 16% profit on every project? Was it to be an average? Would he be paid bonus per project only on those that passed the 16% threshold? If he failed to achieve on one project, would he lose the bonus altogether or was there to be a sliding scale? What would he be paid if he achieved the target, whatever it was? Would he be paid the entire £20,000, or would he receive some percentage calculated by project or the level of profit?
23. I would find it impossible to tell whether the claimant had become entitled to a bonus or if so, to how much, given the wording used. Trying to imply that he would be paid what was reasonable would not help, because there are so many possible variables, any of which might have been reasonable. This is not to be compared with an exercise of, say, discovering a reasonable price to be paid for a single article. I cannot derive any help from the normal custom and usage because the claimant was the only employee of the respondent who had any provision for bonus in his contract.
24. So, however I look at the situation, I consider that the contract term about bonus is so vague as to be unenforceable. I infer that the parties did not intend to be bound until the bonus terms were agreed, because there was so much left unsaid. Their conduct in doing and saying nothing at all further about the bonus confirms that. No steps at all could be taken in deciding whether the claimant had an entitlement or to calculate any sums due.
25. The words used by Mr Gray do not amount to an agreement about terms or even confirmation of terms. But even if they did, the terms are still so vague that if I were to try to enforce them I would have to write the contract for the parties. The fact that I would have to write in so much shows the extent of the vagueness.

26. I make these findings knowing how unfair the situation must seem to Mr Richardson. He has come from Australia to take a job. He was promised a bonus, and his employer intended that there would be provision for a bonus but because his employer left the terms wholly unspecified he cannot have a chance of qualifying for the bonus. However, I am not applying a law of general fairness, but of contract. I cannot enforce a term of a contract that is so vague that it is unenforceable.
27. I have made no findings about whether the claimant's performance was such that he would or would not have qualified for any bonus.
28. It follows that because the term is unenforceable, the sum which the respondent wishes to set off against the claim also falls away. There is nothing against which to set off that figure.

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Employment Judge Heal

Date: 21/11/2017

Sent to the parties on: .....

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For the Tribunal Office