



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104997/2022

Held in Glasgow on 22 November and 16 December 2022

Employment Judge P McMahon

Mr. D McCann

**Claimant
In Person**

Redpath Construction Limited

**Respondent
Represented by:
Mr. A Sloan
(Director)**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:-

- (i) The respondent made a series of unlawful deductions from the claimant's wages in July 2022 (of the gross sum of £1,600 (ONE THOUSAND SIX HUNDRED POUNDS)) and August 2022 (of the gross sum of £1,706 (ONE THOUSAND SEVEN HUNDRED AND SIX POUNDS)) contrary to section 13(1) of the Employment Rights Act 1996 (the "ERA").
- (ii) The respondent is ordered to pay the claimant the gross sum of £3,306 (THREE THOUSAND THREE HUNDRED AND SIX POUNDS) in accordance with section 24(1) of the ERA.
- (iii) The respondent shall be at liberty to deduct from the above sums prior to making payment to the claimant such amounts of Income Tax and Employee National Insurance Contributions (if any) as it may be required by law to deduct from a payment of that amount made to the claimant, provided that if it does so, the respondent shall duly remit such sums so

deducted to His Majesty's Revenue and Customs (HMRC), and provide to the claimant written evidence of that fact, the amount of such deductions and of the sums deducted having been remitted to HMRC, payment of the balance to the claimant shall satisfy the requirements of this judgment.

- (iv) The Tribunal does not have jurisdiction to consider the claimant's claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3.

REASONS

Introduction

1. This case was heard on 22 November and 16 December 2022.
2. The claimant represented himself and the respondent was represented by Mr. Alistair Sloan in his capacity as a director of the respondent.
3. The claimant's claim consisted of:
 - 3.1. A claim for unlawful deduction from wages under Section 13 of the ERA in respect of non-payment of the second and third instalments of the "Non-retained Bonus" (hereinafter defined).
 - 3.2. A claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3 in respect of the "Retention Bonus" (hereinafter defined).
4. The respondent resisted both claims.
5. A Joint Bundle was provided (containing documents numbered 1 to 15). The claimant also submitted an additional bundle (containing documents numbered 16 to 18) and the respondent submitted an additional bundle (containing document numbered 19). Not all documents were referred to in evidence.

6. An agreed statement of facts was provided.
7. Evidence was heard on oath or affirmation from all witnesses. For the claimant, evidence was heard from the claimant and for the respondent, evidence was heard from Mr. Sloan. Both parties exchanged and submitted detailed written submissions and made brief oral submissions based on these on the last day of hearing.

Issues

8. The issues to be determined by the Tribunal were as follows:-

- 8.1. Had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA and, if so, should the respondent be ordered to pay the claimant the amount of any such deduction in accordance with section 24(1) of the ERA.
- 8.2. Had there been a breach of contract which the Tribunal had jurisdiction to consider under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3.

Findings in fact

9. The Tribunal considered the following facts to be admitted or proved:

10. The Claimant commenced employment with the Respondent as a Project Manager on 26 August 2019.
11. The Respondent issued the Claimant with a written contract of employment. (a copy of which was included in the Joint Bundle at document 4). This included a paragraph (paragraph 5 on page 74 of the Joint Bundle) which read:

"You are eligible for inclusion in the Company Incentive Scheme with effect from your commencement date. This is not a contractual bonus scheme, it is

a payment at the discretion of Board of Directors and is based on performance on projects under your direct control – please refer to the attached document.”

12. The Claimant's contract of employment contained a Schedule with details of a bonus scheme for Surveyors, Contract Managers and Project Managers / Site Managers (the "Project Bonus Scheme") (a copy of which was produced at page 47 (and also at page 76) the Joint Bundle). This was written by Mr. Sloan in 2008 and was the "Company Incentive Scheme" referred to paragraph 11 above. It read:

“Redpath Construction Ltd

Bonus Scheme

Surveyors, Contracts Managers, Project Managers and Site Managers

1. On each of the projects included within the bonus scheme, the following staff will be entitled to receive a bonus equal to 2% of the contract profitability:

- Site manager*
- Contracts manager*
- Surveyor*

For the avoidance of doubt, only permanent employees of Redpath Construction Ltd will qualify for the bonus scheme. Any freelance staff will be excluded from the bonus scheme.

2. The bonuses will be paid on December 31st and June 30th based on the management accounts for November and May.

3. Bonus payments will be made on each project only when the final account has been agreed and paid.

4. The bonus percentage will be reduced to 1% of the contract profitability if the project is completed late. For the avoidance of doubt, if practical completion is achieved later than the contract completion date (as amended by any extensions of time) the project will be "completed late" for the purposes of the bonus scheme.

5. 20% of the bonus will be deferred until the end of the six month period in which retentions are released and paid by the client.

6. Negative bonuses will be calculated on any loss making projects. In the event of any loss making projects the negative bonuses will be calculated at 2% with no adjustments for late completion or retentions. The maximum negative bonus deducted in any particular 6 months will equal the total of the bonuses payable on profitable contracts in that period. For the avoidance of doubt, at no time would negative bonuses be a deduction from basic salary they would be applied where there was sufficient positive bonus to be offset against.

7. After the first payment of bonuses on each project adjustments will be made in each subsequent 6 months if there are any increases or reductions in profitability.

8.No further bonuses will be paid to any member of staff who has resigned from the company.

9.No bonuses will be paid to any member of staff who is involved in a current disciplinary procedure.”

13. In or around June 2022 the respondent decided to pay a bonus to the claimant. On 28th June 2022, Mr. A Sloan (Director) emailed the Claimant attaching a bonus calculation for June 2022 under the Project Bonus Scheme (a copy of which was produced at document 7 of the Joint Bundle).The body of email read:

“David

I've attached a bonus calculation for June.

In addition to some movements on older projects, we've included an initial payment for IRH.

The result on the project is superb, and once the dust has settled on the account, there should be another reasonable bonus when we do the December calculations.

As we are still suffering a bit from a covid hangover, we will spread the bonus payments over three months - with £1,600 in June and July and the balance of £1,706 to be paid in August.

I look forward to similar payments in future!!

5 *Regards*

Alistair Sloan

Director”

The attached bonus calculation was detailed in table format at page 89 of the Joint Bundle.

10 14. The effect of the email and attached bonus calculation referred to at paragraph 13 above was to inform the claimant that the respondent had decided to pay to him and that he was to receive:

15 14.1. a bonus of £4,906 (gross) (referred to in this judgment for ease of reference as the “Non-retained Bonus”), the payment of which was to spread over three instalments payments of £1,600 (gross) to be paid in the claimant’s wages in June, £1,600 (gross) to be paid in the claimant’s wages in July and £1,706 (gross) to be paid in the claimant’s wages in August 2022; and

20 14.2. a further bonus of £1,100 (gross), subject to a condition (being the release and payment by the respondent’s client of funds retained by them in respect of a project at Inverclyde Royal Hospital (“IRH”) and which would be paid within 6 months of that condition being fulfilled, which would not be until at least May 2023 (referred to in this judgment for ease of reference as the “Retention Bonus”).

25 15. The respondent operated a separate bonus scheme referred to as the “Covid Loyalty Bonus Scheme”. A copy of details for this bonus scheme was produced at page 81 of the Joint Bundle) and read:

“Redpath Construction

Covid Loyalty Bonus

Scheme Rules

Covid loyalty bonus to be paid to existing staff who were employed between December 2020 and June 2021

5 *Maximum bonus payment will be the amount of salary sacrifice accepted by staff between December 2020 and June 2021*

Loyalty bonus will be paid in 12 equal instalments between June 2022 and May 2023

10 *If any member of staff leaves the company - no further payments will be made after the employee's final date of employment or during any notice"*

16. The respondent's Covid Loyalty Bonus Scheme was separate to and independent of the Project Bonus Scheme and its terms did not apply to the Non-retained Bonus, the Retention Bonus, or any other bonus payable under the respondent's Project Bonus Scheme.

15 17. The respondent paid the first instalment of the Non-retained Bonus of £1,600 (gross) to the claimant with his wages on 28th June 2022.

18. On 13 July 2022, the claimant provided the respondent four weeks' notice to terminate his employment by letter (a copy of which was produced at document 9 the Joint Bundle). It contained a sentence relating to the payment of bonus, which read:

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"For confirmed bonus payments already achieved please confirm that these will be added to my final salary payment at the end of July."

19. On 15th July 2022, Mr. Pritchard (Director) accepted the Claimant's resignation by letter (a copy of which was produced at document 11 of the Joint Bundle). It contained three paragraphs relating to the payment of bonus, which read:

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"Under the terms of the project bonus scheme, no bonuses were due for Inverclyde Royal Hospital at June 2022 because the final account had not

been certified and paid at that time. As a goodwill gesture, an interim payment was made.

Under the terms of the lockdown bonus scheme, a payment was due at June 2022 and that payment was made.

5 *Under the terms of both schemes, no bonus will be paid to any member of staff working a period of notice.”*

20. The respondent appeared to take the matter of the Project Bonus Scheme very seriously and administer it with great care. It was clearly a significant ongoing task and of considerable importance to Mr. Sloan. The continuing or
10 ongoing nature of the task of administering the Project Bonus Scheme was demonstrated by the fact that bonuses calculated as at the June and December each year as payable took into account any reduction in profitability on projects in respect of which bonuses had been paid previously. When there
15 was a reduction in profitability on projects in respect of which bonuses had been paid previously, any such previous bonuses never required to be repaid but reductions could be applied to subsequent bonus calculations in this respect and, if so, employees would be informed of this at the time they were being informed of what they were to be paid in the subsequent bonus.

21. The terms of Project Bonus Scheme were not always adhered to or followed
20 by the respondent, on some occasions this appeared to be to the advantage of the employee(s) concerned, and on some occasions not. There were a number of occasions when one or more of the terms of the Project Bonus Scheme were not applied or were varied by the respondent unilaterally and without seeking or obtaining the express agreement of employees, examples
25 of which are referred to at paragraphs 22 to 26 below.

22. Around September 2020 the respondent departed from the terms of the Project Bonus Scheme for some employees by making payment of a bonus in relation to a project at Glasgow Fort when such a bonus would not have been paid if applying the terms of the Project Bonus Scheme.

23. On occasion when there was more than one Site or Project Manager, Contracts Manager or Surveyor engaged on a project, each of them did not receive a bonus equal to 2% of the contract profitability, as stated in the Project Bonus Scheme. Instead, the bonus equal to the 2% of the contract profitability referable to their job title was shared with any other employees with that job title engaged on the project.
24. On or around December 2020 the respondent, as result of financial issues during the Coronavirus pandemic, varied the terms of the Project Bonus Scheme to the effect that from that point payment of any bonuses would be spread over three instalments, rather than being paid in one payment. The respondent decided to do this unilaterally and informed employees, including the claimant, of this decision but did not seek or obtain the express agreement of employees to this, including the claimant. The claimant did not object to this at any time prior to termination of his employment, including when he received bonuses in December 2020 and December 2021 which were paid over three instalments and when he was informed that he was to receive the bonus in June 2022 and was told it would be paid over three instalments.
25. On or around June 2021 the respondent decided to not apply the terms of the Project Bonus Scheme to the effect that any bonuses which would have been paid at that time if applying the terms of the Project Bonus Scheme, where not paid. Such bonuses were subsequently paid in December 2021.
26. On or around June 2022, at the point in time when Mr. Sloan was calculating and deciding bonuses to be paid to employees, including the claimant, and prior to sending the claimant the email referred to at paragraph 13 above, the respondent decided to vary the terms of paragraph 3 of the Project Bonus Scheme to the effect that bonuses were to be paid to the relevant employees engaged on a project at IRH, including the claimant, in June 2022 based on the anticipation that the final account for that project would be agreed and paid by the client (rather than it already having been agreed and paid before payment of the bonus, as provided for at paragraph 3 of the Project Bonus Scheme). This was a conscious and deliberate decision by Mr. Sloan which he took because he considered that one of the employees to whom the bonus

was to be paid (other than the claimant) was experiencing very challenging personal circumstances and, having decided to do this in respect of the bonus for that employee, decided to also do so in respect of the other employees, one of whom was the claimant, to avoid a discrepancy. In the event, as anticipated by the respondent, the final account for the IRH project was agreed and paid by the client by 7 July 2022.

27. The respondent did not pay the second instalment of the Non-retained Bonus of £1,600 (gross) in the claimant's wages on 28th July 2022 or at all, and did not pay the third instalment of the Non-retained Bonus of £1,706 (gross) in the claimant's wages on 25th August 2022 or at all.

28. The claimant's employment terminated on 12 August 2022. It was not clear at that stage that there was a definitive refusal on the part of the respondent to pay the Retention Bonus to the claimant. The Retention Bonus has not been paid to the claimant.

Observations on the evidence

29. Most of the tribunal's findings in fact were based on matters that were agreed or on evidence that was given by either the claimant's or respondent's witnesses that was not challenged or disputed and which the tribunal accepted as being sufficiently credible and reliable.

30. Generally speaking, the tribunal considered the witnesses to be giving an honest account of events as they remembered and understood them when giving evidence and there were very few areas in the case where there was a direct conflict of evidence.

31. In coming to its conclusions on the findings in fact the tribunal took into account and considered the evidence, its assessment of the credibility and reliability of witnesses, its other findings in fact and the submissions made on behalf of both parties.

32. The tribunal applied the civil standard of proof, being “on the balance of probabilities” as noted below under the Relevant law section, and with reference to the explanation of Lord Denning on the civil standard proof (then Mr. Justice Denning in **Miller v Minister of Pensions 1947 2 All ER 372, KBD**), referred to under the Relevant law section, the tribunal considered whether the evidence was such that it could say “we think it more probable than not” in respect of each key factual issue it required to determine.
33. The respondent did not lead any evidence to the effect that the claimant expressly (either verbally or in writing) agreed or consented at any time up to the termination of his employment to the terms of the Project Bonus Scheme being varied as referred to at paragraph 24 above (instalment payments) but did point to an email sent by the claimant’s solicitor to the respondent after the termination of the claimant’s employment (a copy of which was produced at document 14 of the Joint Bundle) which was an indicator that, in one way or another (be it expressly or impliedly, or in some other way), they thought it had been agreed. However, the claimant’s evidence was that he did not know why his solicitor had written this and he was also adamant that he did not expressly (either verbally or in writing) agree or consent at any time up to the termination of his employment to the terms of the Project Bonus Scheme being varied as referred to at paragraph 24 above. He did accept in his evidence that he had been informed of the variation and did not object to it at any time prior to termination of his employment, as set out at paragraph 24 above.
34. The tribunal heard evidence from both the claimant and Mr. Sloan in relation to when the final account for the IRH project, referred to at paragraph 26 above, had been agreed and paid and the Tribunal accepted the respondent’s position in this respect. There was evidence from the claimant that he was told by the surveyor on the IRH project that the final account was agreed by late May 2022 and, although he was not informed that it hadn’t been agreed and paid by the time he received the email from Mr. Sloan on 28th June 2022 referred to at paragraph 13 above, he did not know exactly when it was agreed and paid. Mr. Sloan’s evidence, however, was clear on this point that, whilst

he was very confident that the final account would be agreed and paid imminently as at the end of June 2022, when he sent the email to the claimant on 28th June 2022 the final account had not yet agreed and paid and it was not agreed and paid until 7 July 2022. Mr. Sloan's position in this respect was also supported by the documentary evidence produced, in particular a copy of a VAT invoice dated 7 July 2022 (a copy of which was produced at page 107 of the Joint Bundle). Mr. Sloan also made reference to a table within the additional bundle submitted by the respondent, at page 11 of that document, which indicated that the management accounts prepared in May 2022 showed that the account in respect of the IRH project had not been paid at the point at which they were prepared (although it was accepted by the respondent that this document was not actually an extract from the management accounts themselves but rather was a reproduction of information contained within them and formed part of an explanatory note the respondent had prepared for the purposes of the Hearing, after the events giving rise to the claim). Accordingly, this was of limited evidential value itself but in any event, as noted above, the tribunal accepted the respondent's position in this respect based on the evidence overall.

35. The only evidence of the respondent expressing its intentions in relation to the payment of bonus after Mr. Sloan's email of 28 June 2022, referred to at paragraph 13 above, was Mr. Pritchard's letter to the claimant of 15 July 2022 accepting his resignation, referred to at paragraph 19 above. The claimant said in evidence that it *seemed* to him from that letter that the respondent was rejecting payment of the bonus (and appeared to be referring to both the Non-retained Bonus and the Retention Bonus in this respect). The claimant also said that he thought that the respondent was confused in that letter between the terms of the Project Bonus Scheme and the Covid Loyalty Bonus Scheme.

36. The tribunal did not consider that it was clear, in his letter of resignation of 13 July 2022 referred to at paragraph 18 above, to which the respondent's said letter of 15 July 2022 was a response, that the claimant was referring to and seeking payment of both the remaining instalments of the Non-retained Bonus and the Retention Bonus by the end of July 2022. This was particularly so

given that, whilst the claimant had been told the remaining instalments of the Non-retained Bonus would be paid in July and August 2022, the Retention Bonus would not have been payable until at least May 2023 and it was also subject to a condition being fulfilled which had not been as yet (i.e. the release and payment by the respondent's client of funds retained by them in respect of the IRH project).

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37. The tribunal noted that at the point in the respondent's said letter of 15th July 2022 where reference was made to, "*Under the terms of both schemes, no bonus will be paid to any member of staff working a period of notice.*", it was possible that this was simply a statement of what the bonus schemes provided for, rather than a definitive refusal to pay bonus to the claimant specifically. The tribunal further noted that the Retention Bonus could only fall due for payment long after the claimant's notice period, unlike all or part of Non-retained Bonus (one remaining instalment of which the claimant had been told would be paid during what was now the claimant's notice period, and one the month after).
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38. In all the circumstances, the tribunal concluded that it was not clear that the respondent's said letter of 15 July 2022 alone, in response to the claimant's letter of resignation of 13 July 2022, amounted to a definitive refusal on the part of the respondent to pay the Retention Bonus.
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Relevant law

39. In dealing with this case the tribunal had regard to the overriding objective set out in Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
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40. It is the tribunal's task to determine the case 'on the balance of probabilities', which is the civil standard of proof applied in employment tribunal cases. Lord Denning (then Mr. Justice Denning) in **Miller v Minister of Pensions 1947 2 All ER 372, KBD**, explained the civil standard of proof in these terms:

“[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say “we think it more probable than not”, the burden is discharged, but if the probabilities are equal, it is not.’

5 41. Part II of the Employment Rights Act 1996 (ERA) sets out the statutory prohibition on deductions from wages.

42. Section 13(1) contains the general prohibition as follows:

“(1) An employer shall not make a deduction from wages of a worker employed by him...”

10 43. Section 13(3) of the ERA provides that a deduction from wages occurs 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.....”

44. Section 13(3) of the ERA also makes clear that:

15 *“...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.”*

45. Section 27(1) of the ERA provides:

20 *(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.”

46. Section 27(3) of the ERA provides:

25 *“(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.*”

47. A failure to pay at all can amount to a deduction under Section 13 (3) of the
5 ERA, as if an employee is due to be paid and receives nothing, non-payment
is to be treated as a deduction from their wages on that occasion (see
Delaney v Staples [1991] ICR 331 at 340).
48. Section 27(3) of the ERA does not mean that non-contractual bonuses do not
10 come within the definition of wages unless actually paid (see **Farrell
Matthews and Weir v Hansen 2005 ICR 509, EAT**).
49. With reference to Section 13(3) of the ERA referred to above, for wages to be
15 "*properly payable*" by the employer, the employer has to be rendered liable to
pay, either under the contract of employment or in some other way. In the
case of a discretionary bonus, whether contractual or otherwise, once an
employer tells an employee that they are going to receive a bonus on certain
terms, the employer is obliged to pay that bonus in accordance with those
terms, at least until the terms are altered and notice of the alterations is given
(see **Farrell Matthews and Weir v Hansen 2005 ICR 509, EAT**).
50. The words of a contract should be interpreted in their grammatical and
20 ordinary sense in context and the primary source for determining what the
parties meant when they entered into their agreement are the words actually
used in the contract, interpreted in accordance with conventional usage.
Employment contracts "*...are designed to be read in an informal and
common-sense manner in the context of a relationship affecting ordinary
25 people in their everyday lives*" (see **per Mr. Justice McCombe in Harlow v
Artemis International Corporation Ltd 2008 IRLR 629, QBD**).
51. It is a well-established principle of contract law that express terms take
precedence over implied terms. In some circumstances implied terms may be
used to qualify express terms, or at least restrict the way in which they are
30 applied in practice, but they cannot contradict them. (see **Johnstone v**

**Bloomsbury Health Authority 1991 ICR 269, CA, Johnson v Unisys Ltd
2001 ICR 480, HL)**

52. It is also a well-established principle of contract law that where a term of a contract has more than one possible meaning, the meaning least favourable to the party which included that term is to be preferred (known as the “*contra proferentem*” rule) .
53. The contractual jurisdiction of employment tribunals in Scotland is governed by Section 3 of the Employment Tribunals Act 1996, together with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
- 10 54. Article 3(c) of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides:
- “3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
- ...
- c) the claim arises or is outstanding on the termination of the employee's employment.”*
- 20 55. An employment tribunal does not have jurisdiction to hear an employee's claim for the payment of commission achieved during employment but which does not fall due for payment until after the date of the termination of employment. A claim will only be ‘outstanding’ within the meaning of Article 3 if it is in the nature of a claim which, as at the date of termination, was immediately enforceable but remained unsatisfied. Moreover, the claim does not ‘arise’ on the date of the employee's termination because at that stage they only have a prospective right to the payment for which they cannot sue until it has matured into an actual right. If a payment is only contingently due, it is not possible to claim payment until the contingency has happened. Before then, all that can be claimed is a declaration of entitlement to the payment if and when the contingency does happen, but a claim of that sort does not fall
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within Article 3 (see **Peninsula Business Services Ltd v Sweeney 2004 IRLR 49, EAT**).

Submissions

- 5 56. Both parties provided detailed written submissions and spoke to these briefly on the last day of the hearing.
57. Reference is made to the tribunal's position on the parties' submissions in the 'Deliberations and decision' section below and elsewhere where relevant.

10 Discussion and decision

58. There were two issues for the tribunal to determine in this case:

58.1. Had there been an unlawful deduction from the claimant's wages contrary to section 13(1) of the ERA and, if so, should the respondent be ordered to pay the claimant the amount of any such deduction in accordance with section 24(1) of the ERA.

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58.2. Had there been a breach of contract which the tribunal had jurisdiction to consider under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3.

59. In reaching its decision the tribunal considered its findings in facts, which it reached applying the civil standard of proof, being "on the balance of probabilities" and in accordance with the explanation of Lord Denning on the civil standard of proof (then Mr. Justice Denning) in **Miller v Minister of Pensions 1947 2 All ER 372, KBD**), all as noted under the Relevant law section above. The tribunal applied the relevant law, as noted under the Relevant law section above, and considered the submissions made on behalf of both parties.

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Unlawful deduction from wages

60. The claimant's claim for unlawful deduction from wages was in respect of non-payment of the second and third instalments of the Non-retained Bonus (i.e. £1,600 (gross) in July and £1,706 (gross) in August 2022).
61. It was a matter of agreement that the respondent paid the first instalment of the Non-retained Bonus of £1,600 (gross) to the claimant with his June 2022 wages and that the respondent did not pay the second instalment of the Non-retained Bonus of £1,600 (gross) in July 2022 or at all, and did not pay the third instalment of the Non-retained Bonus of £1,706 (gross) in August 2022 or at all.
62. The tribunal considered the parties' respective positions on the contractual status of the Project Bonus Scheme. The claimant's position was that the Project Bonus Scheme was a non-contractual, discretionary bonus scheme. The respondent's position was that it was a contractual bonus scheme. The tribunal concluded that the Project Bonus Scheme was a non-contractual, discretionary bonus scheme for the following reasons:
63. The words used in the claimant's contract of employment in respect of the status of the Project Bonus Scheme are set out at paragraph 11 in the Findings in fact section above. The tribunal considered that these words were clear and unambiguous. Mindful of the law in relation to interpreting the words in a contract referred to in the Relevant law section above and the guidance in the case of **Harlow v Artemis International Corporation Ltd**, the tribunal considered that interpreting the words, "*This is not a contractual bonus scheme, it is a payment at the discretion of Board of Directors...*", in their grammatical and ordinary sense in context and in accordance with conventional usage led to the conclusion that the provision in the contract meant that the Project Bonus Scheme was a non-contractual and discretionary bonus scheme, not a contractual bonus scheme;
64. Although the principle of *contra proferentem* would mean, where there was ambiguity and the words had more than one possible meaning, that the meaning less favourable to the respondent (who drafted the contractual

terms) would be preferred, that principle did not require to be engaged in this context as there is no such ambiguity in the words used anyway;

5 65. The tribunal considered the respondent's submissions in support of its position that the Project Bonus Scheme was contractual. The respondent submitted that there was a conflict between what the contract said and the Project Bonus Scheme as to whether the Project Bonus Scheme was contractual or not and that the Project Bonus Scheme was dominant. This, it was argued, was because, whilst acknowledging the words used in the contract as referred to at paragraph 63 above, the Project Bonus Scheme set out 9 rules that were mandatory, evidenced by the use of the word "will" in the Project Bonus Scheme;

15 66. The tribunal did not agree. The tribunal did not consider that the terms of the Project Bonus Scheme, which the contract explicitly refers to as being a non-contractual scheme, should take precedence over the terms of the contract. Furthermore, for all that the word "will" was used in the Project Bonus Scheme, which might indicate that its terms were applied in a mandatory way, its terms were not always adhered to or followed by the respondent as referred to at paragraphs 21 to 26 in the Finding in facts section above. In the circumstances, the tribunal could not agree that simply the use of the word "will" could elevate the status of the Project Bonus Scheme from it being stated to be non-contractual and payments under it discretionary in the contact, to it having contractual status;

25 67. The respondent submitted that what it described as the 9 mandatory rules of the Project Bonus Scheme were applied to the claimant throughout his employment as evidenced by four calculations/payments of bonuses to the claimant and that these bonus calculations/payments showed that the terms of the Project Bonus Scheme were followed time after time and proved that the claimant was the recipient of contractual bonuses; and

30 68. As referred to above, the terms of the Project Bonus Scheme were not always adhered to or followed by the respondent and even the four examples of the bonus calculations/payments relied upon by respondent as referred to at

paragraph 67 above displayed elements of some of the examples of the terms of the Project Bonus Scheme being varied or not applied by the respondent as detailed in the Finding in facts section above. Furthermore, even if the evidence did support an assertion that the respondent applied the terms of the Project Bonus Scheme consistently on these four occasions, this would not have led to a conclusion that the Project Bonus Scheme was a contractual bonus scheme. Even a discretionary benefit that has been granted for a number of years without fail will not necessarily be converted it into an implied contractual term and, even if it could be, in this case such an asserted implied term would contradict an express term and accordingly would not be implied in any event applying the guidance found in **Johnstone v Bloomsbury Health Authority and Johnson v Unisys Ltd**, as referred to in the Relevant law section above.

69. The tribunal considered the relevant statutory provisions of the ERA referred to in the Relevant law section above. It was noted that, for the purposes of the statutory prohibition on deductions from wages regime, the definition of "wages" can include bonus (Section 27(1) of the ERA) and that a deduction from wages occurs where, on any occasion, a worker receives less than the total amount of the wages "properly payable" on that occasion (Section 13(3) of the ERA). The tribunal concluded that the second and third instalments of the Non-retained Bonus (i.e. £1,600 (gross) in July 2022 and £1,706 (gross) in August 2022) were "wages" which were "properly payable" for the purposes of (Section 13 of the ERA) for the reasons set out below.

70. For wages (in this case, the second and third instalments of the Non-retained Bonus) to be "properly payable" by the employer, the employer has to be rendered liable to pay, either under the contract of employment or in some other way. In this context the tribunal considered the case of **Farrell Matthews and Weir v Hansen**, referred to at the Relevant law section above. The respondent argued that that decision was not relevant to this case because it related to payment of discretionary bonus and the claimant was not the recipient of a discretionary bonus. The tribunal did not agree for the reasons stated at paragraphs 62 to 68 above. The tribunal noted the guidance

in that case that, in the case of a discretionary bonus, whether contractual or otherwise, once an employer tells an employee that they are going to receive a bonus on certain terms, the employer is obliged to pay that bonus in accordance with those terms, at least until the terms are altered and notice of the alterations is given.

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71. With reference to this guidance in the **Farrell Matthews** case and the findings in fact reached in the case as referred to under the Findings in fact section above, on 28th June 2022 the respondent had sent an email to the claimant informing him that he was to receive the Non-retained Bonus of £4,906 (gross) and the terms on which he was to receive it were that it included an initial payment in respect of the IRH project and it was to be spread over three payments of £1,600 (gross) in June, £1,600 (gross) in July and £1706 (gross) in August 2022. As noted in the Findings in fact section above, the respondent had made a decision to include in the Non-retained Bonus a payment in respect of the IRH project by varying the terms of paragraph 3 of the Project Bonus Scheme to the effect that the Non-retained Bonus was to be paid on the anticipation that the final account for the IRH project would be agreed and paid by the client (rather than it already having been agreed and paid as provided for at paragraph 3 of the Project Bonus Scheme). The respondent had also varied the terms of the Project Bonus Scheme in December 2020 to the effect that from that point, payment of any bonuses would be spread over three instalments, rather than being paid in one payment. There was no suggestion that these terms were altered after the respondent sent the claimant the email on 28th June 2022.

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72. The respondent appeared to argue that the terms of Project Bonus Scheme remained terms on which the claimant was to receive the Non-retained Bonus after the claimant had been told he was to receive it on 28th June 2022, i.e. that the actual payment of the Non-retained Bonus was still subject to the terms of the Project Bonus Scheme after the claimant had been told he was to receive it. However, even accepting that argument, the tribunal did not consider that that could render the remaining instalments of the Non-retained

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Bonus not wages that were “properly payable” for the purposes of Section 13(3) of the ERA) for the following reasons:

73. The central thrust of the respondent’s argument was that paragraph 8 of the Project Bonus Scheme meant that the remaining instalments of the Non-retained Bonus, among other payments, were not payable because the claimant had resigned with notice on 13 July 2022. The tribunal did not accept that;
74. The respondent highlighted the wording of paragraph 8 of the Project Bonus Scheme to the tribunal i.e., “*8.No further bonuses will be paid to any member of staff who has resigned from the company.*” and submitted that this qualification applied to all bonuses which had been unpaid and this included any bonuses calculated in June 2022 but not paid, any of the three bonuses retained under rule 5 of the Project Bonus Scheme and any bonuses accrued in the accounts of the company but not calculated in accordance with the Project Bonus Scheme (this included the second and third instalments of the Non-retained Bonus as well as the Retained Bonus);
75. The respondent submitted that the claimant’s argument that the second and third instalments of the Non-retained Bonus were not “further bonuses” fundamentally misrepresented the nature of the bonus scheme and pointed to the ongoing nature of the bonus scheme in this respect and that the email sent by Mr. Sloan on 28th June 2022 referred to at paragraph 13 above provided the latest calculation of an ongoing bonus scheme;
76. The tribunal considered this point and noted the ongoing nature of the Project Bonus Scheme as set out in paragraph 20 in the Findings in fact section above. However, the tribunal did not consider that this had any material impact on whether or not the second and third installments of the Non-retained Bonus should be considered to be “further bonuses” for the purposes of paragraph 8 of the Project Bonus Scheme. There was no suggestion that, since the payment of bonuses began to be paid in instalments in December 2020, instalment payments of a bonus an employee had already been told in the June or December they would receive could still be reduced due to a

reduction in profitability on projects in respect of which bonuses were paid previously (as compared to reductions being applied, if relevant to subsequent bonus calculations and payments at the future June and December six monthly intervals referred to in paragraph 2 of the Project Bonus Scheme). In addition, the ongoing nature of the Project Bonus Scheme never required previous bonuses to be repaid and there was no suggestion that that wouldn't equally apply to instalment payments of previous bonuses;

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77. The tribunal considered that the principle referred to in the Relevant law section above that the words in a contract should be interpreted in their grammatical and ordinary sense in context and in accordance with conventional usage would also apply to the words in a non-contractual bonus scheme and the ordinary and conventional meaning of the word "further" when used in this context is "additional", "more" or "extra". In the tribunal's view, instalment payments of a bonus an employee has already been told they will receive cannot be regarded as additional, more or extra bonuses. The tribunal noted that the wording of paragraph 8 of the Project Bonus Scheme did not provide that no further *payments* of a bonus, far less no further *instalment payments of a bonus an employee had already been told they were to receive*, would be made to any member of staff who has resigned from the company;

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78. The tribunal also noted the context that the Project Bonus Scheme was written by Mr. Sloan in 2008, long before bonuses began to be paid in instalments in December 2020 as a result of the Coronavirus pandemic, so did not consider that "further bonuses" was intended to refer to further instalment payments of a bonus an employee had already been told they were to receive (as opposed to any subsequent bonuses calculated and paid at the future June and December six monthly intervals referred to in paragraph 2 of the Project Bonus Scheme);

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79. Again, the tribunal did not consider that there was any significant degree of ambiguity in the words and that the principle of *contra proferentem* was triggered, but to the extent that that could be argued, the meaning of the words less favourable to the respondent (who drafted the Project Bonus Scheme

terms) would be preferred, i.e. that “further bonuses” did not include further instalment payments of a bonus an employee had already been informed they were to receive;

5 80. It was observed by the tribunal that, even if it had concluded that the Project Bonus Scheme was a contractual bonus scheme as contended by the respondent, the tribunal would have reached this same conclusion as to the meaning and effect of paragraph 8 of the Project Bonus Scheme;

10 81. The respondent did not contend that the meaning or application of any of the other terms of the Project Bonus Scheme meant that the claimant was not entitled to the remaining instalments of the Non-retained Bonus. Mr. Sloan was straightforward and candid in this respect at the hearing and, although highlighting that the account in respect of the IRH project had not been agreed and paid until 7 July 2022 he was clear in his evidence (and alluded to the same in submissions) that had the claimant not resigned, he would have been
15 entitled to be paid the second and third instalments of the Non-retained Bonus, and it was because he did resign that he was not so entitled;

20 82. However, there was some reference in the pleadings and in the submissions and evidence at the hearing in relation to the terms of paragraph 3 of the Project Bonus Scheme and the tribunal considered it as part of its deliberations;

25 83. It was noted by the tribunal that the final account for the IRH project had not been agreed and paid by the client by 28th June 2022 and therefore had also not been agreed and paid by the earlier point in time when the May management accounts were prepared, and had still not been agreed and paid by the time the first instalment of the Non-retained Bonus was paid to the claimant;

30 84. When the respondent decided to pay the claimant the bonus and sent him the email referred to at paragraphs 13 and 14 above in the Findings in fact section informing him that he was going to receive the bonus, the respondent knew that the final account for the IRH project had not yet been agreed and paid and made a conscious and deliberate decision to vary the terms of paragraph

3 of the Project Bonus Scheme to the effect that the bonus was to be paid on the anticipation that the final account for the project would be agreed and paid by the client (rather than it already having been agreed and paid before payment of the bonus). Accordingly, to the extent that the provision in paragraph 3 of the Project Bonus Scheme applied to the payment of this particular bonus, it applied in its varied form as decided upon by the respondent, so that the final account for the IRH project did not require to be agreed and paid before payment of this particular bonus, it was sufficient that it was anticipated that it would be agreed and paid; and

85. It was further noted that the final account for the IRH project had been agreed and paid by the client by 7 July 2022, prior to the dates which the claimant had been informed the second and third instalment payments of the Non-retained Bonus would be paid on. Accordingly, even if the respondent had not decided to vary the provisions of paragraph 3 of the Project Bonus Scheme as set out above, and it applied in its original form, payment of the second and third instalment payment of the Non-retained Bonus would not be contrary to the terms of paragraph 3 of the Project Bonus Scheme if applied in its original form in any event.

86. The claimant argued that, because he had not expressly agreed to the variation to the terms of the Project Bonus Scheme as set out paragraph 24 above (instalment payments), he was entitled to payment of the remainder of the Non-retained Bonus on 30 June 2022 (i.e. £3,306 (gross) being the £1,600 (gross) the respondent said he would be paid in July and the £1,706 (gross) the respondent said he would be paid in August 2022). The tribunal did not agree. In the circumstances that the Project Bonus Scheme was a non-contractual discretionary scheme, changes to it did not require employees' agreement, the respondent had made the change and the claimant was aware of this and did not object to it.

87. It was noted that, for the purposes of the statutory prohibition on deductions from wages regime referred to under Relevant law section above, the **Farrell Matthews** case made clear that Section 27(3) of the ERA does not mean that non-contractual bonuses do not come within the definition of wages unless

actually paid and the **Delaney** case made clear that a failure to pay at all can amount to a deduction under Section 13 (3) of the ERA.

5 88. Accordingly, for the reasons and on the basis set out above, the Tribunal concluded that the respondent had not paid the claimant the second and third instalments of the Non-retained Bonus (i.e. £1,600 (gross) in July 2022 and £1,706 (gross) in August 2022) which were wages which were properly payable for the purposes of Section 13 of the ERA and that, therefore, this amounted to a series of unlawful deductions from wages within the meaning of S.23(3) of the ERA contrary to section 13(1) of the ERA and the respondent
10 is ordered to pay the claimant the gross sum of £3,306 in accordance with section 24(1) of the ERA.

Breach of contract

15 89. In relation to the claimant's claim for breach contract in respect of the Retention Bonus under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Article 3, the tribunal noted that in respect of these proceedings the relevant provision of Article 3 was Article 3(c), which provides that a breach of contract claim can only be brought before an employment tribunal if it "...arises or is outstanding on the termination of the employee's employment".

20 90. The tribunal took into account the judgment in the case of **Peninsula Business Services Ltd v Sweeney**, referred to in the Relevant law section above and noted that, although that case related to a commission payment, it related to commission earned during employment but payment of which would not be due until after termination of employment and was contingent on a
25 condition being fulfilled after termination of employment (in that case, the customer paying 25% of their fee), and the tribunal was of the view that the principle is applicable to the claimant's breach of contract claim in respect of the Retention Bonus in this case, which would also not be due for payment until after termination of employment and payment of which was also
30 contingent on a condition being fulfilled after termination of employment (in this case, the client's release and payment of certain retention funds). The

tribunal also noted its finding in fact that it was not clear at the point of the termination of the claimant's employment that there was a definitive refusal on the part of the respondent to pay the Retention Bonus.

5 91. Accordingly, following the analysis and guidance in the **Sweeney** case, the tribunal concluded that the claimant's claim for breach of contract in respect of the Retention Bonus, which was not payable until at least May 2023 and payment of which was contingent on the client releasing and paying retentions funds, did not arise nor was it outstanding on the termination of the claimant's employment, and so the tribunal did not have jurisdiction to consider the
10 claimant's claim for breach of contract in respect of the Retention Bonus under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3.

15 92. Neither party made an application for costs. The claimant made reference in his written submissions to reserving the right to make such an application and the respondent addressed that briefly in its own written submissions.

20 Employment Judge: Paul McMahon
Date of Judgment: 07 March 2023
Entered in register: 10 March 2023
and copied to parties