Case No: 1602107/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr A Cridge

Respondent: The Christmas Decorators (Franchising) Ltd

Heard at: Cardiff
Chambers

On: 2, 3, 4 April 2024
2 August 2024

Before: Employment Judge S Moore
Mrs J Beard
Mr P Charles

Representation
Claimant: In person
Respondent: Mr O'Callaghan, Counsel

RESERVED JUDGMENT

1. The claimant's claim that the respondent made unauthorised deductions from wages in respect of a discretionary bonus is well founded. The respondent is ordered to pay the claimant the sum of £25,000 (gross).

2. The claimant's equal pay claim is not well founded and is dismissed.

REASONS

Background and introduction

1. The ET1 was presented on 24 August 2023. This followed a period of ACAS early conciliation. The date of receipt was 14 June 2023 and the date the certificate was issued was 26 July 2023. The claimant brought claims of equal pay and a claim for unpaid bonus. The hearing took place on 2, 3 and 4 April 2024 at Cardiff employment tribunal. The claim went part heard largely due to the conduct of the respondent and / or their representatives (not Counsel) which caused a delay in starting the evidence. The Tribunal met in Chambers on 2 August 2024 to deliberate and reach their decision.

2. There was a bundle of 382 pages (subject to additions see below). The Tribunal heard evidence from the claimant and Mrs A Cole and from Mr G Comerford, Operations Director of the Respondent.

Issues arising at the hearing and from case management directions

3. A preliminary hearing took place on 23 November 2023 before Judge S Moore. Case management orders were made as follows:

- The respondent was to provide an amended response clarifying whether they accepted the claimant was employed on like work and their material factor defence;
- Disclosure to take place by 21 December 2023 with copies being sent to each other by 11 January 2024;
- Bundle was to be sent to the claimant by 8 February 2024;
- Witness statements would be exchanged by 22 February 2024.

4. It transpired on the first day of the hearing that the claimant had only received the bundle and witness statements on the previous Thursday (28th of March 2024). Unfortunately the claimant fell and fractured his hand on the Friday and therefore only been able to start preparing for his case on Sunday 1 April 2024.

5. The Tribunal had a discussion with the claimant about whether he was in a position to proceed as Judge Moore was concerned he had not had sufficient time to prepare given the very late provision of the bundle and witness statement exchange. The late disclosure of the bundle meant that the claimant's witness statement did not contain pagination. In further breach of an order, the respondent had failed to provide an updated list of issues. It was decided to adjourn until 1 PM to provide the claimant with further time to prepare and decide whether he wished to make a postponement application. At 1 PM the claimant confirmed that he wanted to continue and he was be provided therefore with further time to insert pagination into his witness statement.

6. The Tribunal identified that the amended response filed after the preliminary hearing on 7 December 2023 raised new material factor defences that had not been originally pleaded and there was no accompanying application to amend the response. It was also unclear whether it was still disputed that the claimant did like work to his comparators, the respondent having accepted that the claimant had a "valid comparator" for his equal pay claim.

Respondent's application to amend the amended response

7. The hearing restarted at 3pm on 2 April 2024. Counsel for the respondent agreed that an amendment application had not been made with the amended response and subsequently made an application to amend so as to be permitted to advance an additional material factor defence of length of service and experience. The original material factors pleaded were as follows:

- The geographical location of the claimant's comparator and the timing of her recruitment (she had been recruited during the first lockdown) and;

- That the interim MD offered the comparator terms and conditions which were not standard and went beyond his authority in doing so.

8. The amended response had sought to include length of service and experience as a further material factor defence. The respondent was permitted to amend the response. In summary the reasons were that there would be no prejudice to the claimant having been in possession of the amended response for some months and aware the response was advanced on this basis. The claimant's witness statement actually addressed these issues.

9. Counsel confirmed that the respondent conceded the like work issue. The only issue remaining in respect of the equal pay claim was the material factor defences.

10. This meant that the whole of the first day had been lost to these preliminary issues. The respondent's representative was ordered to write to the Tribunal to explain why the orders had not been complied with. The respondent's explanation was unsatisfactory and unreasonably sought to blame the claimant.

Issues arising on Day 2

11. In the morning the Tribunal received an application from the Respondent to admit two documents. The first document, which we shall call document 207 was said to be a complete version of the excel spreadsheet already in the bundle at page 207 with additional columns that had been hidden by the printing of the document. The Respondent wished to reference these columns and the different scoring that was not visible on those. The bundle version of document 207 was a spreadsheet containing a list of the claimant's franchisees along with 6 columns expressing KPI scorings.

12. Mr Comerford's witness statement, upon which the Claimant has prepared his claim stated that an email and attachment had been sent to the claimant by a manager on 26 May 2022 attaching the claimant's KPI's. Mr Comerford identified the attachment as the document at pages 150-151 in the bundle. On day 2, Mr Comerford sought to resile from his statement that had been exchanged and say that the correct attachment was at page 207 of the bundle and moreover was incomplete. He now sought to admit an expanded version of 207. The reason provided was that the respondent's representative had included the wrong attachment in the bundle.

13. The Respondent was asked to provide some information about this document namely when it was disclosed to the Claimant and why Mr Comerford's statement was incorrect insofar as it referred to a different document in the bundle as purportedly representing the Claimant's KPI. This was a very important document relevant to the Claimant's bonus pay claim because the document that Mr Comerford's witness statement referred to as evidence of his 2021/22 KPI's showed a different KPI figure to the one that he now wished to persuade this Tribunal was the correct document.

14. The Tribunal was subsequently sent an email from Mr O'Callaghan, the Respondent's Counsel, which had a number of sub-emails.

15. We had sight of the original email from the manager to the claimant dated 26 May 2022 and we could see that the attachment appeared to be the same excel spreadsheet at document 207 (with the hidden columns as it appeared as page 207 of the bundle). This had been disclosed to the claimant on 20 February 2024. The claimant accepted that he had received an email from the respondent's representative on 20 February 2024 with a number of attachments including the email of 26 May 2022 but told the Tribunal he did not check the attached Excel spreadsheet to that email at the time on the basis that he would be preparing for the Tribunal when he received the bundle. At that point it should be observed that the Claimant did not know that he was not going to be receiving the bundle from the Respondent until late on 27 March 2024 in breach of the Tribunal Orders.

16. The Tribunal decided to refuse permission to admit the expanded document 207 due to the serious prejudice this would now cause the claimant. Mr O'Callaghan somewhat bravely contended that this was not an ambush on the Claimant and that there was no prejudice. The reality of the position is that on day 2 of the hearing Mr Comerford sought to resile from his own witness statement and reference a different spreadsheet of questionable provenance in reliance of a suggestion that the KPI indicators had not been met and that was the reason for the non-payments of the performance.

17. Further, we did not have any evidence from Mr Gateson who was the manager who purportedly produced the spreadsheet and sent the email. The KPI indicators and scores at pages 150 and 207 are different and there was no prospect of the Claimant fairly being able to challenge the scores at new document 207. The Claimant would not now be in a position to, for example, say that he should have scored more than zero on the web pages being up to date for his particular franchisees.

18. In those circumstances we found that the prejudice weighed heavily with the Claimant and the expanded document 207 should not be admitted. In any event the final score of the document on 207 was in the bundle and the Respondent was able to ask the Claimant questions about the documents in the bundle.

19. In regard to page 210 we agreed to permit that expanded version to be submitted as it showed the figures that were obscured by ## in the bundle version under the final 2 columns.

Findings of Fact

20. We make the following findings of fact and balance of probabilities.

21. The respondent provides design and installation service of Christmas decorations and festive lighting schemes to commercial private residential customers in the United Kingdom. It is a privately owned company run by the directors and shareholders, one of whom is Mr Comerford, witness for

the respondent. They operate via a network of licensed franchisees of which there are around 40. It is necessary to set out events that took place prior to the claimant's employment as they are relevant to these proceedings.

22. In mid-2019, the respondent was approached by venture capitalists who wish to acquire hundred percent of the respondent's share capital. Negotiations took place and heads of terms were signed in December 2019 with an intended completion date of June 2020.

23. As part of those negotiations, the joint venture capitalists appointed an interim managing director Mr Barrow. Mr Comerford told the Tribunal that it was part of Mr Barrow's remit to replace the exiting management team (including Mr Comerford who would be retained as a consultant) with a new management team. The shareholders of the respondent were asked and agreed to give Mr Barrow full autonomy in his role. Mr Comerford also told the Tribunal that it was also the view of the incoming owners that field-based BDM's (Business Development Managers) was the way to drive the business forward, not a view that was held by the existing management team, but nonetheless, the way the new future owners wanted to grow the business.

24. Mr Barrow recruited and appointed a female business development manager ("JD") to be the northern business development manager on or around mid 2019. The response said JD had been recruited on a salary of £28.000 per annum but dismissed after about five months. Mr Comerford says it was £35,000. Mr Barrow's next appointment was a finance director Mr Gateson. He was recruited on 3 March 2020 also a salary of £35,000 per annum.

25. Mr Barrow then recruited a southern-based business development manager Mrs Angela Cole. She was appointed on 14 April 2020 at an annual salary of £48,000. Ms Cole is based in Devon. She was expected to travel and the majority of her clients were based in the South East, London or Norfolk. Mr Barrow also recruited a self employed London based consultant.

26. The existing management team were concerned at what they considered to be an unnecessary appointment of consultant and also a conflated salary for Mrs Cole but Mr Barrow was convinced that that was an appropriate salary for her location. Mr Comerford again told the Tribunal that Mr Barrow was exercising his autonomy in this regard. The tribunal had sight of an email from Mr Barrow to Mr Gateson concerning Mrs Cole's appointment. This is dated 9 April 2020 and after informing Mr Gateson of her salary he stated as follows:

"*Southern salaries are so much higher than Liverpool! She was on 55K in her previous role and I persuaded her to take a drop by saying she'll be working with friendly people! Oops!*
Car allowance: £250 per month
Bonus: 10%"

Experience

27. Mr Comerford did not address Ms Cole's experience in his witness statement. The only evidence before the Tribunal regarding Ms Cole'

experience (relied upon as a material factor) was in an email from Mr Bolton (director and shareholder) to the franchisees dated 24 July 2020 where he stated:

"Angela Cole is the southern business development manager, with many years of experience in this role. Not a Christmas expert yet though! [JD] who was 'let go' by Martin was meant to be the BDM for the north, but don't get me started on that crank! Those of you under her consultancy were told that it was the company's strategy to let her go in order for the company directive to be to concentrate on the south of the UK. I don't actually believe this was true and under my leadership definitely not happening. Every Christmas Decorator in the north is just as important as every one in the South."

28. Mr Comerford referred to the claimant as having some considerable experience in the franchise industry.

29. At the beginning of June 2020, the joint venture capitalist announced that they would not be proceeding with the acquisition of the respondent shares. Mr Comerford described this as devastating news and resulted in the respondent having incurred substantial wasted costs as well as recruitment and salary costs of the employees mentioned above. Mr Barrow and the self-employed consultant were dismissed however Mr Comerford decide to retain the services of Mr Gates and Mrs Cole as they were adding value to the business.

Recruitment of the claimant

30. In June 2021 the respondent decided to recruit Northern region business development manager and placed an advertisement on Indeed.com. The salary was advertised to be £35,000 p.a. and under "supplemental pay types" the advert stated, "bonus scheme". The role was 50% travel and remote working. The claimant applied for the role and was offered the job after an interview with Mr Bolton and Mr Gateson at Cardiff train station. The claimant told the Tribunal that he expressed concern about the salary being on the low side and was informed by Mr Bolton that there was a "£20k" bonus on top of the basic salary which he would earn. The claimant asked if this was a "magic vanishing bonus here today gone tomorrow" to which Mr Bolton smiled and said he always paid bonuses but only when earned and if the claimant achieved KPI's he would earn the bonus. It was confirmed that Mr Gateson would give details of the bonus but after Mr Bolton left it became apparent to the claimant that Mr Bolton had thrown Mr Gateson a curve ball and Mr Gateson was not aware of bonus details.

31. We had sight of the statement of main terms of employment ("the contract of employment"). This was dated 29 July 2021 with a start date of 9 August 2021. The relevant terms are as follows:

Job Title
You are employed as a: Business Development Manager - Northern Region. The Company reserves the right to require you to perform other duties and work in other departments from time to time, and it is a condition of your employment that you are prepared to do this.

Place of Work

Your normal place of work is at your home.
However, you may be required to travel to and work at various locations and sites as determined by the needs of the business.

Pay
Your salary will be paid at the rate of £35,000 per annum by BACS at monthly intervals on or around the 23rd day of each calendar month.

Bonus scheme
The company operates a discretionary bonus scheme. Awards under the scheme will be made annually, following the submission of the year end accounts and will be based on company financial performance and the achievement of personal objectives. Payments from the scheme are not guaranteed and the company reserves the right to change the scheme each year. The calculation of actual payments from the scheme are at the discretion of management. Key Performance Indicators will be set on an annual basis with Bonus amounts agreed, and maximum bonus potential for 2022 FYE will be £20,000.

32. Soon after the claimant commenced his employment he and Mrs Cole began to chase Mr Gateson for confirmation of how the bonus scheme would operate. On 18 August 2021 Mr Gateson emailed them both to advise (and referenced discussing previously) that they needed to work on identifiable KPI's for bonus. He attached a work in progress document which would need to be discussed and that the respondent wanted to be "open and transparent when we come to set up and then settle in Q2 next year". Attached was an excel spreadsheet titled "Bonus on Compliance with the franchise company in the first column. The column headers for KPI's had suggested scores under each column with a maximum score of 336.

33. The claimant chased for a letter confirming the bonus at a meeting at head office on 8 September 2021 and was assured by Mr Gateson the letter was on its way. He chased again at a Teams meeting on 20 September 2021 and by telephone and email on 14 October 2021. On 18 November 2021 the claimant chased by email and had drafted a letter to be signed by Mr Bolton that reflected the claimant's understanding of how the bonus scheme would be structured. He asked Mr Gateson to arrange for Mr Bolton to sign the letter. The letter stated as follows:

I am writing to outline the terms of your 2021 bonus, which consists of two parts.

Part 1:
£10,000 will be paid, in full, if you achieve a like for like region growth of 30% over 2020.
Should you achieve less than 30% your bonus will be paid pro rata.
Revenue analysis will be calculated from your franchisees submitted MSF's.

Part 2:
An added payment of £10,000 will paid if you achieve the twelve KPI's you have agreed with Mark Gateson.
Should you achieve less than twelve KPI's your bonus will be paid pro rata.
Terms:

> *Your bonus calculation is based solely on your (North) regions performance.*

Your bonus calculations will be shown using on the spreadsheet 'BDM 2021 BONUS' attached to this email.

Payment of any bonus will at the same time as your March 2022 salary.

Thank you for your efforts so far this year. I wish you every success in achieving your full bonus.
Kind Regards

34. Ms Cole' witness evidence, which we accepted corroborated the claimant's understanding of the agreed bonus scheme structure.

35. Mr Gateson did not reply to that email or rebut the claimant's understanding as set out in the letter he drafted for Mr Bolton to sign. We find that the above reflected what had been agreed between the claimant and respondent in respect of the bonus terms. It is the best and contemporaneous evidence of the agreed terms and we accepted the claimant's evidence in this regard.

36. On 7 December 2021 Mr Gateson sent an email to say that he had drafted a document for Mr Bolton to sign, and it would be completed when he was back from holiday.

37. Following this the claimant continued to chase a signed copy of the letter from Mr Bolton with Mr Gateson on numerous occasions at Teams meetings and BDM meetings at the head office.

38. The respondent's financial year ends at the end of February.

39. On 18 March 2022 Mr Gateson sent an email to the claimant and Mrs Cole advising he had discussed with Mr Bolton and they would be paying the £10,000 based on "T/o" and would sit down and do the compliance review with the aim of the figure being settled the following month. We find this reference to T/o must be referring to Part 1 of the bonus (growth). The claimant was asked to do some scoring on compliance for review.

40. On 23 March 2022 the claimant was paid the £10,000 bonus. Mr Comerford told the Tribunal that this was paid as a gesture of goodwill and the claimant had not achieved a 30% growth for 2021 / 2022, attributing the growth to other factors such as recovery after Covid.

41. There is a dispute then about what happened with the KPI review. The claimant says that no review was undertaken, or if it was it was not informed or communicated to the claimant. The claimant was certainly aware of what the KPI's were (and there were 12 – see above). The KPI's were franchises compliant and a large element of the KPI's was to obtain information from the franchisees such as their full statutory accounts and VAT returns. This was dependent on Mr Gateson sharing data and documents with the claimant and Ms Cole who could then in turn analyse and confirm invoice payments. Mr Gateson failed to share this data with the claimant and Ms Cole despite them constantly chasing him for this information.

42. Mr Gateson instructed the claimant and Ms Cole to chase the franchisees for their sales and marking activities and data submissions and was keen to change slack behaviours and lack of previous engagement in the respondent obtaining the information they required to show the franchisees were complying with the franchise agreement. In the absence of the engagement Mr Gateson issued some formal letters however this did not go to plan and on 16 July 2020 26 franchisees signed a formal letter of concern to the respondent. As a result, the claimant and Ms Cole were instructed to take a softer approach by the franchisees who sent in their accounts and only politely ask those that had not. There was an agreement that Mr Gateson will provide regular updates of those franchisees who had not submitted to enable the claimant and Ms Cole to chase them up. This was crucial to the claimant and Ms Cole as without this information form Mr Gateson they could not prove they were meeting their KPI's. The tribunal had sight of numerous emails from the claimant to Mr Gateson between 27 January 2022 and 2 March 2022 chasing for the information and Mr Bolton himself was chasing Mr Gates and for an update on who had submitted data from the franchisees.

43. Following this in February 2022 the franchisees took part in a British Franchising Association survey in which 52% of the franchisees said they did not intend to renew their franchise agreement and 48% said they did not trust the respondent's leadership team. This prompted a change of plan. A meeting had been arranged 7 March 2022 at headquarters between Mr Gateson, the claimant and Ms Cole to go through the bonus KPI's but due to the results of the survey the agenda was changed. The claimant and Ms Cole were informed that the respondent top priority was to rebuild relationships and it was essential they did not aggravate the network. The claimant expressed concern about his bonus knowing the basis of the KPI's but was reassured by Mr Gateson this would not affect his bonus. Thereafter the claimant continued to chase Mr Gateson for information to enable him to comply with this KPI's between March 2022 through 2 August 2022. By this time he had asked for the necessary information at least 10 times. The claimant complained and we agree that the respondent failed to provide the claimant the necessary information to enable him to complete his bonus spreadsheet and show he was complying with his KPI's.

44. In the respondent's response they pleaded as follows:

"It is accepted the KPI review was not undertaken in April 2022 as this was due to an internal restructuring process within the HQ team. The compliance review took place in July 2022 when it was determined that the KPI's had not been achieved and therefore, no further discretionary bonus would be paid. "

45. Mr Comerford's witness statement did not speak of the July 2022 KPI review. Mr Comerford's witness statement stated that Mr Gateson sent the claimant an email and attachment at pages 149 and 150 on 26 May 2022 following a zoom meeting that had taken place where the KPI scores had been discussed and agreed. Mr Comerford stated "the attached spreadsheet identified that less than 50% of the required KPI's had been achieved and therefore no discretionary bonus was payable". Mr Comerford did not explain on what basis there was said to be a term that provided if

less than 50% of the KPI's had been achieved none of the bonus would payable.

46. However the attached spreadsheet at page 150 showed something entirely different. At the bottom of the spreadsheet (under the claimant's franchisees and financial figures for 2020 and 2021) it stated:

Bonus Value Available	Forecast	Actual	Bonus %	Bonus Available
Growth 10000	£ 46,220.21	£ 48,072.23	104%	£ 10,400.70 Capped at £10k
Compliance 10000	179	179.4	100%	£ 10,000.00
				£ 20,400.70

47. This was the spreadsheet that Mr Comerford told the Tribunal was the incorrect spreadsheet attachments and that part of the correct attachment was at document 207. This was unclear as the figure under max score column in the orange row was 79 or 82 as opposed to the 179 at page 150. Up until Mr Comerford resiled from his witness statement the claimant therefore understood, based on the respondent's documents and witness statements that Mr Gateson had produced a document that confirmed in 2021 he had achieved 179.4, the maximum KPI available and as such he was entitled to the full KPI bonus of £10,000.

48. The claimant chased Mr Gateson for part 2 of his bonus on 25 April 2022, 26 May 2022, 15 July 2022, 19 July 2022 15 August 2022, 12 October 2022, 10 January 2023 and was continuously told by Mr Gateson he would chase it up. He was never told it would not be paid. This evidence was corroborated by Ms Cole who experienced the same issue with Mr Gateson.

49. The claimant was asked about the email from Mr Gateson dated 26 May 2022. The claimant told the Tribunal that he had never seen the email and that at no time did Mr Gateson discuss the spreadsheet with him nor had he had any conversation that the claimant had failed to meet his KPI's had he done so he would not be sitting in the Tribunal today. We accepted the claimant's evidence that at no time did Mr Gateson discuss the KPI figures with the claimant. The claimant was a credible witness and the respondent did not call Mr Gateson or provide any documentary evidence other than the email dated 26 May 2022 to support their version of events.

50. We find that it is wholly implausible that had there been the discussion where the claimant was informed he had not met his KPI's and therefore no bonus would be payable that there would have been absolutely no further comment or correspondence from the claimant in this regard. It completely contradicts all of the evidence where the claimant was chasing Mr Gateson for an update on his KPI's: why would the claimant have done this if he had already bene told he had failed and no bonus would be due? Had there been such a discussion Mr Gateson would undoubtedly have referred to it in his email explaining why the bonus had not been paid.

51. The respondent also relied upon a spreadsheet showing financial figures for the claimant at p209 seeking to show five of his franchisees had performed under target for 2022. The claimant told the Tribunal that the figures in this spreadsheet cannot have been accurate as one of the franchisees ("Andy and Danny") on the list are referenced as having been

terminated but at the time of the claimant's departure, they were still franchisees. It is therefore very unclear as to when this spreadsheet was produced and on what figures it was based on and we find it is unreliable.

52. At page 210 of the bundle was a spreadsheet titled "BDM Alan Cridge". This had been produced by the respondent. The spreadsheet contained a list of the claimant's franchisees and turnover of the MSF (management service fee) returns. In 2020 the total was £1,595,692. In 2021 this increased to £2,871,892. In 2022 this increased by £455058 to £3,326,950. To achieve a 30% growth this figure would have needed to be £861,567. These figures were quoted by Mr Comerford in his witness statement in support of his contention that the claimant achieved less than 30% growth. The growth for the 2022/23 period was therefore just over 15%.

53. Having regard to the events in March 2022 the claimant and Ms Cole had a reasonable expectation they would be paid the company performance bonus in March 2023 after the end of the financial year.

Redundancy

54. On 27 March 2023 Mr Gateson arranged to have a Teams meeting with the claimant. During the meeting, the claimant was informed he was at risk of redundancy. The redundancy is not part of these proceedings however part of the meeting is relevant to the bonus claim as it is confirmed in the transcript of the discussion by either Mr Gateson or Mr Comerford that the claimant had hit his forecast for the previous year (expressed as a figure of 6.6).

55. The claimant was subsequently made redundant on 31 March 2023. The effective date of termination was 7 April 2023. The letter dated 31 March 2023 stated he would receive his notice pay and outstanding holiday pay in his final pay. The claimant was paid at the end of each month. The 31 March 2023 pay slip did not include outstanding holiday pay. As of 13 April 2023 the claimant had not received any payment as he refers to this is an email to Mr Gateson of that date. On 2 May 2023 the claimant emailed Mr Gateson confirming he had received £2123.69 and then asked where his bonus was (see above). In the absence of any further pay slip we find that the claimant would have received his last pay on 30 April 2023.

56. On 2 May 2023 after the claimant had been dismissed the claimant wrote to Mr Gateson asking why his bonus had not been paid. The respondent did not reply until 15 May 2023 when Mr Gateson emailed a reply as follows:

"*Apologies for the delay in responding on this.*

The bonuses are discretionary as per the terms of the employment contract and are due for payment on completion of the FYE figures.

In 2022 you were paid a calculated figure earlier than we should have done but on completion on of the FYE numbers for FEB 2022 the remaining balance was not paid at Directors discretion due to the performance of the company.

Bouses that were expected for FYE Feb 23 have not been paid as currently the FYE has not been completed and against drafts that have been produced there will be no annual bonuses paid due to the performance of the company. "

The Law

Bonus claim

57. Where an employment contract has come to an end an employee can bring a claim either under the protection of wages provisions in Part II ERA 1996 or as a breach of contract claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (up to a maximum of £25,000). In this case the claimant elected to advance his claim under s13 ERA but if that meant the claim was out of time, in the alternative he brings the claim as a breach of contract.

Time limits

58. The three month time limit for a claim brought under s13 ERA 1996 is contained in s23 (1) and depends on whether the complaint relates to a deduction, payment or series of deductions or payments. The extension of time test is one of not reasonably practicable.

59. A breach of contract claim must be presented within three months beginning with the effective date of termination of the contract giving rise to the claim (Article 7 (a)). The extension of time test is also one of reasonable practicability.

Discretionary bonuses

60. In **Clark v Nomura International Plc [2000] IRLR 766** Burton J set out the test to be applied where an employer operates a discretionary bonus scheme when analysying the exercise of the employer's discretion:

"*"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."*

61. In **IBM United Kingdom Holdings Ltd v Dalgleish [2017] EWCA Civ 1212** the Court of Appeal confirmed that where an employer exercises a discretionary power, the test to be applied is a rationality test equivalent to the *Wednesbury* test. The claimant can only succeed where the decision was such that no reasonable decision maker could have made it. An employee's reasonable expectations are also relevant.

62. **New Century Cleaning Co Ltd v Church [2000] IRLR 27** considered whether discretionary bonuses amounted to wages under s27 (1) ERA. The Court of Appeal held that the worker must show a legal entitlement to the payment in order for the sum to fall within the definition of wages. A further helpful authority in this regard is **Farrell Matthews & Weir v Hansen [2005] IRLR 160** which held that 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. 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.

Equal Pay

63. In this claim, the only issue in dispute is the material factor defence. S69 EQA 2010 provides:

> **i. The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—**
>
> **1. does not involve treating A less favourably because of A's sex than the responsible person treats B, and**
>
> **2. if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.**

64. Where like work is not in dispute, the burden of proof is on the employer the discrimination is genuinely due to the difference **(National Vulcan Engineering Insurance Group Ltd v Wade [1978] IRLR 225).**

65. The approach to be adopted when considering the material factor defence is set out in **Bury Metropolitan Borough Council v Hamilton & Others; Sunderland City Council v Brennan [2011] IRLR 358.**

It is necessary first to identify the explanation for the differential complained of the alleged genuine material factor. The burden of proof is on the employer.

(ii) It is then necessary to consider whether that explanation is “tainted with sex”. The explanation must not itself involve sex discrimination, whether direct or indirect.

(iii) In considering whether the explanation involves direct or indirect discrimination, the ordinary principles of discrimination law apply: (a) if the differential is the result of direct discrimination the defence under s.1(3) will fail; (b) if the differential involves indirect discrimination, the defence will fail unless the employer proves that the differential is objectively justified, applying the classic proportionality test; and (c) if the employer's explanation involves neither direct nor indirect discrimination, the defence will succeed, even if the factor relied on cannot be objectively justified. In that regard, there were two sorts of indirect discrimination. In the first kind, the employer applies a provision, criterion or practice which puts or would put women at a particular disadvantage when compared with men. In the second kind, first recognised by the ECJ in Enderby v Frenchay Health Authority, two groups of employees doing work of equal value receive different pay and there is a sufficiently substantial disparity in the gender break-down of the two groups. In the first kind, the employer has demonstrably done something to produce the disparity complained of, whereas in the second kind no act on the part of the employer is identified but the nature and extent of the disparity is such as to justify the inference that it must nevertheless be the result of past discrimination (direct or indirect).

(iv) In conducting the exercise under (iii), the ordinary principles governing the burden of proof in discrimination claims will apply. If the claimant shows a prima facie case of discrimination, the burden shifts to the employer to prove the absence of discrimination.

It is not necessary that the explanation given at stage (i) should carry with it its own justification. It is essentially descriptive. Although formally the burden of proving the explanation is on the employer, that burden is discharged simply by showing at a factual level how the state of affairs complained of comes about. In cases like the present one, defences under s.1(3) will rarely fail at stage (i). The real battleground will be at stage (ii), where the tribunal has to consider whether there has in fact been sex discrimination, which will, where the necessary gender disproportion is shown, turn on the issue of objective justification. Otherwise, the employers would have to prove not only how the differential came about but that the explanation was "good" before any question of potential sex discrimination arose.

Section 1(3) provides expressly that an employer invoking the defence must prove that the differential is "genuinely" due to the factor on which he seeks to rely. The word "genuinely" has been interpreted to point to a contrast with something which is false or dishonest, i.e. a sham or pretence. In Hartlepool Borough Council v Dolphin, the employment tribunal treated the question of whether the explanation was a sham as if it were the central question for the decision, and the EAT judgment in that case tended to reinforce that impression. However, the question "genuine or sham" should not be used as the normal starting point in the structured analysis of equal pay cases. The terms "sham or pretence" are essentially concerned with honesty: an explanation which is a sham is one which has been deliberately fabricated in order to present things otherwise than as they are. No doubt there will be cases where employers do dishonestly put forward explanations for pay differentials which they know to be untrue; but these will not be typical. Debates about the correct explanation of allegedly discriminatory pay differentials will generally turn on how properly to characterise or analyse primary facts which are not themselves in issue rather than on the bona fides of individuals.

Conclusions

Bonus claim

66. We have first of all considered whether the bonus claim can be advanced as wages claim under s13 ERA 1996. We have concluded that it could be as the respondent declared on 18 March 2022 that the claimant would be paid part one of the bonus and also that they intended to review and settle part two the following month. Part one was then paid on 23 March 2022 (see paragraph 39).

67. We go on to consider the time issue in relation to a s13 claim. We are unable to agree with Mr O'Callaghan that if the claim is advanced under s13 ERA then part two of the 2022 bonus is out of time. It was submitted that as the bonus depended on company performance and individual performance measured by KPI's there cannot have been a series of deductions in accordance with s23 (3). In our judgment there was a series of deductions (non payments) as the respondent has repeatedly failed to pay amounts properly due and the claimant has presented the claim within three months

of the date the last deduction (or in this case the non payment of the bonus). We do not agree that the fact that different bonus amounts could have been calculated on different factors in 2022 from 2021 means that the series of non payments is broken.

68. We found that the claimant's last pay date was 30 April 2023 (see paragraph 50). Given the dates of early conciliation the claim had to be submitted no later than 9 September 2024. The claim was presented on 24 August 2023 and as such it was in time.

69. Even if we are incorrect about this, the claim would be in time as a breach of contract claim as it was presented within three months of the termination of the contract. The important distinction is the limit on the damages that could be awarded namely £25,000.

70. We now consider whether the respondent acted in a capricious manner in exercising its discretion in respect of the bonus.

71. It was common ground that the bonus considered of two parts based on company and individual performance, measured by KPI's.

Company performance

72. This was not further defined in the contract of employment but again it was common ground that this was based on 30% network growth (accepted by Mr Comerford in his witness statement and also in the claimant's letter he drafted on 18 November 2021 (see paragraph 29). In this, the claimant set out his understanding that he would need to achieve like for like region growth of 30%, it could be pro rated and further that revenue analysis would be calculated from the franchisees submitted MSF's. The other evidence was that when this element of the bonus was met in 2022 it was paid in full.

73. In the financial year ending 2022/2023 the claimant achieved growth of 15%, which was 50% of his 30% target.

Pro rate

74. We soundly reject the contention that there was any term that enabled the respondent to withhold all of the bonus if the full growth amount was not achieved or if less than 50% of KPI's were achieved (see paragraph 40 above). This was unsupported by any documentary evidence. Whilst it is somewhat odd to look at a letter drafted by the claimant for Mr Bolton to sign, this is the best contemporaneous documentary evidence of the terms agreed and understood by the parties at that time and this clearly denotes the bonus would be paid pro rata (see paragraph 33). The respondent at no time rebutted the terms set out in that letter. Mr Gateson's own spreadsheets (see paragraph 46 and 47) suggested there would be pro rate bonus available as did his conduct when he told the claimant he would be sitting down and do a compliance review. Further, we think it is wholly implausible that the claimant would have agreed terms whereby if he say achieved 99% of his KPI's he would not receive any bonus at all.

Part two of the 2021/2022 bonus (individual performance)

75. Based on the evidence before us, the claimant achieved 100% of his KPI's for the financial year ending 2021 / 2022 (see paragraph 46, 47 above).

Part two of the 2022/23 bonus

76. There was no evidence available to the Tribunal as to how the claimant had performed against his KPI's for the year ending 2022/2023 probably because they did not undertake any analysis of his KPI's. This was confirmed in Mr Gateson's email dated 15 May 2023 when he told the claimant to KPI bonus had not been paid due to the financial performance of the company.

77. We now go on to consider whether the respondent's decision not to pay the claimant any bonus in 2022/23 and the individual bonus element from 2021/22 was a rational decision in accordance with the test set out in **Clark v Nomura International Plc.**

78. We have concluded that the respondent acted capriciously in not exercising its discretion for the following reasons.

79. In relation to the 2021/2022 KPI bonus, the respondent's witness (until he resiled) and the respondent's documents evidenced that the claimant achieved 100% of his KPI's. We find that the respondent's case was unreliable and inconsistent. The respondent pleaded that a KPI review had been done in July 2022 then later said in a witness statement it had been done in May 2022. The respondent then sought to tell the Tribunal that their own documents were wrong and that a different KPI scoring had been done at the time, leading no evidence from the individual who had purportedly done the scoring other than the email said to have been sent by Mr Gateson on 26 May 2022. In our judgment this significantly undermined the credibility of the respondent's case.

80. This also did not marry with Mr Gateson's conduct at the time. Mr Gateson told the claimant that the KPI bonus would be settled the following month and when it was not, as had been promised, was evasive with the claimant, effectively thwarting the claimant from receiving the bonus by completely avoiding or promising that he would obtain sign off to Mr Bolton.

81. In these circumstances we find the decision not to pay the bonus was perverse.

82. In relation to the 2022/2023 we also have concluded that the decision not to pay any bonus was perverse. The respondent has acted capriciously in asserting that the bonus was not paid due to company performance. The contractual term on the company performance element was that the claimant would receive a pro rate amount based on 30% growth. This was how the bonus was calculated previous years. The claimant achieved 15% growth and as such he should have received £5000.00. It was capricious to introduce different financial factors into the company performance analysis such as writing off long standing debts from company profit and seeking to withhold the bonus on that basis.

83. We also find the decision to pay nothing in respect of the 2022/23 KPI bonus to be perverse. The respondent did nothing to evaluate the KPI's. In

our judgment the respondent also acted capriciously in this manner. It cannot be a reasonable exercise of discretion to withhold information to enable a party to a contract to meet a term of the contract and that is what the respondent did in this case. The claimant was ready and attempted to render the work or service under the contract but was prevented from doing so by the conduct of the employer.

84. We acknowledge that we have no evidential basis on which to make an accurate calculation of the 2022 / 2023 KPI bonus. The respondent could have led evidence on the claimant's performance against KPI's in 2022/2023 but chose not to do so. In those circumstances we have concluded that the claimant has proven that the terms of his contract were breached and he was ready and attempted to render service to meet the terms of the bonus scheme. We therefore assess the loss under this head at £10,000, the amount potentially payable.

85. In conclusion we award the claimant the following:

- 2021/2022 KPI Bonus - £10,000.00
- 2023/2023 Company performance bonus - £5,000.00
- 2022/2023 KPI bonus - £10,000
- Total award - £25,000.00.

Equal Pay Claim

86. It is necessary first to identify the explanation for the differential complained of the alleged genuine material factor. The burden of proof is on the employer.

87. In this case, the material factors relied upon were:

- The geographical location of the claimant's comparator and the timing of her recruitment (she had been recruited during the first lockdown where it was said to be difficult to recruit as most people were on furlough) and;
- That the interim MD offered the comparator terms and conditions which were not standard and went beyond his authority in doing so
- Length of service and experience.

88. Save for the length of service and experience, the material factors are not factors tainted by sex. They would apply equally regardless of the sex of the claimant and his comparator.

89. There was no evidence before this Tribunal about geographical variations in BDM roles generally between the north and south. We would have expected to see some statistical information supporting this factor. We acknowledge and consider we can have judicial regard to a London weighting but not to any other regional variances without evidence based statistical information.

90. There was some limited evidence to support the geographical location and difficulty in recruiting factors (see paragraph 26 where Mr Barrow specifically comments on this issue). The claimant submitted that he and his comparator both worked from home and lived in the south. In our judgment it is not relevant where they both lived as the claimant was employed as a BDM for the northern region and to cover franchisees within that region.

91. The geographical factor is not supported by Mr Bolton's email (see paragraph 27 above). He told the franchisees that the north was as important as the south however we think this was likely to have been Mr Bolton seeking to assuage concerns of the northern based franchisees. If this was the case we would question why the BDM would be paid less to cover the northern region.

92. In our judgment what fundamentally undermines the claimant's case is that the previous BDM for the northern region, who was female, was paid either less or the same as the claimant. Having considered all of the evidence we have concluded that the respondent has established a material factor not tainted by sex.

93. We will briefly deal with the other material factor defences. In regards to the contention that Mr Barrow had exceeded his authority, Mr Comerford's witness statement entirely contradicted the pleaded response (see paragraphs 23 and 26 where he told the Tribunal Mr Barrow had compete autonomy to recruit Ms Cole). In relation to length of service and experience there was little or no evidence to support the defence about the claimant and the comparator specifically. We do not say this lightly but this is an example of the respondent's poor preparation of this case. Had the geographical material factor evidence not been as compelling the respondent may have not succeeded.

94. We do not find that Mr Comerford sought to mislead the Tribunal as we accept that it is likely his representative included the wrong documents in the hearing bundle. Nonetheless Mr Comerford signed the witness statement confirming the incorrect documents and more care should have bene taken in this regard.

Employment Judge S Moore

Date: 23 August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 27 August 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

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