



EMPLOYMENT TRIBUNALS

Claimant: Richard Howes
Respondent: Direct Commercial Limited
Heard at: East London Hearing Centre
On: 12 October 2022 and 7 December 2022
Before: Employment Judge Thackray

Representation

Claimant: In person
Respondent: Ameer Ismail, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent was in breach of contract in not paying the Claimant the conditional performance bonus.
2. The Respondent is ordered to pay the sum of £2,000 to the Claimant
3. The Respondent was not in breach of the duties under s 1 (1) Employment Rights Act 1996.

REASONS

Introduction

1. This is the reserved judgment with reasons following the hearing on 12 October 2022 and 7 December 2022.
2. By a claim form presented on 24 April 2022 the Claimant complained of breach of contract by the Respondent in respect of non-payment of a bonus. This bonus was conditional on certain obligations being performed; the terms were contained in a letter dated 26 January 2022. The Claimant had given notice of his intention to resign on 10 January 2022 and that his last day would be 10 February 2022. Agreed annual leave was taken between 28 January and 4 February 2022, the Claimant returning to work on 7 February.

3. The letter offered a 'conditional performance bonus' of £2,000 and set out three targets. The text of the letter including the wording of the conditions is set out in the fact finding section below.
4. On 22 February 2022 the Respondent notified the Claimant that the bonus payment would not be paid as, in its view, the Claimant had not met the conditions of the bonus. It argued that the obligations were non-divisible and that the obligation to pay was 'all or nothing'. The Respondent noted that the Claimant had met the requirements of Condition 3, but that as the requirements were non-divisible no payment would be made.
5. The Claimant made representations he had sufficiently met the targets and should be entitled to payment. His interpretation of the wording of the contract was that the conditions were divisible; that it was not, in any event, necessary for him to have met each condition, or each in its entirety, to receive at least part of the payment.
6. The Claimant was also aggrieved that a reference had not been prepared and sent in a timely way; he also sought a detailed future reference. By the time of the hearing the Claimant had started his new employment, having received a reference and the matter of the content of any future reference was not one for the Tribunal to consider.
7. There had also been an issue over two days' holiday pay that had been resolved between the parties.
8. The Claimant sought to amend his claim to include claims that:
 - 8.1 the Respondent failed to give an updated statement of particulars of the Claimant's employment; and
 - 8.2 the Respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures

Claims and Issues

9. The issues the Tribunal had to decide are set out below:
 - 9.1 Should amendment of the Claimant's claim be permitted?
 - 9.2 Did the Respondent breach its contract with the Claimant in not paying him the 'conditional bonus' upon termination of his employment?
 - 9.3 Should the three conditions be treated as separate and divisible leading to the potential for a part-payment for part-performance or was the obligation entire and non-divisible, i.e. was it an 'all or nothing' obligation to perform and to pay?
 - 9.4 What interpretation should be put on the terms of the conditional bonus?
 - 9.5 Was the decision made by the Respondent, based on its interpretation of the contract and its assessment of the Claimant's performance reasonable and taken in good faith?
 - 9.6 If there had been a breach of contract how much should the Claimant be paid?

Procedure, documents and evidence heard

10. A bundle of 87 pages was provided by the Respondent with input from the Claimant. References to a page number refer to that bundle of documents.
11. The Respondent was represented by Counsel; the Claimant represented himself. The Respondent called Peter Houlihan, IT Manager (and the Claimant's line manager) and Chris Webb (Operations Director) as witnesses, having filed witness statements by them. The Claimant gave evidence himself, having filed a witness statement, but did not call any other witnesses.

Preliminary Matters

12. The Tribunal considered the application to amend by the addition of two claims. It was noted that the Claimant had raised the issue in writing in September 2022, prior to the date of the hearing, but months after his claim had been made.
13. The application was opposed by the Respondent on the basis of: delay; an attempt to bring in additional issues that should have been raised earlier; an attempt to relabel the case away from the narrow focus on a breach of contract and in relation to which other evidence may be required; that in relation to the ACAS code there had been a failure to show relevance of a code that related to grievance and disciplinary matters.
14. The Tribunal declined to allow the amendment in relation to the ACAS code on the basis that it had not been shown to be relevant to the determination of the issue relating to the breach of contract.
15. There had been significant delay in bringing the amendment application, though the Respondent had had notice of this prior to the hearing and was not ambushed by it. In relation to the s 1 Employment Rights Act issue relating to terms and conditions, the Tribunal weighed the prejudice, if any, of allowing the amendment as against not allowing it. The Tribunal allowed the amendment on the basis that evidence was to be heard in any event about the terms of employment, any amendment and adherence to the terms as part of the existing claim. This would not add to the time significantly or require further evidence and the Tribunal permitted the issue to be considered.

Evidence and Findings of fact

Claimant's role

16. The Respondent is a company providing reinsurance and related services to the haulage industry. The Claimant was a Management Information Analyst ("MI Analyst") at the Respondent and had started his employment on 25 January 2021. The Claimant was working on a project known as the Great Lakes Insurance SE ("GLISE") project, also known as the DEFnS project. The Respondent was acting as the underwriter for the insurer GLISE and the project involved producing management information for GLISE.

17. The Claimant had two broad areas of responsibility; one related to writing computer script for extracting and preparing reports of management information (bordereaux or BDX) for the DEFnS project and the other to the routine reporting and running month-end processes. His line manager was Peter Houlihan, IT Manager. The Operations Director was Chris Webb. Other individuals mentioned in evidence were Helen Cunningham (Human Resources), Mr Guilfoyle (Finance Director) and Huw Myatt (Claimant's replacement as MI Analyst).

Brief chronology

18. A brief chronology of dates is as follows:
- Monday 10 January 2022 - Claimant gave written notice of his intention to resign. He was required to give one month's notice and his final day would be Thursday 10 February 2022
 - Meeting takes place between the Claimant and Mr Webb (on 19 January according to the Claimant; on or around 24 January according to Mr Webb)
 - Monday 24 January - Tuesday 25 January 2022 'Paul', (first replacement for the Claimant) started work. Remained 1 ½ days before leaving
 - Wednesday 26 January 2022 - the Respondent offered a 'conditional performance bonus' to the Claimant in a letter (the bonus letter) signed by Helen Cunningham (HR)
 - Thursday 27 January 2022 - the Claimant signed the bonus letter agreeing to its terms
 - Friday 28 – Friday 4 February 2022 - the Claimant was away from the office on agreed annual leave
 - Monday 31 January 2022 - the Claimant's new replacement, Huw Myatt, started employment
 - Monday 7 February 2022 - the Claimant returned to work
 - Thursday 10 February 2022 - the Claimant's last day at work.
 - Tuesday 22 February Letter from the Respondent confirmed intention not to pay the Claimant.
 - Exchange of correspondence continued until the claim is brought.

The bonus letter and its purpose

19. The full text of the bonus letter dated 26 January 2022 is as follows:

Dear Richard,

Further to your recent meeting with Chris Webb it has been decided to offer you a conditional £2000 Performance Bonus at the end of your employment if you meet the following agreed targets:

- *To make all reasonable efforts to finalise the DEFnS project. If this is not possible, to make all reasonable efforts to bring the project to as fuller completion as possible and complete a suitable hand-over so that the project can be continued as seamlessly as possible. [to be referred to as Condition 1]*
- *To complete a full handover of the DEFnS project i) so that any uncompleted work can be continued without disruption or delay ii) so that the DCL team have sufficient information and training to*

maintain, update and adapt the DEFnS outputs as necessary.
[Condition 2]

- *To provide a full handover of the Claims reporting function and ad-hoc reporting requirements for other departments e.g. Agency and HIO, to a sufficient level that there is no disruption to departmental reporting requirements.”* [Condition 3]

You will be notified by Chris Webb on the final day of your employment if you have satisfactorily met the agreed targets and the Bonus will be included in your final pay on the 25th February 2022.

20. The Tribunal heard evidence about the purpose of the bonus and the process leading to the offer. The Claimant stated that in a meeting between himself, Mr Webb, Mr Houlihan, Ms Cunningham on 19 January he was told that he was being offered a bonus for ‘all your hard work and leading the GLISE project. We and the Board appreciate all you have done for us in the time you have been here at DCL’. He was originally under the impression that it was an unconditional bonus but that when the letter was received ‘rather than an unconditional, one-off bonus being made to me for hard work, a conditional offer was made to me.’
21. In his statement Mr Houlihan stated that he had had a discussion with Mr Webb about how to motivate the Claimant to ‘complete the project as far as he could during his remaining time with the Respondent’ and the conditional bonus was formulated. Mr Houlihan’s evidence, summarised by the Respondent’s counsel in his submissions, was that ‘the reason behind offering the conditional performance bonus to the Claimant was because Mr Houlihan considered that the Claimant was a “flight risk” as it was known that the Claimant was seeking alternative employment. The Respondent needed progress on the DEFnS project and Mr Houlihan feared that the Claimant might leave before the end of his notice period.’
22. Mr Webb, in his witness statement explained his reasoning for offering the bonus; ‘there was only a very short time to ensure that there was a suitable handover with his replacement’ and that they ‘were keen for the Claimant to complete the DEFnS project and provide a suitable handover’. He denied that there had ever been the offer of an unconditional bonus. He gave evidence at the hearing that the issue of the Claimant not working out his notice period or being a ‘flight risk’ had not played into the thought process. He further gave evidence that the wording was intended ‘to be reasonable and achievable’ and that the Respondent had ‘offered the bonus with the anticipation of paying it.’
23. Mr Houlihan’s evidence was that ‘the intention was for the Claimant to achieve all of the conditions in order for the bonus to be payable. There was never any discussion for the bonus to be partly payable if the Claimant only met some of the conditions and this would not have made any business sense as we needed to complete all of the conditions.’
24. The Tribunal found that it was immaterial on which date the bonus had first been discussed. The offer and acceptance of the bonus was of a conditional bonus as set out in the letter and that it had not been the intention of the Respondent to pay an unconditional bonus. The Tribunal found that the intention was to attempt to motivate the Claimant to do as much work as

possible towards the goals during the notice period. There was no evidence to suggest that he was a 'flight risk'; he had already given notice on 10 January and was on pre-agreed leave from 28 January to 4 February. There were, in fact, a maximum of six working days from the date of the bonus letter until the Claimant left his employment once his holiday had been taken into account and there was no evidence to suggest that he did not intend to fully work his notice period.

25. There was no evidence that the Respondent had been dissatisfied with the Claimant's performance during his employment (subject to what is said below about time commitment in the last week) or that he was likely not to comply with his contract. On the contrary, the evidence showed that the Claimant was an employee who paid significant attention to the detail of his terms and conditions. The Respondent referred to a matter regarding allegedly inaccurate information about the Claimant's previous appointment and it appears that a six month probation period was implemented in part as a result of this. There was also reference to suspicions that he was job-seeking over a period of time, but the Tribunal considered that irrelevant, as by the time of the bonus offer and letter, he had already given his notice. It was clear that he was leaving but there was no evidence at that stage that there was any dissatisfaction with his work. The Tribunal found that the intention to offer the bonus was to motivate the Claimant to be productive during his notice period.

Evidence as to whether the conditions were met

26. It was conceded by the Respondent that the Claimant had met Condition 3 regarding the handover of routine reporting. Conditions 1 and 2 will be considered together as the evidence was intertwined; whilst the first condition refers to finalising the DEFnS project it also includes reference to handover, as does Condition 2. Condition 1 included a clause referring to a 'suitable handover' to the project and the second condition refers to completing a 'full handover'.

Condition 1

27. *To make all reasonable efforts to finalise the DEFnS project. If this is not possible, to make all reasonable efforts to bring the project to as fuller completion as possible and complete a suitable **hand**-over so that the project can be continued as seamlessly as possible. [to be referred to as Condition 1] [Tribunal note: 'as fuller' is read as a typing or grammatical error to mean 'as full as possible']*

Condition 2

28. *To complete a full **handover** of the DEFnS project i) so that any uncompleted work can be continued without disruption or delay ii) so that the DCL team have sufficient information and training to maintain, update and adapt the DEFnS outputs as necessary. [Condition 2]*
29. The DEFnS project had been worked on for three years and had a deadline of May 2022 (Mr Houlihan's evidence). The project involved writing six scripts that would 'output six pieces of information to be given to insurance partners'

and involved the automation of insurers' statement of payments and claims. The Claimant commenced employment in January 2021; one person had worked on the project in that role prior to him. Mr Houlihan estimated that the project took 5-10% of the Claimant's time in any work week. The work was 'steady and scoped out'; the scripts were sequential. He stated that by the time he left the Claimant had completed five scripts, but three were not working correctly. It was a business priority for the scripts in the project to be completed.

30. The Claimant, in his witness statement, stated that 'the four GLISE Paid and Written scripts were fine and a signoff of these was agreed'. In oral evidence he confirmed that he had completed three out of the six prior to his notice period and completed the fourth during the notice period. The Claimant stated that he was not aware of the May 2022 deadline until these proceedings were started. He stated that the project took up around 60% of his time. Part of the process was testing data from certain months against previous months and then manually checking to test the effectiveness of new scripts. The Claimant stated that in January and February he was 'comparing data against October and November'; he had 'updated his colleagues', 'produced outputs and had them validated by the finance director' and stated that Mr Houlihan and Mr Webb approved the work. He stated that during his notice period he copied both into communications and did not receive queries during that period.
31. On 24 and 25 January a first replacement for the Claimant was employed for 1½ days and the Claimant described how he worked with him taking him through the processes set out in the 'Handover Manual' document he created (a step-by-step guide on how to produce each of 30 regular reports).
32. On 25 January the Claimant emailed Mr Houlihan with a copy of the claims script, asking for an issue with one of the scripts to be referred out for assistance from third party host RDT. He stated *'I feel the 'Amounts', 'Amounts Recoveries' and AmountsCanx'(which run independently) [scripts] are bringing back correct data. The issue I am having is aligning this when we go from 'FinalStatement' onwards. I am at the stage where I need some technical expertise/help with this. If RDT can help, that would be very much appreciated...'*
33. This part of the issue continued after the end of the Claimant's employment. Further emails (dated early March) were seen that showed discussions between the Respondent and RDT about the latter undertaking the work to remedy the problem, which involved defining the issue and providing the current script and some example 'expected and actual' figures. Mr Houlihan summarised 'the script...wasn't extracting the correct claims payment and reserve figures from [L]. When doing a comparison on a previous manually created Bordereau, we couldn't match up both payments and reserve amounts per claimant.' The database administrator/platform engineer at RDT responded that the information provided helped him to focus on where the problems were. He identified that some of the figures matched what he expected, with some variation and that 'there seems to have been some question to what reserve figures should be shown in the new extract i.e. the change in reserve over the reporting period as per the manual BDX or the total reserve. Are you able to get an answer to that question please?' He

would provide and estimate as to the 'amount of work needed to completely rebuild the extract before the end of the week.'

34. On 27 January Mr Houlihan and the Claimant discussed handover. The Claimant stated he had shown two items 'Handover List 200122' (a list of file locations and tabs on spreadsheets), and the 'Handover Manual' document referred to above. The Claimant stated that on 11, 18 and 25 January and on 8 February there had been meetings to discuss the project; he met with Mr Webb, Mr Houlihan, Mr Guilfoyle the Finance Director and on 8 February also with his replacement Mr Myatt. He said that he was not challenged about the progress on the project or the handover process and there was no evidence from the Respondent regarding those meetings.
35. The Tribunal saw an email trail from 1 February to 10 February that started while the Claimant was on leave and concluded on his last day of employment. On 1 February the Head of Agency and Business development enquired of the Agency Manager about whether certain numbers could be obtained or organised by postcode region. The Agency manager asked Mr Houlihan whether this could be 'added to the reports'. On 9 February the Agency Manager emailed the Claimant asking whether this had been 'put on his radar as well...hopefully this one is something simply that can be added into the pivot data?' The Claimant replied on 10 February that he had 'added a field...into the model...you should be able to pick up the field and use this as part of your report'. There was a later email from the Agency manager to Mr Houlihan on 14 February that stated that he was 'struggling to see what [the Claimant] has done on this one, as I have looked for what I think he has added but is not the right thing'.
36. On 9 February the Claimant sent an email to Mr Webb and Mr Houlihan copied to his replacement, Mr Myatt, with attachments: 'GLISE Bordereau Project'; 'Broker Report Procedure notes'; 'Broker Report Master'; 'Regular Reports – Handover Manual' and 'Handover List'. He summarised the handover on the GLISE project naming the four completed scripts but noting that 'the latest is I have stated why there was a discrepancy on the December Written bordereau and have sent across the December Paid bordereau (and their difference) to Liam.' He went on to enumerate the reports prepared which included 'procedure notes' that he had prepared, a report tracker on 'ad-hoc requests' showing items on the 'to-do' list which he marked '99% complete' and regarding the claims regular reports 'I have trained up, shown and explained to Huw all claims regular reports... and produced two documents – one is a list of where each report's working file and output file is, and one which has notes on how to produce each report'.
37. The Claimant stated that he asked his replacement to read through the emails and notes and to ask any questions prior to him leaving. He notes that they had a 30 minute question and answer session on the afternoon of 10 February in addition to the earlier work that they had done together.
38. The Claimant claims that he did not get emails, questions or requests for clarification from the Respondent challenging him prior to him leaving on 10 February.

39. The Respondent's evidence was that the project was 'only finalised and sent off in or around May or June 2022'

The decision and appeal process

40. The Respondent determined that the Claimant had not met the conditions for receiving the bonus. This decision was communicated after the Claimant had left employment, in a letter dated 22 February 2022, from the HR manager H Cunningham. A reason was given for each of the conditions 1 and 2 not being met;
- 40.1 the comment under Condition 1, refusing payment of the bonus stated 'not completed; there had been no progress made on the project since the bonus was offered'.
- 40.2 the comment under Condition 2, refusing payment stated 'Not completed; an insufficient handover on the project, not enough information was provided to the new role holder and the project is currently encountering delays as a result.'
41. The Claimant challenged the decision by email dated 25 February. He referred to the six days' annual leave between the proposal of the bonus and the leaving date and the email detailing the status of the project and how to continue it as evidence of the work and handover he had done. The Claimant proposed a compromise of a payment of £1,590 to resolve the disagreement. The Respondent relied on the phrase 'progress had not been made on the DEFnS project because I was on leave for six days. During my time at Direct Commercial, your third party were also unable to resolve outstanding issues' to argue that the Claimant recognised that he had not made progress and so had not met his targets.
42. The Respondent responded by letter on 11 March with further reasons. That letter was written by Mr Webb and attached a report from Mr Houlihan and confirmed that the Respondent was not prepared to offer a pro-rata payment as it was not part of the agreed terms. The letter noted; 'in respect of your request for further explanation you will recall that I sent you email requests/invitations to come and talk to me on 8 and 9 February but you did not agree to come and see me until the very end of your last day. I explained that I would now need to speak to Peter Houlihan...to review the conditions of the bonus and determine whether you had satisfied these conditions'.
43. The brief report from Mr Houlihan, referred to in Mr Webb's letter, made the following points:
- *'The handover was insufficient...not clear enough to continue with the project. There was a major issue...that Richard failed to explain the extent of the problem that Huw could not continue to work on the issue'*
 - *the Claimant took extended lunch breaks and so did not dedicate enough time to handover*
 - *on his final day he spent 30 minutes on a zoom call.'*
44. An email from Mr Myatt was attached, initially undated, but later a timestamped version was provided dated 8 March. This confirmed that the Claimant had talked about 'the high-level project requirements of

transitioning from a manually-run process' and 'with regards to the written and paid scripts, I was just told that they are working and ok as they are. Regarding the claims report, the only detail I received that there is a difference in the output compared to Accounts' versions, and that lies in the 'Final Statement' section of the code, and that it would need to be fixed. We went through his process of comparing the automated outputs to those from Accounts, but it was only a 5 minute run-through of the comparison spreadsheet.'

45. The Claimant further challenged the decision by letter on 18 March. He reiterated the limited time to work on the project and effect handover; he highlighted the 1 ½ days spent working with the first replacement undertaking handover; he argued that he started work early and finished late on some of the relevant days, though there were two days during his notice period when his work station had been moved without notice causing him lost time; he agreed that he had spent 30 minutes on a zoom call with his new employer which he said was related to a reference not having been provided, which was not excessive; he argued that these issues had not been raised at the time; he argued that some induction could and should have been undertaken in his absence, such as the regular month end reporting process and introductions to other staff.
46. In his witness statement Mr Houlihan characterised the handover to Mr Myatt as *'insufficient and not clear enough to enable him to continue with the project. There was one component of the project in particular which had a major issue and this had not been brought to Mr Myatt's attention before the Claimant's employment terminated'*. He stated that Mr Webb had *'asked [him] whether the Claimant had satisfied the conditions of the conditional performance bonus...[he] explained that he had not and provided a response to Chris Webb explaining why (pages 73-5)'*. That reference is to the report attached to Mr Webb's letter of 11 March and included the email from Mr Myatt, which was dated 8 March. Mr Houlihan stated that the original decision on 22 February had been informed by a conversation with Mr Myatt and that the email of 8 March followed up on and confirmed the conversation.
47. Mr Houlihan also gave evidence that further issues came to light after the Claimant left; *'there was one component of the project in particular which had a major issue and this had not been brought to Mr Myatt's attention before the Claimant's employment terminated'*.
48. The Claimant produced a schedule during negotiations with the Respondent that attached a weighting to the conditions, in some cases splitting them into part-conditions. He attached a monetary weighting to each item and proposed a percentage achievement to each item. This was in support of his request for a compromise payment of £1,590. The Respondent challenged this on the basis that the offer was indivisible and these were arbitrarily allocated amounts; in addition that the Claimant had given a 50% weighting to the first half of condition 1 relating to completion of the project. The Respondent argued that was acceptance, on his own case, of failure to meet the target. The Claimant argued that this related to actual completion of the project, which was not achieved and could not have been achieved. He argued that he had met the target of having made reasonable efforts to do so.

49. Likewise the Respondent pointed to the achievement of '95%' included by the Claimant in that schedule with regard to the second part of Condition 2, i.e. 'to complete a full handover...ii) so that the DCL team have sufficient information and training to maintain, update and adapt the DEFnS outputs as necessary' as evidence that the Claimant accepted that he had not met that target. The Claimant argued that he had provided sufficient information in the form of meetings, trainings, email, demonstrations and so on but that 'it is difficult to anticipate all presentational enhancements that are subsequently required after my departure', noting that 'coding is never a completed task' and arguing that he had been trying to be reasonable in acknowledging the ongoing nature of the work.
50. In relation to the additional claim that the Respondent failed to provide appropriate particulars of employment, it was the Claimant's case, not that he had not been issued with particulars initially, but that they had not been appropriately amended to reflect a change to the start time of his working day on one day of each week. The Claimant stated that the Respondent had required him to start one hour earlier on a Monday, in order that certain reports could be prepared in time for a management meeting that took place later on that day. The Respondent agreed that this had been the case. The Claimant argued that his terms of employment should have been amended and re-issued.
51. The evidence showed that the contract of employment provided:
- 3. Hours of Work**
- 3.1 The Employee is required to work such hours as are necessary for the proper and efficient performance of his duties hereunder with a minimum of 35 hours per week*
- 3.2 The Employee's basic working hours will be 9 am to 5 pm Monday to Friday. However the Employee will work such additional hours in excess on those days or at weekends or on Bank Holidays as is reasonably necessary for the proper and efficient performance of his duties.*

The Tribunal's findings of fact

52. Mr Houlihan had knowledge of the Claimant's work and the IT side of the GLISE/DEFnS project, being an IT manager and the Claimant's line manager. Mr Webb had an overview of the GLISE/DEFnS project but did not have a detailed knowledge of the IT aspects of the reporting.
53. The project had a deadline of May 2022 and in fact concluded in May or June 2022, according to the Respondent and had been going on for around three years.
54. At the time the Claimant gave in his notice, not all of the six scripts had been completed and nor had there been an expectation that they would have been. The Claimant stated that four were complete (one of which was completed during the notice period) but one of those had a problem and the Respondent stated that five were completed but two had problems. It appears to be common ground that three were working well. There could be lengthy periods of testing and adapting the scripts before they were finalised.

55. The Tribunal found that there was a problem with one of the scripts that the Claimant had identified and considered that a third party, RDT, may be able to assist with. The Tribunal did not find that there had been major problems with two scripts at that time.
56. The Tribunal found that at the time of the decision about the bonus the Respondent (through Mr Houlihan) knew that there was a problem with the script that the Claimant did not know how to resolve without input. He had detailed the problem to Mr Houlihan in the email referred to in paragraph 32 and requested assistance. He was not challenged and told that this should have been within his knowledge. There was no evidence that the request for assistance was inappropriate or not required and it was in fact referred to that third party after the Claimant had left the company, supporting the view that it had been needed as part of the progression of the project.
57. The Respondent later complained that the relevant script did not make sense and that a large sum had to be spent for a third party host to work on and resolve. It is a matter of speculation as to whether the same amount of work would have been required by RDT had the Claimant remained in post, whether the work was more extensive and expensive because there was a new MI Analyst in post, less experienced with the system or whether failures on behalf of the Claimant had been the cause. However, the evidence showed that the matter was not fully actioned, i.e. scoped and costed between the Respondent and RDT until early March and it took some time to resolve. The Tribunal assessed that it would not have been possible for that problem to have been resolved whilst the Claimant was in employment; he set out the issue and request for help from RDT on 25 January and was then out of the office from 28 January to 7 February when four days remained before he left. This matter could not have been completed in that time. The Tribunal found that later dissatisfaction was not directly relevant to the question of whether the project was being progressed or handover effected; the line manager was aware of the current status of the project and the scripts and there was no evidence of dissatisfaction with the status, with the work to date or with the request for input from RDT to progress the project.
58. The Tribunal found that the project was ongoing and during the relevant time both new requests and existing problems with the scripts were being worked on. The evidence referred to in paragraph 35 indicates that requests for new elements were being made and the Claimant responded to them. It was later suggested that this was not working well, but the Tribunal found that testing and refinement of changes had been shown to be a normal part of the process and was not unusual or unexpected in terms of how such project may proceed.
59. The Tribunal did not accept the evidence that the project work took only 5% of the Claimant's time in any given week. It may not have constituted as much as the 60% the Claimant estimated; there was no specific evidence to assess the percentage. But given the importance attached to it by the Respondent and the work involved over the lengthy period it was clearly a substantive part of his work responsibilities and the expectation was that he would spend a substantial amount of time on it.

60. The Tribunal found that the lack of meetings between the Claimant and Mr Webb in the last days of employment was not relevant to an assessment of the handover or project progression. The subject line of the email in which Mr Webb asked the Claimant to meet him, suggested that the issue was the outstanding reference and the bonus letter anticipated a decision being made on the last day of employment, but Mr Webb made it clear to the Claimant that he would need to liaise with Mr Houlihan before communicating the decision and he was away from the office at that time. It was clear from that evidence that, in the event, it was not the Respondent's intention, on the last day of employment to finalise the bonus decision.
61. The Tribunal found that as a matter of fact the assertion in the decision of 22 February that Condition 1 as it related to the project was 'not completed; there had been no progress made on the project since the bonus was offered' was not correct. Some, albeit limited, progress had been made in the time between the offer on 26 January and 28 January and 7 February and 10 February when the Claimant was working.
62. In relation to the handover of the project, the requirement was 'to complete a full handover of the DEFnS project i) so that any uncompleted work can be continued without disruption or delay ii) so that the DCL team have sufficient information and training to maintain, update and adapt the DEFnS outputs as necessary.' The Respondent assessed (Mr Houlihan's report attached to letter of 11 March) that the handover was *'insufficient and not clear enough to enable [Mr Myatt] to continue with the project. There was a major issue with one component of the project that Richard failed to explain the extent of the problem that Huw could not continue to work on the issue.'*
63. The Tribunal found that the objection focussed mainly on the identified issue with the one problematic script and the suggestion that Mr Myatt was not enabled to do his job. The Tribunal found that the Respondent relied heavily on the information from Huw Myatt in an email of 8 March. It was asserted that this followed up on a conversation, but there was no note of that conversation, nor was it clear when that had taken place. No other evidence about the quality of the handover was produced that related to the period of the Claimant's employment, though the Respondent did seek to rely on later emails about the ongoing issues with the scripts to argue that the handover had been at fault.
64. The Tribunal could attach only limited weight to the email from Huw Myatt assessing the handover; the email was not a statement made formally in the proceedings and the evidence suggested that Mr Myatt was not aware that the email would be used in proceedings; it was not produced in contemplation of it being used in the context of assessing a breach of contract claim. Mr Myatt was not a witness whose evidence could be tested; there was no way to assess whether his email constituted all he had to say about the handover nor what his own capabilities or motivations may have been, in order to assess the validity and reliability of his assessment
65. The Tribunal found that the need for external input had already been identified and had been communicated to the Respondent, to Mr Myatt and to the external team.

66. The Tribunal found that there was an absence of any document identifying in detail the specifics of the requirements of a full handover, nor one which identified the perceived deficiencies in the handover. The report relied on the point quoted above about the failure to fully explain the extent of the problem with the script and the two points about extended lunch breaks and a zoom call to support the assessment that the Claimant 'did not dedicate enough time for the handover.'
67. The Tribunal found that the allegation that the Claimant had not worked his full hours in the last week leading to handover being insufficient was not made out. The Tribunal found that Claimant had undertaken a significant amount of work on handover, both in preparing documents and in face to face work. The Respondent asserted that the Claimant had taken longer lunch breaks and had taken a 30 minute zoom call; the Claimant asserted that he had started earlier and/or finished later to complete his work and that one zoom call to deal with the reference issue was not excessive. The Respondent had set out the times that the Claimant was alleged to have taken lunch in the last week; it was not clear what the source was. The Claimant set out his start and finish times and his lunch breaks in the last week; again the source of the information was not clear. The Tribunal could not determine the precise hours worked at that time, as there was no separate and full record, but did note that the Claimant's evidence was more detailed, taking into account start and finish times. It was noted that the Claimant was not challenged on his attendance or timekeeping during his notice period.
68. There was no evidence that Mr Myatt was prevented from continuing with the project, after the matter that had been referred externally had been addressed, and the evidence showed that there was little or no delay to the overall completion of the project.
69. The Tribunal found that between the decision being made and the further justifications for the decisions, matters developed and that issues not in play at the time of the decision itself were being relied on to support that decision.

Relevant Legal Principles and Conclusions

70. The case involved the question of whether there had been a breach of contract in the Respondent not paying the conditional performance bonus to the Claimant. There was no dispute as to whether there had been an intention to create a legal obligation; it was common ground that the provision and signing of the bonus letter had constituted an intention to create a contract. If there were a breach of that contract the remedy would be to place the Claimant in the same position as he would have been had the contract been performed.
71. There was a dispute over whether the obligation was an entire one, to meet the three conditions in the bonus letter, or whether it was divisible. The Respondent argued that its conditional obligation to pay £2,000 was an entire obligation that required all elements to be met. The Claimant argued that the wording did not require that each obligation be performed in its entirety.
72. The bonus was not a discretionary bonus but was conditional upon certain requirements being met. The requirements were not immediately

quantifiable by reference to a particular measure and required a degree of interpretation and the application of judgement and discretion. An assessment of whether the conditions had been met necessarily involved the exercise of employer's discretion and there were arguments as to how that discretion had been applied. In such a situation there is an implied term that the employer must exercise discretion reasonably and in good faith. (Mihlenstedt v Barclays Bank International Ltd [1989] IRLR 522.)

73. In relation to principles of interpretation the Tribunal was referred to . (**Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R.**) and the principle that 'interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.
74. The Tribunal also took into account the principles in **The Ocean Neptune [2018] EWHC 163** that 'the court's task is to ascertain the objective meaning of the language' used and to give appropriate weight 'to elements of the wider context in reaching its view as to the objective meaning of the language used' and a 'construction which is consistent with business common sense' is to be preferred'.
75. The Tribunal was referred to **Marks & Spencer v BNP Paribas [2016] AC 742** and the (summarised) principles regarding implied terms:
- the implication of a term is assessed by the intention of the 'notional reasonable people in the position of the parties at the time at which they were contracting' rather than the parties' actual intention.
 - A term should not be implied 'merely because it appears fair'
 - 'Necessity for business efficacy involves a value judgement' and is not absolute necessity',
76. In relation to the question of whether the obligations were entire or divisible the Tribunal preferred the Respondent's interpretation that the obligations were entire and were indivisible. Whilst the Claimant was correct that the bonus letter did not include the wording 'all of the conditions' or similar, the Tribunal found that the 'reasonable third party' test of interpretation of the letter was that all three elements were required. The letter referred to 'a bonus' with multiple references to 'the agreed targets' in the plural: "It has been decided to offer you a conditional £2,000 Performance Bonus at the end of your employment if you meet the following agreed targets:..." The Tribunal found that there was nothing in the wording of the letter that suggested a reading other than that all conditions were required for the conditional bonus to be paid.
77. There was no weighting attached to the different conditions, nor provision for part-payment on part-performance. The Claimant had set out, in an effort to reach an agreement, a proposal about how weightings could have been applied to the elements with a monetary value attached to each. There was no evidence that this had been the intention of the parties and this was not a reasonable inference from the terms of the letter itself. It could have been that the parties decided to agree a weighted scale or a proportionate conditional bonus, but in those circumstances, it would be expected that the

weightings or proportions would be specified in the agreement to avoid inevitable dispute about the scope of the bonus and how to measure achievement. That was not the case here. The Claimant argued that it would not be fair to impose 100% compliance with the conditions to trigger payment. The Tribunal concluded, however, that it was not appropriate to imply a term, merely because it may be more fair, where it was not reasonable to imply it, applying the principles referred to above. The Tribunal concluded that the obligation was an 'entire' one.

78. The Tribunal considered that there were a number of aspects of the circumstances that were relevant to the interpretation of the contract and the conditions for meeting the bonus payments. These constituted the relevant 'background knowledge', being 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' per Wilberforce in the West Bromwich case. The relevant factors here were many, but included:

- The short length of time between the date of the bonus letter and the end of employment in which the tasks could be undertaken, taking into account the pre-agreed holiday;
- the complexity of the GLISE/DEFnS project, the length of time it had been going on for and the estimated conclusion date
- the fact that the project could not have been brought to conclusion within that timeframe; the Respondent knew that the scripts were not complete, that external help had been sought, that work on the scripts was sequential and the whole could not be completed in that time frame when the deadline was May 2022;
- that the stated aim was to get as much work as possible out of the Claimant, progressing the project and effecting handover within the timeframe
- that the original expressed intention was to tell the Claimant on the last day of work whether he had met the targets
- that some of the explanation or justification for the decision not to pay the bonus included a number of issues that arose or crystallised after the Claimant had left employment
- that there was no evidence that the Respondent had not been satisfied with the progress on the project up until that stage, nor that there were specific elements that had to be completed to achieve payment
- that the wording relating to progress on the DEFnS project was to 'make all reasonable efforts to bring the project to as fuller [sic] completion as possible'
- that two conditions referred to the hand-over of the project, but with different wording, necessitating additional interpretation: 'suitable handover' to continue the project 'as seamlessly as possible' as part of condition 1 that contained the 'reasonable efforts' clause and 'full handover' so that 'any uncompleted work can be completed without disruption or delay' as part of condition 2 that did not contain the reasonable efforts clause.
- That the Respondent placed heavy reliance on the feedback and assessment of the Claimant's replacement and the Tribunal has commented on the reasons for a more limited weight being attached to what is known of what Mr Myatt has said.

79. The Tribunal found that the Claimant had met the requirement in Condition 1. He had made 'all reasonable efforts' to bring the project to 'as full a completion as possible'. There was no possibility that the DEFnS project could have been concluded fully within the 6 working day period given the May deadline, the outstanding script work that had been sent to RDT and the remaining unwritten script. Therefore, to meet the condition the Claimant had to 'make all reasonable efforts to bring it to as full a completion as possible'. The Tribunal found that the Claimant had continued to work on the project as much as could be achieved whilst the issue with the script that had been referred externally had not been resolved. He had been requested to provide an amendment to one of the scripts as referred relating to the postcode analysis and he had attempted to progress the project by external referral. There was no evidence that this had not been appropriate or necessary at the time; the Claimant had not been challenged on this by the Respondent. The fact that later problems arose in trying to resolve the difficulties with the script with the replacement MI Analyst were not relevant to the assessment of whether the Claimant had made reasonable efforts to progress the project.
80. The Claimant made the point that 'coding is never done' and the same could be applied to most work, that unless employment ends after a project is completed there would always be some tasks remaining. A new employee taking over is likely always to involve some lead-in time for them to become familiar with the work. An assessment of the progress on a project, the seamlessness of a handover and the future running of a project could be influenced by a number of factors, including the work of the outgoing worker, management, supervision, the incoming worker and a range of other factors. The assessment of success could not be by reference to a standard of perfection in concluding all potential tasks; the reality of a continuing role with multiple tasks had to be taken into account.
81. The wording of the handover elements of the conditions required interpretation in terms of how to assess whether a handover had been successful or not and the timing of that assessment. The bonus letter included an intention to assess compliance on the last day of employment. It was a reasonable interpretation that information available at that time would be used as the basis for the assessment. Condition 2's wording regarding a full handover 'i) so that any uncompleted work can be continued without disruption or delay ii) so that the DCL team have sufficient information and training to maintain, update and adapt the DEFnS outputs as necessary' created an issue in interpretation and the way in which the Respondent should assess whether the conditions had been fulfilled. The 'so that' clauses referred to events or consequences e.g. disruption or delay that were 'future events' at the end of the employment period, the anticipated assessment time. It was clear that there had been no intention to have a review period after the end of the employment during which the impact of the handover would be assessed; the assessment was to take place at the end of the employment. There was a necessary element of prediction in determining the 'so that' clauses. In the event, the Respondent did not provide the determination until 22 February as Mr Houlihan had been away and his input had been needed to make the assessment. The Tribunal considered that the appropriate approach remained to assess as at 10 February 2022 and not to take into account subsequent developments. That was not a reasonable interpretation of the bonus letter.

82. The Respondent's initial determination on 22 February was that this condition was *'not completed; an insufficient handover on the project, not enough information was provided to the new role holder and the project is currently encountering delays as a result.'* Subsequently this was expanded upon in March: *'the handover was 'not clear enough to enable [Mr Myatt] to continue with the project. There was one component of the project in particular which had a major issue and this had not been brought to Mr Myatt's attention before the Claimant's employment terminated' and 'there was a major issue...that Richard failed to explain the extent of the problem that Huw could not continue to work on the issue'.*
83. The Tribunal has found as a matter of fact that the Claimant had brought the issue of the problematic script properly to the attention of the Respondent and Mr Myatt and the proposed solution by referral to RDT had not been challenged. Overall, there was little or no delay to the project, though the Tribunal accepted that additional expense may have been incurred as a result of the involvement of RDT. It was not possible to determine whether that was greater than it would have been had the Claimant continued in post, but in any event, all of that occurred after the date on which the assessment should have been undertaken. The Respondent did not apply its discretion reasonably in taking into account subsequent events in assessing the handover. The Claimant sought to allege that the discretion had not been applied in good faith, but the Tribunal found no evidence of that.
84. The Respondent argued that the Claimant should not be able to go behind his written statement in the 'calculation document' that a 50% and 95% payment for subcategories of two of the conditions would be appropriate. The Respondent argued that this should be determinative. The Tribunal took the written statement into account along with all of the other evidence; the statement was not determinative. The Claimant had accepted the Respondent's proposition that it was for the Respondent to exercise its discretion in its assessment, saying 'it wasn't for me to mark my own homework', though in a sense he had gone on to do that in the creation of the weightings and percentage assessments. He was arguing on the basis that the contract was divisible and trying to undertake an analysis, that the Tribunal has rejected, having found that the terms represented an entire obligation. That document had been treated as an open document and appeared in the bundle but was effectively an attempt at settlement, and which included compromise. The Tribunal undertook its own assessment of the bonus letter, the conditions and the extent to which compliance had been achieved; due weight was given to all statements from the Claimant and Respondent's witnesses but none of those was treated as determinative of the whole issue.
85. In relation to Condition 2 there was no 'reasonable efforts' clause and the requirement was to complete a full handover relating to the project. In addition to the objections to the quality of the handover made above, the Respondent relied on the suggestion that the Claimant took extended lunch breaks and so did not dedicate enough time to handover and that he had spent 30 minutes on a zoom call on his final day. As the Tribunal found that this allegation had not been made out, it was unreasonable to rely on it substantively as a reason to conclude that not enough time had been given

to completing an appropriate handover. The Tribunal noted that Condition 3 regarding the handover on a suite of other reporting functions and ad-hoc reporting requirements was said to have been met. There had not been a suggestion that the Claimant had not spent enough time on that nor that he had spent too much time on this aspect of handover to the exclusion of the project handover. The Tribunal was not persuaded that the Claimant's working hours had been insufficient causing the handover to be inadequate.

86. The Tribunal had seen various emails referencing meetings and reports relating to the project handover. These had been addressed to the Respondent and provided copies and links to documents and set out the stage reached on various issues. The Tribunal considered that what exactly was required to meet Conditions 1 and 2 in relation to the substantive project work and the handover was not set out with any great specificity. The Respondent had needed to apply discretion in the assessment and that discretion had to be exercised reasonably. The Tribunal was required to interpret the bonus letter with reference to the reasonable third party with all the background knowledge test. The lack of specificity in the targets meant that a considerable amount of interpretation was required and the factors that fed into the interpretation have been set out.
87. The Tribunal found that there was a lack of clarity in the reasons given by the Respondent as to the ways in which the Claimant had not met the targets. The criticisms of the Respondent's handover, for example, were somewhat generic; the handover was 'not clear' and the information was 'inadequate'. There appeared to be an over reliance on the opinion of the Claimant's replacement and a lack of specificity about the ways in which the Claimant had failed to meet the targets. It was not clear what additional work the Claimant should have done or was expected to have done to meet the targets. The Claimant was not told during his last week of any inadequacies about the project work or the handover so that he could remedy it. The later clarification by the Respondent, after the initial determination, was still lacking in detail and sought to rely on subsequent difficulties to justify the decision. The Tribunal considered that a reasonable assessment should have taken into account matters up to the end of employment and not subsequent to it.
88. The Tribunal determined that, for the reasons set out, the Claimant had achieved the targets under Conditions 1, 2 and 3. The Respondent had therefore breached the contract in not paying the Claimant the conditional performance bonus of £2,000 and that the Claimant was therefore entitled to the payment.
89. In relation to the additional matter regarding provision of updated terms of employment, the relevant law is Employment Rights Act 1996. S1 provides that when a worker begins employment they should be provided with a written statement of particulars of employment. S(4) (c) provides that the statement: '*shall also contain particulars of any terms and conditions relating to hours of work including any terms and conditions relating to—*
- (i) normal working hours,*
 - (ii) the days of the week the worker is required to work, and*
 - (iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.'*

90. S4 goes on to provide that: *'(1)If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the worker a written statement containing particulars of the change.'*
91. The Tribunal took into account the fact that there had been no change to the overall hours required and although an earlier start was convenient there was no evidence that it was a permanently required change. The change was minor and the contract already provided for some flexibility in relation to the working hours as required by the business need. The Tribunal considered that the Respondent had not failed in its duty to provide the statutory statement of terms and the Claimant was therefore not entitled to any remedy in relation to that aspect of his claim.

**Employment Judge Thackray
Date: 13 March 2023**