



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr K Black

v

Inovus Limited

Heard at: Liverpool Employment Tribunal **On:** 30 November 2020

Before: Employment Judge Johnson

Appearances

For the First Claimant: in person

For the Respondent: Mr A Ross (counsel)

JUDGMENT

1. The complaint that the claimant did not receive a bonus payment to which he says he was contractually entitled is not well founded, which means it is unsuccessful and dismissed.
2. As the claimant conceded at the final hearing that his claim for a bonus payment was the only claim that he was pursuing, the proceedings are dismissed in their entirety.

REASONS

Background

- (1) The claimant was employed by the respondent, as a Lead Database Developer (the respondent describes the job as a Software Engineer, from 19 August 2019 until dismissal with effect on 18 March 2020. By a claim form presented on 29 May 2020, following a period of early conciliation, the claimant brought complaints of 'other payments' which he identified as 'unreasonable dismissal & breach of contract'.
- (2) The claim is essentially about the termination of the claimant's employment and his belief that he was denied a substantial bonus in the region of £10,000.

- (3) In summary, the respondent's defence is that the claimant was dismissed for gross misconduct for a number of conduct related issues. They say that the claimant did not achieve certain key performance indicators ('KPIs'), which gave rise to payment. Although the initially also argued that the mention of a bonus in the initial offer letter was replaced by a later statement of claim, Mr Ross confirmed that this argument would not be pursued. Accordingly, the respondent accept that the claimant was entitled in principle to the award of a bonus, but that it was not payable to him before or at the date of dismissal due to his failure to achieve the KPIs identified.

The Evidence Used in the Hearing

- (4) The Tribunal heard from the claimant who had prepared a witness statement. He did not call any other witnesses.
- (5) The respondent called Mr Jordan Van Flute (Chief Technical Officer) and Dr Elliot Street (Managing Director). It was Mr Van Flute who was the primary respondent witness and Dr Street provided.

The Issues

- (6) The claimant conceded that the only issue he was pursuing in this case was the payment of the bonus payment which he believed he was entitled to. The respondent conceded that the claimant was in principle entitled to a bonus payment under his contract of employment, but that this was only payable if the claimant achieved the necessary KPIs. Accordingly, the Tribunal simply had to determine the following:
- (i) Did the claimant achieve the necessary KPIs in his designated duties?
 - (ii) If the answer to the first question is yes, what amount of bonus is payable by the respondent?

Findings of Fact

- (7) The respondent is an IT company which is involved with the design and manufacture of medical simulation products. It is a small company that is managed by two directors who are answerable to a board of directors who are investors in the business. It is understood that the board do not deal with day to day management decisions, but any significant financial matters cannot be made without their authority.
- (8) Not surprisingly, the respondent employs a number of IT experts who are involved with the development of the respondent's products and that a considerable amount of work is involved in the preparation of products for the market. The claimant was employed by the respondent as a software engineer from 19 August 2018. He was engaged to primarily work on

project which was described by Dr Street as being to develop systems for an augmented laparoscopic simulator.

- (9) The claimant's offer of employment identified a *'Tiered Bonus Structure'*, with *'Tier 1: £5,000 bonus to be paid out upon achieving the set KPI's within a 10-month period'*, and *'Tier 2: £5,000 bonus to be paid out upon achieving the set KPI's within a 6-month period'*. The subsequent Principal Statement of Terms and Conditions of Employment dated 21 August 2018 was silent as to the provision of a bonus, but in final submissions, Mr Ross confirmed that the respondent accepted the principle of the claimant being entitled to a bonus, but only when he achieved the relevant KPI's.
- (10) There was clearly a concern on the part of the claimant as to when he would become entitled to receive his bonus and an exchange of messages between Mr Van Flute and him took place on 6 January 2020, when Mr Van Flute confirmed that *'assuming it's [which is understood to mean the claimant's project] completed for the end of Jan, you can expect to get it in Feb, Jan payroll will be done in the next couple of weeks'*. Mr Van Flute confirmed a number of matters that had to be completed and the messages concluded with him explaining that the claimant should be able to achieve the necessary tasks and that board approval was required before a bonus payment could be released.
- (11) A meeting took place between Mr Van Flute and the claimant on 10 January 2020. A note was produced which had been signed by Mr Van Flute on this date and which was entitled; *'List of outstanding KPI's for Keith Black – Senior Software Developer'*. This provided a number of headed elements which formed the different themes within which were numbered tasks that comprised the KPI's which the claimant had to achieve. They were *'Statistics Area, User Accounts, Video Area, Message Centre/Tasks, Online Orders, License Assignment, Server/Web Requirements, Permissions, Bug Reporting, Admin Area, Other, Testing and Code review'*.
- (12) The list concluded with the following statement; *'Anything outside these requirements will be considered feature creeping and should affect the access to the bonus schemes. Once completed the employee will have succeeded in completing all required targets for the project and will thus have earned the proposed bonus. Deadline for Completion 31/01/2020 (Code review to be done once final code is handed over)*. I find that this is a key document in this case and it describes the parties' understanding as of 10 January 2020 as to what the KSI's were and what the claimant needed to satisfy in order that he could receive a bonus payment.
- (13) The Tribunal acknowledges Mr Ross's submission that the receipt of a bonus payment involved a more complicated process than would be found

in (say), a sales environment where success was achieved by securing a certain value of sales. The KSI's were necessary because it involved a project where it was essential that a technically complicated medical procedure was not only completed, but was also fit for its intended purpose. Not surprisingly, this did require a number of issues to be resolved and to be of a high quality.

- (14) The list was annotated and some entries initialled by Mr Van Flute such as his deletion of the '*Font finalisation*', which he described as not being '*vital requirements as part of KPI's*'. The parties clearly understood the necessary KSI's that had to be achieved before a bonus would be considered and that other matters could not be added to the claimant's tasks in this list, so as to affect the entitlement to a bonus.
- (15) There was some annotation by the claimant in the Testing and Code review, where he crossed out the three requirements of the code review. He added his own note as follows to this section; '*(to test for bugs etc, bonus not...[word unclear]*'. Although there was lengthy cross examination concerning this document during the claimant's evidence, I am satisfied that the claimant treated the list as a working document and he crossed out each task as he believed that he had completed. The Testing and Code review is no exception and his crossing out of each task indicated his belief that he had completed each one.
- (16) The claimant submitted his completed website project on 30 January 2020 and on 31 January 2020, Mr Van Flute messaged him to say '*Bare [sic] in mind I'm happy to give you a buffer week on any bugs I find but the first is. Store items can't be deleted. Shows fatal error*'. It was clear that although the claimant's project had been largely completed, it was necessary for a number of checks to be carried out before the product could be considered finished. This form of 'proof reading' or 'play testing' (my words) was an understandable and necessary part of the completion process in order that a viable product could be sold by the respondent. It was clear during the hearing of evidence that there were several problems with the functionality and format of the coding used in the product submitted by the claimant and which needed correction. It was reasonable that this was something that would have to be addressed before the entitlement to a bonus was achieved and was consistent with the Testing and Code review in the KSI list discussed above.
- (17) The claimant then sent a message to Mr Van Flute on 5 February 2020 enclosing a zip file entitled '*BackUpMainFiles-05-02-2020.zip*' and described in the message as being '*All php files and admin files for code checking*'. At this point, Mr Van Flute confirmed that he was reviewing the claimant's work and was also asking his mentor who was a very experienced software engineer to check and '*corroborate*' so as to ensure it was completed and of an appropriate quality. The claimant chased Mr

Van Flute on 21 February 2020 and he replied within the hour, confirming that he was chasing his mentor for a reply and that the board were happy to proceed with his bonus in principle. Mr Van Flute confirmed that this was no guarantee of the payment and that the board needed to be satisfied that the project was quality checked before releasing it to the claimant. The discussions between the claimant and Mr Van Flute continued by messaging on 21 February 2020 on a number of issues and it ended with Mr Van Flute saying *'I'll do what I can, ill let you know by Tuesday if it will be'*. I did not find any evidence of stalling by the respondent in relation to this payment at this point and they were behaving reasonably in carrying out these quality checks.

- (18) Mr Van Flute then messaged the claimant on 4 March 2020 requesting an *'up to date zip with the entire source code'* and asked *'why is the site still hosted on your server not AWS?'* I understood that this meant that the claimant did not have the web site on the Amazon Web Services and which was where the respondent operated its systems. As long as the site was still on his own server, only the claimant could work on the site and as the intellectual property in the site belonged to the respondent, it understandably was concerned that it was transferred to AWS. There was an ongoing issue as to whether the claimant could access the AWS himself to carry out the necessary work and how often he transferred the current version of the site to AWS. However, it was clearly a matter that concerned the respondent and it was something that they had to continually mention to him and where the claimant did not give a clear explanation as to why he could not comply.
- (19) A further request was made by Mr Van Flute on 6 March 2020 for a transfer of all files and mentioned that the site was not working and should be on AWS and he was reminded that his KPI's required an AWS upload. He was informed that it was not good enough for the claimant to keep this information on his own server, but the claimant appeared to be resistant despite a number of requests that day. Interestingly, when it was stressed by Mr Van Flute that he needed to be able to run the test *'...to warrant the bonus'*, the claimant responded by messaging immediately, *'why – I have already earned it'*. Mr Van Flute appeared to be puzzled why the claimant would not export the file to him as he thought it did not involve a great deal of data, would be a quick and easy task to comply with and he requested it within *'the next half hour'*. The claimant's reply was *'I need to speak with my solicitor before I continue with any further work'*.
- (20) There then followed a gap of a few days, when on 8 March 2020, Mr van Flute messaged the claimant and asked if they could discuss the outstanding issues *'like rational adults'*. He said *'I just want the database, I don't care what was said. Right now the project hangs in the balance. If I can get the files I'm happy to forget all of this and move forward with other projects. I'm happy to speak with you this afternoon or evening to sort this out'*. This was followed immediately by a further message which said; *'Just spoken to the [sic] Glenn the chairman. Financially I think we*

can come to an agreement to move forward but it has to have some contingency in place for us to guarantee any issues dod get fixed after the fact. Want to talk this through?’ The claimant’s reply was simply; *‘Please text your proposal’.*

- (21) On 10 March 2020, the claimant raised a formal grievance and raised a number of issues that he said he experienced at work since he commenced working for the respondent. In relation to the bonus, he simply said that *‘During all the work I was doing on Friday [6 March] I asked again about my bonus and was once again fobbed off, give the fact I was now at breaking point I opted to stop work on the project immediately & seek advice from a 3rd party.’* He then said he was taking time off for stress. He concluded by requesting his full bonus to be paid by Friday 13 March 2020, failing which he would present a claim to the Employment Tribunal.
- (22) What followed then was a grievance hearing arranged for 17 March 2020. The claimant did not attend this meeting and did not provide a reason to the respondent. In the meantime, a disciplinary process was commenced against the claimant with a hearing arranged for 18 March 2020. The disciplinary letter inviting the claimant to this meeting identified 3 matters relating to project that he was working on. The claimant provided a reply by email on 18 March 2020 and asked that the attached statements and screenshots be used at the hearing. The hearing proceeded in his absence and a decision letter dated 18 March 2020 was sent to the claimant informing him of his summary dismissal for gross misconduct of the reasons considered at the hearing.
- (23) It is not necessary to go into detail concerning the procedural matters arising from the disciplinary and grievance processes given that the claimant has not presented a claim of wrongful dismissal and due to insufficient service, he was unable to bring an unfair dismissal claim. However, the dismissal letter informs the claimant that he is summarily dismissed without notice for gross misconduct and that his final pay would include outstanding 6 days untaken annual leave. The claimant was not paid his claimed bonus, but no explanation was provided in this letter as to why it was not paid. The outcome of the grievance hearing letter dated 21 March 2020, informed the claimant that he was not entitled to the bonus, which was described as a *‘discretionary bonus’* in the letter. The conclusion was that the claimant had not provided the necessary evidence to show he had completed the required KPI’s and due to this and his failure to act in good faith, he was not entitled to a bonus.
- (24) In considering the evidence in this case, I do find that Mr Van Flute was a convincing and reliable witness and gave a clear impression of a manager who was acting in good faith. This was both in terms of his oral evidence, but also in his messages which are considered in the findings of fact

above. I was left with the clear impression that he was puzzled by the claimant's behaviour and was if anything trying to encourage to cooperate with him in, so that the project could be completed and that the claimant could receive his bonus. What the claimant believed was '*fobbing him off*', was simply Mr van Flute seeking the claimant's assistance with completing the necessary steps so that the board would be satisfied that a bonus could be released. I accepted his evidence that he wanted the claimant to receive the bonus, but understandably, it had to be with the necessary KPI's provided and the project being fit for purpose.

- (25) The claimant's behaviour in this case was somewhat strange. I was not aware of any underlying health problems, but I did hear some evidence of domestic difficulties relating to damage the roof of his home. There was also a clear sense of urgency about the bonus and it did seem that his anticipation that it would be paid at the beginning of 2020, created a great deal of anxiety when it became clear that its payment would be delayed. I do not think that the claimant's resistance in complying with management requests for data migration of their intellectual property was done in a deliberate or cynical way to extract greater advantage from the company. What I find on balance is that for some reason, the claimant became convinced that the respondent was seeking to avoid paying him a bonus and in his mind, once he sent what he thought was the completed project to Mr Van Flute on 30 January 2020, this action would unlock the bonus payment within a very short period. Despite the clear explanations given by Mr Van Flute in subsequent messages about what had to happen with regards to a code review, he seemed to conclude that the only way he could recover his bonus on 6 March 2020, was to refuse to send over the necessary files until it was received. This was wholly unreasonable and placed his employer in an extremely difficult and potentially dangerous business situation and it is understandable that without good reason, they took the action that they did.

The Law

- (26) Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified her written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.
- (27) A contractual bonus payment can fall within the definition of 'wages' under section 27(1) Employment Rights Act 1996 ('ERA'). Once an employer tells an employee that he is going to receive a bonus payment on certain terms or performance, it is under a legal obligation to pay that bonus in accordance with those terms or performance; i.e. when the necessary conditions are met.

- (28) If the performance targets are vague, courts and tribunals are likely to construe the contract in favour of the employee.
- (29) Where a worker's right to payments are stated to be 'discretionary' or 'non-contractual', the worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order that it fell within the definition of being 'properly payable' within the meaning of section 13(3) ERA. **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA.**
- (30) Mr Ross also referred me to an additional case of **Braganza V bp Shipping Ltd and anor 2015 ICR 449, SC**, where the Supreme Court considered the irrational use of discretionary management powers to determine relevant facts or to form an opinion. The court determined that any decision-making function carried out by an employer in accordance with the employment contract, must be exercised in accordance with the implied obligation of trust and confidence. Additionally, the public law test of rationality as set out in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 1 KB 223, CA** could apply. This test has two limbs: the first focuses on whether the correct matters have been taken into account in reaching the decision; while the second is concerned with whether the result is so outrageous that no reasonable decision-maker could have reached it.

Discussion and Analysis

- (31) The respondent accepted that in principle the claimant was entitled to a bonus of £5,000 as described in the offer letter and which would be paid if the claimant achieved a set of KPI's within a 10 month period. This was the Tier 1 part of the bonus structure.
- (32) Tier 2 of the bonus structure allowed for a £5,000 to be paid out to the claimant if he achieved a set of KPI's within a 6 month period. The plain reading of section 9 of the offer letter suggests that the claimant could receive £5,000 within 6 months within Tier 2 and effectively this allowed for 'accelerated receipt' of a bonus, with the possibility of working towards the next bonus either under Tier 1 or Tier 2. However, there was no argument between the parties that the meaning of the Tiered bonus structure was that the £5,000 bonus under Tier 1, would be increased to £10,000 under Tier 2 should the claimant complete the KSI's within the shorter 6 months period. This does make sense in terms of incentivisation of employees and there appeared to be no argument that completion of the necessary KPI's within 6 months would result in the payment of £10,000.
- (33) I find that this amounted to evidence of a discretionary, but legal bonus existing between the parties. It was one that could become contractual and constitute wages under section 27(1) ERA and being properly payable under section 13(3) ERA, once the necessary conditions were satisfied,

namely the completion of the KSI's identified by management. The claimant accepted that the KSI's were to be determined by his employer.

- (34) The List of outstanding KPI's agreed between the claimant and Mr Van Flute on 10 January 2020 was produced due to concerns expressed by the claimant on 6 January 2020 as to what his KSI's were, in order that he could achieve his bonus. The claimant used this as a tick list and he crossed off the items which amounted to his KSI's and by 30 January 2020, he believed that he had complied with the necessary tasks and the only remaining matter was the code review.
- (35) The code review was a necessary and rational consideration and was quite rightly a KPI that had to be complied with before the bonus could be recommended to the board by Mt Van Flute. It was entirely reasonable that not only did he review the material sent, but that he used an external mentor whom he felt could give the necessary extra 'pair of eyes' and could also provide impartial feedback. Issues did arise that needed correcting and this supports the need for a code review to take place before the product could be determined to be fit for purpose. Unfortunately, the claimant became very impatient in seeking the release of the bonus and treated the delay which took place in carrying out the code review as being indicative of Mr Van Flute looking to avoid paying the bonus.
- (36) Having heard the evidence of Mr Van Flute and having read the List of outstanding KPI's and the messaging between him and the claimant, I cannot see how this was a reasonable position for the claimant to hold. The delay was no doubt frustrating and the claimant was anxious that he would receive the additional money which the bonus would provide. But it was not the case that he was being denied the bonus and it was clear that in principle, Mr Van Flute thought the claimant by submitting his project by the end of January 2020, he would be paid his bonus.
- (37) The claimant however, could not become entitled to payment of the bonus until the necessary conditions were met and only at this stage would it become wages properly payable to him under his contract of employment. The remaining KPI's relating to the code review had to be completed, it was recognised that this was something that could only happen once the claimant migrated all of the necessary data to Mr Van Flute and any other relevant colleagues. An added difficulty was that the issue arose concerning the failure to migrate the data to AWS and despite being asked on a number of occasions that this was part of his KPI's and his bonus required it to be provided, the claimant failed to comply.
- (38) The claimant's refusal to migrate the data until he had spoken with his solicitor and his subsequent grievance appeared to be strange give the dialogue that existed between him and Mr Van Flute. I did not interpret it

as a malicious act, but simply that of a man who had become suspicious and fearful that he would not receive the bonus. This was an unreasonable position to hold and taking into account all of the evidence that I have heard in this case, it is my judgment that management behaved reasonably in exercising their discretion with regard to the award of the bonus. There were clear KPI's, they had not been completed by the claimant at the time that he submitted his grievance and his failure to engage with the respondent concerning the resolution of this matter, understandably gave rise to the subsequent disciplinary action. It is unfortunate that this situation arose, but did not arise from any unreasonable behaviour on the part of management and as such the claimant was not entitled to his bonus as he had not complied with the necessary conditions required by the terms of the scheme.

Conclusion

- (39) The complaint that the claimant did not receive a bonus payment to which he says he was contractually entitled is not well founded, which means it is unsuccessful and dismissed.
- (40) As the claimant conceded at the final hearing that his claim for a bonus payment was the only claim that he was pursuing, the proceedings are dismissed in their entirety.

Employment Judge Johnson

Date: 1 December 2020

Sent to the parties on:
18 December 2020

For the Tribunal Office