Neutral Citation Number: [2024] EAT 144

Case No: EA-2021-000800-NT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 September 2024

Before :

MR BRUCE CARR KC

- -

Between :

MR R MOON **Appellant**

- and –

SLATER & GORDON UK LTD **Respondent**

- -
- -

The **Appellant** appeared in person
Mr R Quickfall, counsel, instructed by Eversheds Sutherland, for the **Respondent**

Hearing date: 5 & 6 June 2024

- -

JUDGMENT

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES; HARASSMENT; UNFAIR DISMISSAL

Unlawful deduction – the Claimant challenged the approach taken by the ET on the basis that they had not properly considered his contractual rights or the exercise by the Respondent of its discretion with regard to the award of bonus. However, the claim at all times fell outside the scope of a claim for unpaid wages based on the decision of the CA in ***Coors Brewers v Adcock [2017] ICR 983***. Whilst it was correct that the ET appear not to have properly considered the definition of 'wages' in **section 27 Employment Rights Act 1996**, any error was academic given the way in which the claim had been advanced by the Claimant;

Harassment – the ET had been entitled to find that objectively, it was not reasonable for the Respondent's conduct to have had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him – the ET had properly applied **section 26 Equality Act 2010** and the decision could not be said to be perverse;

Unfair dismissal – the ET had properly considered the reason for dismissal and found it to be redundancy. There was no room for any conclusion that the real reason for dismissal was the Claimant's absences from work or that the decision maker had been manipulated into the conclusion that he had reached.

MR BRUCE CARR KC:

Introduction

1. In this judgment, the parties will be referred to by the titles which they held in the Employment Tribunal ("**ET**"). This is an appeal and cross-appeal against a decision of the Cardiff ET sent to the parties on 21 April 2021. The Claimant had originally brought proceedings in the ET, advancing a range of claims including unfair dismissal, dismissal for the assertion of a statutory right, and disability discrimination, harassment and victimisation. He also brought a claim for unlawful deduction from wages. The ET found in favour of the Claimant only in relation to his unfair dismissal claim and, as far as that claim was concerned, the finding of unfairness was limited to the fact that he had not been allowed a right of appeal against his dismissal, which the ET had found was by reason of redundancy.

2. The Claimant first submitted a Notice of Appeal on 5 October 2021 and in which he took three grounds of appeal. His appeal was rejected by HHJ Beard on 22 November 2021 under Rule 3(7) **Employment Appeal Tribunal Rules 1993** ("**EAT Rules**"). At a Rule 3(10) hearing held on 6 December 2022, HHJ Tayler allowed the appeal to proceed to a further hearing, the Claimant having indicated that he was abandoning a number of his original Grounds of Appeal and was limiting the scope of the remaining grounds. HHJ Tayler, whilst accepting that there appeared within the remaining Grounds, points of law that were properly arguable, the points that he was making were still lengthy and in part, hard to follow. He therefore ordered that the Claimant should submit "concise proposed amended grounds" which would then be considered at a preliminary hearing to consider whether in fact, the points raised by the Claimant should proceed to a full hearing.

3. The preliminary hearing duly took place before HHJ Tucker who, by an order dated 9 July 2023, directed that the appeal be set down for a full hearing and that the Claimant should indicate whether he wished to adopt the Grounds of Appeal which had been identified by the Judge and

recorded in the Reasons attached to her order. Three grounds were identified as follows:

a. **Ground 1** – unlawful deduction – failure to have regard to the definition of "wages" in section 27(1) **Employment Rights Act 1996** ("**ERA**") or properly to consider the effect of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("**TUPE**") and took unreasonably narrow construction of contractual provisions;
b. **Ground 2 –** error in relation to the conclusions reached at paragraph 204 of the ET Reasons, dealing with the Claimant's harassment claim;
c. **Ground 3 –** unfair dismissal – failure properly to consider whether redundancy was the reason for dismissal and failure to identify the decision maker.

4. The Claimant duly adopted the Grounds of Appeal as formulated by HHJ Tucker in an email to that effect that he sent to the EAT on 12 July 2023.

5. The Respondent submitted an Answer and Cross-Appeal on 4 August 2023. In the Cross-Appeal, 6 points were taken under 2 separate headings. Grounds 1-3 related to the Claimant's unlawful deduction claim and Grounds 3-6 related to findings that the ET had made regarding disability related harassment. The Cross-Appeal was considered by John Bowers KC who, by an order dated 12 September 2023, allowed the appeal to proceed to a full hearing in relation to Grounds 1-3 but rejected Grounds 4-6 on the basis that they amounted effectively to a challenge to hypothetical findings made by the ET and did not arise out of the Appeal. The Respondent applied for a hearing under Rule 16(6) EAT Rules. That hearing took place on 18 April 2024 before HHJ Auerbach who allowed Grounds 4-6 of the Cross-Appeal to proceed to a full hearing.

The Unlawful Deductions Claim – Findings by the Employment Tribunal

6. In his application to the ET, the Claimant pursued as an unlawful deduction from wages, a

claim for bonus for the 2017 financial year ("**FY17**"). In his Claim Form he stated that had he "been paid the bonus in accordance with the previous year's measures or measures similar to the other Cardiff staff, the amount would have been over £20,000". This was in contrast to the payment of just £3,400 which had been paid to him under the terms of a letter received from the Respondent and dated 18 September 2017. Under the heading "Remedies" at paragraph 124(e) of his Claim Form, the Claimant said that he was seeking compensation in the form of a payment of his "reasonable bonus for FY17 and any bonus payable at the conclusion of or part way through FY18". It is therefore apparent from the Claim Form that whilst the Claimant was seeking a substantial sum by way of unpaid bonus, he did not specify any particular figure and instead put the claim on the basis of any assessment of what he felt was his reasonable entitlement.

7. The key findings made by the ET in relation to this claim were as follows:

a. The Claimant had advanced bonus claims for FY2017 and FY2018 in the sum of £20,830 for each year. The Respondent had asserted that any entitlement to bonus was discretionary and that as a result, the sums claimed did not amount to "wages" that were properly payable to the Claimant. The ET had therefore focussed its attention on the question of whether the Claimant had a contractual right to a quantifiable bonus (ET Reasons, paragraph 20);

b. The Claimant had originally commenced his employment with Leo Abse & Cohen solicitors ("**LAC**") in November 2012. In May 2015, that business was transferred to Slater and Gordon (UK) 1 Limited ("**S&G UK1**"). At the time of the transfer, the Claimant was provided with a letter setting out the terms under which he was employed which included as an appendix, a schedule setting out the core benefits and salary of his employment with LAC and the proposed salary and benefits relating to S&G UK1. Whilst the transfer of LAC was subject to the provisions of the **TUPE**, the S&G UK1 terms were an improvement on those which applied to the Claimant's

employment with LAC – he told the ET that he was happy to accept the new S&G UK1 terms and did not rely on TUPE (ET Reasons, paragraphs 32-33);

c. The S&G UK1 schedule of terms and conditions contained the following wording regarding bonuses:

> "S&G are currently reviewing their bonus schemes as part of their remuneration strategy Project. S&G is looking to establish a balanced scorecard approach which encourages a broader range of behaviours to support culture, clients and practise development. At the beginning of the scheme year, managers will determine the weightings ascribed to each balanced scorecard element for individuals. At the end of the scheme year, managers will be required to assess an individual against the objectives set. The level at which the scheme pays out is determined by achievement against these objectives, and payments could range from 5% to 40% of base salary. The scheme is currently awaiting final approval by the S&G Governance Group and the outcome of staff consultation. It is proposed that the new scheme would be effective from one July 2015. S&G's bonus schemes are discretionary and noncontractual and participation is subject to eligibility." (ET Reasons, paragraph 33)

d. On 30 April 2016, there was a further TUPE transfer following a restructure process within the Slater and Gordon group, with the Claimant's employment transferring to Slater and Gordon Solutions Limited. That company later changed its name to Slater and Gordon UK Limited, the Respondent to the Claimant's claims (ET Reasons, paragraph 34);

e. In October 2016, the Claimant had received a bonus payment of £20,830 gross in respect of the preceding financial year which had run from 1 July 2015 to 30 June 2016. In January 2018, he received a gross payment of £3,400 for the financial year

ending 30 June 2017 (ET Reasons, paragraph 39);

f. On 18 October 2018, the Claimant was notified that his bonus for the financial year ended June 2018 would £3267.17 gross and would be paid to him on 24 December 2018, subject to him remaining in employment with the Respondent as at that date. He was told that he was eligible for a bonus of 10% of his annual salary but his actual bonus had been pro-rated to 61% of that figure to take account his absences from work that he had had during the year (ET Reasons, paragraph 114);

g. The focus of the Claimant's claim, the ET found to have been the provision set out in the S&G UK1 schedule of terms and conditions dealing with bonus and which is set out above. As to that, the ET found that "the appendix included a sentence that the Respondent's bonus schemes were discretionary and non-contractual and that participation was subject to eligibility" (ET Reasons, paragraphs 205-6);

h. The Tribunal accepted an argument apparently advanced by the Respondent that there could not be a contractual right to a non-contractual bonus save in circumstances in which a commitment might have arisen by virtue of custom and practice, a point which was not pursued by the Claimant. The result was that "any bonus payable was entirely discretionary." (ET Reasons, paragraph 208)

i. The Claimant was therefore, in the absence of any argument based on perversity, only entitled to such bonus as had been declared by the Respondent – which for 2017 was £3,400 and which was paid to him. He would only have been entitled to the 2018 bonus if he had been in employment as at 24 December 2018, which he was not. For those reasons there had not been any deduction from wages relating to the 2018 bonus (ET Reasons, paragraphs 208-209)

The Harassment Claim – Findings by the Employment Tribunal

8. The key findings of the ET with regard to the Claimant's harassment claim were as follows:

a. As set out in the List of Issues (Reasons, paragraph 5), the harassment claim advanced

by the Claimant centred on the conduct of a meeting held on 16 February 2018 at which he had been accused of "insubordination….failing to communicate properly and putting him to his election as to whether he was fit for work on the spot";

b. The Claimant had suffered a period of ill health, particularly anxiety and depression and which had led him to take sick absence with effect from 4 December 2017 (Reasons, paragraph 46) at which point he was signed off work for a one month period (Reasons, paragraph 48);

c. The Claimant was then absent from work for a further period from 9-23 January 2018. He had a return-to-work discussion on 25 January 2018 with Mr Frank Wade, the Respondent's Chief Operating Officer and the Claimant's line manager at the relevant time. The following day, the Claimant sent a lengthy email to Mr Wade in which he stated that he was suffering from anxiety which was worsened by the office environment (Reasons, paragraph 54);

d. A further return-to-work meeting was then held on 31 January 2018. In addition to Mr Wade, the meeting was also attended by Jayne Ross, HR Manager for the business. (Reasons, paragraph 55);

e. On 15 February 2018, the Claimant sent an email to Mr Wade in which he stated that he did not think that the new work allocation process was working or even being implemented. Mr Wade responded by email saying that the allocation process had indeed been implemented. He concluded his email as follows "In simple terms, what is the point that you are making?" (Reasons, paragraph 57);

f. The Claimant replied some three minutes later in which he said that he "may be reading things wrong" and "ignore me". Mr Wade responded by writing "no issue at all in looking into the matter" but he just needed a little more information. The Claimant replied to Mr Wade saying "Feel free to handle it however you see fit Frank. I'll bow out." (Reasons, paragraph 57);

g. The next morning, 16 February 2018, the Claimant sent a variety of emails, including one to a senior manager, Emma Holt in which he said that there had been numerous breaches of policy and procedure by the Respondent and that he had suffered stress and anxiety as a result. He said that he was "shaking" as he wrote the email and had "completely ceased to function as a manager" but that he had nevertheless decided to remain in employment with the Respondent and lodge formal complaints about it to the Solicitors Regulation Authority and the Association of Costs Lawyers in the hope that things would change. (Reasons, paragraph 58)

h. He also sent an email to Mr Wade, copied to Ms Ross, stating that he had escalated matters both internally and externally. (Reasons, paragraph 60). Mr Wade and Ms Ross then spoke to the Claimant the same day. The Claimant's Further and Better Particulars, provided for the purpose of the ET proceedings, recorded Mr Ross as having said on that call that the Claimant had a history of sending disrespectful emails and that this needed to stop. He also recorded Mr Ross as saying that he also had a history of insubordination, such as refusing to join telephone calls. Mr Ross was also said to have said that whilst the Claimant's condition might have caused him to write the emails that he did the day before, this needed to stop. He then stated that the Claimant needed to make a decision there and then as to whether he was fit to return to his desk to work or take holidays or go back to his GP. The Claimant then hung up on the call. (Reasons, paragraph 63)

i. Following the call, the Claimant sent an email to Mr Wade and Ms Ross describing it as having been "the most shocking thing" he had ever been subjected to. Of the email, the ET said as follows:

> "66……..The content of the e-mail was, without wishing to be disrespectful to the claimant, rather garbled, and it seemed to us that, at times or greatest stress, the Claimant did type and send emails which

were rather incoherent and contained a number of typographical errors, in contrast to his usual emails which were properly typed and coherently expressed.

67. In the e-mail, the Claimant made reference to not being insubordinate, not having a history of disrespectful emails, and not having to go back to his GP, for more tablets and more time off. Those comments clearly referenced those matters which in our view, confirmed that they had been discussed during the conversation. However, our conclusions were that the call was made by Mr Wade and Ms Ross with good intentions and without having any clear understanding of the Claimant's mental state at the time.

68. Whilst it may have been better for Ms Ross not to have made reference to insubordination or disrespectful emails, we noted that, even by the Claimants own assertion in his further and better particulars document, Mr Wade indicated that it was understood that those matters could have arisen due to his illness. We also noted that the call arose following the Claimant’s emails of the morning in which he had escalated matters to very high levels within the Respondents group internally, and also indicated that he had notified external regulators. In our view, therefore, it was not surprising that Miss Ross and Mr Wade may have been a little defensive on the call and may have been keen to impress upon the Claimant that sending emails of that sort may not have been the best way of going about things.

69. With regard to the discussion about whether to stay in work, take leave, or go to the GP, we noted that by this stage of the conversation, the Claimant himself confirmed that he was very upset. In our view,

particularly bearing in mind that the Claimant was indeed shortly afterwards granted a further period of paid leave, the references made to the decision on the Claimant's part about staying in work, taking leave, or visiting the GP, were made with the best of intentions to try to ensure that the Claimant did what was best for his health at that time."

j. The ET's conclusions in relation to the allegation of harassment were then set out at paragraphs 198-204 as follows:

"198. Considering the application of section 26 EqA, as noted….above, in stages, we were satisfied that references to the Claimant essentially being subordinate and of having a history of inappropriate communications could be considered to be unwanted. We were not, however, satisfied that the questions about whether the claimant was fit to be at work or should take paid leave or should seek medical assistance were unwanted, as it appeared to us that Ms Ross and Mr Wade were only seeking to do what was best for the Claimant in the circumstances.

199. We then considered whether the conduct, in the form of referencing the potential for the Claimant's actions to have been viewed as insubordination and the reference to him communicating inappropriately, was related to his disability. In broad terms, we were satisfied that it was. It seemed to us that the Claimant's e-mail to Mr Wade on the evening of the of 15 February 2018, and the emails that he sent to other of the Respondent's managers by way of escalation on 16 February 2018, which were actions considered to potentially amount to insubordination and/or to be inappropriate communications, had

been triggered by the Claimant's condition. In our view, he had not been suffering from anxiety in the way that he was at the time, he would not have taken the action he did or expressed himself in the way that he did. We were therefore satisfied that the matters raised related to his disability.

200. We then considered hostile, degrading, humiliating or offensive environment for him, whether the conduct had the purpose or effect of violating the Claimant's dignity, or of creating an intimidating [environment]. We saw no evidence of any motive or intent on the part of Ms Ross and Mr Wade to violate the Claimant's dignity or to create such an environment. With regard to effect, we considered that the Claimant certainly perceived that his dignity was being violated by virtue of the comments made at the meeting. However we were conscious that we also had to consider the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

201. In that regard, we were conscious of the context behind the meeting of 16 February 2018. We considered that the e-mail exchange between the Claimant and Mr Wade on 15 February had been anodyne, and that Mr Wade and Miss Ross would have understandably been somewhat on the defensive as a result of the allegations made by the Claimant to Mr Wade directly in his e-mail on the evening of 15 February, and by the escalation of matters by the Claimant on 16 February to more senior people within the Respondent's organisation. Consequently, we felt it was not unreasonable for Mr Wade and Ms Ross to wish to speak to the Claimant on 16 February. We also did not

consider that it was unreasonable at that time for Ms Ross and Mr Wade to be somewhat critical of the Claimant's actions and to point out the way in which they could be perceived.

202. We noted that, by that stage, the Claimant had had a period of sickness absence by reason of anxiety and, therefore that Ms Ross and Mr Wade were aware of the Claimant's condition, but we do not consider that they would reasonably have been fully aware of the Claimant's difficulties at that time. We also noted, in the Claimant's summary of the meeting in his further and better particulars document, that Mr Wade indicated that the Claimant's condition might have caused his actions, and that ultimately the call moved on to discussing whether the Claimant was fit to be in work at that time. Whilst, as we have noted, the Claimant took issue with that discussion, in our view that was simply an attempt by Ms Ross and Mr Wade to check that the Claimant was fit to be in work, and we anticipate that this was largely driven by the Claimant's reaction at that time.

…….

204. Overall, in our view, we did not consider that, taking into account the overarching circumstances, it was reasonable to conclude that the Respondent's conduct, in the form of raising issues of potential insubordination and inappropriate communication, should be considered to have had the effect of violating the Claimants dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We considered that, had the Claimant's managers made similar comments subsequently, i.e. in circumstances when they would have been more on notice of the impact of their words on the

> Claimant, then a harassment claim would have been made out, But in the circumstances that applied on 16 February 2018, it was not."

The Unfair Dismissal Claim – Findings by the Employment Tribunal

9. With regard to the Claimant's claim of unfair dismissal, the key findings of the ET were as follows:

a. The Respondent operated its costs drafting business under the trading name of Compass Costs Solutions from 2016 onwards. The Claimant was employed in that business, initially as a Costs Manager and then with the job title Costs Resolution Manager ("CRM"), based in the Respondent's Cardiff office. (Reasons, paragraph 36)

b. In October 2018, "following budgetary discussions as part of the Respondent's normal budget forecast process in August and September, the Respondent's Personal Injury Division had been tasked with reviewing and reducing the overall headcount to maximise efficiency. This included the Compass Cost team [of which the Claimant was a part]. Mr Jarvis, as the Managing director for Personal Injury Services, supported by Miss Grewal, undertook this review." (Reasons, paragraph 118)

c. The ET's Reasons then continued as follows:

> "119. He [Mr Jarvis] noted that the ratio of team members to the CRM in Cardiff was smaller than the ratios in the other offices. In Cardiff, the CRM was in charge of a team of approximately 6; In Manchester, the CRM was in charge of a team of approximately 14; and in Liverpool, two CRM's were in charge of approximately 23 team members. The three Southern offices, amounting to 11 employees, were managed by one CRM in London……
>
> ……
>
> 122. Following the identification of the potential to make the role of

> CRM in Cardiff redundant being confirmed, Mr Morris [the Respondent's Head of Costs for the Compass Group] was contacted by Ms Ross to take charge of the consultation with the Claimant. This appears to have been done due to Mr Morris' experience of dealing with internal HR matters including redundancies. A note taken by Mr Morris of his discussion with Ms Ross noted that Ms Ross had explained that the Claimant had brought three grievances and two tribunal claims, and he had been through occupational health processes and had been very unwell. The note recorded that Ms Ross told Mr Morris that the Claimant could not deal with some duties, and that two senior drafters were running the office. The note also recorded the other CRM's in the other offices and stated that that structure was not in place in Cardiff.
>
> 123. Mr Morris' evidence which we accepted, was that he was extremely reluctant to undertake the consultation. He was focusing on his role as the head of NIHL, which included, at the time, the management of the collective redundancies in Leeds. His evidence was also that he was unhappy that he was being asked to undertake such a role due to the fact that other managers had not been trained up to perform it. Ultimately, however, following Ms Ross' explanation about the issues that had arisen with the Claimant in recent times, Mr Morris accepted that he would undertake the role of managing the redundancy consultation process with him."

d. The Tribunal later set out its specific findings in relation to unfair dismissal at paragraph 150 – 175. Of particular importance in the context of this appeal are the following findings:

    i. Although there was a lack of documentation around the redundancy decision

and process, the ET was "satisfied that the reason for the Claimant's dismissal had been redundancy." (Reasons, paragraph 152)

ii. "We noted that the statutory definition of redundancy was made out in that there was a reduction in [the] requirement for employees to carry out work of the particular kind carried out by the Claimant in the Cardiff office. In that respect, we noted the lower ratio within the Cardiff office of manager to other staff within the costs team, and also that two senior drafters within the Cardiff team had taken on the [Claimant's] duties during his two lengthy periods of absence in December 2018 to January 2019, and June, July and August 2018. Indeed as the Claimant had himself confirmed in his discussions with the occupational health adviser, and in other emails, even when he had returned, he was only undertaking a limited part of his duties with the balance being managed by the two senior drafters." (Reasons, paragraph 153)

iii. "In the light of those points and the overall drive of the Respondent's organisation to reduce costs and improve efficiencies wherever possible, we were satisfied that a redundancy situation existed and therefore that redundancy was the reason for dismissal." (Reasons, paragraph 154)

iv. "We noted the Claimant's contentions that the redundancy was, in effect, a sham, and that the underlying reason for dismissing him was either his health and his sickness absences or the fact that he had raised grievances, and indeed brought tribunal claims about his bonuses. We noted that he felt he particularly felt that Ms Ross, the HR manager with responsibility for the cost business, was motivated to manipulate his dismissal in that regard. However, we took account of Mr Morris' evidence that he had to be persuaded to undertake the role of managing the redundancy consultation with the Claimant, and that he was "his own man", who had, in the past, reached decisions on internal HR

matters which were not those that had been felt appropriate by immediate line management, e.g. he had upheld appeals against disciplinary sanctions. We considered that if there had been any underlying motivation from within the cost business itself, whether from Mr Jarvis or Ms Ross or both, then they would have managed the redundancy process themselves, and would not have brought in a relatively independent person to make the ultimate decision." (Reasons, paragraph 155)

v. "We also noted the evidence of Miss Grewal that Miss Ross played no part in the identification of the Claimant's role as potentially redundant, and would never have played any part in that decision, bearing in mind that HR's role is simply to assist with the implementation of strategic decisions by management. Overall, therefore, whilst the Claimant's health and the concerns he had raised may have been in the background, and in our view may have made it a little easier for the Respondent to take the decision that the termination of his employment by reason of redundancy should be explored, we were satisfied that redundancy was the reason, or certainly the principal reason for his dismissal." (Reasons, paragraph 156)

vi. As far as redundancy consultation and pooling were concerned, the Claimant was effectively in a pool of one in the role of CRM in the Cardiff office and that the possibility of pooling the Claimant with other CRMs in other offices was considered but rejected (Reasons, paragraphs 159-161) with the ultimate result that "identifying the Claimant as being in a pool of one" was within the range of reasonable responses that was open to the Respondent (Reasons, paragraph 162). The other pooling option – pooling with Mr Morris himself – was found to be never a realistic option (Reasons, paragraph 163). There had also been reasonable consultation with the Claimant prior to the point at which

the decision to dismiss was made (Reasons, paragraph 164).

vii. The dismissal was however unfair for the reasons set out in paragraph 169, namely:

> "…we considered that a reasonable employer, acting reasonably in the circumstances, would have allowed the employee the opportunity to appeal against the redundancy decision. Notwithstanding that there had been a reasonable consultation process and that, in the circumstances of this case, a relatively independent manager had been brought in to manage the redundancy consultation process and to make the final decision as to whether the Claimant should be made redundant, we considered that it would have been appropriate for the Claimant to have had the opportunity to lodge an appeal against that decision and to have that appeal considered by another of the Respondent's managers."

Legal Framework – Unlawful Deduction from Wages

10. **Section 13(1) Employment Rights Act 1996** ("**ERA**") creates the right not to suffer unauthorised deductions from "wages". "Wages" is then defined in section 27(1) as follows (and in so far as is relevant to the issues in this appeal):

> "In this part, "wages" in relation to a worker, means any sums payable to the worker in connection with his employment, including –
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,"

11. Whilst it is therefore clear that claims for unpaid bonus may be advanced in the ET under section 23 ERA, this does not represent the end of the story. The question of extent to which an ET can consider a bonus claim under section 23 was looked at by the Court of Appeal in ***Coors Brewery***

v Adcock & others [2007] ICR 983. In that case, the Claimants sought to recover unpaid bonuses as unlawful deductions from their wages based on an entitlement under a profit share scheme operated by the Respondent pursuant to which they were entitled to what they calculated as being between 4 and 5% of their annual wages. The Court of Appeal allowed an appeal by the Respondent on the basis that the Claimant's case at its highest established no more than an obligation on the employer to put in place a scheme which, properly and fairly operated, was capable of replicating the benefits of an earlier scheme. If the replacement scheme on which they relied, did not fulfil that obligation, the Claimants would have suffered loss. However, given that that loss was unquantified and given that the Claimants were requiring the ET to quantify it, the claim was one for damages for breach of contract which fell outside the scope of potential claims for unlawful deduction of wages for the purposes of section 13 ERA. In giving the lead judgment in the Court of Appeal, Wall LJ (at paragraph 46) said this:

> "In my judgment, the underlying facts of *Delaney v Staples* are a paradigm of the circumstances in which Part II of the Employment Rights Act 1996 is designed to operate. The employee complains that there has been an unlawful deduction from his wages. He has not been paid an identified sum. He makes a claim under Part II. The employer may have a number of defences. Those defences may raise issues of fact. Those issues will be for the tribunal to determine. But the underlying premise on which the case is brought is that the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him. That, it seems to me, is the proper context both of *Delaney v Staples* and Part II of the 1996 Act."

12. His Lordship continued (at paragraph 49) by accepting that a non-contractual bonus *can* constitute wages within section 13 and can found the basis of a claim under Part II ERA but that there would still need to be an "identified amount" for this to be the case. Then (at paragraph 56) he said this:

"Part II of the Employment Rights Act 1996, as I read it, is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure."

Legal Framework – Harassment under Section 26 Equality Act 2010

13. **Section 26 EqA** provides as follows:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

……..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

……

disability;"

14. Assuming that the relevant protected characteristic has been established (as it was in this case), there is then a step-by-step process that the ET has to go through before a harassment claim will succeed. In particular, it must consider:

- Has there been unwanted conduct related to a protected characteristic?
- If so, did that conduct have the purpose or effect of either:
    - Violating the Claimant's dignity, or
    - Creating an intimidating etc environment for him?
- In considering the "effect" question, did the conduct have that effect having regard to:
    - The Claimant's perception;
    - The other circumstances of the case;
    - Whether it was reasons for the conduct to have that effect.

Legal Framework – Unfair Dismissal

15. The first issue for a Tribunal to determine in an unfair dismissal case is what was the reason for dismissal, with redundancy being a potentially fair reason within section 98(2) ERA. The burden of establishing the reason (and that it is a potentially fair one) falls on the employer under section 98(1) ERA. Once a potentially fair reason is established, a neutral burden arises under section 98(4) ERA at which point the Tribunal has to consider whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal. It is well established in the authorities that, generally speaking, the reason for dismissal will be determined by examining the set of facts known to the employer or the beliefs held by him which cause him to dismiss the employee – see ***Abernethy v Mott Hay and Anderson [1974] ICR 323***.

16. It will sometimes be the case that a Tribunal will be entitled to look beyond the mind of the immediate decision maker in order to establish the true reason for dismissal – see for example ***Jhuti v Royal Mail [2020] IRLR 129***. Thus where an innocent 'dismissing' manager has been manipulated by others within the employer's organisation, an ET is entitled to look to what was in the mind of those responsible for the manipulation in order to determine the true reason for dismissal.

The Appeal – Ground 1 - Unlawful Deduction

17. The Claimant essentially advanced three points under this head:

a. The ET had failed properly to address the definition of "wage" in section 27(1)(a) and in particular had taken a narrow view of contractual terms that applied to the Claimant's employment;

b. The ET had failed to treat the Claimant's entitlement to bonus as having transferred under TUPE;

c. The ET had failed to engage with the issue of "employer discretion" in relation to his entitlement to bonus and should have made an evaluation of the exercise of that discretion.

18. Under Ground 1(a), the focus of the Claimant's criticisms in his oral submissions to me was that the ET had erroneously interpreted his claim as being one for breach of contract (at paragraphs 205 and 206 of its Reasons). His Notice of Appeal (in the form of that set out by HHJ Tucker and then adopted by him) was that the ET had erred in that it:

> "failed to have proper regard to s.27(1) ERA which defines 'wages' as "any sum payable to a worker in connection with his employment" and failed to consider the Claimant's contractual terms as a whole as set out within his written contract dated 19 February 2023 and the attached Annexes."

19. The reference to a contract dated 2023 is plainly a typographical error as the relevant contract dated from February 2015. The rival contentions on this point were set out by the ET at paragraph 20 of its Reasons – the Claimant's case was that he was entitled to bonuses at the particular levels that he claimed – the Respondent's case was that any entitlement (under his contract) was discretionary and did not therefore give rise to an ascertainable sum that could properly be described as "wages". The ET then recorded (at Reasons, paragraph 205) that the Claimant had himself sought to rely on

the bonus terms which were set out in the appendix to the letter that had been provided to him when his employment originally transferred from LAC in 2015. The ET then, as one would expect, focussed its attention on that term and, at paragraph 206, noted that the Respondent's bonus scheme was "discretionary and non-contractual and that participation was subject to eligibility."

20. The ET then say as follows – at paragraph 207 – that it:

> "agreed with the submission made by the Respondent that there cannot be a contractual right to a non-contractual bonus save potentially where the employer's actions may be said to give rise to a contractual entitlement e.g. by virtue of custom and practice."

21. I am not entirely sure why the ET went down this route in addressing the Claimant's claim for a bonus for 2017 given that the wording of section 27(1)(a) ERA makes it clear that within the scope of the definition of "wages" is any bonus "whether payable under his contract of employment or otherwise". That being so, a claim could potentially be advanced by way of a complaint of an unlawful deduction under section 23 ERA even if it was for a sum which was due as a consequence of a non-contractual bonus not being paid. From the content of paragraphs 207 and 208 of the ET decision, it does appear that they seek to answer this part of the Claimant's claims not by reference to the definition of "wages" in section 27 ERA but on the basis of treating that claim as one for breach of contract with their conclusion being that:

- the Claimant had an entitlement to a discretionary bonus;
- that discretion was exercised to produce a figure of £3,400 payable for 2017
- in the absence of any arguments based on custom and practice entitling him to a higher sum or any arguments to the effect that the discretion had been exercised perversely, that was the end of the matter as far as his 2017 and 2018 bonus claims were concerned.

22. In this respect therefore, the ET appear to have fallen into error in failing to approach the unlawful deduction claim by reference to the definition of wages. However, I do not believe that this leads to a conclusion that the appeal should be allowed on this point or that the claim should be remitted to a fresh ET for rehearing. My reasons for this are that had the ET addressed the question by reference to section 27 ERA and the Court of Appeal in ***Coors Brewery,*** it would inevitably have still dismissed the claim. Under the terms of the 2015 contract, as identified by the ET, any entitlement that the Claimant had to bonus was indeed clearly subject to a discretion and could not on any view be said to be an entitlement to an ascertainable sum that could be recovered as a consequence of a complaint made under section 23 ERA. Thus one comes to the same outcome in terms of the success or otherwise of that claim. Therefore, whilst the ET appear to have fallen into error, it made no difference to the outcome and this part of the appeal falls to be dismissed either on that basis or on the basis that, for the reasons set out below, the Respondent's cross-appeal on this point succeeds with the effect that the claim for unpaid wages remains dismissed. Indeed, the arguments advanced by the Claimant and the authorities referred to in his Skeleton Argument, serve to demonstrate that his argument is focussed on an assertion that the ET should have scrutinised the contract more closely in order to test whether the Respondent, in exercising its discretion, had done so rationally and without caprice. Thus, these arguments – and in particular ground 1(c), serve to illustrate that the case that the Claimant advances is based on an improper exercise of a discretionary power with regard to bonus rather than advancing a claim to a particular sum which had resulted from the exercise of that discretion and which had not been paid.

23. The same analysis applies to the Claimant's claim for pro rata bonus for 2018 in respect of which the ET relied (at paragraph 209 of its Reasons) on the fact that under the Claimant's contract, he was only eligible for the payment of bonus if he was employed at the point at which any such bonus came to be paid. Whilst the 2018 pro rata bonus claim was determined on the basis of an analysis of the contractual terms, the effect of the ET's conclusion is that at the date at which his

employment came to an end, the Claimant was not eligible to receive any bonus payment and therefore could not properly claim to have suffered an unlawful deduction from his wages. Any discretion on the part of the employer had not been exercised at that point.

24. Whilst it is correct that the ET recorded the Claimant's claim for 2017 as being for £20,830, and whilst he sought to put forward a similar figure to me in the course of his submissions, I did not regard him as putting forward an argument based on an entitlement to an ascertainable sum in the ***Coors*** sense – rather he was saying that a proper exercise by the Respondent of its contractual discretion should have resulted in him receiving that amount. In addition, neither in his Grounds of Appeal nor his Skeleton Argument, did he advance the case on the basis that an entitlement to that figure had in fact arisen and remained unpaid. Similarly, in his ET1, the case was put on the basis that he was entitled to in excess of £20,000 without a precise or ascertainable figure being set out. The claim therefore in my view has always been on based on an alleged failure by the Respondent to properly exercise its contractual power in relation to bonus as opposed to a bonus having been determined as a consequence of such exercise and then not actually paid to the Claimant.

25. Turning to Ground 1(b), this advances the case that the ET had fallen into error in concluding that the Claimant's contractual entitlement to bonus "had not transferred under the TUPE Regulations (see in particular paragraph 207 of the Reasons)". In his Skeleton Argument produced for the purpose of this appeal, the Claimant asserted that it was "common ground" that TUPE applied to his transfer to the Respondent on 30 April 2016 but he goes on to suggest that the ET did not treat his entitlement to bonus as having transferred to the Respondent as at that date. That does not appear to have been the ET's finding. In their Reasons at paragraphs 31 and 32, the ET had recorded that there had been an earlier transfer from LAC to S&G UK 1 in May 2015. The Claimant had then "confirmed in his evidence" that the terms on offer at that point (and which were those contained in the letter of 19 February 2015) were improvements on his LAC terms and included the bonus terms set out at paragraph 33 of the Reasons and contained in the schedule to the Claimant's contract of employment.

The ET recorded at paragraph 32 of its Reasons that:

> "…..the terms proposed by Slater and Gordon [as part of the transfer that occurred in May 2015] were improvements on he terms he previously enjoyed with Leo Abse and Cohen and therefore he was happy to accept them and did not rely on any transferred provision of his Leo Abse & Cohen terms."

26. Under those terms, the Claimant had, as recorded by the ET at paragraph 39 of its Reasons, received a bonus payment in October 2016 in the sum of £20,830 for FY2016 (from 1 July 2015 to 30 June 2016). The ET also noted (at Reasons, paragraph s 34 and 35) that whilst there had been a further TUPE transfer on 30 April 2016, there had been no further contractual changes, "with the contract entered into in February 2015 continuing to apply". I therefore do not accept that the ET made any error in paragraph 207 of their decision – the Reasons proceed on the basis that the terms set out in the letter of 19 February 2015 (and under which bonus entitlement was discretionary) continued to apply after the Respondent became the employer in 2016.

27. Turning to Ground 1(c), here the suggestion is that the ET, following on from the error asserted under Ground 1(b), should have considered what the Claimant's entitlement was to bonus "taking into account its stated discretionary status and established legal principles that that discretion should not be exercised in an irrational or capricious manner". I remind myself that the Claimant was advancing claims that he had been subjected to an unlawful deduction from wages. As set out above, in order to be able to advance such a claim based on unpaid (or underpaid) bonus, it would be necessary for him to show that his entitlement to bonus had crystallised into an ascertainable amount which had then not been paid. Even if the ET concluded that the Respondent's decisions as to the level of bonus which the Claimant was paid were reached as a result of an irrational or capricious exercise of discretion, they would not be in a position to determine what the correct figure was – i.e. it was not 'ascertainable' – with result that the claim would not fall within the jurisdiction set out in

Part I ERA. This was not a claim for breach of contract and the ET cannot be criticised for not considering whether the Respondent had acted irrationally or capriciously in determining the levels of bonus to be paid to the Claimant.

The Appeal – Ground 2 - Harassment

28. The Claimant attacks the finding set out in paragraph 204 of the ET Reasons that it was not reasonable to conclude that the Respondent's conduct had the effect of violating his dignity or creating an intimidating etc environment for him. On the second day of the appeal, I allowed the Claimant to make a modest revision to the wording of Ground 2.1(a) so as to read that the error of the ET was that it "*relied on* the knowledge of the two individuals involved in the telephone call on 16 February 2018 *in determining the question of the effect of their conduct on the Claimant*" (the italicised words being the ones that I allowed the Claimant to adopt). I did not accept that there was any prejudice to the Respondent in allowing the Claimant the opportunity to put his case in a way that reflected the terms of the amendment to Ground 2.1(a).

29. Under Ground 2.1(b) the Claimant alleged that the ET had come to a perverse finding in stating that "had the Claimant's managers made similar comments subsequently, i.e. in circumstances when they would have been on notice of the impact of their words on the Claimant, then a harassment claim would have been made out." He then set out a number of pieces of evidence which he said should have been considered and which would have resulted in a different conclusion in relation to his harassment claim had this been done by the ET.

30. The key findings, which I have already set out above, can be summarised briefly as follows:

- The harassment issue centred on a phone call on 16 February 2018 between the Claimant and Mr Wade and Ms Ross which had followed a series of emails that the Claimant had sent over the past few days (Reasons, paragraphs 57, 58);

- Mr Wade and Ms Ross had made the call with good intentions and without a clear understanding of the Claimant's condition (Reasons, paragraph 67);
- It was not surprising (given the content of the Claimant's emails over the past couple of days) that Mr Wade and Ms Ross were "a little defensive" on the phone call but the call as a whole was done with good intentions, including the discussion about the Claimant visiting the GP or returning to work (Reasons, paragraph 69).

31. The ET found that it was not reasonable to conclude that the Respondent's conduct had the effect of violating the Claimant's dignity or creating an intimidating etc environment for him (Reasons, paragraph 204). The Claimant's case on this point is that the ET should not have relied on the state of knowledge of the two individuals involved in the call but should have looked more widely at what was known by others within the Respondent and also at other events relating to the Claimant himself. Given the findings of the ET that the call by Mr Wade and Ms Ross was made with good intention, it is not surprising that they reached the conclusion (at Reasons, paragraph 200) that they found "no evidence of any motive or intent" on the part of either or them to violate the Claimant's dignity or to create the relevantly adverse environment for him. This meant that the issue of "purpose" fell away which then left with ET to consider the question of "effect" as the other limb of section 26(1)(b) EqA under which harassment might be established. As to that, the ET was required to take into account the matters set out in section 26(4). As to that, they accepted that the perception of the Claimant was that his dignity was being violated, in particular as a result of comments made regarding "insubordination and inappropriate communication". They were then required to look at "the other circumstances of the case". As to what comprise "the other circumstances of the case", this, it seems to me will depend on the context in which the allegation arises and, in some circumstances, might involve a wider examination than that conducted by the ET on this occasion. However, it is clear from their decision that they did examine those circumstances which they regarded as bearing on this question and having done so, concluded that it was not reasonable for the conduct to have had the

effect on the Claimant that it did. In circumstances in which the ET had concluded that the two managers had only a limited understanding of the Claimant's condition and had "good intentions" in looking to speak to him on 16 February 2018, it is in my view, not possible to conclude that there was an error of law in their approach. Even if there was a wider "awareness of the [Claimant's] disability" within the Respondent (as the Claimant suggested in his Skeleton Argument), the ET was entitled to reach the conclusion that it did, having regard to the particular factors that it relied on, namely that objectively (through the lens provided under section 26(4)(c)), it was not reasonable for the conduct to have had the effect that it did on the Claimant. This is essentially a question of fact for the ET to decide and the circumstances in which the EAT could interfere with their conclusion is limited and in my view, do not arise in this case. Ground 2.1(a) therefore fails.

32. As to Ground 2.1(b), as the Claimant accepts, this is a perversity appeal, based on an alleged failure to take account of wider evidence, allegations or findings. Given the way in which the ET dealt with the harassment question at paragraphs 197-204 of their Reasons, and given the findings that they made within those paragraphs with regards to the reasons that lay behind the call being held on 16 February 2018, I do not see any basis on which it could be said that their conclusions were perverse.

The Appeal – Ground 3 – Unfair Dismissal

33. Four grounds are raised under this heading. Under Ground 3.1, it is suggested that the ET, having concluded that there was a "redundancy situation" then "failed properly to consider whether the reason for the Claimant's dismissal was redundancy." The focus of this part of the Claimant's appeal is on a sentence contained in paragraph 154 of the ET's Reasons in which they say that "we are satisfied that a redundancy situation existed and therefore that redundancy was the reason for dismissal." The Claimant suggests that this finding leads to the conclusion that the ET focussed on

the existence of a "redundancy situation" and as a result failed to conduct a proper examination of what was the true reason for dismissal. I do not believe that this criticism is valid. The ET directed themselves on the law relating to unfair dismissal at paragraphs 11-18 of their Reasons. In particular:

- At paragraph 11, they had reminded themselves that a key focus was "the reason for dismissal" and noted that the Respondent was arguing that that reason was redundancy whereas the Claimant was seeking to put forward a competing reason, in the form of an assertion by him of a statutory right;
- At paragraph 12, they acknowledged that the reason for dismissal also impacted on his disability-based claims;
- At paragraph 13, they noted that the burden of establishing the reason for dismissal lay with the Respondent;
- At paragraph 14, they recorded that where the reason advanced was redundancy, it was still necessary to address the question of whether any 'redundancy situation' was in fact the cause of the dismissal.

34. It is clear from the above, that the ET was alive to the fact that even where a 'redundancy situation' was found to exist, there was still a further step to be taken to determine whether that situation was the reason or principal reason for dismissal.

35. Moving on specifically to paragraph 154, this contents of this part of the Reasons, needs to be read alongside the other paragraphs in the decision in which the ET deal with the reason for dismissal. Those paragraphs can be summarised as follows:

- At paragraph 150, they set out the correct issue arising from the Respondent's assertion as to the reason for dismissal – firstly, that there was a "genuine redundancy situation" and secondly that this was the reason for dismissal;

- At paragraph 151, they concluded that the Claimant's role had been identified as potentially redundant as a consequence of budgetary discussions;
- At paragraph 152, they stated that, even though there was a lack of documentary evidence, they were still satisfied that the reason for the Claimant's dismissal was redundancy;
- At paragraph 153, they tested whether a redundancy situation in fact existed and concluded, with particular reference to the Claimant's employment, that it did;
- At paragraph 155, they addressed the Claimant's 'competing reason' argument and concluded that this was not made out given the independence of Mr Morris who conducted the consultation process;
- At paragraph 156, they gave further reasons for rejecting the competing reason argument and having done so, again stated that they were "satisfied that redundancy was the reason, or certainly the principal reason, for dismissal."
- At paragraph 157, they formally rejected the Claimant's competing reason case.

36. It is therefore clear in my view that when one reads the decision of the ET as a whole, they have not been guilty of any error of law in the way in which they examined the reason for dismissal. They recognised that there was what is commonly referred to as a "redundancy situation"; they considered whether this had in fact led to the decision to terminate the Claimants employment and, when placed alongside the Claimant's competing reason argument, they concluded that the reason for dismissal was redundancy.

37. Under Ground 3.2, the Claimant suggests that the ET erred in failing to identify the relevant decision maker and to focus on what was in that person's mind rather than on what was "merely communicated to the Claimant by the dismissing officer (Mr Morris)." Again, it seems to me that this criticism is not based on a fair reading of the ET decision as a whole. In particular, at paragraph 122, the ET noted that Mr Morris was approached to manage the consultation process after the "potential

to make the [Claimant's] role of CRM in Cardiff redundant" had been identified by Mr Jarvis and Ms Grewal. There was then an extensive consultation conducted by Mr Morris which was reviewed by the ET at paragraphs 125-138 and which concluded with Mr Morris considering matters and concluding that the redundancy should be confirmed. The ET was clearly alive to the fact that the initial identification of the role as potentially redundant had not been done by Mr Morris but he was "his own man" who had overturned line management decisions in the past – rather he was (as set out in paragraph 155 of the Reasons) "a relatively independent person [brought in] to make the ultimate decision.

38. Bearing in mind these findings, and the fact that the ET expressly considered (and rejected) the Claimant's competing reasons arguments as explaining the true reason for his dismissal, I do not consider that Mr Morris can be said (as set out under Ground 3.2) to have "merely communicated" the decision to dismiss. It is clear from a fair reading of the ET's decision, that they regarded him as having independently reached his own conclusion that the Claimant should be dismissed and that the reason for this was redundancy.

39. In paragraph 155 of their Reasons, the ET stated that the Claimant "particularly felt that Ms Ross, the HR manager with responsibility for the costs business was motivated to manipulate his dismissal" due to the fact that he had had sick absences, raised grievances and brought Tribunal claims regarding bonus – this argument was then rejected by the ET for the reasons set out in paragraph 155 and 156, including that Ms Ross had in fact played no part even in identifying the Claimant's role as potentially redundant. In terms of identifying "what factors were in the mind of the dismissing officer", the ET's finding was of course that this was Mr Morris, not Mr Ross. In any event, the key question for the ET to examine was the Claimant's competing reason argument – this they did and gave reasons why they did not accept the Claimant's contentions.

40. Under Ground 3.3, the Claimant asserts that the ET did not consider relevant evidence which supported his case and which he contended would have supported his competing reason arguments. In that regard, he placed particular emphasis on an email that he had sent on 28 September 2018 (mistakenly referred to in the Grounds of Appeal as 28 August 2018) which he described a "cry for help email". He noted that whilst this had been sent to Ms Grewal and Mr Jarvis (and copied to two others employed by the Respondent), it had not been sent to Ms Ross and yet she had got hold of it and sent a reply on 23 October 2018 to one of the original recipients in which she said "Just an FYI that I am dealing with this, so don't take any action." She suggested that Ms Ross must have deleted this email and yet she sent an email a few days later (on 5 November 2018) to Mr Morris setting out a suggested rationale for the Claimant's dismissal on redundancy grounds and an invitation for him to begin the consultation process.

41. Dealing first with the Claimant's email of 28 September 2018, the ET noted this in their Reasons at paragraph 11, recording that the Claimant had felt devalued and that no one appeared to care about him. As far as Ms Ross' email of 5 November 2018, the ET noted this at paragraph 124 of their Reasons and must be taken to have been aware of its contents at the point at which they addressed the Claimant's competing reason arguments at paragraphs 155 and 156 of their decision.

42. As far as the third document relied on by the Claimant is concerned (the email of 23 October 2018 from Ms Ross to Niva Reitz), it was accepted by Mr Quickfall on behalf of the Respondent, that this had not been addressed directly by the ET in its Reasons. He suggested however that this was one page in a 1300-page bundle which the ET had to deal with and that it was not given the focus then that it had now assumed in the EAT. He also noted that the document was not referred to either in the Claimant's ET1 or in his witness statement. Whilst the former may well be explicable on the basis that the Claimant may not have been aware of it at the point at which he drafted his ET1, there is no reason to think that he would not have had sight of it by the time that he prepared his witness

statement and certainly by the time that he presented his case to the ET. That being so, I do not think that the absence of an express reference to this single email can found a proper basis on which to impugn the ET's decision as a whole. In addition, given the ET's finding (at Reasons, paragraph 118) that the provisional identification of the Claimant's role as potentially redundant had happened in August and September (well before the date of the email) and (as set out at Reasons, paragraph 156), Ms Ross had played no part in that identification process, it is difficult to see that this one line email on which little emphasis was placed at the ET hearing, in fact represents a pivotal document which means that the ET decision falls to be unpicked.

43. Under Ground 3.4, the Claimant suggests that the ET has failed to provide adequate reasons for its decision. I do not think that there is anything in this argument – the decision is more than adequately explained and reasoned, even with any express reference to the email of 23 October 2018.

The Cross-Appeal – Grounds 1-3 – Unlawful Deduction from Wages

44. Ground 1 of the Cross-Appeal seeks to make the case that the ET, or as it is stated, the Employment Judge erred in "failing to decide whether he had jurisdiction to determine the unlawful deduction from wages claim in relation to the 2017 bonus pursuant to ss.13 and 23 ERA." The particular criticism which is then spelled out in the Respondent's Skeleton Argument is that the ET did not properly address the question of whether the Claimant was advancing a claim for "wages" within the definition in section 27(1) ERA. This ground clearly covers substantially the same terrain as the Claimant's Ground 1 in relation to which I have dismissed his appeal, albeit whilst at the same time recognising that the ET does appear to have fallen into error. This ground of the Cross-Appeal succeeds on the same basis, namely that I would the analysis of the ET set out in paragraphs 206-209 strongly suggests that it approached this matter as simply one based on contract and on the face of it, had erroneously proceeded on the basis that as long as any bonus was discretionary, that was an end to the Claimant's claim. As I have already stated in relation to Ground 1 of the Claimant's appeal, it

is perfectly possible for a Claimant to bring an unlawful deductions claim based on an entitlement to a discretionary bonus – but only where he can point to the discretion having been exercised so as to produce an identifiable or ascertainable sum which the employer had then not paid or not paid in full.

45. Ground 2 of the Cross Appeal makes essentially the same point – namely that, given the ET's acceptance at paragraph 33 of its Reasons that bonus was to be assessed on the basis of a management analysis of achievements against set objectives, there was no quantifiable sum which could be described as "wages". Again, this provides a further basis on which to allow the cross-appeal. Given the findings that the ET made as to the prevailing terms and the way in which the Claimant sought to argue his case, it is in my view inevitable that, had they applied their minds to the definition of "wages" in section 27 ERA as well as the guidance from the Court of Appeal in ***Coors Brewery***, they would have concluded that they did not have jurisdiction to hear what was essentially a claim for breach of contract based on an assertion that a contractual discretion had been improperly or irrationally exercised.

46. In relation to both of these grounds however, whilst the Cross-Appeal technically succeeds on the bases set out above, the outcome is academic in that the Claimant's unlawful deductions claim ultimately fail for the reasons set out above in relation to his substantive Grounds of Appeal.

47. Under Ground 3, the Respondent asserts that the claim could not have been brought under the Tribunal's contract jurisdiction as under the Employment Tribunal (Extension of Jurisdiction) (England and Wales) Order 1994, it did not arise or was not outstanding at the date of termination of the employment. Whilst the Claimant did seek to advance bonus related claims as part of a claim for reasonable adjustments as well as on the basis that there had been an unlawful deduction from wages, he did not advance any claim by reference to the ET's contractual jurisdiction. This point therefore does not arise – the ET cannot, by way of cross-appeal or otherwise, be criticised for not addressing a claim that was not advanced before it. It may well be that in fact, this part of the Cross-Appeal is

better viewed as an alternative basis on which to uphold the decision of the ET as opposed to being a ground on which to cross appeal but the point is in any event academic given the findings that I have already made in relation to the Appeal and the Cross-Appeal.

The Cross-Appeal – Grounds 4-6 – Disability Related Harassment

48. Under Ground 4, the Respondent asserts that the ET erred in concluding that the Claimant's claims of harassment would have been made out if Ms Ross and Mr Wade had been on greater notice of the impact of their words on the Claimant. Given my findings in relation to the Claimant's appeal, this issue does not arise and is in any event based on a hypothetical situation which did not in fact occur. It seems to me that in paragraph 204 of their decision (in which this observation was made), the ET was doing no more than indicating that they may have seen things in a different light had the meeting on 16 February 2018 not been something of a 'one off' – had that been the case, the managers would have been much more likely to have been aware of the impact of their behaviour which in turn might make it more objectively reasonable for the Claimant to feel the effect of their behaviour was to create an intimidating etc environment for him.

49. Given the hypothetical nature of the findings by the ET, it is not in my view necessary to address what might have been the outcome of the Claimant's claim had circumstances been different. For those reasons, I do not propose to address further the points raised under Grounds 4-6 of the Cross Appeal.

Disposal

50. For the reasons set out above, I will dismiss the Claimant's appeal and allow the Respondent's Cross-Appeal on Grounds 1 and 2 only. However, given the ultimate outcome of the Cross-Appeal, the effect of which is essentially to provide additional bases on which the ET should have rejected the Claimant's unlawful deduction claims, no consequential order follows.