Case Number: 3323815/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Sexton	v	Compass Group UK and Limited
Heard at: Watford	**On**:	15 June 2017

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Ms Rachel Owusu-Agyei, of Counsel

For the Respondent: Miss E Bristow, Representative

JUDGMENT

(1) The respondent breached the claimant's contract of employment.

(2) The respondent must pay the claimant the sum of £4,760 by way of damages for breach of contract

REASONS

Introduction; the claim

1 In these proceedings the claimant claims that the respondent wrongly failed to pay her a bonus payment and that the respondent failed to pay all of her accrued holiday pay on the termination of her employment. Prior to the hearing before me, the respondent had paid the claimant the amount that she was claiming by way of accrued holiday pay. Accordingly, the claimant

withdrew the claim for accrued holiday pay. The only claim that I had to determine was therefore the claim in respect of the unpaid bonus.

The evidence

2 I heard oral evidence from the claimant on her own behalf and from Ms Gemma Goodchild on behalf of the respondent. I was referred to and read documents in a joint bundle of documents. Having done so, I made the following findings of fact.

The facts

3 The claimant was employed by a firm called Acquire Services Limited ("Acquire") when the business of that firm was bought by the respondent in 2014. The claimant started working for Acquire on 12 October 2009. The claimant was at all times when employed by either Acquire or the respondent entitled to a discretionary bonus. The claimant started a new job, with new contractual terms, with the respondent after accepting an offer of a post which was a promotion for her on 11 July 2016. The written contract of employment under which she was employed as from that date was agreed subsequently. The contract was evidenced by the letter dated 4 October 2016 in the bundle at pages 49-50 and its accompanying document entitled "written particulars of employment" at pages 51-58. The letter contained this paragraph:

> 'I am pleased to inform you that you are invited to participate in the Management Team Bonus (MTB) plan. Your "par" potential for "on-target" (budget) achievement is 10% of your salary for the current financial year 1st October to 30th September (pro rata to your re-grade date). This scheme is non-contractual."

4 At pages 75-76 there was a document entitled "Management Team Bonus Plan Rules Financial year 2015/16". That document was not given to the claimant before she accepted the terms copies as pages 49-58 of the bundle.

5 On 11 November 2016, the claimant resigned on notice, because she was unhappy in her new post with the respondent for a number of reasons. Her notice period was of 3 months and her employment terminated (see further below) on 14 February 2017.

6 During that notice period, the respondent informed the claimant's colleagues of the amount of their annual bonuses, calculated under the rules of the MTB plan. On 22 December 2016 the claimant wrote to her line manager, Mr Dejan Uzur, complaining that she had not been told what her bonus payment was to be. He did not initially respond, but eventually, in an email dated 11 January 2017 (at page 73) wrote this:

> "Please find attached the bonus scheme rules for the financial year 2015/16 which should provide clarity on the points you have raised in your email.
>
> As detailed in the attached, the bonus scheme is discretionary and there is no contractual right for an employee to receive any payment. The scheme rules also confirm that no bonus will be paid when an employee has left the business or is in their notice period.
>
> You will therefore not receive a bonus as you are currently in your notice period as I received your written resignation (dated 11th November 2016) on the 14th November 2016 and your last date with the Company will be 14th February 2017."

7 The MTB plan rules which Mr Uzur enclosed with that email were in the document at pages 75-76 of the bundle. The rules included these bullet points:

> "• The MTB Plan is discretionary, does not constitute gross salary, and confers no contractual or non-contractual employment rights whatsoever."
>
> "• If, at the date any payment is due to be made (the Payment Date, which is anticipated to be in or around December 2016) the employee is no longer employed by the Company or has given or received notice of the termination of their employment, s/he shall have no entitlement to any bonus or pro-rated bonus."

8 The MTB plan rules started with a section entitled "Aim", which stated that the aims of the plan included these things:

> "• Engage, motivate and reward you to achieve, and where possible exceed your targets.
> • Retain your services and recognise your value to the organisation.
> • Recognise the value of our employees."

9 Ms Goodchild's evidence (in paragraph 3 of her witness statement) about the process for deciding whether, and if so how, an employee was to receive a bonus was this:

> "The authorisation of all bonus payments is the responsibility of the HR Director (at the time this was Fiona Ryland) and the Managing Director. It is rare that they exercise discretion to depart from the guidelines and authorise payment of a bonus contrary to them. For the 2015/2016 year, only one person who was in their notice period at the date of payment of the bonus was permitted to receive a bonus. There were at least 3 people in the HR team who were in their notice period at the date of

> payment of the bonus and they received no bonus because they were in their notice periods. The Claimant did not receive a bonus payment because she was in her notice period at the date the bonus was paid, which was 23rd December 2016."

10 Ms Goodchild's evidence was that if the respondent had decided to pay the claimant a bonus, then the bonus would have been the full amount, and that was in the circumstances 8% of her salary, which was £4,760 gross, i.e. before the deduction of income tax and national insurance contributions.

11 The respondent put before me no evidence of the exercise of a discretion as to whether the claimant should receive a bonus. I concluded in any event, that no such discretion was so exercised, in that Mr Uzur decided that the claimant should not receive any bonus simply because she was on the Payment Date working out her notice, i.e. that date was within the period of notice that she had given the respondent.

The relevant law

12 The claimant's entitlement or otherwise to a bonus payment fell to be determined by reference to the case law in the law of contract. The relevant cases and the principles to be drawn from them were not in dispute between the parties, but I drew the parties' attention to some helpful passages in *Harvey on Industrial Relations and Employment Law ("Harvey")*, and I set them out below. I regard those passages as accurate statements of the effect of the case law which they describe.

13 In paragraph AII[145.01] of *Harvey* this is said:

> "It was held by the Supreme Court in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] IRLR 487 that there is an implied term in contracts generally, including employment contracts, that where one party (here, the employer) has a discretion under the contract to make a particular decision or determination which may adversely affect the other party (here, the employee), the former must exercise that discretion lawfully and rationally 'in the public law sense that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose' (per Lady Hale at [30]). The obvious parallel here is with judicial control of administrative discretions, but the precise nature of this contractual term remains to some extent debatable."

14 In paragraphs AII[194] and [194.01], this is said:

> "The T&C term [i.e. the implied term of trust and confidence] has surfaced in the context of the calculation of damages for breach of the employment contract, being a possible way of an employee challenging what he or she perceives to be an unfair exercise of an employer's

> discretion under the contract. This has arisen particularly in the area of discretionary bonuses—in strict contract law, the fact that the bonus is stated to be discretionary means that the employer could always decide to give nothing or very little (in spite of performance), but a capricious application of this power has been challenged on the basis of the T&C term (*Clark v BET* [1997] IRLR 348; *Horkulak v Cantor Fitzgerald International* [2004] IRLR 942, [2005] ICR 402, CA; see para [400] below). Perhaps significantly, other case law in that area has also prayed in aid concepts from administrative law such as perversity and irrationality in exercising a discretion, and it may be that these two approaches have much in common. In *Commerzbank A G v Keen* [2006] EWCA Civ 1536, [2007] IRLR 132 the Court of Appeal stressed that, although able to rely on this law, the onus on the disappointed employee is a heavy one under these tests, but also stressed the importance of the employer giving reasons for the exercise of a discretionary power, aligning this not just with perversity, but also with the implied T&C term itself.
>
> In *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] IRLR 487 the Supreme Court considered judicial limitations on the exercise of a contractual discretion, but did so by the use of a separate implied term that such a discretion will be exercised lawfully and rationally. This case is considered in more detail at para [145.01] above where the point is made that, although the facts arose in an employment context, they were hardly typical and the judgments concentrated more on the general law of contract than the specifics of employment law. The possible relevance of the T & C term here was not relied on directly in the parties' arguments. In the majority, Lord Hodge considered obiter that it was arguable that in an employment law case it could be used in addition, to emphasise the importance of fair consideration of the evidence by the employer, but without deciding the point. The T & C term was also mentioned in passing in the principal majority judgment of Lady Hale, but on the other hand Lord Neuberger, giving the minority judgment, specifically denied any importance for the T & C term over and beyond the rational decision term. As Lord Hodge said, this point 'may merit further argument in a suitable case'."

15 In *Transco plc v O'Brien* [2002] ICR 721, the Court of Appeal decided (as described, in my view accurately, in the headnote) that:

> "an employer's refusal to offer an employee a new contract or to vary it could in law, depending on the context or the substance of the particular case, be a breach of the implied term of trust and confidence; that to deprive one member of a large workforce on capricious grounds of the same opportunity as offered to all his fellow workers was a breach of the implied term, since there were few things which would be more likely to

damage seriously the relationship of trust between an employer and employee".

16 The implied term of trust and confidence is an obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or destroy the relationship of trust and confidence which exists, or should exist, between an employer and an employee as employer and employee.

My conclusions

17 Ms Owusu-Agyei submitted that the fact that the document at pages 75-76 (i.e. the MTB plan rules) was not drawn to the claimant's attention specifically before she signed her contract of employment meant that the MTB plan rules were not incorporated in the claimant's contract of employment. I rejected that submission because in my view a document can be incorporated in a contract of employment (or any other contract) by reference without its terms being drawn specifically to the attention of the party against whom it is relied on.

18 Turning to the words of the MTB plan rules, I noted that the words set out in paragraph 7 above were in one sense contradictory: the words in the first bullet point stated that the payment of a bonus was discretionary, but the words in the second bullet point referred to an "entitlement" to a bonus or pro-rated bonus. That suggested a recognition that once it had been decided that a bonus would be payable in any particular year, then a bonus could still be paid to an employee whose notice period was current at time of payment.

19 In any event I concluded (in part in reliance on the approach taken by the Court of Appeal in *Transco plc v O'Brien* but also as a result of the simple application of the implied term of trust and confidence to the facts) that the failure by the respondent to even consider whether to give the claimant the bonus which she would have received if she had not given notice, or any part of that bonus, was a breach of the implied term of trust and confidence. This conclusion was supported by the fact that administrative law imposes a duty on a public body which has a discretionary power to exercise that power and not to fetter the exercise of that power by a policy which is applied as a rule. Here, the respondent had regarded the words of the second bullet point set out in paragraph 7 above as justifying the application of a rigid approach: if an employee is in his/her notice period then he/she is not to be awarded a bonus. Thus, in my judgment, the claimant's claim of a breach of contract (in fact it was a breach of the implied term of trust and confidence) succeeded.

20 The question of the loss caused by that breach was by no means a straightforward one to answer. However, while in other circumstances it could have been said that the damages awarded for that breach should be a percentage of the bonus which the claimant would have been given by the respondent if she had not given notice before 23 December 2016, on the

basis that there was only a percentage chance that the respondent would have awarded her that bonus, in this case there was no evidence on the basis of which that percentage could be determined, since there was no evidence about the circumstances of the one person to whom the respondent did give a bonus despite him/her having given (or been given) notice of the termination of his/her contract of employment.

21 In addition, it appeared from the evidence of Ms Goodchild that the respondent had failed to consider in the case of a number of other employees whether or not they should be given a bonus payment purely because the bonus payment date fell within their notice periods. That made it even more difficult to assess the percentage chance of a bonus being awarded to the claimant if the respondent had considered whether to award her a bonus.

22 The fact that (as noted in paragraph AII[194] of *Harvey*, which is set out in paragraph 14 above) "In *Commerzbank A G v Keen* [2006] EWCA Civ 1536, [2007] IRLR 132 the Court of Appeal stressed ... the importance of the employer giving reasons for the exercise of a discretionary power, aligning this not just with perversity, but also with the implied T&C term itself" suggested that if an employer did not give any reasons for a failure to exercise the discretionary power to give a bonus, then it could be said that the employer had failed to put any evidence before the tribunal or court to show that the discretion might not have been exercised in favour of the employee, so that the employee should be awarded the whole of the bonus that would have been given to him or her if his/her notice period had not been current.

23 Fortunately, Miss Bristow said that the respondent would accept (not least because of the evidence of Miss Goodchild recorded in paragraph 8 above) that if it had considered whether to exercise its discretion then it would have given the claimant the whole of her bonus. I therefore concluded that the claimant should be paid the whole of the agreed amount of her bonus, namely £4,760. If income tax falls to be deducted from that sum, then it will be so deducted by the respondent under the relevant income tax regulations. If it does not, then the whole of that sum should be paid by the respondent to the claimant.

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Employment Judge

Date: ……19 June 2017……..

Sent to the parties on: ……..

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For the Tribunal Office