EMPLOYMENT TRIBUNALS

Claimant: Mr P Oakley

Respondent: LEBC Group Limited

Heard at: Leeds by Cloud Video Platform ("CVP") **On:** 2 December 2020

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: in person
Respondent: Mr Hussain, Consultant

JUDGMENT

The Respondent **did not** act in breach of contract by failing to pay the Claimant a bonus. The Claimant's claim for breach of contract **fails** and **is dismissed**.

REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (by CVP). A face-to-face hearing was not held because all issues could be determined in a remote hearing.

Preamble

2. The Claimant's employment with the Respondent began on 2 March 2015 and ended on 29 November 2019. Following the termination of his employment, the Claimant presented a claim to the Employment Tribunal on 9 March 2020 for "arrears of pay". The hearing of the claim took place by CVP on 2 December 2020.

3. The parties had agreed a joint bundle running to 174 pages. I also permitted the Respondent to rely on the additional document it had sent to the Tribunal just before the Hearing, despite the Claimant objecting to this. The document ran to 6 pages and was a letter to the Claimant dated 12 October 2018 enclosing his role profile. I gave the Respondent permission to rely on this document when it raised the matter right at the beginning of the Hearing although the document had not been included in the joint bundle in accordance with the Tribunal's orders of 21 May 2020. This was because it was a document that the Claimant had already

seen and, because I allowed a brief adjournment for him to review it, I did not consider that he would be prejudiced by its inclusion.

4. The Respondent then sought to introduce another document during the Claimant's cross-examination. This was not because of anything unexpected that had arisen during the cross-examination. Mr Hussein accepted that there was no justification for the document having not been included in the bundle in June in accordance with the Tribunal's directions. The Claimant objected. I refused permission: it seemed to me that, if I gave permission, a further adjournment would be necessary and then the Hearing might not be concluded in the day. I took the view that in all the circumstances of the case the over-riding objective to deal with cases fairly and justly required me to proceed and complete the Hearing if at all possible on 2 December 2020.

5. The Claimant gave oral evidence in support of his claim. He called no other witnesses. Ms Gosain (Group HR Manager), Ms Ingram (Director of Public Policy), Mr Simmons (Director of Compliance), and Mr McVicar (Chief Operating Officer of the LEBC Group) gave evidence on behalf of the Respondent. A witness statement had also been prepared for each of the witnesses and these were included in a separate bundle running to 24 pages. The Respondent had also included its skeleton argument at the back of this bundle.

6. After the five witnesses had given their evidence, Mr Hussain and the Claimant each made brief closing submissions. I then reserved my judgment. There was no time for me to reach a decision on the day.

The issues

7. The Claimant contends that he was contractually entitled to be paid a bonus of £7921 in respect of the Respondent's financial year which began on 1 October 2018 and ended on 30 September 2019.

8. At the beginning of the Hearing, the parties agreed that the terms of the bonus were included in the document headed "LEBC Pay & Reward Agreement and Scheme" which ran from page 55 to page 68 of the bundle ("the Scheme"). The documentation of the Scheme comprises the "Pay & Reward Agreement" (pages 56 to 57), which sets out from when the Scheme applied and expressly incorporates it into the Claimant's contract of employment. There then follows the "Pay & Reward Scheme" from page 58 to page 63, which sets out the mechanics of the Scheme ("the Pay & Reward Scheme"). Appendix 1 to the "Pay & Reward Scheme" sets out the Scheme's Rules in more detail (pages 64 to 67)("the Scheme Rules") and Appendix 2 sets out an Appeal Process (page 68).

9. The parties agreed that, subject to all the terms of the Pay & Reward Scheme and the Scheme Rules being met, the Claimant would have been contractually entitled to receive a bonus calculated in accordance with clauses 3.1 to 3.6 of the Pay & Reward Scheme as follows:

Salary	**Bonus target**	**Income generated**	**Amount on which bonus calculated**	**Max bonus**	**Financial element (50%)**	**KPI element (25%)**	**Discr element (25%)**
£45,506	£145,620	£169,382	£23,762	£7921	£3960	£1960	£1960

10. Essentially, the Scheme provided that the maximum bonus was one third of the amount by which income generated by the Claimant exceeded his bonus target (which was three times annual salary). However, 25% of the maximum bonus was only payable subject to KPI targets being met and 25% remained discretionary.

11. The Claimant said that he was entitled under the terms of the Scheme to receive the full amount of £7921. The Respondent, however, said that he was entitled to receive nothing under the terms of the Scheme. The Respondent's case evolved over time, but by the date of the Hearing its reasons for arguing that the Claimant was entitled to nothing under the terms of the Scheme were as follows:

    11.1. **Income generated:** The Respondent contended that in fact the income generated by the Claimant should be reduced by £46,507. This was because this amount had been paid out to a Mr N as a result of a complaint which he had made which related to the Claimant. In this respect the Respondent relied upon paragraphs 3.8 and 3.9 of the Scheme Rules which state as follows (page 65):

> 3.8 Achieved Income (Income generated) includes all fees and commissions received or receivable by the firm within the scheme year which is attributed to you less any deductions which are attributed to you
>
> 3.9 Deductions will include all pay-aways, any compensation or redress payment, ex-gratia payments, the cost of carrying out redress calculations or any network or regulatory fine or any payments which are passed on to LEBC.

    This would have had the effect of reducing the Income generated by the Claimant to below the minimum amount at which any bonus would be payable.

    11.2. **Discretionary element:** Further and separately the Respondent contended that the Discretionary element would not have been paid because it was discretionary and the Respondent had not been in a position to do so. In this respect it relied in particular upon paragraph 3.7 of the Scheme Rules which states as follows (page 65):

> 3.7 A discretionary award is only payable where the company is in a position to do so.

    11.3. **Compliance scorecard:** Further and separately, the Respondent contended that the Financial element, the KPI element and the Discretionary element would all have been reduced by 100% because of the "Compliance scorecard" provisions of the Scheme Rules (section 4), when read together with section 3.5 of the Pay & Reward Scheme.

    11.4. **Debtor reduction:** Further and separately, the Respondent contended that any bonus payable under the Scheme should be reduced by reference to clause 5 of the Pay & Reward Scheme which provides:

5 Frequency of Payment and Debtors

The Bonus will be paid on an annual basis. The first part of the payment will be payable in December with the December payroll following the end of the financial year but this payment will be reduced if the adviser has any outstanding debtors at the end of the financial year. The reduction applied will be 1/3rd of the total outstanding debtors as at 30th November. A further balancing payment will be made in January with the January payroll for any debtors recovered by 31 December. Any Bonus due on debtors remaining uncollected after 31st December will be lost.

The Respondent contended that on the relevant date the outstanding debt was £12,404. Any bonus payable would be reduced by one third of that amount (£4,134.66) and so, even if all the other requirements relating to the payment of the bonus had been met, the bonus payable would have only been £3,785.34 (£7921 - £4134.66).

12. There was no dispute that the Claimant was contractually entitled to any bonus payable under the Pay & Reward Scheme and, therefore, the issue for me was how much (if anything) the Claimant should have been paid by way of bonus in light of the points raised by the Respondent as set out above.

The Law

13. A breach of contract occurs when a party to a contract fails to fulfil an obligation imposed by the terms of the contract.

14. A breach of contract gives the innocent party the right to sue for damages, i.e. for financial compensation for losses flowing from the breach. The general principle which applies to all types of claim for breach of contract is that damages should return the innocent party to the position they would have been in if there had been no breach. A claim for damages for breach of contract may be pursued in the Employment Tribunal when it arises, or is outstanding, on the termination of employment, but not otherwise. That was the case in the claim.

Findings of fact

15. In making these findings of fact I have taken account of all the evidence before me, even though I do not of necessity refer to all of it in these findings.

The error relating to Mr N and who was responsible for it

16. The Claimant was initially employed by the Respondent as a Pensions Adviser. The key events in this case took place between April and August 2017. By this point the Claimant was also the project manager for the "TRW project". That was a project in which pensions advisers employed by the Respondent gave advice to members of the TRW Final Salary Pension Scheme ("the TRW Scheme") in relation to whether they should cash in their defined benefits under the TRW Scheme and invest them instead in a personal pension.

17. The Claimant advised a Mr N in relation to this possibility in April 2017 (when he advised him not to cash in his benefits under the TRW Scheme) and then again in June 2017. On this latter date the Claimant advised Mr N to cash in his benefits in light of the transfer value then on offer. Mr N accepted this advice and completed and returned the necessary paperwork to the Respondent. Effecting the transfer

of the value of Mr N's benefits from the TRW Scheme to a personal pension involved three parties: the Respondent, as Mr N's adviser, Capita, as the administrator of the TRW Scheme, and AVIVA who would set up and manage Mr N's investments in his personal pension.

18. An account of what then went wrong is in the letter the Respondent sent to Mr N on 12 May 2020. Neither the Respondent nor the Claimant disputed the accuracy of that letter's contents. The letter explains matters as follows (page 156):

> We received your completed paperwork and completed the online application with Aviva. On 4 August 2017 the required forms were sent to both Aviva and Capita. On 15 August 2017 Capita emailed our admin support team to advise one of the forms they required was not included in our submission.
>
> Unfortunately, I can find no evidence to confirm the necessary form was then sent to Capita. As a result, it appears Capita closed their file without confirming to us and regrettably Aviva did not query why they had not received any funds from Capita.

19. The error was discovered by Mr N in February 2019 when he discovered that there was no money in his personal pension. He reverted to the Claimant. The Claimant obtained a new cash equivalent transfer value from the TRW Scheme and Mr N's benefits in that scheme were transferred out and then invested by AVIVA in a personal pension on 24 June 2019. Unfortunately, the transfer value obtained in 2019 was slightly lower than that on offer in 2017 and, in addition, Mr N had suffered a significant loss because if he had invested the transfer value in 2017 the invested funds would have grown significantly. His total loss was valued at £46,507.07. The Respondent agreed to pay Mr N that amount. It is worth noting that although the Respondent felt Capita and/or AVIVA had contributed to events, it stated in its letter of 12 May 2020 "it is clear the error was ours in the first instance". The error was of course the failure of the "admin support team" to deal with Capita's request that a particular form be provided to it.

20. The Respondent's case is that the Claimant was ultimately responsible for the fact that transfer was not made in 2017. It argues that the Claimant should have checked that the transfer was complete both because he was Mr N's pensions adviser and because he was the project manager for the TRW project. The claimant accepted that he was the project manager for the TRW project and Mr N's pensions adviser but not that he was responsible for the error.

21. There was very little documentation relevant to the exact duties of the Claimant as a pensions adviser and project manager contained in the bundle. The Respondent's main evidence in relation to this issue was contained in paragraphs 12 to 15 of Mr Simmons' witness statement and paragraphs 7 to 10 of Mr McVicar's witness statement.

22. Mr Simmons' argued that as an FCA authorised individual the Claimant should have followed up and made sure the transfer had taken place. He noted that colleagues of the Claimant kept their own client lists to make sure transfers had been properly completed. He also said that, as the TRW project manager, the Claimant should have checked that all clients in the TRW project were processed correctly. In summary, the Claimant had failed to exercise the level of due care and attention that could reasonably have been expected of him.

23. Mr McVicar included a list of tasks for which the Claimant was responsible as the TRW project manager in paragraph 7 of his statement. Mr McVicar also illustrated

the nature and extent of the Claimant's duties as project manager by pointing to an email he had sent in April 2016 prompting another adviser to take action before a transfer value expired.

24. The Claimant did not take issue with the evidence of Mr Simmons or Mr McVicar when he cross-examined them. Rather he focused on the inadequacy of the administration department, with Mr McVicar accepting in answer to questions asked in cross-examination that it was an employee called Hannah who had made the error in question and stating that she was an employee who required a lot of supervision.

25. Generally, the position of the Claimant in his evidence was that whilst he accepted he was the TRW project manager, the fact remained that the error that had occurred was an administrative error for which he was not responsible. It was not his job to deal with or supervise the processing of the paperwork once a client had decided to effect a transfer following the Claimant giving advice and had returned the paperwork to the Respondent. However he did accept in answer to a question asked in cross examination that it would have been reasonable to expect him to check with the administration team what was going on with a particular case if he had had time, and if he had not been under pressure and subject to time constraints.

26. The Claimant also accepted in answer to questions asked that he would have had an ongoing relationship with Mr N after the initial transfer. This was because he would conduct an annual review of his personal pension so that changes to Mr N's investment strategy might be considered. Indeed, the error had come to light as the first annual review had approached.

27. Taking the evidence in relation to this issue in the round, I find that the error which caused Mr N (and so ultimately the Respondent) loss was an administrative error for which the Claimant had no initial direct responsibility. However, in light of the Claimant's role as TRW project manager, and the fact that he had an ongoing relationship with Mr N, I find that if he had performed all his duties with the diligence that an employer might reasonably expect from someone holding a role such as his, he would have checked that the transfer had taken place and so would have discovered the error at a point at which it could have been rectified.

28. I make this finding in particular in light of: (1) the substantial amount of money involved (£369, 148 – it is self-evidently the case that the larger the sum to be invested the greater the care to be taken); (2) the fact of the Claimant's ongoing advisory relationship with Mr N; (3) his TRW project manager role; (4) the fact that the Claimant was an FCA regulated individual; (5) the fact that the check he had failed to make was comparable to a check he had in effect made in relation to another colleague's work as referred to at paragraph 23 above. In each case the purpose of the check would have been to ensure that a transfer was effected before the transfer value expired. It was the failure to make the transfer of Mr N's benefits in 2017 before the transfer value expired which caused the loss.

Other matters in relation to which factual findings are necessary

29. The Respondent's evidence was that, apart from Foundation Advisers, no employees had received the discretionary part of the bonus payable under the Scheme. This was dealt with in particular by the evidence of Ms Ingram. The context for the decision of the Respondent to restrict the payment of the

discretionary element of the bonus in this way was that the Respondent had suffered financial losses in 2018 to 2019. I accept as true Ms Ingram's evidence that the payment of the discretionary part of the bonus was restricted in this way because of the Respondent's financial position.

30. The Respondent submitted that the application of the "compliance scorecard" would have resulted in the Claimant receiving a zero bonus because of the error relating to Mr N. I do not accept that that would have been the case for the following reasons:

    30.1. This was not a matter dealt with in the witness evidence of any of the Respondent's witnesses;

    30.2. Paragraph 4.2 of the Scheme Rules refers to a Compliance Scorecard Score being produced but I received no evidence in relation to any such score in relation to the relevant financial year;

    30.3. This was not a point raised by the Respondent either in its Response or at the preliminary hearing on 21 May 2020;

    30.4. There was no evidence that Mr N's complaint had been dealt with as a compliance issue prior to the termination of the Claimant's employment.

31. The Respondent's evidence was that there were outstanding debtors in relation to the generated income of the Claimant of £12,404 as at the relevant calculation date. This was the evidence in particular of Mr McVicar as a result of questions that I asked him. The Claimant did not challenge this evidence in cross-examination when I gave him the opportunity to do so. I find that Mr McVicar's evidence in this respect was true.

32. A document which was repeatedly referred to throughout the Hearing was the bonus calculation sent to the Claimant on 17 December 2019 (page 149 of the bundle). This showed income generated unreduced by the compensation payable as a result of the error concerning Mr N and also stated "we have agreed to disregard all project debtors on this occasion".

33. The Claimant relied on this document to argue, in effect, that the Respondent had not intended at the time to reduce his bonus either because of the compensation paid out to Mr N or as a result of debtors. Its subsequent reliance on these matters was a *post facto* justification for not paying him his bonus after he had left.

34. Having heard the evidence of Ms Gosain, I accept, however, that the memo at page 149 was sent out in error. I accept as true her evidence that she had sent out bonus memos to everyone on a particular spreadsheet, misunderstanding her instructions to send them out to only Foundation Advisers, and that this reflected minor changes in procedures following the appointment of a new finance director. I accept her explanation as true because her oral evidence was consistent and coherent, despite the lack of care it revealed in the Respondent's administrative processes.

35. I also accept her evidence that the discounting of project debtors referred to in the memo sent in error at page 149 was never intended to relate to individuals such as the Claimant who worked in The Retirement Adviser side of the Respondent's

business, and note that similar wording was not included in the member sent to the Claimant on 24 July 2019 (page 121 of the bundle).

Conclusions

36. My conclusions in relation to the issues which arise as a result of the issues set out above are as follows.

The income generated figure

37. The definition of "Achieved Income (Income generated)" in paragraph 3.8 states that the amount of income will be reduced by "any deductions which are attributed to you". Paragraph 3.9 states that deductions will include "any compensation or redress payment, ex-gratia payments…".

38. In light of my findings of fact above about the Claimant's role in relation to the error which led to the compensation payment being made to Mr N, I conclude that this was a "deduction" which the Respondent was entitled to "attribute" to the Claimant. This is for the following reasons:

    38.1. First, a compensation payment such as that made clearly falls within paragraph 3.9;

    38.2. Secondly, I conclude that *if* fault were required, there was sufficient fault in the actions of the Claimant in light of my findings of fact above for the compensation payment to be a "deduction" to be "attributed" to him;

    38.3. Thirdly, and further and separately, I conclude that in any event fault is not required. The words "attributed to" do not carry a connotation of fault and equally some of the "deductions" do not imply fault (for example an ex-gratia payment). All that is required is a link between the actions of an individual employee and the deduction, and there is such a link in this case.

39. In light of these conclusions, the income generated figure fell to be reduced by £46,507.07 and consequently the Claimant was entitled to no bonus because he did not reach the required income generated figure.

The discretionary element

40. In case my conclusions in relation to the income generated figure are wrong, I have considered the question of the discretionary element.

41. I conclude that the Respondent was contractually entitled not to pay this part of the Claimant's bonus (£1960) for the following reasons:

    41.1. First, it is a discretionary component and, in all the circumstances, deciding not paying it to the Claimant was an entirely reasonable exercise of the Respondent's discretion. The discretionary nature of the component is made very clear in clause 3.4 of the Pay & Reward Scheme which states:

> At the end of each financial year, after considering branch head and Regional Sales Director recommendations, the Pay & Reward Committee (P&RC) will make these awards. The Committee will document the reasons for the level of reward but generally it will be awarded for doing something extra, going above and beyond or for continued strong performance across all areas.
>
> In exceptional circumstances, the Pay & Reward Committee may decide that the Financial element and the KPIs element do not adequately reflect the additional work done by an adviser. In these cases, subject to a satisfactory compliance record, the adviser may be awarded a Discretionary Award.

41.2. Further and separately, the fact that the Respondent had made a loss in the Financial Year 2018-2019 meant that it was entitled to conclude that no such bonus would be paid because the Respondent was "not in a position to do so". Such words should not be interpreted as referring only to circumstances where the Respondent literally does not have access to sufficient funds to pay the discretionary component of the bonus.

The compliance scorecard

42. In light of my findings of fact set out above, any bonus payable to the Claimant would not fall to be reduced as a result of his "compliance scorecard".

Debtor reduction

43. In case my conclusions in relation to the income generated figure are wrong, I have also considered the debtor reduction issue. In light of my findings of fact above, any bonus payable to the Claimant would have been reduced by the amount of one third of £12,404, by reference to clause 5 of the Pay & Reward Scheme, that is to say by £4,134.66.

44. In light of these conclusions, the Claimant's claim fails and is dismissed. The conclusion in relation to the income generated figure means that no bonus was payable at all and so the Respondent did not act in breach of contract.

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Employment Judge Evans

Date: 29 December 2020