



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105942/22

Hearing Held by CVP on 19 January 2023

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Employment Judge McFatridge

15 L Scott

Claimant
In Person

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Signature Group

Respondent
Represented by:
Mr Forrest -
Finance Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The respondent did not unlawfully withhold wages from the claimant. The claim is dismissed.

REASONS

35 1. The claimant submitted a claim to the Tribunal in which he claimed that he had suffered an unlawful deduction of wages. It was his position that he was due a payment in respect of a bonus which was withheld from his final payslip in August 2022. The respondent submitted a response in which they denied the claim. It was their position that the claimant had been paid all sums due

to him. They indicated that the bonus to which the claimant referred was non contractual and discretionary and that the respondents had reasonably exercised their discretion not to pay this. A Final Hearing was held on 19th January by CVP. The claimant gave evidence on his own behalf.
5 Mr Forrest the respondent's representative gave evidence on behalf of the respondent. Both parties lodged a small number of documents which will be referred to in the Judgment below by page number. The claimant's documents will be preceded by the letter C and the respondents by the letter R. On the basis of the evidence and the productions the Tribunal found the
10 following essential facts relevant to the matter to be decided by the Tribunal to be proved or agreed.

Findings in Fact

- 15 2. The respondents are Signature Group who run a number of public houses and restaurants. At the time of the Hearing they had 21 business units and employed around 650 staff. The claimant commenced employment with them in or about January 2019 as a Lead Chef. In May 2019 he became Head Chef at a venue operated by them known as The Basement.
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3. When commencing employment with the respondents the claimant was shown and signed a statement of terms and conditions of his employment. It contained the usual clauses and conditions to be expected in such a document. It contained a provision regarding notice pay at para 14.1 which
25 obliged the employee to give 4 weeks notice of termination of employment during the first 6 months of employment and 6 weeks notice of termination thereafter. It referred to an initial 12 week probationary period. This document was lodged by the respondents (R11-17). This document represented the claimant's initial particulars of employment.
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4. Paragraph 6 set out the claimant's rate of pay. Paragraph 6.3 stated :-

"Following the successful completion of your probationary period you may be eligible to participate in the company's bonus scheme,

specific details of which will be laid out by your Line Manager. Participation in the company's bonus scheme does not give you any entitlement to receive a bonus. The company may withdraw or amend the bonus scheme without notice at any time or may exclude you from participating in it. The company bonus scheme is discretionary and the Managing Director shall determine the final amount of any bonus award taking into account your performance during the relevant quarter as well as any other factors he considers relevant. Any bonuses awarded will fall due to be paid following completion of the relevant quarterly management accounts. Any bonus will only be paid if you are employed on the date payment is due to be made and are not under notice to terminate your employment (whether given by the company or by you)."

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5. The claimant's employment with the respondent was successful and he enjoyed his job. During 2019 he was paid a bonus however he understood that the metrics of this scheme were different from the eventual scheme adopted by the company. The claimant was furloughed through the Covid pandemic. Initially the unit he worked in did not reopen immediately after the pandemic and he worked for a time in a unit called Maclarens and then latterly assisted in a unit known as Cold Town House. He returned to work in The Basement in or around June 2021 .
 6. On the 11th of June 2021 he received a letter from the respondent's Operations Director Ian Fisher. (R7-10). This confirmed that his salary would increase effective from 1st June 2021 . The letter went on to say:

"All other terms and conditions of your Contract of Employment remain unchanged.

Additionally I am writing to confirm the details of 2 new bonus schemes you will be eligible to participate in.

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1. *Kitchen Loyalty Bonus Scheme ~ a retention scheme that pays out 8%, 9% and 10% of salary on anniversary dates in 2022, 2023 and 2024. Further details of this are included in Appendix 1 of this letter.*
 2. *Operational Bonus Scheme - a quarterly bonus scheme that will begin in quarter 4 (August 21 to October 21) enabling you to earn up to an additional 30% of your salary for that period payable in the month following the end of the period. Further details on this are included in Appendix 2 of this letter.*
 3. *The above commitments represent a significant financial investment for the company at a time when the challenges of Covid culminated in the company recording its worst ever financial performance. However we are committed to building and retaining a high performing team that helps to ensure we bounce back from the challenges of Covid in a manner rewarding for all.*
 4. *Thank you for your continued hard work and commitment and please accept my best wishes for your continued success. ”*
7. Appendix 1 set out the details of the Kitchen Loyalty Bonus Scheme. There was no dispute between the parties in relation to this however it is as well to set out that it stated under “Points to Note.”

30 *“Non contractual but “unconditional offer.” If employees still in a kitchen role with Signature Pubs Limited on 1st September 2022, 1st September 23 and 1st September 24 bonus will be deemed payable. The only caveat being the individual is not subject to any disciplinary proceedings.*

This retention bonus scheme will run alongside and in conjunction with the quarterly operational bonus scheme. ”

8. The operational bonus scheme set out a number of criteria based on a budget and “stretch budget” for each kitchen team. It then went on to state:

5 *'Bonus Eligibility*

Employees will be eligible to participate in the bonus scheme from the period commencing 1st February, 1st May, 1st August or 1st November whichever comes first after their date of joining.

10 *Bonus Reference Period*

Quarterly August, October, November, February, March, May, June, August. Bonus payments will be made with salary in the month following the end of the quarter.

15 *Timing - Trial in Q4 (August 21st - October 21st) with a view to refining if necessary and launching from 1st November 2021.*

20 *Important Point to note - bonus payments are non contractual and remain discretionary. Payment of bonuses will be subject to prior approval from the Operations Director and owner. The absolute intention is to reward good performance and achievement of the above targets will lead to the full amount of bonus being paid in the vast majority of circumstances. However partial or full withdrawal of a bonus payment may be made in certain circumstances, for example In the event of compliance issues such as the unit being*
25 *subject to a licensing review or the kitchen having been served with an EHO Improvement Notice. ”*

30 9. There then followed some worked examples of how the bonus would be calculated in certain circumstances.

10. The background to the introduction of this bonus scheme was the difficulties many hospitality businesses were suffering in retaining and attracting staff following the end of the Covid pandemic. The respondent wished to retain as

many as possible of their existing staff and the bonus was seen by them as a tool to incentivise staff not to leave.

11. In or around August 2022 the claimant decided to give notice of termination of his employment. The background to this were that he and his wife were expecting a child and considered it would be appropriate for him to take some time away from work in order to look after that child. In terms of his statement of terms and conditions of employment the claimant was required to give 6 weeks notice of termination. The claimant wrote to the respondents
- 10 The claimant wrote to the respondent on 15th August. This letter was lodged (C3). The claimant stated:

"Please accept this letter as notice of my resignation from the position of Head Chef of The Basement Signature Group.

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As per the terms of my Employment Contract I will continue to work for the company for the next 6 weeks completing my employment on 25th September 2022.

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/ have enjoyed working for Signature Group and I would certainly consider working for the company again in the future. They were due to personal reasons. I will take some time off to spend with family.

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I wish you and the company all the best in the future and look forward to working with you over these next 6 weeks to ensure a smooth transition to my successor in the role."

12. On or about 23rd August Mr Fisher, the respondent's Operations Director had occasion to be in the venue where the claimant worked for a meeting. He requested a meeting with the claimant and asked the claimant why he had handed his notice in. The claimant and Mr Fisher had an amicable conversation during which the claimant indicated his reasons for leaving and made it plain that as stated in his letter of notice he would be happy to return to work for the company. Mr Fisher told him that if he did find himself in this
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situation then he should contact Mr Fisher direct and Mr Fisher would be in a position to advise him of any vacancies which the respondents had in any of their venues.

- 5 13. The respondents had written to the claimant again confirming the terms of the operational bonus scheme on 7th December. This letter was lodged by the claimant (C1-C2). This letter also stated:

10 "Important point to note - bonus payments are non contractual and remain discretionary. The payment of bonuses will be subject to prior approval from the Operations Director and owner. The absolute intention is to reward good performance and achievement of the above targets will lead to the full amount of bonus being paid in the vast majority of circumstances. However partial or full withdrawal of
15 a bonus payment may be made in certain circumstances for example in the event of compliance issues such as the unit being subject to a licensing review or the kitchen having been served with an EHO improvement Notice."

- 2.0 14. The claimant had worked the quarter between 1st May and 31st of July and his unit had achieved the target set and if the operational bonus was due his payment would have been around £1500 which was due to be paid with his salary payable on 31st August 2022. The claimant expected that he would receive this bonus payment. He had not discussed the matter with Mr Fisher
25 directly at the meeting but Mr Fisher had also not given any indication this sum would not be payable.

15. When the claimant received his August salary he noted that the bonus had not been paid. He contacted his General Manager who initially told him that
30 he suspected this must be a mistake and that he would speak to Mr Fisher about it. He subsequently reported to the claimant that Mr Fisher had said it was not a mistake but that the bonus would not be payable since the claimant was working under notice at the date the bonus would otherwise have been payable.

16. The claimant subsequently contacted Mr Fisher by telephone. Mr Fisher confirmed that the bonus would not be paid because the claimant had given his notice prior to the date of payment. Mr Fisher sent the claimant an email dated 1st September which was lodged (C4). This stated:

“Further to our telephone conversation this morning and subsequent undernoted email I regret to confirm that Signature Group’s position remains unchanged regarding the quarterly scheme. I attach a copy of the letter you received detailing the terms of the Ops Bonus Scheme which clearly states the Bonus Scheme is non contractual and payments remain discretionary. The Bonus Scheme is a big investment for the company and you have benefitted from payments in the past. However the Scheme is designed as a means of incentivising retention. You have decided your future career lies away from Signature Pubs and as such no further payments will be made. This stands as common practice within the industry.

However I can confirm with reference to the Kitchen Retention Bonus this will be paid. This is a different scheme to the Ops Bonus Scheme with different conditions attached. As you were in role on 1st September 22 you do meet the conditions of the bonus and payment will be included in your final salary on 30th September 2022. Please note the conditions of this scheme detail the payment date as September 22 salary run as such payment of this bonus has not been withheld or fallen past due.

Thank you for your efforts over your time with the company and I wish you all the best for your future career path.”

17. The respondent's normal practice with regards to payment of bonus was for the company's Finance Director Mr Forrest to prepare quarterly figures showing the performance of each business unit and provide a bonus calculation. Out of the respondent's total number of around 650 employees

around 50 or 60 could potentially be eligible for bonus. The issue would then be discussed at a meeting between Mr Forrest who was the Finance Director, Mr Fisher the Operations Director and Ms Wallace the HR Manager. Ms Wallace was there to advise whether there were any outstanding disciplinaries against anyone or whether anyone had given notice.

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18. During the period the bonus scheme had been operational 12 employees had been denied a bonus payment in respect of the operational bonus on the basis that they were working under notice as at the date the bonus would have been due to be paid. Mr Forrest understood this to be standard practice in the industry. In the past he had himself lost a potential bonus payment on the basis that he had given his notice prior to the date the bonus would otherwise have been paid. No-one who was working under notice as at the date of payment had been paid the operations bonus.

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19. On the other hand the respondents had exercised their discretion in favour of an employee and awarded operations bonus in respect of 18 employees where they did not meet the precise terms of the scheme. One of these was in fact the sous chef working at the same unit as the claimant who had received an operations bonus despite still being on probation and despite not having worked in the position of sous chef during the whole of the bonus period. Others had received bonus in circumstances where the EBITDA performance of their unit had suffered as a result of circumstances beyond their control such as increased utility bills.

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20. The respondent's Mr Forrest was aware that the claimant had expressed a general willingness to return to the business but considered that this fell far short of any form of commitment. His view was that often things change when a baby comes along and there would be absolutely nothing to prevent the claimant changing his mind. He and the others could see no reason to change their usual practice and deny bonus to those who were working under notice as at the date the bonus would be paid.

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21. Subsequent to receiving the letter from Mr Fisher the claimant had spoken to Mr Fisher who had indicated that the decision was out of his hands and had been made by the owner Mr N Wood.

5 22. In or about December 2022 the claimant became aware that the respondent were advertising for a head chef at "Badger & Co", another unit they operated in Edinburgh. The advert was lodged (C6). It refers to various employee benefits including "A quarterly performance related bonus scheme".

10 Observations on the Evidence

23. The claimant gave his evidence in a patently honest manner and was not cross examined on this by the respondent's representative. I accepted his evidence as being credible and reliable. I also accepted the evidence of Mr Forrest as being credible and reliable. There was really no real dispute on the factual background between the parties. The claimant disagreed with Mr Forrest's evidence that it was commonplace in the industry for bonus to be withheld from employees who were working under notice at the time of payment. Mr Forrest clarified that this was simply his understanding of the position albeit that it was based on his own personal experience. He said he had previously been in this situation himself and had bonus which would otherwise have been due to him withheld on the basis that he gave his notice prior to the date of payment. He was not in a position to prove it was commonplace within the industry. I accepted Mr Forrest's evidence as to how the respondents decided whether or not to exercise their discretion in relation to bonus payments. I accepted that Mr Fisher may well have told the claimant that the decision was the owner's rather than his own and I accepted that although the decision was primarily made in the manner suggested I accepted Mr Forrest's evidence that the owner would also have been aware of what was happening and could potentially have intervened.

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Issues

24. The sole issue was whether or not the claimant had suffered an unlawful deduction of wages. Neither party produced a calculation as to what the bonus would have been. The claimant gave evidence that the sum payable to him would have been around £1500 gross. The respondent's representative indicated that he considered this figure to be about right. Essentially the issue was whether or not the claimant was due to be paid the operations bonus for the months of May, June and July or whether he was not due to be paid this on the basis that the bonus was discretionary and the respondent had reasonably exercised their discretion not to pay it because at the date of payment (31st August) he was working under notice of termination given by him on 15th August.

15 Discussion and Decision

25. Both parties made short submissions confirming their position. The claimant's position was that although the bonus was discretionary the respondents were required to exercise their discretion in good faith and on reasonable grounds. He had expected the bonus to be paid. When he discussed matters with Mr Fisher he had made it clear that he would be happy to go back to work with the company. Mr Fisher's email of 1st September would appear to indicate that he had made his decision on the basis that "You have decided your future career lies away from Signature Pubs". This was unreasonable. He was unaware of any general practice within the industry allowing bonus to be withheld. The bonus had been earned by him in the period before he gave notice.

26. The respondent's position was essentially that it was a non contractual discretionary bonus and that they had exercised their discretion reasonably and within the terms of the scheme. It was common practice for Signature Pubs to exercise their discretion in this way. It was the way they always operated. The aim of the bonus was to retain staff. It was reasonable to withhold it from staff who were leaving. If the claimant had made a

commitment to definitely come back then possibly an arrangement could have been reached to defer the bonus and pay it 6 months after he came back to work but nothing like this had been proposed or negotiated. He made the point that the sum otherwise payable for bonus required to be utilised in recruiting the claimant's replacement.

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27. The leading case of *Horkulak v Canter Fitzgerald International* [2005] ICR 402 CA makes it clear that one must often look beyond a bare statement that the bonus is discretionary and examine the general background in which the bonus scheme operated. In the case of *Cattray v Cooperative Central* © *Raiffeisen-Boerenleenbank* BA [2010] IRLR 715 the Court of Appeal stated in round terms that "If a bank decides to reward their employees by means of purely discretionary bonuses then they should say so openly and not seek to dress up such a bonus with the language of entitlement qualified by a slight phrase which does not make it absolutely clear that there is in fact no entitlement at all".
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28. In this case however I was satisfied that the bonus was genuinely a discretionary one. It was introduced by the respondent at a time when the hospitality industry was having issues with job retention. It replaced a previous scheme which was also non contractual and discretionary. I was satisfied on the basis of the evidence and in particular the respondent's initial letter setting out the bonus scheme that the Operations Bonus was non contractual and discretionary. It was also my view that the Operations Bonus was covered by paragraph 6.3 of the claimant's statement of terms and conditions. Paragraph 6.3 confirmed that any bonus scheme was discretionary. The Managing Director could determine this taking into account any other factors he considered relevant. I also note this paragraph particularly stated that "*Any bonus will only be paid if you are employed on the date payment is due to be paid and are not under notice to terminate your employment (whether given by the company or by you).*"
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29. Having determined that payment of bonus was discretionary I then had to determine whether the respondent had exercised their discretion reasonably. The law is clear that even where a bonus scheme is found to be discretionary
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the employer's exercise of its discretion is not unfettered but is constrained by the operation of implied contractual terms. This was initially stated as an implied duty not to exercise the discretion in a way which is irrational or perverse. This was first described in the case of *Midland Bank Pic v McCann* EAT1 041/97 where the EAT held that while there was no obligation to exercise the discretion reasonably an employer could not exercise its discretion capriciously when deciding whether or not to award a performance bonus to a senior employee. In *Clark v Nomura International Pic* [2000] IRLR 766 the High Court stated the test was whether the employer had behaved irrationally or perversely. The issue was also discussed in the *Horkaluk* case mentioned above. In my view it is clear from the more recent authorities that the test is now in fact wider than merely avoiding capriciousness or acting irrationally or perversely. I am entitled to look at the wider circumstances in which the bonus is paid and decide, taking all factors into account, whether the employer has behaved reasonably or whether the employer is trying to behave in the way described in *Cattray*. Essentially the test has become one of reasonableness. If the bonus would normally be paid the employer has to have a good reason for withholding it and cannot simply point to a statement that it is non-contractual.

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30. In my view, having decided that the bonus was discretionary I was required to consider whether the respondent had acted reasonably in deciding not to pay it to the claimant. I believe the respondent in this case did act reasonably. The first point is that the claimant's statement of terms and conditions clearly stated that the bonus would not be paid in these circumstances. I also take on board the fact that in all of the previous occasions when this situation had arisen the respondents had not paid bonus. Their position was consistent. On the basis of the evidence before me I was not prepared to make a finding that this was common practice in the industry to adopt this position however I did accept Mr Russell's statement to the effect that this had happened to him in the past and that he had accepted it and it is therefore not something which was totally unknown.

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31. Mr Russell's evidence was to the effect that the purpose of the bonus was to reward people who were committed to the company going forward. For this reason the company would often exercise their discretion to award the bonus to people staying with the business who were not strictly entitled to it in the circumstances set out above. This was consistent with the reason for the bonus being to reward employees who are sticking with the business. Mr Russell made the point that the claimant's commitment to return to the business was in no way a cast iron one. In his view things often change once a baby comes along and although it may be the claimant's current intention to return there was absolutely no guarantee this would happen. If the claimant was simply taking a career break it would have been open to him to try to negotiate a deal whereby for example the bonus could be paid 6 months after he returned. The respondents also made the point that they behaved reasonably in paying the kitchen bonus since on the basis of what they had said regarding this bonus the claimant was still in his kitchen post on 1st September and was not subject to any disciplinary proceedings.
32. At the end of the day I did not believe the respondent could be said to have exercised their discretion unreasonably in withholding the bonus in situations where they had previously made it clear they would withhold it and in circumstances where it was their invariable practice to withhold it. Circumstances would have been different if, for example, the claimant had not given notice and the claimant's kitchen had met the terms of the bonus and the respondent decided not to pay it relying on the fact it was non contractual. That was not the situation here.
33. I had genuine sympathy with the claimant who appears to have been an admirable employee but it was not possible to make a finding that the respondents behaved unreasonably by following their published policy of not paying bonus to individuals who were working their notice at the point where the bonus would otherwise have been payable. It was clear that one of the reasons for the bonus was to retain staff. They were entitled to exercise their discretion in a way where they needed to reward staff who were staying with the business rather than staff who were leaving. My finding therefore is that

the respondents did not unlawfully withhold wages from the claimant and the claim is dismissed.

Employment Judge: I McFatridge
Date of Judgment: 20 January 2023
Entered in register: 23 January 2023
and copied to parties