EMPLOYMENT TRIBUNALS

Claimant **Respondent**
MISS DE VILLIERS v **ASTELLON INVESTMENT SERVICES LTD**

Heard at: London Central **On: 31 January and 1 February 2018**

Before: Employment Judge Mason

Representation
For the Claimant: Mr. N. De Silva, counsel
For the Respondent: Ms. L. Bone, counsel .

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was dismissed for some other substantial reason. That dismissal was unfair but the Compensatory Award is limited to her actual financial loss of earnings following dismissal of £770.76 and the sum of £500 for loss of statutory rights. Having already received the equivalent of a Statutory Redundancy Payment, this extinguishes any Basic Award. The Claimant is therefore awarded the total sum of £1,270.76.

2. The Claimant's claim for breach of contract fails and is dismissed.

REASONS

BACKGROUND

1. Miss De Villiers ("the Claimant"), commenced employment with Astellon Investment Services Limited ("the Respondent") on 3 March 2014. Her employment with the Respondent terminated on 2 May 2017.

2. The Claimant claims (i) compensation for unfair dismissal and (ii) damages for breach of contract. The Respondent denies the Claimant was unfairly dismissed and says the Claimant was dismissed for a fair reason, namely redundancy and/or some other substantial reason, and that in all the circumstances of the case it acted fairly and reasonably and dismissal was within the range of reasonable responses. The Respondent also denies that it breached the Claimant's contract.

3. The Claimant was represented by Mr. De Silva and the Respondent by Miss Bone. As I expressed at the Hearing, I am grateful to both counsel for their measured and courteous conduct throughout.

4. The Claimant gave evidence. Mr. Bernd Ondruch and Mr. Brian Coldrey gave evidence on behalf of the Respondent. I have referred to individuals other than Mr. Ondruch, Mr. Coldrey and the Claimant by their initials.

5. A large bundle of agreed documents was provided (pages 1-512) ("the Bundle"). I have considered only those documents to which the parties referred to either in their statements or during the course of giving oral evidence. Any reference to page numbers in this judgement and reasons are to page numbers in the bundle.

6. The Hearing took place on 31 January and 1 February 2018. At the start of the Hearing, I identified with the representatives the issues and the relevant documents; I then retired to read the witness statements and any documents referred to in those statements. Mr. Ondrich gave evidence on the 1st day and on the 2nd day, Mr. Coldrey and the Claimant gave evidence. The representatives then made oral submissions which I have paid heed to together with their written submissions and case law provided. I was provided with copies of the decisions in **Duffy v Yeomans & Partners Ltd [1995] CA; Reda and another v Flag Ltd [2002] UKPC 38; Rawlinson v Brightside Group Ltd UKEAT/0142/17/DA; Takacs v Barclays Services Jersey Ltd [2006] IRLR 877; Patural v DG Services (UK) Ltd [2015] EWHC 3659 (QB); Commerzbank AG v Keen [2006] EWCA Civ 1536; Braganza v BP Shipping Ltd [2015] UKSC 17; Adrian Faieta v ICAP Management Services Ltd [2017] EWHC 2995; IBM v Dalgleish and others [2017] EWCA Civ 1212**.

ISSUES

7. The parties had prepared and agreed a list of issues as follows:

7.1 Unfair Dismissal:

(i) Was the reason for the Claimant's dismissal a potentially fair reason (s98(2) Employment Rights Act ("ERA")?

(ii) Alternatively, was the dismissal for some other substantial reason, namely business reorganisation?

(iii) Was the dismissal fair in all the circumstances of the case, having regard to the Respondent's size and resources? (s98(4) ERA).

(iv) If the dismissal was unfair, what compensation is the Claimant entitled to? If is is found that the Claimant would have been dismissed in any event the Respondent asserts that Polkey applies to extend the Claimant's employment by 1-2 weeks, so that the Claimant's compensation is limited to this period. The Claimant asserts that there should be no Polkey reduction, alternatively that a fair procedure would have extended her employment by at least 1 month.

7.2 Bonus claim

(i) Has the Respondent breached the implied term of trust and confidence by allegedly fabricating the reason for giving the Claimant notice of termination and seeking to rely on clause 6.3 of the Employment Contract when the Claimant had worked the entire bonus year on the assumption she would be eligible to be considered for a bonus for 2016?

(ii) If so, what loss if any flows from that breach?

(iii) Alternatively, did the Claimant have any entitlement to bonus, given clause 6.2 of the Employment Contract? If so, has the Respondent breached the implied term of trust and confidence by exercising its discretion unfairly, irrationally and capriciously not to award the Claimant a bonus for 2016?

(iv) If so, what bonus if any should the Claimant be awarded?

FACTS/FINDINGS OF FACT

8. There was a degree of conflict on the evidence. I have found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the parties. The Claimant gave her evidence in a calm and measured manner as did Mr. Coldrey. When challenged (perfectly properly by Mr. De Silva), Mr. Ondruch frequently became angry. It was necessary for me to explain to Mr. Ondruch the nature of the adversarial process and advise him more than once that Mr. De Silva was doing his job by challenging him and putting to him the Claimant's case.

9. Astellon Capital Partners LLP ("the LLP") was founded in 2011 by Mr. V-C and Mr. Bernd Ondruch as an alternative investment fund manager. The Respondent acts as the employing entity for UK based employees. In reality, the two legal entities operate interchangeably. Mr. V-C was Chief Executive Officer (CEO) and a partner in the LLP; he left in January 2016. Mr. Ondruch is the Chief Investment Officer (CIO) and also the CEO and a partner in the LLP. Mr. Coldrey joined in October 2014; he is Chief Financial Officer (CFO) and a partner in the LLP and also the sole statutory director of the Respondent. Mr. DV was Chief Operations Officer (COO) and also a partner in the LLP; he left in January 2017.

10. I accept Mr. Ondruch's explanation that the Respondent's income is generated from a) management fees calculated essentially as a percentage of the Assets under Management (AUM); and b) performance fees aligned with the performance of the fund and calculated as a percentage of the increase in the investment. This is not disputed.

11. I also accept Mr. Ondruch explanation [WS 56] that the bonus pool is usually calculated from the profits the business has made which reflects performance fees. This alignment is important as cash bonuses "*are there to reward and incentivise key roles*". All bonus decisions are taken by him and are wholly discretionary; there are no guaranteed bonuses. He decides how to divide up the bonus pool. He *"will take into account how an individual has performed during the preceding year, but the most important factor is how the fund, as a whole, has performed and where the business needs to incentivise staff".*

12. In addition, the Respondent operates a Deferred Award Scheme [Deferral Rules 109-111] whereby an award is deferred and invested in the funds of the business and paid in subsequent tranches over a three year period. This is entirely separate to the discretionary bonus scheme and is not applicable to the Claimant and therefore to the issues in this case.

13. On 4 March 2014, the Claimant commenced employment with the Respondent as "Executive Assistant/PA". Her starting salary was £64,000 gross per annum. The Claimant says that during her interview, she was asked if she would prefer a higher base salary or a higher bonus and said she would prefer a higher bonus. Mr. Ondruch says the contrary is true, she said she would prefer a higher base salary. This point has limited relevance as the parties subsequently agreed express terms relating to salary and bonus in a Contract of Employment dated 19 February 2014

("the Contract")]112-125] which includes a "*whole agreement clause*" (para. 20.8) [120].

14. Key terms in this Contract for the purposes of these proceedings are as follows:

"2.3 Either you or the Firm may terminate this agreement by giving to the other not less than three months' prior notice."

"*6.2 You will be eligible to be considered for an annual discretionary bonus. The payment, the amount (if any), the nature and the timing of such bonus and the terms upon which such bonus may be payable are all at the Firm's absolute discretion. The fact that a bonus is paid in one year or in relation to a particular period is no guarantee of (and does not give rise to any expectation of or entitlement to) a bonus in any subsequent year or in relation to any subsequent period. Any annual discretionary bonus will be based on the relevant calendar year (or part thereof) and will be payable in accordance with the Firm's normal practice from time to time. At the Firm's discretion, the Firm may defer payment of all or part of any discretionary bonus award"*

"6.3 You shall be neither eligible to be considered for nor entitled to receive any discretionary bonus if at the time the bonus is due to be paid you are no longer employed by the Firm or you are under notice of termination of employment (whether given by you or the Firm) ... "

15. The Claimant was not given a written job description. As "Executive Assistant/PA", the Claimant's role was partly to act as personal assistant to Mr. Ondruch and Mr. V-C which included all aspects of their business lives and to some extent with their personal lives; this is not in dispute and in her capacity as personal assistant to Mr. Ondruch, she was also required to provide assistance to his wife on a regular basis.

16. With regard to the rest of her duties, the Claimant gives examples [WS para. 9] of the sort of tasks she was required to carry out:

- *"contacting investors and sales contacts ... to organise meetings ... as well as business travel;*
- *preparing for meetings by ensuring rooms were ready, materials in place, greeting investors when they came to the office, directing investors into the boardroom and generally supporting such meetings;*
- *providing support to all aspects of Office and Event Management by ordering supplies such as stationery, refreshments, arranging maintenance for office equipment as well as supporting investor, team and personal events;*
- *assisting the team when required such as arranging travel and setting up and clearing meeting rooms. In particular, during the transitioning period between staff that were responsible for Investor Relations, I ensured marketing materials were presented professionally, I arranged meetings as and when required and I liaised with investors for the scheduling of meetings, for marketing trips and greeting them on their visits to the office;*
- *co-coordinating the reorganisation and redecoration of the office;*
- *regular interaction with immediate family members of Mr. Ondruch and occasional interaction with [Mr. V-C's] family members."*

17. In about May 2015, the Claimant says she met with Mr. V-C and Mr. Ondruch and they asked her to communicate more when dealing with requests; she agreed to do so. Mr. Ondruch says that right from the outset, the Claimant "*seemed to object to providing assistance to the wider team and she had clashes with other staff members as a result*" [WS para 22].

18. On 24 September 2014, the Respondent wrote to the Claimant confirming she had passed her six months probationary period [128] and thanked her for all her hard work.

19. On 26 January 2015, the Claimant was paid a bonus of £15,000. She understood this was a bonus for her work carried out in 2014, adjusted to reflect the fact she had not worked the full calendar year.

20. In February 2015, the Claimant met with Mr. V-C and Mr. Ondruch to discuss her role. They told her they wanted her to support the wider team more than she had been doing and asked her to prioritise this over personal assistance going forward. She says apart from this and the earlier discussion in about May 2014, she was not given any negative feedback and she understood the Respondent was happy with her. The Respondent says she almost exclusively refused to give general assistance to the wider team; she denies that she was reluctant to perform any aspect of her duties and that she refused to provide assistance to other members of the management team.

21. Following that meeting, on 18 February 2015, Mr. Ondruch emailed the Claimant [129]; the subject of the email is "*clarification of duties*". Mr. Ondruch summarised their discussions regarding the scope of her responsibilities:
"*1) all team-related PA and office management related work is part of your every day duty. This includes travel-related work, meet and greet of visitors, preparations for such meetings, preparation of offices and meeting rooms and subsequent cleaning as well as the "catering" aspect. It also includes the printing and binding of documents should that be required, for example investor meetings. Finally, it also included office management (ocado and office supplies etc).*
2) an element of personal work is to be expected but should be subordinated in priority relative to Astellon-related work. In case of doubt please just talk to me or [Mr. V-C] as the case may be.
3) certain business travel-related work for other team members should also be included. Most analysts for example do a lot themselves but often there is a real logic to have it coordinated through you. It should also be understood that any work you do for or on behalf of any other team member, you do implicitly or explicitly also for [Mr. Ondruch/Mr. V-C].
4) as discussed, should you feel that this is too much work then we need to discuss hiring an additional team assistance [sic]"

22. Mr. Ondruch says despite this email, the Claimant refused to carry out work for the wider team on a day-to-day basis. At the Hearing, he was unable to say if there were any other emails regarding this but said there were numerous conversations. Sometime in 2015, he considered hiring a Team Assistant to cover that part of her role but it was a "*vague idea*" and was dropped "*as it simply made no commercial sense*" [WS 23]. Around June 2015, interviews took place with a view to recruiting a Team Assistant to support the Claimant; a suitable candidate was not found and the recruitment process went no further.

23. Mr. Ondrich says he had other concerns regarding the Claimant and says she "*was occasionally irresponsible and took a careless attitude when spending my and*

Astellon's money" [WS 25]. However, there is no satisfactory supporting evidence of this and I find this was not a significant concern.

24. It was part of the Claimant's role to make purchases for the office and also personal purchases for Mr. V-C and Mr. Ondruch. She kept a spreadsheet of details of the various credit and debit cards and bank accounts; she lists the various cards in para. 17 of her witness statement. The Respondent alleges that the Claimant inappropriately used a corporate AMEX credit card in her name to make purchases for the Respondent, Mr. Ondruch or Mr. V-C rather than use Mr. V-C's card or Mr Ondruch's card; in this way she received reward points which she then redeemed for her personal benefit. At the Hearing, I asked Ms. Bone to explain the relevance of this to the issues given that the Respondent's case does not relate to the Claimant's performance or conduct and there is no counter-claim to her breach of contract claim. She responded that it goes to the Claimant's credibility. I have therefore considered it but find there is no merit in this allegation. As the Claimant points out, all expenses were reviewed by either Ms. MP (Financial Accountant) and/or Mr. Coldrey (CFO/Compliance Officer); she did not attempt to conceal this and the value of the reward points redeemed are clearly shown on the monthly statements which Ms. MP and/or Mr. Coldrey received. She accepts that Mr. Coldrey at one point asked her to keep business and personal expenses separate and use the right card(s) but I accept that she explained to him (WS para 20) that it was easier to use a card in her own name as this allowed her, for instance, to make flight changes and return purchases. In the absence of anything in writing to the Claimant regarding this, I do not accept that the Respondent had genuine concerns; this is something the Respondent has seized upon only after commencement of these proceedings.

25. On 31 December 2015, Mr. V-C left the Respondent. The Claimant continued to support Mr. Ondruch in a business and personal capacity and also continued to manage the office. She says she had increasing requests from Mr. Ondruch's wife to assist her with personal tasks. She also assisted the Investor Relations team to organise events and also worked on various office projects.

26. On 25 February 2016, the Claimant received a bonus of £30,000 and her salary was increased to £65,000 gross per annum. She had initially been told in early February that she would received a bonus of £35,000 and after some discussion, the Claimant received an additional £5,000 bonus on 4 March 2016.

27. I accept Mr. Ondruch's evidence that "*2016 was a very bad year for the business*" [WS 32]. The "*markets tanked in January 2016*" and then the situation worsened in June 2016 following the Brexit referendum and there was "*a run on the fund*" and the Respondent's income fell by about 90%. This is not in dispute and is clearly reflected in the accounts [512] and supported by Mr. Coldrey's evidence.

28. In light of this, I accept Mr. Ondruch's evidence that:

28.1 There "*was a general atmosphere of concern and panic amongst the staff*" [WS 35] and a number of staff left of their own volition including SvW (IR Team) on 25 July 2016 and AC (IR Team) on 5 August 2016. It is not in dispute that none of these people received a bonus (prorated or otherwise) on termination.

28.2 From the second half of 2016 onwards he was focussed on the Respondent's survival. He wanted to keep the business going but to restructure and his focus was

to "*retain the talent it required, with all the mission-critical roles filled*" and therefore "*keep the core employees who filled the minimum necessary roles to maintain the fund in operation*" [WS 34].

29. Mr. Ondruch says there were ongoing discussions between him and Mr. Coldrey and Mr. DV and other LLP partners to consider cost reductions. The Claimant's role was discussed; he wanted to retain her but "*by the end of 2016/beginning of 2017, it became clear that this could not be put off any longer*".

30. Mr. Coldrey says there were a number of meetings and *"...it was clear in those meetings that there were certain functions that were business-critical, such as trading and investment analysis, and certain functions we did not need. One of the latter was Natalie's role, which (by that time) was a personal assistant to Bernd. Bernd realised this and by the end of 2016 he had said in one of the meetings I had had with him and [DV] that he would have a conversation with Natalie*" [WS 27].

31. In an email dated 17 October 2016, Mr. DV sent an email to Mr. Ondruch and Mr. Coldrey [318-319]. The subject is "Team Assistant Job Spec" and states as follows:
"I have put this document together to highlight some of my thoughts to you on what I think the firm needs in the potential next hire. Can I please have your thoughts on this?
Broadly, I envisage a professional, energetic and dynamic person to help the firm as a Team Assistant with four core responsibilities ...
- *Office management*
- *Investor Relations admin*
- *Personal assistance to the PM*
- *Assistance to the wider team*

A great candidate for this would be an Executive Assistant from a professional investment bank who has experience supporting larger teams. Like the profile we received today.
I appreciate that you will speak with Natalie at a convenient time and in an amicable way as you described before, so this document will not be flicked around. But if we can agree on what we want, then we will be able to filter candidates better and to pose better questions to those who come into our office"
Attached to that email is a Job Specification for a Team Assistant dated 17 October 2016 [320 321]. The authors are Mr. DV and Mr. Coldrey. This states that the role of Team Assistant is a "*business support role and crucial to the smooth operating of the firm*", that the Respondent had a team of 13 people and was "*looking for someone who can provide comprehensive administrative support*". The Job Specification attached expands on the four bullet points in Mr. DV's email.

32. At the Hearing, Mr. Ondruch was asked which of the four bullet points in the job description were within the Claimant's role; he said that "office management" and "personal assistance to the PM" were within her role; "assistance to the wider team" was also within her role but she was "*only doing half of that*"; Investor Relations admin" was not within her role.

33. Recruitment was then put on hold.

34. On 19 January 2017, there was an exchange of brief emails between Mr. Oldruch and Mr. Coldrey [247-248]. Mr. Coldrey wrote:
"I assume we will not discuss our year end discussions in time for this deadline and as a result bonuses for AISL employees (VM, IK, BP, SP and NdV [the Claimant]) *will have to be paid as part of Feb's payoll run.*
As a work around: I can make advance payments to these staff members on or after 25 Jan (this month's pay day) in anticipation of a Feb bonus if necessary"
Mr. Ondruch replied that he would "*review this over the weekend*".

35. On 24 January 2017, there was a further exchange of emails between Mr. Coldrey and Mr. Ondruch [250-251]. Mr. Coldrey provided a spreadsheet of figures and concluded:
"... clear that we need to:
1. Reduce our headcount .... The above does not exclude Natalie and I have assumed you have not yet spoken to her, so I am not sure what you have in mind in terms of leaving date
2. Lower our location costs (move office".
Mr. Ondruch replied asking Mr. Coldrey to send him last year's bonuses. I find that at this point, Mr. Ondruch had not yet decided bonuses. At the Hearing, he was unable to say exactly when he made the decision regarding bonuses but says it was sometime in February.

36. On 31 January 2017, Mr. Ondruch arranged to meet the Claimant in a local cafe:

36.1 He told her that the Respondent was not doing well and that she should start looking for another job and if she found a job, he would not hold her to her 3 months notice period and if she took a little longer to find a job, he would allow her to stay on past her 3 months notice. He also said he would allow her time off to attend interviews during her notice period.
Mr. Ondruch says *"I do not remember the exact words that I used, but I told Natalie that the Firm could no longer afford to keep her in her role. Due to the significant reduction in the work she had to following [Mr. V-C]'s departure and the significant financial difficulties* ..."[WS 40].
At the Hearing, Mr. Ondruch said "*I told her her employment was being terminated*".

36.2 Mr. Ondruch says she *"took the news well"* and agreed with him [WS41]. She says this came as a total shock and would have expected an initial meeting to warn her and then further meetings before a decision was taken. She denies that she agreed with this decision; it was clear to her that he had made up his mind and there was no point arguing or challenging him. She therefore tried to "*keep things amicable*".

36.3 The Claimant says at that meeting she asked about her 2016 bonus; she says Mr. Ondruch became angry and told her no one was getting a bonus but selected staff may be paid an "*incentive bonus*". She asked if he would consider a redundancy package if she was not to be considered for a bonus; he said he would think about it overnight. Mr. Ondruch does not recall discussing her bonus at that meeting [WS 44].

37. That evening, the Claimant emailed Mr. Ondruch [253 – 254]:
"May I ask that we finalise what will happen financially as quickly as possible and before rumours start around the office, I'm not sure who already knows.
I've just had a call with a few agencies I have a long standing relationship with and roles come up, but are few and far between at my level so ultimately it may take longer and/or salary cut which I'll need to consider.

Although I agree it's ultimately for the best, I'm feeling anxious now so would appreciate not waiting and also be able to let people know as soon as possible I'm agreeably looking.
I know I put a brave face on, but the reality of both at once has hit me and I don't want to be upset or the stress to show while I'm in the office".
Mr. Ondruch forwarded that email to Mr. Coldrey the same evening.

38. Mr. Ondruch says he did not see the point in having any further meetings with the Claimant as she understood the situation and had indicated (at the meeting on 31 January and in her email) that she agreed it was for the best

39. The next communication the Claimant received from Mr. Ondruch was an email on 2 February 2017. Attached to this email was a letter from Mr. Ondruch dated 1 February 2017 headed "Notice – Employment Contract" and stating that her role was redundant and her last day of employment would be 2 May 2017 [263 and 274]. It also states: "*we wish to be supportive of your search for a new job as possible*..." and concludes by thanking her for her contribution and assistance.

40. I have no hesitation in finding that there was no consultation with the Claimant prior to the decision to dismiss. The decision was taken by Mr. Ondruch prior to the meeting with the Claimant on 31 January 2017 and simply communicated to her at that meeting and followed up with a confirmatory email on 2 February 2017. Ms. Bone valiantly submits that there was consultation but this is inconsistent with Mr. Ondruch's own evidence in his witness statement and verbally at the Hearing. With regard to the date when the decision was taken, whilst I have found it was taken prior to 31 January 2017, the precise date is hard to pin down but I find that the decision was taken prior to 17 October 2016 as an of that date, it is clear that it was Mr. Coldrey's understanding that Mr. Ondruch would speak with the Claimant "*as you described before*" [318] it is reasonable to infer, in light of the content of the email and subsequent events, that that conversation was the conversation which eventually took place on 31 January 2017.

41. The Claimant says she spoke to Mr. Ondruch in the office later on 2 February 2017 day and explained to him the financial stress he was inflicting on her as a result of losing her job, not receiving a bonus for 2016 and not receiving a redundancy package. She asked if she could go on "gardening leave" but Mr. Ondruch refused. She says the conversation was "*unpleasant and heated*". He says they met informally about 4 weeks later at the beginning of March 2017. His recollection of this meeting chimes with the Claimant's recollection of the meeting she says took place on 2 February. He says he told that *"there were not going to be any bonuses this year...*" [WS 50]. When this conversation took place is irrelevant to the issues and I make no finding other than that such a conversation did take place.

42. On 3 February 2017, Mr. Ondruch called a meeting of all staff to give a general update [277]. The Claimant was invited but did not attend.

43. Based on the Respondent's poor financial performance in 2016, Mr. Ondruch says no one should have received a bonus. However, he decided to use cash reserves to make bonus payments with the aim of incentivising and retaining key people. He told

staff that he would only be making payments to incentivise people to stay in the business and help turn it around.

44. Between 9 and 14 February 2017 (according to Mr. Coldrey [WS 43(b)]) Mr. Ondruch then had a series of one to one meetings with individual employees; Mr. Coldrey was also in attendance. Mr. Ondruch denies that he paid a bonus to every employee except the Claimant and stressed that he was "*paying bonuses to incentivise key staff over the course of the next year and to stop people leaving to join other businesses"* [WS 61]. Payment of some bonuses were deferred until June 2017.
45. Mr. Ondruch says he considered 12 people for a bonus in 2017. Bonuses were paid to certain people on the basis the business would not function without them and he needed to try to retain them; these included:

45.1 Mr. Coldrey.
45.2 Mr. BP (Assistant Trader) (resigned 26 March 2017 and left 26 June 2017).
45.3 Mr. DM (Trader & Partner in the LLP).
45.4 Miss SP (Operations Assistant/Associate), bonus paid 24 February 2017 (resigned after bonus paid and left 29 June 2017); Mr. Coldrey was unable to recall the amount of the bonus at the Hearing but said it was higher than the previous year. He said it had been his intention to promote SP to be Head of Operations and COO.
45.5 Mr. IK (Investment Analyst): partial bonus paid in February (resigned 27 February 2017 and left 14 April 2017 before balance of deferred bonus due in June 2017)
45.6 VM: bonus paid partly in February and partly in June 2017.

46. Mr. Ondruch says [WS 61] that in addition to himself and the Claimant, he did not make bonus payments to:

46.1 CP (Investment Analyst): Resigned late February 2017 and left 1 March 2017 (referred to as Partner A in Mr. Ondruch's WS para. 61].
46.2 KT (referred to as Partner B) who had left 3 February 2017 [508]
46.3 Mr. DV (referred to as Partner C) who announced his resignation in January 2017 and left 8 May 2017 [508]

47. The Claimant accepts she was not in a revenue generating role. At the hearing she acknowledged that she had no targets and she was in a different role to those involved with the investment fund. However she points out that Miss SP was also not income generating and received a bonus in 2017. In 2015, Miss MP (Financial Accountant), Ms V-W (Investor Relations Associate) and Mr. Coldrey all received bonuses. Furthermore, she herself was not income generating in 2014 or 2015 and yet received bonuses in respect of both those years; at the Hearing she said she does not know how the figures were calculated but understands it was based on the performance of the fund and also her own personal performance. She accepts that the bonus was discretionary but says it is not right for Mr. Ondruch to have singled her out. At the Hearing, she said she was not aware of anyone being paid a bonus who had either left or was working out their notice.

48. The Claimant says it did not occur to her to appeal the decision to terminate her employment, her focus was on getting another job and during her notice period she attended interviews and appointments with various agencies. Between January and April 2017, she had 5 days sickness absence. She says she would let the Respondent know when she was due to attend a meeting; she would email Mr. Coldrey and the Operations Team and add the approximate time out of the office to

Mr. Ondruch's calendar (outlook). Whilst I accept that the Claimant's notice period was difficult and frustrating for both sides, I do not accept that the Respondent had any real concerns about the Claimant's conduct in the absence of any supporting evidence. Mr. Ondruch was obliged to allow the Claimant reasonable time off to look for new work and she understandably did just that and used the time well given that she found new comparable employment starting only a week after she left.

49. The Claimant says "*very soon*" [WS 59] into her notice period, she became aware that the Respondent was interviewing for a Team Assistant to replace her. She says Mr. Coldrey openly conducted interviews in the office and she was also told by a recruitment agency in mid-February that they were recruiting for her replacement.

50. Mr. Coldrey says by February 2017 "*it had become essential*" to replace the investor relations team. He spoke to Mr. DV and on 21 February 2017 emailed Mr. Ondruch [317] as follows:

"I had a chat to [DV] about rekindling the hire process and below are some of my preliminary thoughts regarding the IR/Team Assistant hire:

- *Job spec attached as used by [DV] when he spearheaded the search. Feedback?*
- *Preferred profile? Graduate or someone with experience?*
- *I'd like your feedback on [GE] ... who you interviewed? She was a referral from MSPB. Asking salary was £45k p.a. This will guide me in terms of filtering candidates.*
- *Preferred start date? (How much time overlap with Natalie? Natalie's last day is 02-May).*
- *Shortlist? How many candidates would you like to see?*
- *Should we consider a temp/contract to perm role?*
- *I am happy to pursue our own network in addition to an agency search.*
- *Are you happy to put the search out to an agency?*
- *Should we consider Office Angels on a rolling weekly basis before we make a permanent appointment?*

Prior correspondence below from Davi.
Hopefully this will inform our discussion when we you're [sic] back in the office".

51. Mr. Ondruch replied the same day [322]:
"*lets re-engage with the person from MS first and alternatively I think we need a very junior person with no more than 2yrs experience and a salary of <30k"*

52. On 8 March 2017, a revised Job Spec for the role of Team Assistant was prepared by Mr. DV and Mr. Coldrey [363-364]. The core responsibilities were set out under the following headings:

- *Office Manager*
- *IR Admin*
- *Personal assistant to the PM*
- *Assisting the wider team.*

Also on 8 March 2017, Mr Ondruch emailed Mr. Coldrey [354]:
"*We should start looking for a replacement taking into account 2 weeks of transition with NdV*".
Mr. Coldrey replied [354]:

"*Agreed – I had my first call on this with an agent (Cameron Kennedy) this afternoon. I have passed over the job spec and asked what they will change. They have suggested we can find a good candidate for around £28k p.a."*
Later the same day, Mr. Coldrey emailed a recruitment agent [361]: "*We are looking to recruit at the junior end of the Team Assistant/Office Manager/Pa Market. Our job spec also extends to include junior IR responsibilities".*

53. On Friday 17 March 2017, the Claimant says Mr. Coldrey told her that the quality of the candidates had not been high. Mr. Coldrey accepted at the Hearing that he told the Claimant that they were having difficulty finding a replacement.

54. The Claimant says all the duties listed in the Job Spec [363-364] were essentially duties she performed apart from IR Admin. She therefore believes that at the time the decision to dismiss her was taken, her role was not redundant and Mr. Ondruch timed giving her notice of termination of her employment to deny her a bonus. She says she "*might have considered taking a role at that time even at a lower salary*" [WS 63].

55. In May 2017, Miss CD commenced employment with the Respondent as "Investor Relations Associate". Mr. Ondruch says this role is *"entirely investor relations focussed*" and is not the same as the Claimant's role; the Claimant was not qualified to perform that role. Miss CD's job description [455-455] was created on 17 May 2017 by Mr. Coldrey and states there are two core functions "*Business Development and Investor Relations admin*" and specifies the "qualities of the ideal candidate including "*Relevant experience within alternative investments and the appreciation of what is appropriate in a professional environment is desirable*". It is not in dispute that the Claimant was not offered this role or given the opportunity to apply. The Claimant accepted in oral evidence that this role is wholly different to her role.

56. Having considered the timeline and the emails and job specifications, I find that at the time the decision was taken to dismiss the Claimant and at the time she was informed of that decision and indeed right up until 8 March 2017, the intention was to recruit someone to essentially carry out the Claimant's role. Mr. Ondruch says it was never his intention to replace the Claimant and always intended to carry out personal tasks himself. However, whilst I accept that this is how matters have transpired, I do not accept that this was the intention until sometime after 8 March 2017 when the Respondent came across Miss CD and changed the role.

57. It is not in dispute that when the Claimant left, she had prepared a detailed spreadsheet and handover notes which she reviewed with Mr. Coldrey and Mr. Ondruch. Relations between the Claimant and Mr. Ondruch became strained in her last few weeks.

58. The Claimant's last day in the office was 28 April 2017 and her employment ended on 2 May 2017. She was paid a statutory redundancy payment (SRP) of £2,155.50 [275].

59. The Claimant started new employment the following week with a gap of 3 working days. Her new salary is comparable (£60,000 per annum); there is a bonus scheme in place but she has not yet received a bonus and hopes to be paid a bonus in June.

At the Hearing, she said she was not seeking anything over and above 3 days pay (i.e. £770.76) and £500 for loss of statutory rights by way of a Compensatory Award.

60. A summary of my key findings of fact is as follows:

60.1 The Respondent had no significant concerns regarding the Claimant's conduct at any time whether during her notice period or beforehand.

60.2 The Respondent had a very poor financial year in 2016 and as result a number of staff left and it was necessary to consider how to reduce its cost base and also how to incentivise key employees to remain.

60.3 Around mid-October 2016, Mr. Ondruch decided to dismiss the Claimant and I find that that was on grounds of cost in an effort to reduce overheads following the Respondent's very poor financial performance in 2016.

60.4 Also around that time it was concluded that the Claimant should be replaced with someone on a lower salary but essentially doing the same role as the Claimant. This view did not change until around March 2017. The possibility of the Claimant accepting a lower salary or alternative role was not discussed.

60.5 The Claimant was told she was being made redundant on 31 January 2017; there was no prior consultation. I accept she was in a pool of one. The Claimant did not appeal.

60.6 Bonuses were paid on 24 February 2017. I do not accept that bonuses were "due" to be paid in January 2017; there was perhaps a will on Mr. Coldrey's part to pay bonuses in January [247-248] but the contract does not specify a date and makes it clear that "*the timing of such bonus ... is at the Firm's absolute discretion";* there cannot be said to be any certain due date as a matter of custom and practice given that the dates varied in previous years and in fact in 2016, bonuses were also paid in February .

60.7 Those who had already left or given notice were not paid a bonus including the Claimant.

60.8 The Claimant was not in fact replaced. Miss CD carries out some of the Claimant's duties but it is accepted that she is in essentially a different role to the Claimant. This role was not offered to the Claimant.

SUBMISSIONS

Claimant's submissions:

61. Mr. De Silva submits as follows:

61.1 Dismissal

(i) Reason for dismissal

The email correspondence (17 October 2016, 21 February 2017 and 8 March 2017) shows there was no redundancy situation or planned business reorganisation. The Respondent simply wanted to replace the Claimant with someone else doing very substantially the same role. Mss CD's appointment to the role of Investor Relations Associate does not assist the Respondent as this took place in May 2017 and the documents do not support the notion that this was the sort of role being considered earlier. The evidence shows that the reason for dismissal was a combination of: a desire to recruit into the Claimant's role someone more "*professional, energetic, dynamic*" [318] and to avoid payment of a bonus given the timing. Therefore the Respondent has failed to establish a potentially fair reason (section 98(1) ERA).

(ii) Procedure

The dismissal was in any event unfair procedurally (section 98(4) ERA).

a. Mr. Ondruch accepted in oral evidence that he presented the Claimant with a fait accompli on 31 January 2017; this is consistent with his witness statement. The Claimant did not "agree" with him. It was a bolt from the blue. She did not challenge the decision because she knew Mr. Ondruch had made his mind up. Clearly the Claimant was suitable for the Team Assistant role. In any event the onus was on the Respondent to advise her of her right of appeal.
b. A **Polkey** reduction is not appropriate as it simply cannot be said what would have happened if a fair process had been followed or how long this would have taken. If a **Polkey** reduction is made on the basis of how long a fair procedure would have taken, this would have been at least a month.

(iii) The bonus falls to be paid as part of the Compensatory Award for unfair dismissal; it does not fall within the "**Johnson** exclusion zone"

61.2 Bonus claim

a. The decision not to award a bonus was separate to the decision to dismiss the Claimant and may be pursued as a breach of the implied duty of trust and confidence (**Takacs v Barclay [2006] IRLR 887 QB**).
b. On the exercise of discretion, the question for the Tribunal is whether the decision-making process was lawful and rational in the sense that the decision was made rationally as well as in good faith and consistent with its contractual purpose. The Tribunal should consider whether (i) the right matters have been taken into account in reaching the decision and (ii) whether the decision is so outrageous that no reasonable decision-maker could have reached it. The burden of proof rests with the Claimant but if the Claimant shows a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were (**IBM v Dalgleish [2017] EWCA Civ 1212**).
c. The wording of clause 6.2 of the Contract demonstrates the contractual purpose of the bonus was to reward past performance: "*Any annual discretionary bonus will be based on the relevant calendar year (or part thereof)* ...".
d. The Respondent's decision not to pay the Claimant a bonus is "*opaque*" and not assisted by its failure to comply with its disclosure obligations. There is no evidence when the decision was made. Mr. Ondruch alleges he was not proposing to pay bonuses in January 2017 and only decided to do so in early February 2017; but this is not supported by emails between Mr. Ondruch and Mr. Coldrey in January 2017 [247 and 250].
e. The Respondent's rationale for bonus decisions with regard to payments to others is also opaque and inconsistent as to whether it was based on a combination of past performance and the need to incentivise staff or just the latter. The suggestion that bonuses were only paid to incentivise staff who stayed only makes sense if the bonuses were deferred but this did not happen in all cases, for example Miss SP and Mr Philips. There is no evidence why Miss SP was so valuable. It is reasonable to infer that the bonus was performance based and even if "incentivisation" was a factor, it was irrational not to pay the Claimant any bonus given the wording of clause 6.2. when other staff were paid bonuses.
f. Bonus was "due to be paid" in the January 2017 payroll as it had been in previous years. It may have been paid later in previous years but only because it was late. The Claimant was not on notice in January 2017 and therefore when the bonus was due so payment cannot be avoided on the basis that she was on notice.
g. The Claimant claims £30,000 in respect of her bonus.

Respondent's submissions:

62. Ms Bone submits as follows

62.1 Dismissal

(i) Reason for dismissal:

The reason for dismissal was redundancy, alternatively some other substantial reason (SOSR) namely business reorganisation. The Claimant's role as Executive Assistant/PA was taken out of the business and an entirely different role was created of Investor Relations Associate. The Claimant's duties have been distributed across several members of staff and personal assistant tasks previously performed by the Claimant for Mr. Ondruch's family are no longer carried out by anyone at the Respondent.

(ii) Procedure

a. The Claimant was in a pool of one so there was limited scope for consultation. No unfairness arises as consultation would have made no difference (**Duffy v Yeomans [1995] ICR CA)**. The Claimant did not appeal or challenge her redundancy until July 2017 when she instructed solicitors. If the dismissal was unfair for lack of consultation, a formal period of consultation would have taken 1-2 weeks (**Polkey**)

b. Even if the Claimant had been qualified for the new role of Investor Relations Associate, the salary was far below anything that would have been acceptable to her. It would not have been a suitable offer of alternative employment and the Respondent had no duty to consider her for it.

62.2 Bonus claim

(i) Being on notice, the Claimant had no entitlement to a bonus as clause 6.3 of the Contract expressly provides that there is no entitlement.

(ii) There was no breach of the implied term of trust and confidence; the Respondent did not fabricate the reason for the Claimant's dismissal and her dismissal was not timed to frustrate her right to a bonus. It is well-established by the Privy Council in **Reda v Flag [2002]** that exercise of an express contractual power to dismiss does not breach the implied term of trust and confidence. **Reda** prevails over **Takacs** which is an interlocutory decision of the High Court.

(iii) Even if there was a breach of the implied term of trust and confidence (which is denied), this does not assist the Claimant:

a. The alleged breach is within the Johnson exclusion zone as it is intimately connected with the dismissal and the right not to be unfairly dismissed. **Rawlinson v Brightside Limited [2017]** EAT does not assist the Claimant as it is materially different on the facts. Essentially, if an employer dismisses in a bad way, the unfairness is "scooped up" by the ERA but bonus is not recoverable as part of the Compensatory Award for unfair dismissal.

b. In any event, there is no damage arising from that breach as she has suffered no loss by being told that she is redundant as opposed to being told she was being dismissed without any reason being given.

c. Even if at the date the bonus awards were decided and paid the Claimant was in a period of consultation and not on notice, there would still have been a good reason not to pay the Claimant a bonus as entitlement would be discretionary (clause 6.2 Contract) and Mr. Ondruch's guiding principle was the need to retain mission critical staff.

RELEVANT LAW

Unfair dismissal:

63. **Reason for dismissal**

63.1 **S98 (1) ERA:**

"In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or if more than one the principal reason) for the dismissal

(b) that is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

A reason falls within subsection 2 if it is that the employee was redundant".

63.2 **S139(1) ERA**:

(i) *"... an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place

where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish".

(ii) It is accepted in this case that only s139(1)(b)(ii) potentially applies. Guidance as to whether or not an employee is redundant is given in **Safeway Stores plc v Burrell [1997] ICR 523 EAT**. A Tribunal must decide if the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to cease or diminish and, if so, was the dismissal caused wholly or mainly by the diminution? A restructure or reorganisation of a business which does not entail a reduction in the number of employees doing work of a particular kind may not create a redundancy situation. Where for example, an employee is dismissed by an employee of lower status, the reason for dismissal will not be redundancy but it may be for some other substantial reason (**Pillinger v Manchester Area health Authority 1979 IRLR 430 EAT).**

63.3 To amount to "some other substantial reason" (SOSR) there must be a finding that the reason could justify dismissal; the employer is required only to show that the substantial reason for dismissal was a potentially fair one; it must be a substantial reason and not frivolous or trivial or based on an inadmissible reason such as race or sex.

64. **Reasonableness of Dismissal:**

64.1 **S98(4) ERA:**

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

(b) shall be determined in accordance with equity and the substantial merits of the case".

64.2 In deciding whether an employer has acted reasonably in dismissing (whether for for redundancy or SOSR), a tribunal's function is not to ask whether it would have thought it fairer to act in some other way; the question is whether the decision lay within the range of conduct which a reasonable employer could have adopted.

64.3 "*In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment with his own organisation*" (***Polkey v AE Dayton Services Ltd*** [1988] ICR 142). Consultation will only be meaningful when it happens at a formative stage rather than when there is a fait accompli. (***R V British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price*** [1994] IRLR 72).

Consultation is also usually required in the context of a reorganisation. Where no consultation has taken place, the dismissal will normally be unfair unless the tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances. It is a question of fact for the tribunal to consider whether consultation was so inadequate as to render the dismissal unfair. Lack of consultation in any particular respect will not automatically lead to that result. The tribunal must view the overall picture, to the date of termination. The essential obligation is to give the employee the opportunity of being consulted.

64.4 Whether the employer has reasonably explored all alternatives to dismissal may be relevant to the question of reasonableness.

65. **Compensation for unfair dismissal:**

65.1 In addition to a basic award (section 119 ERA), **Section 123(1) ERA p**rovides for a compensatory award**:**

"*Subject to the provisions of this section ... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*"

65.2 **Section 123(4) ERA** requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The tribunal is obliged to consider the question of mitigation in all cases.

65.3 **Polkey**:

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event, for example an employee would not have accepted fundamental changes, in which case the future period of loss is the period during which consultation would have occurred. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

66. **Breach of contract claim**

The Claimant's claim for bonus is a claim for breach of contract and is permitted by article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 provided the claim was outstanding on termination of her employment.

CONCLUSIONS

Unfair dismissal claim:

67. Applying the relevant law to the findings of fact to determine the issues, I have concluded that the Claimant was unfairly dismissed.

68. The Respondent has shown a potentially fair reason for the Claimant's dismissal (s98 ERA), specifically SOSR. The position must be viewed at the point the decision to dismiss was taken by Mr. Ondruch and I have found that at that time it was in Mr. Ondruch's mind to essentially replace the Claimant with someone on a significantly lower salary in order to reduce overheads following a terrible business year in 2016. This does not meet the definition of redundancy but I accept that the decision was for SOSR justifying dismissal; the reason was substantial and not frivolous or trivial or based on an inadmissible reason such as race or sex.

69. However, I conclude that the dismissal was unfair as the procedure (or lack of procedure) adopted by Mr. Ondruch did not fall within the range of conduct a reasonable employer could have adopted in two respects:

69.1 I have found that Mr. Ondruch made his decision to dismiss the Claimant prior to the meeting on 31 January 2017 and that there was no consultation with the Claimant.

69.2 I have also found that at the relevant time (i.e. when the decision to dismiss was taken), Mr. Ondruch was considering recruiting someone to carry out essentially the Claimant's role at a much lower salary but did not even discuss it with her.

70. Compensation

70.1 The Claimant has received a payment equivalent to a Statutory Redundancy Payment and this therefore extinguishes any entitlement to a Basic Award.

70.2 With regard to a Compensatory Award the Claimant has helpfully clarified that she is only seeking £770.76 (3 days pay) and I have no hesitation in awarding her this sum subject to any **Polkey** deduction which I will consider below. The Respondent has wisely not suggested that the Claimant has failed to mitigate her loss and the ACAS code does not apply.

70.3 Mr. De Silva submits that the Compensatory Award should include any damages for breach of the implied duty of trust and confidence, specifically the Respondent's timing of giving notice to the Claimant which triggered clause 6.3 in the Contract. I do not agree. In **Johnson** the House of Lords dealt with the interface between (i) claims by an employee for damages at common law for breaches by his employer of terms of the employment contract and (ii) claims by an employee for statutory compensation under the ERA for unfair dismissal. In **Johnso**n, the contract claim was also for breach of the implied duty of trust and confidence. The effect of **Johnson** was to exclude any recourse to the common law by way of a bid to recover damages in unfair dismissal proceedings.

"27 … An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal."

Applying this to the Claimant's case, the loss that she suffered (if any) by reason of not being awarded a bonus was not caused by, or a consequence of, the dismissal but by the Respondent's antecedent breach which arose before the dismissal and was not consumed by it.

70.4 With regard to **Polkey**, it is unlikely that anything the Claimant said during a consultation process would have made any difference but I cannot conclude that it would have been futile. I believe consultation would have taken 2 weeks in an organisation of this size. Given that the Claimant found new employment so swiftly her loss is in any event limited to 3 days pay i.e. £770.76.

71. I therefore conclude that the Claimant's dismissal was unfair and she is entitled to a Compensatory Award of £770.76 and a sum of £500 for loss of statutory rights.

72. Turning to the Claimant's claim for breach of contract:

72.1 I do not accept that the Claimant had any entitlement to bonus under clause 6.2 of the Employment Contract having been given notice of termination of her employment prior to the due date. The relevant contractual provision is clause 6.3 of the Contract and I must concentrate on construing the contract as it is, rather than speculating about what it would have been sensible or just for the parties to agree. I conclude that clause 6.3 is clear and unambiguous; once notice is given – by either side and for whatever reason – an employee is not entitled to even be considered for a bonus payment. The question of discretion does not arise. Therefore there was no breach of clause 6.3 when the Respondent declined to pay the Claimant a bonus in February, notice of termination having been given beforehand.

72.2 It is not in dispute that the Claimant's contract of employment contained an implied term that the Respondent would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. The Claimant claims damages for breach of the implied duty of trust and confidence in that the Respondent timed termination of her employment in such a way as to deliberately deprive her of a bonus.

(i) Mr. De Silva relies on the High Court's decision in **Takacs** in which it was held that the claimant in that case was *"... entitled to pursue his claim that it was an implied term of his contract that the employers would not terminate his employment in order to avoid the obligation to make ... additional conditional payments* ...". However, this was an interlocutory hearing and at para. 70 it is clear that there was no conclusion that the claim was likely to succeed, only that it was "*inappropriate for a final determination ... at an interlocutory hearing*".

(ii) Ms. Bone relies on **Reda** in which the Privy Council held that the employees' employment was lawfully terminated in accordance with a contractual provision giving the employers an express and unrestricted power to terminate the employment without cause at any time during the contract period. The very nature of such a power is that its exercise does not have to be justified and it was not accepted that the express provision relating to termination was qualified by the implied term of trust and confidence. The implied term of trust and confidence must yield to the express provisions of the contract. The more recent cases of **Braganza v BP Shipping Ltd [2015] UKSC 17** and **Patural v DG Services (UK) Ltd [2015] EWHC** do not alter this or assist the Claimant as both those cases concerned the exercise of an employer's discretion.

(iii) I am bound to follow **Reda** as although it predates **Takacs**, it is a final determination on the merits and a decision by the Privy Council. In the Claimant's case, the

Respondent exercised an express and unrestricted power to terminate her employment on three months' notice. This triggered clause 6.3 and consequently excluded her from being eligible for a bonus payment. In accordance with **Reda**, I must conclude that this was not a breach of the implied term of trust and confidence but a consequence of what the parties had agreed.

72.3 Although it is not necessary to consider clause 6.2, for the avoidance of doubt I agree with Ms. Bone that even if at the date the bonus awards were decided and paid the Claimant had been in a period of consultation and not on notice, on the balance of probabilities she would not have received a discretionary bonus as Mr. Ondruch's objective was to retain "mission critical" staff and it was reasonable to conclude that the Claimant did not fall within that category.

73. In summary, the Claimant's claim for unfair dismissal succeeds and she is awarded £770.76 compensatory award and £500 for loss of statutory rights. Her claim for breach of contract fails and is dismissed.

Employment Judge Mason on 7 February 2018