THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

ANDREW GHIGLIERI

Claimant

AND

SYSTECH GROUP EMPLOYEES LIMITED

Respondent

ON: **24 May 2018 &**
25 May 2018 (In Chambers)

Appearances:

For the Claimant: Mr G Anderson, Counsel
For the Respondent: Mr R Paines, Counsel

RESERVED JUDGMENT ON REMISSION FROM THE EAT

1. The constructive dismissal and wrongful dismissal claims succeed.

2. Any compensation for unfair dismissal is subject to a *Polkey* deduction of 60%.

3. The respondent's employer contract claim fails and is dismissed.

4. The matter will be listed for a remedy hearing on a date to be advised.

REASONS

1. This was a case of constructive dismissal and wrongful dismissal remitted from the EAT to the same tribunal by its judgement dated 7 June 2017. The terms of that remission are referred to below.

2. The EAT did not disturb the tribunal's original findings of fact albeit some additional finding may be necessary. The existing findings will therefore be relied upon where relevant to the remitted issues. Any existing findings repeated verbatim in the judgment will be shown in bold and italics. The parties agreed that no additional witness evidence was required for the remitted hearing and in those circumstances, the hearing relied on the original signed statements and oral testimony of the witnesses. In relation to the latter, the parties have agreed a transcript of the proceedings and I am satisfied that it accords with my own contemporaneous notes.

3. The original bundles were relied upon and I adopt the same page referencing to them as before. In addition, there was a supplementary bundle containing, in the main, documents produced in the litigation. Page references from the supplementary bundle will be prefixed with an "S".

The Issues

4. The issues for this hearing are set out in the EAT's order of 7 June 2017 [S171-172] and are more specifically referred to in my conclusions below.

Submissions

5. The parties' representatives have provided detailed written submissions, which they spoke to at some length. These have been carefully considered, along with the authorities referred to. They are referred to, as appropriate, in the conclusions below.

Conclusions

Did the claimant have a contractual entitlement to be paid his annual guaranteed bonus on a quarterly basis

6. It is common ground that by a contract variation dated 13 January 2012, the claimant was contractually entitled to a guaranteed annual bonus of £32,000. [287]. The contract was silent on the timing of such payments but they were routinely paid by 4 annual instalments of £8,000.

7. ***In December** [2014], **the claimant raised a query with the respondent's finance department about a shortfall in his bonus payments.[687] In response, he received a letter from Simon Jones, Director, informing him that there had been a payroll error which had led to a shortfall in his payments of £31,701.75 in total, which would be paid in 3 equal monthly instalments between January and March 2015. [686]…….***

8. The remitted issues relates only to the guaranteed bonus and not the overseas allowance. Hence, of the figure of £31,701.75 referred to, only £16,000 is in issue. I should point at that although in my original findings I used the term "*shortfall*" in reference to the figure of £31,701.75, that is not a term used in Simon Jones' letter. He refers to it as the total sum due to the claimant.

9. ***The claimant was unhappy with this arrangement and on 5 January 2015 sent an email to Simon Jones insisting that all sums due to him be re- paid before the end of January [687]***.

10. On 9 January 2015, Simon Jones replied to the claimant stating that his understanding was "*that the terms of when quarterly bonuses are paid… remain at the discretion of the company*". [692] This was a reference to the timing of the payment rather than the entitlement to the sums claimed.

11. The claimant remained dissatisfied with this response and on 15 January 2015 emailed Simon Jones to again insist on the payment being settled by the end of January 2015 [696]. ***Mr Jones' short email response on 19 January 15' was: "I am afraid I have nothing to add to my previous letter".*** **[696]**

12. ***The claimant contends that this email response from Simon Williams was the final straw and on 22 January 2015, he tendered his resignation. In his letter he alleged a breach of the implied term of trust and confidence in requiring him to relocate to the UK and breaches of a number of express terms relating to payment of expenses, bonuses and the overseas allowance. [699-702]. That same day, the claimant accepted an offer of temporary employment with Axima on the Omega contract. [703]***

13. It was submitted by Mr Paines, counsel for the respondent, that the claimant had the burden of showing that there was an implied term that he was entitled to receive bonus payments of £8,000 every 3 months and that it was a high bar in law which he could not make good. The respondent accepted that the bonus was routinely paid in this way but submitted that this was done as a matter of administrative practice rather than a legal obligation. It was submitted that where the contract was silent on the timing of payments, as this one was, the natural conclusion to draw was that this was a matter within the respondent's discretion. Relying on the authorities: Park Cakes v Shumba Ltd [2013] IRLR 800, para 36f and Solectron Scotland Ltd v Roper [2004] IRLR 4, para 22, it was submitted that the claimant would not be able to displace that natural conclusion if the respondent's practice of paying the bonus quarterly, when viewed objectively, was just as consistent with the exercise of a discretion as it is with the exercise of a contractual obligation. I disagree. The guaranteed bonus was for a fixed amount annually and formed part of the claimant's normal remuneration. It would be unusual for an employer to have a contractual obligation to pay a defined amount in wages but at the same time have a complete discretion as to when that payment was made.

14. It was submitted by Mr Anderson, counsel for the claimant, that the entitlement to be paid the bonus quarterly was implied by custom and practice. It was submitted that the respondent's conduct; in consistently paying the bonus quarterly; describing the payment in documents as a "quarterly bonus" and explaining the delay in paying the claimant's bonus as an error rather than the exercise of discretion, pointed to the existence of a legal obligation. Para 36 of Park was also relied on.

15. I have considered the reference to payroll errors in Simon Jones' letter of 5 January 2015. [686]. The errors are said to be in respect of the non payment of the claimant's quarterly bonuses. That the bonuses are described as quarterly is, in my view, no accident. The quarters are identified by specific periods - Q1 (1 April - 30 June 2014) and Q2 (1 July - 30 September 2014). The respondent had routinely paid the claimant

for Q1 and Q2 in August and November of each year respectively. The respondent failed to pay the claimant's Q1 and Q2 bonuses in August and November of 2014. Crucially, the respondent describes its actions in failing to do so as an error rather than an exercise of discretion.

16. In all the circumstances, I am satisfied that the respondent by its actions has evinced to the claimant that he is entitled as of right to receive his bonus quarterly. Mr Jones' subsequent assertion, in his email of 9 January 15', that the timing of payment of the bonus (which he still referred to as quarterly) remains at the discretion of the company does not alter my view as I am satisfied that the entitlement had crystallised into a contractual term by then. [692]

17. I find that the right to be paid the bonus quarterly was a term of the Claimant's contract implied by custom and practice.

If there was such a contractual entitlement, was the respondent in breach of contract by not paying the bonus on a quarterly basis

18. It was submitted for the respondent that the claimant had asked for payment of the said bonus to be deferred and therefore any entitlement to be paid it by quarterly instalments had been waived. The Respondent's evidence relating to this is at paragraph 51 of the witness statement of Robert Chapman, Company Director [S52]. That states:

"*In April 2014 AG (*the claimant*) requested that payment of his overseas allowance should be deferred to a later date, not specified at the time of the request. He also requested deferred payment of discretionary bonus payments for Q1 and Q2 of the 2014/2015 financial year. It appears AG requested these deferrals in order to minimise his income at that time for the purpose of negotiating the settlement agreement with his ex-partner. It is also clear that he sought to reduce the deductions from his earnings which would be made under an order for deductions made by the Child Support Agency/Child Maintenance Service……."*

19. This was disputed by the claimant. He claimed that the request for deferment related to a separate type of bonus – the overseas allowance (also referred to as the overseas bonus or Europe bonus) and not to the guaranteed bonus. At paragraph 133 of his witness statement, he says that whilst he had a conversation with Simon Jones in early 2014 about the possibility of deferring certain payments, he told him that this was not possible. Simon Jones did not attend the original hearing so was not in a position to dispute this. However in the bundle is an email chain dated 15 April 2014 in which the claimant queries with Simon Jones the gross salary figure on his P60 for the tax year 2013/4. He writes: "*I asked Bob to defer my annual overseas bonus and even including this it is higher than previous years, hence my enquiries*. *Can I please talk to someone about this as I am dead with the CSA on this basis!!!"* [419]. The email supports the claimant's case that the request for deferral was in respect of the overseas allowance only.

20. If there was an agreement to defer the bonuses for Q1 and Q2, as claimed by Bob Chapman, Simon Jones (who would have known of such an agreement) would not have described the non payment of the bonuses as an error and would have reminded the claimant of the agreement when responding to his demand for immediate payment.

21. I have considered the respondent's submission that the claimant did not raise the issue of non payment before January 15 and that this was consistent with it having been deferred. My finding on liability was that the claimant raised the issue in December 14'. [para 36 liability judgment] At paragraph 128 of his witness statement the claimant explains that because of the various components to his pay and the various deductions, it was hard for him to keep track of his income and what he was contractually owed and that it was only when he saw that his salary for December 14' was lower than expected and queried this with the finance department, did he become aware of the situation. Although that is surprising, it is not implausible and I accept the claimant's evidence on this.

22. Taking all of the above matters into account, I find that there was no agreement to defer the claimant's bonus payments for Q1 and Q2. The entitlement to be paid the bonuses quarterly had not been waived and the respondent was therefore in breach by not having paid the bonuses when they fell due.

    Was the Claimant in breach of the implied term of trust and confidence by not paying the bonus on a quarterly basis, if obliged to do so

23. It was submitted for the respondent that in this case there was a genuine dispute between the parties as to whether the timing of the payment was contractual or discretionary and in those circumstances, if there was a breach of contract, it was not a fundamental one. Financial Techniques (Planning Services) Ltd v Hughes [1981]IRLR 32. It was submitted for the claimant that the tribunal was not in a position to assess the genuineness of the respondent's position as Simon Jones was not called to give evidence. Further, the breach was repudiatory as it went to the heart of the wage/work bargain and there was a determined resolution on the part of the respondent not to comply and a long period of non compliance.

24. The Hughes case very much turns on its own facts and is distinguishable from the present case. Hughes was concerned with an anticipatory breach of contract in circumstances where all the employer had done was propose action based on its genuine but mistaken view of the contractual position. Our case concerns an actual breach. In any case, Hughes does not establish a general principle that a genuine but mistaken belief about the contract can never be repudiatory. Whether there has been a repudiation of the contract will depend on the circumstances and the consequences of that mistaken belief. I agree with Mr Anderson's submission that the breach in our case went to the heart of the wage/work bargain and therefore the root of the contract. There was a long period of non compliance, causing the claimant serious financial difficulties – he refers in one of his emails to being put into overdraft. The situation was compounded by the respondent's refusal to adjust its position. Simon Jones made no attempt to explain to the claimant the basis of his "understanding" that the timing of the bonus payment was discretionary even though he knew that the claimant disagreed and that, the bonus had been paid quarterly as a matter of routine. Neither was an explanation provided to the tribunal through any of the respondent's witnesses. By his subsequent email to the claimant: "*I'm afraid I have nothing to add to my previous letter"* [696] Mr Jones was closing down any further debate on the matter thereby evincing an intention not to comply with the contractual term. There was no reasonable or proper cause for the respondent to take that position and I am satisfied that the respondent's attitude amounted to a breach of the implied term of trust and confidence.

Did the respondent breach the implied term of trust and confidence by i) offering Omega the services of Ian Sisley at the same rate as was being charged for the claimant at the time that the respondent terminated the claimant's assignment with Omega, citing commercial grounds as the basis for doing so; and/or ii) inviting Omega to pay higher rates for the claimant but deciding to terminate the claimant's assignment before Omega had given its answer in that regard

25. It was submitted for the claimant that his assignment in France was terminated in order to procure his resignation or otherwise secure his departure from the Respondent. The matters at i) and ii) are identified as matters that support that contention.

26. Dealing first with item i), one of my conclusions at paragraph 59 of the liability judgment was that the reason behind the respondent's renegotiation of the Omega contract was because it was not profitable. I have reviewed that conclusion in light of the matters at i) and ii) above.

27. As stated paragraph 17 of the liability judgment: "***The profit to the respondent would be the differential between the client charge and what it paid to the claimant in salary and expenses. It is common ground that the profit margin the respondent sought on its contract assignments was 35-40%. This was not going to be achieved based on the claimant's assignment alone but it was anticipated that the claimant would develop further business opportunities on the project so that additional contractors could be brought in***".

28. From the calculation at paragraph 33 of Bob Chapman's statement, which in turn was based on the figures at [556], the contract was running at a loss from the outset. Bob Chapman told the tribunal that the hope was that the claimant would create an opportunity to get others onto the project and create profit that way, otherwise it was not commercially viable. [S229-230, 233]. That did not happen.

29. The claimant's daily charge out rate under the Omega contract was 1050 euros (770 base plus 280 expenses). It is important to note that the 280 euros was not the claimant's expense allowance. Bob Chapman told the tribunal that although 280 euros was what the respondent charged the client for the claimant's daily expenses, this did not necessarily reflect the expenses actually incurred by the claimant or paid to him by the respondent – they could be higher or lower and the respondent's profit margin depended upon which end of the spectrum the claimant's actual expenses fell. As is clear from the liability judgment, the claimant's expenses were an ongoing issue over the course of the contract.

30. The proposal put to the client in November 2014 was that the contract be renegotiated at 1300 euros per day (1150 base plus 150 expenses). The respondent said that those figures would have put the contract into profit, albeit not at the desired 35% margin. [S234]. More importantly, it would also have required the claimant to agree a 47% reduction in his expenses. Earlier attempts to negotiate a reduction in expenses with the claimant had been unsuccessful.

31. ***The client was not prepared to agree the respondent's proposal and on 13 November 14' the respondent served 4 weeks' notice of termination of the***

contract. At the same time, it gave the client permission to approach the Claimant with a view to offering him direct employment on the contract, if it so wished [640]

32. It was submitted for the claimant that Mark Woodward-Smith's email was evidence of a conspiracy to push the claimant out and that the respondent put a proposal to the client knowing that it would not be accepted, thereby giving it an excuse to remove the claimant from the role.

33. On 9 December 2014, Bob Chapman proposed to Omega that Ian Sisley take over the Claimant's role from 2 January 2015 on the same terms and conditions currently in place for the Claimant [677]. The first question I have asked myself is whether that offer undermines the respondent's claim that the renegotiation was because the contract was unprofitable. The respondent's evidence was that, because Ian Sisley was a French resident, his expenses would have been lower than the claimant's, therefore the profit margin on the contract would have been higher. I was not provided with details of Ian Sisley's expenses, but he told the tribunal that because he lives in France he did not require the respondent to pay for flights home. Presumably, he would not require an overseas allowance either. Also, it is clear from my findings at paragraph 28 of the liability judgment that the respondent felt that the claimant's plan to base himself permanently in France whilst retaining his UK resident status had adverse tax (and therefore financial) implications for it. No such consequences arose in respect of Ian Sisley and that was likely to result in a cost benefit to the Respondent. Ian Sisley was not directly employed by the respondent – He was a consultant working through his own company. That arrangement may also have had its benefits from the respondent's viewpoint. That much is suggested in the Woodward-Smith email where he says that the claimant could be encouraged to contract through a vehicle such as another consultancy or company if the client would not agree to the increased rates. [571].

34. Taking all of this into account, I find that the decision to offer Ian Sisley as an alternative to the claimant was for genuine commercial reasons.

35. Turning to item ii), it was submitted for the claimant that the respondent's decision to give notice on the Omega contract before the negotiations with the client were concluded was an indication that the respondent was not interested in the client's position and was going to terminate the contract regardless, as a means of getting rid of the claimant. It is far from clear to me that the negotiations were active prior to notice being given. According to the transcript of Ian Sisley's evidence, the client had not given a final view on whether he would raise the fee but had said that the respondent was too expensive and needed to reduce its fee (it is unclear whether that was a reference to the existing fee or the proposed fee) [S246]. Either way, Ian Sisley said that he had tried to get hold of the client to discuss how they move forward but was unable to do so. That is confirmed in an email he sent to Mr Woodward-Smith dated 12 November 14'. [638]. I accept Mr Sisley's evidence on his communications with the client. There is nothing in this sequence of events that would lead me to conclusion I am being invited to reach by the claimant. Again, it seems to me that the timing of the notice was dictated by the commercial reality of the situation. It seems from what happened after notice was served that it created the impetus for further negotiation between the parties as the respondent agreed to the client's request for an extension of the contract until the end of January to allow further negotiations to take place [672]. That belies the claimant's suggestion that the respondent wanted to terminate the contract come what may.

36. Having now reviewed my conclusion at paragraph 59 of the liability judgment in light of the matters at i) and ii) above, they are unchanged. I am satisfied that the respondent had reasonable and proper cause for its actions in relation to the termination of the Omega contract and its actions did not amount to a breach of the implied term of trust and confidence.

Did the claimant resign in response to the breaches?

37. ***For personal reasons related in large part to the breakdown of his relationship with his partner and child custody issues, the claimant decided to sell his property in the UK and base himself in France for the foreseeable future. The respondent was aware of this decision but no changes were made to the claimant's contractual arrangements as a result.***

38. It was submitted by the respondent that the reason for the claimant's resignation was that he had made a new life for himself with a new partner in Aix-en-Provence and was not prepared to accede to the respondent's request that he return to the UK. To that end, he had secured direct employment with Omega and having done so, chose to resign from the respondent, using the bonus situation as a convenient pretext.

39. It was submitted for the claimant that his resignation was in response to the various alleged breaches identified in his resignation letter, the failure by the respondent to pay his bonus payments timeously being the last straw act.

40. It is settled law that where an employee has mixed reasons for resigning, the resignation will be a constructive dismissal if the repudiatory breach was a substantial part of those reasons. I have been referred by Mr Anderson to the recent case: United First Partners Research v Carreras [2018] EWCA Civ 323, in which Underhill LJ says at paragraph 45:

As to (a), the fact that there were other reasons why resigning was attractive to the Claimant is not inconsistent with his having done so in response to Mr Mardel's conduct on 14 February: as noted at para. 40 above, it is well-established that it is sufficient if the repudiatory breach in question is part of the reason for the employee's resignation. The position would be different if Mr Mardel's conduct was a mere pretext because the Claimant was going to resign anyway, at or about the same time, because his wife was moving to America; but that would be a very strong finding, which I cannot read the Tribunal as having intended to make. And even if that was the intended finding it would be hard to reconcile with the sequence of events found by the Tribunal, where the Claimant's resignation seems clearly to be at least in part a response to Mr Mardel's conduct. The fact that the Claimant might in the next few months have been moving to America – on his evidence, once his personal injury claim was resolved – would be very relevant to the quantum of his claim, but that is a separate matter.

41. I consider it more likely than not that the claimant's changed domestic arrangements were a major factor in his decision to resign. However, I do not consider it to be the sole reason and I accept the claimant's evidence that Simon Jones' refusal to pay his bonuses timeously was the last straw and a further and substantial reason for resignation.

Fairness

42. It was submitted by the respondent in the alternative, that if the claimant was dismissed, then it was for "some other substantial reason" (SOSR) i.e. the respondent's mistaken belief that it had a discretion as to the timing of bonus payments. It was submitted for the claimant that at the liability hearing, the respondent had conceded that if there was a constructive dismissal, it was unfair. In those circumstances, the respondent should not be allowed to withdraw that concession by seeking now to argue SOSR. The respondent, in reply, submitted that as the matter had been raised by the EAT as an issue on remittal, it was properly before the tribunal. I disagree. Paragraph 2 of the EAT order makes clear that it was not one of the issues remitted on appeal but one of the additional matters that the tribunal may (my emphasis) wish to consider and decide upon. In light of the respondent's previous concession and the fact that there is no evidence before the tribunal on matters relevant to section 98(4) Employment Rights Act 1996, I have decided not allow this argument.

Contributory Fault

43. It was submitted for the respondent that if there was an unfair dismissal, any compensation should be reduced because of the claimant's contributory fault. The conduct relied upon is set out at paragraph 106 of the respondent's original submissions. In essence, it argues that the claimant's attitude towards his expenses was unreasonable and amounted to culpable and blameworthy conduct. [S134]. In my judgment I have commented, in passing, on the disproportionate amount of time the claimant appeared to spend arguing about expenses. I also found in the liability judgment that Mark Woodward Smith was exasperated by what he viewed as the claimant's unreasonable expenses demands. However, I made no finding that the claimant's expenses demands or his approach towards expenses was unreasonable, neither is it possible for me at this juncture to make such a finding without further evidence. In those circumstances, I am not satisfied that there are any just and equitable grounds to reduce compensation for contributory fault.

Polkey

44. It was submitted for the respondent that any compensation due to the claimant for unfair dismissal should be reduced as the claimant would or might have been fairly dismissed in any event for redundancy. For the reasons stated above, the claimant's position on the Omega contract would have legitimately come to an end, regardless of the repudiatory breach. That, of itself, does not mean that the Claimant's employment would have come to an end. Over the course of his employment the claimant had undertaken several projects for the respondent in Europe, lasting between 9 weeks to 18 months, and there is no reason why he could not have been redeployed. However, it is unlikely that the respondent would have redeployed him in France as it evidence at the liability hearing, which I accept, was that it did not have a sufficient flow of commissions in France to make that a realistic possibility [BC – para 31]

45. The respondent had instructed the claimant to return to the UK pending further assignment but the claimant did not want to do so. Although an alternative assignment had not been identified, it was no part of the respondent's case on liability that the claimant was at risk of redundancy and I am therefore unable to speculate on whether there was any chance of that happening.

46. As indicated above, the claimant's resignation was in part due to his changed domestic circumstances. Given the choice between returning to the UK, where he no longer had a base, and working directly for Omega, which was an option made available to him at the time (and which he ultimately took up) and which suited his changed domestic circumstances, I consider it likely that he would have chosen the latter and resigned from the respondent and left its employment on expiry of the respondent's contract with Omega, at the earliest, or at the end of his notice period, at the latest. I put that likelihood at 60%. Compensation in respect of unfair dismissal is reduced accordingly.

Judgment on remitted matters

47. My judgment is that the claimant's constructive dismissal claim succeeds.

Wrongful dismissal

48. In light of my judgment on constructive dismissal, my original judgment on wrongful dismissal is revoked and substituted with a finding that the wrongful dismissal claim succeeds.

Employer's contract claim

49. In light of my judgment on constructive dismissal, the judgment on the employer's contract claim is no longer sustainable in light of the respondent's repudiatory breach. The judgment is therefore revoked and substituted with a judgment in the claimant's favour.

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Employment Judge Balogun
Date: 3 August 2018