EMPLOYMENT TRIBUNALS

Claimant: Mr Ben Summerfield

Respondent: ITEC Connect Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at:	**Bristol (remotely by VHS)**
On:	**21st & 22nd March 2022**
Before:	**Employment Judge Knowles, sitting alone**
Representation:	
For the Claimant:	**Ms Rachel Levene (Counsel)**
For the Respondent:	**Mr C Kelly (Counsel)**

RESERVED JUDGMENT

1. The claimant's claim for breach of contract in relation to the 2020/2021 bonus is well founded and succeeds. The respondent is ordered to pay to the claimant damages in the net sum of £18,750.

2. The claimant's claim for unlawful deductions of wages is not well-founded and is dismissed.

3. The claimant is awarded compensation for unfair dismissal as follows:

    a. a basic award of £8,608;

    b. a compensatory award of £74,449.39 which includes compensation for loss of statutory rights of £500;

    c. No recoupment of benefits is necessary under the Employment Protection (Recoupment of Benefits) Regulations 1996.

4. In total therefore, the respondent is ordered to pay to the claimant the sum of £101,807.39 to be grossed up as appropriate.

REASONS

Introduction

5. By claim form dated 20th May 2021 the Claimant brought a complaint of unfair dismissal, breach of contract and unlawful deductions of wages in respect of a bonus payment. The claim of unfair dismissal had been conceded by the Respondent prior to the Hearing. The Hearing was therefore to address the quantum of the Claimant's claim for unfair dismissal and liability and quantum on the Claimant's claims for unlawful deductions from wages and breach of contract.

6. The Claimant claims that he was entitled to a bonus in the financial year 2020/2021. It is the Respondents case that he agreed to suspend his right to receive a bonus in 2020/2021 as part of the selling of his shares in the Respondent to Xerox (UK) Limited.

Procedure, documents and evidence heard

7. Ms Levene appeared for the Claimant and Mr Kelly for the Respondent. I am grateful to both for their assistance to the Tribunal. The Claimant gave affirmed evidence and was cross-examined. For the Respondent, Mr Ford, Sales Consultant, and Mr Orme, Chief Executive of the Respondent, gave affirmed evidence and were cross examined.

8. I was referred to documents in a bundle of documents of 194 pages. As a preliminary issue the Respondent had made an application that a supplementary bundle of 14 pages comprising of two Settlement Agreements dated 19th March 2020 be submitted. Having considered both parties submissions and the overriding objective, I decided to allow the respondent's supplementary bundle.

9. Save for the issue at 1 (b) and 11 (c) below, the parties had agreed the issues to be decided. As a second preliminary point the Respondent put forward that issue 1 (b) 'giving the claimant the opportunity to earn a bonus in the year 2020/2021' did not form part of the Claimants claim as pleaded at paragraph 7 of the Particulars of Claim and therefore to be considered required the Claimant to make an application to amend. The issues which remain in dispute relate to the Claimant's claim for loss of opportunity to earn a bonus in the year 2020/2021. It is the Claimant's position that the claim for loss of opportunity flows from the Respondent's failure to notify the Claimant of the terms of his bonus scheme, which is set out at paragraph 7 of the Particulars of Claim. There is therefore no requirement to amend. Having considered both parties submissions both in their skeleton arguments and set out to me, I agree with the Claimant that the issue at 1.b does not extend the scope of the claim. It is part of the factual matrix to consider the loss of a chance, what would or might have happened as part of the breach of contract.

10. At the end of the hearing, I decided to reserve my judgment as I felt I needed more time to reflect on the issues in the case.

Issues

11. The Respondent had conceded liability for unfair dismissal prior to the Hearing.

12. The Claimant specifically did not bring a claim for breach of contract in relation to the 2019/2020 bonus and reserved his right to pursue a breach of contract claim under a separate jurisdiction.

13. At the outset, I reviewed the list of issues prepared. Save for issues at 1(b) and 11(c), the following list of issues to be determined by the Tribunal had been agreed by the parties:

14. ***LIABILITY***

Breach of Contract

1. Did the Respondent breach the Claimant's contract of employment by not:

a. notifying the Claimant of the terms of a bonus scheme for the year 2020/2021 at the start of the bonus year?

b. giving the Claimant the opportunity to earn a bonus in the year 2020/2021?

c. paying a bonus to the Claimant for the bonus year 2020/2021?

Unlawful deduction from wages

2. By not paying the Claimant a bonus for the 2020/2021 bonus year, did the Respondent make a deduction from the Claimant's wages pursuant to section 13 of the Employment Rights Act 1996?

3. If so, was that deduction, either:

a. required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract, or

b. had the Claimant has previously signified in writing his agreement or consent to the making of the deduction?

REMEDY

Unfair dismissal

4. What Basic Award should be made to the Claimant?

5. Is the Claimant entitled to a Compensatory Award and, if so, in what amount taking into account whether the Claimant has adequately mitigated his losses?

6. Should any compensation awarded be reduced or uplifted as a result of any failure by the parties to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

7. Should any compensation be reduced to reflect the fact that the Claimant would have been dismissed in any event due to redundancy and/or a breakdown of trust and confidence pursuant to Polkey v AE Dayton Services Ltd [1987] IRLR 503 as the Respondent contends, and if so, when would the Claimant have been fairly dismissed?

8. Should any compensatory award be adjusted for taxation and/or interest?

9. Does the Claimant reach the statutory cap?

Loss of statutory rights

10. Is the Claimant entitled to an award for loss of statutory rights and, if so, in what amount?

Breach of Contract

11. Is the Claimant entitled to compensation for breach of contract? If so, in what amount taking into account:

a. the bonus targets applicable to the Claimant in the 2018/2019 and 2019/2020 bonus years and his performance against those targets;

b. the finances associated with the Claimant's personal performance during what would have been the Respondent's 2020/2021 bonus year prior to the Claimant being furloughed;

c. the Respondent placing the Claimant on furlough removing his opportunity to work;

d. the Respondent's financial performance during what would have been the Respondent's 2020/2021 bonus year;

e. the impact of the pandemic, including the redundancy program undertaken by the Respondent; and

f. whether the Claimant has adequately mitigated his losses.

Unlawful deduction from wages

12. Is the Claimant entitled to compensation for unlawful deduction from wages and, if so, in what amount?

Findings of Fact

15. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account in my assessment the credibility of witnesses and the consistency of their evidence with surrounding facts. My findings of fact are relevant to the agreed issues.

16. The claimant's employment began on 1 June 2004 when he was employed by Copyrite Business Solutions (Copyrite). The claimant's salary with Copyrite was c£150,000 per annum. The claimant was an Executive Director and shareholder of the business. Copyrite was acquired by the Respondent in April 2018 (the "First Transaction"). Copyrite's three directors: the claimant, Mr Ian Stewart and Mr Phil Ford, became employees, directors and shareholders of the respondent. It is accepted by the respondent that the claimant's continuity of employment with the respondent began on 1 June 2004. The claimant was employed by the respondent in the role of Head of Technical Pre-Sales (Southern) and retained office as Executive Director and as a shareholder.

17. The claimant's employment with the respondent was governed by a service agreement dated 26 April 2018. As part of the First Transaction, the claimant agreed to a reduction in his base salary from £150,000 to £75,000 per annum. This was on the

condition that he would have a contractual bonus of up to £75,000 to allow him the opportunity to earn up to the £150,000. The claimant's base salary is set out a clause 6.1 of the service agreement:

"The Employee shall be paid an initial salary of £75,000 per annum."

18. Clause 6.5 of the service agreement expressly stated the claimant's entitlement to a contractual bonus:

"the employee shall be entitled to receive an annual performance related bonus of £75,000 per annum for achievement of targets set by the Board from time to time of which £37,500 is guaranteed for the first 12 months. The terms of the bonus scheme will be notified by the Board to the Employee at the start of the financial year".

19. The bonus was due at the end of February and payable on 31st March each year.

20. Under clause 2.1 the service agreement was for an initial fixed term of 27 months and thereafter, could be terminated on six months' notice. Clause 2.1 expressly stated:

"The Company shall employ the Employee and the Employee shall serve the Company on the terms of this Agreement. The Appointment shall commence on the Commencement Date [26 April 2018] and subject to the remaining terms of this Agreement, shall continue for a period of 27 months from the Commencement Date ("Initial Term"). Thereafter, it may be terminated by either party giving the other not less than 6 months' prior notice in writing PROVIDED THAT notice is not given prior to expiry of the Initial Term."

21. In October 2019, the respondent entered into discussions with Xerox Limited ("Xerox") regarding a possible acquisition. Mr Nick Orme, the CEO of the respondent, held a meeting on 30 October 2019 regarding the proposed acquisition and he enquired hypothetically whether the claimant would be agreeable to making concessions, specifically waiving his bonus for the financial year 2019/2020 if required, to help make the deal more palatable to the majority shareholder of the respondent.

22. On 3 November 2019, the claimant emailed Mr Orme to explain that he was unable to agree to waive his right to a bonus in 2019/2020 at that time as he had already agreed as part of the First Transaction to halve his old salary on the condition that he could make up the shortfall by earning a bonus. The email reads:

"*I appreciate your briefing of the proposed deal on Wednesday. Thank you.*

The first thing to say is that I think it undoubtedly represents a worthwhile opportunity for everyone concerned at ITEC and most importantly for the future security and growth prospects of the company. For those reasons I will, of course, give you my full support in helping bring it to a successful conclusion.

For my own part, I'm reluctant to commit to any alteration in the terms of our agreement right now. If the closing negotiations demand such consideration in order to make the deal work, of course we can talk about options. We both know how much can change from initial purpose to conclusion.

To explain my concern to avoid any specific commitment at this point, I do believe strongly that a deal is a deal. Exiting Copyrite involved sacrifices and it's not an experience I'd relish repeating. I'm working on half of my old salary and accepted that

partly on the promise of a compensatory bonus so I can't relinquish that (especially as it appears the salary structure going forward is unlikely to be very flexible).

Interest payable on the outstanding balance of the deferred consideration was carefully calculated to compensate for any unforeseen hiccups in payment which is exactly what has happened so I'm grateful for the arrangement (by the way, I've calculated the interest due to the end November and if I'm not mistaken it amounts to £27,130, making a total payable in December of £180,820 v your figure of £162,937) – at the appropriate time, can we check this please.

That said, of course I will work to remain in the company and negotiate a new role and package. More than this, as I've said, I will offer as much support as I can to help you bring the deal to a successful conclusion.

I suggest we wait until we have clarity over the offer and the final balance sheet before we discuss any what-if financial scenarios. I know you will appreciate that my compensation for selling my interest in Copyrite was my principal opportunity to enhance my financial position and that there is less of an upside in a further deal for me than for others at ITEC. That's why, for the sake of my family's future, I prefer to stick to the terms of our agreement at this early stage.

I'm sure you'll understand all this Nick and I look forward to seeing how things develop.

In terms of your proposal for deferred payment adjustment, as a concession to you personally, I will go along with the proposal although I don't see why my benefit should be delayed due to Phil's poor financial planning.

23. The claimant spoke with Mr Orme on 14 November 2019. In cross examination the claimant confirmed at this point he was "not prepared to rule anything out" and that if the waiver of the bonus was necessary, he would "consider it". He was "not saying yes or no to anything" but that he needed to "look at the numbers" as it was "impossible to relinquish without knowing how much it was". Mr Orme confirmed in cross examination that he was very clear that this was the claimant's position at this time in November 2019, that he was not prepared to commit at that time. There was however some inconsistency in Mr Orme's evidence, as he further confirmed that the claimant's position was more than a 'maybe or may not', he accepted in questioning that the claimant's position was that having made such a large salary reduction, that he was not prepared to waive the bonus and that he made it clear that he would not accept it. This is going further, than simple reserving his position on the bonus.

24. On 7 February 2020, Mr Orme emailed the claimant and the other Directors, Mr Ian Stewart and Mr Phil Ford, with the proposed financial elements of the deal which had been agreed with Xerox.

25. In relation to the claimant, the email provided:

"Below, I have set out the proposal for you all, based on the deal now agreed with Xerox – if we lived in a normal world with normal people.

Ben Summerfield
Deferred consideration to be paid at 31st March 2020 = £384,224
Interest due up to and including 31st March 2020 = £40,299
Sale of ITEC shares, based on completion value of £26,200,000 = £382,296

This gives totally payable to you on 31st March of £806,819.

You would then have to leave £3,823 in the completion accounts retention pot until 31stMay 2020
You would then have to leave £38,230 in the warranty retention pot until 30th June 2022.

So you would receive on completion £764,776 – the rest to follow in due course if there are no completion accounts adjustments and there are no warranty claims

Performance deferred consideration in December 2020 likely to be £0, but small possibility that it might be £41,000.

Of course, we don't live in a normal world and Jacques wants me, Mike, Dave and James to carry his completion accounts and warrant retention pot risks.

Based on out discussions I am happy to offer the same to the three of you.

In return, I need some relief on the interest element of the deferred, but I will also make a small contribution to settling the performance deferred.

So, here is the deal I would like to you accept, if you can – to enable me to get this done.

Ben Summerfield
Deferred consideration to be paid at 31stMarch 2020 = £384,224
Interest due up to and including 31st March 2020 = £14,827
Sale of ITEC shares, based on completion value of £26,200,000 = £382,296
Buy-out of Performance deferred consideration = £8,200

This gives total payable to you on 31st March of £789,547.
So you would receive on completion £769,547 with no money retained and no liability under warranties or completion accounts retention (other than the fundamental warranties and tax deed of course)."

26. The email did not make any mention of directors waiving their right to a bonus following the conversation on 14 November 2019 or to agreeing to suspend the bonus for 2020/2021. It was Mr Orme's evidence that there was nothing in this email suggesting that they would be expected to give up a bonus, as "it had already been decided by that point". There was confusion in Mr Orme's evidence, as he stated that the claimant, along with everyone, had agreed at some point between 14 November 2019 and 7 February 2020 to waive the bonus. However, Mr Orme was not able to point to any document at the time confirming this other than the minute of the meeting on 10 March 2020 and he could not confirm when a conversation took place in which the claimant confirmed he had made his mind up and would agree to waive or suspend the bonus .

27. The claimant was consistent in his evidence that the email on 7 February 2020 set out what he understood the deal to be. Clearly there is no mention of the bonus in that email. However, Mr Orme made the point that there were "400 other terms which are not mentioned in the email" and on this basis the fact that the waiver of the bonus was not being included should not be taken as an indication that it did not form part of the deal. I consider that it does make sense that the email is setting out what the claimant would be paid 'based on the deal agreed' and therefore the waiver of the bonus in

2019/2020 or the suspension of the 2020/2021 scheme not being mentioned in this email is not clear evidence that it did not form part of the final deal. However, it is still the fact that Mr Orme could not confirm when and how the claimant did agree to waive and/or suspend his bonus.

28. Throughout the evidence, unhelpfully for the purposes of this case, the claimant and Mr Orme were focusing their evidence on the waiver of the bonus. However, the alleged waiver is in relation to the bonus for 2019/2020 which has specifically been excluded from the issues to be decided in this case. In terms of the 2020/2021 bonus, which is the subject of this case, the issue as set out in the Grounds of Resistance is whether the claimant agreed to the suspension of the setting of the bonus scheme and payment. It was not clear on the evidence put before me at which point the proposal of suspending (not waiving) the setting of the bonus scheme and payment of a bonus for 2020/2021 was made. Mr Orme in his evidence confirmed that the 2020/2021 bonus was not in discussion in November 2019.

29. On 9 March 2020, the claimant received an email from Mr Orme with the subject heading "signing". As well as the claimant the email was sent to Mr Ian Stewart and Mr Phil Ford. The email said:-

"Hi guys,
We are on for signing at 3.00pm tomorrow at Lawrence Stephens offices in London.
Please confirm you can make it.
You will need to bring Passport I.D
Best regards
Nick"

30. The claimant arrived at the meeting at approximately 3:15pm due to travel disruption with the trains. The claimant gave evidence that it seemed there had been a pre-meeting which he had been excluded from and that no meeting took place after his arrival. It was the claimant's evidence that the meeting had in fact started at 1:30pm, based on the impression he got when he arrived that his fellow directors had been present for some hours and appeared to have had a working lunch together. It was the claimant's evidence that the Respondent had intentionally excluded him from this meeting at 1:30pm on the basis that Mr Orme knew that he would not agree to waive his bonus. Both Mr Orme and Mr Ford gave evidence of the timing, and structure of the meeting and the breakout groups. The claimant had the opportunity to bring further witness evidence from those others in attendance and did not do so. On the evidence before me I do not find that that was an intentional exclusion of the claimant and rather that the stating of 1:30pm on the minutes was a genuine mistake, that individuals were arriving at various times and the actual meeting started once all were in attendance and went on for the rest of the afternoon into the evening.

31. The completion date of the acquisition by Xerox was 19th March 2020.

32. The claimant's shares in the respondent were valued at circa £380,000 and as a result of the transaction, he received the deferred consideration from the First Transaction which was significantly overdue. Due to the increase in the value of the claimant's shares, he came out of the deal with consideration of circa £80,000 in exchange of his shares in the respondent.

33. The Share Purchase Agreement (SPA) was signed at the meeting. Under "Section 9 Warranties" of the SPA clause 9.12 provides:

9.12 If any Target Group Company has any liability to or obligation to pay or confer a benefit on any Seller and/or any of the IICL Sellers (and/or any of its Related Persons) or that Seller and/or any of the IICL Sellers (and/or any of its Related Persons) has any right or claim against any Target Group Company, such Seller and/or IICL Seller on behalf of itself and its Related Persons irrevocably waives and releases (or, as the case may be, shall procure the waiver and release of) as at the Completion Date, the relevant Target Group company from any such liability, obligation, right or claim.

34. The claimant in cross examination explained that as he was not a warrantor as part of the SPA, his interpretation of clause 9.12 is that it would not alter the terms of his service agreement. If his service agreement was being changed, he would have expected to receive a new service agreement. No new or amended service agreement was issued.

35. The claimant sent on email of 12 March 2020 in which he asks, "any advice you can impart indicating likely bonus quantum and timing would be most helpful". In his witness statement, the claimant says that this was in relation to 2019/2020 and he was asking what the amount of the bonus would be and when he would be paid.

36. The claimant resigned as a director of the respondent by letter dated 19 March 2020 which read as follows:

"I refer to the sale and purchase agreement dated [10 March] 2020 to which I am a party, together with the other Sellers and the Buyer (each as defined therein). … I hereby resign from my office as director of the Company with immediate effect and confirm that I have no claim or right of action of any kind (whether in respect of any breach of contract, compensation for loss of office or monies due to me or on any account whatsoever) against the Company…arising or allegedly arising in any capacity in relation to the termination of my office or otherwise in respect of or arising out of my position as a director of the Company. To the extent that any such claim, in any jurisdiction, exists, has already existed or may exist in future (whether known or unknown to me), I irrevocably and unconditionally waive such claim and release and forever discharge the Company, their officers, agents and employees from any liability in respect thereof that I may have against them.

37. As part of the claimant's role as Head of Pre-Sales, Southern, he had access to Customer Relationship Management software ("CRM"). On 22 May 2020, the claimant emailed the administrator because his access to the CRM system had been removed without notice.

38. On 4 June 2020, the claimant received an email from James Arscott (Group Head of Pre-Sales) informing him that he was being furloughed in line with the Government Job Retention Scheme from 6 June 2020.

39. On 14 July 2020, the claimant attended a remote meeting during which Nick Orme outlined a new sales structure as Xerox was looking into how the respondent could extend its IT capability to maximise growth and profit in the other recently acquired Xerox companies.

40. On 21 July 2020, the claimant emailed Nick Orme to thank him for taking the time to outline the detail of the new Xerox company structure and the current trading position "*during our meeting last Tuesday*" and he expressed an interest in the potential new IT role.

41. On the 27 July 2020, Nick Orme emailed the claimant to serve notice of termination of his employment. The email explained staff with longer notice periods were being terminated and either put onto new service agreements or that their employment would be terminated altogether:

> *"In the meantime, you will shortly receive a letter serving the 6 months-notice to terminate your Director Service Agreement with ITEC. Don't be unduly alarmed, we are doing this with all the Directors on those types of Contracts with long notice periods (including me) as a matter of best practice, so that when the notice periods expire, we can either agree to separate or come all onto standard terms.*
>
> *Your current Ts and Cs are protected, of course, until the end of your notice period and we will sit down to discuss new potential roles and terms long before the 6 months' notice expires.*
>
> *If you have any questions or concerns about the process, please let me know."*

42. The claimant received the letter serving him notice later that same day on 27 July 2020 from Mrs Bartlett, Group Head of Personnel Services which stated:

> *"..As per Nick's email dated today and in line with your current Contract, I would like to serve the stated 6 months' notice to terminate your Director Service Agreement with ITEC as of today's date 27th July 2020, with the contract expiring 26th January 2021.*
>
> *I know that Nick will be in contact with you regarding, further discussions, however, if you have any queries in the meantime, please do not hesitate to contact me…"*

43. On 3 September 2020, the claimant wrote to Nick Orme to express concerns regarding the furlough, the termination of his employment and his bonus. The claimant asked for the bonus plan for 2020/2021:

> *"..please also let me have a bonus plan for the current financial year. I need to know what my targets are in order to understand how I will be in a position to generate uplift on my basic salary, which – as you know – I don't consider sufficient to sustain our family life. You'll recall when I joined ITEC, I effectively agreed to halve my pre-acquisition salary on the basis that £75,000 was guaranteed (basic) with a clear understanding of how I could make the other 50% up so that I have reasonable opportunity of matching my previous income of £150,000…*
>
> *I need to hear back from you as swiftly as possible about my bonus for the last financial year and the achievement targets for the current financial year, as well as anything you want to say to dissuade me about my fears for my future in the company…"*

44. On 7 September 2020 Mr Orme responded, in relation to the 2020/2021 bonus he states:

> *"For the current Financial Year, all bonuses were suspended in April due to Covid. This was applied unilaterally for all roles. We have now re-introduced bonuses to engineering staff who are back at work and to salespeople and sales management. Bonuses for Technical Pre-Sales staff, Support staff and Senior Management have not yet been re-*

introduced. Again, this was made clear at the time and we have kept everybody informed of this situation through our Town Hall Meetings."

45. In respect of the serving of notice, Mr Orme said:

"With regard to notice, I was instructed to serve notice on all minimum term contracts and fixed term contracts where prior notice is required. This applied to a number of employee related contracts, as well as numerous supplied and subcontractor contracts".

46. On 12 October 2020, the claimant was notified that the Respondent was carrying out a redundancy exercise. He was placed in the redundancy selection pool of "IT Technical Pre-Sales for the Bournemouth Sales Teams" and informed that he would be invited to a redundancy consultation for "Wimborne IT Technical Pre Sales"

47. A redundancy consultation meeting took place on 13 October 2020 followed up by a formal letter of the same date.

48. On 22 October 2020, the claimant's solicitors Stephenson Harwood wrote to the Respondent setting out his anxieties with respect to his dismissal and his bonus. In relation to the 2020/2021 bonus the following was set out:

> *"No bonus plan has been provided to our client in respect of the period 1 March 2020 to 28 February 2021. Under clause 6.5 of the Service Agreement … our client is contractually entitled to receive an annual performance related bonus of £75,000 for achievements of targets set by the Board from time to time. No such targets have been set to date. The Company is in breach of contract by (a) failing to notify [the claimant] of the bonus scheme at the start of FY20/21; and (b) failing to give our client the opportunity to achieve an annual performance-related bonus of £75,000. Our client was responsible for generating significant profit between March and June 2020 (c. £47,000 over two months' alone) which should have entitled him to a bonus had a bonus scheme been in place and performance-related targets set, as is contractually required."*

49. Mr Orme acknowledged receipt of the letter at 12:16 on 22 October 2020 and undertook to *"provide a full response within 14 days".* The claimant also wrote directly to Mr Orme on 22 October raising queries and concerns around the redundancy consultation.

50. On 22 October 2020 at 16:15, the claimant was informed that his period of furlough was coming to an end with effect from 2 November 2020 in line with the government scheme ending.

51. On 30 October 2020 the claimant was placed on garden leave with immediate effect in accordance with clause 15 of his Service Agreement.

52. The claimant wrote to Nick Orme on 30 October 2020 to express his concerns about being placed on garden leave and cutting his access to company systems.

53. On 6 November 2020, the claimant received a response from the Respondent to Stevenson Hardwood's letter dated 20 October 2020. Within their response, the Respondent alleged that the claimant had waived his bonus in respect of the financial years 2019/2020 and 2020/2021 during a meeting on 10 March 2020. For the first time, the claimant was provided with a copy of the minutes of that meeting. The Chairman, Mr

Orme, had signed the minutes which stated the claimant was present at the meeting at 1:30pm. In relation to the Bonus 2020/2021 it was set out:

"Bonus 2020-2021
Your client agreed that any award and payment of bonuses in relation to the 2020-2021 financial year would be suspended until bonus plans were agreed with Xerox (UK) Limited (see Waiver of Claims below). No such bonus plan has been agreed with Xerox (UK) Limited to date therefore no entitlement to a bonus for this period has arisen.

Even if your client were able to establish a bonus entitlement for this period or a claim for lack of opportunity to earn a bonus, the financial impact of COVID-19 on the business has been so significant that it is clear that no bonus would have been payable in any event. Your client therefore will not have suffered any loss in respect of any bonus for 2020-2021.

Waiver of Claims
Your client participated in a Directors' meeting on 10th March 2020 to consider the sale of ITEC to Xerox (UK) Limited and related recommendations to waive bonus entitlements and waive rights of claim against ITEC for the periods preceding the sale of the business. At this meeting all the Directors (including your client) specifically agreed to (i) waive any entitlement to bonuses in respect of bonus plans for the financial year 2019-2020 and (ii) suspend any award and payment of individual performance related bonuses for the period March 2020 – February 2021 until such time as appropriate individual bonuses could be agreed by Xerox (UK) Limited with the Directors (including your client). On the basis of unanimous agreement having been reached on the waiver and suspension of bonus payments, it was also then agreed to enter into the Sale and Purchase Agreement, which resulted in significant payment for your client's shares and early settlement of his deferred consideration from the sale of Copyrite to ITEC in 2018. A copy of the Minutes of this meeting is attached.

In addition to the waiver and suspension of bonus entitlements agreed to by your client at the meeting as set out above, your client also signed a Deed of Resignation as a director of ITEC dated 19 March 2020 under the terms of which your client agreed to waive irrevocably and unconditionally all claims against ITEC arising out of his position as a director of the company. A copy of this Deed is attached.

A further waiver of claims was agreed by your client under the Sale and Purchase Agreement dated 10 March 2020 between ITEC (defined as a Target Group Company) and Xerox (UK) Limited and signed by your client as a "Seller". We understand that your client has a copy of this agreement but we can provide access to this if required.

Your client agreed under clause 9.12 that ITEC was released from any obligation to pay or confer a benefit on him and he waived any right or claim against ITEC. The full text of the clause is as follows:

9.12 If any Target Group Company has any liability to or obligation to pay or confer a benefit on any Seller and/or any of the IICL Sellers (and/or any of its Related Persons) or that Seller and/or any of the IICL Sellers (and/or any of its Related Persons) has any right or claim against any Target Group Company, such Seller and/or IICL Seller on behalf of itself and its Related Persons irrevocably waives and releases (or, as the case may be, shall procure the waiver and release of) as at the Completion Date, the relevant Target Group company from any such liability, obligation, right or claim.

54. The *"Minutes*" of the meeting held on the 10 March 2020, which the claimant received for the first time on 6 November 2020, stated that the meeting had taken place at 1:30pm. The claimant is listed as "present". Under point 5.1.5 a purpose of the meeting is stated as:

"to suspend award and payment of further individual performance related bonuses for the period March 2020 to February 2021 until such time as we were able to agree appropriate individual performance related bonus schemes with the Buyers for each Executive Director".

55. Under *"6. Documents Produced to the Meeting"* it is detailed:

"..The latest drafts of the following documents were then produced to the meeting:-

6.1.1 the proposed Share Purchase Agreement and waivers;

6.1.2 the proposed Director resignation letters and waivers.

56. Under "*7 Consideration of Transaction Documents*" it is detailed:

.."7.1 IT WAS NOTED that Clause 9.12 of the SPA expressly waived any past claims of the Sellers and that the Director Resignation Letters expressed the same…"

57. In cross examination questions about why the minutes of the meeting had not been signed, Mr Orme explained that the meeting on 10 March was not a board meeting and that it was an executive meeting. He said that they "had already had a board meeting to agree the deal". The minutes or notes of this board meeting were not included in evidence.

58. Mr Orme explained that the 1:30pm time on the minutes was a mistake, that had been original meeting start time and it had not been changed to 3:00pm. Mr Orme in evidence said that "nothing was being discussed in that meeting, as it had already been agreed". The date, time and place of such meeting or discussions when it was "agreed" has not been provided by the respondent.

59. There was further correspondence between the claimants and respondents' lawyers on 20 November and 21 December 2020.

60. On 31 December 2020, Nick Orme wrote to the claimant to advise that the business was no longer proceeding with the redundancy situation and that he was no longer at risk of redundancy. He explained that this did not affect the existing notice and that the claimant's employment would terminate on 26 January 2021. No reason for the termination of the claimant's employment was given.

61. On 26 January 2021, Nick Orme wrote to the claimant thanking him for his hard work and support and requested he facilitate the return of company property. The claimant's employment ended on 26 January 2021.

The Law

Unauthorised deduction from wages

62. S.13(1) of the Employment Rights Act (ERA) 1996 provides that "an employer shall not make a deduction from wages of a worker employed by him unless

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing their agreement or consent to the making of the deduction

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

63. S.27 (1) (a) ERA 1996 provides that wages means "any sum payable to the worker in connection with his employment".

64. An employee has a right to complain to an Employment Tribunal of an unlawful deduction of wages pursuant to section 23 of the Employment Right Act 1996.

65. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable after that.

Breach of contract

66. The Tribunal has jurisdiction to consider the claimant's breach of contract claim by virtue of article 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994.

67. Should the claimant succeed in demonstrating a breach of contract, then any compensation for losses flowing from that breach are capped at £25,000 by virtue of article 10 of the Extension of Jurisdiction Order:

"An employment tribunal shall not in proceedings in respect of a contract claim, or in respect of a number of contract claims relating to the same contract, order the payment of an amount exceeding £25,000."

68. When interpreting express terms of a contract, the aim is to give effect to what the parties intended. In ascertaining that intention, the words of the contract should be interpreted in that grammatical and ordinary sense, assessed in the light of any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executes, and commercial common sense, but disregarding subject evidence of any party's intentions.

ACAS Code of Practice on Disciplinary and Grievances Procedures

69. It is necessary to consider whether the ACAS Code applies. Para 1 of the Code explains that:

"This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

- Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure, they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should be followed, albeit that they may need to be adapted.

- Grievances are concerns, problems or complaints that employees raise with their employers.

- The Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry."

70. The reason for the claimant's dismissal is stated as SOSR, stating both commercial and financial challenge and a breakdown of trust and confidence. The Code is silent on whether it applies to SOSR dismissals.

71. Three cases were referred to which deal with the circumstances when the Code may apply to SOSR dismissal. These are Lund v St Edmund's School, Canterbury UKEAT/0514/12; Hussain v Jurys Inns Group UKEAT/0283/15; and Phoenix House Ltd v Stockman and another UKEAT/0264/15. The EAT in these cases express the view that the ACAS Code does apply to SOSR dismissals where the disciplinary procedure has been, or ought to have been, invoked.

72. In the course of submissions, the Tribunal was referred to a number of cases by Counsel for each party as follows:

Wood v Capita Insurance Services Ltd [2017] AC 1173;

Prenn v Simmonds [1971] 1 WLR 1381;

Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen] [1976] 1 WLR 989;

Delaney v Staples [1991] 2 QB 47;

Coors Brewers Ltd v Adcock [2007] ICR 983;

Lund v St Edmund's School, Canterbury UKEAT/0514/12;

Hussain v Jurys Inns Group UKEAT/0283/15;

Phoenix House Ltd v Stockman and another UKEAT/0264/15

Bank of Credit and Commerce International (BCCI) SA (in compulsory liquidation) v Ali (No. 1) UKHL 8;

Absalom v TRCU Ltd [2005] EWHC 1090 (Comm);

Merthyr (South Wales) Ltd v Merthyr Tydfil CBC [2019] EWCA Civ 526;

Antaios Compania SA v Salen AB (The Antaios) [1985] AC 191;

Cheall v Association of Professional, Executive, Clerical and Computer Staff [1983] 2 AC 180;

Petroplus Marketing AG v Shell Trading International Ltd [2009] EWHC 1024;

Chaplin v Hicks [1911] 2 KB 786

Browning v Brachers [2005] EWCA Civ 753;

Double G Communications Ltd v News Group International Ltd [2011] EWHC 961 (QB);

Fearns v AngloDutch Paint & Chemical Company Ltd [2010] EWHC 1708 (Ch);

Agarwal v Cardiff University and others [2018] EWCA Civ 2084;

Wilding and British Telecommunications plc 2002 IRLR 524.

The parties' submissions

The respondent's submissions

73. Counsel for the respondent made a number of detailed submissions, both in a skeleton argument and also orally at the end of the evidence. I have considered both with care but do not rehearse in full here. In essence it was asserted that:-

73.1 In relation to the issue of should any compensation awarded for unfair dismissal be reduced or uplifted as a result of any failure by the parties to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, Counsel for the respondent went through the authorities of Lund v St Edmund's School, Canterbury UKEAT/0514/12; Hussain v Jurys Inns Group UKEAT/0283/15; and Phoenix House Ltd v Stockman and another UKEAT/0264/15. It is submitted that those authorities do not apply as this is not the type of case where the dismissal was a breakdown in the relationship. Notice was served due to the length of notice in the service agreement in order to bring those with long notice periods in line with the standard Xerox notice period of 3 months. There were no disciplinary or grievance issues which engaged the ACAS Code. Further, that if the authorities were to apply, the respondent had tried to engage with the claimant but had been met with refusal; the opportunity to engage and discuss with the claimant had been offered, but had not been taken up by the claimant.

73.2 In relation to the breach of contract, the respondent submits that it had no obligation to notify the claimant of the terms of the bonus scheme, and still less to pay a bonus, for the 2020/2021 bonus year as the claimant waived his right to receive a bonus by agreeing to clause 9.12 of the SPA; the claimant waived his right to receive bonus at a board meeting on 10 March 2020; and the claimant waived his right to receive a bonus when he resigned as a director of the respondent.

73.3 In relation to unlawful deductions of wages, the claimant has not suffered a 'deduction' as he cannot identify a specific sum of wages 'properly payable' so that the 'deduction' can be calculated within section 13(3) ERA (Coors Brewers Ltd v Adcock [2007] ICR 983]. Similarly, the Claimant cannot identify any sum of 'wages' as defined by the House of Lords in Delaney v Staples, as he has not, as a matter of fact, done the work which had it been done, may have entitled him to a bonus.

The claimant's submissions

74. Counsel for the claimant also made a number of detailed submissions, both in a skeleton argument and also orally at the end of the evidence. I have considered both with care but do not rehearse in full here. In essence it was asserted that: -

74.1 It is denied that the claimant waived the right or agreed to suspend the right to receive his bonus scheme terms at the start of the financial year. Supported by the interpretation of the terms of clause 9.12 in the SPA, the factual background and evidence in relation to the meeting on 10 March 2020 and the bonus claim arising out of his right as an employee which his resignation as director does not extinguish.

74.2 Applying the contractual interpretation tests of loyalty to the text, context, business common sense and that a party may not take advantage of its own wrong, the claimant was entitled to the full £75,000 for breach of contract. Further and alternatively, the claimant has suffered a loss of chance, and had the 2019/2020 scheme been followed the claimant would have been due a bonus payment in the sum of £18,750.

74.3 In terms of unlawful deductions of wages, the claimants Counsel repeated its submissions on the contractual interpretation of clause 6.5 asserting that £75,000 was properly payable because the respondent failed to set terms for the bonus. As a result, there were no targets for the claimant to meet and he is entitled to the specific sum of £75,000. To interpret the clause otherwise allows the respondent to benefit from its breach.

Discussion and conclusions (including where appropriate any additional findings of fact)

75. I have applied the relevant findings of fact and applicable law to determine the issues in the following way.

Liability

Breach of contract

76. Considering the first issues of did the respondent breach the Claimant's contract of employment by failing to notify him of the terms of his bonus scheme for the year 2020/2021 at the start of the bonus year or failing to pay him a bonus for the bonus year 2020/2021 I find in favour of the claimant. The claimant did not agree to suspend and/or waive his right to be notified of the terms of the bonus scheme for 2020/2021 or to be paid a bonus in respect of the financial year 2020/2021.

77. Mr Orme in cross examination answered to the question, where the Company fails to set the bonus targets would they be in breach of contract, "yes, unless obviously the claimant has agreed to waive the right. If he had not agreed to waive that right, it would have been a breach."

78. Looking at the factual background, the focus was on the 2019/2020 bonus and the claimant was clear that he did not waive that bonus. The respondent could not point to a specific date, meeting, conversation or any documentation showing when the claimant was said to have agreed to the suspension of the 2020/2021 bonus scheme and payment.

79. I accept that the claimant did not suspend his right to a bonus scheme from the beginning of the financial year or payment of a bonus at the meeting on 10 March 2020. The minutes do not have any signature from the claimant, and he was not given a copy of the minutes until some 8 months later, on 6 November 2020.

80. I find the evidence of 7th September 2020 letter from Mr Orme is particularly telling:

> *For the period March 2019 to February 2020 the Company did not achieve its targets and no performance bonuses were paid to any Director of the Company or the Group Companies. That includes myself, Jon Horler, Martin Hargreaves, Gary Tozer, Ian Stewart, Phil Ford and yourself. This position was made clear at the time of the sale of the company to Xerox in March 2020. For the current Financial Year, all bonuses were suspended in April due to Covid. This was applied unilaterally for all roles. We have now re-introduced bonuses to engineering staff who are back at work and to salespeople and sales management. Bonuses for Technical Pre Sales staff, Support staff and Senior Management have not yet been re-introduced. Again, this was made clear at the time and we have kept everybody informed of this situation through our Town Hall Meetings.*

81. If the claimant had agreed to suspend, or indeed waive, the 2020/2021 setting of a bonus scheme and payment in the 10 March 2020 meeting, I consider on balance that this would have been said in the letter of 7th September, rather than saying that the reason was COVID in April 2020. Further, the letter says in relation to the 2019/2020 year that this was made clear at the time of the sale of company to Xerox in March 2020. Whereas in relation to 2020/2021, it was stated 'this was made clear at the time' – which I take as April 2020.

82. In any event, even if the claimant had agreed to the suspension of the bonus, this raises the question of whether any agreement to a suspension of the bonus, could in fact change or vary the contractual obligation under clause 6.5 that *"the terms of the bonus scheme will be notified by the Board to the Employee at the start of the financial year".*

83. Clause 33.1 of the Service Agreement dated 26 April 2018 is a standard no-oral modification clause which states:

> *"No variation of this Agreement or of any of the document referred to in it shall be valid unless it is in writing and signed by or on behalf of each of the parties"*

84. The claimant stated in his evidence that if his service agreement had actually been amended or varied that he would have expected to receive a new service agreement and he did not do so.

85. Looking at the terms of the SPA and whether they constitute an agreement to vary or suspend the notifying of the terms of the bonus scheme for 2020/2021 and the paying of that bonus, I do not find that they do. I considered the relevant factors of the language of the clause itself, the contract as a whole (as far as possible on the pages included in the bundle), and the factual background known to the parties. The language of the clause 9.12 does not demand an interpretation under which the claimant suspended his right to his 2020/2021 bonus scheme or payment, when this had not been specified and runs contrary to the background context whereby it was known that the claimant had not committed to giving up his 2019/2020 bonus and this was the focus of bonus discussions, rather than consideration of 2020/2021.

86. Clause 9.12 is focussed on the time of the completion date and is written in the past tense, not the future tense. I agree with the claimant that it does not make business common sense to read any future obligation into a clause that is drafted in the present tense for obligation as at the date of completion (19 March 2020). To do so would be to create a clause that was indefinite, unclear and vague, and at odds with the actual language chosen, being the present tense. Further, evidence of this intention can be

seen in the minutes of the 10 March meeting which provide under "*7 Consideration of Transaction Documents*":*.."7.1 IT WAS NOTED that Clause 9.12 of the SPA expressly waived any past claims of the Sellers and that the Director Resignation Letters expressed the same…"*

87. I agree with the claimant's submissions that the claimant's resignation as a director did not suspend his right to bonus in 2020/2021. The deed is solely related to giving up his rights as director. The bonus claim in clause 6.5 arises out of his right as an employee. The claimant was always an employee and remained an employee after his resignation as a director. Clause 3.1 of the service agreement refers to the duty on the employee to serve the company as Director of Technical Pre-Sales (Southern Region) or such other role as the Company considers appropriate. It cannot be correct that the ending of his directorship ended his rights as an employee and terms under his service agreement. Under clause 12.2 of the service agreement dated 26 April 2018:

> *If during the Appointment, the Employee ceases to be a director of the Company or any Group Company (otherwise than by reason of his death, resignation or disqualification pursuant to the articles of associate of the Company or the relevant Group Company, as amended from time to time, or by statute or court order) the Appointment shall continue with the Employee as an employee only and the terms of this Agreement (other than those relation to the holding of the office of director) shall continue in full force and effect. The Employee shall have not claims in respect of such cessation of office.*

88. I did consider the case of MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553, and in finding that the SPA did not constitute an agreement to suspension, I find that even if there had been an oral agreement to suspend the 2020/2021 bonus scheme and payment, such variation would be invalid as the alleged agreement did not follow the procedural requirements to vary the contractual terms as stipulated by clause 33.1. Indeed, in the claimant's evidence, he was clear that if the terms of his service agreement had been waived, or varied, he would have expected to receive a new copy containing that change. Mr Orme confirmed that no new service agreement had been issued and could not point to a document setting out the agreement to suspend the contract obligation to notify the claimant of the terms of the 2020/2021 bonus scheme at the start of the financial year, other than the minutes of the 10 March 2020 meeting and these are not signed by the claimant.

<u>Unlawful deductions of wages</u>

89. By not paying the Claimant a bonus for the 2020/2021 bonus year, did the Respondent make a deduction from the Claimant's wages pursuant to section 13 of the Employment Rights Act 1996?

90. The Court of Appeal in Delaney v Stapes [1991] 2 QB 47, defined 'deduction' in the following terms, *per* Nicholls LJ at 56H-57A

> *If on his "pay day," when an employee is due to be paid, a worker receives less wages than he should have done, the deficiency is to be regarded as a deduction for the purposes of the Act. Likewise, if he receives nothing. If, come his "pay day," a worker is in law entitled to a particular amount as wages and he receives nothing then, whatever be the reason for non-payments (excepting only errors of computation), that amount is to be treated as a deduction made from his wages on that occasion.*

91. This passage was not doubted by the House of Lords. Further, Lord Browne-Wilkinson provided the following guidance on the meaning of 'wages' at 692B:

…the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment.

92. Further assistance is found in *Coors Brewers Ltd v Adcock* [2007] ICR 983, at [46], Wall LJ stated that the proper context of a claim under Part II ERA "*is that the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him*."

93. I find that the claimant did not suffer a 'deduction' as looking at the actual facts in front of me, he cannot identify a specific sum of wages 'properly payable' so that the 'deduction' can be quantified and calculated within section 13 (3) ERA. The claim for unlawful deductions of wages is not well-founded and is dismissed.

Remedy

Unfair Dismissal

94. The parties had agreed that the claimant's basic award is in the sum of £8,608. I make a basic award in favour of the claimant is the sum of £8,608, namely 1 x 16 x £538 = £8,608.

95. There is no formula for calculating the compensatory award other than what the Tribunal considers "just and equitable". As regards the compensatory element of the awards to the claimant in respect of his unfair dismissal, I accept the claimant's Counsels submissions. Polkey and contributory fault were pleaded in the Respondents Grounds of Resistance, however no evidence was put before the Tribunal to support either principle having application to this case and no submissions were made by the respondent on either point. Having considered what is just and equitable with regard to the circumstances of the case, the evidence before me and the submissions made, I am satisfied that there are to be no deductions to the claimant's compensation either based on Polkey principles or contributory fault.

96. The compensatory award is subject to a maximum of £88,519 or 52 week's gross pay, whichever is the lower. When assessing what the claimant has lost because of being unfairly dismissed, the Tribunal looks at the net remuneration the claimant would have continued to have received if he had not been dismissed. The amount of the compensation for the compensatory award is calculated net of tax and the claimant is awarded an amount based on his take-home pay.

97. The following heads of compensation have been applied to calculate the compensatory award:

97.1. Immediate loss of earnings (i.e., between the dismissal and the hearing).
97.2. Future loss of earnings (i.e., estimated loss after the hearing).
97.3 Loss of statutory employment rights – this covers, for example, the fact that the unfair dismissal means that the claimant will be unable to bring another unfair dismissal claim until he has had two years' continuous employment in a new job.

98. I accept the calculations of the compensatory award as set out in the claimants amended schedule of loss to the date of the hearing. In terms of future loss, I have considered that the restrictions at clause 16 of the service agreement dated 26 April 2018 ended on 25 January 2022 and the restrictions in the share purchase agreement ended on 19 March 2022. Considering the claimants experience, the current job market in the UK and the wider scope of vacancies available due to an increase in the ability for hybrid working I consider it reasonable to expect the claimant to have secured suitable alternative employment within 4 months of the ending of all restrictions and by 22 July 2022.

Mitigation

99. When calculating compensation, the Tribunal must take account of what steps the claimant has taken to mitigate his loss (ERA section 123(4)). If he has failed to take reasonable steps to mitigate his loss, his compensation may be reduced.

100. All persons who have been subjected to wrongdoing are expected to do their best, within reasonable bounds, to limit the effects on them. If the Tribunal concludes that a claimant has not done so, it must reduce the compensation so that a fair sum is payable. The Tribunal will expect evidence to be provided by claimants about their attempts to obtain suitable alternative work and about any earnings from alternative employment.

101. The Tribunal will expect respondents, who consider that the claimant has not tried hard enough, to provide evidence about other jobs which the claimant could have applied for. Ultimately the burden of proof is on a respondent to show loss was not mitigated.

102. The claimant provided details of the attempts he had made to obtain suitable alternative work, which had unfortunately been unsuccessful at the time of the hearing. The respondent argued that the claimant was unreasonable in what he did and did not do. They argued that he had applied for roles which were not suitable and that he has not applied for as many roles as he could since his dismissal. However, whilst making the assertion that the claimant had not done enough, the respondent did not provide any evidence of roles which the claimant could have applied for and had failed to do so. I am satisfied that the claimant has mitigated his loss and taken reasonable steps to secure alternative work, and in fact had been thinking ‘outside of the box’ in his attempts and considered how he could apply his skills to add value in other sectors.

ACAS Code

103. I considered the cases referred to as set out at paragraph 71 and agree with the respondent that when considering if the ACAS Code applies, the issues is not that the ACAS Code covers all dismissals for SOSR, but whether the context of a dismissal was a disciplinary or grievance issues, or whether the specific contents of the Code are otherwise applicable. I am required to focus on the context of the dismissal and not simple the reason at the end of the process.

104. I accept that notice was served due to the length of notice in the service agreement in order to bring those with long notice periods in line with the standard Xerox notice period of 3 months. I find that at the time of serving notice there were no disciplinary or grievance issues which engaged the ACAS Code. Further, that if the authorities were to apply, I consider that Mr Orme for the respondent had tried to engage and discuss with the claimant but had been met with refusal to discuss; the opportunity to engage

and discuss with the claimant had been offered, but had not been taken up by the claimant.

105. I considered the judgment of the EAT in Phoenix House Ltd v Stockman and another UKEAT/0264/15 at paragraph 19 and 20:

19. "In Hussain v Jurys Inns Group Ltd UKEAT/0283/15/JOJ Laing J on 3 February 2016 said the following, in paragraph 47 of her Judgment:

> *"47. Whether this Code is intended to apply to dismissals for some other substantial reason is not entirely clear from its text. There are pointers in both directions. So, I have some sympathy for the view that was expressed by the ET that it did not apply to a dismissal for some other substantial reason. If the Code is given a purposive construction, I would be inclined to hold on balance that it should apply to a dismissal for some other substantial reason. That conclusion is to an extent supported by the decision of this Tribunal in the Lund case, although I note Ms Misra's submission that the Lund case is distinguishable because of the precise nature of the other substantial reason that was relied on in that case, but I do not have to decide this point. …"*

20 I respectfully disagree with Laing J's provisional view. Parliament has laid down a sanction in section 207A of the 1992 Act for failure to comply with a Code:

> *"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
> *(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that -*
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
> *(b) the employer has failed to comply with that code in relation to that matter, and*
> *(c) that failure was unreasonable,*
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

21. In my judgment, clear words in the Code are required to give effect to that sanction, otherwise an employer may well be at risk of what is in reality a punitive element of a basic and compensatory award in circumstances in which he has not been clearly forewarned by Parliament and by ACAS that that would be the effect of failing to heed the Code. The Code does not in terms apply to dismissals for some other substantial reason. Certain of its provisions, such as for example investigation, may not be of full effect in any event in such a dismissal. What is required when a dismissal on that ground is in contemplation is that the employer should fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be reincorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker, in this case Ms Zacharias, of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair, as it was found to be here to a marginal extent by the Tribunal, to take into account matters that were not fully vented between decision maker and employee at

the time that the decision was to be made. Ordinary common sense fairness requires that. Clearly, elements of the Code are capable of being, and should be, applied, for example giving the employee the opportunity to demonstrate that she can fit back into the workplace without undue disruption, but to go beyond that and impose a sanction because of a failure to comply with the letter of the ACAS Code, in my judgment, is not what Parliament had in mind when it enacted section 207A and when the Code was laid before it, as the 2009 and 2015 Codes both were."

106. I accept the evidence of Mr Orme that he was making efforts to discuss matters with the claimant, and thereby to explore if the claimant could continue in the workplace, however this opportunity of discussion was not taken up by the claimant. On the basis of the judgment that to go beyond elements of the Code being applicable, and to impose a sanction because of failure to comply with the letter of the Code, was not in the judgment of the EAT in Pheonix, not what Parliament had in mind, I do not increase an uplift under section 207A of the 1992 Act.

107. The calculation of the compensatory award is set out below:

Prescribed element (loss of wages to date of assessment and future loss)

Immediate loss of earnings:

26 January 2021 to 22 March 2022 (60 weeks) 60 x £902.69	£54,161.40
Loss of pension entitlement	£3,461.53
Future loss of earning	
Loss of earnings for 4 months following the date of the final hearing 22 March 2022 to 22 July 2022 (17 weeks) 17 x £902.69	£15,345.73
Loss of pension entitlement	£980.73
Non- prescribed element	
Loss of statutory protection	£500.00
Reduction for failure to mitigate (0%)	£0
"Polkey" reduction (0%)	£0
TOTAL	£74,449.39

<u>Breach of contract</u>

108. Upon failing to give the claimant a bonus scheme in 2020/2021 the respondent was in breach of contract. Claimants counsel argued that in the context that the claimant agreed to reduce his base salary from £150,000 p.a. to £75,000 p.a. on the condition he had a contractual right to earn a bonus of £75,000, then the claimant must be given his contractual bonus when no targets were set. The Claimant argued that where no target is set, the target must be £0, as otherwise the respondent would take advantage of its

own wrong. This however in my view goes too far and cannot make business common sense, that would effectively be that the respondent would be setting no target but the quantum for performance against a target of £0nil would be £75,000.

109. In considering damages for the well-founded breach of contract claim and the loss of a chance arguments, the assumption I am required to make is that the contract was performed as intended and I assume that the breach did not occur. I was mindful that the fact that damages are difficult to assess and, therefore, there might be an element of speculation, does not disentitle the claimant to compensation for the loss caused by the defendant's breach (Chaplin v Hicks [1911] 2 KB 786).

110. As part of that required element of speculation, I assumed that a target was set and then what that target might have been. The figures for 2019/2020 are relevant and provided guidance as a best guide to what a scheme for 2020/2021 might look like. Applying those figures, the claimant would have been entitled to £18,750 based on sales gross profit alone for the financial year. In evidence it was clear that the claimant was awarded bonus based on the team's performance, rather than his own individual performance: the evidence of Mr Orme was that "Ben did not do deals himself, he supported the sales team to make as much sales gross profit as possible". Therefore, the fact that he was on furlough and garden leave makes no difference, he would have been awarded bonus based on the team's performance as they continued working and their performance can be seen in the figures provided. There was no evidence in the documentation or witness statements that targets would have gone up in 2020/2021 because of the inclusion of further companies acquired by Xerox. I could only go on the accounts provided in evidence by the respondent. The evidence given in relation to the terms of the bonus scheme for 2019/2020 and the figures by Mr Orme was confusing. There had been an error on calculations and oversight on the documentation in the bundle in terms of the total calculations. The spreadsheet showing the Total Cross-Category Sales Gross Profit for March 2020 to March 2021 had only totalled the first four months. The correct Cross- Category Sales Gross Profits in the period for Mailadoc Sales is £286,880; for DCW Sales is £26,669, for UC Sales is £194,887 and for IT Sales £2,713,322. Under the terms of the 2019/2020 bonus the claimant would achieve a bonus of £6,250 for Cross-Category Sales Gross Profit of £2,600,000. A further bonus of £6,250 for Cross Category Sales Gross Profit of £2,800,00 and a further bonus of £6,250 for Cross-Category Sales Gross Profit of £3,000,000. Ongoing through the figures, Mr Orme accepted the claimants counsels calculations and confirmed that on the Total Cross-Category Sales Gross Profit between March 2020 and March 2021 was £3,221,758. The figures show that the £3,000,000 had been achieved by the end of January 2021. The claimant's employment ended on 26 January 2021. In breach of contract the respondent had not notified the claimant of the terms of the 2020/2021 bonus scheme and had not paid the claimant a bonus for the bonus year. Had the same bonus scheme for 2019/2020 been set, based on the figures for 2020/2021 at the time of the ending of his employment, he would have been entitled to a bonus payment of £18,750.

111. Whilst asserting that no scheme was set and a different bonus scheme would have been set, Mr Orme did agree in cross examination that given the Cross-Category Sales Gross Profit was over £3,000,000 that if the bonus scheme had been the same for 2020/2021 as it had for 2019/2020, then the claimant would have been entitled to a bonus of £18,750. The respondent is ordered to pay the claimant the net sum of £18,750 in damages for breach of contract to be grossed up as appropriate.

Grossing up for tax

112. The parties confirmed that they would try to agree what the grossed-up amount should be for the compensation award. I do not have the necessary information in terms of where the claimant falls in tax bands. As proposed, the parties are to seek to agree the amount due in respect of tax the claimant will have to pay on receipt of his compensation. The representatives are asked to inform the Tribunal by no later than 22nd August 2022. If they have not reached agreement, they should inform the Tribunal of which issues have been settled, and which remain in dispute, with each representative submitting their detailed calculations for each disputed issue.

Employment Judge L Knowles

Date: 21 June 2022

Reserved Judgement and Reasons sent to the parties: 22 June 2022

For the Tribunal Office

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