[2014] JMCA Civ 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 9/2012

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**NCB INSURANCE COMPANY LIMITED**	**APPELLANT**
AND	**CLAUDETTE GORDON-MCFARLANE**	**RESPONDENT**

Gavin Goffe and Jermaine Case instructed by Myers Fletcher and Gordon for the appellant

Dr Christopher Malcolm and Miss Sacha-Gaye Russell instructed by Malcolm Gordon for the respondent

28, 29 April and 19 December 2014

MORRISON JA

[1] I have had the advantage of reading in draft the judgment prepared by Phillips JA in this matter. I agree with it and can add nothing to it.

DUKHARAN JA

[2] I too have read in draft the judgment of Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

[3] This is an appeal from the judgment of F Williams J, wherein he ordered that judgment be entered for the respondent in the sum of $2,358,698.20 with interest thereon at the rate of 1% above the appellant's prime lending rate from 1 November 2008 to 14 December 2011.

[4] The issue in the appeal relates to the true and proper construction of clauses 1-3 of the respondent's contract of employment with the appellant, particularly in respect of her entitlements to performance reward and a profit share in addition to her basic salary.

[5] The contract, which was by agreement dated 28 January 2004, came into effect on 2 February 2004. It was initially between the respondent and West Indies Trust Company Limited (WITCO), which is a wholly owned subsidiary of National Commercial Bank Jamaica Limited (NCB). However, by Deed of Novation dated 1 April 2007 between the respondent, WITCO, and the appellant, the appellant engaged the respondent, with effect from the said 1 April 2007, under the same terms and conditions of her then existing contract of employment with WITCO, save for an adjustment to her basic salary.

[6] While employed to WITCO, the respondent held the post of vice-president of Pension Trust & Property Administration. Subsequent to her having been assigned to the appellant, she was appointed vice president of Corporate Services & Human

Resources. As indicated, the clauses the subject of this appeal remained a part of her contract of employment and for ease of reference I will set them out below:

> "**1. Basic Salary**
>
> An annual basic salary of $3.5M gross of statutory deductions, payable on the 23rd Day of each month or on the working day preceding that date, if the 23rd falls on a weekend or public holiday.
>
> **2. Performance Reward**
>
> An annual performance reward of up to 25% of basic salary will be applied based on agreed terms, measured primarily for the first year on successful implementation of those areas for which you are primarily accountable.
>
> **3. Profit Share**
>
> As agreed by the Board of West Indies Trust Company Limited from time to time, based on individual and company-wide performance."

The proceedings in the court below

The fixed date claim form, affidavit in support and the defence

[7] On 26 October 2009, the respondent filed a fixed date claim form against the appellant claiming damages for breach of contract in the sum of $2,300,000.00 being performance reward and profit share for the period October 2007 to 10 July 2008; interest pursuant to the Law Reform (Miscellaneous Provisions) Act; general damages; and costs. She filed an affidavit in support setting out the terms of her employment as stated above, inter alia, the novation, and the fact that she commenced work with the appellant with a new basic salary but that the other terms of her contract remained the same. She further testified that a bonus had been paid to her under an Executive

Bonus Scheme (the scheme) for the years 2005-2006 and 2006-2007. It was her contention that the scheme did not "specifically or otherwise abrogate any rights which existed under my contract of employment." The appellant took no issue with any of those allegations in its defence.

[8] The respondent stated that her employment with the appellant had been terminated on 10 July 2008 under a redundancy exercise, and prior to her termination of employment no documents had been shown to her concerning a bonus and/or performance reward and/or profit share for 2007-2008. She also stated that she had not agreed to any "amendment, abridgment or other change" of the terms of her contract of employment, in respect of that aspect of her emoluments, relating to the period 2007-2008. She indicated further that on 12 November 2008 she wrote to the appellant with regard to her contractual entitlements, and enclosed an appraisal report for the period under review, namely October 2007-July 2008, which she said reflected an excellent overall performance of 87%. The appellant also took no issue with any of those allegations in its defence.

[9] The respondent referred to the letter in response from the appellant dated 9 January 2009 and stated that the appellant had suggested therein that there had been a revision of the methodology for calculating payment and that she had not qualified to receive the entitlements claimed. The appellant took issue with this view expressed in the contents of the letter and stated that what the letter made clear was that the respondent "would not have been entitled to such payments under the old or the revised policies". I will deal with the contents of this letter later in more detail as it

formed one of the triggering events for the litigation which ensued. In fact, the respondent referred to certain items of correspondence between the attorneys for the respondent on the one hand, requesting the payments claimed to be due, and for the appellant, on the other hand, rejecting any such entitlement. The respondent deposed that in the main there were no facts in dispute, and so the court was only being asked to interpret her contract of employment and the Deed of Novation relevant to these issues.

[10] The respondent further deposed there were other persons in similar situations who had received their performance reward and profit share, and so she had on the basis of the calculations used in relation to those persons, computed that the amount due to her was $2,300,000.00. The appellant stated in its defence that it was not aware of any persons in such a similar situation.

[11] Save as set out above, the appellant in its defence pleaded specifically that the annual performance reward and profit share were within its discretion and/or were subject to agreement between the parties. The practice had been that the proposed terms of the scheme, which provided the calculation for the profit share and performance reward, were to be approved by the board of WITCO (the board) on an annual basis and thereafter represented the agreement between the board and the employees. This agreement, the appellant averred, was generally not achieved until well into the financial year. It was also the further contention of the appellant that, for at least two years prior to the termination of the respondent's employment, the terms under which she had been paid contained stipulations that executives whose contracts

of employment had been terminated in the course of the year (other than by way of death or retirement) would not receive any bonus entitlement other than any outstanding payment due from the year previously, which had not been paid.

[12] The appellant further pleaded that, at the date of the termination of the employment of the respondent, the scheme for the period October 2007 to September 2008 had not been approved by the board. As a consequence, in the absence of an approved scheme for that period, the respondent's position was governed by the terms agreed in respect of the immediately preceding period, which represented the agreement in place between the parties, at the date of termination. The scheme for the period October 2006 to September 2007 provided that, in order to qualify for a bonus, the executive must be on the payroll as at September 2007 (the end of the appellant's financial year). The appellant confirmed the major restructuring exercise which it underwent in 2008, which had the result of several senior managers (including the respondent) being made redundant, and not being on the payroll as at September 2008, who were therefore not entitled, so it went, to any incentive payments.

[13] The crux of the appellant's position is set out in paragraphs 11-13 of its defence. For clarity, I will set them out in their entirety below:

> "11. A new methodology for the calculation of profit share and performance bonus was agreed on November 25, 2008, after the Claimant was made redundant, and provided for specified incentive payments to be made to the remaining senior managers specifically named in the proposal ('the New Policy'). The claimant could not have been specifically named as she was no longer an employee and therefore could not

have obtained a bonus under the New Policy. Incentive payments to former executives were not covered in the New Policy because of the agreed understanding in the previous schemes that there was no bonus entitlement where an executive was terminated in the course of a financial year. Further, since the New Policy was only applicable to specified senior managers, any incentive payments to persons not covered in the New Policy would continue to be governed by the last agreed terms of the Executive Bonus Scheme.

12 Further and/or in the alternative, there being no agreement with the Claimant as to her performance bonus and profit share for the year 2007-2008 and no agreement being possible once her contract of employment came to an end, no incentive payments are due to her as her contract only entitled her to a performance reward and profit share if and when agreed by the parties.

13. Accordingly, the Claimant was not entitled to a bonus under the existing agreed terms of the Executive Incentive Bonus scheme as at the date of her redundancy, nor was she entitled to a bonus under the terms subsequently agreed with the remaining senior managers, nor was she able to agree different terms after her contract of employment came to an end."

The letter of 9 January 2009, which I will also set out later in detail, in essence formed the basis for these three paragraphs.

Witness statements

[14] In her witness statement, the respondent made it clear that in each year, from 2005-2007, there had been agreement between the executives and the appellant with regard to the scheme. The scheme, she said, governed the performance relative to the activities for the year under consideration and did not extend automatically or otherwise

to any other year, and certainly did not abridge or amend any right that existed under her contract without express approval. She confirmed that she had agreed the terms in respect of the scheme for the period 2006-2007; that she had not received any proposed scheme in respect of the period 2007-2008 and so had not agreed any terms and conditions for this period outside of the terms in her contract of employment; and that her claim was therefore referable to the terms in her contract of employment. She deposed that she had been involuntarily separated from the appellant and she was entitled to profit share and merit award pursuant to her contract. It was also her contention that any new methodology for the calculation in respect of profit share and the performance reward that may have been agreed on 25 November 2008 subsequent to her separation from the appellant would not apply to her.

[15] She deposed to the fact that in 2004 she had voluntarily given up her entitlement to a merit award due to the poor financial position of WITCO. She stated, however, that she knew of other persons who had been made redundant and who had received their bonus payments. She deposed that in the absence of a scheme for 2007-2008 she had submitted her performance appraisal for processing, in accordance with the relevant provisions of her contract, which had been agreed.

[16] Ms Lilla Campbell-Wiggan deposed that she had been employed to NCB for the period 24 March 1986 to 4 July 2008, and had joined the appellant on 9 November 2001. She held the post of human resources manager when she was made redundant on 4 July 2008. She testified that while employed to the appellant she had received an annual performance reward of up to 10% of her basic salary based on her performance

and also profit share based on the company-wide performance. She stated that she had received profit share and merit award benefits on 12 November 2008 and 12 December 2008 respectively, subsequent to her departure from the appellant.

[17] Ms Ingrid Saint Marie Chambers had been the managing director of the appellant and WITCO for the period January 2003 to March 2008, and in that role she stated that it was her responsibility to make recommendations to the board concerning compensation in respect of members of the executive team. Pursuant to that obligation, she had worked with the consulting actuary in developing the scheme in respect of the years 2005-2006 and 2006-2007. She indicated, however, that she had not done so in respect of the year 2007-2008. Ms Chambers explained the purpose of the scheme and how it operated in this way:

> "6. The Executive Incentive Scheme was designed to link the performance of the team to the budgeted company results and business plan for the particular year. It was flexible in design in that the parameters could vary from year to year depending on the Company's strategic outlook. The scheme was dependent of [sic] the Board's approval of its budget and business plan, it also required the input of the Consulting Actuary.
>
> 7. In the years 2005-6 and 2006-7, after the Board's approval of the business plan and budget, the scheme was first drafted by my-self and the Consulting Actuary. The draft was presented to the team for their inputs and comments and thereafter presented to the Board of Directors for approval. Consequent on the Board's approval the scheme was presented to [sic] team.
>
> 8. In the year 2007-8 there was a delay in the Board's approval of the Company's budget and business

> plan, hence the scheme was not formulated for that year, that is, at the time of my leaving the Company in March 2008."

[18] Ms Ann Marie Hamilton was the general manager of the appellant. In her witness statement she confirmed the background employment history of the respondent, and contended that both the annual performance reward and profit share were within WITCO's discretion. She also confirmed the process of the design and operation of the scheme as described by Ms Chambers. Ms Hamilton referred to the fact that, for at least two years prior to the termination of the respondent's employment, she (Miss Hamilton) had received incentive payments under schemes which stipulated that if the contract of employment was terminated during the course of the year, other than for death or retirement, then no bonus would be paid. As a consequence, she stated, as the bonus had not been approved for the year 2007-2008, the respondent would be governed by the terms of the 2006-2007 scheme, which required that she be employed at the end of the year. The respondent therefore would not have been entitled to any bonus, as having been made redundant on 10 July 2008, she would not have been on the payroll of the appellant at 30 September 2008.

Issues identified by the parties in the pre-trial memoranda in the case below

[19] With the pleadings and the witness statements thus configured, the parties set out their competing legal and factual contentions in their respective pre-trial memoranda. For the respondent the issues to be determined by the trial judge were stated as follows:

"(i) Whether the scope and ambit of the Claimant's contract properly enable her to maintain this action against the defendant?

(ii) Whether the contract of January 28, 2004 (subsumed under novation of April 1, 2007) could have been unilaterally changed by the Defendant without the involvement of the Claimant to her detriment or at all?

(iii) Whether the rights that have accrued under the contract of January 28, 2004 (subsumed under novation of April 1, 2007) in favour of the Claimant permits recovery on the basis claimed?

(iv) What is the appropriate measure of damages and consequential rate of interest to be awarded and for what period should such interest apply?"

For the appellant the issues were posited in this way:

"1. Whether, under the terms of the claimant's employment contract, performance reward and profit share were payable to the claimant at the defendant's discretion, subject to agreement between the parties and/or as of right.

2. Whether the Executive Bonus Scheme for 2006-2007, as the last existing agreement between the parties in relation to incentive payments, governed the payment of performance reward and profit share to the claimant for the period October 2007 to September 2008.

3. If not, whether the absence of 'agreed terms' and/or 'agreement by the Board' in respect of the claimant's performance reward and profit share for the period October 2007 to September 2008 means that she has no entitlement to same."

The parties gave evidence which was more or less in keeping with the pleadings and witness statements disclosed. There was very little dispute between them with regard to the historical background of the respondent's contract of employment and the events that had unfolded subsequently.

Reasons for judgment of F Williams J

[20] Indeed, the learned judge said just that in his reasons for judgment and set out what he called the undisputed facts which as those facts have already been stated, there is no need to reproduce them again in any detail here. He referred to the terms of the respondent's contract with WITCO; the receipt of the bonus payment in 2004, being the profit share only, as the merit award was not taken; the bonus payments under the schemes for years 2005-2007; the novation; the respondent's separation from the appellant by redundancy; the correspondence between the parties relevant to the 2008 bonus entitlements; and the failure to reach any agreement and thus the ensuing litigation.

[21] Suffice it to say, the learned trial judge correctly identified the relevant facts and thereafter reduced the issues for resolution into two, namely:

> "(i) Whether the performance reward and profit share should be regarded as being discretionary payments and subject to agreement between the parties; or were payable as a matter of right.
>
> (ii) Whether, in the circumstances of this case, matters relating to performance reward and profit share (if payable), would be governed by the claimant's

> contract of employment or by the terms of the Executive Bonus Scheme of 2006-2007 (the last existing agreement before the claimant's departure from the defendant)."

[22] With regard to the first issue, the learned trial judge recognised the respondent's position to be that on a true and proper construction of the terms of her contract, given her performance rating which was very high (87%), she was entitled to the payments she sought. It was the practice of the company to make performance reward and profit share payments over the years, and her calculation of $2,300,000.00 dollars was reasonable in all the circumstances of the case. The judge stated that the contention of the appellant was that the bonus payments claimed by the respondent, were discretionary, and even if payable, had not been agreed by the board, and the practice was that they were paid as agreed, based on individual and company-wide performance.

[23] The learned judge resolved this issue in the respondent's favour as he found that the words "will be applied" in item 2 of the contract referable specifically to performance rewards were also applicable to the item numbered 3, namely the profit share (see para [6] above). He also found that the phrase "will be applied" lent support to the view that the payment was contractual and not discretionary. What was discretionary, he opined, was the amount of the payment, and in respect of the performance reward, it could range up to 25%, and, in respect of the profit share, the amount would be agreed by the board, influenced by the performance of the respondent. He also stated that the words of the respondent's contract were clear and

did not admit of another interpretation but to the extent that he could be wrong in that conclusion, then the terms would be ambiguous, and he would pray in aid the *contra proferentem* principle, which, he said, would produce the same result.

[24] The learned judge indicated that there were several cases which assisted in the resolution of the first issue in the case, with regard to whether the incentive payments were contractual or discretionary, and indicated that he had found **Clark v Nomura International plc** [2000] IRLR 766 and **Horkulak Cantor Fitzgerald International** [2004] EWCA Civ 1287, particularly helpful, which I shall deal with in detail later in this judgment. He also referred to **Powell v Braun** [1954] 1 All ER 484 as a case having somewhat similar facts to the instant case, where the court held that the payment of bonus was not meant to be discretionary but that the agreement between the employer and his secretary was for a bonus in a reasonable sum to be paid. He found that the principle running through the cases is that although the bonus payment may be described as discretionary, the court may still find it to be contractual in the circumstances of the particular case.

[25] Further, he stated that in the instant case the bonus payment was an important, even an integral part of the compensation of the respondent, which was, he considered an important point, particularly as in the scheme the performance reward was stated as an addition to the salary in respect of the respondent's compensation. Additionally, it was the appellant's contention that payment of the profit share depended on agreement, and since there had been none in respect of the period 2007-2008, then there could be no entitlement. The learned trial judge indicated that he found it

significant that the separation of the respondent from the appellant had been by way of redundancy, not for cause, and so the respondent had not been at fault in that situation, and equally was not responsible for the unwillingness of the appellant to have discussions toward an agreement in respect of incentive payments for that particular period. He was also suitably impressed with the evidence of the respondent's outstanding performance, which was not in doubt. He therefore posed the question: whether it would be fair and or just to deny the respondent the performance bonus in those circumstances; be answered the same in the negative.

[26] With regard to the second issue the learned judge recognised the respondent 's position to be that as there was no agreed incentive scheme for the year 2007-2008, then the terms of her contract were applicable, as to her entitlements. Additionally the terms of each scheme varied from year to year and only applied to each specific year. The appellant's position was as set out in paras 11-13 of its defence, and repeated in para 13 herein.

[27] The learned judge found on the evidence before him that the schemes did vary from year to year, and that even the heading of each of the bonus scheme payment documents bore the particular year which suggested that the scheme was limited in its applicability and effect to each particular year, and in the absence of any expressed provision would not apply to any other year, or carry over into a succeeding year. He found that on the other hand the contract of employment of the respondent was not limited to any particular year and its terms governed the relationship between the parties throughout their relationship for an indefinite period. He also found that the

respondent could not be bound by terms agreed in respect of the methodology of calculation of her bonus entitlements after her departure from the company. The court was also concerned that the wording in the scheme relating to the requirement for the respondent to be in the appellant's employment at the end of the year, spoke to a positive activity of the respondent in respect of the termination of employment, and did not embrace the separation from the appellant by redundancy. There was no evidence, he stated, that she would voluntarily have left the employment with the appellant, before the end of the financial year. Indeed, the facts spoke to the contrary, as her performance with the company was commendable. The court therefore concluded that the relevant document for the determination of the respondent's bonus entitlements was the respondent's contract of employment.

[28] The court found that there was evidence on which it could conclude that the sum of $2,358,698.20 was reasonable in respect of profit share and performance reward, pro-rated for the 10 months for which the respondent was at the appellant in 2008 and for which she had claimed. He rejected the appellant's challenge to the same on the basis that the respondent's appraisal report had been done by her supervisor at a time when she (the respondent) had left the company, and the report had been submitted when both the respondent and her supervisor were no longer employed to the appellant. He noted that there had never been any dispute that the respondent was a high performer, and an even more noteworthy feature, he stated, was that the appellant had never contended that there was an inability to pay, or that it had made a loss in respect of the relevant period. So, he indicated that he had done

the best that he could in the circumstances, and he made the award set out in paragraph [3] herein.

The appeal

[29] The appellant filed five grounds of appeal as set out below:

> "(1) The learned judge erred in finding that, based on the terms of the Respondent's contract, incentive payments were contractual as opposed to discretionary, particularly in circumstances where both parties led evidence that the incentive payments were at NCBIC's discretion.
>
> (2) The learned judge erred in applying the *contra proferentem* principle of interpretation in circumstances where:
>
> i. the contract was not considered ambiguous by either contracting party;
> ii. both parties led evidence that the incentive payments were at NCBIC's discretion;
> iii. there was no evidence that the terms were not arrived at by mutual consent; and
> iv. the use of the *contra proferentem* rule is a last resort when all other rules of construction have failed to resolve an ambiguity.
>
> (3) The learned judge erred in applying the cases of **Clark v Nomura** and **Cantor Fitzgerald v Horkulak** to the present case in which there was neither an allegation nor any evidence that NCBIC had failed to properly exercise its discretion in relation to the question of whether to make an incentive payment to the Respondent.

(4) The learned judge erred in substituting his discretion for that of NCBIC's in relation to the question of whether the Respondent should receive an incentive payment and, if so, the amount of such payment.

(5) The learned judge erred in finding that an incentive payment should have been made to the Respondent as an employee whose contract had been terminated before the end of the year, contrary to the evidence as to the custom and practice at the Appellant and within the group of companies which includes the Appellant."

In essence, the real matters in controversy between the parties as I indicated previously are:

(1) What is the true and proper interpretation to be given to the terms of the respondent's contract of employment with the appellant.

(2) If the incentive payments were payable, in the light of the fact that the appellant declined to do so, could the court do so instead?

(3) In those circumstances what would be a reasonable sum to be paid to the respondent?

I will deal with the submissions of counsel to the extent that they address these specific issues.

Appellant's submissions

[30] Counsel for the appellant took issue firstly with three matters which, he stated, have relevance to the ultimate determination of the real issues between the parties, namely:

(1) The respondent did not receive any payment under the scheme as that was first introduced in 2005-2006

(2) In 2004 the respondent was paid profit share; her contract did not refer to "group profit share" but profit share "based on individual and company -wide performance. In the exercise of its discretion NCB paid her profit share based on group-wide performance and not 'company–wide performance as stated in her contract".

(3) There were no other executives who were made redundant and who received pro-rated bonus payments.

Grounds of appeal (1), (2) and (3)

[31] Counsel submitted that the decision by the learned judge was ambiguous. The learned judge found, he stated, that the incentives were payable as a matter of right and were not discretionary. Yet he appeared to be saying that there was a contractual obligation to pay the performance reward and profit share but in an amount that was within the appellant's discretion. Counsel stated that this "hybrid" interpretation

between a contractual bonus and a discretionary one was not contended for in the court below and additionally, challenged whether any such approach was supported by the authorities.

[32] Counsel submitted that based on the authorities there are two types of situations encountered when dealing with incentive schemes, namely:

> (1) Where there is a contractual right to receive a bonus as additional remuneration for services rendered. That bonus may be based on a formula stated in the contract or in the absence of a formula on a quantum merit basis (the **Powell v Braun** category).
>
> (2) Where there is a contractual right to be considered for a bonus at the employer's discretion (the **Kofi Sunkersette Obu v A Strauss & Co Ltd**, [1951] AC 243 **Clark v Nomura**, and **Horkulak v Cantor Fitzgerald International** category).

Counsel submitted that it was the respondent's contention that her case was in line with the first category of cases, while the appellant's position was that the respondent's case fell into the second category, but could be distinguished from **Clark v Nomura** and **Horkulak v Cantor Fitzgerald International** as the facts and the relief claimed in the instant case differ, having regard to the remunerative nature of incentive payments in the particular industry referable in those cases.

[33] With regard to **Powell v Braun**, counsel submitted that the incentive payment in that case was for compensation for services rendered, and in lieu of an increase of salary, and was not considered as due to the respondent, the amount of which was

discretionary, as was decided by the learned trial judge in the instant case, as against "a reasonable sum" which was found by the Court of Appeal in England.

[34] In **Clark v Nomura**, counsel stated, the issue revolved around whether the exercise of the discretion whether to grant the bonus was irrational or perverse and therefore an abuse, which counsel submitted was a very heavy burden, and in any event that was never claimed in the instant case. That was also the focus of the arguments and the decision in the **Horkulak v Cantor Fitzgerald International** case, he argued, where the burden was said to have been discharged. It was counsel's contention that the terms in respect of the payment of bonus in the respondent's contract of employment were consistent with those in **Kofi** in which the discretionary incentive scheme was held to apply. The basis and the rate of the commission were within the company's discretion.

[35] Counsel submitted further that the respondent had never pleaded nor relied on the fact that the payment of the bonus was an important and even integral part of the respondent's compensation package as the learned judge found. In fact, had that been pleaded the court would have had to answer the question whether the bonus was for services rendered as in the **Powell v Braun** case or was additional compensation in the discretion of the company as in the **Kofi** case. Counsel submitted that in the instant case the bonus was not compensation for services rendered. The salary was the only part of the respondent's compensation that she was entitled to receive as remuneration for services rendered. Counsel further submitted that there was no guarantee that any of the incentive payments would be paid, only an indication that in

respect of the performance reward, regardless of the respondent's performance, only up to 25% of basic salary could be paid, and that in respect of the profit share, the respondent may receive the same based on the company's results.

[36] Counsel averred that there was no allegation in the case that the appellant had failed to exercise its discretion in good faith. Counsel submitted that that would fly in the face of the respondent's position that the bonus is not discretionary at all. The respondent had not sued the appellant for failure to exercise its discretion or for having abused the same. Counsel submitted that the **Kofi** case was relevant to the instant case as it was the only case which did not involve a claim for breach of the duty to exercise the discretion in a rational manner, and submitted that the ratio decidendi of that case was that the basis and rate of the commission not having been agreed, there was no legal basis for the court to interfere in the contract between the parties. I will refer to these cases in detail later in this judgment.

[37] Counsel suggested that the respondent may perhaps have been in a better position if her claim for damages for breach of contract had been coupled with a claim for damages for the improper exercise of discretion. Counsel therefore concluded that the learned trial judge ought not to have proceeded to determine what the discretionary payment may have been in the absence of a claim and or a ruling that the appellant failed to properly exercise its discretion.

Grounds of appeal 4 and 5

[38] Counsel submitted that at the time that the claim was filed the appellant had exercised its discretion with regard to bonus payments in respect of the period 2007-2008, and the respondent was not one of the named executives who stood to benefit there from. In the absence of any finding that the decision was irrational or perverse, the court was not empowered to substitute its discretion for that of the appellant, to declare that the respondent ought to receive any incentive payment and the amount of that payment. Counsel referred to **Kofi** and said that the respondent having indicated that she was relying on her contract, was unable to make any further claim for greater remuneration. Counsel also challenged the method of computing the incentive bonus claimed by the respondent, and referred to her evidence, in which she stated that the amount claimed she "had made up in her mind", as being inaccurate as the respondent had used the document submitted by the appellant with reference to those executives who had received bonuses for that particular year 2007-2008, pursuant to the decision taken by the appellant, subsequent to the respondent's departure. Counsel's complaint was therefore that the court had "ignored the basis upon which the appellant had paid bonuses in 2008, but had applied the methodology and rates". The court had, he submitted, ignored the fact that only specific persons had been selected, but the learned judge had applied the formula used in respect of those persons nonetheless.

[39] Counsel concluded forcefully that the "court should not have imported words into the employment contract that were not there". Counsel also challenged the alleged 87% performance appraisal of the respondent and the manner in which the appraisal

had been done and submitted that it was not justified just because the appellant had not challenged the respondent's competence and/or that of her supervisor who had completed the appraisal. It was noteworthy though, he submitted, that neither of those persons were either "employee" or "supervisor" of the appellant at the time that they signed the appraisal form.

Respondent's submissions

Ground of appeal (1)

[40] Counsel for the respondent submitted that the words "will be applied" in item 2 of the respondent's terms and conditions of employment were not qualified by the words, "based on agreed terms", as the words "will be applied" give "proper effect to the fact that the payment will be made to the employee". Counsel also submitted that the judge was correct when he ruled the words "will be applied" were equally applicable to the performance reward as to the profit share.

Ground of appeal (2)

[41] Counsel submitted that the learned judge had indicated that the words in the contract were clear particularly with regard to the words "will be applied" as set out above, but accepted that the application by the judge of the principle "contra proferentem" was also correct as any alleged ambiguity would, as the learned judge said, produce the same result. Counsel also submitted that the words "time to time" referred to in item 3 of the respondent's letter of employment "are artificial as they do

not encapsulate the normal practice under this contractual agreement"… "which is to make profit share and merit award payments".

Ground of appeal (3)

[42] Counsel referred to and relied on the contents of the 9 January 2009 letter to demonstrate that the failure of the appellant to pay the respondent her bonus entitlements after having made her redundant was an indication of the appellant not having properly and or reasonably exercised its discretion. Counsel endorsed the learned trial judge's treatment of the cases referred to in the judgment and submitted that his application of the principles disclosed therein was correct.

Ground of appeal (4)

[43] Counsel again endorsed the approach of the learned trial judge indicating that the case of **Kofi** was inapplicable to the instant case, for as the learned judge had made clear, he "had not sought to determine the respondent's rate and bonus entitlement but had applied a rate as per the agreement between the parties". Counsel relied on the learned judge's analysis adopted from the documents supplied to the court setting out the basis of the calculation for the persons remaining in the appellant's employ after the restructuring exercise who were at the respondent's level. That was 20.86% of basic salary in respect of profit share, and where the performance score was less than 92% the formula used was - score/92x25 x basic salary which resulted in the respondent's percentage being 23.6%. Counsel therefore submitted that the learned judge had been guided by the agreement between the parties.

Ground of appeal (5)

[44] Counsel submitted that the learned judge was correct to hold that the respondent was entitled to receive incentive payments subsequent to having been made redundant on 10 July 2008 and as no specific amount had been agreed in respect of the scheme for 2007-2008, the governing document determining the respondent's bonus entitlements would be the respondent's contract of employment.

Discussion and Analysis

[45] It is trite law that in interpreting any provision in a contract, one must give the words their plain and ordinary meaning, and this meaning can only be displaced if it produces a commercial absurdity (per Lord Dyson in **John Thompson and Janet Thompson v Goblin Hill Hotels** [2011] UKPC 8). In such a case one might get assistance from the context, the background and the other provisions in the document.

In this particular case the umbrella words in the contract of employment which governed clauses 1, 2 and 3 read as follows:

> "'... West Indies Trust Company Limited a wholly owned Subsidiary of National Commercial Bank Jamaica Limited (hereinafter referred to as the Company) is pleased to offer you employment as **Vice President-Pension Trust & Property Administration** with effect from February 2, 2004.
>
> You will report to Miss Ingrid Chambers, Managing Director, West Indies Trust Company Limited.
>
> The terms and conditions of this offer of employment are as follows:
>
> 1.

2.

3…." (see para [6] herein)

[46] In my view, clauses1, 2, and 3 when read together with the umbrella words indicate that the parties had in mind that the respondent would be paid on the 23rd day of every month an amount which represented initially $3,500,000.00 annually. There is no dispute on this. Additionally, it seems, in the wording "will be applied" that an annual performance reward of up to 25% of basic salary on "agreed terms", measured on implementation of areas of responsibility, would be paid. There was also a profit share "as agreed" by the board from "time to time" based on individual and company-wide performance.

[47] The words underlined above require specific attention, and in my view, the authorities utilised by the learned trial judge, when analysed give guidance to the true and proper interpretation to be given to the terms and conditions in the respondent's contract of employment. In analyzing the authorities, I will also address whether the respondent's incentive payments were contractual as opposed to discretionary, were ambiguous, and ought to be construed against the maker (the appellant), and whether, bearing in mind the true and proper construction to be placed on the clauses in the contract, whether in all the circumstances there was a proper exercise of the discretion by the appellant not to make any incentive payment to the respondent.

[48] I will first consider the English Court of Appeal case of **Powell v Braun**. In this case, the employer wrote to his secretary offering to pay her a bonus each year on net trading profits of the previous year in lieu of a rise in salary. The secretary responded in

writing indicating her approval for such a consideration and her appreciation for the same. Bonuses were paid for the years 1946-51 but the employer refused to pay any bonus in respect of the years 1952 and 1953. He claimed that no firm promise had been made; in fact such a promise, if made, was too vague to be enforced. Additionally, a claim for quantum merit us too novel and therefore inapplicable. In the headnote of the case, it was recorded that the court held that:

> "As a matter of construction of the letters it was intended by the parties, not that the payment of a bonus should be within the discretion of the defendant, but that he should pay the plaintiff a reasonable sum, i.e, a sum which bore a reasonable relation to the relevant trading profit; the principle of quantum meruit was no less applicable where the remuneration in question was additional remuneration than it was where the basic remuneration was the only remuneration; and, therefore the plaintiff was entitled to recover a sum agreed as reasonable in respect of the two years in question."

[49] At first instance the county court judge found that any further payment over and above the secretary's fixed salary was in the discretion of the employer and dismissed the claim. On appeal, however, Sir Raymond Evershed, MR set out the contentions of the employer and rejected them wholeheartedly. Sir Raymond stated that it was clear that the secretary relied on the promise in exchange for her continued service with greater responsibility. The employer also could not have from the evidence thought that he was under no liability at all, if he chose not to pay. He concluded that the parties did not mean and intend the payment of bonus to be "purely discretionary". He also

rejected that the document was too vague, and he stated that once it was concluded that it was not to be a reward in the discretion of the employer:

> "inevitably, it must be taken that the sum to be paid- unless the parties chose from time to time to agree some other figure-would be a reasonable sum, that is, a sum arrived at so as to bear a reasonable relationship to the trading profit. If there were no trading profit, no doubt, there would be no so-called bonus, but, in any other event, I think the principle of quantum meruit or of reasonable remuneration (which comes to the same thing) is no less applicable where the remuneration in question is additional remuneration--- that is, over and above the fixed salary—than it is where the basic remuneration is the only remuneration."

He therefore arrived at a reasonable sum to be paid to the secretary.

[50] Lord Denning put it this way. He said the agreement clearly contemplated that the employer should pay something. It was not a matter as found by the learned trial judge that it was within the discretion of the employer whether he should pay something or nothing. He had bound himself to pay something. The precise amount also would not be in his unfettered discretion. It would be an amount within his reasonable discretion, that is "it would be the amount which a fair and just man would pay in the exercise of a reasonable discretion".

[51] Romer LJ, having commented that the actions of the employer reflected very little credit on him, stated that the judge was in error in finding that the intention of the parties would have been that the employer should pay such portion of the profit as he in his discretion might decide, as in his view, it was a matter of a legal bargain giving

rise to a legal right and the secretary was to get at all events something, provided there were profits. He also agreed that the secretary should be compensated on a quantum meruit basis.

[52] I agree with the learned trial judge that the circumstances of this case are somewhat similar to the instant case, particularly with regard to the payment of the performance reward. The words "will be applied" in the respondent's contract of employment with reference to the annual performance reward of up to 25% of basic salary, could only mean that the appellant was bound to pay the respondent something, but not in excess of 25% of the basic salary. The amount to be paid also would not be in the appellant's unfettered discretion, but agreed between the parties, being a reasonable sum based on the respondent's performance. In respect of the profit share it would also have been intended between the parties that once there was profit, a reasonable sum would be paid which would be agreed by the board, not being purely discretionary, but reasonable.

[53] In **Clark v Nomura** the facts were as set out in the headnote, and summarily are as follows: Mr Clark was employed to the defendants as a senior proprietary trader in equities from July 1996, under a contract of employment in which his remuneration was stated to be by way of a basic salary, supplemented by a bonus awarded under a discretionary scheme, which according to the terms set out in his letter of appointment, "is not guaranteed in any way, and is dependent on individual performance and after the first twelve months your remaining in our employment on the date of payment". Mr Clark's performance between 1995-1997 was extraordinary, and he was responsible for

the company earning substantial profits. He was dismissed in February 1997, however, on the basis of "management's fundamental and irretrievable loss of confidence in his ability to support their strategy and desired culture", which they stated had, "manifested itself in inappropriate dress and appearance, erratic time-keeping and attendance, lack of attendance at management meetings, involvement in perpetuating rumors about peers, and outright criticism of the management committee and their strategy in front of peers and subordinates".

[54] Although he had received bonus payments throughout 1996, in three monthly intervals, and was still employed at the company, when the bonus in respect of 1997 was due, he was paid three months' salary in lieu of notice, which he was required to serve as "garden leave", by way of basic salary only. He made a claim for damages on the basis that the failure to pay him the bonus was a breach of contract, and the company claimed that his performance was only the "triggering condition" to the exercise of the employer's discretion, and in the exercise of that discretion his own individual trading performance was only one of the matters to be taken into consideration, as "performance" in his contractual context meant his overall contribution to the success of the business, the company's legitimate business needs and interests, and the need to retain and motivate him. These were all matters, the company said, should be taken into account.

[55] The court held that the company was in breach of contract as Mr Clark ought to have been paid bonus for the nine month period of the year prior to his dismissal, in spite of the words in his contract describing the bonus as discretionary, and not

guaranteed. The court also held that in exercising a discretion, even if it appeared on the face of it to be unfettered and absolute, if exercised in a manner in which no reasonable employer would have done, the company would be in breach of its contract. The court found that the contractual term required one to assess Mr Clark's individual performance and that was not just a "triggering event" as claimed by the employer. So, corporate contribution, team working, capital usage and risk, were all matters which should only be taken into consideration in assessing the individual performance of the employee relative to his requirement to make profit. Thus, the court found that on a true construction of the terms of the contract, the assessment of the bonus depended on the individual performance of Mr Clark, and that alone. That was the contractual obligation. Other factors such as the need to retain and motivate the employee should not be taken into account in assessing performance. Additionally, if there was no variation and deficiency in the performance of employees, they were entitled to be treated equally. So refusing to pay Mr Clark when he had been so profitable in his trading activities would have been irrational and perverse. Had the company complied with its contractual obligations he would have received a bonus in the terms in which he had claimed. The employer's discretion is not unfettered and must never be exercised capriciously, irrationally, or perversely.

[56] The court held further that the company could not without justification dismiss an employee who earned a small basic salary as against the expected bonus, and then use the fact of its own dismissal to justify a nil bonus. It was unacceptable to say that

Mr Clark had worked well in the past, but as in the future he would not be employed with the company it would simply exercise its discretion to make a nil award.

[57] In the instant case, the performance reward was not stated to be either "discretionary and in no way guaranteed," nor was the profit share stated to be payable by way of an unfettered discretion. In the case of the performance reward, as indicated, it was to be applied based on individual performance and to be agreed through the formula discussed and arranged with the assistance of the consultant actuary and by way of input from the executive staff. The profit share was also, by way of practice, paid annually, which can be inferred as being from time to time, and it too was based on individual, but also company-wide performance, and as agreed by the board.

[58] In the circumstances whereby the company had been profitable, which was not disputed, the respondent having achieved commendable performance, in my view, no reasonable employer could have come to the conclusion that a nil award was to be made to the respondent. Such a decision could be viewed as irrational, whether any specific pleading had been drafted to that effect. It could be so, because the respondent was entitled to payment of a performance reward, and a profit share, pursuant to the terms of her contract, and the decision not to pay her any amount at all would be in breach of contract, and the exercise of the discretion not to do so and the basis and manner utilised could be thus described.

[59] I found the case of **Horkulak v Cantor Fitzgerald International** equally instructive. In this case, Mr Steven Horkulak was employed to Cantor Fitzgerald International a firm of inter dealer brokers trading in bonds, equities and interest rate derivatives from 1997, and was made senior managing director in 1999 under a three year contract to expire on 30 September 2002. It is interesting to note the terms of the contract in this case. The headnote recorded them thus:

> "The contract provided for a basic annual salary of £250,000.00 a year, with the employers reserving the right to reduce this sum by no more than 25% if revenue targets were not met. Provision was also made for a 'once only' bonus of £100,000.00 on his signing the contract, plus a further guaranteed bonus of £100,000.00 in respect of the year to 30 September 2000. The contract further provided that: 'In addition the company may in its discretion, pay you an annual discretionary bonus which will be paid within 90 days of the financial year-end (30 September) the amount of which shall be mutually agreed by yourself, the chief executive of the company and the president of Cantor Fitzgerald Ltd Partnership, however the final decision shall be in the sole discretion of the president of Cantor Fitzgerald L P…. It is a condition precedent to any payment hereunder that you shall at all relevant times exercise best endeavours to maximise the commission revenues of the global interest rate derivatives business and that you shall still be working for the…company on the date such bonus is due to be paid."

[60] Mr Horkulak resigned on 29 June 2000 giving as his reason abusive treatment, including foul language from the company's chief executive, amounting to a breach of the implied contractual term of trust and confidence. The company claimed shortcomings on Mr Horkulak's part, saying that he could not cope with the pressures of the job. It was known that he was a heavy drinker and cocaine user. The judge at first

instance awarded him £900,000.00 on his claim for wrongful dismissal including sums under the discretionary clause, which the judge found would have been made to him had he remained in the company's employment. The judge held that he was entitled to the benefit of the term in his contract which entitled him to receive a discretionary bonus, and he was entitled to a fair and rational assessment of that entitlement.

[61] The Court of Appeal upheld the decision of the judge, and in respect of the discretionary bonus stated that:

> "A discretion provided for in a contract which is prima facie of an unlimited nature will be regarded as subject to an implied term that it will be exercised genuinely and rationally. That is presumed to be the reasonable expectation and therefore the common intention of the parties, even though they are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion."

In this case the court had to address the fact that Mr Horkulak, having been wrongly dismissed, was entitled, had he remained in the defendant's employment, to a bona fide and rational exercise by the company of its discretion as to whether or not to pay him any bonus and in what sum.

[62] Although the use and positioning of the word "may" in his contract of employment attached a discretion to the obligation to pay a bonus at all as against the assessment of the amount payable, the court made it plain that "nonetheless the clause is one contained in a contract of employment in a high earning and competitive activity in which the payment of discretionary bonuses is part of the remunerative structure of

employees". The bonus, the court held, was "to motivate and reward employees in respect of their endeavours and to maximize the commission revenue of the global interest rate derivatives business." The court viewed the clause of requiring the employees to be still working with the company at the time the bonus was to be paid, as demonstrative that the bonus was to be paid in anticipation of future loyalty, which itself was therefore to be regarded as a contractual benefit to the employee as opposed to being a mere declaration of the employer's right to pay a bonus if it wished, a right which the, court stated, the company would enjoy regardless of the contract.

[63] The court also viewed the manner in which the bonus was to be assessed as important and stated that it should be done in a rational manner, for failure to do so would "strip the bonus provision of any contractual value or content in respect of the employee whom it is designed to benefit and motivate". It would, the court stated, fly in the face of the principles of trust and confidence which have been held to underpin the employment relationship. In this case, the court was also faced with the difficult task of trying to assess whether Mr Horkulak would have remained in sufficient good health to have continued in the employment of the company for the remainder of his contract, and also whether he would remain profitable and deserving of a bonus. (That situation did not obtain in the case at bar, as the respondent was made redundant only a few months before the end of the financial year and when the decision to pay bonuses was finally made.)

[64] What is important in the **Horkulak v Cantor Fitzgerald International** is that in those particular circumstances and in the absence of any specific contractual criteria,

the court found that the company was not free to operate carte blanche in deciding whether or not to award a bonus. Once the court decided that there was a breach of contract, the matter became one of assessment, and Potter LJ said, speaking on behalf of the court, despite there being no contractual sign posts in relation to the framework of computing the bonus payable, that only makes the court's task that much more difficult, but, he stated the principle remains the same. The court held that the judge was entitled to have regard to the range of salaries and bonus payments being made to employees who worked in the same title and station as Mr Horkulak, not only as an indication that bonuses were being paid over the relevant years, but to see whether he was in the right ball park when assessing what might have been paid to him, as the company was claiming that nothing at all should be paid. The judge, the court held, had to do the best that he could in the circumstances. As long as the judge restricted himself to the exercise of reviewing general levels of remuneration including bonuses of persons of the same level and station as Mr Horkulak, and took account of the different work of other senior managing directors by way of distinction when considering him, then the judge could not be faulted. So, the question at the end of the day was were the figures arrived at by the judge in keeping with Mr Horlulak's legitimate expectations and had the company acted reasonably in all the circumstances?

[65] In my view, the terms of the contract in the instant case, are not as wide as in the **Horkulak v Cantor Fitzgerald International** and should be construed accordingly. The respondent was entitled to the benefit of the contractual term to pay the performance reward, and to a profit share, both of which the appellant ought to

have considered rationally and reasonably and the appellant was not free to operate carte blanche as to whether or not to pay the bonus. The appellant was also in a position to assess the work of the respondent, and to obtain an appraisal as had been done in the past. Additionally, in that assessment the appellant could also review and compare the performance of the respondent with other employees operating at the same level in the company.

[66] The letter of 9 January 2009 set out with great clarity the approach taken by the appellant as to why no bonuses were to be paid to the respondent, which letter as earlier stated, informed the defence filed on behalf of the appellant. I have set out the letter in its entirety below.

> "January 9, 2009
>
> Mrs Claudette Gordon-McFarlane
> 5 Kingswood Close
> Stony Hill
> Kingston 9
>
> Dear Mrs Gordon-McFarlane,
>
> **Re: Performance Reward and Profit Sharing Payments**
>
> I refer to your letter dated November 12, 2008. I apologise for the delayed response. However I had to consult as appropriate before responding.

Your contract referred to payment of performance reward and profit share as 'agreed'. In the 2005-2006 and 2006-2007 financial years, the Board and its Evaluation & Compensation Committee, respectively, agreed that a person would benefit from these only if employed to the Company at the end of the financial year, unless the employment was terminated by reason of death or retirement. For the financial year 2007-2008, there was a revision of the methodology for calculating the payments, albeit after you had left. The revised methodology for 2007-2008 financial year provided for the award of incentive payments only to the Senior Managers who were in the Company's employ at the date the revised policy was finalized and who were specifically named in the revised methodology.

In the light of the above you would not be entitled to the sums sought in your letter: the most recently revised methodology would not be applicable to you as you were not one of the named Senior Managers. Similarly, you would not be entitled to incentive payments under the 2006-2007 Scheme (which was the scheme last agreed while you were employed to NCB Insurance Company Limited) as you were not in the Company's employ at September 30, 2008.

Yours faithfully,

.....
ANN MARIE HAMILTON
GENERAL MANAGER

cc. General Counsel Division
Mr. Rickert Allen, Group Human Resources Division"

[67] As the judge correctly found there was no express or implied condition that the terms of the scheme in respect of 2006-2007 would be applicable to 2007-2008. The heading of the document specifically referred to the year to which it related and there

was therefore no basis on which to conclude that the terms of that scheme would be applicable to the respondent in the year 2007-2008. The respondent was made redundant in July 2008. The system of agreeing the award of bonuses was approached with even greater lethargy than had been done in the year previously. It was not finally agreed until November 2008. For the company at that stage to determine that only some of the executive staff and others would benefit and that the respondent who had obtained a performance score of 87% would get a nil bonus in respect of her performance reward, and in circumstances where the company had made a profit, that the profit share bonus would also be nil, would in my view appear arbitrary and not in keeping with what a reasonable employer would do in the light of the specific terms of the respondent's contract of employment, which was the relevant applicable document, and which gave the respondent certain benefits. The respondent was certainly entitled to expect the appellant to act rationally in the exercise of the discretion whether or not to pay her the bonuses referred to in her contract of employment.

[68] The NCB had published a staff circular No 65/2008/S to all managers of head-office divisions and branches on the subject of profit sharing on 7 November 2008. It stated, inter alia that the audited financial statements had recently been released in respect of the period 2007-2008. It stated:

> "… These results reflect another year of record performance which is demonstrated by the 32% ($2.1B) increase in after-tax profits over the prior year.
>
> "The achievement of $8.7B in after-tax profits is in no small measure due to the collective effort of all NCB

> employees. On behalf of the Chairman and the Board of Directors, please accept our commendation for your continued good performance…
>
> "We are … pleased to note that profit share payments over recent years have been consistently increasing, which points to the value of making our own performance determine our rewards."

By this memorandum the board of NCB thanked its employees for their contribution during the recently concluded financial year. The respondent had been deployed for nine months of that financial period, and so, on any reasonable approach she would have been entitled to her profit share, bearing in mind that her separation from the company was through no fault of hers, but by way of the company's own decision to go through a restructuring exercise.

[69] The appellant relies on the cases **Kofi** and **Lavarack v Woods of Colchester Ltd** [1966] 3 All ER 683. In my view both cases are readily distinguishable.

[70] In **Kofi** the appellant had signed an agreement as agent in West Africa for the respondent company for the purchase and shipment of rubber to the company in London. Clause 6 of the agreement provided inter alia:

> "The company has agreed to remunerate my services with a monthly sum of fifty pounds to cover my personal and travelling expenses for the time being which I have accepted. A commission is also to be paid to me by the company which I have agreed to leave to the discretion of the company."

The company terminated his agreement, sued for sums allegedly due from him and he counterclaimed for an account of all the rubber shipped by him and the commission

on all the rubber purchased by him for the company. On appeal from the West Africa Court of Appeal, the Privy Council held that:

> "the relief which the appellant claimed by his counterclaim was beyond the competence of any court to grant. The court could not determine the basis and rate of commission. To do so would involve not only making a new agreement for the parties, but varying the existing agreement by transferring to the court the exercise of a discretion vested in the respondents."

[71] The judgment of the court was delivered by Sir John Beaumont. The main issue in the appeal related to the appellant's counterclaim for an account and payment of commission. The appellant contended that the respondent had refused to pay him commission that he was entitled to be paid by way of quantum meruit for services rendered. The court found that the appellant had agreed an amount for services rendered and no other amount, save and except the commission, which was left entirely to the discretion of the company. The claim by the appellant was one which required the company to fix a rate but also the basis for the commission which basis could be a share of profits. This was clearly beyond the competence of the courts. The absence of profits could render nugatory any commission based on profits. The claim for an account and payment of commission would therefore require the court to determine the basis and rate of the commission. As Sir John Beaumont stated, to do so would involve not only making a new agreement for the parties, but varying the existing agreement, by transferring to the court the exercise of a discretion vested in the respondent.

[72] This situation was clearly different from the case at bar, as the parties had agreed that a performance reward would be applied and there was evidence as to its calculation; so too the profit share. Both incentive payments as set out in the contract were additional to the basic salary stated in the contract. They were contractually agreed between the parties, which as indicated were expected to be applied rationally.

[73] Potter LJ in **Horkulak** set out a summary of the facts of **Lavarak and Woods**. He said at paragraph 32 that:

> "…the plaintiff claimed damages under a contract entitling him to 'such bonus (if any) as the directors… shall from time to time determine". He was dismissed in the second year of a five-year contract, at a time when a form of bonus scheme applicable to all employees of his grade was in place under which he received payments. Following his dismissal, in the third year of the contract period, the defendants ended the bonus scheme for all the remaining employees of his grade, and agreed with most of them to pay an increase in salary which was less than the total of their previous salary plus bonus. The Master assessed damages on the basis that the plaintiff would have received such an increase in salary had he remained in the defendant's employment. However the Court of Appeal held that damages for wrongful dismissal could not confer on an employee extra salary benefits which the contract did not oblige the employer to confer, even though the employee might reasonably have expected his employer to confer them on him in due course."

[74] Potter LJ also referred to certain observations of Lord Diplock in that case where he (Lord Diplock) said:

> "I know of no principle on which he can claim as damages for breach of one service agreement compensation for remuneration which might have become due under some imaginary future agreement which the defendants did not make with him but might have done if they wished. If this were right, in every action for damages for wrongful dismissal, the plaintiff would be entitled to recover not only the remuneration h would have received during the currency of his service agreement but also some additional sum for loss of the chance of its being renewed upon its expiry."

[75] In any event, Potter LJ commented that **Lavarack v Woods** was not a case relating to a true construction of a bonus discretionary scheme. Indeed, Lord Diplock had indicated that, had the bonus scheme not been abolished, Mr Woods would likely have participated in the scheme because it was a scheme which had applied equally across the board to all employees of a similar grade, whereas once it had been abolished, the salary had been negotiated and adjusted according to the company's view of each individual's merit.

[76] Indeed Potter LJ in agreeing with the judge below in **Horkulak** distinguished the principles arising in **Lavarack v Woods** in this way (in paragraph 48 of his judgment):

> "The judge was correct to find that application of the principles in **Lavarack v Woods** provided no rule of thumb applicable to discretionary bonus cases for reasons which I have already made clear. In that case the claimant was never party to the putative agreement in respect of which he claimed damages and the court reserved its position in respect of the outcome if the claim had been made for loss of bonus under the scheme applicable to the claimant during his employment, had it continued…. Nothing was said in

> **Lavarack v Woods** to suggest that, in respect of a claim for damages put upon the basis that the claimant would have received payments under a discretionary bonus scheme of which he was already potential beneficiary, the court should assume that the employer's discretion would be exercised against him in a case where such a decision would be irrational or arbitrary or one which no reasonable employer would make. The broad principle that a defendant in an action for breach of contract is not liable for doing that which he is not bound to do will not be applicable willy-nilly in a case where the employer is contractually obliged to exercise his discretion rationally and in good faith in awarding or withholding a benefit provided for under the contract of employment. Where the employer fails to do so, the employee is entitled to be compensated in respect of such failure..."

[77] In the instant case the respondent was also a potential beneficiary under a contract of employment which obliged the employer to exercise his discretion in respect of incentive bonus payments, rationally.

[78] There is no doubt in my mind that the proper construction of the terms, which terms were not ambiguous, of the contract of employment between the respondent and the appellant is that the incentive bonus payments were agreed to be made as indicated, by way of individual performance assessment being not in excess of 25% of basic salary as agreed, and annually (from time to time) as agreed by the board pursuant to procedure and practice which had been applied in respect of the calculation for the profit share in the year previously, and had been similarly assessed in November 2008. The clause in the scheme relative to 2006-2007 requiring the respondent to be in the appellant's employ at the end of the financial year was not applicable to her in

respect of the period 2007-2008. There was no such clause in her contract of employment, which was the document applicable to determining the incentive payments due to her in respect of that period. The incentive payments were a contractual obligation, the performance reward was agreed to be applied, and the profit share to be paid based on the agreement and discretion of the board, which was expected to be applied reasonably, in the light of the company-wide profit achievement of NCB referable to the particular year.

[79] The learned judge did the best that he could in utilising the documents submitted, which showed that someone at the respondent's level when she was separated from the appellant would have received an NCB group profit payment of 20.6% of basic salary. The formula in respect of merit award was stated to be that where the performance was less than 92% then the following was applicable: score/92 x 25 x basic salary. The learned judge used this formula and arrived at the respondent's merit award of 23.6%. In her evidence the respondent said that she believed that her profit share was 87% x 25% x basic salary. In adopting those parameters the learned judge arrived at the amounts stated in his judgment and set out in para [28] herein.

He awarded:

"Profit Share- $1,325,970.00

Merit award- $1,504,466.96

$2,830,437.84 [sic]

Pro-rated for the 10 months for which the respondent, claimed, her entitlement would be $2,358,698.20 plus interest."

[80] In my judgment the learned judge cannot be faulted. I find that the grounds of appeal do not have any merit and must fail. I would therefore dismiss the appeal, affirm the judgment of F Williams J and order that the costs of this appeal and in the court below be the respondent's to be taxed if not agreed.

MORRISON JA

ORDER

Appeal dismissed. Judgment of F Williams J affirmed. Costs of the appeal and in the court below to the respondent to be taxed if not agreed.