EMPLOYMENT TRIBUNALS

Claimant: **Mr J Dorman**

Respondent: **Nessy Learning Ltd**

Heard at: **Bristol** **On:** **22 to 26 October 2018**

Before: **Employment Judge Livesey**
Mrs L B Simmonds
Mr E Beese

Representation
Claimant: Ms A Reindorf, counsel
Respondent: Ms G Hirsch, counsel

JUDGMENT having been sent to the parties on 7 November 2018 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a Claim Form dated 9 January 2018, the Claimant brought complaints of discrimination on the grounds of race, unfair dismissal, unlawful deductions from wages and unpaid holiday pay.

1.2 The claim was originally brought against a second respondent, Mr Jones, but that claim was rejected as a result of non-compliance with the early conciliation provisions.

1.3 The claim of unpaid holiday pay was withdrawn on the second day of the hearing.

2. The evidence

2.1 Witnesses gave evidence in the following order;
- On behalf of the Claimant; Mr Bunn;
Mr Murphy;

Claimant;

- On behalf of the Respondent; Mr Jones;
Ms James;
Mrs Jones.

2.2 The following documents were produced;

C1 The Claimant's counsel's Closing Submissions;
R1 The hearing bundle (2 lever arch files);
R2 The Respondent's counsel's Opening Note;
R3 The Respondent's counsel's closing Skeleton Argument with Schedule 1.

3. The issues

3.1 The claim had been heard at three Case Management Preliminary Hearings. And the first one, the Employment Judge had been presented with an Agreed List of Issues which was adopted by him. He listed the case for a determination of issues relating to liability only. That List was slightly revised on 17 August 2018, but it remained agreed between the parties (pages 53 to 56 of the hearing bundle, R1).

3.2 We have returned to the List of Issues later in these Reasons but the matters which fell to be determined were, in summary, as follows;

3.2.1 Unfair dismissal; on the second day of the hearing, the Respondent conceded that the Claimant's dismissal had been unfair within the meaning of s. 98 (4). It continued to run arguments under ss. 122 (2) and 123 (6) and under the principle in *Polkey*;

3.2.2 Direct discrimination (s. 13); the Claimant complained of the three acts set out in paragraph 3 of the List of Issues;

3.2.3 Indirect discrimination (s. 19); the provision, criterion and practice was set out in paragraph 7 of the List of Issues;

3.2.4 Victimisation (s. 27); the protected act was said to have been the Claimant's grievance of 22 October 2017. Two detriments were relied upon (paragraph 13 of the List of Issues);

3.2.5 Unlawful deductions from wages; this was said to have concerned the Claimant's bonus/commission for 2017.

3.3 Soon after the start of the hearing, the Respondent's counsel clarified that no statutory defence was being put forward under s. 109 (4) and paragraphs 6 and 14 of the List of Issues were abandoned.

3.4 The parties also wanted us to determine two questions in relation to the Claimant's entitlement to shares which were framed as follows;

(a) Would the Claimant have been sold shares in the Company but for his dismissal?
(b) If so, when and how many?

The questions were relevant to issues of remedy only, but we were prepared to deal with them as we were told that the answers would have significantly assisted the parties resolve any residual issues.

4. The facts

4.1 We reached the following factual findings on the balance of probabilities. We attempted to restrict our findings to matters which were relevant to the issues. Any page references within these Reasons are to pages within the hearing bundle, R1, unless otherwise stated and have been cited in square brackets.

Preliminary comments about the evidence

4.2 We made some initial findings about the quality of the evidence from the main protagonists, the Claimant and Mr Jones. We did not consider either of them to have been particularly good witnesses. The Claimant, in particular, we found to have been evasive on occasions. He shifted his ground during the course of his evidence on several issues. Although he made some concessions on issues that were put to him, we were surprised that he did not make more when faced with some of the documentary evidence during cross-examination.

4.3 Although Mr Jones struggled to deal with some questions both at the start and the end of his cross examination regarding the nature of his investigation and the interplay between him and Mrs Jones during the disciplinary process, we gained the strong impression that he was trying to be open and truthful in the answers which he gave in other respects. Ultimately, we had the sense that Mr Jones and his mother were essentially decent people who were trying to protect their business from the Claimant when they perceived him to have been a threat in October 2017. The manner in which they did so, however, was wrong, naïve and ill-advised.

Background

4.4 The Respondent is a business which produces educational resources which are marketed to schools, parents and other organisations. Its products are specifically aimed at the education of children with dyslexia. It was established in 1999.

4.5 Mr Jones, the Chief Executive Officer, is a 90% shareholder. Mrs Jones, his mother, is a director and a 10% shareholder. She has a background in educating children with dyslexia and founded the Bristol Dyslexia Centre.

4.6 The Respondent now employs more people than it did in the Claimant's time there. There were 12 employees at the point when he was dismissed. In the UK, they included Ms Taylor, the Chief Financial Officer, and, apart from the Claimant and Mr and Mrs Jones, there were 5 others whose roles were set out on an organo-gram [15]. Ms Rooney also started as the office administrator in June 2017. In the US, Mr Ferrara was employed as a Sales Manager. Mr Bates worked as a consultant. He was briefly employed in 2017 before he resigned. Ms James was employed from either late 2016 or early 2017.

4.7 The Respondent had a Disciplinary Policy [246-253] but it was not referred to us during the evidence. We were told that it had an Equal Opportunities Policy which was not produced either.

4.8 The Claimant, who is of Irish national origins, was employed by the Respondent as its Sales and Marketing Director from 2 September 2013. Mr Jones was his line manager. His role required him to undertake sales and marketing work in the UK and US which involved increasing awareness of the Respondent's brand, running and managing marketing campaigns, coordinating and monitoring the salesforce and reporting monthly sales figures. In relation to his US role, he tended to visit the United States four or five times a year to attend conferences and visit his line reports, Mr Ferrara and Mr Bates.

Salary, bonus/commission and shares

4.9 The Claimant's remuneration was set out in his contract of employment [1-3]. He received a salary which rose from £60,000 to £80,000. The contract contained an entitlement to bonus or commission on non-UK sales as follows;

> "*5% of all income derived from sales in countries outside the UK where those sales are as a direct result of his work in developing new markets and up to a maximum of one million pounds in any one year. You will not be entitled to sales that derive from pre-existing arrangements or arrangements put in place by another person. The directors agree to meet biannually, to vote upon repatriation of funds to the UK, and quarterly to review budgets and consider bonus payments… All payments will discontinue after you cease to work for Nessy.*"

4.10 The Respondent ran an Enterprise Management Incentive ('EMI') Share Option Plan [639-651] under which the Claimant was given an option to buy 7,500 shares at a cost of £10 each. The EMI Plan was a separate, collateral contract and was created in 2015, although it had been discussed for some time before that. The scheme specifically required the Respondent's performance targets to have been hit before the share options could have been exercised [649 & 651]. The Claimant accepted in evidence that the Respondent did not actually hit those targets, although the grantor retained a discretion under the Plan in that respect (see clause 3.3 [642]).

4.11 The Claimant tried to buy 2,500 shares for £25,000 in July 2017 [661]. That would have given him a 2.5% shareholding in the Company. He did not, however, have £25,000 and discussions were held about the possibility of the Respondent loaning him the money. The Respondent's accountant was involved in those discussions [657]. The parties were never *ad idem* over the terms of a loan and no agreement was ever drawn up. No money or shares ever changed hands.

4.12 In any event, Mr Jones identified significant capital gains tax liabilities in respect of such a sale and/or loan agreement (see paragraph 11 of his

witness statement), an issue upon which he was not challenged in cross-examination.

4.13 The Claimant's case was that, at a meeting near Bristol in July 2017, there was a discussion about him buying a further 5% shareholding in October of that year. A note of the meeting was kept by Mr Bunn [71] but the minutes were written on the assumption that the initial 2.5% option had already been validly executed. Mr Jones' case was that the notes were wrong both in that respect and in respect of the granting of a further option to buy more shares in October. He said that he had probably indicated to Mr Bunn that the Claimant had already obtained a shareholding in order to cover his embarrassment over the fact that he had not been able to afford to buy them. Mr Bunn partially agreed; he agreed that the reference to the Claimant already having a 2.5% stake in fact reflected his desire to exercise that initial option. Either way, both parties agreed that no shares were in fact transferred.

Mr Bunn

4.14 The Claimant introduced Mr Bunn to Mr Jones as a consultant in 2017. He had a background in sales and marketing and knew the Claimant as a friend as a result of their children sharing the same school. They had been on two charity bike rides together.

4.15 Mr Bunn sent a proposal to review the business in April 2017 and then met Mr Jones in June. There were a number of meetings through the summer of that year and their working relationship appears to have been positive and mutually beneficial (see, for example, [38] and [541]). Mr Bunn received confidential financial information from a number of sources to enable him to review the Company's finances. It was even mooted that he would have been given the role of Executive Chairman [542] (he made that suggestion to both Mr Jones and the Claimant). Mr Jones responded positively [541] but stated, in evidence, that he had not read the email properly.

4.16 In the autumn, however, things cooled and Mr Jones told Mr Bunn that he had done an "*excellent job*" but that he did not want a closer relationship [540-1]. It appeared that this cooling of relationships came as a result of Mr Jones then fully appreciating the proposal in relation to Mr Bunn's role and title. By mid October, Mr Jones felt that the Respondent could not sustain Mr Bunn's cost and he stated that he wished to end their relationship [537-8]. Nevertheless, at least until September 2017, the working relationship between the Claimant Mr Jones remained good. Indeed, the documents showed that in August, Mr Jones was still exploring how to affect the sale of shares to him [663].

The Claimant's US role and the events of September 2017

4.17 At the end of 2016 or the beginning of 2017, Ms James joined the Respondent. She is a US national and she was recruited by Mr Jones who had then moved to work in the US for approximately 6 months from January

2017. They developed a personal relationship and became engaged. They are now married.

4.18 Mr Jones and the Claimant had different views on marketing in the US. The Claimant wanted to devise a strategy of using state advisers for a more targeted approach to different geographical areas. Mr Jones was not, however, convinced that the plan was an efficient use of the advisers as a resource. A more significant issue was, however, looming which concerned Mr Ferrara.

4.19 The Claimant's case was that Mr Ferrara was underperforming, was reluctant to travel and was not effective. When asked in cross-examination what contribution Mr Ferrara had made to US sales, the Claimant said "*nil*". The Claimant required Mr Ferrara to record his time, so that he could be satisfied that he was being effective [48-51]. He discussed a less sales focused role with him because of his perceived limitations. That change was implemented, together with a salary reduction of $30,000. The Claimant said that Mr Ferrara had consented to the changes, but not happily. He also accepted that Mr Jones had not known of or agreed to the changes before they were put in place.

4.20 The Respondent's case was that Mr Ferrara, who it considered to have been a key player in its US operation, complained to Mr Jones on 13 September about what he claimed to have been a unilateral reduction of his income and a change in his role. He told Mr Jones that the Claimant had told him that he (Mr Jones) had sanctioned the changes. Mr Jones was very concerned at the security of the US operation. He felt that Mr Ferrara held a significant amount of customer data, had very important relationships with clients and was held in high esteem. Mr Jones believed that Mr Ferrara was very upset and was considering his position within the business.

4.21 A marketing strategy meeting was held on 15 September 2017 in Texas between the Claimant, Mr Jones and Ms James, who took some notes [39-41]. The Claimant's case was that the meeting started a process which ultimately saw him removed from his US role. The Respondent's case was that, although the meeting had been conceived to discuss marketing, it soon degenerated into one at which the Claimant staked his claim to the entire US sales area. The notes reflected the fact that the Claimant wanted Mr Ferrara out of the business, whereas the Respondent did not want to lose him. Mr Jones proposed breaking the US up into sales regions which the Claimant opposed "*aggressively*". He was recorded as having been "*very rude*" and angry about the idea.

4.22 We considered that Ms James' notes were likely to have been a reasonable reflection of the events at the meeting and, therefore, that the Respondent's account of it was broadly to have been accepted. It was noteworthy that some of the contemporaneous documentation also corroborated the Respondent's account ([53] for example, in which Mr Jones told the Claimant again that he did not want to lose Mr Ferrara).

4.23 On 18 September, Mr Jones met Mr Ferrara again. On that occasion, Mr Ferrara gave him a greater sense of the damage which had been caused by what Mr Jones then believed to have been a forced pay reduction and restructure of his role by the Claimant. Mr Jones concluded that Mr Ferrara's working relationship with the Claimant was ruined. We found his evidence on that aspect to have been particularly compelling. He then emailed Ms Taylor back in the UK in the following terms [44];

> "*There is some trouble brewing with John that I need to resolve when I get back. He is unhappy with Ron and pushing him out by suddenly reducing his salary by 20k and requiring him to make records and report on every task. John told me Ron had agreed to a salary cut and reduction in hours/tasks but Ron says it was forced on him and he is feeling undervalued and very unhappy. I think Ron is absolutely essential to the entire US operation and want to keep him. I also want to reinstate his salary. This has put me in a very difficult situation with John and I am not sure how to resolve but I know losing Ron would be a disaster.*"

4.24 Thereafter, there were discussions between Mr Jones, Mr Ferrara and Ms James about the future of the US operation. Mr Jones wanted Mr Ferrara to take over but he was reluctant, knowing how badly the Claimant would have taken such news. He suggested that Ms James should do so and that was agreed.

October 2017

4.25 Mr Jones held a meeting back in the UK office on 9 October 2017 with his mother and the Claimant. The Claimant was told that he would no longer be leading the US sales team and that Ms James would do so and would report to Mr Jones. The Claimant was to have been given responsibility for sales in the UK, Australia and the rest of the world.

4.26 The Claimant's case was that Mr Jones' explanation for the changes was that he wanted "*an American to head up the American operation*". He also maintained that he was told that Mr Jones was to have reviewed his commission/bonus entitlement. Paragraphs 14 of the Claim Form read as follows;

> "*The Second Respondent stated that Ms Miller would take on the responsibility for the US market and would report directly to him, not the Claimant. There was no explanation or other justification given nor was the Claimant given any opportunity to discuss or influence the decision. The Second Respondent stated he wanted 'an American to head up the American operation'.*"

4.27 The Respondent's case was very different, as set out in paragraph 27 of Mr Jones' statement;

> "*I told him that Tiffany was going to work with Ron to drive US sales because we needed someone on the ground and Tiffany had a detailed understanding of the federal nature of the US education system. I did not say that I wanted an American to run the American business.*"

4.28 Mr Jones nevertheless accepted in cross-examination that the Claimant might have been concerned about his commission entitlement going forward and that he may have perceived the changes to have been a demotion.

4.29 Later that afternoon, Mr Jones made an announcement to the office that Ms James was taking on the US sales role because, according to the Claimant, he wanted an American to do it. The Respondent's case was, again, that Ms James was given the role because she knew the US education system so well. Mr Jones' evidence was as follows (paragraph 29 of his statement);

> "*I did not say I wanted an American to head up the American operation. I also did not give the real reason for the change, which was that Ron could no longer work with John and we could not afford to lose Ron, as I did not wish to embarrass John*."

Ms James, however, could not recall whether Mr Jones had said that she was going to do the job because she was an American (paragraph 6 of her own statement).

4.30 The meeting outcome was confirmed to Mr Ferrara by email [58] and to Mr Bates in the following terms [59];

> "*You will now report to Ron and Tiffany instead of John. It is an exciting time for the company and for us to take the company forward to the next stage the US needs to be run in the US by an American.*"

We were told that the email was sent after the meeting (not before it as the time suggested) as the software was set to US time.

4.31 We concluded that the expression (that the Claimant was replaced because the Respondent wanted an American in the role or something similar) was probably used on 9 October. It was echoed by Mr Jones' email later that day [59], in the Claimant's grievance soon afterwards [72-4] and by Mrs Jones at the two disciplinary hearings which were conducted on 24 November [311] and 1 December (see [379] and [421a]). It was also corroborated by other accounts; for example, Mr Bunn in paragraph 9 of his statement and Mr Murphy, at paragraph 6. Neither Mr Jones (in cross-examination) nor Ms James (paragraph 6 of her witness statement) had been particularly positive in their evidence; Ms James could not remember the use of the phrase in the group meeting and Mr Jones said that he had no recollection of using the phrase and had been surprised at the way in which his subsequent email had been worded [59].

4.32 Having concluded that the expression had been used, we did not, however, conclude that that had been the real reason for the removal of the Claimant from his US role. The real reason was, in fact, the effect of his actions upon his relationship with Mr Ferrara. We found Mr Jones' evidence on that issue to have been particularly compelling and it was reflected and corroborated by much of the contemporaneous documentation ([44] and Mr Ferrara's account [284-6]). In effect, therefore, the comment was a lie. It was used as the false justification for the removal of the Claimant from his US role, as Mr Jones had said within paragraph 29 of his witness statement.

4.33 Following Mr Jones' return from the US on Friday 6 October, he started to receive complaints about other aspects of the Claimant's performance and conduct from his UK staff, as set out in paragraphs 30 to 32 of his witness statement. Added to his concerns about the Claimant's conduct in the US, the new issues began to mount up to a serious picture. He had been in the US for most of 2017 and he had felt able to trust the Claimant to run the UK office, but it was Ms Rooney's complaint, referred to within paragraph 31 of his witness statement, which was the 'trigger' (in his words) for what followed. He was very concerned, and visibly moved during his evidence, about an allegation of bullying of that sort. Ms Rooney ultimately recorded her complaint in her statement to the investigation [254-5].

4.34 On 15 October, Mr Jones emailed his accountant, Mr Bascombe, and asked for advice because he was "*letting John Dorman go*" [62]. Mr Jones explained the email as having been a hot-headed reaction which he subsequently retracted such that he was able to maintain an open mind to what followed. We were far from convinced by that explanation for the reasons which have been explained below.

4.35 On 16 October, the Claimant was suspended by Mr Jones in a meeting which was noted by Ms Taylor [64]. He was told that they had been "*serious allegations*" which needed investigating and which involved potential favouritism, cronyism, bullying, putting the US operation into jeopardy and exceeding his authority. His suspension was then confirmed in writing [243-4].

4.36 On 22 October, the Claimant issued a grievance in which he complained about his suspension and the removal of his US role [72-5]. He mentioned potential acts of discrimination on two occasions within the letter and, in light of Mr Jones' subsequent correspondence, the grievance was clearly understood to have included such an allegation [78].

4.37 On 27 October, the Claimant was informed that, because of the interplay between the grievance and the disciplinary issues, they were to have been dealt with together. As far as we were able to determine, he did not complain about that suggestion.

4.38 Mr Jones then conducted an investigation. He emailed members of staff with a list of the allegations in broad terms and asked them to provide "*any information…about the allegations*" [94]. Some of his communications at this time talked of "*building a strong case*" [95]. He also accepted in cross-examination that he had mistakenly given at least one member of staff the impression that the Claimant had already *been* dismissed.

4.39 The actual evidence that he gathered which was subsequently referred to in his report was from Ms James [260-3], Ms Rooney [545-5], Mr Ferrara [283-8] and Ms Taylor [289] and an email from Mr Bates [209]. In addition, Mr Jones submitted numerous statements of his own (see paragraph 36 of his witness statement) but it was unclear which had been prepared before the disciplinary hearings and which were prepared after, but before the

outcome letter. For example, at least one of the documents appears to have been Mr Jones' critique of the Claimant's conduct at the second disciplinary hearing which was held on 1 December on the basis of his reading of the Respondent's notes [548].

4.40 On 30 October, Mr Jones commented to his mother that the Claimant's assertions in relation to his shareholding in the Company were "*laughable*" lies [350]. In reply, she listed examples of fraud, insubordination, demeaning conduct and lying which she considered the evidence to have revealed [351]. This was hardly an exchange which ought to have been expected between an impartial investigator and the chair of the forthcoming disciplinary hearing.

4.41 On 1 November, Mr Jones wrote to his mother again. He told her how to set up a disciplinary hearing and suggested some dates (3 or 6 November) [96]. At that stage, he had not yet compiled his report.

4.42 Mr Jones's report was dated 14 November [141-6]. The Claimant was then invited to a disciplinary hearing to face 7 allegations [116-120];
(a) Exceeding his authority and undermining that of the CEO;
(b) Placing the US subsidiary into a "*dangerously vulnerable position*";
(c) Making false representations/acting dishonestly;
(d) Causing damage to the brand and the Respondent's reputation;
(e) Using the Respondent's funds without due diligence;
(f) Claiming incorrect bonus figures;
(g) Promoting an unhealthy atmosphere in the workplace.

4.43 The first disciplinary hearing took place on 24 November. Mrs Jones took the chair and she was supported by Ms Woods who took notes. The Claimant was supported by Mr Murphy. We were supplied with one page from the Respondent's handwritten notes of the hearing [321], its typed version [301-312] and Mr Murphy's notes [322-8].

4.44 The Claimant complained that he had not seen the witness statements which have been obtained as part of the investigation; he had not been sent hard copies and had not been able to open the soft copy attachments which had been sent by email. Nevertheless, the meeting continued for a while and some of the allegations were put to him before it was adjourned to enable him to consider the documentary evidence.

4.45 The hearing was reconvened on 1 December. The same people attended although the Respondent's note taker changed partway through. Ms Wood covertly recorded the meeting and the Claimant sought to rely on two extracts which his solicitors had transcribed [421a-b]. In addition, the Tribunal was shown the Respondent's notes [389-411] and Mr Murphy's version [412-421]. The allegations were considered in much greater detail over approximately 3 hours.

4.46 An initial outcome letter was provided on 8 December [438-9]. Mrs Jones decided to dismiss him for gross misconduct and/or a loss of trust and

confidence. He was told that he was to receive a more detailed letter the following week which then followed on the 15th [451-465].

4.47 Mrs Jones indicated that she had carried out her own investigation after the hearings, during which she had spoken to 13 people. We were not clear which parts of any of that additional evidence was shared with the Claimant. We did, however, have an insight into the nature of some of that further investigation from Mr Bunn; he had been sent a list of questions by Mrs Jones, in reply to which he suggested that they met face-to-face, which she declined [485-6]. She then telephoned him on 8 December and told him, however, that his evidence was not considered relevant by her [591-2].

4.48 The findings on the seven allegations were, in essence, as follows;

4.48.1 Exceeding his authority and undermining the CEO's; it was alleged that the Claimant had entered into a profit sharing plan with the International Dyslexia Association ('IDA') without permission, that he had appointed his friend, Mr Bunn, as a consultant "*without prior consultation with the Board*", that he had reduced Mr Ferrara's salary unilaterally, that he had paid Ms Barnes to run focus groups despite express instruction from Mr Jones to stop them and that he had been rude and insubordinate on 15 September;

4.48.2 Putting the US business into a dangerously vulnerable position; it was alleged that the Claimant's unilateral change to Mr Ferrara's salary and role had risked his continued employment, thereby risking key accounts and the Respondent's US market share;

4.48.3 False representations/dishonesty; it was alleged that the Claimant had told Mr Ferrara that Mr Jones had approved his salary reduction and that, at the disciplinary hearing, he said that he thought that he *had* discussed it with Mr Jones. It was also said that he had denied any personal relationship with Mr Bunn, yet Mr Bunn had said that they had known one another for 6 years and been friends for 3;

4.48.4 Reputational damage; this allegation concerned the Claimant's alleged failure to review the Respondent's sponsorship of the British Dyslexia Association's ('BDA') 'spell' campaign which was not considered to have been in line with the Respondent's profile and which prompted poor comments and publicity. It was also alleged that the Claimant missed key deadlines in the run-up to the IDA's conference in the US;

4.48.5 Using funds without due diligence; four main issues were found against him; that he had organised a costly cocktail party at the IDA conference, that he had caused costly expenditure on consultants (Mr Bunn and Ms Barnes), that he had failed to develop work from the expensive sponsorship deal with the IDA and that he had been guilty of a number of other failures in relation to the IDA conference;

4.48.6 Bonuses; the Respondent found that the Claimant had ensured that he was paid a bonus which was referable to the entire US turnover, not just the sales that *he* had achieved and that he had based the calculation on estimated, not actual sales;

4.48.7 Unhealthy atmosphere; Mrs Jones found that the Claimant had bullied staff and been aggressive; he had teased Ms Rooney by comparing her to the character Nessa from the TV sitcom *Gavin and Stacey* who was known to have been overweight, he had referred to Mr Ferrara as 'old' or 'too old' and he had teased Ms Jones about her use of some American expressions, implying that they had sexual connotations.

4.49 There was also an eighth allegation, relating to the Claimant's performance which was also included, although it was not one of the allegations referred to in the original invitation letter. That allegation was said to have amounted to a loss of "*all trust and confidence*" in him [463].

4.50 The outcome letter concluded [464];

"*Having reviewed all of the evidence, I have concluded that your conduct, in particular, your refusal to follow reasonable instructions, your demonstration of clear insubordination, your acts of dishonesty, knowingly claiming bonus payments that you were not entitled to and your aggressive and bullying behavior amounts to gross misconduct. Furthermore, I have found that you are guilty of a serious neglect/failure in the performance of your duties and have acted in repudiatory breach of your contract of employment. In addition, the Company has lost all trust and confidence in your ability to perform your senior role as Director of Sales and Marketing and concluded that it is no longer viable for you to continue to be employed in the business and operate alongside the remaining senior management team.*"

4.51 The outcome letter also contained Mrs Jones' determination of the Claimant's grievance which was rejected [463-4].

4.52 The Claimant appealed on 22 December and an appeal hearing was convened before Ms Taylor on 16 January 2018 [610-616]. At the outset, the Claimant queried the process and asked who would have been making the decision. Ms Taylor stated that the meeting was just a formality and that Mrs Jones was to have made the decision [611]. The Claimant's appeal was rejected.

<u>Bonus/commission</u>

4.53 The Claimant's dismissal had been in early December 2017. The Respondent's case was that, because he had not been in employment at the end of the year, he had not earned the portion of his bonus attributable to UK sales for that year.

4.54 Mr Jones accepted that, subsequent to the Contract of Employment, the Claimant had himself devised the terms upon which bonus/commission

payments were to have been made the 2016 and 2017 [667-8]. Mr Jones said that he had not really read the document but he accepted that it had been implemented as the basis of such payments. At the bottom of the first page of the document it stated that "*Bonus* [was] *to be paid at the end of the year December based on final year results*".

4.55 With regards to the bonus/commission payable in respect of US sales, the Respondent's case was that the Claimant had overpaid himself in 2016 by more than £8,000 and in 2017 by more than £10,000. That was because, first, the figures had been calculated on estimated sales, and secondly, they had been calculated on the basis of the entire US territory, not just those sales achieved by the Claimant himself. His commission for the third quarter of 2017 was therefore not paid (it was due to have been £1,376.62 [193] and [460-1]).

4.56 The Claimant, on the other hand, claimed that he was entitled to bonus based upon all US sales for two reasons; first, he claimed that he had been the effective cause of all such sales, Mr Ferrara having had "*nil*" effect and Mr Jones having been in the US are nothing more than a "*romantic quest*". Secondly, he claimed that his entitlement emanated from the terms of the scheme [668] which referred to a calculation based on US sales in broad terms.

4.57 Our factual findings on those issues were as follows. First, it was clear that the US bonus figures had originally been based upon Clause 7 of the Claimant's Contract [1], but the US and UK figures were subsequently calculated on the basis of the scheme written by the Claimant himself [667-8]. Further, although the US bonus figures were based upon estimated or predicted month end sales results [193], sometimes those predictions were higher and sometimes lower than the figures which were subsequently finalised. The bonus/commission figures were sent to Mr Jones and/or Ms Taylor, the CFO [293-5]. We did not detect any attempt on the Claimant's part to hide them, although we noted that it was only in September 2017 that Mr Jones started to scrutinise them more closely [46], at around the same time that he began to question other aspects of the Claimant's work.

5. Conclusions

Unfair dismissal; the reason

5.1 The Respondent relied upon the fair reasons of conduct and/or some other substantial reason, namely a breakdown in trust and confidence, under s 98 (2). For reasons which have been explained more fully below, we were satisfied that the Claimant was dismissed for those reasons. We considered that the reason was better described as some other substantial reason, which related to a breakdown in trust and confidence.

Unfair dismissal; s. 98 (4)

5.2 The Respondent wisely conceded that the Claimant's dismissal had been unfair under s. 98 (4) of the Act, albeit somewhat belatedly (on the second day of the hearing).

5.3 It seemed to us that there had been some significant problems with the Respondent's case in relation to both the application of the *Burchell* test and issues of procedural fairness. Although we did not accept all of what was contained within paragraph 40 of the Claimant's counsel's closing submissions, C1, we had particular sympathy for the points contained within paragraphs 40.1, 40.2, 40.5, 40.9, 40.11, 40.13, 40.16, 40.17, 40.18, 40.21, and 40.25.

Contributory conduct

5.4 We were invited to consider whether the Claimant's dismissal was caused by or contributed to by his own conduct within the meaning of s. 123 (6) of the Act. In order for a deduction to have been made under the section, the conduct needed to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (*Nelson-v-BBC* [1980] ICR 110).

5.5 We applied the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56 which required us to;

(i) Identify the conduct;
(ii) Consider whether it was blameworthy;
(iii) Consider whether it caused or contributed to the dismissal;
(iv) Determine whether it was just and equitable to reduce compensation;
(v) Determine by what level such a reduction was just and equitable.

5.6 We also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to his dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

5.7 The original 7 allegations which the Claimant had faced contained numerous sub-allegations and the dismissal letter covered over 20 examples of the Claimant's perceived misconduct, although they were not all covered by the evidence before us. In our deliberations, we considered whether the Respondent had been able to demonstrate whether the tests under ss. 122 and/or 123 had been made out in respect of any of the allegations, either through its oral evidence, the documentation that we were invited to read and/or through the cross-examination of the Claimant himself. There were a number of issues upon which we were not satisfied that the tests were made out which have not been specifically covered below but, those in which we did make findings were as follows.

5.8 Under the heading 'Exceeding authority', we concluded that there was merit in the allegation in relation to proposed profit-sharing with the IDA. The Claimant accepted in evidence that his proposal to the IDA, to give up 25% of the profit from US sales once the Respondent had been accredited with

the Association, had not been preapproved by Mr Jones or Ms Taylor [470]. When Mr Jones saw the proposal he was "*amazed*". He considered that the Claimant had exceeded his authority in conducting those negotiations at that level. In part, we accepted the Claimant's evidence that it was inconceivable that any *actual* deal would have been finalised without Mr Jones' agreement, but we also accepted Mr Jones's evidence, that he would never have consented to giving up a 25% share and if such an offer had been taken off the table at such a late stage in negotiations with the IDA, there was a real risk that the Respondent's relationship with it would have been harmed. On that basis, we were satisfied that the Claimant had exceeded his authority by negotiating at such a level without prior consent.

5.9 In relation to Mr Ferrara, the Claimant accepted that the reduction in pay which Mr Ferrara experienced was not agreed with Mr Jones beforehand and was not something about which Mr Ferrara had been happy, even though he had allegedly consented to it. If the Claimant had perceived that Mr Ferrara had been underperforming, there were, of course, methods of performance management that might have been adopted. They were not. The evidence demonstrated that Mr Ferrara had not been happy, that any 'consent' had been cajoled or extracted under a degree of pressure and that the whole episode had caused fractured the key relationship which the Claimant had needed to foster in order to run the US operation successfully. That in turn significantly affected his relationship with Mr Jones because of his failure to discuss the changes with him before they were implemented and the high regard which Mr Jones had for Mr Ferrara, his knowledge and experience.

5.10 In relation to the Claimant's conduct towards Mr Jones himself, we concluded that it was, at times, undoubtedly challenging and disrespectful. Although the Claimant did not recall the emotions recorded by Ms James at the meeting of 15 September, we found those notes to have been reasonably accurate. Also, the Claimant's failure to action Jones' request to dis-instruct Ms Barnes appeared stark (see [523-4] and [455] at paragraph (d)). The Claimant had said that he had understood that Mr Jones' instructions were restricted to Ms Barnes' running of focus group trials [523]. He initially said in evidence that she was only engaged to do different work after Mr Jones' direction (raising brand visibility and making introductions to key educational personnel [524]), but he then accepted that she was also paid for a trial beyond that point as well.

5.11 The Respondent relied upon the further example of the Claimant's email of 19 July 2017 in which he responded to Mr Jones' criticism of Mr Bates' performance which did not reflect well on him either [554];

> "*I was hoping the Michael bashing would blow over and was choosing to ignore it before. Getting a little tired of it now though!*"

5.12 Under the heading 'False representations/dishonesty', the Claimant accepted in cross-examination that he considered Mr Bunn to have been a friend. He had, however, distanced himself from him at the first disciplinary hearing on 24 November and said that they had not socialised together [305]. This was not a particularly significant issue but we nevertheless appreciated how the Claimant's lack of candour in that respect had further led Mr Jones to lose faith and trust in him once he discovered the truth.

5.13 Under the heading 'Using funds without due diligence', we were concerned about the Claimant's activities in relation to the IDA Conference. He accepted in cross-examination that a lot of money was spent on the conference and that it had been his responsibility to maximise opportunities through that sponsorship. He had not been aware of the 5 issues which had concerned the Respondent about errors in relation to the preparations for the conference as set out in the dismissal letter [459]. Having accepted responsibility and having not questioned the fact that those issues had arisen, we considered that the blame lay with him, albeit we recognised that Mr Jones was able to salvage much of the problem for the conference actually started.

5.14 As to the allegations relating to the creation of a 'Bad atmosphere', the Claimant accepted that, upon his return to the office to view his emails during the disciplinary process, he did say that 'he could not bear to have been in the same room as Ms James' [429b]. Such a statement was hardly conducive to a positive working relationship going forward. Further, in relation to Ms Rooney, he accepted in cross-examination that he had referred to her as 'Ness' or 'Nessa', with reference to the character from *Gavin and Stacey*. The character was known to be physically large and to have told far-fetched stories about her past. Although the Claimant denied that the use of the nickname was referrable to Ms Rooney's size, he accepted that he had effectively accused her of telling stories, which made her upset [255]. And so another working relationship was damaged and the Claimant did not dispute that it *was* damaged; that Ms Rooney was genuinely upset, although he could not explain why. Finally, we also accepted that the Claimant had embarrassed Ms James as alleged [452], having preferred her evidence to his on that issue.

5.15 On two issues that occupied a reasonable proportion of the evidence, we did not find favour with the Respondent's arguments. The first of those related to the bonus/commission issue, which has been dealt with below. The second concerned the allegation of brand damage allegedly caused by the changed format of the BDA's sponsored spell [458]. The damage, in our judgment, was not to have been blamed on the Claimant. Mr Jones told us that even the Director of the BDA did not know that the format had changed. The Claimant had been told that the Respondent's sponsorship was to have proceeded on exactly the same basis as it had in 2016. The fact that the test format changed appeared to have been a shock to everyone.

5.16 Nevertheless, the conduct that we have referred to above we considered to have been blameworthy under the test in *Steen.* We also determined that it had caused or contributed to the Claimant's dismissal. We considered the nature of the conduct very carefully. Much of it was properly to have been regarded as negligent or foolhardy, rather than behaviour which ought to have been categorised as gross misconduct. We considered whether it was just and equitable to make a reduction under the sections and we bore in mind the fact that we had only heard from some of the witnesses on the issues at the hearing and that the Claimant had not had the opportunity to challenge much of the evidence at either of the disciplinary hearings and/or the appeal. Nevertheless, he made significant concessions in cross-examination and there was much documentary evidence which served to

corroborate many of the Respondent's concerns. Doing the best that we could, having considered all of those factors, the reduction that we made was one of 70% under both ss. 122 and 123, having considered the slightly different tests.

Polkey

5.17 The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 introduced an approach which required a tribunal to reduce compensation if it found that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation could be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM). We had to assess what *this* Respondent would have done if it had acted fairly, not some other, hypothetical employer.

5.18 It was for the employer to adduce relevant evidence on this issue, although a tribunal should have regard to any relevant evidence when making the assessment. A degree of uncertainty was inevitable, but there may well be circumstances when the nature of the evidence was such as to make a prediction so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

5.19 Our firm view here was that, by October 2017, the Claimant's relationship with the Respondent had become toxic. His work in the US had become untenable given what had happened between him and Mr Ferrara, his relationship with Mr Jones had been soured by a number of things (those covered in the findings above that we made in respect of ss.122 and 123 at least), and his relationship with others had been damaged. If this employer had conducted a fair hearing we considered it likely that the Claimant would still have been dismissed. We tempered our findings by acknowledging that the Respondent had been a long way (not just a short distance) from having conducted a fair disciplinary process and that some allegations which had helped to sour the relationship had been ill founded. Nevertheless, we concluded that the chances of the Claimant's dismissal were still high and the appropriate percentage chance which was to have been applied was one of 85%, but after the Claimant had served his notice period because we did not consider that his actions could properly have been categorised as acts of gross misconduct.

Direct discrimination; the legal test

5.20 Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

5.21 The protected characteristic relied upon was race, specifically the Claimant's nationality and/or his national origins. The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

"*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

5.22 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

5.23 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may have been the reason for the treatment alleged. More than a difference in treatment and a difference in protected characteristic needed to have been shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his race, because of his race.

5.24 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). If the burden shifted, we had to determine whether the Respondent had proved, on the balance of probabilities, that the treatment had not been on the prohibited ground in any sense whatsoever.

5.25 If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32).

5.26 As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se, but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

5.27 We reminded ourselves of Sedley LJ's well known judgment in the case of *Anya-v-University of Oxford* [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

Direct discrimination; conclusions

5.28 We took the first and second allegations within paragraph 3 of the List of Issues together as the Claimant's counsel had done in her closing submissions, since both complaints concerned the linked events of 9 October 2017. In relation to paragraph 3 (b) of the List, although Mr Jones had accepted that there had been a discussion on 9 October which might have led the Claimant to have concluded that his salary/bonus had been at risk, we had not found that there had been any overt threat to reduce it at that stage and/or to have given it to Ms James as suggested. At that point, there had been nothing more than an indication that it was to have been discussed and revisited.

5.29 Nevertheless, the burden of proof shifted to the Respondent in relation to paragraph 3 (a) since we had concluded that the comment about the Respondent requiring an American to run its US operation had been made and since an American was in fact put into that role. The Claimant had established a prima facie case.

5.30 Was the Respondent able to shift the burden of proof? That was difficult because we had rejected its evidence about the use of the comment and, although not directly relevant, we had found against it in other respects (Mr Jones' evidence regarding the closed nature of the investigation, for example). Despite that, we had accepted his evidence about the motivation for the Claimant's removal from his US role having been because of the effective failure in the relationship between him and Mr Ferrara. Having considered the evidence in this area carefully, we did not accept that the Claimant's nationality or his national origins were any part of the reason for his removal from his US role. It was done because Mr Jones regarded Mr Ferrara highly and the Claimant's actions had irreparably damaged their working relationship. Mr Jones's stated justification was false (paragraph 29 of his statement).

5.31 During the Claimant's evidence, he had also given us the sense that he felt that he had been edged out for a reason other than his race. He believed that it had been Mr Jones' relationship with Ms James which had been the cause and it had been justified (i.e. on a false premise) on the basis that she was an American. He said that "*behind the scenes, there was a massive change in the way that things were run; Mr Jones wanted Mrs*

James and Mr Ferrara to have had greater roles." His evidence led us to believe that even he thought that the changes were precipitated by something other than his race. Although we concluded that his suspicion in the reason having been based upon the personal relationship between Mr Jones and Ms James was wrong, even that would not have been linked to his race.

5.32 Accordingly, although we concluded that the comment had been made, it had not been the reason for the conduct complained of in paragraphs 3 (a) and (b) of the List of Issues and those allegations failed.

5.33 We recognised that the comment itself, rather than the consequences of it, had not been identified by the parties as a separate act of detriment under s. 13 within the List of Issues. At the conclusion of the case, we invited further submissions as to whether we should have found in the Claimant's favour on the comment itself as an act of direct discrimination. We referred the parties to the decisions in *Scicluna-v-Zippy Stitch* [2018] EWCA Civ 1320 and *Royal Mail-v-Jhuti* [2018] UKEAT/0020/16/RN, particularly at paragraphs 57-8 of Simler J's judgment.

5.34 The Respondent said that we ought not to have made the finding for the following reasons; first, it had never been in the List of Issues. Secondly, there had been no evidence of less favourable treatment which would have enabled us to have made that finding. Thirdly, it was said that it had made certain strategic decisions in relation to offers on the basis that it considered that the discrimination claims, as framed, were weak. Fourthly, the Claimant had been well advised by competent solicitors throughout the claim.

5.35 In response to those submissions, Ms Reindorf stated that there was ample evidence of less favourable treatment (Ms Hirsch's second point), not only because it was self-evident from the nature of the comment itself, but also within paragraph 12 of the Claimant's witness statement. In relation to the third point, she asserted that the Respondent's settlement strategy was wholly irrelevant to whether or not we ought to have considered the issue *as* an issue at that point. In relation to the first, third and fourth points more generally, she concentrated upon the text of the Claim Form at paragraphs 14, 17 and 18 of which clearly referred to the comment, its effect and the Claimant's removal from the US Sales team as having combined together to have been acts of direct or indirect discrimination.

5.36 We accepted that the List of Issues appeared to have been drawn by experienced and competent solicitors and that, ordinarily, it ought to have been followed strictly by us. As the Court of Appeal said in *Zippy Stitch,* such lists ought to form the road map for our determinations but, as the President said in *Jhuti,* we were not required to stick to one slavishly if it might have prevented us from hearing or determining the case in accordance with the law and the evidence which had been adduced.

5.37 The making of a finding of direct discrimination in relation to the comment alone did not require us to hear any additional evidence or to make any additional factual findings. No amendment to the Claim Form was necessary. We accepted Ms Reindorf's submissions and agreed that, to have stuck slavishly to the List of Issues in those circumstances, would

have been to have ignored the interests of justice. We therefore made the finding that the use of the expression had been an act of direct discrimination.

5.38 In paragraph 3 (c) of the List of Issues it was asserted that, prior to 15 October at 5:45 pm when the email was sent [62], the Respondent had decided to dismiss the Claimant, either because he was not an American and/or because of his reaction to the events of 9 October. In relation to the first alternative, since we had not concluded that the Claimant had been dismissed because he was not an American, that argument failed.

5.39 In relation to the second part, we had not found that there had been any 'reaction' from the Claimant to the events of 9 October. He filed a grievance on 22 October, but that was after the alleged decision to dismiss. Further and in any event, we were not satisfied that there had been any link between any response from him and his dismissal. He was suspended because of mounting concerns which Mr Jones held which had started with the incident involving Mr Ferrara in the US and were further fueled by matters which he became aware of following his return to the UK culminating, crucially in his view, in the receipt of Ms Rooney's complaint. Rightly or wrongly, those were the matters which caused the Claimant's dismissal, not his alleged reaction to the events of 9 October.

Indirect discrimination; legal principles

5.40 We considered and applied the test in s. 19 of the Act;

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

5.42 We approached the case in the same way as we had in respect of the s. 13 complaints in relation to the burden of proof (see above).

5.43 We first considered whether there had been provisions, criteria or practices ('PCPs') which had been applied. We then turned to the question of disadvantage under s. 19 (2)(b) and (c). That required us to ask two questions; first, whether people with the Claimant's characteristics were exposed to a particular disadvantage as a result of the PCP and, secondly,

whether the Claimant himself was exposed to that disadvantage. The word 'disadvantage', as it is used in s. 19, set a relatively low threshold. We bore in mind, in particular, the Equality and Human Rights Commission's Code of Practice from 2011 (paragraph 4.9).

5.44 Next, we would have had to have dealt with the question of justification but, since Miss Hirsch accepted that there was no evidence upon which we could have made such findings if we had reached that point, we were not required to do so.

Indirect discrimination; conclusions

5.45 The PCP which was set out in paragraph 7 of the List of Issues was really two. Ms Reindorf did seek to rely upon the first one as she said that it was legally incoherent, but she did rely on the second (the requirement for there to have been a leader of the US Sales and Marketing team who had a permanent presence in the US).

5.46 We accepted that the removal of the Claimant as head of the team had, as a desirable biproduct, the appointment of a successor who had a permanent presence in the US. Both Mr Ferrara and Ms James were both based there. But was that a PCP? In other words, was it conceived as a requirement which then either entirely or in part resulted in the Claimant's removal from that role? That was not the situation in our judgment.

5.47 The Claimant had run the US for several years from the UK. We did not perceive there to have been any change in the market which required a greater physical presence in the US. Ms James was pushing the Respondent's products well in her area in or around Texas where she lived and the new state advisors were beginning to target particular markets elsewhere. If anything, there seemed to have been less need for the Claimant, or someone in his role, to have been physically based *in* the US. Whilst there was an obvious attraction to the US operation having more people on the ground in the US, that was not the reason, intention or design behind the Claimant's removal. It was a consequence of it only. Accordingly, the complaint of indirect discrimination was dismissed.

Victimisation; legal principles

5.48 The Respondent contended that the Claimant had had not performed a protected act and Ms Hirsch relied upon the case of *Fullah-v-The Medical Research Council* [2013] UKEAT/0586/12 and, specifically, paragraph 25.

5.49 The test of causation under s. 27 was similar to that under s. 13 in that it required as to consider whether the Claimant had been victimised because he had done a protected act, but we were not to have applied the 'but for' test (*The Chief Constable of Greater Manchester-v-Bailey* [2017] EWCA Civ 425). The act had to have been an effective cause of the detriment. It did not need to have been the principal cause. In order to succeed under the section, the Claimant needed to show two things; first, that he was subjected to a detriment and, secondly, that it was because of a protected act. We applied again the shifting burden of proof again under s. 136.

Victimisation; conclusions

5.50 Was there a protected act? Within the Claimant's grievance, he raised allegations of discrimination twice ([73] and [74]). The two allegations were clearly factually linked and were acknowledged as having been potential complaints of discrimination by the Respondent a few days later [78]. There

ought not to have been any doubt as to the protected characteristic that was relied upon (as required by the case of *Fullah*) and the Claimant had therefore performed a protected act.

5.51 In paragraph 13 (a) of the List of Issues, it was alleged that the Respondent "*subjected* [him] *to a lengthy and protracted period of suspension and investigation into unfounded and unjustified allegations*". He was not suspended because of the grievance. He was suspended *before* the grievance. We could detect no basis for the assertion that the suspension or investigation was any longer because of the grievance. Mr Jones had actually wanted to get the matter in for hearing sooner [96]. Although he told us that the discriminatory element of the grievance had not concerned him in the sense that he simply had not given it any credence. Mrs Jones gave similar evidence. We accepted that it had played no part in determining the length of the Claimant's suspension or the investigation. The allegation within paragraph 13 (a) failed.

5.52 In paragraph 13 (b) of the List of Issues, it was alleged that the Respondent had "*approached the investigation into his grievance in a biased and predetermined way*". The Respondent's approach to the grievance had been closed in the same way as its approach to the misconduct investigation had been, as best illustrated by Mr Jones' initial email to his accountant [62]. That closed mindset was capable of shifting the burden of proof, but Mr and Mrs Jones satisfied us that the discriminatory element of the grievance had had nothing to do with their approach to it. They had simply seen no merit in it, but that was not because it contained allegations of discrimination. That was manner in which they had approached the entire investigation, both before and after the grievance. There was no causative link between the manner in which the grievance was dealt with and the protected act and that claim failed too.

Unlawful deductions from wages

5.53 Paragraphs 15 – 17 of the List of Issues concerned the non-payment of bonus in two respects. First, the Claimant complained that he was not paid his bonus in 2017 referable to the entire US sales figures and, secondly, he complained that he was not paid any of his UK bonus beyond his dismissal.

5.54 In terms of the basic principles of law, we adopted paragraphs 24 – 28 of Ms Reindorf's closing submissions, C1, which were not challenged by Ms Hirsch and we dealt with the two issues in turn.

5.55 First, the US bonus. The Respondent's case, as explained at the start of the hearing by Ms Hirsch, was that Clause 7 of the contract [1] formed the initial basis of the US commission calculation, but that the Claimant's subsequent terms [667] formed the basis of the *UK* commission calculation by way of supplement or variation to the contract. The problem was that the second page of the document [668] concerned the calculation of US bonus or commission too. That page, in our judgment, did not limit the Claimant's bonus to 5% of sales that he alone achieved. It referred to "*sales in the US*" more generally. Further, or alternatively that approach to the calculation was adopted by custom and practice; the Claimant was very open about the fact that the figures for his commission were based on entire US sales and sent his calculations either to Mr Jones or the CFO [pages 293 – 295].

5.56 The next question was whether, by leaving in December, the Claimant was disentitled to any portion of the US commission which had been earned in

that year but which he had not been paid. Clause 7 stated that "*All payments will discontinue after you cease to work for Nessy*" [1] but the varied term stated that "*Bonus to be paid at the end of the year December based on the financial year results*" [667].

5.57 Ms Hirsch referred to the case of *Lock-v- Candy and Candy* [2011] ICR 769. Ms Reindorf referred us to paragraph 1.54 and following from the IDS Handbook on *Wages* and to the case of *Rutherford-v-Seymour Pierce* [2010] which was cited in that text. We also referred the parties to the further case of *Brand-v-Compro* [2005] IRLR 196.

5.58 Having considered those authorities, the arguments and the facts that we had found, we reached the following conclusions;

- If there was a clear clause disentitling an employee to bonus unless he had been employed at the point of payment, such a clause was potentially enforceable following *Lock*;
- If, however, such a clause was not clear, one could not have been implied following the case of *Rutherford*, nor did Ms Hirsch seek to do so;
- The same principles broadly applied in relation to contractual terms which sought to limit the rights of an employee to his commission payments if he had not been employed at the point of payment (see the *Brand* and the IDS Handbook at paragraph 1.59);
- Here, the wording "*all payments*" in Clause 7 clearly related to payments referred to within that Clause but which only covered the non-UK bonus payments. Clause 7 did not operate to deny the Claimant his pro rata entitlement to his UK bonus for 2017;
- Further, the varied terms [667-8] did not alter the position insofar as the UK bonus was concerned since the term at the bottom of the first page [667] related to the mechanics of payment not the calculation of entitlement;
- In relation to US bonus, Clause 7 did not say that the Claimant was not entitled to what he had earned in bonus prior to his dismissal. It merely said that payments were to have ceased at the point of dismissal.

5.59 Accordingly, in respect of the first part of the wages claim, there was an unlawful deduction in respect of the Claimant's bonus insofar as he was not paid in respect of 5% of all US sales for 2017 up until the point of his dismissal. Further, in respect of the second part, the Claimant was entitled to both his UK and US bonus up to 8 December 2017.

<u>Questions raised in relation to shares</u>

5.60 Finally, we dealt with the questions that were put to us in relation to the purchase of shares in the Respondent.

Q1: Would the Claimant have been sold the shares in the Company but for his dismissal?

5.61 We answered that question in the negative. Given the toxicity of the relationship that existed in October 2017 and beyond, we did not consider it at all likely that any shares would have been sold. Mr Jones was very protective of the business, as illustrated by his approach to Mr Bunn. Since he had lost trust in the Claimant and considered him to have been a threat to his authority and/or the safe future of his business, we did not consider it

likely that he would have transferred any of the shares even if he had not been dismissed. Despite their good relationship during the majority of 2017, no shares had been transferred - no loan terms had been agreed and Mr Jones had identified significant tax liabilities which were a strong disincentive for him to have completed the deal, an issue upon which he was not challenged.

5.62 Mr Bunn's note of the July meeting [71] had been inaccurate insofar as it had referred to an existing 2.5% shareholding. Even if it was accurate about a future intention transfer shares in October, that had not taken place by December because of what had transpired.

5.63 Accordingly, it was necessary for us to have answered the second question that was put to us.

Preliminary views on remedy

5.64 Ms Hirsch asked us to express a preliminary view under *Vento* as to the likely award that would be made in respect of injury to feelings in order to aid settlement. Given the late stage in the day and the need for further deliberation, we declined to try to express such a view, not having heard from the Claimant further on that point.

_____
Employment Judge Livesey

Date: 20 November 2018