EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D Peake		**JPR Solutions UK Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
RESERVED JUDGMENT

HELD AT Newcastle-under-Lyme **ON** 25 – 28 March 2019
14 May 2019 (Panel Only)

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For Respondent: **Ms B Clayton (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

1 The claimant was not dismissed by the respondent: his claim for unfair dismissal is not well-founded and is dismissed.
2 The claimant's claim for unpaid bonus is well-founded and the respondent is ordered to pay to the claimant the sum of **£4470.10**

REASONS

Introduction

1 The claimant in this case is Mr Darren Peake who was employed by the respondent, JPR Solutions Limited, as a Divisional Manager, from 7 November 2014 until 30 October 2017 when he resigned.

2 By a claim form presented to the tribunal on 29 December 2017, the claimant claims that he was constructively and unfairly dismissed: he also claims unpaid bonus which he calculates in the sum of approximately £15,000.

3 The respondent denies that the claimant was dismissed and accordingly disputes the claim for unfair dismissal. In its response to the claim, the respondent denied any outstanding bonus, but later produced a calculation showing a basis upon which it could be that there was unpaid bonus in the sum

of £1875.65. The respondent does not admit that sum; and raises jurisdictional objections to any award.

The Evidence

4 I heard oral evidence from a total of four witnesses: the claimant gave evidence on his own account; the respondent called evidence from Mr Roland Joseph Conn - Managing Director; Mr Carl Wheeldon - Director of Compliance & Business Development; and Ms Natalie Hassett - Office Assistant.

5 I was provided with an agreed trial bundle running to approximately 500 pages I have considered the documents within the bundle to which I was referred by the parties during the hearing the parties also produced additional documents as the hearing went on

6 Within the bundle, and amongst the documents subsequently produced, there were witness statements made at various times by Mr Martin Kenneth Johnson; Mr Darren Leck; Mr Warren Andrew; and Mr Melvin Stevens. Those witnesses did not attend the hearing they did not give oral evidence and were not subject to cross-examination I found the evidence of Messrs Johnson; Leck; Andrew; and Stevens; to have no significant relevance to the issues to be decided in the case.

7 There were some significant differences in the factual evidence given by the claimant and that given by the respondent's witnesses: but, my judgement is that these differences were of peripheral relevance to the issues. On the main issues in the case, there was little by way of factual dispute; instead, the case depends on the correct interpretation of factual events which are not in dispute.

The Facts

8 In March 2010, the claimant commenced employment with a company named Lightbridge Support Services Limited (LSS). LSS had a contract for the deep cleaning of emergency vehicles used in the North West Ambulance Service (NWAS) covering the areas of Greater Manchester; Cheshire; Merseyside; Lancashire; and Cumbria. The claimant was appointed as an Area Supervisor; Mr Conn was employed by LSS as Operations Director for the North of England. Within two years the claimant was promoted to Deputy Contract Manager. LSS was then bought out by a company named Churchill Services Limited (Churchill): the claimant's employment transferred to Churchill under the TUPE Regulations; he became Contracts Manager. Following the transfer to Churchill, Mr Conn left the company to pursue other interests.

9 In 2013, the NWAS contract went out for tender: by then, Mr Conn was a Director and part owner of JPR Roofing and Flooring Limited (JPR). JPR wished

to tender for the contract: it is the claimant's case that he naïvely became involved in a corrupt conspiracy involving Mr Conn and Mr Steve Fawcett of NWAS to ensure that JPR secured the contract. This involved the claimant and Mr Fawcett feeding relevant information to Mr Conn to ensure that is tender was successful. This was at a time when the claimant continued to be employed by Churchill who were also tendering to renew the contract themselves. When JPR were successful in the tender process, the claimant's employment transferred under TUPE. The claimant was employed by JPR as Divisional Manager; and, in August 2015, his employment transferred to the respondent following a restructure of JPR under which Mr Conn parted company with his former Co-Director.

10 In addition to his agreed salary, under his contract of employment, the claimant was entitled to receive a bonus equal to 10% of the net profit earned on the contracts for which he was responsible. It is the claimant's case that, over the period of his employment with the respondent, the bonus was never paid. He claims that this was a significant breach of his employment contract; and contributed to his decision to resign. However, it was not until the claimant's resignation letter on 30 October 2017 that he made any complaint regarding the unpaid bonus; during evidence the claimant could give no satisfactory explanation for this.

11 On 14 October 2015, Mr Wheeldon commenced employment with the respondent; and, in January 2016, Mr Wheeldon was promoted to Director of Compliance & Business Development. Following a meeting on 23 May 2017, Mr Wheeldon took over as the claimant's line manager. It is clear that the claimant enjoyed an uneasy relationship with Mr Wheeldon; it is equally clear that he enjoyed a very good and close relationship with Mr Conn.

12 In 2017, the NWAS contract was again open for tender; and the claimant believed that he would again be asked to engage in corrupt practices involving Mr Conn; Mr Wheeldon; and Mr Fawcett. His case is that, in May/June 2017, he made it clear to Mr Conn that he would have no part in any under-hand dealings regarding the tender; he would only do things "*above board*" and "*transparently*". It is the claimant's case that, following this declaration, Mr Conn and Mr Wheeldon significantly changed their behaviour towards him.

13 The claimant claims that he was excluded from important meetings to which he had previously been party; that he was undermined by Mr Wheeldon in conversations with staff who reported to the claimant; that previous payments made to the claimant when attending St Thomas' Hospital in London were suddenly withdrawn; that Mr Wheeldon was unsympathetic to any difficulties which the claimant encountered; and was sarcastic towards him.

14 The claimant was absent on holiday at the beginning of September 2017; he returned to work on 14 September 2017. On that day he received an appraisal document from Mr Wheeldon in which details were given of a proposed reallocation of duties. The claimant was concerned that he had been allocated the lead role for the Liverpool area: this at the same time that other managers were being moved out of that area; the claimant was concerned that the satisfactory performance of the contract with the resources allocated was impossible. He believed that he was being set up by Mr Wheeldon for failure.

15 The claimant; Mr Conn; and Mr Wheeldon met on 14 September 2017: it was clearly a difficult meeting; the claimant was concerned about the reallocation of duties; and Mr Wheeldon had concerns about matters which had arisen during the claimant's absence. The claimant had to leave the meeting to collect his children from school, but later exchanged texts with Mr Conn in which he complained about Mr Wheeldon's treatment of him. It is the claimant's case that he asked Mr Conn to keep his concerns confidential; but that Mr Conn broke this confidence by sharing them with Mr Wheeldon. The following day, Mr Wheeldon emailed the claimant expressing concern as to the matters raised with Mr Conn; seeking to reassure the claimant; and offering to withdraw from involvement with the claimant's contracts and leave matters to him alone if he preferred.

16 On 17 September 2017, the claimant informed Mr Wheeldon that he was unwell and would not be attending work the following day. Mr Wheeldon replied by text expressing sympathy and wishing the claimant well. The claimant was signed off work for two weeks.

17 During the claimant's absence he complained that his emails had been deleted. He believed that this was further evidence that he was being undermined within the respondent's business. However, I accept Mr Conn's evidence that no emails had been deleted: the emails had simply been organised; some of them transferred to separate mailboxes; and some of them archived. This was done because the claimant's emails had been monitored during his absence and it was found that his inbox was full and very disorganised.

18 On 11 October 2017, the claimant raised a formal grievance by letter to Mr Conn. The letter is seven pages long and complains principally of incidents which occurred since June of that year. The letter ends with a series of bullet points setting out the claimant's desired outcomes.

19 Of course, the subjects of the grievance were Mr Conn and Mr Wheeldon, the two most senior individuals within the organisation. The respondent therefore decided that the only fair way to deal with the grievance was to employ an external HR Professional - Mrs Mary Scarratt FCIPD. Mrs Scarratt would be supported through the process by Ms Hassett. Ms Hassett wrote to the claimant

on 23 October 2017 explaining how it was proposed that his grievance would be dealt with and offering three alternative meeting dates. The following day the claimant responded by text message stating that before he attended a meeting he wanted a response to the issues raised in the grievance. Ms Hassett promptly responded stating that it would not be possible to respond to the issues raised in the grievance until all relevant parties had been interviewed and the process would begin with a meeting with the claimant.

20 On 27 October 2017, Ms Hassall did respond to the claimant answering his queries about the process and why matters were being dealt with in the way that they were. The claimant then agreed to attend a meeting on 31 October 2017. But, on 30 October 2017, the day before the arranged meeting, the claimant tendered his resignation. Ms Hassett and Mrs Scarratt remained available for the meeting on 31 October 2019, but the claimant failed to attend.

21 In his letter of resignation the claimant set out four reasons which can be summarised as follows: -

(a) The non-payment of his agreed bonus.
(b) The directors actions and behaviours had made working for them impossible.
(c) The removal and refusal to reinstate is emails.
(d) The grievance procedure set out in his contract of employment was not fit for the situation.

22 So far as the claimant's bonus is concerned, it is clear to me that over the period of his employment the claimant had received payments of bonus totalling £2464. These payments had been made in a haphazard way; largely when the respondent's cash flow permitted. Prior to his resignation the claimant had never complained about this.

23 As to the calculation of the total bonus to which the claimant was entitled, the respondent did not operate an accounting system which provided a separate profit figure for each individual contract; the respondent has therefore approached this on the basis of assuming that the contribution to profit from each of the claimant's contracts would be proportionately the same as each contract's contribution to revenue. The claimant does not oppose this method of calculation and it appears reasonable in the circumstances. It was of course open to the claimant to adduce evidence as to the profit earned on each individual contract, but this may have involved employing expensive forensic accountants.

24 The respondent calculated that the outstanding balance payable for bonus was £1875.65: but this was based on what in my experience was a previously unheard-of definition of "net" profit. The respondent was working on the profit

after payment of shareholders dividends. The amount of bonus due to the claimant if calculated on the profit before payment of dividends is £4470.10.

The Law

25 **The Employment Rights Act 1996 (ERA)**

Section 13: Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

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

(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

23 Complaints to Employment Tribunals

(1) A worker may present a complaint to an employment tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

Section 94 - The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct - *Constructive dismissal.*

Section 98 - General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

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

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

26 **Decided Cases – Constructive Dismissal**

There are many decided cases which provide guidance to employment tribunals with regard to the law of dismissal and of constructive dismissal. We found the following to be particularly relevant when considering the facts of this case:-

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**
Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**
The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik –v- BCCI **[1997] IRLR 462 (HL)**
The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

Waltons & Morse –v- Dorrington **[1997] IRLR 488 (EAT)**
It is an implied term of every contract of employment that the employer will provide and monitor for employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**
The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

Nottinghamshire County Council –v- Meikle **[2004] IRLR 703 (CA)**
Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**
The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Bournemouth University Higher Education Corporation –v- Buckland
[2010] IRLR 445 (CA)
The conduct of an employer, who is said to have committed a repudiatory breach of the contract of employment, is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one factor in the employment tribunal's analysis as to whether or not there has been a fundamental breach but it is not a legal requirement.

Once there has been a repudiatory breach, it is not open to the employer to cure the breach by making amends, and thereby preclude the employee from accepting the breach as terminating the contract. What the employer can do is to invite affirmation, by making or offering amends.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others
[2011] IRLR 420 (CA)
A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Waltham Forest LBC -v- Omilaju **[2005] IRLR 35 (CA)**
This case clarified the position where a complainant was relying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment In response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous It is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principal. An entirely innocuous act on the part of the employer cannot be a final straw.

27 **Decided Cases – Unpaid Wages**

New Century Cleaning Co Ltd v Church **[2000] IRLR 27 (CA)**
Hellewell v Axa Services **[2011] ICR D29 (EAT)**
The words 'properly payable' in ERA 1996 s 13(3) refer to a legal, but not necessarily a contractual, entitlement on the part of the worker to the payment. Therefore, the preliminary stage is to consider whether there is a sum legally due. It is only if the answer to this question is in the affirmative that consideration should then be given as to whether there has been a deduction from that sum.

Coors Brewers Ltd v Adcock **[2007] IRLR 440 (CA)**
In order for an Employment Tribunal to have jurisdiction to hear an unlawful deductions claim, the claim must be in respect of a 'significant, identifiable sum.' Accordingly, it held that an unquantified claim to payment under a profit share scheme which had yet to be finalised could not be brought as unauthorised deductions claim. A tribunal will have jurisdiction in the case of an alleged failure to pay a bonus, even if the bonus in question is expressed as a percentage of gross earnings rather than as a specified sum.

Lucy v British Airways **UKEAT/0033/08 (13 January 2009 EAT)**
Where cabin crew claimed flight allowances denied to them when they ceased to perform flying duties, the EAT stated, obiter, that if a claim is unquantifiable that would take it out of the unlawful deductions jurisdiction, but if the claim was merely difficult to quantify and/or has not been quantified at the time that proceedings are commenced then the tribunal would still have jurisdiction.

Group 4 Nightspeed Ltd v Gilbert **[1997] IRLR 398 (EAT)**
The issue of when the clock starts ticking for the purposes of the three-month limitation period came before the EAT. The case concerned a worker who was paid a salary plus a quarterly commission. In practice, the commission was paid with the relevant month's salary – although under the worker's contract it was not

strictly due until the last day of the month following the relevant quarter. There was a dispute about the level of commission that had been paid and G brought an unauthorised deductions claim. The EAT had to decide when time started to run. Was it the date on which the relevant commission payments had been paid into the worker's bank account (20 January 1995) or the date on which payment was due under the contract (31 January 1995)? The EAT held that it was the later date. As a matter of law, it is only when an employer fails to pay a sum due by way of remuneration at the 'appropriate time', meaning the contractual date for payment, that a claim for an unlawful deduction can arise. It was only at that point that the employer could be said to have failed to pay that which was properly payable on a given occasion within the meaning of ERA 1996 s 13(3).

Discussion & Conclusions

Constructive Dismissal

28 I have carefully considered the reasons stated in the claimant's letter of resignation my conclusions regarding each of them are as follows: –

Non-payment of bonus

(a) Whilst, for the reasons set out below, I find that there is bonus payable to the claimant, I do not find that the non-payment of it prior to the claimant's resignation was a fundamental breach of the employment contract. The contract provides for a bonus of "*10% of the overall net profit performance of the contracts under the claimant's control. To be paid annually after the company accounts have been completed and filed with the company accountants*." There is no specific date for payment: it is only possible to identify a date *after* which payment becomes due. The practice had become established that the claimant was paid haphazard amounts towards his bonus; the claimant clearly accepted this; and made no complaint about it until his resignation letter. In my judgement therefore, the failure to pay the entirety of the bonus as at the date of resignation was not a fundamental breach of the employment contract.

The directors actions and behaviours had made working for them impossible

(b) This is a reference to how the claimant claims he was treated from June 2017 onwards. He claims that he was undermined by Mr Wheeldon; that he was given an impossible set of responsibilities following the September 2017 re-allocation of duties; that Mr Wheeldon belittled him when he reported a difficult return journey from London; and so on. It is clear on the evidence that there was always a difficult relationship between the claimant and Mr Wheeldon although, until September 2017, the claimant clearly had a close and positive relationship with Mr Conn. Nothing in the

evidence I have heard from the claimant persuades me that, during the period June - October 2017, the respondent acted towards the claimant in a way which fundamentally breached the employment contract. When the claimant complained about the re-allocation of duties, Mr Wheeldon offered to stand aside; Mr Conn attempted to mediate between them; and the claimant's complaints of being undermined by Mr Wheeldon speaking to other staff are simply not substantiated. These complaints rely on messages provided to the claimant by witnesses who have not been called to give evidence and who have made contradictory statements to the respondent. Further, in my judgement, the respondent's response to the claimant's grievance demonstrated a clear intention to take his complaints seriously and resolve them. In summary therefore, there is nothing which in my judgement amounts to a breach of the employment contract.

The removal and refusal to reinstate the claimant's emails

(c) As I have previously stated, I find that the claimant's emails were not removed. His inbox was simply reorganised; and the emails would have been available to him upon his return from work after sickness absence. The respondent's actions were entirely reasonable and justified. This does not in any way amount to a fundamental breach of the employment contract.

The grievance procedure set out in his contract of employment was not fit for the situation

(d) The claimant is concerned at the decision to involve an external HR Professional - Mrs Scarratt. He is correct that there is no provision in his contract of employment for such a procedure to be adopted. However, as is commonplace, the contract of employment envisages that an employee's Line Manager or a Senior Manager will investigate and hear a grievance. Inevitably, some variation of the procedure will be needed where the subjects of the grievance are the two most senior individuals in the organisation. In my judgement, the respondent's decision to commission Mrs Scarratt was reasonable and justified; it demonstrated a clear intention to have the claimant's grievance properly investigated and fairly determined. Although this represented a departure from the written terms of the contract, I find that it does not amount to a breach of contract because the written terms simply did not provide for the particular situation which arose - namely complaints against Mr Conn and Mr Wheeldon. The claimant resigned before Mrs Scarratt had an opportunity to complete (or even begin) her investigation into his grievance. In my judgement no fundamental breach of the employment contract arises by the respondents response to the grievance; or its departure from the written procedure.

29 In the circumstances, I find that there is no identifiable breach of contract in this case. And, absent a fundamental breach of the employment contract, there can be no finding of constructive dismissal.

30 I therefore find that the claimant's claim for unfair dismissal is not well-founded and is dismissed.

Unpaid Bonus

31 The claimant provided a very rough and ready calculation valuing his unpaid bonus at approximately £15,000. The claimant did not produce evidence to justify such a figure. As I have stated, subject to production by the respondent of the necessary accounting records, it would have been possible for the claimant to establish the correct figure, but I imagine this would have involved commissioning a costly report from forensic accountants. No such evidence was produced by the claimant. The claimant also fails to give credit for any bonus payments received when it is clear from his wage slips that some such payments were made on an irregular basis.

32 Ms Clayton's primary submission on the question of bonus is that the claims are out of time: the bonus being due for payment at the end of each accounting year. My judgement is that this submission is without merit: it is abundantly clear, and indeed, where convenient, forms part of the respondent's own case, that the actual payment of the bonus was made by way of irregular payments as and when cash flow permitted. In my judgement it cannot therefore be said that payment was actually due earlier than the termination of the claimant's employment. I find that the claim was presented in time.

33 I accept that the respondent has produced genuine accounting evidence showing the profits made over the period of the claimant's employment. In the absence of any alternative evidence from the claimant, I also accept the respondent's approach to the calculation of bonus: namely, to assume that the profit contribution from the claimant's contracts would be equivalent to their revenue contribution. The total net profit for the year ended 31 August 2016 was £48,765 on total revenues of £957,479; the revenues attributable to the claimant's contracts represented 65.5% of the total; thus, the respondent calculates that the profit attributable to the claimant's contracts is £31941. For the year ended 31 August 2017, the total revenues were £1,007,066; the total profit was £57,361; the contribution to revenue from the claimant's contracts was 66.77%; and thus, the profit attributable to the claimant's contracts is calculated at £38,299.94. I accept the respondents evidence that there was no profit recorded for the year ended 31 August 2015.

34 The total relevant profit for the period of the claimant's employment is therefore £70240.94: 10% of this figure is £7024.10; the sums already paid to the claimant by way of bonus total £2464; leaving a balance payable of £4560.10.

35 The above figures are calculated on the basis of net profit after payment of directors remuneration but before payment of dividends. The respondent contends for the bonus to be calculated as 10% of the figure remaining after payment of dividend. In my judgement, this contention is not sustainable: "net profit" must mean profit before dividends are paid. The respondent argues that in this case the directors were taking minimal salaries and justifiably supplementing their income by way of dividend. It was argued that had they taken a more realistic salary, upon which the respondent would also have had a liability to pay Employer's National Insurance Contributions, then the resulting profit figure would have been less still and thus their approach was to the claimant's advantage.

36 How the shareholders/directors of a private limited company arrange their fiscal affairs so as to receive remuneration as dividend as opposed to salary is a matter for them and their advisers and is outside the jurisdiction of this tribunal. But, I am satisfied that no reasonable interpretation of the phrase "net profit" could imply profit after payment of dividend. Accordingly, I am satisfied that the balance of bonus remaining due to the claimant is £4560.10 as calculated above.

Employment Judge Gaskell
21 May 2019