EMPLOYMENT TRIBUNALS

Claimant: Mr R Thurlow

Respondent: KC Design House Limited

Heard at: Leeds **On:** 21 and 22 May 2019
Reserved decision: 19 June 2019

Before: Employment Judge Licorish

Representation
Claimant: Mr R Ryan, Counsel
Respondent: Mr J Boyd, Counsel

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal succeeds.
2. The claimant's complaint of breach of contract in respect of notice pay succeeds.
3. The claimant's complaint of breach of contract in respect of bonus pay is dismissed for want of jurisdiction.
4. The claimant's complaint of unlawful deductions from wages in respect of bonus pay succeeds.
5. The provisional remedy hearing listed to take place on **5 September 2019** is now confirmed and will start at 10.00am.

REASONS

1. The claimant was employed by the respondent limited company, most recently as its head of design, from January 2013 until 1 November 2018. By a claim form presented on 18 January 2019, following a period of early conciliation which began and ended on 13 November 2018, he complains of unfair dismissal, breach of contract and unlawful deductions from wages.
2. The respondent denies the claimant's claim. It maintains that the claimant was not dismissed but chose to resign having found another job.

The hearing

3. During the hearing, the claimant first gave evidence. For the respondent, the Tribunal then heard from Peter Wood (aftersales and procurement) and Richard Jewkes (managing director and majority shareholder).

4. The claimant also submitted a witness statement by Lloyd Stroud, director of Lobbys-Links Limited (an IT consultancy). Unfortunately Mr Stroud did not attend the hearing. In the circumstances, the Tribunal explained to the parties that it could attach only such weight to Mr Stroud's statement as was appropriate in the circumstances, in view of the fact that he was unable to confirm under oath the accuracy of his evidence, nor was he available to be cross-examined by the respondent or questioned by the Tribunal.

5. The Tribunal read all of the witness statements before the claimant gave evidence.

6. The Tribunal was also provided with an agreed bundle of documents (comprising 147 pages). The Tribunal read the pleadings, and the documents referred to in the witness statements and during the evidence, and in submissions. Unless otherwise stated, the page numbers in these Reasons correspond to those in the bundle.

7. The respondent's evidence finished sufficiently late on the second day of the hearing with the effect that the parties agreed to provide submissions on paper prior to the Tribunal reaching its reserved decision. The claimant's and respondent's representatives accordingly made a number of helpful written submissions and replies as ordered by the Tribunal (marked as C1 and C2, and R1 and R2). The Tribunal considered those submissions with care, but does not set them out in full. The parties will readily recognise how the Tribunal has taken their submissions into account in resolving relevant disputes of fact and determining the issues. The parties' contentions are nevertheless summarised below where necessary.

The issues

8. At the beginning of the hearing, the issues were identified and agreed. Also taking into account the parties' submissions, the issues are summarised as follows:

   <u>Unfair dismissal</u>

   8.1 Has the claimant proved a breach of contract by the respondent, and if so, was that breach sufficiently important to justify the claimant resigning, or else was it the last in a series of incidents which justified his leaving? The claimant contends that the respondent was in breach of the implied term that it would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.

   8.2 In accordance with the grounds of his claim (pages 13 to 16), the claimant relies on the following:

   8.2.1 From around 2017, discussions he had with the respondent about an amendment to his contract of employment requiring three months' notice of termination on either side, which was never implemented (paragraph 4);

8.2.2 On around 19 October 2018, comments made by Richard Jewkes about the claimant and the respondent's cleaner in his local fish and chip shop, and on around 22 October 2018 Mr Jewkes's subsequent failure to apologise to the claimant and the remarks he made in failing to do so (paragraphs 6 and 8).

8.2.3 On around 22 October 2018, Mrs Jewkes confronting the claimant on two occasions and berating him for his behaviour, and on 25 October 2018, Mr Jewkes' son-in-law informing the claimant that Mrs Jewkes was looking to oust him from his employment (paragraphs 7 and 9).

8.2.4 On 22 October 2018, Mr Jewkes refusing to alter his policy to allow the claimant to speak directly to clients, representatives or colleagues, and the existence of the policy generally (paragraphs 3 and 8).

8.2.5 The claimant alleges that the "*last straw*" occurred during the afternoon on 25 October 2018, when he found that a large number of emails had been deleted from his inbox and folders. Mr Jewkes thereafter postponed a requested urgent meeting with the claimant to discuss developments until week beginning 29 October 2018. On around 29 October 2019, the claimant found the missing emails in his trash folder, and discovered that the emails had been deleted between 8.15am and 10.50am on 25 October 2018. By letter on 30 October 2018, the claimant resigned offering a long notice period (paragraphs 10 to 12).

8.2.6 At the beginning of the hearing, the claimant confirmed that he intended to rely on allegations in respect of his requirement to train other designers as background only (paragraph 5).

8.3 If the claimant has proved a sufficiently serious breach of contract, did he resign at least in part because of that breach? Otherwise, it is not disputed that the claimant delayed too long in terminating his contract.

8.4 Did the respondent thereafter terminate the claimant's contract of employment on 1 November 2018?

8.5 If not, did the events at paragraphs 8.2.1 to 8.2.5 above, together with the events leading up to and on 1 November 2018 amount to a fundamental breach of contract? The claimant maintains that Mr Jewkes effectively suggested to the claimant that he might not be paid his annual bonus, and made comments about and to the claimant concerning (among other things) his mental health and accusations of extortion and blackmail, which led the claimant to resign without notice (paragraphs 13 to 17).

8.6 If the claimant has proved a sufficiently serious breach of contract, did he resign at least in part because of that breach? It is otherwise not disputed that the claimant delayed too long in terminating his contract.

8.7 If the claimant was dismissed, has the respondent shown that the reason for dismissal was potentially fair? The respondent asserts that it was, but has pleaded or puts forward no specific reason. If the claimant was constructively dismissed, the Tribunal will consider the reason for the respondent's conduct.

8.8 Did the respondent otherwise act reasonably in dismissing the claimant for that reason? If the claimant was constructively dismissed, the Tribunal will consider whether the respondent's reason for its conduct was otherwise sufficient to justify any fundamental breach of contract.

8.9 If the claimant was constructively dismissed, did the claimant unreasonably fail to follow the ACAS Code relating to resolving disputes? Neither party made any submissions in this respect.

Breach of contract

8.10 Did the respondent breach the claimant's contract by failing to pay him for his notice period? It is not disputed that, in the absence of any act of gross misconduct, the claimant was entitled to receive 5 weeks' notice of the termination of his employment. The respondent contends that the claimant was not dismissed but chose to terminate his employment on 1 November 2018 without notice.

8.11 Did the respondent breach the claimant's contract by failing to pay him a bonus payment relating to its financial year 2018? Following the evidence, the respondent raised a jurisdictional point to the effect that no such breach arose or was outstanding as at the termination of the claimant's employment.

8.12 If so, has the claimant suffered loss as a result of any breach?

Unlawful deductions from wages

8.13 In the alternative, did the respondent make an unauthorised deduction from the claimant's wages by not paying him an annual bonus relating to its financial year 2018, either on or following the termination of his employment?

Factual background

9. Having considered all of the evidence, the Tribunal makes the following findings of fact, on the balance of probabilities, which are relevant to the issues to be determined. Some findings are also set out in the Tribunal's later Conclusion to avoid unnecessary repetition.

10. The respondent specialises in the design, manufacture and installation of high-end domestic kitchens and dining rooms, and is based in Clayton West, Huddersfield. It employs 12 staff, and Richard Jewkes is its managing director and owner.

11. The claimant started to work for the respondent as a freelance designer and illustrator in 2008. From 2 January 2013, he became directly employed as a senior designer. His initial contract of employment states that he was "*entitled to receive a minimum of four weeks notice during the first 4 years of employment and thereafter an additional week for each complete year's service up to a maximum of 12 weeks*" (page 39). The contract later states that the claimant was obliged to give the same period of notice to terminate his employment (page 41).

12. It is not disputed that the claimant and Richard Jewkes worked extremely well together. The claimant is a highly regarded computer-aided designer, and is well known for the quality of his drawings and designs. Mr Jewkes excels in sales and client care. Peter Wood (a long-standing employee, who is mainly responsible for aftersales and procurement) acknowledged in cross-examination that the claimant was "*the most important cog in the wheel*" behind Mr Jewkes. Mr Jewkes described their relationship as a "*partnership*" which was "*unique*" within their industry.

13. Nevertheless, although the claimant and Richard Jewkes both acknowledge that they were able to develop the respondent's business significantly by working together, the claimant believes that his personal development was curtailed to a certain extent by remaining "*behind the scenes*". In re-examination, he maintained that every other sales person and designer who worked for the respondent received high-pressure sales motivation training, whereas he was "*just let loose for a year*". The claimant also believes that Mr Jewkes was controlling. For example, he would give him "*dirty looks*" if he was seen in conversation with colleagues, and Peter Wood would intervene if the claimant was seen talking to sales representatives. Mr Jewkes also steadfastly refused to allow the claimant to deal directly with customers.

14. Richard Jewkes explained that from around 2011 he and the claimant agreed to work as a team. This is because in around 2010 the claimant was achieving a sales conversion rate of just over 35% (the industry standard is 33%) whereas Mr Jewkes's rate was 80% (page 105). Throughout the next few years, their combined sales increased from just under £580,000 in 2010 to £1,190,000 in 2017. From 2011, the claimant's bonus was accordingly based on their combined sales figures.

15. Richard Jewkes also believes that the claimant was ambivalent about the client-facing side of the respondent's business. He says that although from time to time he did suggest that he would be interested in doing more of this work, the claimant's enquiries were always tentative. In any event, Mr Jewkes considered that the claimant was unpredictable and reacted badly to, for example, requests to change to his designs. He cites one example in September 2017 when the claimant was given the opportunity to present a scheme to the purchasers of a newly built home arranged by the housebuilder. The claimant returned to the office swearing and complaining about the purchasers wanting changes. Mr Jewkes says that the housebuilder asked him specifically to front any further meetings with the purchasers on the basis that the claimant's manner had "*caused issues*".

16. In their witness statements, Richard Jewkes and Peter Wood also suggest that the claimant has a volatile personality. Put simply, he had been known to slam the telephone down and storm out of the showroom, or would disappear into "*dark places*" to the extent that he would not voluntarily speak to his work colleagues. In cross-examination, the claimant stated that these descriptions of his behaviour at work were "*greatly exaggerated*". It was accordingly put to him that an exaggeration usually contains a kernel of truth. The claimant readily accepted that he is an emotional person who can, at times, become frustrated. It appears to the Tribunal, therefore, that client care was not his strong point.

17. In this respect, the Tribunal was also shown the note of a meeting between the claimant and Mr Jewkes's wife (the respondent's general manager) on 30 January 2018 (pages 58 to 60). Mrs Jewkes states that during the previous week the claimant had been "*chatty and approachable*", but was now uncommunicative and "*appeared to be 'in a mood'*". She was mainly concerned that this was causing "*team morale to dip*". When pressed, the claimant raised a number of matters, including:

    17.1 he felt that he was being watched by Peter Wood when he spoke to the cleaner on his coffee break;

17.2 he was stressed because there had been a lack of work on his desk owing to Richard Jewkes being off sick for the first two weeks of January 2018;

17.3 he was cross and frustrated because he had not been warned that his commission and bonus for the previous year would not be paid with his January wages;

17.4 he felt excluded from the team because he was told rather than asked about any changes.

18. Mrs Jewkes tried to reassure the claimant as far as she could, on the basis that he was "*a valuable part of the team, with vast experience and his knowledge and advice was invaluable*". Nevertheless, she maintained that the claimant ultimately needed to "*put a smile on his face*" and leave any personal problems at home.

19. There also followed a discussion about the claimant's health. In summary, he explained that he was taking an anti-depressant. Mrs Jewkes suggested that he see his GP to check whether the dosage needed adjusting and to find out whether he could be referred for further counselling. She also suggested that he should take up walking again to improve his mood. She concluded and recorded: "*Part of [the claimant's] problem is the fact that he stews over what has been said, winding himself up and the conversation become distorted. [The claimant] agreed.*"

20. Ultimately, Richard Jewkes explained (and the Tribunal accepts) that the claimant was not refused contact with clients or colleagues, but he tended not to communicate very well with them.

21. In September 2015, the claimant was approached by and offered a job with another company. Following discussions with Richard Jewkes, he was promoted to the respondent's head of design effective from 1 October 2015. During their negotiations, Mr Jewkes drew up an "*indicative proposal*" in respect of the claimant's remuneration package, which the claimant explained to the Tribunal he subsequently accepted (the bonus agreement – page 50). The respondent's financial year runs from January to December. The body of the bonus agreement reads:

*"**Position to date as Senior Designer***

£54,000 (42K basic + 12K (subject to RJ & [the claimant] achieving targeted £1,2M)

Promotion to 'Head of Design' from 1st October to 31st of December 2015

£15,750 (equivalent to 63,000 PA) (subject to [the respondent] achieving target of £1,2M) Currently [the respondent] is tracking to hit this figure, so this remuneration offer is under-written by RJ.

1st January 2016 to 31st December 2016

£60,000 basic plus £10,050 bonus based on [the respondent] achieving £1.5M. This bonus is based on an additional 300K of turnover (over and above base line 1.2M) at a GP rate calculated at 33.5% delivering £100,500 of GP, of which a bonus of 10% is awarded. This offer of remuneration is to be guaranteed for this year.

1st of January 2017 onwards

… £60,000 basic plus £10,050 bonus based on [the respondent] achieving £1.5M. This bonus is based on an additional 300K of turnover (over and above base line 1.2M) at a GP rate calculated at 33.5% delivering £100,500 of GP, of which a bonus of 10% is awarded. In addition, a 5% commission to [be] paid on all GP generated over and above 1.5M, without cap. Basic salary guaranteed, bonus structure reliant on company profits.

On the current GP for every 100K of turnover and above £1.5M you will earn an extra £1,675.00, based on GP of 33.5% (emphasis added)."

22. By letter on 8 September 2015, Richard Jewkes confirmed the claimant's promotion and "*basic pay increase to £60,000 + bonus per annum*" (page 51). The claimant suspects that from this time Mr Jewkes felt resentful towards him. This is because generally (as the claimant put in in cross-examination) Mr Jewkes "*didn't like to feel he was over a barrel regarding his subordinates*". In any event, the claimant and Mr Jewkes continued to maintain a successful professional partnership.

23. During the claimant's appraisal on 6 June 2017, he and Richard Jewkes discussed increasing his notice period to three months on both sides. This was stated to be "*required to protect the business"* on the basis that Mr Jewkes would need time to recruit a replacement if the claimant chose to leave. That proposed amendment to the claimant's contract was never made.

24. The claimant's objectives for the latter half of 2017 also included writing a training programme for a software package called Sketchup, and mentoring Mr Jewkes's daughter in this respect to help her to design and present individual projects, and meet a higher sales target in 2017. It was also noted that training delivered by the claimant to two other colleagues had been "*received positively*". The claimant commented that he would "*continue to work towards improved systems + training to help with continued growth targets*" (pages 53 to 56).

25. In February 2018, the claimant was paid his bonus in respect of the financial year 2017 in the sum of £13,196.95, comprising £10,860 at the capped 10% rate of commission and £2,336.95 at the uncapped 5% rate, calculated according to an average profit margin of 36.2% (page 61).

26. At around the same time, Mrs Jewkes invited the claimant to attend a training session in Germany, which he declined to do owing to "*having pets at home*" and that he was "*not sure there is anything significant or valuable for [him] to learn*" (pages 62 to 64). In re-examination, Richard Jewkes explained that he wanted and needed the claimant to attend that training as it was provided by an important supplier.

27. In March 2018, the issue of extending the claimant's notice period was once again discussed between Richard Jewkes and the claimant during his appraisal meeting, but once again it was not implemented.

28. In the summer of 2018, the respondent recruited its first post-graduate trainee. The respondent also recruited a new senior designer/showroom manager. The claimant was left off the circulation list announcing the latter appointment, but not the reminder that he was due to start work on 10 September (pages 70 to 71).

29. By email on 25 September 2018, the claimant was also informed that following the graduate trainee's three-month appraisal, he would be required to deliver training comprising hourly sessions four times per week. Mrs Jewkes told the claimant that she had diarised the sessions to take place from 8.30 to 9.30am "*to cause less disruption to [his] day*" (page 73).

30. At around this time, the respondent was also in the process of rewriting its employee handbook and issuing new contracts. By email on 1 October 2018, Mrs Jewkes asked all employees to read the handbook and sign a form to confirm that they had done so, and thereafter to sign their individual contracts (page 74). At this point, the claimant had not been given a new contract. He says that, as a result, he began to question his job security with the respondent. On 19 October 2018 he raised the matter with Richard Jewkes who replied that the claimant's contract was "*a bit more complicated and I will probably get around to it when I do your bonus*".

31. In around October 2018, the respondent was also experiencing problems with its staff email accounts. It appears that some emails were either disappearing from individual inboxes or not arriving at all (page 75). The claimant described this as a "*synching issue*". As a result, on 2 October 2018, Mrs Jewkes asked everyone to send her details of any "*ongoing problems*" within the following two weeks so that they could be resolved "*once and for all*" (page 77). In evidence the claimant maintained that she did not receive any replies because this was an isolated and relatively minor problem.

32. In the meantime, throughout 2018 the respondent's employees were regularly kept up to date in terms of its sales and projected turnover for the financial year. The minutes of a team meeting which took place on 10 April 2018 show that the respondent was on target in respect of its orders, but turnover was marginally down from the previous year. The respondent's overall target for 2018 was by that point £1.8 million, although the claimant's personally agreed target in in his bonus agreement remained unchanged (page 65). By the end of July 2018, the respondent's overall turnover was predicted to reach £1.5 million (page 66). By September 2018, it was predicted to reach £1.75 million (page 72). The minutes of a team meeting on 16 October 2018 state: "*Anticipated takings for the year 1.65M*" (page 78).

33. More generally, Richard Jewkes explained that he and other colleagues had noticed that the claimant appeared to get on well with the respondent's cleaner. She worked on Mondays, and the claimant appeared to be "*more positive and upbeat*" whenever she was in the showroom.

34. On Friday 19 October 2018, after he had finished work Richard Jewkes visited his local fish and chip shop. The person serving saw the respondent's logo on his jacket and identified herself as a friend of the respondent's cleaner. Mr Jewkes told to her to ask the cleaner about her "*special friend*" and named the claimant. He says that he meant it as an off-the-cuff light-hearted remark, but as he drove home he immediately regretted saying it. Mr Jewkes was not thereafter due in work until the following Tuesday.

35. On Monday 22 October 2018, the claimant arrived for work at around 8.15am. Soon after, the respondent's cleaner told him that Richard Jewkes had said to a close friend of hers that she "*fancied*" the claimant. The claimant says that he was extremely embarrassed and felt compelled to apologise to the cleaner for the rumour.

36. According to the claimant's evidence, he thereafter became agitated about the matter while he tried to work and eventually approached Mrs Jewkes to ask whether her husband would be coming in to apologise to the cleaner. He says he did so "*firmly*", and was "*visibly upset and angry*". Mrs Jewkes replied that she would speak to her husband, but also that he should not raise his voice. The claimant asked her whether it was acceptable for his employer to spread rumours about him. Mrs Jewkes replied that it was not her fault and he should not speak to her like that, but she would try to contact her husband. The claimant walked away, stating: "*It would just go in one ear and out the other as usual.*" Mrs Jewkes followed the claimant back to his desk, repeating that he should not speak to her in that way.

37. The claimant believes that Mrs Jewkes inflamed rather than tried to defuse the situation. He thereafter left his desk and spent approximately an hour in the car park trying to calm himself down. Eventually Mrs Jewkes came out to tell him that her husband was on his way into the office and that he should get back to work. Mr Jewkes recorded in his appointments diary that he was told that the claimant had "*kicked off in front of the whole team, paced around the car park, didn't work*" (page 88). In cross-examination, he said that his wife told him that the situation was "*getting out of hand*" and the claimant was "*up in arms*".

38. Richard Jewkes arrived at work at around 10.30am and first spoke to the cleaner in private to apologise for his comment and clarify what he had said to her friend. The cleaner readily accepted the apology and stated that she regretted mentioning it to the claimant. Approximately twenty minutes later, Mr Jewkes asked Peter Wood to be present at a meeting with the claimant in the car park.

39. Once in the car park, Richard Jewkes says that he explained to the claimant that he had been misquoted and offered a full apology. The claimant responded aggressively, his body language was "*confrontational*" and he launched into a personal attack, among other things stating that the respondent was all about Mr Jewkes's ego and the claimant was "*only there to make him look good".*

40. The claimant remembers that Mr Jewkes explained the exact words he had used in the fish and chip shop, and accepted that he should not have made the comment. He does not agree that Mr Jewkes gave an unreserved apology, but said that the claimant was making a mountain out of a molehill. He also suggested that the claimant's reaction indicated to him that "*something was going on*" between the claimant and the cleaner. Peter Wood and Richard Jewkes both confirmed in cross-examination that the claimant's recollection about Mr Jewkes's additional comments was correct.

41. It is not disputed that the claimant took the opportunity to raise a number of other matters with Richard Jewkes. For example, he accused him of double standards and that he appeared to take issue with the claimant speaking to anyone else at work. At that point, Peter Wood suggested that they should have a separate meeting to try to resolve the issues between them. In evidence, Mr Wood explained that it was obvious from the claimant's reaction and demeanour that there was "*more to it*" than Mr Jewkes's original comment about the cleaner.

42. In cross-examination, the claimant accepted that there had been "*a simmering resentment … for some time*" which had now effectively boiled over. He

accepted that during this meeting he was "*loud*" and "*abrupt*", but not aggressive or physically threatening. Put simply, he was frustrated and felt professionally held back by Mr Jewkes's "*inflated view of himself*".

43. Richard Jewkes later told his wife what had happened in the car park, which prompted her to send an email to her husband at approximately 1.50pm (page 83):

    "*Shall I set up a meeting with [the claimant] and you to iron out what exactly is the issue?*

    He cannot continue to behave in this aggressive tone, and if he has serious issues with this work place I need to know.

    I don't understand why we have to tiptoe around him. No one else in the company is allowed to behave in this fashion.

    I don't like to be spoken to in the aggressive tone he uses and I would like to know what is to be done about this?"

44. Later that evening the claimant contacted his previous employer to discuss job opportunities. They arranged to meet during the evening of 25 October 2018.

45. First thing on 23 October 2018, the claimant told the graduate trainee that he would not be able to provide an hour's training that morning, owing to his workload and impending deadlines. A short time later, Mrs Jewkes instructed the claimant to stop what he was doing and provide the scheduled training. When he arrived for work on 24 October 2018, Mr Jewkes's son-in-law (the respondent's workshop manager) told the claimant to be careful as he and his wife thought that Mrs Jewkes "*wanted [him] out*".

46. First thing on 25 October 2019, Mr Jewkes's daughter repeated to the claimant what her husband had said, and explained that she had told her father and Peter Wood that her stepmother's response to the claimant at the beginning of the week had been "*disproportionate*". In cross-examination, Mr Jewkes's explanation was that his daughter's and son-in-law's comments reflected problematic relationships within the family – that is to say, they were not objective.

47. The claimant spent time in the morning training Mr Jewkes's daughter and the graduate trainee because he had no client work. Mr Jewkes's daughter later signed a statement to the effect that their training session took place between approximately 9.30 and 11am (page 94). In response to the Tribunal's questions, the claimant confirmed that he started work at 8.30am. He thought that he would have spent the first hour of the day on non-client-related work "*at my computer*".

48. At around 11.30am, Richard Jewkes arrived at the office. The claimant thought that he looked flustered, but Mr Jewkes denies that this was the case. He eventually passed the claimant a client file and left the premises. The claimant realised that he did not have any email instructions from Mr Jewkes relating to the file. He then he saw that a significant number of emails had disappeared from his inbox and folders (page 85). One of those emails related to a client file he was passed later, which the claimant asked Richard Jewkes to send again (pages 79 to 81). His folder containing the respondent's policy-related emails was also all but empty.

49. The claimant says that he was unnerved by this development, and told everyone who was in the showroom including Peter Wood, who was "*extremely*

aggressive". In response to the Tribunal's questions, Mr Wood thought that he replied to the effect that he "*didn't know anything about it*". When Richard Jewkes returned later that afternoon, the claimant also told him what had happened and he replied: "*gmail does that a lot*." Mr Jewkes maintained in evidence that he assumed that the claimant was experiencing the general email issues that the respondent had at that time, but now realises that he was not. The claimant did not otherwise refer the matter to the respondent's IT provider.

50. Later that afternoon the claimant requested a "*serious*" meeting with Richard Jewkes, which was arranged to take place at 1.30pm the following day. However, the Tribunal accepts that Mr Jewkes was forced to cancel that meeting because his evening appointment on 25 October 2018 overran until 10pm, and he needed to prepare for two further meetings due to take place on 26 October (page 89).

51. Later on at home on 25 October 2018, the claimant checked his work emails on Outlook on his own computer. The missing emails were still in their folders.

52. On 29 October 2018, while at work the claimant checked the file properties of the deleted emails which showed that they had been moved to his trash folder between 8.15 and 10.50am on 25 October (pages 116 to 117). The claimant estimates that "*hundreds*" of emails had been deleted. He later took the afternoon off and met with his previous employer who offered him a job.

53. On 30 October 2018, the claimant gave the following letter to Richard Jewkes (quoted as written – page 95):

    "*Please accept this letter as formal notice of my resignation …*

    Should you wish, I would be willing to work notice period up to the end of 2018, a full two months from the date of this letter. I leave the decision with you, in the spirit of amicability and in the hope of a mutual honouring of all outstanding commitments."

54. The claimant explained that he thereafter raised with Mr Jewkes payment of his bonus for the 2018 financial year, which was due in January 2019. In cross-examination, Mr Jewkes recalls that the claimant agreed to work until the end of 2018 to complete his current projects, continue to train other designers and allow the respondent time to find a replacement. In return he expected to receive his bonus. By letter of the same date, Mr Jewkes wrote to the claimant (page 96):

    "*I acknowledge and accept your request to resign from [the respondent]. Furthermore, for you to continue to work beyond your contractual notice period, to the end of this year … your last day physically in the business will be Wednesday 19th of December.*"

    Mr Jewkes also summarised the claimant's "*intent*" in terms of what he hoped to achieve during his notice period, but did not mention the claimant's bonus. In cross-examination, Mr Jewkes maintained that "*nothing was deliberately missing*" in this respect, because he and the claimant otherwise understood that the reference to "*all outstanding commitments*" in his resignation letter included the payment of his annual bonus.

55. During cross-examination, Mr Jewkes essentially maintained that the end date for the claimant's employment was at this point unclear. He appeared to rely on the fact that the claimant's agreed last working day in the office was stated to be before Christmas, taking into account to the claimant's untaken annual

leave. In the event, based on the contemporaneous exchange of letters on 30 October 2018, and Mr Jewkes's response to further correspondence with the claimant on 31 October and 1 November 2018 (as set out below), the Tribunal is satisfied that on 30 October 2018 Mr Jewkes agreed that the claimant's employment would effectively terminate at the end of the year, namely on 31 December 2018.

56. The following day, the claimant presented Richard Jewkes with a draft agreement dated 31 October 2018 (page 97). Among other things, it stated that in return for agreeing to work until the end of December 2018:

"*Your bonus for the year 2018 will be paid in full, along with your final salary payment, prior to, or at the ending of, your employment, and as confirmed in my letter to you dated 7th September 2015 and as structured in my letter to you dated 4th September 2015 which states the following [quotes the bonus agreement] …*"

57. Richard Jewkes refused to sign that document. At some point he wrote on his copy: "*RJ refused. Saw it pointless*." He explained that this was because he could not agree to pay the claimant's bonus before the end of the respondent's financial year. The claimant then asked for a reduced bonus payable on termination, but Mr Jewkes refused to discuss that as a possibility.

58. On 1 November 2018, Richard Jewkes accordingly gave to the claimant the following letter (page 98):

"*<u>Confirmation of entitled 2018 bonus payment date</u>*

Further to your request, I confirm that any amounts due that relate to your contractual bonus will be paid to you in January 2019. The amount of bonus will be calculated, as outlined in [the bonus agreement] …

I will not know exactly what the company turned over in 2018 until the first or second week in January. The figure will then need to be processed by me, in order to calculate your final bonus [quotes bonus agreement].

I trust the above will remove any doubt you may have had."

59. Richard Jewkes says that when he gave the claimant that letter he also said that the respondent was currently "*running below target and that nothing was guaranteed*". He also reminded the claimant that in 2017 the respondent had hit its target only on 13 December. He says that the claimant "*reacted with disbelief saying how busy we were*". The claimant remembers that Mr Jewkes said before he gave him the letter: "*We might not hit target*." When Mr Jewkes later handed him the letter, he refused to discuss the matter any further. The claimant became concerned because up until that point and throughout the year, all of the financial information which had been shared with the showroom team suggested otherwise.

60. In cross-examination it was accordingly put to Richard Jewkes that, based on the October 2018 figures and projection, he would nevertheless have been able to reassure the claimant to a significant extent. Mr Jewkes replied that although it was not in his witness statement, he had "*just recalled*" that he had in fact reassured the claimant that the respondent "*should hit target*".

61. On balance, the Tribunal prefers the claimant's version of events and was not persuaded by Richard Jewkes's additional evidence in this respect. Most importantly, the respondent's pleaded case is that the claimant was told that there was "*no guarantee*" that the target would be reached (page 26). Indeed,

it was put to the claimant in cross-examination that at that point in the financial year it was reasonable for Mr Jewkes to say as such. The claimant accepted that it was, but also thought that "*something pretty devastating would have to happen*" for the respondent not to reach the target stated in his bonus agreement.

62. In addition, the Tribunal is not convinced that Mr Jewkes would have simply forgotten that he did his best to reassure the claimant at that time. He confirmed during his evidence that he wrote the letter on 1 November 2018 because it was clear that the claimant was anxious about the bonus issue. However, he maintained in his written statement that his comments should have come as no surprise to the claimant, because (among other things) throughout the year the showroom team had been told that the respondent was "*tracking below target*". Mr Jewkes nevertheless conceded during his evidence that this in fact referred to the respondent's overall £1.8 million target, not the minimum stated in the claimant's bonus agreement (which at that time the respondent was on course to exceed).

63. Later that morning, Richard Jewkes says that the claimant came to see him in an "*agitated"* state. The clamant told Mr Jewkes that he was withdrawing his offer to work until the end of the year because he was now concerned that Mr Jewkes could manipulate the sales figures to avoid paying him a bonus. He raised the fact that Mr Jewkes in the past had mentioned that he had put certain payments into the following year "*to suit*". The claimant asked again whether Mr Jewkes was prepared to negotiate a lower compromise figure, but he once more refused. Mr Jewkes then asked the claimant to ask his prospective employer whether he would be able to start his new job in December "*before we put anything in writing*".

64. In the event, the claimant was unable to contact his new employer (page 92). Nevertheless, by this point he had concluded that the respondent no longer wanted him. He thought that, because the respondent was very busy, his only leverage comprised his offer again to work an extended notice period. He therefore repeated his offer in exchange for an agreed bonus payment on termination, or else he would leave immediately. The claimant says that by this stage he "*was extremely emotional and upset*", and thought that he had every right effectively to present an ultimatum. In cross-examination, he confirmed that took this course of action because by this time he thought that Mr Jewkes was not in fact going to honour the respondent's obligations regarding his bonus.

65. In his witness statement, Richard Jewkes thereafter confusingly remembers that the claimant had been previously calm (rather than agitated, as quoted above), but now "*returned with a new fury and arrogance*". He explained that the inconsistency within his statement was because the claimant was a smoker and "*needed nicotine so can switch*". The Tribunal was not convinced by that explanation. The claimant told him that he had worked hard for the respondent, there was plenty of work in the pipeline and he wanted to do a deal.

66. It is not disputed that Richard Jewkes replied to the claimant to effect that he regarded his offer as "*a means of extortion*". An argument followed. Mr Jewkes among other things said that he would sue the claimant for breach of contract if he left without notice. He also recalled stating that the claimant was "*paranoid (or was being paranoid)*" on the basis that he thought Mr Jewkes was going to manipulate the sales figures. In cross-examination, he recalled that he also

told the claimant: "*I hear you thought [Mrs Jewkes] was on your computer*." He considered that this allegation was "*ridiculous*" because his wife had simply been "*wiping it down*". Mr Jewkes also acknowledged that he told the claimant to "*sort [his] head out*".

67. The claimant recalls that, after a long silence, Richard Jewkes told him that "*he could no longer trust me to be there and that I would have to leave immediately as soon as I provided him with passwords for my computer and the furniture pricing Excel spreadsheet*".

68. It is not disputed that Mr Jewkes then accompanied the claimant to his desk while he removed from his computer some software that he owned personally. The claimant left the respondent's premises at around 2.30pm. The claimant says that by the time he reached home, he was no longer able to access to his work emails.

69. Richard Jewkes recalls that during their final exchange and prior to the claimant leaving the respondent's premises, the claimant presented him with an ultimatum: to pay him more money for working his notice period or he would "*walk*". Mr Jewkes replied that, faced with those options, the claimant would have to "*walk*" because he was not prepared to pay him any more money. He says that he told the claimant:: "*Given that you are trying to blackmail me for money that you are not entitled to – when you know I need you to work your notice. You clearly do not trust me, then you had better do what you've told me you will do, and walk.*" The claimant replied to Mr Jewkes: "*OK, you can have a half day on me*" (meaning that he had already been paid until 31 October).

70. The Tribunal prefers the claimant's version of events, largely on the basis that Mr Jewkes's evidence was inconsistent not only within his own statement but also during the hearing. Most importantly, in cross-examination Mr Jewkes first maintained that there was "*nothing to say that [the claimant] wouldn't get it*" (meaning the bonus payment), notwithstanding the fact that according to his own evidence he had rather misleadingly told the claimant that the respondent was tracking below the target relevant to the bonus agreement. Mr Jewkes went on to explain that he was about the leave the office to prepare for the respondent's first ever trade fair in Harrogate beginning the next day, and the claimant was "*holding [him] over a barrel. Our relationship eroded within minutes on a particular day because something told him that I was going to diddle him*". Having re-read his witness statement, he thereafter maintained that he did not say to the claimant that <u>he</u> no longer trusted him.

71. In response to the Tribunal's questions, Mr Jewkes thereafter suggested that he had made a contemporaneous note of what he and the claimant had said to each other during their final meeting. He told the Tribunal that he directly transposed those notes into his written statement, as a result of which he was able to quote directly what the claimant had said. Again, the Tribunal was not persuaded by that additional evidence or the timing of it. Most importantly, no such notes were in the bundle of documents before the Tribunal, notwithstanding the fact that they went to a highly important disputed issue between the parties.

72. In his written statement, in contending that he did not dismiss the claimant Richard Jewkes also later summarised his position thus: "*Faced with those options – I told him he would have to walk.*" In the Tribunal's judgment, this form of words and Mr Jewkes's evidence in cross-examination suggests that, by this point, the claimant effectively had no choice in the matter because Mr

Jewkes was not prepared to leave the claimant in the office while he was at the trade fair.

73. On 31 October 2018, the respondent's turnover was £1,389,984.96 (pages 99 to 100). On 25 November 2018, the respondent reached £1,504,166.09 turnover (pages 101 to 102). Its total sales revenue for 2018 was £1,617,428.63 (pages 103 to 104).

The relevant law

Unfair dismissal

74. Section 95 of the Employment Rights Act 1996 (the ERA) states:

"(1) For the purposes of this part an employee is dismissed by his employer if …

(a) The contract under which he is employed is terminated by the employer … [or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employer's conduct."

75. The latter situation is known as constructive dismissal. The case of **Western Excavating (ECC) v Sharp 1978 ICR 221** states that it is for the employee to prove on the balance of probabilities that the employer committed a repudiatory breach of contract. A repudiatory breach means: "*a significant breach of contract going to the root of the contract which shows that the employer no longer intends to be bound by the essential terms of the contract*." The employee must then prove the employer's breach at least in part caused them to resign as a result and that they did not affirm the contract by delaying too long before resigning.

76. The case of **Malik & Another v BCCI 1997 ICR 606** confirms that there is an implied term in every contract of employment that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. A breach of this implied term is "*inevitably*" fundamental (**Morrow v Safeway Stores plc [2002] IRLR 9 EAT**).

77. In **Woods v W M Car Services (Peterborough) Limited 1981 IRLR 347**, the Court of Appeal explained:

"To constitute a breach of this implied term it is not necessary to show 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 to determine whether it is such that its cumulative effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

78. A number of acts by an employer (in other words, a course of conduct) can, when considered as a whole, amount to a fundamental breach of contract. In this situation, an employee may resign following a "*last straw*" incident (**Lewis v Motorworld Garages Limited 1986 ICR 157**). Guidance on such cases, provided by the Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**, can be summarised as follows:

78.1 The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of

trust and confidence, but it must, when taken in conjunction with earlier acts, contribute something to that breach and be more than utterly trivial.

78.2 Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

78.3 An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the employer's act as hurtful and destructive of their trust and confidence in the employer.

78.4 The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It may not itself amount to a breach of contract. However, if the "final straw" consists of conduct which, when viewed objectively, is found to be reasonable and justifiable, it would unusual for an employment tribunal to find that it contributed to the undermining of the employee's trust and confidence in their employer.

79. In addition, there is no need for there to be any "*proximity in time or in nature*" between the last straw and any previous acts or omissions by the employer (**Logan v Commissioners of Customs and Excise 2004 ICR 1 CA**).

80. In **Kaur v Leeds Teaching Hospital NHS Trust 2018 EWCA Civ 978** the Court of Appeal recently clarified that when considering whether an employee has been constructively dismissed as a result of cumulative or successive acts or omissions, it is sufficient for a Tribunal to ask itself the following questions (paragraph 55):

80.1 What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered her or his resignation?

80.2 Has s/he affirmed the contract since the last act?

80.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

80.4 If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation. This is because if the Tribunal considers the employer's conduct as a whole to have been sufficiently serious and the final act to have been part of that conduct, it should not normally matter whether it amounted to a repudiatory breach at some earlier stage; even if it had and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive her or his right to do so.

80.5 Did the employee resign in response (or partly in response) to that breach?

81. If the Tribunal finds that an employee has been dismissed, it must then consider whether that dismissal was unfair in accordance with section 98 of the ERA.

82. Section 98 of the ERA states:

"(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 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— …

(b) relates to the conduct of the employee …"

83. The reason for dismissal is the set of facts known to the employer or may be beliefs held by it which caused it to dismiss the employee. The reason for a constructive dismissal, as confirmed by the Court of Appeal in **Berriman v Delabole Slate Limited 1985 ICR 546**, is the reason for the employer's conduct which entitled the employee to terminate the contract in accordance with section 95(1)(c) of the ERA.

84. Section 98(4) of the ERA states:

"…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".

85. In constructive dismissal cases, in general terms the Tribunal should consider whether the employer's reason for committing a fundamental breach of contract was, in the circumstances, sufficient to justify that breach.

86. Finally, if a party has unreasonably refused to follow the ACAS Code of Practice 2009 on resolving employment disputes, under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) a Tribunal may increase or reduce the amount of any award by up to 25% if it considers it just and equitable in all the circumstances to do so.

Breach of contract

87. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the 1994 Order) states that (subject to certain exceptions) claims for breach of contract of employment may be brought before a Tribunal if the claim arises or is outstanding on the termination of an employee's employment. Under ordinary common law principles, the purpose of damages for breach of contract will be to put the employee into the position he or she would have been in had both parties performed their obligations under that contract.

Unlawful deductions from wages

88. Section 13 of the ERA provides:

"(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 in 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 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 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 an employer from the worker's wages on that occasion".

89. Section 27(1)(a) of the ERA defines wages as including "*any bonus [or] commission … whether payable under [the employee's] contract or otherwise*".

90. In determining what is "*properly payable*" to the worker in accordance with section 13 of the ERA, Tribunals must resolve disputes over the amount of the wages that the worker was contractually entitled to receive from the employer. The approach that the Tribunal should adopt in resolving such disputes is the same as that adopted by the civil courts in claims for breach of contract (**Greg May (Carpet Fitters & Contractors) Limited v Dring 1990 ICR 118 EAT**). That is to say, the Tribunal must decide, according to the ordinary principles of common law and contract, the total amount of wages that were properly payable to the worker on any relevant occasion. If what was actually paid was less than the amount properly payable, then there will have been a deduction.

Conclusion

91. The Tribunal now applies the law to its findings of relevant facts in order to determine the agreed issues.

Unfair dismissal

92. The first issue is whether the claimant was constructively dismissed by reason of the respondent's conduct up until his decision to resign and offer long notice on 30 October 2018. The Tribunal must first consider the most recent act (or omission) on the part of the employer which the employee says caused or triggered his resignation. According to paragraph 8.2.5 above, the trigger was the claimant's discovery that emails were missing from his inbox and folders, Richard Jewkes's postponement of the subsequently requested meeting, and the claimant's later realisation that the emails had been moved to his trash folder. It is not disputed that the claimant did not delay too long in resigning in this respect.

93. The next question is whether those acts or omissions were, by themselves, a repudiatory breach of contract. The Tribunal is unable to conclude that they were for the following reasons.

94. A constructive dismissal requires some act or behaviour that the law regards as the conduct of the employer. In cross-examination the claimant conceded that he was "*only guessing*" what might have happened in respect of his emails. As far as he knew, only Richard Jewkes or the respondent's IT provider would have been able to access his email account. During re-examination, he said he could not think of a positive explanation, only for example that someone was simply trying to provoke a reaction from him. There is also evidence which suggests that the claimant suspected that Mrs Jewkes had at least used his computer.

95. The claimant also relies on the written evidence of Lloyd Stroud (who runs his own IT company) who did not attend the hearing. Mr Stround explained in his statement that it was highly unlikely that any IT-related glitch would cause the deletion of selected emails from different folders without "*human intervention*". He also reviewed a popular service-status website (downdetector.co.uk) which contains no history of such recorded incidents or problems with gmail in around October 2018.

96. A printout obtained from the respondent's IT provider shows that on 25 October 2018 the claimant logged in and out of his gmail account between 8.16 and 8.23am, and logged on again at 11.54am (page 87). The claimant maintained to the Tribunal that he did not understand what the respondent intended to show by this document. It has since been submitted on his behalf that the document lists activity relating only to the email accounts for the claimant, the senior designer and Mr Jewkes's daughter. All have the same IP address.

97. Richard Jewkes explained in cross-examination that the document was obtained after the respondent had seen the claimant's screenshots disclosed during these proceedings. Otherwise, he was able to confirm only that any access to the claimant's email account from an external source would show a different IP address. The document does not show that the claimant in fact accessed his emails remotely during the same evening.

98. In his witness statement, Richard Jewkes said that during the claimant's employment no one had the password for the claimant's computer. In cross-examination, he confirmed that he could access staff email accounts with the assistance of his IT consultant "*if [he] wanted to*". He thought that there was no doubt that the issue was "*mysterious*" in view of fact that a large number of emails had been moved to the claimant's trash folder over the course of almost three hours. He now appreciates that this incident was "*seismic*" compared to the general issues experienced with the respondent's email accounts at that time.

99. The Tribunal is satisfied on balance that the claimant told Mr Jewkes and Mr Wood (among others) only that something had happened to his emails when he first discovered the problem. The claimant did not subsequently share with Mr Jewkes or the respondent's IT provider what he had found out about the manner, volume and/or timing of the deletions. The respondent was not therefore afforded to opportunity to investigate the matter at all. Mr Jewkes also insisted (and the Tribunal accepted) that deleting the claimant's emails would have been an act of self-sabotage on the respondent's part because it would have unnecessarily interfered with its business.

100. Based on the available evidence, the Tribunal is therefore unable to conclude on balance that the deletion of the emails in itself amounted to conduct for which the respondent can be held to be responsible, absent any

formal complaint made by the claimant which made clear the extent, manner and timing of what had happened.

101. Based on its findings at paragraph 50 above, the Tribunal is further satisfied that Richard Jewkes had reasonable and proper cause for cancelling the meeting scheduled for 26 October 2018. Mr Jewkes's next working day was 30 October 2018, by which time the claimant had decided to resign from his employment.

102. The Tribunal next considers whether those matters were nevertheless a part of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence. The Tribunal is satisfied that, viewed objectively, there was no such repudiatory breach.

103. The Tribunal takes into account that the claimant became concerned in September 2018 because his training responsibilities had never been directed in such a way in respect of the graduate trainee. In cross-examination, he said that he suspected that he was effectively training up a replacement who would be cheaper for the respondent to employ. Mr Jewkes explained in cross-examination that following his promotion to head of design, the claimant had capacity to and did train other designers. The graduate trainee's appraisal in September 2018 revealed that up until that point his training had been unstructured and deficient. The respondent "*had to put in energy into*" its first-ever post-graduate training scheme, and do everything that was required in order "*to get him up to speed*".

104. In terms of the announcement of the senior designer's arrival, Richard Jewkes acknowledged that he may have simply missed off the claimant's name as the respondent had no group email function set up on its system. In cross-examination, Mr Jewkes also confirmed that, in his view, the graduate trainee and senior designer would in no way reach the standard of work generated by the claimant, and therefore were not intended to replace him. The claimant knew that the respondent's longer term goal was to reach £3 million annual turnover, and it needed additional team members to achieve it.

105. The discussions regarding extending the claimant's notice period were first initiated by Richard Jewkes in 2017 and discussed again in March 2018. The claimant was not then offered a revised contract in October 2018, when everyone else appeared to have theirs. Mr Jewkes explained that the claimant's contract was the last to be updated because he was on a more complicated remuneration scheme compared to everyone else. The other employee's contracts simply involved a change of job title (where necessary) and salary. The claimant was also told the reason for the delay, that Mr Jewkes intended to put the claimant on three months' notice when he came to review his terms and conditions, and that during very busy periods Mr Jewkes would prioritise client work. The Tribunal appreciates that, in the circumstances, this may have been irritating for the claimant, but at the time he was given a sound reason for what was happening.

106. The comments made by Richard Jewkes in the fish and chip shop in October 2018 were thoughtless and in poor humour. The respondent's own representative describes them as "*puerile*". Mr Jewkes knew that he had spoken out of turn because he immediately regretted it.

107. It is clear that Mrs Jewkes thereafter thought that the claimant's behaviour towards her when he found out about the incident was inappropriate. By the claimant's own account, he had worked himself up to the point of being visibly upset and angry, and left his desk for an hour to try to calm himself down. Viewed objectively, the Tribunal sees nothing unreasonable or improper about Mrs Jewkes objecting to being caught in the firing line. Mr Jewkes's son-in-law and daughter thereafter offered their opinion to the claimant in terms of what they thought was going on. In the circumstances, the Tribunal accepts that both of their assessments were unlikely to have been objective. Nevertheless, the respondent cannot bear responsibility in this respect if the claimant never raised the matter formally with it.

108. Stepping back and reviewing these matters objectively, the Tribunal is in no doubt that the chip shop incident "*opened a can of worms*", as Richard Jewkes put it in cross-examination. He could not remember whether the claimant raised the issue about lack of contact with clients and customers at that point (although the Tribunal has found that the claimant's communication skills were a source of legitimate concern for the respondent). Nevertheless, Mr Jewkes's comments in the car park in terms of the claimant's reaction were not particularly helpful, but he had resolved to set up a meeting to try to clear the air.

109. In the Tribunal's judgment, and taking into account its analysis of events from 25 to 29 October 2018 above, the respondent as the claimant's employer had not clearly shown an intention to abandon the essential elements of its contract with him. Most importantly, the claimant was prepared to offer longer notice than was necessary and not for purely altruistic reasons. In all of the circumstances, the Tribunal is not persuaded that the cumulative effect of the respondent's conduct up to that point, judged reasonably and sensibly, was such that the claimant could not have been expected to put up with it.

110. The next issue is whether the respondent terminated the claimant's employment on 1 November 2018. The Tribunal has explained why it prefers the claimant's version events in this respect. In accordance with its findings set out at paragraphs 67 to 68 above, the Tribunal is satisfied that Richard Jewkes effectively dismissed the claimant without notice on that basis. Taken together, his words and actions were unambiguous.

111. In evidence, the claimant accepted that he also made the "*half day on me*" comment, but the Tribunal considers that, in context, this comment is not material. On balance, the Tribunal is persuaded that, prior to the claimant's comment, Mr Jewkes considered the claimant's ultimatum to be objectionable and unwarranted, and chose to terminate his employment without further discussion.

112. The Tribunal next considers whether the respondent has shown that the reason for the claimant's dismissal was potentially fair. It advances no positive case in this respect. According to its findings, the claimant gave Richard Jewkes an ultimatum and believes that he was justified in doing so. Mr Jewkes, however, refused to be put under pressure to negotiate an agreed bonus payment in return for the claimant working any notice at all. He regarded that as an attempt at extortion and blackmail, and said so. Mr Jewkes acknowledged that their "*relationship eroded within a few minutes*". The Tribunal is therefore satisfied that the belief held by Mr Jewkes which caused him to dismiss the claimant related to the latter's conduct.

113. Turning to the requirements of section 98(4) ERA, the respondent followed no disciplinary process at all. As a consequence, the Tribunal finds that the claimant was unfairly dismissed.

114. In the circumstances, the issue as to whether the claimant unreasonably failed to raise a grievance in accordance with section 207A of TULRCA falls away.

115. Further and separately, the Tribunal has considered whether, in the alternative, the claimant was constructively dismissed on 1 November 2018. The Tribunal would have found that he was. It accepts that at this point although the claimant's relationship with Richard Jewkes as his employer was not seriously damaged or destroyed, it was certainly vulnerable. In an attempt to obtain some assurance about the payment of his bonus, Mr Jewkes was prepared to confirm that he would be entitled to a payment in accordance with the bonus agreement, but added that the respondent was running below target. According to the terms of the bonus agreement, this simply was not the case and the claimant had been told as such only two weeks previously. Accordingly, he reacted with disbelief, lost all trust in the respondent and concluded that Mr Jewkes was somehow going to try to avoid paying him. In cross-examination Mr Jewkes accepted that because the claimant "*never directly saw any numbers*", he did need to trust him in this respect.

116. Mr Jewkes thereafter accused the claimant of extortion and blackmail, and threatened him with legal action. In the Tribunal's judgment, in view of his attempt to mislead the claimant about the prospects of realising his bonus, he had no reasonable or proper cause for doing so. He also made inappropriate comments about the claimant being paranoid. The claimant maintains (and the Tribunal accepts) that he had previously told Mr Jewkes about his medical history.

117. The Tribunal would also have been satisfied, on balance, that the claimant resigned without notice on 1 November 2018 in response to that breach and entirely for that reason.

<u>Breach of contract – notice pay</u>

118. It is not disputed that, in the absence of any act of gross misconduct, the claimant was entitled to receive 5 weeks' notice of the termination of his employment. The respondent simply contends that the claimant was not dismissed but chose to resign.

119. For the avoidance of doubt, based in its findings as to the circumstances surrounding the claimants' dismissal, the Tribunal is satisfied that his behaviour on 1 November 2018 was not so serious as to amount to gross misconduct. This is because Richard Jewkes unnecessarily chose to mislead him about the respondent's anticipated turnover relevant to the bonus agreement as at that date. The claimant's complaint of breach of contract in respect of his notice pay therefore succeeds.

<u>Complaints related to the bonus agreement</u>

120. The Tribunal next considers whether, notwithstanding the termination of his employment on 1 November 2018, the claimant remained entitled to a payment under the bonus agreement. This issue is of course separate to any question of the measure of the claimant's compensation for unfair dismissal.

121. It was not disputed that the only relevant document is the bonus agreement, which is silent in this respect. In re-examination, the claimant also confirmed that he was never told by Richard Jewkes that he had to stay in employment until the end of each financial year in order to qualify for a bonus.

122. According to the claimant's submission, the Tribunal accepts that implied terms are read into a contract of employment by operation of law where the contract is silent on a particular issue to reflect the unexpressed but real intention of the parties which they would have included at the time if they had addressed their minds to it. They may also be implied to make the agreement workable in practice. Both the claimant and Richard Jewkes acknowledged that if it had been brought to their attention at the time, they would have discussed it and arrived at an arrangement acceptable to both sides.

123. The Tribunal was shown a letter dated 7 December 2018 from Richard Jewkes to the claimant. It is expressed to be "*without prejudice*", but the parties appear to have waived any privilege by including it in the bundle. In summary, Mr Jewkes states that he never disputed the claimant's entitlement to bonus and that any sums due would be paid in January 2019. He later states, however, that at the time of the claimant's departure the respondent had not reached the required target figure. As a result, the claimant was no longer entitled to any bonus payment (pages 142 to 144). In cross-examination, Richard Jewkes did not accept that those statements were conflicting, but was "*very sure*" what was required for the claimant to be entitled to a bonus. The Tribunal finds that his certainty has been acquired in hindsight.

124. Indeed, in cross-examination Richard Jewkes accepted that, at the time, the uncapped bonus was designed to incentivise the claimant to help the respondent to reach its goal of £3 million annual turnover. It was put to him that it would have been relatively easy to specify that payment of the bonus was conditional upon the claimant remaining in employment, to which he replied: "*Hindsight is a wonderful thing*". He maintains that he was effectively at a disadvantage because he has "*little education and is dyslexic"*. It was therefore up to the claimant to question anything which was vague or ambiguous. Nevertheless he refused to say what might have happened if the claimant had raised it, because the question was "*purely hypothetical*". He acknowledged only that "*a discussion would have taken place*".

125. During cross-examination, Mr Jewkes also claimed that it is "*an industry standard that that designers have to work the full year to get the bonus*". When the Tribunal asked why that evidence was not in his written statement, he replied that he had only just recalled that it was a commonplace practice. The Tribunal was unconvinced by the timing of that evidence, and notes that it was not contended in the pleaded response to the claimant's complaints.

126. Among other things, the claimant relies on the principle contained in the case of **Brand v Compro Computer Services Ltd 2005 IRLR 196 CA** which deals with commission that was earned during employment but fell due following termination. In that case the contract stated that the employee had to "*remain in full time employment in order to qualify for the commission payments*". The Court of Appeal held that clear words were needed which made it plain that any accrued entitlement to commission was also dependent on the employee remaining in employment on the date that any commission became payable.

127. The Tribunal accepts that clear words were similarly needed in the bonus agreement in order to deprive the claimant of any benefit derived under it. Such words relate only to the baseline turnover figure for the relevant period. At the end of the hearing, the respondent drew the Tribunal's attention to the case of **Peninsula Business Services Limited v Sweeney 2004 IRLR 49**. In contrast to that case, the bonus agreement does not spell out the post-employment position "*clearly and unambiguously*" (paragraph 59). The respondent therefore effectively asks the Tribunal to imply a condition that the claimant had to remain in employment at the end of each financial year to qualify for any bonus payment at all. Such a term is certainly not necessary in order for the agreement to work.

128. At the time that the bonus agreement was entered into, the Tribunal accepts that Richard Jewkes's intention was to maintain his lucrative partnership with the claimant. To this effect, the Tribunal notes from the bonus agreement (quoted in emphasis at paragraph 21 above) that he agreed a pro-rated bonus figure for 2015. He was also prepared to guarantee that figure because as at September 2015 the respondent was on track to hit the relevant target by the end of that financial year. From 2017, however, the bonus was to be conditional on company profits.

129. The Tribunal therefore considers it most likely that, in the absence of any express term to the contrary, at that time the parties would have agreed that any bonus due would be similarly pro-rated if the claimant left part way through the financial year. However, according to the terms applicable from 2017 it would be calculated according to annual turnover and payable once that figure had been declared. It is similarly not necessary to imply a term that any bonus would have been payable on termination (as the claimant contends) for the agreement as drafted to work.

130. For the avoidance of doubt, Richard Jewkes suggested in his written statement that the bonus agreement was effectively varied by the exchange of correspondence towards the end of the claimant's employment. In response to the Tribunal's questions, Mr Jewkes suggested that his letters of 30 October and 1 November 2018 should be read together in this respect. In re-examination he also specified that the "*request*" referred to in his last letter to the claimant referred to the claimant's draft bonus agreement, which had suggested that the claimant's bonus would be paid in full in return for staying in employment until the end of December 2018.

131. In any event, the Tribunal is satisfied that the bonus agreement was never effectively varied. This is because the claimant wanted to paid on or before the termination of his employment (presumably because in 2015 Mr Jewkes had agreed to a guaranteed bonus as a "*golden hello*" at an earlier stage in the respondent's financial year). Mr Jewkes refused to agree to that proposal. He was thereafter simply prepared to confirm that the claimant would receive his agreed bonus if the minimum turnover figure was met. Negotiations fell apart when he needlessly suggested that the respondent was at the time tracking under that figure, which the claimant knew was not the case.

Is the bonus payment recoverable as damages for breach of contract?

132. After the evidence, the respondent drew the Tribunal's attention to the **Peninsula** case. The timing was unfortunate, but the claimant has been given an opportunity to make submissions on it. In the Tribunal's view, the existence of that authority would not have affected the evidence to any extent. The

claimant advanced his case on the basis that a bonus was payable either on termination or in January 2019 at the date of usual payment.

133. The proposition contained in the **Peninsula** case is binding. It is commonly assumed that the 1994 Order was designed to confer jurisdiction on Tribunals to determine contractual disputes arising out of the termination of employment (subject to specific exceptions) to avoid claimants having to sue in more than one venue. However, in the **Peninsula** case the EAT confirmed that prospective rights as at termination are not so enforceable. According to the 1994 Order, when the contract of employment effectively ends the right must be immediately enforceable.

134. In the circumstances the Tribunal has found that under the bonus agreement, payment fell due in January 2019 – that is to say, after termination of the claimant's employment. The Tribunal does not therefore have jurisdiction in respect of that complaint.

Is the bonus payment recoverable as an unlawful deduction from wages?

135. The respondent suggests in its submissions (R1, paragraph 26) that this point was effectively disposed of at the beginning of the hearing during our clarification of the issues. It was not. The Tribunal asked the claimant, when it came to making submissions, to clarify on what basis he intended to argue that any bonus was properly payable. The claimant has accordingly done so.

136. The claimant relies on **Robertson v Blackstone Franks Investment Management Limited 1998 IRLR 376**, which is authority for the proposition that the definition of wages according to section 27(1)(a) of the ERA refers to any sums payable to a worker in connection with employment, but without limit as to the time when it is payable or paid. The respondent contends that **Robertson** cannot be relied upon largely because it concerns the payment of commission earned on a monthly basis rather than an annual bonus which falls due after employment has ended. The Tribunal disagrees. Most importantly, that case draws no distinction between the elements listed in section 27(1)(a); they must simply become properly payable at some point. Additionally, the bonus agreement in the claimant's case effectively defines capped and uncapped elements of a lump sum commission payment deferred until the end of the financial year and dependent on a certain target being reached. Indeed, for the period relevant to this case the bonus agreement refers to "*commission*" in respect of the uncapped element.

137. It therefore appears to the Tribunal that once an employer tells an employee that they are going to receive a bonus payment on certain terms, there is a legal obligation to pay the bonus in accordance with those terms and the employee has a legal entitlement to receive it. The bonus payable in this case therefore falls within the definition of wages in the ERA.

138. The Tribunal is further satisfied that, based on its analysis of the bonus agreement above, withholding payment if he left employment was not authorised by a relevant provision of the claimant's contract, or previously agreed in writing by the claimant. The complaint of unlawful deductions from wages therefore succeeds.

Remedy

139. The remedy hearing provisionally listed to take place on 5 September 2019 will therefore proceed. If the parties are minded to agree the amount of compensation payable to the claimant, according to the Tribunal's findings

above they will no doubt bear in mind that the starting point for any assessment of the compensatory award for unfair dismissal will be based on the claimant's losses during what would have been his notice period to the end of December 2018, as well as any bonus due in respect of that financial year.

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Employment Judge Licorish
Date: 15 July 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS