Case Number: 3331426/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr G Taylor **v** Fortec Distribution network Limited

Heard at: Cambridge Employment Tribunal **On:** 25 July 2019

Before: Employment Judge Johnson

Appearances
For the Claimant: in person (unrepresented)
For the Respondent: Mr Fitzpatrick (counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint of constructive unfair dismissal is not well founded and is dismissed.

2. The claimant's complaint that he was contractually entitled to a payment relating to the balance of his 2017 bonus payment is successful and the Respondent must pay to him the sum of £957.42 within 14 days of the date of this judgment.

RESERVED REASONS

Introduction

1. This case is about two matters that remain in issue between the parties. The first concerns the Claimant's complaint that he was constructively unfairly dismissed when he resigned from the Respondent's employment. The second relates to his claim that he had not received all of his bonus payments which he believes he was contractually entitled to for the 2017/18 financial year.

2. The Claimant was employed by Respondent from 10 March 2014 as a Regional Commercial Manager North and that continuous employment was carried over from a previous employer from 23 January 2012.

3. The Respondent is a company which specializes in the delivery of palletised good throughout the UK.

4. The Claimant gave notice of his resignation on 4 April 2018 and gave 3 months notice to Respondent. The Claimant argues that his effective date of termination was 29 June 2018 and the Respondent submits that it was 3 July 2018. In any event, the Claimant commenced work with another employer on 2 July 2018.

5. Following a period of early conciliation with ACAS from 11 April 2018 until 18 April 2018, a claim form ET1 was presented by the Claimant to the Tribunal on 18 July 2018. The Respondent presented a Response on 29 August 2018 resisting the claim.

The Issues

6. The Claimant was claiming constructive unfair dismissal and also breach of contract by the Respondent company relating to bonus payments that he believes he was owed upon termination of his employment.

7. The scope of the Claimant's claim has changed since he presented his claim form and at the hearing it was confirmed that the other claims originally identified in his ET1 of notice pay and holiday pay had since been resolved. My findings of fact have therefore been restricted in scope to reflect that.

8. The Claimant seeks compensation.

The hearing

9. The Claimant represented himself at the hearing and had done so since the start of his claim. The Respondent was represented by Mr Fitzpatrick of counsel. The hearing took place on a day where the temperature in Cambridge was exceptionally hot and in a court room that was not well ventilated or cooled. I made sure that the parties understood that there was no requirement for them to wear jackets and that breaks would be allowed upon request. I am grateful to the parties' representatives and witnesses for their willingness to continue with the hearing and to work towards completing the hearing up to and including final submissions. They all displayed a great deal of resilience in coping with the extreme temperatures that day.

10. The tribunal heard oral evidence from the claimant and Mr Carl Spencer (a former work colleague). I also read a witness statement from Mr Jamie Cuthbert (another former colleague). Mr Turner did not attend

the hearing to be questioned. The Claimant confirmed that he understood that as a result, less weight would be attached to Mr Turner's statement. The Claimant also sought to rely upon a number of other witnesses whose evidence was contained within documents that appeared to be emails or notes. I was unwilling to read these statements as they were unsigned and did not contain postal addresses or email addresses that could identify that the person to whom the statements were attributed. None of these witnesses were present at the hearing. I therefore was of the view that they could not confidently be considered to have been produced by these individuals and did not allow them to be used.

11. For the Respondent, I heard oral evidence from Mrs Alketa Idrizi who is a HR Manager with Geodis UK Limited which is the parent company of the Respondent. Two witness statements were produced, one of which focused upon the issue of bonus payments.

12. This was a case where a bundle was produced. The Claimant produced an additional document relating to the payment of bonuses and in reply to the issues raised in Mrs Idrizi's statement. The Respondent's representatives and Mrs Idrizi were given an opportunity to look at it during a short adjournment while I read the parties' statements. As the document was a one page letter and was potentially relevant to the question of bonus payments, I allowed it to be added to the bundle as there was little prejudice to the Respondent from its late production.

13. All witnesses were asked questions by way of cross-examination, with some further occasional questions from the Tribunal.

14. Based on this evidence, and insofar as relevant to the issues I must determine, the tribunal makes the findings of fact as set out below.

Findings of Fact

Documentation

15. There were relatively few documents produced which related to issues which gave the Claimant says gave rise to his decision to resign. Indeed, most of the documents relating to this issue were created in response to the Claimant's resignation email which was included in the bundle. These included various emails relating to the issues identified by the Claimant once he was contacted by Mrs Idrizi. Documentation relating to the bonus payments included letters and emails regarding the bonuses paid to the Claimant and performance targets and contracts of employment. Mrs Idrizi also produced tables showing the Claimant's bonuses over a number of years.

London Bierfest and the job offer

16. I find that by the Autumn of 2017, the Claimant was employed by the Respondent as a Regional Commercial Manager. The Respondent

company was in the process of changes to its senior management and a number of managers had resigned. Dave Spong, who was understood to the Claimant's line manager resigned on the day of the London Bierfest on 20 October 2017 and which was an event where the Claimant and other managers were in attendance, including the Managing Director of the Respondent, Allan Blakeley.

17. The Claimant gave evidence that at this event, Mr Blakeley asked him whether he 'fancied the job' and in reply, the Claimant said 'yes'. It was understood that Mr Spong's former role as Network Director. It was clear in giving his evidence, that the Claimant believed at the time that he would now be considered for the job. He suggested that salaries were discussed, but based upon the evidence that I heard from the Claimant, I do not think that this would have been anything more than a discussion concerning Mr Spong's salary when employed as Network Director. However, it is reasonable to assume that at this point the Claimant had certain expectations as to the remuneration he would receive if he was offered and accepted the job.

18. Following the Bierfest conversation, it seems that discussions took place with Mr Blakeley concerning the Network Director role. I was not shown any contemporaneous documentation concerning these discussions, but am satisfied that the role was offered to the Claimant by Mr Blakeley, subject to an agreement being reached regarding salary.

19. In his Formal Grievance email that was sent to Olivier Merlot (who is the Executive Vice President of the Respondent company) on 2 May 2018, the Claimant argued that he was offered the job by Mr Blakeley at a salary that was £15,000 below that which Mr Spong received for the role. He confirmed when giving evidence that he remarked to Mr Blakeley that he thought it was a low amount. No counter offer was made by the Claimant and Mr Blakeley did not propose a revised salary figure.

20. This job title was then changed from Network Director to Network Manager and the Claimant's evidence is that formal applications were then invited. It was not entirely clear why this change took place and it may well be the case that it was simply done to justify the lower pay now being offered. In any event, the Claimant chose not to formally apply for the job and gave evidence that he felt he would not be considered for it, because the Respondent had another employee in mind for this role.

21. Having heard the evidence relating to this particular issue, I accept that at this level of senior management with the Respondent, conversations would take place concerning jobs becoming available and potential candidates being approached to see if they were interested in a role. However, the initial conversations between Mr Blakeley and the Claimant took place on the same day as Mr Spong resigned. I was shown an email dated 9 April 2018 in the bundle which contained Mr Blakeley's recollection of the Bierfest conversation and that he told the Claimant that he had not decided what he would do with this role and I am not satisfied

that this was anything other than an initial exploratory conversation to see whether the Claimant might be interested in Mr Spong's role.

22. I find that while discussions might have subsequently taken place regarding potential salary, senior management would have been considering whether they would advertise the Network Director role or would look to restructure and regrade it based upon what they believed its value was to the company. I am satisfied that there was ultimately an opportunity for the Claimant to apply for the regraded role of Network Manager and that he declined to apply for it. His reasons for not doing so may well have been connected with the reduced salary or that he felt another candidate would probably be successful. However, he did not provide any further evidence to support his belief that the recruitment process would have been a sham and in failing to apply for the role, it was reasonable for the Respondent to assume he was no longer interested in applying for it.

The Role Change

23. The Claimant argued that his role had changed. It was not clear exactly when this event took place, but it seemed to relate to the period following the Bierfest and in 2017 and into early 2018. He gave evidence that while his job title remained as Regional Commercial Manager North, he was required to undertake work outside of this geographical location and to deal with customers in the South as well. The Claimant accepted that he was covering for vacant management posts, but it was more than simply 'picking up the slack'. He believed it was unreasonable for him to expected to do work in the South when in his view there were already people working in this area. He said that while he did not mind doing 'odd jobs', it should not have been all of the time.

24. I was not provided with any documentary evidence which showed that the Claimant's role actually changed. I am satisfied that he remained as a Regional Commercial Manager North. As a long standing manager with the Respondent, he was expected to help out when other management positions were vacant. The Claimant did not identify any grievances or concerns being raised regarding this matter either in a formal or informal way and I do not accept that this was a substantial act on the part of the Respondent that unilaterally varied the Claimant's role.

The bullying allegations

25. The Claimant argued that he was the victim of bullying by the Respondent's senior managers from December 2017 and in particular by a manager Craig Johnson.

26. The Claimant relied upon copies of text messages that were produced at the hearing and which he believed illustrated a hostile work environment. These text messages were between Mr Blakeley and the Claimant where they talked about other employees in a somewhat

derogatory way. However, I was not convinced that they revealed anything other than informal 'jokey' messages about work colleagues with an element of bravado. The Claimant does engage in this messaging and does not appear to be uncomfortable with the conversations. In any event, they do not support this particular allegation.

27. More relevant is the allegation that the Claimant was bullied in January 2018 when during a conference call with senior managers and where Craig Johnson told the Claimant 'that he should be prepared to be challenged'. The Claimant described the questioning by Mr Johnson as being bullying in its nature and that afterwards people who were present at the meeting, called to confirm that they felt he was bullied.

28. It was not in dispute that every day at 8.30am from January 2018, there was a conference call that would take place involving senior managers including the Claimant. Those who were present at the head office would meet in a conference room and those who were not present would call in by phone. The calls appeared to be chaired by Allan Blakeley or Craig Johnson. Having heard the evidence of the Claimant and considering the limited documentation available, it is fair to say that these meetings would involve company performance issues and could be challenging for managers who might have to justify their actions taken in relation to the business.

29. The other incident that the Claimant alleged amounted to bullying was later in February 2018. This was Mr Blakeley accused him of telling employees at the Respondent's premises in Scotland that they might be made redundant in the near future. The Claimant gave evidence that this was incorrect because the source of this 'leak' was a manager at Geodis' premises in Yorkshire. I accepted that the Claimant was challenged by Mr Blakeley regarding this incident and that he had incorrectly assumed that the Claimant had leaked this information without making further enquiries before making this assumption.

30. There was reference in the Claimant's evidence to a meeting which must have taken place before October 2017 as Mr Spong was still working for the Respondent. The Claimant says that Mr Spong was told by Mr Johnson that the Claimant was '*an embarassment'.* The Claimant did not provide further evidence concerning this matter at the hearing. However, the email response to the Claimant's resignation dated 9 April 2018 contained comments by Mr Blakeley was that the comments were not about the Claimant, but that the actual meeting was '*embarrassing'* as it involved a client ending its relationship with the Respondent due to poor interaction. In the absence of any further relevant evidence concerning this issue, I find that if this meeting did happen, it is difficult for the Claimant to rely upon comments that were made during it, if he was not actually present.

31. The Claimant also said that he noted a marked change of attitude from both Mr Blakeley and Mr Johnson in that they did not engage in

messaging as Mr Blakeley had done previously and he felt marginalised. He also referred to conversations with Carl Spencer who was a former colleague and who told him that when he was a present at the morning conference calls had made 'cut throat gestures' when the Claimant was speaking on the phone and had told Mr Spencer that the Claimant 'was a dead man walking'. The Claimant went on to say that Mr Spencer told HR of these comments and following this there was a marked change in the attitude of both Messrs Blakeley and Johnson towards the Claimant. In particular, he mentioned that they knew the Claimant had a firework display business and that the Respondent company might ask him to provide a display for them. Both parties accepted that the fireworks conversation took place and the issue appeared to be what were the reasons for it taking place.

32. I heard from Mr Spencer who gave evidence on behalf of the Claimant concerning these allegations of bullying. Mr Spencer did not work for the Respondent for very long and confirmed that he had been dismissed for reasons of mistrust. Mr Spencer also complained about Mr Johnson and made allegations of inappropriate behaviour by him towards both Mr Spencer and other employees. I saw an email from Crystal Danbury, who was Head of Health, Safety and Compliance at Geodis concerning these complaints and which was sent to Mr Blakeley on 16 April 208. I am satisfied that these were investigated by the Respondent and none of them were upheld. None of these complaints related to conduct towards the Claimant.

33. Mr Spencer had produced a witness statement which was undated and which did not appear to focus upon the issues that I was expected to consider in this hearing. Nonetheless, he was permitted to give evidence and was cross examined by Mr Fitzpatrick. Unfortunately, Mr Spencer was not able to provide much by way of relevant oral evidence and he did not assist the Claimant with his case and did not provide any convincing evidence that the gestures to which the Claimant had alluded being made by Mr Johnson, had actually happened.

The Resignation

34. The Claimant decided to look for another job in February 2018. He gave evidence that he spoke with an independent HR adviser who recommended that he didn't resign and instead looked alternative employment in the meantime. However, by 4 April 2018 he emailed Ms Idrizi giving notice of his resignation. He confirmed that his position had become untenable, he was giving 3 months notice and that he was going to work for an unidentified competitor. He reminded Ms Idrizi that he was due an £8,000 bonus for the 2017/18 financial year and warned that he would take action if the matter was not resolved quickly. Ms Idrizi acknowledged the email as soon as she returned from leave on 9 April 2018 and asked to speak with the Claimant.

35. This conversation took place on the same day and she immediately informed Mr Blakeley of the reasons that he had given for his decision to resign. The Claimant had not returned to work his notice and he gave evidence that he was sick during the notice period. Mr Blakeley was unhappy that the Claimant was not working his notice and replied to Ms Idrizi's email and rebutted the Claimant's reasons. He responded to the reasons given in the email of 9 April 2018 and it was noticeable that while he did deny some of the allegations such as 'the dead man walking' comment , for some of the reasons, he remarked that the Claimant had misunderstood what had been said.

36. On 2 May 2018, the Claimant raised a grievance with Olivier Merlot. Despite a number of reminders being sent by the Claimant to Ms Idrizi during the following months, I did not see any reply from Mr Merlot or his colleagues.

37. The Claimant started employment with his new employer on 2 May 2018

The Bonus Payments

38. The Claimant's contract of employment with Fortec dated 10 March 2014 identified that his remuneration would be *'£51,150.00 per annum plus commission details of which will be provided upon commencement with the company'.* There was no dispute that this related to the company non contractual bonus scheme. The bonus scheme itself did not form part of the terms contained within the contract of employment. I did not see any documentation specifically explaining how the bonus scheme operated or how it interacted with an employee's contract of employment and have therefore relied upon the witness evidence of the Claimant, Ms Idrizi and the limited documentation relating to the contracts of employment and the calculation of bonus payments in relation to the Claimant.

39. Ms Idrizi gave evidence and referred to documents within the bundle which explained that the bonus was paid for the previous financial year in or around April. At the beginning of the financial year, the Claimant would be given a number objectives each year that would be measured upon its conclusion to identify whether he had failed or achieved his goals. Each objective formed a percentage of an overall result which if achieved in total, would amount to 100%. The maximum bonus payable was 20% of the employee's gross salary and if all of an employee's goals were achieved, these would be paid in full. If not all of the goals were achieved, the notional 20% bonus amount would be reduced to whatever percentage of the successful goals had been achieved.

40. The Claimant was sent a letter from Mr Blakeley on 17 April 2018 and which informed him that his bonus for the 2017 financial year was £2,400. The Claimant challenged this figure and argued that he should have

received an additional £900 and set out his calculation in his email to her dated 6 June 2018.

41. I was shown a document from Mr Johnson dated 14 May 2018 which set out the Claimant's objectives for 2017 and which only 2 of 5 goals set had been achieved. This resulted in his bonus being only 30% of his potential maximum figure.

42. The Claimant produced a letter on the day of the hearing which was dated 20 April 2017 and gave details of his 2016 bonus and his gross pay from 1 April 2017, which was £55,957. Using the evidence that was available to me at the hearing and applying the 20% potential maximum bonus for 2017 against the Claimant's gross pay for that year, a figure of £1119.40 is realised. Taking into account the Claimant's performance for 2017 as set out in Mr Johnson's document, 30% of the potential £1119.40 bonus is £3,357.42. This is of course £957.42 more than the actual bonus received by the Claimant for 2017, which was £2,400.

43. In her supplementary witness statement, Mrs Idrizi confirmed that the Claimant's bonus payment in 2017 *(was calculated based on his annual salary (i.e. after salary sacrifice) of £53,641.54, as opposed to his basic salary which the calculation should have been based on. This is due to an admin error'.* This evidence was not challenged when she gave witness evidence and I find that this explains why the difference between the £2,400 the Claimant actually received and the £3,357.42 that he expected to receive.

44. While Ms Idrizi did give evidence as to the Respondent sometimes withholding bonuses if the company was performing badly, I find that the Respondent did decide to pay the Claimant a substantial figure by way of a bonus for 2017 and the letter informing him of this decision on 17 April 2018 did not suggest that it had been reduced because of any financial difficulties faced by the company.

45. The Claimant's entitlement to claim this shortfall will be considered within the Legal Framework below and the subsequent discussion.

The Legal Framework

Constructive Unfair Dismissal

46. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if 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.

47. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). The question of whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (as opposed to what the employer intended) must be viewed objectively: Meikle v Nottinghamshire CC [2005] ICR 1.

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyn House [2012] 7 WLUK 624). Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach played a part in the resignation see: Wright v North Ayrshire Council [2014] ICR 77; and,

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

48. All contracts of employment contain an implied term that an employer shall 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: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

49. In Aberdeen City Council v McNeill [2010] IRLR 375 the Employment Appeal Tribunal held that the implied term of trust and confidence was mutual; neither the employer nor the employee would, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The Employment Appeal Tribunal ruled that if the employee was, at the time he resigned, in breach of that implied term, he is in repudiatory breach and not entitled to terminate the contract on the basis that the employer had itself breached that implied term. This case was determined by reference to Scottish law and the decision of the Employment Appeal Tribunal was overturned by the Inner House of the Court of Session; [2013] CSIH 102.

50. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

51. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see Derby City Council v Marshall 1979 ICR 731 EAT.

52. Mr Fitzpatrick did refer to some of these cases in final submissions, but I also noted his reference to the Court of Appeal case of Buckland v Bournemouth University 2010 EWCA Civ 121 and its reference to the expectation that an employee cannot ordinarily expect to continue with their employment before very long before affirming the contract following a perceived repudiatory breach.

Bonus Payments and Contracts of Employment

53. Where a bonus scheme is contractual, it will generally be incorporated into the terms of the employee's contract of employment. If an employee is contractually entitled to a bonus, the Tribunal can estimate what they would have received during the damages period and include it in the award. However, if such a payment was merely discretionary it will be ignored even if the employee had a reasonable expectation that it would be paid, and it would in fact have been paid, if he had continued to work during the damages period. (Lavarack v Woods of Colchester Ltd 1967 1 QB 278).

54. The distinction between contractual bonuses and wholly discretionary bonuses is not an easy one to define. However, in Clark v BET 1997 IRLR 348, QBD, the High Court found that even though the employer referred to a bonus being discretionary, the employer must exercise that discretion in good faith. A similar approach was adopted in the case of Horkulak v Cantor Fitzgerald International 2005 ICR 402 by the Court of Appeal. The broad principle is that the employer is contractually obliged to exercise its discretion rationally and in good faith in awarding or withholding a benefit provided for under a contract of employment.

55. Mr Fitzgerald referred to the case of Clark v Nomura International plc [2000] IRLR 766 and I have considered this decision as requested. In particular, I have given regard to the High Court's finding that when

exercising its discretion whether to pay a bonus, the employer should not act irrationally or perversely. As a consequence, the Tribunal should only interfere if it finds that no reasonable employer could have exercised its discretion in such a way and cannot substitute its own view of reasonableness.

Discussion and analysis

Constructive Dismissal

56. The Claimant was unhappy with the way in which the Respondent looked to replace Mr Spong when he resigned as Network Director in October 2017. It is understandable that when a more senior colleague leaves, employees may be interested in applying for the vacant position or may be asked by those in charge, whether they would be interested in applying for the post. However, while this may be the case, a reasonable employee will recognise that in anything but the smallest of business, discussions of this nature are nothing more than a prequel to any formal recruitment exercise. Their role is to simply to allow potential candidates to be identified and to enable those who are interested in a potential vacancy to let senior management know they would be interesting in applying.

57. The conversation that took place at the Bierfest in October between the Claimant and Mr Blakeley and indeed the subsequent discussions was nothing more than that. I have no doubt that the Claimant was interested in the role of Network Director and the level of remuneration was a significant motivation for him in that regard. This was clear from the evidence I heard at the hearing and from the documents produced.

58. It is noticeable that the Claimant became less interested when it became clear to him that the salary which would be applied to the role was less than he envisaged and lower than that paid to the previous occupant of the post, Mr Spong. Indeed, as the matter progressed, the Respondent decided to re-designate the vacant post from that of Network Director to Network Manager and this perhaps reflected the lowering of the pay band applicable to the role. I do not criticise the Respondent for doing this as it is something that employers often do when a senior manager resigns as jobs are re-evaluated before they are advertised for recruitment.

59. The Claimant chose not to apply for this post. The reason that he gave was that he felt the Respondent had signalled to him that they intended to recruit someone else. The reduction the salary that the Claimant expected would apply to that post however, was also a motivating factor. In any event, he did not seek to raise a grievance concerning any issues regarding the recruitment exercise, challenge the level of salary or job title applied and did not apply for the job. For this reason, I find that the Claimant acquiesced to these matters and I fail to see that they amounted to a fundamental breach of contract. It was certainly not a case where the Respondent reneged on the acceptance by the Claimant of an offer of the post of Network Director.

60. The Claimant felt that he was treated harshly by Messrs Blakeley and Johnson from late 2017 until before he resigned. I am satisfied that the Respondent company operated in an environment where managers were subject to performance goals and were scrutinised on a daily basis at the morning management meetings. I have no doubt that such meetings were frank and could be quite challenging for those involved. It would also have been more difficult for those managers phoning in by conference call, where they might feel somewhat isolated from those sat around the table at head office.

61. I accept that the Claimant will also have been challenged about the disclosure of information which was confidential and concerned the Respondent's business in Scotland. However, I do not think that it was reasonable for Mr Blakeley to be challenged concerning this issue. It is correct that Mr Blakeley did jump to conclusions and made an error, but he did not subject the Claimant to any disciplinary process or sanction and in itself, it is not unreasonable for a manager to hold those to account whom he felt had behaved inappropriately in relation to confidential information.

62. As I have already found, I am not convinced by Mr Spencer's evidence that 'cut-throat' gestures or 'dead-man walking' comments were made about the Claimant in meetings where he was not present. Mr Spencer was not a believable witness, had not produced a witness statement that dealt with these issues and there was no other evidence available to support these allegations.

63. I did note that texts which had been copied by the Claimant and which involved a conversation between Mr Blakeley and him. While their content is not particularly grown up or well advised, they at most amount to jokey and playful messaging away from the work environment and it is noticeable that at no stage does the Claimant call out Mr Blakeley over his comments. In fact the Claimant joins in and adopts a similar tone to that used by Mr Blakeley.

64. While this may well be the case, I do not find that the Claimant was challenged in such a way that could amount to bullying or harassment and which could amount to a fundamental breach that would entitle him to resign. It is fair to say that the working environment at the Respondent company was not a particularly kind one and in many respects they could have behaved in a more structured and thoughtful way and operated a management style that sought to check on the wellbeing of their managers, given the tough business that they operated in. This however, does not support an argument that by failing to do so, they created a repudiatory breach.

65. The Claimant however, did not seek to challenge any issues that he had at the time with his employer and instead sought to look for alternative employment once he returned from leave in February 2018. He may have considered resigning at this stage and was dissuaded from doing so by the

independent HR professional whom he spoke with, but he did not commence any grievance at this stage or warn the Respondent that he was considering his position. The grievance was only commenced after he had made the decision to resign and was about to start his new job.

66. What the Claimant chose to do instead, was to wait until he had secured alternative employment before giving notice of resignation on 4 April 2018. While he did refer in this email to his situation being *'untenable'* he appeared to have continued working for the Respondent since the last incidents in February 2018 took place without any complaint being raised. Under these circumstances, I do not consider that the Claimant demonstrated he was subjected to a repudiatory breach or a series of lesser breaches culminating in a 'final straw' event in February 2018.

67. This was a case where the Claimant had unfortunately become unhappy over time with the management style operated by the Respondent's senior managers and sought to look for alternative employment. This is not a case where there was a repudiatory breach by the Respondent and which caused the Claimant to resign and as such, the claim of constructive unfair dismissal is not well founded and must fail.

Entitlement to Bonus Payment

68. As has already been outlined within the legal framework, employers have a wide discretion within the exercise of a non-contractual bonus scheme. The limited documentary evidence available to the Tribunal supported a finding that this scheme did not form part of the Claimant's contract of employment or that it was collateral to it.

69. Nonetheless, the discretion exercised by the Respondent as an employer must be in good faith in an irrational or peverse way.

70. It is clear that despite the Claimant having given notice of his resignation on 4 April 2017, the Respondent decided that the Claimant should receive a bonus payment. The Claimant was notified of this in the letter from Mr Blakeley date 17 April 2019 despite the challenging conditions identified in the letter and in evidence by Ms Idrizi at the hearing. Indeed, it was noted that the previous bonus awarded to the Claimant in 20 April 2017 for the 2016 year also referred to challenging conditions. This evidence suggested to me that while it was possible for the Respondent to withhold bonuses due to difficult trading conditions, it was not usually the case that they would do so.

71. Ms Idrizi confirmed that the calculation of the 2017 bonus of £2,400 was the product of an admin error in that it was calculated against the incorrect salary level. Had the correct gross salary figure been used and the percentage formula applied as described in paragraphs 42 to 43 of this judgment (see above), the Claimant would have received £3,357.42 by way of a bonus.

72. Accordingly, as the Respondent had decided to exercise its discretion to award the Claimant a bonus for 2017 and it chose to apply its usual performance formula, a reasonable employer would be expected to carry out the calculation correctly. Given that there was no disagreement that the Claimant had been paid a figure which had been incorrectly calculated, I find that he must be entitled to the balance of this payment, with the error having been corrected. Accordingly, the Claimant is entitled to receive the sum of £957.42 which represents the shortfall in payment caused by this error.

Conclusion

73. For the reasons given above, my conclusion is that the claim of constructive unfair dismissal must fail, but the Claimant is entitled to payment representing the balance of the bonus payment due to him for the 2017 period of £957.42.

_____
Employment Judge Johnson

Date: …02.08.19…….

Sent to the parties on: ....15.08.19.....

.....
For the Tribunal Office