EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr S Wedlock	**v**	LHR Airports Ltd

Heard at: Reading **On:** 9 August 2019

Before: Employment Judge Hawksworth

Appearances
For the Claimant: No attendance or representation
For the Respondent: Mr T Kirk (counsel)

JUDGMENT

The complaints of wrongful dismissal and breach of contract relating to bonus fail and are dismissed.

REASONS

Claim

1. The claimant worked for the respondent as an asset graphical data BIM manager from 25 August 2015 until his dismissal on 18 October 2016.

2. The claimant's claim form was presented on 15 March 2017 after a period of ACAS early conciliation from 16 January 2017 to 16 February 2017. The respondent defended the claim.

Previous hearings

3. There have been a number of previous hearings and postponements in this case. I set out here a summary of the procedural history to explain the issues for determination at this hearing, and because it is relevant to an application for recusal made by the claimant, to which I return below.

4. Originally, the full merits hearing was listed for 9 June 2017 for 1 hour, but this was postponed and re-listed to 22 August 2017 for one day on the tribunal's initiative.

5. The precise complaints being made by the claimant were not clear from the claim form. In section 8 of his claim form the claimant described his complaints as 'wrongful dismissal or breach of contract'. He said that he was seeking compensation for notice pay, unpaid salary, pay in lieu of holiday and bonus. He also made reference to his dismissal being unfair and requested compensation for injury to feelings.

6. On the respondent's request, the hearing listed for 22 August 2017 was converted to a public preliminary hearing to clarify what claims the claimant was pursuing, to consider applications by the respondent for strike out/deposit orders, and for case management.

7. The preliminary hearing on 22 August 2017 went ahead. The claimant did not attend but made a written application for postponement because of a bereavement. The respondent did not object. The postponement application was granted at the hearing, and the preliminary hearing was relisted to 11 December 2017.

8. On 1 December 2017 the claimant made an application for postponement of the 11 December hearing. He enclosed copies of two fit notes from his GP relating to fitness for work. His postponement application was refused; he was informed in a letter from the tribunal on 8 December 2017 that if he was unfit to attend the hearing, his application must include a statement from a medical practitioner to confirm this. No correspondence was received from the claimant in response to the tribunal's letter.

9. The second preliminary hearing took place before me on 11 December 2017. The claimant did not attend. I decided that the preliminary hearing should proceed as it would not be in line with the overriding objective, in particular with avoiding delay, to postpone the hearing again.

10. At the second preliminary hearing, I decided that the claimant did not have sufficient service to bring a complaint of unfair dismissal, and that, his holiday pay and arrears of pay having been paid by the respondent, those complaints should be struck out. I identified that the complaints remaining for determination were therefore a) wrongful dismissal or breach of contract in respect of notice pay and b) breach of contract in respect of bonus.

11. I also made case management orders to enable clarification of whether the claimant was seeking to pursue any complaint of discrimination (or to amend his claim to do so). On 1 March 2018 the claimant made an application to amend his ET1 to include discrimination claims.

12. A preliminary hearing to determine the claimant's amendment application was listed for 6 August 2018. This was postponed at the claimant's request because of a bereavement and was relisted for 8 November 2018.

13. At the third preliminary hearing on 8 November 2018 the claimant attended and gave evidence. His application to amend his ET1 to include a complaint of discrimination was refused.

The Issues

14. The issues for determination at the full merits hearing were identified and set out in the case management summary following the preliminary hearing of 8 November 2018. They are:

15. <u>Wrongful dismissal – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994</u>

    15.1. The claimant claims notice pay of £11,900.79 under clause 21 of the contract of employment.

    15.2. The respondent claims that the claimant was summarily dismissed and is not entitled to notice pay.

16. <u>Breach of contract - article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994</u>

    16.1. The claimant claims that he is entitled to a company bonus of £4,174.43.

    16.2. The respondent claims that the claimant was dismissed and is no longer entitled to receive a bonus payment under the Management Incentive Scheme.

Claimant's application for recusal

17. In response to a call from the tribunal administration on 8 August 2019 (the day before this hearing) the claimant informed the tribunal at 13.33 that he would not be attending the hearing.

18. At 17.16 on 8 August 2019, the evening before the hearing, the claimant sent an email to the tribunal and the respondent's representative. It was addressed 'Dear appointed Tribunal Judge' and headed 'Application for the Judge to recuse himself or herself from case or making Final Hearing Judgements'.

19. In his email, the claimant says that he does not know which judge will be hearing his case. He had been told that a judge had not yet been appointed, and said 'hence I have not been able to address my email or application to named or appointed judge'.

20. The claimant's email is around two and half pages long and the grounds for his application for recusal are unclear. He refers to his "right to access justice without judicial potential conflict of interest or lack of impartiality" but does not explain the basis on which he says there is any conflict of interest

or lack of impartiality on the part of any specific judge. He says that he believes that the Employment Tribunal or members of the judiciary and the court or Tribunal staff that have been involved in his case have violated his statutory rights, his equality rights and his human rights. He refers to a number of statutes and statutory instruments.

21. Two central points emerge from the claimant's email which appear to be reasons why the claimant says the hearing should not proceed. These are:

    21.1. Issues relating to disclosure/bundle: he received late disclosure from the respondent on 8 August 2019. Also, the bundle prepared by the respondent for the hearing did not include all the documents he requested or expected to be disclosed; and

    21.2. Ill-health: the claimant says he is "psychologically and emotionally affected by certain aspects of the case proceedings and the judgments that were given in the previous case hearings". He also says he has a severe mental health condition due to his unfair dismissal.

22. The claimant's email refers to attachments, of emails and documentation. I only had only one other document, an email from the respondent's solicitor sent at 16.45 on 8 August 2019 to the claimant enclosing additional disclosure and an amended bundle index.

23. I have considered the claimant's email carefully. It does not appear to me to disclose any reason why I should recuse myself from hearing his case. The claimant was not aware that I would be hearing his case when he made his application. The only possible ground referred to in his email on which he could base a request for me to recuse myself is my previous involvement in his case, namely that I heard the second preliminary hearing. I did not consider that this suggests any potential conflict of interest or lack of impartiality on my part. I have decided that I should not recuse myself.

24. The claimant does not expressly say in his email that he is applying for the hearing to be postponed. However, it seems to me that the underlying thrust of his email is that the hearing should not proceed, and that this should be treated as an application to postpone the hearing. I have therefore gone on to consider whether the hearing should be postponed.

25. The respondent's representative says that the respondent objects to the hearing being postponed and would like it to proceed. The respondent's two witnesses had attended the tribunal and the case was ready to proceed.

26. Rule 30A(2) of the Employment Tribunal Rules of Procedure provides:

"*Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing beings, the Tribunal may only order the postponement where –*

a) all other parties consent to the postponement and –

i) it is practicable and appropriate for the purpose of giving the parties the opportunity to resolve their disputes by agreement; or

ii) it is otherwise in accordance with the overriding objective;

b) the application was necessitated by an act or omission of another party or the Tribunal; or

c) there are exceptional circumstances."

27. The claimant's email request for the hearing not to proceed was made less than seven days before the hearing, in fact it was made at 17.16 the evening before the hearing was due to start. If the claimant's email is treated as an application to postpone, Rule 30A(2) applies. I may only order a postponement if one of the situations in sub-paragraphs (a) to (c) arises.

28. As to 30A(2)(a), the respondent does not consent to a postponement, so this sub-paragraph does not apply.

29. I have considered whether sub-paragraph 30A(2)(b) applys, that is whether the claimant's request for the hearing not to proceed was necessitated by an act or omission of another party or the Tribunal.

30. In this context, I have considered the points made by the claimant about the respondent's disclosure and the bundle. The additional disclosure sent by the respondent to the claimant on 8 August 2019 was sent at 16.45. I note that this was after the claimant had confirmed to the tribunal staff at 13.33 that he would not be attending the hearing. The additional disclosure included the respondent's disciplinary policy. This had already been sent to the claimant in the course of the disciplinary proceedings, on 29 September 2016. As the claimant had already had this document, I do not consider that the late addition of the document into the bundle would necessitate a postponement of hearing.

31. The additional disclosure also included 5 pages which were screenshots from the respondent's log in and intranet pages. These were relied on by the respondent as evidence of employees being made aware of (and being able to access) the policy documents which were already in the bundle. These 5 additional pages of disclosure were sent to the claimant by the respondent very late. However, I conclude that given the nature of the documents, the late disclosure of these screenshots would not necessitate a postponement of the hearing.

32. I also considered the claimant's suggestion that the respondent had failed to disclose any requested documents or had failed to include documents he asked to be included in the bundle. Although this general point was

made in the claimant's email, and he referred to a failure by the respondent to manage and process his personal information or data accurately in accordance with the Data Protection Act 2018, he did not detail or specify any documents which he had asked the respondent to disclose and which had not been disclosed or which he had asked to be included in the bundle but which had not been. There was therefore no basis for me to make a determination that there had been any failing by the respondent to disclose any requested document or to include any particular document in the bundle.

33. I conclude therefore that sub-paragraph 30A(2)(b) does not apply.

34. This means that I can only order a postponement if sub-paragraph 30A(2)(c) applies, that is that there are exceptional circumstances. In considering whether there are exceptional circumstances which would permit an order to postpone the hearing, I also bear in mind the overriding objective to deal with cases fairly and justly, which includes, so far as practicable, avoiding delay so far as compatible with proper consideration of the issues.

35. In considering whether there are exceptional circumstances, I take into account what the claimant says about his ill health. However, I note that he has not provided any medical evidence as to unfitness to attend the tribunal hearing. The claimant was made aware by the tribunal in its letter of 8 December 2017 that a request to postpone a hearing must include a statement from a medical practitioner that the claimant is unfit to attend a hearing.

36. I also take into account the unfortunate history of postponements in this case, which has meant that the full merits hearing is taking place almost three years since the claimant was dismissed, and well over 2 years since he presented his ET1.

37. For these reasons I have concluded that there are no exceptional circumstances that would permit postponement of this hearing under sub-paragraph 30A(2)(c) of the ET rules of procedure. I also conclude that continuing with the hearing is in accordance with the overriding objective and in particular the objective of avoiding delay, bearing in mind the procedural history, for the hearing to proceed.

38. (After I made this decision (during the respondent's witness evidence) I was handed by the clerk a further copy of the claimant's email, this time with the attachments. After the conclusion of the respondent's witness evidence, I considered the attachments and reconsidered my decision not to postpone the hearing. I concluded that there was no further information in the attachments which meant that I should vary or set aside my earlier decision not to postpone the hearing.)

Evidence

39. At the hearing on 9 August 2019 I heard evidence from the respondent's witnesses Mr Chestney (the dismissing manager) and Mr Palmer (the respondent's Policies and Procedures Manager). Both had produced written witness statements which had been sent to the claimant.

40. There was a bundle of 248 pages which had been prepared by the respondent.

Findings of fact

41. The claimant worked for the respondent as an asset graphical data BIM manager from 25 August 2015.

<u>Contract and policy documents</u>

42. The claimant was sent his contract of employment on 15 July 2015. The cover letter advised that he should take the time to read through his contract. The contract itself stated:

> *"These documents together with relevant policies which can be found on the company's intranet site form your contract of employment."*

43. In relation to notice, the contract provided at clause 21:

> *"The company will give you three months' notice unless you are dismissed for gross misconduct in which case you will forfeit your right to notice."*

44. In relation to bonus, the contract provided at clause 7:

> *"The company may operate a bonus scheme related to personal and/or company performance from time to time at its absolute discretion. Details of the bonus scheme operated for the calendar year 2015 can be found on the company's intranet site. There is no guarantee that you will be entitled to a bonus in any year."*

45. There was a separate document about the bonus scheme, the 'Management Incentive Scheme 2016'. This stated:

> *"3.2 The bonus payment is non-contractual and discretionary based on the success of the company and subject to approval from the remuneration committee…*
>
> *3.6 Participants who have been dismissed by Heathrow during the period 1 January 2016 to 31 March 2017 will not be entitled to receive payment under the management incentive scheme."*

46. The respondent's policies are included on its intranet to which all staff have access. The claimant therefore had access to the respondent's policies, including the information security policy, the acceptable use policy and the disciplinary policy. The respondent's log in screen for all staff (ie the screen which comes up on the computer before every log-in) has a message headed 'Important Notice' which says that by accessing and using the computer system they are confirming that they will comply with the information security policy and says that unauthorised use of or access to the computer system may subject the user to disciplinary action.

47. The information security policy makes clear at clause 1.1 that although it refers to email, internet and messaging systems, the spirit of its provisions and the standards of acceptable behaviour apply to all communication systems.

48. Clause 2.1.2 says that 'undesirable, inappropriate, offensive or illegal emails' are prohibited and that where breaches of the policy are found, action may be taken under the disciplinary code of conduct and procedures.

49. Clause 2.1.7 of the information security policy tells staff that they must not send emails containing abusive, malicious or offensive language.

50. The policy also makes clear that:

> *"Non-compliance (breach) of this policy may constitute a disciplinary offence and will be dealt with under the Disciplinary Code of Conduct and Procedures, and in serious cases may be treated as gross misconduct leading to summary dismissal."*

51. The respondent's acceptable us policy provides at paragraph 1.1 that:

> *"IT infrastructure should not be used to record, store, send or in any way use material that is offensive, malicious or which contains inaccurate or bad taste material or harass or bully anyone in any way."*

52. This policy also says that failure to follow the policy will be dealt with under the disciplinary policy.

53. The disciplinary policy itself has a non-exhaustive list of gross misconduct which includes:

> *"Serious and/or deliberate breaches of the company's policies including IT policies"*
>
> *"Deliberately bringing the good name of the company into disrepute through acts or conduct in either work or personal life."*

The 'Message for you' document

54. The computer used by the claimant was loaded with a CAD software system which was not on all of the respondent's computers. For this reason, the computer used by the claimant was also used by others, either physically as it was at a hot desk, or by accessing it remotely.

55. On 5 August 2016, a contractor of the respondent was remotely logged on to the claimant's computer for the purpose of using the CAD software. On the 'c' drive of the computer, the contractor saw a folder called 'LOOK INTO MY FILES' and opened it. The folder contained one file which was saved with the name 'Message for you'. The contractor opened the file.

56. The file was a Word document which said:

> "I know that there is an asshole LIKE YOU looking into what I am currently INTERNET searching right now and what I write in my emails.
>
> If you are monitoring me right now I suggest you go f*ck yourself as I already know who you are as I have already sassed [sic] you out and am monitoring you too. I already know everything about you.
>
> Don't fuck around with an ex-military intelligent [sic] officer; I am not a dumb fuck like you.
>
> WATCH YOUR BACK & HAVE A GOOD NIGHT SLEEP BECAUSE I'LL BE WATCHING YOU.
> YOU WON'T KNOW WHEN YOUR TIME IS UP.
>
> BUT I KNOW."

57. The highlighting was included in the original, the first three lines were highlighted in yellow and the last line in red.

58. The contractor found the content of the file threatening and the language abusive, and reported it to the respondent. A disciplinary investigation was commenced. The contractor participated in the investigation but asked that they be kept anonymous.

Disciplinary proceedings

59. The document properties of the 'Message for you' document named the claimant as the author of the document. The claimant was suspended on 9 August 2016 pending an investigation. The suspension letter said that there were allegations of serious and/or deliberate breach of the company's IT and other policies, and of bringing the company into disrepute.

60. The respondent's analysis of the file properties of the document showed that the document was created on 26 April 2016 and last saved on 11 May 2016. There were four revisions of the document. The analysis of data from the claimant's security pass (used to access the respondent's buildings and systems) showed that the claimant was at work and using that computer on the date and time the document was last saved.

61. The claimant was invited to an investigation meeting on three separate occasions but chose not to attend. The investigating officer's report was produced on 22 September 2016 and recommended that the case should proceed to a disciplinary hearing. The claimant was invited to two disciplinary hearings; he did not attend. The disciplinary manager decided that the allegations were proven and that they amounted to gross misconduct. The claimant was summarily dismissed on 18 October 2016. He was not given an any notice or pay in lieu of notice.

62. The respondent held an appeal hearing. This was rescheduled twice at the claimant's request. The appeal hearing was held on 17 January 2017. The claimant attended. He was asked to explain the message but chose not to do so.

63. At the appeal, the claimant did not deny creating the document. In his ET1, he described it as his personal note.

64. In deciding whether the claimant created the file 'Message for you', I have found the following helpful: the analysis of the file properties and the security pass information contained in the investigation report, and the claimant's response to the allegations including what was said by him in the appeal hearing.

65. Based on that evidence, I find that the document was created by the claimant on 26 April 2016, amended by him and then saved by him in its final form on 11 May 2016. This was the version opened by the contractor on 5 August 2016.

66. Because of the way in which the file was named and saved, and the way in which the document was addressed to a person, I find that the claimant intended that someone (it does not matter whether the claimant had a particular person in mind) to access the file, and that it was not a personal note of his.

The relevant law

67. Under article 3 of the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994, a claimant who has left their employment may bring a breach of contract claim in the employment tribunal.

68. Wrongful dismissal is an example of a breach of contract. It arises where an employee is dismissed without notice in circumstances where they had an entitlement to notice.

69. In cases of dismissal for gross misconduct, to avoid a wrongful dismissal, the burden is on the respondent to show that:

    69.1. the claimant committed the alleged misconduct; and
    69.2. the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.

70. The approach is not the same as in a complaint of unfair dismissal. It is not sufficient for the employer to demonstrate a reasonable belief that the employee was guilty of gross misconduct. (Shaw v B&W Group Limited UKEAT/0583/11).

71. The question of whether the misconduct was sufficiently serious is a matter of fact for the tribunal to decide. In Briscoe v Lubrizol Ltd [2002] IRLR 607 CA, the Court of Appeal held that the test can be summarised as follows: "Was there a deliberate intention to disregard the fundamental requirements of the contract of employment, or does the conduct so undermine the trust and confidence between the employer and the employee that the employer should no longer be required to retain them?"

72. The conduct must be a deliberate and wilful contradiction of the contractual terms, or amount to gross negligence (Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 1 WLR 698 CA.

73. The terms of the contract of employment and the employer's policies, and whether the employer has made clear that certain acts will lead to summary dismissal, are also relevant factors (Dietmann v Brent London Borough Council [1988] ICR 842 CA).

Conclusions

74. I applied these relevant legal principles to my findings of fact as set out above to decide the issues.

Wrongful dismissal (dismissal without notice)

75. First, I remind myself that this is a claim for wrongful dismissal and breach of contract, not a complaint of unfair dismissal. The fairness or sufficiency of the investigation are not issues for me to consider. Instead, I must be satisfied firstly, that the claimant committed the alleged misconduct and secondly, that the misconduct was sufficiently serious to amount to repudiation of the contract.

76. As to the first of these questions, I have found that the claimant committed the alleged misconduct; he does not deny writing the note or give any explanation for it. There is substantial evidence to suggest that the note was written by him and I have found on the balance of probabilities that it was.

77. On the second question, I conclude that the claimant's conduct was sufficiently serious to amount to repudiation of the contract of employment, justifying summary dismissal. I have based this on the following factors.

78. The specific circumstances of the message and the way it was written made the conduct particularly serious for a number of reasons.

    78.1. Its content is clearly offensive, using swear words and threatening language. The contractor who read it found it threatening and found the language abusive. They participated in the investigation but asked to be kept anonymous.
    78.2. The message was clearly intended for somebody to read and was not a personal note just for the Claimant. The names of the folder and file suggest that he wanted it to be read by another user. I have found that it was deliberately created by the claimant with the intention that someone else should read it.
    78.3. The document was created intentionally, worked on on at least two different days, written and saved on different days and amended on four occasions – this was not a one-off or spur of the moment act.

79. The message was in clear breach of the respondent's IT policies. It used abusive and threatening language. The contract and policy guidance made it clear that this was the sort of conduct which would be treated as gross misconduct and the claimant was, or should have been, aware of this.

80. The document was read by an outside contractor which is a factor which further erodes trust and confidence; it was not just employees of the respondent who saw the document. This gave rise to the element of reputational risk for the respondent which was expressed in the allegation that the conduct brought the company into disrepute.

81. Lastly, there was no explanation or mitigating circumstance put forward by the claimant. He did not for example say that he wrote it because he was unwell. He mentions work-related stress in his appeal letter but that is in the context of an earlier grievance complaint.

82. For these reasons I have concluded that the conduct was sufficiently serious to amount to repudiation of the contract entitling the respondent to summarily dismiss the claimant. There was a deliberate breach of the claimant's fundamental contractual terms which undermined the respondent's trust and confidence in the claimant.

83. The complaint of wrongful dismissal therefore fails.

<u>Bonus claim</u>

84. The claimant's contract of employment and the respondent's bonus scheme documents expressly state that the scheme is not contractual. It is discretionary; there is no guarantee of a bonus.

85. Further, the scheme makes clear that there is no bonus payable if an employee is dismissed during the period 1 January 2016 to 31 March 2017. As the Claimant was dismissed during this period, this term applies to him and he has no entitlement to a bonus.

86. The claimant's complaint of breach of contract in relation to bonus therefore fails and is dismissed.

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Employment Judge Hawksworth

Date: …23 August 2019……………..

Judgment and Reasons

Sent to the parties on: ....

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For the Tribunal Office

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