EMPLOYMENT TRIBUNALS

Claimant
Mr. S. Sadhukha

Respondent
Kentucky Fried Chicken (Great Britain) Ltd

v

Heard at: Watford

On: 1 May, 2 and 3 July 2019

Before: Employment Judge Heal

Appearances
For the Claimant: Mr. C. Davey, counsel
For the Respondent: Mr. S. Hoyle, consultant

RESERVED JUDGMENT

(1) The complaint of unfair dismissal is well founded.
(2) There will be a remedies hearing on a date to be fixed.

REASONS

1. By a claim form presented on 21 September 2018 the claimant made a complaint of unfair dismissal.

2. I have had the benefit of an agreed bundle running to 221 pages.

3. I have also heard oral evidence from these witnesses in this order:

Ms Emily Crouch, currently People Capability Manager;
Mr. Abdel Hafiz Mohamed, Restaurant General Manager;
Mr. Sukdeb Sadhukha, the claimant.

4. The witnesses were taken out of order due to their availability. Each witness gave evidence in chief by means of a prepared typed witness statement and then the witness was cross-examined and re-examined in the usual way.

The Issues

5. The issues are those identified with the parties on 1 May 2019:

5.1 The claimant makes a complaint of unfair dismissal. The respondent accepts that the complaint was made in time and that the claimant qualifies to claim unfair dismissal.

5.2 At the time of the claimant's resignation, the parties agree that he was employed by the respondent.

5.3 The parties accept that the respondent's business was transferred by TUPE transfer to MFIT Ltd. MFIT Ltd is not a party to the proceedings.

5.4 It is not in dispute that the claimant objected to the transfer or that he resigned by email dated 18 June 2018. What was the date of the transfer and what was the date of termination of the claimant's contract?

5.5 Was the claimant dismissed? The respondent says that the claimant resigned.

Therefore:

5.6 Was it an implied term of the claimant's contract of employment with the respondent that he was contractually entitled to the benefits set out at box 8.2, 1-4 of the claim form?

That is, using the wording from the claim form, the claimant says:

5.6.1 '*The Share Scheme. MFIT stated that there was no equivalent benefit. This was worth about $4,700 p.a. to the claimant;*

5.6.2 The 'Pick'n'Mix Benefit. Again, there was no equivalent benefit. This was worth about £1,000 p.a. to the claimant;

5.6.3 The Bonus scheme. MFIT stated that this would not be as generous as the Respondent's Bonus Scheme. This constituted a substantial part of the Claimant's remuneration package.

5.6.4 The Discount card. MFIT did not have a discount card or a benefit equivalent to the respondent's 'Sogoodrewards.'

5.7 The claimant says that the term claimed was implied by custom and practice. He relies upon factors set out at paragraph 15 of the Court of Appeal in *Albion*

Automotive Ltd v Walker and others [2002] EWCA Civ 946. The respondent agrees that this is the correct law to apply.

5.8 If the term alleged was implied into the contract of employment, was the respondent in fundamental breach of contract in that on the TUPE transfer MFIT Ltd did not provide the same benefits?

5.9 If so, did the claimant resign in response to such breach as he may prove? The respondent says that the resignation letter says that the claimant felt discriminated against. The respondent also says the claimant resigned in anticipation of a proposed breach.

5.10 The respondent does not allege that the claimant waived such breach as he may prove. The claimant did not do any work for the transferee.

5.11 If the claimant was dismissed, what was the reason for the dismissal? The respondent relies upon 'some other substantial reason' that is, it says that it was unable to take any other action than it took. There was no alternative that could be offered to the claimant.

5.12 Was the sole or principal reason for the dismissal an economic technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer, within the meaning of regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006?

5.13 If not, is the transfer the sole or principal reason for the dismissal?

5.14 If so then the parties agree that the dismissal was automatically unfair.

5.15 If there was an unfair dismissal, then the respondent does not rely upon contributory fault.

5.16 The respondent does rely upon 'Polkey' in that it says it had no job into which to retain the claimant regardless of the process; if the claimant did not transfer with the business there would be nothing for him to do. What is the percentage chance of a fair dismissal in any event and if so, when would that dismissal have taken place?

5.17 The respondent has relied upon regulation 4(8) which states that where an employee objects to a transfer, the transfer shall operate so as to terminate the contract of employment with the transferor, but he shall not be treated as having been dismissed by the transferor. That regulation is subject to regulation 4 paragraphs (9) and (11).

5.18 Therefore: (the parties agreeing that regulation 9 is irrelevant) was there a substantial *change* to the claimants working *conditions*? (Regulation 4 (9)). Does

a change in the terms of the claimant's contract amount to a change in the claimants working *conditions*?

5.19 The respondent accepts that if there was a change as claimed, then that would be to the claimant's material detriment.

5.20 The respondent also accepts that if there were a repudiatory breach of contract then the effect of regulation 4 (11) is that regulation 4 (8) does not oust the right to claim constructive unfair dismissal.

Effect of Unless Order

6. By directions sent to the parties on 3 October 2018, the parties were ordered as follows:

'The claimant and the respondent shall send each other a list of any **documents** that they wish to refer to at the hearing or which are relevant to the case. They shall send each other a copy of any of these documents if requested to do so.'

7. By an Unless Order sent to the parties on 11 March 2019, Employment Judge Bedeau ordered that:

'**Unless by 4pm on 22/3/2019 the respondent serves its list of documents and copies on the Claimant's Representative the response will shall be dismissed and the Respondent will be entitled to participate in any hearing only to the extent permitted by the Employment Judge**.'

8. In the event that there are further documents relevant to the issues which have not been disclosed by the respondent, is the respondent in breach of the Unless Order sent to the parties on 11 March 2019 and has the response therefore been struck out on 22 March 2019?

9. On 1 May 2019 I heard evidence from Ms Emily Crouch who was examined in chief and cross-examined. Her evidence was not concluded however because a screenshot document produced by the claimant partway through the hearing demonstrated that there were substantial additional documents relating to the operation of the respondent's bonus scheme which were relevant to the issues and which had not been disclosed by the respondent. Therefore, Ms Crouch did not complete her evidence because she had not given evidence about those matters. I released her formally from her oath so that she could give instructions to Mr Hoyle about further disclosure.

10. I also heard evidence on 1 May from Mr Abdel Mohamad. Mr Davey further examined him in chief about the screenshot document and then he was cross-examined. I have no heard further evidence from him.

11. At the outset of the hearing on 2 July, the respondent produced new documents from the 2017 and 2018 bonus schemes, said to be relevant because they contained a passage saying that all bonus plans are non-contractual.

12. The respondent accepted that it was therefore in breach of the Unless Order of 11 March 2019. Therefore, the response had been struck out. I granted relief from sanction however and gave full oral reasons at the time.

Facts

13. I have made the following findings of fact on the balance of probability.

14. The respondent is a limited company in the business of running a well-known chain of restaurants.

15. The claimant was employed by the respondent from 14 May 1995, initially as a crew member.

16. Over the years the claimant was promoted. He became a manager in 2000. From about 2016 he was manager of the respondent's Tottenham Hale restaurant. The claimant's salary was increased to £39,800 gross from 21 April 2016 and at the time he left was about £41,800.

17. The latest written terms and conditions of employment actually signed by the claimant are dated 2 March 2001.

18. According to that contract, there were the following express terms of his employment:

19. The respondent provided free private medical insurance covering the job holder only.

20. Any changes in the terms of the contract or the policies which form part of it would be notified when they occurred either by notice on the staff notice board or by individual written communication. Company policies might be altered from time to time.

21. The claimant's employment was also said to be subject to the respondent's Employment Policy and any other Policies issued from time to time by the respondent's Human Resources department and as contained in the respondent's Standards Library.

22. There is a subsequent contract in the bundle in the name of a Mr Lever. The claimant accepted that he was employed on the same terms as these. Both sides agree that this contract was binding on the claimant. This contract too said that it was subject to the respondent's Employment Policy and any other

Policies issued from time to time by the respondent's Human Resources department and as contained in the respondent's Standards Library.

23. There were further express terms of that contract that:

Any changes or amendments to the terms or to the policies which form part of them would be confirmed in writing by general notice within one month of them occurring. Company policies may be altered from time to time without notice.

24. The contract contained this paragraph:

'*Flexible benefits Plans*

You are entitled to core (contractual) benefits from your start date and in addition, employees who have satisfactorily completed their probationary period, will be able to personalise their benefits via the Flexible Benefits Plan; Benefits Pick n Mix

There are a range of benefits available in benefits Pick n Mix under the headings of Finance and Insurance, Health and Wellbeing, and Leisure and Lifestyle. Benefits Pick n Mix offers you the chance to change your core benefits, purchase additional benefits in a tax efficient manner, and access an online discounted shopping service.

From the end of your probationary period you can access Benefits Pick n Mix should you wish to amend your benefits….

Benefits become effective from the 1st of the month following your selections. The scheme is non-contractual.'

25. There are then express terms providing for Core pension and insurance benefits. These are pension, Group Life Assurance and various types of income insurance.

26. The terms add:

'*The Company reserves the right to withdraw or make changes to the insurances at any time (with the appropriate notice period given)*

Your right to participate in the schemes referred to under the paragraph above headed 'Core Pension and Insurance Benefits' is subject to the rules and the terms of such schemes from time to time in force. The Company reserves the right to change schemes and/or insurers or providers and is under no obligation to provide or continue to provide these benefits if they are not available for you or not available at a cost to the company considers reasonable. …'

27. There were no express terms about bonus.

28. The respondent produced a guide for staff to their benefits entitled 'Your Benefits Guide 2018'. This appears to have been issued on 15 February 2018. In the guide, Neil Piper, Vice President HR says that the benefits form an integral part of the total rewards proposition and are key in '*our commitment to being a Great Place to Work*.'

29. The contents page of this document divides the benefits into 'Core benefits' which are Critical Illness, Group Income Protection, Life Assurance, Pension, Personal accident and Medical Insurance; and Flexible benefits, including Online Discounted Shopping.

30. In small print on the bottom of the back of the guide, there is this statement:

'*KFC may at its absolute discretion replace, amend or withdraw any of the benefits detailed in this booklet at any time and without notice. The Company reserves the right to amend any other agreed terms and conditions of employment*.'

Any time there is a discrepancy between this brochure and your employment contract, the contract of employment will prevail. Please note that the savings illustrations are available as a guide, visit the site to calculate your own individual cost and savings.'

31. From the year 2000, the claimant received bonuses in the region of £4,000 to £8,000 each year under the respondent's bonus scheme. In the tax year ending 5 April 2017 he received a bonus of £8,000 and in the tax year ending 5 April 2018 he received £3,500.

32. Mr Mohamad also earned a bonus: on average about £2,000 per quarter, net of tax. He has received no bonus since the transfer.

33. The document produced by the claimant on the first day of this hearing is a table which shows that there was a sophisticated and fixed method of calculating the bonus, based on measurements of 'growing people', 'growing customers' and 'growing the business'.

34. The respondent says that the bonus was discretionary. Miss Crouch gave evidence that in about February 2018 there was a distribution crisis which led to about three quarters of the 900 restaurants being shut for about 6 days. This led to a drop in profitability. The bonus is driven by profitability, so most managers did not receive a bonus.

35. The claimant said that there were occasions when he did not get a bonus: for example, when he moved stores. On one occasion a loss-making store closed so there was no profit on which to calculate his bonus.

36. On 2 July 2019 the respondent produced two previously undisclosed documents: the 2017 and 2018 terms and conditions bonus booklet and bonus scheme. Both documents contain the same passage:

'*All bonus plans are non-contractual and details of eligibility, payments and scheme rules may be changed at any time. The company's decision regarding any payment is final*.'

37. Mr Davey for the claimant accepts that these two documents have contractual effect.

38. On the balance of probability, I find that the claimant had been shown a Powerpoint of these documents. The respondent had a practice of showing the managers a detailed document each spring, setting put the detail of the bonus scheme. The claimant's real concern at such meetings was with the detail of the bonus calculation: indeed, he took a photograph of one such document which was produced to the tribunal on the first day of this hearing. However, on the Powerpoint presentations he was also told that the bonus plan was not contractual.

39. There were no express terms in the claimant's contract about the share scheme. However, the claimant did participate in the respondent's share scheme. This was called, 'Yumbucks'. This was not one of the Core benefits described in the contract of employment.

40. There is very little evidence about how this scheme was applied or worked. Miss Crouch did not know anything about the contractual arrangements, or whether there was anything in the policies to say whether the scheme was contractual. There is a document plainly produced for employees by the respondent which uses colloquial language to explain the scheme. It is expressed in the second person: addressed to 'you'. It describes grants of Stock Appreciation Rights which are issued to 'you'. When the shares have vested, four years after the grant, 'you' can 'exercise your grant' i.e. sell the shares, or wait and see if the value goes up.

41. There is a further document setting out the detail of the scheme more formally. This states:

'You are entitled to exercise your shares under the terms below if you:
-Transfer to franchisee partner remaining in your current role
-Transfer to a franchisee partner in a new role
- Remain an employee of KFC UK & I.

You will be unable to exercise your shares if your contract with KFC UK & I ends through resignation or dismissal.'

42. According to the Yumbucks document therefore one only had to remain an employee of KFC UK&I to be eligible to exercise Yumbucks. Eligibility at least was automatic. In the box, 'How it works', the text states, 'You are issued Yumbucks grants'. So, it appears that the issue of the grant is automatic. However, it is clear that the employee then has to take decisions about whether to cash the grant in or wait and see if the value goes up. There is a warning not to forget about them, because 6 years after vesting they will expire.

43. The claimant first received an entitlement to shares when he became a restaurant manager in 2000. He was 'eligible' to gain share rights in every year thereafter until he left in 2018. He received share rights in 12 of those years and not in 6 of those years. He thinks that in 3 or 4 of those 6 years he missed out because he was not in the same store for the whole year. I do not entirely understand how this fits with the documents I have been shown and it has not been explored in evidence.

44. The claimant also says that in the 17-18 years since he became a manager, he has cashed in a total of $81,000 of shares amounting to about $4,700 per year. On 26 March 2018 he cashed in about $4,500. This was not challenged.

45. The figures are in dollars because the share scheme was operated in the United States. It is based on the 'Yum' brand which is Yum Brand International. That organisation administers and operates the scheme. The information is fed down into the relevant business units to the relevant employees. It is operated by a team in the US as part of the parent company. Miss Crouch thought that the UK company had very little if any control over the scheme.

46. Under the 'Pick n Mix' programme the claimant was able to select from various benefits as set out in his contract of employment. He could sell holidays in return for various benefits, such as health benefits. One year, he paid for his wife's health insurance through selling his holidays. The claimant received benefits every year from about 2010 to 2018. The benefits were worth about £1,000 per year to the claimant.

47. The claimant received a discount card. To use this, he telephoned a number to receive a 9% discount to buy goods. He could also have different percentages off in Marks and spencer. He would go to the respondent, pay his money, receive a voucher and then take that to buy his goods. For example he bought a television worth £900 and received an £81 discount. He did not have documents to show how much this benefit was worth in savings overall. The

employment contract makes no mention of this scheme but it is dealt with in the Benefits Guide 2018 as 'Peoole Value Discounted Shopping':

'*All KFC employees have access to the People Value discounts and cash back offers*.'

48. Employees could save up to 15% in the high street discounts category, use online discount codes to save money when shopping online, save up to 5% cashback on grocery shopping, earn cashback, save up to 14% off package holidays, save up to 17% off with a commission free travel service, have 30% off cinema tickets and receive unlimited cashback from 'mutiple retailers online'.

The transfer

49. In November 2017 the respondent told the claimant that it proposed to transfer the Tottenham Hale restaurant to MFIT Foods Ltd.

50. By letter dated 17 January 2018 written to the employee representatives, one of whom was the claimant, the respondent set out the details of the proposed transfer. The respondent said that it believed that the TUPE regulations applied, that there would be no economic or social implications in the proposed transfers. KFC did not envisage taking any measures in relation to the affected employees in connection with the transfers,

51. The letter enclosed a 'Measures Letter' from MFIT to Edward Evans of the respondent. This said that MFIT did not currently envisage changing the terms of employment of those employees who would transfer to the transferee, save for the measures set out.

52. These measures included:

'*Other Core benefits – Medical, Income and Accident Insurances - It may not be possible for those employees who would transfer…to continue to be members of the KFC (GB) Ltd above named insurances following the proposed transfer, as they would no longer be employed in the KFC (GB) Ltd Group.*

Their current arrangements may therefore have to cease and MFIT Foods Ltd would provide policies that would provide broadly comparable benefits. Details of the schemes will follow.

…

Bonus Scheme – The KFC (GB) Ltd employee bonus / incentive scheme will not be replicated by the transferee. RGMs would be entitled to a discretionary bonus based on a balanced scorecard similar to the transferor although with different targets and payment amounts. Details of the amended scheme will be available and circulated to affected staff in the near future.

Yumbucks Share scheme – It would not be possible for those employees who would transfer from KFC (GB) Ltd to MFIT Foods Ltd ….to continue to be members of the KFC (GB) Ltd Yumbucks scheme following the proposed transfer, as they would no longer be employed in the KFC (GB) Group. There is no equivalent benefit to offer.'

53. The claimant wrote to Ms Crouch by email on 8 February 2018. He asked why, if there were no economic implications to the transfer the employees pay package would go down. He said that his income would be significantly affected by the transfer to the franchise. He pointed out that he had been told by Andy Goves of MFIT Ltd that their bonus system was not generous like the respondent's bonus scheme. The claimant said that he would lose the benefit of the rewards scheme and several hundred pounds a year from the discount shopping card.

54. The employees' representatives drafted a long list of questions for MFIT Ltd.

55. The answer to the question, '*Do you offer a bonus'* was:

'*We currently only offer a bonus to RGMs based on your BSC. However, we are currently working on the bonus scheme we offer*.'

56. To the question: '*Do you offer a Pick n Mix scheme?',* MFIT said:

'*No, this will not be offered however we are reviewing the benefits we offer to our employees as part of our employee value proposition work'*.

57. In answer to the question, '*What happens to my Yumbucks?*', MFIT replied,

'*Please see attached leaflet with the details on vesting options*.'

58. By letter dated 13 March 2018 MFIT provided further answers specifically relating to questions raised by the claimant. The position MFIT took was that the bonus and rewards systems were non contractual and could not be replicated by MFIT. Although the discount card is not expressly mentioned in the respondent's letter, the inference is that this is included in the benefits and rewards systems which the respondent says are non-contractual, contingent on employment with the respondent and so would not be replicated by MFIT Ltd.

59. The claimant was not provided with any written details of MFIT's proposed bonus arrangements or rewards systems.

60. On 18 June 2018 the claimant wrote to Ross Wyatt, Area Coach at KFC UK saying,

'*Dear Ross,*

I would like to refuse the company's decision to sell my current store to Franchisee will my pay package will reduce by a significant amount. I felt discriminated against after working for 23 years with the company. Also did not receive a written answer for the question I asked to Emily Crouch on the 8th of February 2018. The question was directed to the Company I worked with for the last 23 years. The answer was given by MFIT Foods Ltd with none of the question were direct to them. Also, question was changed to make it convenient to answer. I had mentioned this to you in our final consultation call on the 21st of March 2018.

I therefore, heavy heartedly, take my decision to refuse transfer on the day the store will transfer to Franchisee.

I would like to express my thanks to KFC and wish everyone best of luck in future.'

61. I find as a fact that the claimant resigned because of the changes that would be imposed on his conditions of employment on the date of transfer. He considered that his remuneration would be significantly reduced and refused to accept the transfer as a result. He does give other lesser reasons in his letter, but it is plain from the letter itself and from the surrounding correspondence and history that the reason the claimant objected to the transfer and resigned was the reduction in his remuneration.

62. The respondent replied by letter dated 20 June 2018,

'*We have received a copy of your letter dated 18 June 2018 whereby you state that you refuse to transfer to the franchisee on the proposed transfer date of 25 June 2018.*

As per our previous communication to you during the TUPE consultation process, please note that the consequence of your formal objection to the transfer of your employment to the franchisee is that it will automatically bring your employment with KFC to an end on the transfer date. As a result, you will not be entitled to any termination payments as a result. We assume that you understand this position and that this is your intention unless you inform us otherwise and formally retracted by no later than 5 pm on Friday, 22 June 2018.'

63. By email dated 22 June 2018 at 12:01 pm claimant replied,

'*I consider that the proposed changes to my conditions of employment amounts to a repudiatory breach of contract by KFC entitling me to treat myself as constructively dismissed. Furthermore, proposed changes involve a substantial change to my working conditions amounting to a material detriment under the TUPE regulations. I refuse to transfer and I treat these changes as the termination of my contract employment with KFC.*

I understand that the transfer will take place on 25 June. I hereby give you notice that I will be leaving KFC on 24 June.'

64. The respondent replied on 22 June 2018 at 19:36,

'*As a result of your objection, your employment with KFC will automatically come to an end on the transfer date. As we previously explained, you will not be entitled to any termination payments upon termination of your employment with KFC.*

You will be paid your normal pay up to the transfer date in the usual way, with any accrued but untaken holiday pay. On the transfer date we will expect you to return all KFC company property in your possession. We will also issue your P45 in due course.'

65. Alongside the formal exchange of correspondence, Ross Wyatt wrote to the claimant on 18 June 2018 expressing his sadness that the claimant was leaving and confirming that the forecasted transition date to the franchise business was due to be 2 July 2018. He planned to inform the area on 21 June so this gave the claimant time to inform his team before the transition.

66. By email the same day, the claimant confirmed that he did not want to join the franchise on 2 July 2018.

67. The claimant in fact left the respondent's employment on 24 June 2018 because the respondent had told him that the date of transfer was 25 June 2018.This, 24 June 2018, is his effective date of termination. As things turned out, the transfer was delayed and took place in August 2018. It does not appear that the claimant was told of the impending delay at the time.

Concise statement of the law.

68. At the heart of the TUPE legislation is the rule that a TUPE transfer does not terminate the contract of employment of a person employed by the transferor but all the transferor's rights, powers, duties and liabilities in relation to that contract transfer to the transferee.

69. This applies to a person employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1) (regulation 4(3)).

70. However, regulation 4(8) – (11) provides:

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

71. This claimant has resigned from his employment and claims constructive dismissal. To succeed in that claim, he has to prove first that the respondent was in fundamental breach of his contract of employment. This is the claimant's primary case.

72. He does not allege breach of express terms of his contract but does allege breach of implied terms. He claims that his entitlement to the share scheme, the pick and mix benefit, the bonus scheme and the discount card and 'so good rewards' is implied into his contract of employment by reason of custom and practice.

73. The representatives agreed that the correct law to apply in an employment case where a claimant relies upon custom and practice as the basis for an implied term in his contract is that set out in *Albion Automotive Limited v Walker* and others EWCA Civ 946. In that case, which concerned employees who did not receive enhanced redundancy terms, the Court of Appeal adopted with approval a number of factors suggested by counsel for the employees. These are set out at paragraph 15 of the judgment. They are:

(a) Whether the policy was drawn to the attention of employees;
(b) whether it was followed without exception for a substantial period;
(c) the number of occasions on which followed;
(d) whether payments were made automatically;
(e) whether the nature of communication of the policy supported the inference that the employers intended to be contractually bound;
(f) whether the policy was adopted by agreement;
(g) whether employees had a reasonable expectation that the enhanced payment would be made;
(h) whether terms were incorporated in a written agreement;
(i) whether the terms were consistently applied.

74. A term will not be implied into a contract however if it is inconsistent with the express wording of the contract.

75. A constructive dismissal may arise where the employee leaves in response to an anticipatory breach, that is a situation where the employer indicates that he is proposing to break the contract at some point in the future (see *Harrison v Norwest Holst Group Administration Ltd [1985] IRLR 240, (CA)*.

76. If the respondent was in fundamental breach of contract, the employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was an effective (but not necessarily the sole or the effective) cause of the resignation. Accordingly, if an employee leaves both in order to commence new employment, say, and in response to a repudiatory breach, the existence of the concurrent reasons will not prevent a constructive dismissal arising. What is necessary is that the employee resigned in response, at least in part, to the fundamental breach by the employer.

77. If there is a dismissal and there is not an 'eto' reason for the dismissal, then if the sole or principal reason for the dismissal is the transfer, then that dismissal is automatically unfair.

78. If there is a repudiatory breach of contract, then the effect of regulation 4(8) is not to oust the right to claim constructive dismissal.

79. The claimant's alternative case is based on paragraph 9 of regulation 4. This paragraph preserves the employee's right to leave and claim unfair dismissal due to the substantial changes. However, an employee cannot leave in advance of a transfer and claim constructive dismissal on ordinary principles on the basis of *fears* of detrimental changes: *Sita (GB) Ltd v Burton [1997] IRLR 501, EAT*. If, however, the changes are in fact being threatened, the Court of Appeal have held that the protection of this paragraph can be claimed by the leaving employee: *University of Oxford v Humphreys* [1999] EWCA Civ 3050.

80. Under the wording in the 1981TUPE Regulations it was held the employee still had to show a repudiatory breach of contract: *Rossiter v Pendragon plc [2002] IRLR 483, CA*. I consider that the wording in para (9) of the 2006 Regulations is wider than this. This means that the question of substantiality is one of fact in each case.

81. Therefore, even if the employer has the contractual power to require the change in question, the employee can still argue that it is a substantial one to his or her detriment. The converse must also be true: the fact that the employer did not have the contractual power to make the change does not mean that there must in law have been a substantial change under paragraph (9).

82. Where an employment is terminated by an employee because a transfer involved a change of pay to his detriment, article 4(2) requires the member state to provide that the employer is to be regarded as responsible for the termination: *Merckx v Ford Motors Co Belgium SA*: C-171, 172/94 [1996] IRLR 467*, ECJ*. A change in the level of remuneration awarded to the employee is a change in working conditions.

83. Paragraph (8) could leave an objecting employee without any remedy against transferor or transferee. However, where the he leaves due to substantial detrimental changes under paragraph (9), paragraph (8) does not apply.

84. The test of whether the substantial change is to the material detriment of the employee under regulation 4(9) is whether the treatment is of such a kind that a reasonable worker could or would take the view that in all the circumstances it was to his detriment. (*Tapere v South London & Maudsley NHS Trust* [2009] IRLR 972.) The respondent has however conceded that the changes in this case were to the claimant's material detriment.

Analysis

Paragraph 9

85. I have analysed this case by taking the claimant's secondary case first.

86. The Yumbucks scheme was unequivocally withdrawn at the transfer. This was worth sums of approximately £3,500 to £3,700 on a regular basis for the claimant, even if he did not receive these sums every year. The figures involved over the 17-18 years he had been in employment were substantial and any employee would reasonably regard the sums lost as to his detriment. This change was substantial and to the claimant's material detriment. It was a change in his working conditions, following *Merckz*. The claimant has treated the contract as terminated, paragraph 9 is engaged and he is to be treated as dismissed by his employer, the respondent. This analysis would apply on the basis of the loss of the share scheme alone. However the claimant would have had further losses on the transfer.

87. The pick n mix scheme was also withdrawn. MFIT made it clear that they would not be offering it. There was a somewhat vague suggestion that MFIT were reviewing their benefits, however it is clear that the claimant did not simply fear that this benefit would be lost. He was told that it would be withdrawn without being told what if anything would be in its place. This too was a loss which was substantial: it was worth some £1,000 a year to him and also had the unusual benefit of flexibility: he could swap one benefit for another according to his and his family's needs. A reasonable worker would take the view in all these circumstances that this loss was to his detriment, particularly when viewed in the light of the additional loss of the Yumbucks scheme.

88. The same applied to the discount card. No mention of this was made in the measures letter of 12 January 2018 but it is plain from the 13 March letter that this benefit will not be available to the claimant with MFIT Ltd. This is a smaller, but nonetheless material detriment to the claimant.

89. The bonus scheme as the respondent provided it would not be continued. Some bonus was to be put in its place, but MFIT was again vague about what it would be. Given my previous findings, this is perhaps academic, however in the lack of any concrete proposals by MFIT at the time, given that it was clear the

previous scheme would not continue, and that the claimant had been told by Andy Goves of MFIT that the new scheme would not be 'generous like' the respondent's scheme, this was more than a mere fear held by the claimant: he was going to lose a material benefit with no assurance that it would be replaced or replaced with a scheme of similar value and with some indication that the new scheme would be of less value. This was a substantial change and a reasonable employee would regard it as to his detriment in all the circumstances.

90. The claimant has treated the contract as terminated, paragraph 9 is engaged and he is to be treated as dismissed by his employer, the respondent.

91. For those reasons I consider that the claimant has been dismissed. The dismissal was self-evidently solely because of the transfer. No economic, technical or organisational reason has been advanced by the respondent in evidence or submissions, and indeed the contemporaneous correspondence (the letter of 17 January 2018) stated plainly that there were no economic implications and no measures being taken by the respondent in relation to the transferring employees. As a result, I do not make a finding on issue 5.11.

92. Therefore, without more, the claimant was unfairly dismissed. Because the claimant objected to the transfer, the liability for his dismissal did not transfer to the transferee. Regulation 4(8) would prevent the dismissal being by the respondent, save that paragraph 9 applies. Therefore, the claimant has been unfairly dismissed by the respondent which was his employer, and the respondent is liable for that dismissal.

Constructive dismissal

93. In case I am wrong about any of that, I turn to the claimant's primary case, that of constructive dismissal.

94. I do not find that the entitlement to the bonus scheme was implied into the contract. Mr Davey has accepted that the 2017 and 2018 terms and conditions bonus booklet and bonus scheme were contractual documents. If I implied into the claimant's contract a term that he was entitled contractually to be paid his bonus, that would be inconsistent with those two documents, so I do not do so.

95. There is no express term in the claimant's contract entitling him to take part in the 'Yumbucks' scheme. Nor however is there any term in the contract inconsistent with an implied term to that effect.

96. I turn to the factors in *Albion*.

97. The Yumbucks scheme was drawn to the attention of the claimant and his fellow employees in the documents described above; indeed, the claimant participated in the scheme.

98. There is no evidence about employees other than the claimant, but his experience is evidence of the number of occasions on which it was followed: he took part in the scheme from 2,000. He was eligible every year from 2,000

to 2019. So, I conclude that the scheme has been in place every year from 2000 to 2018.

99. I do not have evidence on whether payments were made automatically: it is clear that an employee had to be 'eligible'. According to the Yumbucks document one only had to remain an employee of KFC UK&I to be eligible to exercise Yumbucks. Eligibility at least was automatic. In the box, 'How it works', the text states, 'You are issued Yumbucks grants'. So, it appears that the issue of the grant is automatic. However, it is clear that the employee has to take decisions about whether to cash the grant in or wait and see if the value goes up. There is a warning not to forget about them, because 6 years after vesting they will expire.

100. I consider that, although colloquially written, the document produced by the respondent explaining the Yumbucks scheme shows an intention to be contractually bound. It uses the terminology of 'rights', and eligibility. It provides for exact calculations of the appreciation amount and for the circumstances when the right is forfeit.

101. I have no evidence about whether the policy was adopted by agreement.

102. The wording of the documents is such that it will have given the employees more than a reasonable expectation that they will receive the Yumbucks grant: they are told that they are eligible, so their expectation will be absolute.

103. The terms of the Yumbucks scheme were not set out in a written agreement, but they were clearly set out in writing and in detail. The wording of the documents makes it clear that the scheme was to be consistently applied.

104. Weighing all those factors up: although the facts of this case are not entirely square with the factors in Albion, I consider that the entitlement to the Yumbucks scheme was implied by custom and practice into the claimant's contract of employment.

105. Although the contract makes it clear that the right to swap benefits under the 'PicknMix scheme' was not contractual, so that the flexible elements cannot be implied into the contract, the contract also stipulates that the core benefits are themselves contractual. For these rights, there is no need to imply a term: the benefit is a contractual benefit, expressly provided but on terms that it can be withdrawn on notice.

106. The pension is one of the core contractual benefits, however that forms no part of this case.

107. The other core contractual benefits are Group Life Assurance and various income protection insurances.

108. The respondent has however reserved the right to withdraw the insurances at any time (subject to appropriate notice).

109. There is no mention of the discount store card in the contract of employment. It is not said to be a core contractual benefit. It was part of the flexible benefits described in the Benefits Guide 2018. That guide expressly states (albeit on its

back cover) that the benefits provided are discretionary and may be withdrawn without notice. The contract makes it clear that the flexible element of the pick'n'mix benefits was non contractual. I cannot imply into the a term that the claimant was entitled to the discount card by reason of custom and practice because this would be inconsistent with the wording of the contract.

110. On the above findings, the claimant had a contractual right to participate in the Yumbucks scheme only. MFIT was unequivocal that this right would not be transferred.

111. There was therefore a breach of an implied term in the claimant's contract of employment. This is a term which went to the level of his remuneration: it was his right to share in the profits of KFC. I consider that this was a fundamental breach of his contract of employment: it amounted to a unilateral reduction in the claimant's remuneration.

112. The claimant accepted this fundamental breach of contract and resigned in response to it. He did also resign in response to other losses, but he resigned, at least in part, in response to this breach. He did not affirm the contract after the breach.

113. Accordingly, he was dismissed by this means also. Pursuant to regulation 4(11) an employee retains a right to terminate his contract of employment in these circumstances without notice in acceptance of a repudiatory breach of contract by his employer.

114. I reject the respondent's submission that there was no breach of contract because the claimant resigned in response to the proposed breach. This was an anticipatory breach of contract and the claimant resigned in response to it.

115. For the reasons set out above, the dismissal is unfair.

Polkey

116. Although 'Polkey' was raised by the respondent as one of the issues at the outset of the hearing, the respondent called no evidence and made no submissions about the issue of the percentage chance of a fair dismissal in any event. Therefore, there will be no reduction to the compensation on this basis.

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Employment Judge Heal

Date: …24 September 2019……..

Sent to the parties on: .....

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For the Tribunal Office