EMPLOYMENT TRIBUNALS

Claimant: Mr J Roe

Respondent: Lantei Limited

Heard at: Manchester **On:** 30 - 31 October 2019 and 13 November 2019 (in Chambers)

Before: Employment Judge Ainscough (sitting alone)

REPRESENTATION:

Claimant: Mr N Sharples, Solicitor
Respondent: Mr R Lassey, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for constructive unfair dismissal is dismissed.

2. The claimant's claims for unlawful deduction from wages are dismissed.

REASONS

Introduction

1. The claim was brought by way of a claim form dated 12 July 2018 in which the claimant claimed he had been constructively dismissed from his role as a Business Development Manager from the respondent company, which provides electrical compliance services to business across the UK.

2. The response form dated 20 August 2018 defended the proceedings. The respondent denies that there was a repudiatory breach of any express or implied term of the claimant's contract or in the alternative, if there was, the claimant did not resign in response to such a breach.

Issues

3. Following submission of the claim form and applications to amend made on 9 August 2018 and 29 August 2018, and the judgment of Employment Judge Holmes at the preliminary hearing on 14 December 2018, the claimant contended that the following amounted to fundamental breaches of contract that caused him to resign:

(a) A failure by the respondent to pay contributions to the Occupational Pension Scheme; and

(b) A failure by the respondent to investigate the claimant's grievance.

4. In addition, the claimant also sought remedy for the following deductions, which he maintained were unlawful:

(a) The failure to pay the claimant a bonus of £2,400;

(b) The deduction of £365.40 for an alleged inability to work;

(c) A deduction of £1,440 for damage to a company vehicle.

Evidence

5. The parties agreed a joint bundle of written evidence running to 479 pages.

6. The claimant gave evidence and did not call any other witnesses. The respondent called three witnesses: Anthony Smith, the Chief Executive Officer who had interaction with the claimant before and after his resignation; Andrew Livesey, the claimant's line manager and responsible for the initial disciplinary investigation; and Jon Greenwood, an Operations Director with the respondent who chaired the disciplinary meeting.

7. At the outset of the hearing, I noted a Judgment made by my colleague, Employment Judge Sharkett, on 14 and 15 May 2019. In that Judgment Employment Judge Sharkett had found that the disciplinary process was paused on 1 March 2018 and that it was reasonable in the circumstances of the case for that process to be paused on that date. It was also found that the respondent ceased to have reason to pause the disciplinary process after 20 March 2018 after which time it could or should have recommenced the disciplinary process unless there was good reason not to do so.

8. Employment Judge Sharkett ordered that the reasons for the Judgment were given orally at the hearing and could not be relied upon in any other hearing or examined in cross examination by either party. The documents considered by Employment Judge Sharkett at the preliminary hearing were contained in a sealed envelope with instructions that they not be opened.

9. As a result, I did not consider any of that documentation or the oral reasons given by Employment Judge Sharkett for that decision. It became apparent during the course of the witness evidence that the witnesses could not give evidence about events between 1 March 2018 and 20 March 2018. Following submissions from the legal representatives, I determined that the 1 March 2018 to 20 March 2018 would

not be considered by me, and for the purposes of this Judgment the 20 March 2018 would be taken as to immediately follow 1 March 2018.

Relevant Legal Principles

10. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which 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."**

11. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

12. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the 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."**

13. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

14. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

15. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

16. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation

approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
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> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
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> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

17. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

18. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516**. Alternatively failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

19. In the case of **Assamoi v Spirit Pub Company (Services) Limited (formerly known as Punch Pub Co Limited) UKEAT/0050/11/LA** the Employment Appeal Tribunal confirmed that (paragraph 36):

> **"There is a fundamental distinction which, it is perhaps more easy to recognise than to define, between there being a fundamental breach of contract that an apology by an employer cannot cure and there being action by an employer that can prevent a breach of contract taking place."**

20. In the case of **Blackburn v Aldi Stores Limited [2013] IRLR 846** the Employment Appeal Tribunal determined that a failure to adhere to a grievance procedure was capable of amounting to or contributing to a fundamental breach. However, not every failure to adhere to such procedure will constitute a fundamental breach. The Employment Appeal Tribunal was clear that this is a question for the Tribunal to assess in each individual case.

21. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions unless:

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

22. A relevant provision in the worker's contract is defined by section 13(2) as:

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

23. By virtue of section 14, section 13 does not apply if the deduction is for the overpayment of wages.

24. Section 27 defines wages which includes:

> **"any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."**

25. In **Russell v Ikon Office Solutions plc ET Case No.2201827/06** a Tribunal held that an employer was entitled to deduct the cost of a replacement device that was stolen as a result of the employee's negligence, because the contract of employment provided for such a deduction in such circumstances in accordance with section 13(2)(a).

26. In **Dawson and anor v South Tyneside Metropolitan Borough Council ET Case No.2512046/05** a Tribunal held that whilst a reduction in the rate of pay on the commencement of a new role had not been varied in the contract of employment, employees had received written notice in a letter detailing the reduction and the deduction was therefore lawful in accordance with section 13(2)(b).

Relevant Findings of Fact

27. The claimant was a Business Development Manager for the respondent responsible for consulting with commercial companies for the provision of electrical testing compliance services. The aim of the claimant's role was to generate sales and manage accounts.

28. The claimant was predominantly based at home and only attended at Head Office approximately once a fortnight.

Damage to Company Car

29. On 29 January 2018 the claimant's car was damaged whilst parked on a residential street close to the respondent's Head Office.

30. The respondent leased office space for its Head Office from another company and was therefore limited in the number of car park spaces that were allocated to the business. As a result, those spaces at Head Office were reserved for visitors and staff were instructed to park in designated car parks where the respondent had made arrangements for staff to park.

31. There had been an issue between the claimant and the respondent following the claimant attempting to block book a visitor's space at Head Office to avoid parking on the street. The claimant was advised on 2 October 2017 in an email from Andrew Livesey that he could not block book a visitor's space and was to call the office to reserve a space on the day that he required one. In the absence of a space, the claimant was directed to in one of the alternative car parks. If one of the alternative car parks was not available, the respondent expected staff to use the local NCP next door to Head Office though the claimant was unaware of this option.

32. At paragraph 32.12.4 on page 87 of the company handbook, it states that:

> "It is an express term of your contract of employment that the company shall have the right to retain from your salary the cost of any repairs to the vehicle."

33. Following the claimant's resignation, the sum of £1,440 was deducted from his final salary to cover the cost of the damage to the company vehicle.

Claimant's Grievance

34. On 25 January 2018, the claimant was invited to a disciplinary hearing following an incident with the receptionist at the respondent's Head Office on 23 January 2018. It was alleged that the claimant had been very unpleasant and expressed a terrible attitude towards the receptionist when questioned about the use of the car park.

35. The claimant was informed that the hearing would be dealt with by his line manager, Richard Shine. The claimant instructed solicitors to respond to that letter raising concerns about a lack of investigation and a predetermined outcome. As a result, the respondent confirmed the hearing would be chaired by the Chief Executive, Anthony Smith, and that investigations would be carried out by another investigating officer.

36. On 31 January 2018, the investigating officer, Andrew Livesey, took the decision to suspend the claimant in order to progress the investigation. On the same date, the claimant was invited to an investigation meeting and notified of allegations of misconduct and gross misconduct.

37. On 2 February 2018 the claimant's solicitors responded to both letters on his behalf and raised further concerns about the disciplinary process.

38. The claimant was interviewed by a different investigating officer on 8 February 2018.

39. The claimant was sent a copy of the investigation report on 22 February 2018 and informed that the disciplinary hearing would take place on 23 February 2018. The claimant continued to raise his concerns and a disciplinary hearing was scheduled for 1 March 2018.

40. On 26 February 2018, the claimant submitted a grievance via his solicitor complaining of:

(1) A failure by the respondent to pay pension contributions;

(2) A campaign of bullying by Richard Shine; and

(3) An unfair disciplinary investigation.

41. On 27 February 2018 the respondent's solicitor responded to receipt of the grievance and advised the claimant's solicitor that the respondent would investigate the claimant's grievance in accordance with the grievance procedure in regard to the issues raised about pension payments and the bullying by Richard Shine. It was stated that that investigation would be carried out once the disciplinary hearing on 1 March had been finalised. It also stated that the claimant's concerns in regard to the unfair disciplinary investigation would be dealt with as part of the disciplinary process on 1 March 2018, and should the claimant remain unhappy with that matter, he could raise it at any appeal process.

42. The respondent's grievance procedure sets out at paragraph 11.5.1 on page 63 of the company handbook that there would be a grievance meeting scheduled usually within seven days of receiving a written grievance.

43. The claimant attended the disciplinary hearing on 1 March 2018. The meeting was adjourned following the disciplinary Chair discovering that he had no details of the claimant's grievance in regard to the unfair disciplinary procedure.

Pension Contributions

44. On 12 February 2018 the claimant and colleagues received a letter from Peoples Pension informing them that their employer (the respondent) had not paid contributions to the pension scheme on their behalf for the month of September 2017. The claimant and his colleagues were directed to speak to the respondent about this.

45. A colleague of the claimant sent a text message on 20 February 2018 to Anthony Smith, the Chief Executive, asking for an explanation. Anthony Smith responded explaining Peoples Pension were wrong and payments had been made to the scheme. A further text was sent from Anthony Smith to the claimant's colleague stating that Peoples Pension were going to send an apologetic response to the respondent and he would forward the same on.

46. The claimant subsequently contacted Peoples Pension who informed him that there had been no mistake and the contribution had not been paid. The claimant did not speak again to Peoples Pension again before he submitted his grievance or resignation.

Claimant's Resignation

47. On 20 March 2018 the claimant submitted his resignation and provided one month's notice to the respondent.

48. The reasons given by the claimant for his resignation were as follows:

(a) Unlawful deduction of pension contributions;

(b) Failure to follow grievance and disciplinary procedures;

(c) Dishonesty towards clients;

(d) Removal of client accounts from claimant;

(e) Refusal of a company car; and

(f) Late payment and underpayment of colleagues' wages.

49. Following receipt of the claimant's resignation, he was instructed to work from home and await instructions from his line manager, Andrew Livesey.

Deduction from wages for non working days

50. On receipt of the claimant's final wage, he noted that he had a deduction of £365.40.

51. The claimant was absent from work as a result of sickness on 28 March 2018. In addition, on 17 April 2018, the claimant was unable to attend work because he had to look after a sick child.

52. If an employee of the respondent is sick, paragraph 10.4 of the contract of employment states that they will be provided with statutory sick pay.

Bonus Payment

53. On 3 April 2018 the claimant submitted a further grievance which included the non payment of a personal performance bonus for Quarter 2 of £2,400 for the period covering 1 December 2017 to 28 February 2018. The claimant stated he should have been paid alongside his normal wages at the end of March 2018.

54. On 4 January 2018 the respondent set out a commission structure for the period 2017 to 2018. The claimant's personal accumulative target for Quarter 2, was £600,000. It stated that should the claimant meet that target, he would be entitled to a bonus of £2,400. The first bullet point in the structure states that all supporting documentation must be on the system at the time of running the commission report "i.e. at the end of each period" in order for the employee to achieve bonus. This structure varied the commission paragraph in the claimant's contract dated 22 September 2014.

55. Paragraph 7.3 of that commission structure confirmed that any commission would be payable to an employee on the payment date.

56. Clause 1.1 of the claimant's contract defined "payment date" as "within 30 days from the date of invoice of the orders qualifying for commission".

57. Paragraph 7.7 of that commission structure detailed that a bonus payment would not be paid, if at the payment date, the employee had left the respondent's business or was working their notice period.

Submissions

Respondent's Submissions

58. The respondent submits that the claimant's grievance in regard to an unfair disciplinary process would have been dealt with had the disciplinary hearing reconvened or in any event at any appeal against the finding in a disciplinary hearing. The respondent contends that the response from the respondent's solicitor on 27 February 2018 sets out clearly how the grievance will be dealt with.

59. It is the respondent's position that the disciplinary matter had been live since January 2018 and there was no reason to delay the conclusion of that matter to deal with a grievance which was submitted over a month later. The claimant had no reason to doubt that the grievance would not be dealt with. The respondent also contends it was not reasonable to deal with the unfair disciplinary hearing allegation before reconvening the disciplinary hearing. The respondent was clear that it wanted to avoid causing the claimant further stress, from which he admitted he was suffering, and sought to deal with matters sequentially.

60. The respondent submits it was right to rely on solicitor's advice and deal sequentially. The seven day time limit is a suggestion rather than mandatory and in any event the grievance policy is not contractual.

61. The claimant agreed in evidence that his grievance was premature and he should have awaited a decision of the disciplinary hearing.

62. The respondent contends that the pension payments were made before the claimant resigned and before he submitted his grievance. The simple matter is that the claimant did not bother to check. The respondent contends that the claimant should have contacted Peoples Pension before submitting his resignation.

63. The respondent concedes that there was a delay in making the payments but once discovered that it was the respondent's fault, it was immediately rectified. The

comments made by the Chief Executive in the text messages were a genuine belief on what he had been told by his Finance Manager.

64. The respondent submits that it had the right contractually to deduct the cost of car repairs. It further submits that the claimant had ignored instructions and parked his car on a street. The claimant had no evidence to show that other people who had left the company with a damaged car had not suffered a deduction. The respondent doubts the claimant's credibility in regard to this incident.

65. It is the respondent's contention that on two separate occasions the claimant called in sick and was paid statutory sick pay. The respondent was therefore entitled to deduct any overpayment to take account of the statutory sick pay period.

66. In regard to the bonus, the respondent submits that any bonus payment was only due on 30 March 2018. Clause 7.7 of the contract of employment clearly states that if the employee is no longer employed or working the notice period on the date the bonus is due, it will not be paid. The respondent was therefore entitled to withhold that payment.

Claimant's Submissions

67. The claimant submits that both breaches were contractual and amounted to a fundamental breach. The grievance in regard to the unfair disciplinary procedure should have been dealt with before the disciplinary process itself. The claimant submits that the respondent's concern in regard to his welfare is disingenuous and there was no evidence that the claimant was suffering from stress, and in any event the disciplinary officer did not know he was to deal with the grievance at the outset of the hearing.

68. It is submitted on behalf of the claimant that even if the disciplinary grievance should have been dealt with at the disciplinary hearing, there was no excuse for not dealing with the grievance in regard to the bullying complaint and the pension payment complaint. The claimant is clear that the reasons he resigned were the failure to pay pension contributions and the failure to deal with the grievance.

69. The claimant was not aware when he resigned that the pension contribution issue had been rectified. The claimant is clear that at no stage prior to his resignation did the company seek to inform him or his colleagues as to the correct position. The claimant contends this can amount to a fundamental breach.

70. The claimant contends that the respondent had a discretion whether to make the deduction for the damage to the car. The claimant did not know that there was an alternative NCP car park which he could use. The claimant contends it was unreasonable for the respondent to deduct the cost of the damage from his pay. The claimant contends the deduction was beyond what the respondent was contractually entitled to deduct.

71. The claimant concedes that he was sick on one day and took dependent leave on another day. The claimant also concedes that if the pay he was entitled to for those absences equates to a deduction of £365.40, he no longer seeks reimbursement of this amount.

72. The claimant submits that the bonus scheme he received on joining the company was different to that when he left. It is the claimant's case that the qualification for payment is a different date to when the actual payment was due to be made. The claimant submits he was in excess of his target and the supporting documentation was in place. It is the claimant's case that this occurred prior to the submission of his resignation and therefore he is entitled to payment.

Discussion and Conclusions

UNLAWFUL DEDUCTION FROM WAGES CLAIM

Deduction for damage to car

73. A deduction will not be unlawful if it is authorised by virtue of a contract of employment. An employer can rely on such a provision if the employee has had notification of the written terms of the contract prior to the deduction in question.

74. The claimant confirmed that when he commenced employment he was familiar with the company handbook. The claimant accepted that the handbook amounted to contractual terms. Paragraph 32.12.4 of the company handbook states that it is an express term of the claimant's contract of employment that the respondent would have the right to retain the cost of any repairs to a vehicle. This paragraph is written in the context of an employee with a company car leaving the business.

75. The claimant was informed of his contractual terms including the content of the company handbook on joining the business. The respondent has deducted the cost of the repair to a company car on the claimant's termination from employment. Whilst the claimant submits that the deduction is unfair, he has not proven that it was unlawful. As per the contract of employment and express term in the company handbook, the deduction for the cost of the repair to the car was lawful.

Deductions made for claimant's absence

76. In submissions the claimant's representative conceded that the claimant was off sick on 28 March 2019 and had dependent's leave on 17 April 2019. In light of these concessions, the claimant also conceded that should he have been overpaid for those two days of employment, it was lawful for the respondent to deduct the value of the overpayment. I did not hear submissions from either party as to the correct amount the claimant should have received for those two days' absence. However, it appears that in principle the respondent was right to deduct the overpayment from the claimant's final wage. Section 14 of the Employment Rights Act 1996 confirms that any deduction made by an employer of an overpayment of wages will not be deemed unlawful.

Non payment of bonus

77. The respondent provided a variation to the commission section of the employment contract on 7 January 2018 which set out the target expected to achieve bonus and the criteria for qualification. One such criteria was that all supporting documentation would be uploaded to the system at the time of running the commission report which is clarified as the end of each period.

78. The end of the period was 28 February 2018. There is no term contained within the document at page 288 of the bundle which varies the term of payment date, and the only evidence available to the Tribunal is that contained within the employment contract at page 93 of the bundle which states that the payment date will be within 30 days from the date of invoice of the orders qualifying for commission. 30 days from 28 February 2018 is 31 March 2018, and it is my finding that the claimant's bonus was due to be paid on 31 March 2018.

79. This is supported by the claimant's own contention in his grievance document dated 3 April 2018 that he was expecting to receive his bonus payment at the "end of March".

80. Similarly, the document at page 288 of the bundle does not vary the provision found at paragraph 7.7 on page 96 of the employment contract which states that:

> "If at the payment date the employee is no longer employed or has given notice to terminate, the employee shall have no right to payment of commission."

81. Again, this is the only evidence before the Tribunal in regard to the contractual term and the provision on which the respondent seeks to rely.

82. I find therefore that the claimant was on notice of this contractual term and the respondent was entitled to withhold the payment of the bonus following the claimant's resignation from employment.

CONSTRUCTIVE DISMISSAL CLAIM

Non payment of pension contributions

83. In the letter of resignation submitted by the claimant on 20 March 2018 the first reason given for resignation is "unlawful deduction of my own (and my colleagues) pension contributions since September 2017".

84. In the amendment to the claim submitted to the Tribunal by email of 9 August 2018 and further particulars of claim of 29 August 2018, the claimant asserted that the respondent had failed to make pension contributions to the pension scheme.

85. I heard evidence from the Chief Executive, Anthony Smith, that on being notified by his staff that the pension contributions had not been made, he made enquiries with his Finance Manager. Mr Smith was clear that he was told by his Finance Manager that the contributions had been made but because there had been a delay in uploading a spreadsheet, they could not be allocated to particular employees' pension schemes. The Finance Manager informed Mr Smith that the fault lay with Peoples Pension and not with the respondent.

86. Mr Smith was clear in his evidence that this was the reason why he responded to the text message from the claimant's colleague in the way that he did. Mr Smith gave evidence that he subsequently discovered that this was not in fact the case and the contributions had not been made to Peoples Pension. Mr Smith confirmed that on discovery of this fact, the contributions were paid on 23 February

2018. This fact was not conveyed to the claimant or his colleagues prior to the claimant's grievance on 26 February 2018 and his resignation on 20 March 2018.

87. Case law has established that in order for there to be a fundamental breach on which an employee can rely in order to resign from employment, the employer must have conducted itself in a manner which is "likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". The non payment of pension contributions, deducted from an employee's salary, could destroy or seriously damage the relationship of confidence and trust between an employer and employee. However, prior to the submission of the claimant's grievance and his resignation, the non payment had been rectified by the respondent.

88. The claimant had independently contacted Peoples Pension to speak with a representative about the non payment. The claimant admitted in evidence that prior to submitting his grievance or resignation he did not seek to check the situation with Peoples Pension. Similarly, it would appear that he did not seek to check the position with the respondent before the submission of either document.

89. It is unfortunate that the respondent did not seek to reassure the claimant or his colleagues once the payment had been made to Peoples Pension. It was Mr Smith's evidence that the company worked in an open plan environment and that had anybody been concerned, they would have received such reassurance. The reality is that prior to the submission of the grievance or the claimant's resignation the pension contributions had been made, and it was remiss of the claimant not to check.

90. I do not accept that at the time of submission of the claimant's resignation the respondent was in breach of the contract of employment. Had the claimant submitted his resignation between 12 February and 23 February, there would have been such a fundamental breach to justify the claimant's resignation. As it was, by 20th March 2018 any such breach had been rectified.

Handling of claimant's grievance

91. The claimant submitted his grievance on 26 February 2018 within a week of the scheduled disciplinary hearing. One of the complaints made by the claimant was about the unfair disciplinary procedure. The respondent's policy endeavours to hold a grievance meeting within seven days of the submission of any grievance.

92. The claimant's representative was informed on 27 February 2018 that the unfair disciplinary procedure complaint would be dealt with at the disciplinary hearing scheduled for 1 March 2018. The other two parts to the claimant's grievance would be dealt with following the conclusion of the disciplinary hearing.

93. The respondent's grievance policy is an expectation rather than a mandatory time limit. In fact, the ACAS Code of guidance on grievance does not set down any mandatory time limits in which grievances must be dealt with, and in any event the respondent's grievance policy is not contractual.

94. Given the short period of time between the claimant submitting the grievance and the disciplinary hearing, I accept the respondent's explanation that it considered it reasonable to deal with the disciplinary hearing and the claimant's concerns about the same on 1 March, and then deal with the other aspects of the grievance once that disciplinary hearing had concluded. In reality this would have meant that the claimant's concerns about the disciplinary hearing would have been dealt with at the disciplinary hearing on 1 March and therefore within the seven day expectation outlined in the grievance policy, and the other parts of the grievance would in any event have been heard a short time thereafter.

95. I am not concerned with the period from 1 March 2018 to 20 March 2018 for the reasons outlined in the earlier part of this Judgment. The disciplinary hearing was adjourned on 1 March 2018 before there was a discussion of either the disciplinary allegations or the claimant's grievance. The Judgment of my colleague (having seen other evidence) is that it was not reasonable for the respondent to start the disciplinary process until 20 March 2018. It therefore follows that it was not unreasonable of the respondent not to deal with any part of the claimant's grievance prior to the recommencement of the disciplinary process.

96. The respondent was right that the disciplinary process had started in January 2018 and the claimant had submitted his grievance at the end of February 2018, some days before the disciplinary hearing was due to take place. On 20 March 2018 the claimant submitted his resignation. Mr Smith of the respondent was clear that because the claimant had submitted his resignation he could see no point in dealing with the claimant's grievance because the respondent had no intention of continuing with the disciplinary process, there was to be no ongoing relationship with the claimant.

97. I do not accept that the respondent failed to deal with the claimant's grievance. The email of 27 February 2018 from the respondent's representative set out clearly the respondent's plan to deal with the grievance which was thwarted by the adjournment of the disciplinary hearing on 1 March 2018 and then the claimant's resignation on 20 March 2018.

98. The respondent's plan of how to deal with the grievance as set out on 27 February 2018 did not amount to a breach of contract let alone a fundamental breach of contract on which the claimant could rely as support for his resignation.

Employment Judge Ainscough

Date: 13 December 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 December 2019

FOR THE TRIBUNAL OFFICE

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