EMPLOYMENT TRIBUNALS

Claimant: N Munden
v
Respondent: Tori Ltd (1) Tori Global Ltd (2)

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD remotely: by CVP **On: 24, 25 and 26 November 2020**

Employment Judge: Ms D Henderson (sitting alone)

Appearances
For the claimant: Ms A Johns (Counsel)
For the respondent: Ms Y Montaz (Senior Litigation Consultant)

JUDGMENT

1. **The correct respondent is Tori Ltd. Tori Global Ltd is removed from the proceedings.**

2. **The claimant's claim for constructive unfair dismissal and unlawful deduction of wages is successful (on liability).**

3. **There shall be a Remedies Hearing (1 day) on 28 January 2021 (as agreed with the parties at the hearing). This shall be a remote hearing using CVP**

4. **Directions for CVP Remedies Hearing**

By no later than 5 days before the hearing, the respondent must email a copy of the remedies bundle, the witness statements, any skeleton or opening, and any other relevant document, or a link to a site from which they can be downloaded, to londoncentralet@justice.gov.uk The respondent should copy the claimant into this email. Each party shall be responsible for ensuring they have access to the same written materials that have been sent to the tribunal in a format appropriate to them.

The respondent's email should include **the case number and hearing date and say "FAO THE CVP CLERK" in the subject line.**

All written materials should be provided in pdf format and should be rendered text readable. Witness statements should be provided in a separate bundle.

All witnesses when giving evidence must have access to:

a. Their own witness statement
b. The witness statements of all other witnesses (as they may be questioned on these)
c. The bundle

The documents must be clean copies, without any markings, highlighting, notes or bookmarks.

Each party shall be responsible for ensuring the witnesses they are calling have access to the required written materials in a format appropriate to them.

REASONS

Introduction

1. This was a claim for constructive unfair dismissal and for unlawful deduction of wages/breach of contract for two days' pay. Ms Montaz (on behalf of the respondent) conceded at the commencement of the hearing that the effective date of termination (EDT) was 10 February 2020 (not 9 February as stated in the ET3) and also conceded that the claimant was owed two days' pay.

2. Having taken instructions, Ms Montaz confirmed that the correct respondent was Tori Limited (R1), referred to in this judgement as "the respondent": this was the active company which paid the claimant. R2 had been incorrectly named as the employer in the Offer Letter, but was a dormant wholly-owned subsidiary of R1. R2 plays no part in the proceedings.

3. The claimant was employed by the respondent as Head of Cyber Security on 8 May 2017 until 10 February 2020 when he resigned with immediate effect claiming constructive dismissal. He issued an ET1 on 4 June 2020 following early conciliation via ACAS from 27 April to 5 May 2020. The respondent defended the claims.

Issue of Constructive Unfair Dismissal

4. At the commencement of the hearing, I asked the parties to confirm the outstanding issues for determination by the Tribunal, which were agreed as set out below.

5. The main issue was whether the respondent had committed a series of acts culminating in "a last straw" which formed a repudiatory breach of the implied term of trust and confidence such that the claimant was entitled to accept that breach by his resignation on 10 February 2020 and to claim constructive unfair

dismissal contrary to section 95 (1) (c) of the Employment Rights Act 1996 (ERA).

6. The claimant said that the last straw was (as set out at paragraph 17 of the Particulars of Claim (page 19 of the agreed bundle) that he was told in the appeal outcome letter (which, in fact, overturned the decision to dismiss him and reinstated him) that his actions amounted to "Gross Misconduct" and that he would receive a Final Written Warning instead.

7. The claimant says he had never previously been told of any impropriety: he had originally been warned that he was being placed on a capability process (which he disputed). He was told (on 5 December 2019) that he was dismissed due to lack of trust and confidence for not following the company's sickness procedures, thereby jeopardising an important trip to Saudi Arabia which resulted in financial loss to the respondent (Dismissal letter at pages 86-86). The claimant felt that the respondent's conduct put him under intolerable pressure as any future minor misdemeanour could result in his dismissal.

8. The respondent denies that there has been any breach of contract at any stage. The respondent maintains that there had been ongoing performance issues with the claimant. Ms Montaz confirmed (in response to a specific question from Ms Johns) that no point was taken on the claimant's delay (of 10 days from 31 January (the date of the appeal decision) to 10 February 2020) in accepting the breach.

Conduct of the Hearing

9. This was a remote hearing (for 3 days) which has been consented to by the parties. The form of remote hearing was using the Cloud Video Platform -CVP (V). A face to face hearing was not held because all issues could be determined in a remote hearing, to which the parties did not object.

10. There were some technical problems on Day 1 with a power cut in Ms Montaz's office which delayed the proceedings by around 1.5 hours. Furthermore, Ms Montaz asked to stop the hearing at around 4.15pm on Day 1 as she was struggling to see due to poor lighting (and did not wish to turn on any lights as this may trigger another power cut). There were also some technical difficulties for Mr Davies in giving his evidence on Day 3 (see below).

Interlocutory applications

Respondent's application re amendment of the issues

11. The proceedings were also delayed by an application at the commencement of Day 2 by the respondent to amend the agreed issues. Ms Montaz said she had "inadvertently" omitted to raise the delay point on Day 1. It was pointed out that she had specifically confirmed that no point was being taken by the respondent on delay – which could not be construed as "inadvertent". Ms Montaz accepted that; but mentioned that the EAT had indicated that lists of issues should not be regarded as conclusive (by which I took her to mean, ***Parekh v London***

Borough of Brent **[2012]** though this case was not expressly cited to me). I accept that as a matter of principle, but this was a different situation.

12. Ms Johns pointed out (and Ms Montaz agreed, having been given time to check the ET3 and the response) that the delay point had not been pleaded by the respondent. This meant that the Ms Montaz's application would, in effect, be an application to amend the response. Ms Johns cited the **Selkent ([1996] ICR 586)** principles and in particular the balance of prejudice against the claimant as to how he had structured his own case evidentially. If the amendment were allowed then the claimant would seek an adjournment to allow him to consider and possibly amend his position on the relevant "last straw".

13. I allowed both parties time to take instructions. Upon resuming the proceedings, Ms Montaz confirmed that she was not making an application to amend the response and that she withdrew her application to amend the list of issues.

Claimant's application on amendment

14. At the commencement of Day 3 Ms Johns brought an application (which had been flagged by email overnight) to amend the claim for unlawful deduction of wages/breach of contract for one more day's pay, of £673.08 (ie three days in total). This flowed from the respondent's concession that the EDT was 10 February 2020 (and not 9 February as per the respondent's previous position).

15. Ms Montaz opposed the application saying that the claimant had been legally advised throughout the dismissal and appeal processes and in submitting the ET1. She also said that if the amendment was allowed the respondent would seek to amend its response to include a breach of contract claim against the claimant for terminating his contract without notice. I pointed out that this would technically be an amendment application by the respondent to include a counterclaim to the employee's breach of contract claim, which had not previously been made. This could result in a postponement of the case to allow the parties to re-plead their positions.

16. I allowed both parties time to take instructions. Following that break, Ms Montaz confirmed that the respondent would not seek to amend the response but did oppose the claimant's amendment application. However, Ms Montaz was not able to identify any real prejudice to the respondent in terms of proceeding with the case if the amendment was allowed, other than the fact that the respondent may have to pay a further day's pay to the claimant.

17. I noted that the amendment to the claim was essentially a matter for evidence on remedies and there would be no reason why the current liability hearing could not continue. Both representatives agreed.

18. I allowed the amendment following the **Selkent** principles. The amendment was a new head of loss within an existing claim (for unlawful deduction of wages/breach of contract) brought by the claimant. The claimant said that the EDT had only finally been conceded as 10 February at the start of this hearing, which meant there had been a shortfall of a day's pay claimed. Ms Montaz was

unable to identify any real prejudice or hardship to the respondent in allowing the amendment. Further on the basis of the overriding objective, I find that it would be proportionate to allow the amendment given the relatively low additional amount sought by the claimant. If the claimant did not succeed in his constructive dismissal claim, there would be no further loss to the respondent.

Witnesses and documents

19. I heard evidence from the claimant (afternoon of Day 1 and morning of Day 2) and from Paul Lowrie (on behalf of the claimant) on the morning of Day 2. The claimant also produced written witness statements from Raaj Parmar and Rose Hunt but they did not give oral evidence and so limited weight can be attached to those statements.

20. On behalf of the respondent, I heard evidence from Martin Harvey (CEO) on the afternoon of Day 2; Susan Harvey (Head of HR) – who made the decision to dismiss the claimant, on the morning of Day 3; William Higgins (Managing Partner of Aspiro Management Consultants based in Dubai) on the afternoon of Day 3 and Robin Davies (Non-Executive Director of the respondent) - who heard the claimant's appeal against his dismissal, on the afternoon of Day 3.

21. Mr Davies had problems with his internet connection when giving his evidence in that his video and audio could not function simultaneously. I eventually agreed (with both parties' consent) that we would hear his evidence using the audio function only. Mr Davies confirmed that he had a hard copy folder of the agreed bundle and so had access to the documentary evidence.

22. All the witnesses adopted their written witness statements as their evidence in chief and answered questions in cross-examination and from the EJ and representatives were allowed the opportunity for re-examination. Witnesses were given regular breaks and any which were specifically requested. Mr Harvey needed breaks every 30-40 minutes, which were taken.

23. The documents to which I was referred were in a bundle of 499 pages in total (page numbers in this judgement and reasons are to that bundle). Unfortunately, the bundle was not sent as one file but in four separate sections, which meant that the thumbnail pages in the pdf files were not consecutive and could not be easily accessed; this slowed the hearing process down.

24. Both parties' representatives provided written submissions and made brief oral submissions on the afternoon of Day 3. I reserved my Judgement and (in accordance with standard Tribunal practice) agreed with the parties, a provisional date for a one-day Remedies Hearing (if needed) on 28 January 2021, which it was agreed could be conducted using CVP.

Evidence and Findings of Fact

25. I heard detailed evidence from the witnesses, including lengthy (though not strictly relevant) evidence on the claimant's objectives and performance. I make

only such findings of fact as are necessary to determine the outstanding issues in this case.

Background Facts – not in dispute

26. The claimant commenced work for the respondent on 8 May 2017 as head of Cyber Security. His terms of employment were set out in a letter dated 22 May 2017 (at pages 34-38). Mr Harvey accepted that the employer had been incorrectly stated as TORI Global Limited, whereas the correct employer was Tori Ltd. Mr Harvey accepted that the claimant was a senior member of the team and was paid accordingly.

27. The claimant had been introduced to the respondent organisation by his neighbour and friend, Paul Lowrie, who had initially been the claimant's line manager until his departure from the organisation in June 2019. From June - August 2019 Mr Harvey had been the claimant's interim line manager and was succeeded in that role by Chris Renardson.

28. In her evidence Mrs Harvey said she was the respondent's Head of HR, but was not formally qualified in HR matters. Ms Hunt was the HR manager at the relevant time and conducted the day-to-day administrative and strategic matters relating to HR. Mrs Harvey said that she relied on Ms Hunt and her external advisers, Peninsula, to provide advice on HR matters and on employment law generally.

29. The respondent's Employee Handbook dated May 2018 was at pages 477-490. It was agreed between the parties that the policies and procedures set out in the handbook were not incorporated as contractual terms into the contract of employment.

30. The section on "Notification of Incapacity for Work" was at page 482 and stated that notification of sickness absence should be made by telephoning either the HR manager or HR assistant as well as the employee's immediate line manager. It was agreed between the parties that on 25 November 2019 the claimant had informed Ms Hunt by email at 08:45 that he was off sick and unable to attend scheduled meetings for that day (page 72).

31. The capability procedures are at pages 484-485. These state that if the employer has general concerns about an employee's ability to perform their job, they will try to ensure that the employee understands the level of performance expected and that adequate training and supervision is provided. If the standard of performance is still not adequate there will be a warning in writing that a failure to improve and to maintain the performance required could lead to dismissal. Failure to improve after a reasonable time could lead to a final warning of dismissal unless the required standard of performance is achieved and maintained.

32. The disciplinary procedures are at pages 485-487. This is set out in sections A-I. Section E is headed "Rules covering Gross Misconduct. This sets out a non-

exhaustive list of examples of gross misconduct including matters such as serious instances of theft or fraud; physical violence or bullying; possession of or being under the influence of drugs at work; breach of health and safety rules endangering lives of others. Such behaviour would result in "a fundamental breach of contractual terms that are irrevocably destroys the trust and confidence necessary to continue the employment relationship".

33. Section F sets out the disciplinary process which involves a notification in writing by the HR manager leading to a disciplinary interview to hear all the facts which will be followed by written notification of the appropriate sanction.

The claimant's performance

34. This was a matter of considerable dispute between the parties and there was lengthy evidence given in cross-examination of the claimant and Mr Harvey on this matter. However, as mentioned above, it was accepted by the respondent's witnesses that the claimant's performance was always a secondary matter with regard to the initial decision to dismiss him and the subsequent appeal decision to reinstate him with a final written warning due to gross misconduct. Therefore, I do not propose to make detailed findings with regard to whether the claimant did or did not meet such performance targets/objectives which may or may not have been set by the respondent.

35. Mr Harvey accepted that the claimant's performance appraisals/reviews whilst Mr Lowrie was his line manager were positive (pages 240 and 262). Mr Harvey also accepted that at the time those appraisals were conducted, Mr Lowrie was acting for the respondent and that neither Mr Harvey, nor any other senior manager, had ever questioned the accuracy of those appraisals.

36. Mr Harvey also accepted that the claimant had received pay rises in 2018 and 2019. Mr Harvey said that these were based on a cost of living percentage which had been the same for all employees; however, he accepted that this fact had never been communicated to the claimant (pages 225 and 302) and that it would be reasonable for the claimant to assume these pay rises reflected a positive view of his performance. This was especially the case as Mr Harvey also accepted that the Employee Handbook (page 480) stated that pay rises were linked to performance, though he maintained that this was performance of the organisation as a whole and not necessarily individual performance.

37. Mr Lowrie referred at paragraph 8 of his witness statement to an exercise involving a 9-box grid performance review (assessing candidates on potential and performance) which had been carried out by Mr Harvey, Mr Renardson and the other joint-MD, Mr Liassides. Employees were graded 1-9, with 1 being the highest grade and 9 being the lowest. The claimant had been graded at 5, whereas Mr Lowrie thought that he should have been graded higher at 3.

38. The claimant's evidence on this was that he regarded a grade 5 for someone at his level (who had effectively plateau-ed as regards their potential) to be an acceptable grading which he did not regard as a performance issue.

39. In cross-examination Mr Harvey was asked about the 9-box grid exercise. He said that he believed that this had been carried out in February 2019 and not in April 2019 as set out in the ET3. He confirmed that the notes on that exercise were at page 187. This was a photograph of the page from a notebook which contained 9 boxes; each box contained initials representing the various employees and each box had a circled number from 1 to 9. Mr Harvey said that this document had not been prepared by him and he struggled to explain how the grid worked, though he insisted that it was a serious grading exercise. He said he believed that the 9 boxes represented where the relevant employees sat in an overall assessment of their performance. He confirmed that the claimant had achieved a score of 5, but disagreed with the claimant's assessment that this was an acceptable score. Mr Harvey noted that the claimant's initials were in the middle box of the grid, but could not explain why that box was numbered 6 and not 5. I did not find Mr Harvey's evidence as plausible to support his statement that this was a thorough and serious assessment exercise.

40. In cross-examination on the following day, Mrs Harvey confirmed that the 9-box grid exercise had been carried out in February 2019. However, she said that the claimant had scored a 6 (being a lower score than 5) which was why his initials appeared in the box numbered 6 on the grid. It was noted that until Mrs Harvey's oral evidence, it had been agreed that the claimant had scored 5, although the interpretation of that score had differed. It was also noted that Mrs Harvey had only changed paragraph 5 her witness statement, changing the claimant's rank from 5 to 6 when she commenced giving her oral evidence on the morning of Day 3. This had been after Mr Harvey's evidence (given the day before) and after the Tribunal had been referred to page 187.

41. Given the lack of clarity and the inconsistency of the respondent's evidence on the 9-box grid exercise, I place no weight on that exercise as any evidence of the claimant's poor performance. It is evidence, however, of the poor level of communication between the respondent and the claimant on matters of performance generally.

42. On 15 August 2019 the claimant attended a meeting with Mr Renardson to discuss restructure (page 195). Mr Renardson notified the claimant that the respondent did not have the Cyber manpower to continue with a separate Cyber business strand and wished Cyber to be aligned to other business areas. The claimant was given three options: 1) to remain within the business and ensure Cyber was aligned to other business propositions; if he felt this was diluting his skill set and he wished to concentrate on Cyber alone, then 2) he would have to create a pure Cyber business case to be reviewed over 3 months or 3) the respondent would discuss potential redundancy. The claimant said he felt he was already working at promoting Cyber across several business areas, but asked for time to consider his position. There was no specific mention in the notes of that meeting of any problems/ issues with the claimant's performance generally.

43. On 28 October 2019 the claimant's performance review was undertaken by way of what is referred to as "Sales Deep Dive" – pages 54-65. This meeting

involved a presentation by the claimant of a slideshow headed "Front Office review". There was some confusion (and lengthy evidence) over the exact content of that slideshow, but again I do not propose to make any findings of fact on this matter as it is not strictly relevant to the issues before me.

44. The notes of that meeting are at pages 63-65. The claimant, Mr Renardson and Mr Harvey were present and the notes were taken by Ms Hunt. The respondent believed that meeting highlighted to the claimant that there were performance issues; namely that he was only meeting 1 out of 4 of his objectives and in particular by the reference (page 64) to "*performance improvement plan objectives to be set by Mr Renardson by 15 November*".

45. However, the claimant did not accept that reading of the meeting notes. He did not accept that he had been told he was not meeting his objectives and he did not realise that he had been placed on a performance improvement plan (PIP).

46. There was also extensive evidence and yet more confusion and dispute with regard to the timing and interpretation of handwritten notes allegedly made by Ms Hunt on the claimant's review form of 20 June 2019 with Mr Harvey (page 45). Again, I do not propose to make any findings of fact on this matter but simply note this for completeness and to highlight the extent of the confusion and lack of communication between the parties.

47. Nearly a month after the meeting on 28 October, Ms Hunt wrote a letter to the claimant dated 22 November 2019 (page 68). This set a three-month period to achieve various targets with a further meeting to review progress. The letter stated that it should be treated "*as an informal warning*" and told the claimant that failure to meet the objectives set in the PIP would lead to formal action in accordance with the company's capability procedures. There was no reference to any specific objectives/documents where these could be found.

48. On 22 November 2019 (the same day as the letter) there was a meeting between Mr Renardson and the claimant, with notes taken by Ms Hunt. The meeting notes at pages 69-71 are headed "Performance Improvement Plan". The claimant accepted that the notes of that meeting were an accurate record but the dispute lies in the interpretation of each party's point of view following that meeting. Neither Mr Renardson nor Ms Hunt were available to give evidence and we do not have the benefit of their particular interpretations.

49. The claimant's interpretation was that he had not realised that he was on a PIP (page 70) and he believed he had met his objectives. He believed the meeting was the "follow up" by Mr Renardson of the 28 October 2019 meeting to set the objectives.

50. The claimant states in the meeting notes that he believes he is being measured against something that has not been formally recorded or agreed and is, therefore, subjective. Towards the end of the meeting Mr Renardson appears to agree with the claimant's statement that he had not agreed any specific metrics at the meeting on 28 October. Mr Renardson says "*this is what we need to decide on. We will schedule a session and make sure we are both happy on the*

metric". On a literal reading of what are agreed to be accurate notes, this would appear to be Mr Renardson acknowledging that no firm metrics/objectives had as yet been agreed with the claimant.

51. I do not make any findings of fact as to the level or acceptability of the claimant's performance or whether some or any objectives had been communicated to the claimant orally. The respondent's evidence, as supported by the documents, was unclear and inconsistent as to whether objectives/metrics had been set for the claimant. I also observe that in his evidence, the claimant appeared reluctant to accept any criticism of his performance and this attitude may not have helped the situation.

52. However, I find on the evidence presented to me, that the respondent had not complied with its own capability procedures as set out in the Employee Handbook: namely to ensure that the employee understands the level of performance expected from him and to be given time to achieve the required performance level. The claimant was given an informal written warning on 22 November (some three weeks after an equivocal meeting on performance issues) and a PIP meeting was set up for the same day.

Claimant's sickness absence

53. 22 November was a Friday and on the Monday following, 25 November, the claimant notified Ms Hunt that he was off sick. The claimant did not attend work on 26 or 27 November and had texted Ms Hunt (page 79) to that effect. On 27 November he also confirmed to Ms Hunt that he would be taking his planned and authorised holiday from 28 November up to and including 3 December. This was a pre-arranged holiday in Dubai to attend the Formula One event along with Mr Lowrie, Ms Hunt and others.

54. The claimant accepted in his evidence that he had not notified his then line manager, Mr Renardson on 25 November, which he acknowledged was a technical breach of the sickness notification procedure as set out in the Employee Handbook (see above).

55. In her evidence, Mrs Harvey said that as far as she understood it, Ms Hunt would have entered the claimant's sickness absence on a chart, and then notified Mr Renardson of that absence. Mrs Harvey said that she would also have expected Ms Hunt to tell the claimant to notify Mr Renardson (as per the sickness absence procedure) but she did not know whether this had been done. Mrs Harvey said that she had only learnt of the existence of the claimant's texts to Ms Hunt when the claimant appealed against his dismissal. She could not explain why Ms Hunt would not have communicated the claimant's sickness absence to others in the organisation. Unfortunately, Ms Hunt did not give oral evidence to the Tribunal and her written witness statement did not deal with the question of the claimant's sickness absence notification.

56. The respondent's witnesses and representative consistently referred to Ms Hunt as the claimant's "mate", presumably because Ms Hunt had provided a written witness statement on the claimant's behalf and had been with him on the trip to

Dubai. However, as with Mr Lowrie, at the relevant times Ms Hunt was the respondent's HR manager and, therefore, acting with the respondent's authority. In the absence of any evidence produced to suggest that Ms Hunt was acting in collusion with the claimant to hide his sickness absence, the claimant cannot be held responsible for what appears to be Ms Hunt's failure to follow the usual process, if that is what happened.

57. Mrs Harvey explained at paragraph 18 of her witness statement that the claimant had been due to attend a very important series of meetings in Saudi Arabia on 2 December 2019 following directly on from his holiday in Dubai. Mrs Harvey referred to pages 49-51, which are a sequence of emails, which she said showed that the claimant would be aware that the meetings in Saudi had been arranged.

58. I find that the sequence of emails does not record any agreed meeting dates. In his oral evidence, Mr Harvey was taken to those and other emails relating to the Saudi meetings (page 469). He accepted that the culture of working in Saudi Arabia was that it was hard to schedule anything in advance and meetings were often agreed at the last minute.

59. He was also referred to an email at page 472 which referred to meetings at the beginning of December being cancelled due to a family emergency of Mr Renardson. Mr Harvey said that this had been an excuse and was untrue; the real reason the meetings had not gone ahead was because of Mr Munden's absence. Mr Harvey accepted that he had never raised this matter in his statement or earlier. Both Mr and Mrs Harvey said that postponing the meetings in Saudi at such short notice had resulted in a financial loss to the respondent of £1.4 million. They believed that the claimant would have been fully aware of the consequences of his not attending the meetings and Mrs Harvey said in her oral evidence that she believed the claimant's non-attendance was deliberate and possibly malicious.

60. I note that at pages 81-82 there is an email dated 26 November from Mr Renardson to the claimant noting that he was not in the office and asking if it was still his plan to travel to the Grand Prix in Dubai. If this was the case, then meetings could be arranged from 2 December in Riyadh. This email suggests the meetings had not been arranged as yet.

61. Mr Renardson went on to say that if the claimant was not intending to take holiday then he (Mr Renardson) would reschedule the meetings. This suggests that contrary to the evidence from Mr and Mrs Harvey, Mr Renardson was aware that the claimant was on sickness absence as at 26 November and was aware of the possibility that any Saudi meetings may have to be rescheduled. The claimant responded to Mr Renardson simply saying "I am sick and off to see the doctor and will update you later". The claimant did not provide any further updates and did not reply to other emails from Mr Renardson.

62. The claimant's evidence was that he was not aware that any specific meetings had been arranged. He said that it was the company's policy for employees not to deal with work emails whilst on sickness absence, which was why he had not

responded to Mr Renardson. The claimant's adherence to this policy appears to have been selective and I did not find his evidence on this point to be credible. The claimant may well have felt disinclined to assist Mr Renardson following the earlier meetings about his objectives/performance. The claimant did take his holiday and attended the Grand Prix in Dubai (with Mr Lowrie, Ms Hunt and others).

63. The claimant did not attend work on 4 December but sent a doctor's certificate (page 85) which signed him off from work for 3 weeks from 4 December on grounds of "mixed anxiety and depression".

The Claimant's dismissal

64. In cross-examination, Mrs Harvey was taken to an email dated 3 December 2019 from her to Mr Liassides and Mr Renardson (page 345). This records that she had spoken to Peninsula, the company's external HR advisers who said that if the claimant attended work he should be called into an investigative meeting to explain what had happened over the past 10 days and why he had not followed process and had not updated Mr Renardson on his activities. The claimant needed to be made aware of the result of his actions with regards to the cancelled Saudi meetings. The claimant should then be informed that the respondent would be reviewing the situation and would make a decision. If the claimant did not attend work (as subsequently transpired) and sent a message via Ms Hunt then someone should telephone the claimant.

65. On 5 December 2019, following receipt of the claimant's medical certificate, Mrs Harvey wrote to the claimant dismissing him with immediate effect. Mr and Mrs Harvey gave evidence in cross-examination that the decision to dismiss was jointly made by Mr Harvey, Mr Renardson, Mr Liassides and Mrs Harvey. Mr Harvey said that each of them had had a slightly different emphasis on the main reason for dismissal but that it had been a collective decision and that Mrs Harvey had written the letter on behalf of them all. Both Mr and Mrs Harvey agreed in their evidence that the claimant's poor performance (as perceived by the respondent) was not the main reason for his dismissal, but was a secondary issue.

66. Mrs Harvey accepted that in the letter she said that the claimant had reported sick with no clear explanation as to what was wrong (although the medical certificate cites anxiety and depression). Further, Mrs Harvey observed that the claimant had gone on a previously arranged holiday, having failed to respond to Mr Renardson's requests as to whether he intended to travel on that holiday. This had led to commercially sensitive meetings being cancelled at the last minute in Saudi Arabia which had resulted in a cultural "loss of face" for the company and an adverse financial impact for the company of £1.4 million.

67. The dismissal letter stated that "*the total lack of communication with your line manager or other senior Tori management… falls significantly short of what would reasonably be expected of any senior professional in carrying out their duties and responsibilities…. In our view these actions from someone senior as yourself have irrevocably destroyed the trust and confidence necessary to*

continue our employment relationship and therefore according to our Handbook we have decided dismissal is the appropriate sanction. The dismissal will take effect from the date of this letter".

68. Mrs Harvey accepted in cross-examination that there was no specific mention of "gross misconduct" in the letter, although she was very clear in her mind that the claimant was being dismissed under what she regarded as the gross misconduct section of the Handbook. She accepted that the behaviour cited in the letter was not one of the listed examples in the Handbook, but said that she believed it was clear from the letter that the claimant was guilty of gross misconduct and he should have realised this from the fact that no notice was given and it was an instant dismissal.

69. I note that this is symptomatic of the respondent's lack of clarity in communicating with the claimant: assuming that he was aware of the concerns and thought processes of their senior executives, without expressly setting these out to the claimant.

70. Mrs Harvey also accepted in her evidence that although the dismissal letter mentioned "an internal investigation", the respondent had not carried out any such investigation, nor had there been any form of discussion or dialogue with the claimant prior to his dismissal. She said that as he had been certified off sick for 3 weeks from 4 December, the respondent would have had to wait until after Christmas before speaking to the claimant. She said that the claimant was a senior individual on a very high salary and that he had jeopardised the future of other employees of the respondent by his refusal to communicate with Mr Renardson. Mrs Harvey referred to the claimant "flouncing out" of the meeting on 22 November and believed that his actions had been deliberate.

71. She acknowledged that in different circumstances she would have recognised that it was not ideal to dismiss an employee whilst they were off sick, with mental health issues, but she believed the respondent was justified in the current circumstances, because of the claimant's behaviour.

72. When cross-examined as to why she did not follow the disciplinary procedures as set out in the Employee Handbook, Mrs Harvey said that she regarded section E, the rules on gross misconduct as being "outside" the company's regular disciplinary procedure. This must clearly be incorrect based on the respondent's own Employee Handbook and based on the advice received from the company's external advisers. I do not accept Mrs Harvey's evidence on this matter as credible.

73. I find that the respondent acted in breach of their own disciplinary procedures, albeit that these were not incorporated into the terms of the employment contract. I accept that they did so because they believed that the claimant himself had wilfully put them in a difficult position with clients in Saudi Arabia and had caused significant financial loss to the company, which belief may or may not have been correct. Nevertheless, they had an employee who had presented a medical certificate indicating mental health issues and they implemented a summary dismissal without any form of investigation, process or

prior discussion with the relevant employee. I find that this is sufficient to constitute conduct contributing towards a breach of the implied term of trust and confidence. Further, that dismissal would almost certainly have been unfair under the ERA.

74. Further, whilst clearly viewing the claimant's conduct as gross misconduct and specifically quoting the gross misconduct section of the Employee Handbook, the dismissal letter itself did not contain any reference to "gross misconduct". Mrs Harvey was unable to provide any explanation as to why this was the case.

75. The dismissal letter offered a right of appeal, which was compliant with the disciplinary procedure in the Employee Handbook. This contradicts Mrs Harvey's evidence that she believed the dismissal was outside the disciplinary process.

76. The claimant sought legal advice and his solicitors wrote on his behalf to appeal against his dismissal in a letter ("the appeal letter") dated 13 December 2019 (pages 90-99).

<u>The appeal</u>

77. The appeal letter set out the background to the claimant's dismissal, with significant emphasis on the performance issues, which were strenuously denied by the claimant. The letter went on to explain the claimant's conduct over the period 25 November-4 December 2019. The letter then set out at paragraphs 37-48 the claimant's grounds for appeal, which were essentially that no proper investigation or disciplinary process had been followed and no allowance had been made, or any consideration or concern shown, for the claimant's absence due to illness. The letter concluded by summarising the claims which the solicitors had advised could be brought in an employment tribunal (or generally) by the claimant.

78. The respondent arranged for the claimant's appeal to be heard by Mr Davies on 15 January 2020. A letter to the claimant dated 30 December noted that the appeal would be conducted by way of a review of the original decision. However, in his oral evidence to the Tribunal Mr Davies appeared unclear as to the nature of his role in the appeal, though he did eventually agree that it was by way of review of the dismissal decision.

79. The letter of 30 December extracted the relevant grounds of appeal from the claimant's appeal letter and set them out as 13 unnumbered bullet points. The claimant was asked to indicate if any of the Grounds of appeal had been incorrectly identified and to provide any other evidence which he wished Mr Davies to consider. The claimant was given the right to be accompanied at the appeal hearing.

80. Mr Davies was unclear as to exactly what documentation he had seen prior to the appeal hearing. I clarified with him that he had seen the appeal letter of 13 December. He had been given a verbal briefing by Mrs Harvey and he believed she had also given him some documentation, including the dismissal letter, but

he could not remember the exact contents of that documentation. He confirmed that he would have read such documentation as he had been given, prior to the appeal hearing but that (other than the briefing with Mrs Harvey) he had not spoken to anyone else in the organisation and had not carried out any investigations/interviews of his own as regards the complaints made by the claimant in the appeal letter.

81. The minutes of the appeal hearing are at pages 124-138, in the form of the transcript of a recording and both parties accepted that this was an accurate note of the appeal hearing. Mr Davies confirmed in response to questions from the claimant early in the meeting that he believed he was impartial as an independent Non-Executive Director. The meeting took the form of Mr Davies taking the claimant through the grounds set out in the appeal letter, which had been identified in the respondent's letter of 30 December.

82. Mr Davies was asked if he took the transcript into account when reaching his decision. He said that he had not immediately had access to it as there was a minor delay in its completion; he did however say that he had his own notes of the appeal hearing which he consulted prior to reaching his decision. Those notes had not been produced in evidence.

83. On 31 January 2020 the claimant received a letter signed by Mr Davies with the outcome of the appeal ("the appeal outcome") which overturned the original decision to dismiss "taken by Sue Harvey". This is inaccurate as the respondent's evidence at Tribunal was that the decision had not been taken by Mrs Harvey alone but was a joint decision by all the senior executives of the respondent. The reason given for overturning the dismissal was, "*though we feel the actions amounted to gross misconduct, given your long, loyal service we have decided that a dismissal is too severe a sanction on this occasion and have concluded that a Final Written Warning is the appropriate outcome*". The claimant was, therefore, reinstated and his return to work scheduled for 10 February 2020; he was asked to arrange a return to work meeting no later than 7 February to ensure his induction back into the workplace as quickly as possible. Pay was backdated to the date of the original dismissal decision. The letter stated that this decision was final.

84. In his oral evidence, Mr Davies said that he was not sure who had written the appeal outcome letter. He said that he had given his "recommendations" following the appeal hearing and that "they" had prepared a draft and he had made some minor amendments and then approved and signed the letter. Mr Davies was not clear in his evidence as to whether he had made recommendations with which the executives had to agree or whether his own decision was the final one. He later said that references in the outcome letter to "we" was to the company and that the decision was his own.

85. However, Mr Davies's evidence about how and why he reached that decision were far from clear and did not give the impression of a cogent decision-making process. Mr Davies said that this had been his first appeal, but that he had had been a party in a Tribunal case some time ago. He said that for him the pivotal issue had been the claimant's failure to contact Mr Renardson about whether

he could attend the Saudi trip. Mr Davies noted that it would only have taken a simple phone call from the claimant even if he had been feeling unwell. Mr Davies reiterated the evidence of Mr and Mrs Harvey with regard to the serious financial consequences for the respondent due to the claimant's failure to communicate and the loss of the Saudi trip. He saw this as a real breach of the integrity and trust between the respondent and the claimant. He said he believed the claimant may not have wanted to support the respondent because the claimant's performance had been challenged.

86. Mr Davies described his understanding of gross misconduct as where an employee takes an action in breach of trust; is dishonest or in breach of confidence and accepted that in most cases this would mean that the employment relationship could not continue. He said that having heard what the claimant had to say and that bearing in mind the claimant's illness he should be given the "benefit of the doubt". This was why Mr Davies decided on the lesser sanction of a Final Written Warning. Mr Davies also accepted that his reference in the appeal outcome letter to gross misconduct was first time that the claimant would have known that his actions were viewed in this way by the respondent.

87. Mr Davies said that he nevertheless believed that the claimant's actions had been gross misconduct which had resulted in an almost irreparable breach of contract, but the circumstances of the claimant's sickness had led him to overturn the decision to dismiss. It is noted, however, that the appeal outcome does not give this as a reason for overturning the dismissal but refers only to the claimant's long and loyal service.

88. Mr Davies also accepted in cross-examination that although the various grounds of appeal as set out in the solicitor's letter of 13 December had been recited in the appeal outcome letter, he had reached no conclusions or findings with regard to the claimant's complaints and had conducted no investigation into those complaints. Mr Davies did not appear to accept that this was part of his role in hearing the appeal.

89. Given Mr Davies's evidence, I find that his conduct of the appeal was not thorough or in any way forensic. Mr Davies appeared to have little appreciation of what his role was and his decision to overturn the claimant's dismissal and institute a lesser sanction appears somewhat arbitrary and essentially a pragmatic response to his wanting to give the claimant the "benefit of the doubt": His conclusion was not reached through any analysis of the claimant's complaints or any formal structured reasoning. Further, (perhaps unsurprisingly given the inadequate decision-making process) there was no clear communication to the claimant of the reasons for the decision; rather there was further confusion by introducing the reference to gross misconduct for the first time, but reducing the sanction and reinstating the claimant, whilst indicating that the employment relationship had broken down. This was possibly exacerbated by the fact that Mr Davies had not written the appeal outcome letter himself.

90. Mr Davies said in cross-examination that if the claimant had been confused or unclear about anything in the outcome letter or his decision that he could have

contacted Mr Davies and asked for clarification. However, he accepted that the outcome letter had said the decision was final.

91. There is no suggestion that Mr Davies acted in bad faith, but I find that his conduct of the appeal did fall short of what would be expected from a reasonable process and that the appeal outcome letter raised gross misconduct for the first time and did not give any adequate explanation of the reasons for the outcome decision.

The claimant's resignation

92. The claimant wrote to the respondent on 10 February 2020 (at pages 176-179) resigning from his position with immediate effect. He said "*I feel I am left with no choice but to resign in response to Tori's fundamental breach of the implied term of mutual trust and confidence in my contract of employment which entitles me to resign without notice. I believe I have been constructively unfairly dismissed*".

93. The claimant identified two key elements for his resignation: first, the accusation that he had failed to provide an explanation for his absence on 26 and 27 November. He believed he had provided this at the appeal hearing, by saying that he had followed the proper procedure by notifying HR of his sickness absence; secondly the allegations of his poor performance which he strenuously denied. The claimant also noted that upon his reinstatement he had been assigned to a new line manager and that new objectives set for him were, in his belief, unrealistic. I do not make any finding of fact as to whether this belief was correct or not.

94. He also noted that his dismissal had been conducted without any investigation or process. He stated that the appeal conducted by Mr Davies had not engaged with any of the points raised in the appeal letter and had stated (for the first time) that he had been guilty of gross misconduct. I have found that this was in fact the case.

95. The claimant's resignation was formally accepted by Mrs Harvey on 11 February page 180) stating that his last day of service would be 9 February 2020, which the respondent has since conceded was incorrect.

Claimant's intention to leave employment earlier

96. The respondent presented evidence from Mr Higgins intended to show that the claimant already had the intention of leaving his employment, as early as end November/early December, when he met with Mr Higgins in Dubai. However, Mr Higgins evidence on this matter was inconclusive.

97. Mr Higgins said that he had met the claimant in Dubai at the Grand Prix event which was essentially a social occasion enjoyed by those who were part of various business networks. Mr Higgins said that the claimant had told him that he loved being in Dubai and that he would love to work there. Mr Higgins statement (at paragraph 5) said that the claimant had informed him that he was

in the process of leaving the respondent; however, in his oral evidence Mr Higgins said that the claimant had not expressly said that he was leaving, but that he had taken this as the natural corollary of the claimant expressing a desire to work in Dubai.

98. Mr Higgins could not recall whether he or the claimant originally brought up the idea of the claimant working in Dubai. Mr Higgins accepted that the claimant had skills in cyber, which would be a natural fit for Mr Higgins' business interests. Mr Higgins accepted that they were not discussing any specific role or opportunity but were speaking in very general terms. He believed that the claimant then said that he would be in touch with Mr Higgins about job opportunities but that he never followed this up. The claimant's version of their conversation was similar.

99. The claimant was not asked in cross-examination whether he had any intention of leaving the respondent at the relevant time.

100. Given the nature of the business-related, but social, event which Mr Higgins and the claimant were attending and based on the oral evidence of Mr Higgins, I do not find that the respondent has shown on the balance of probabilities that the claimant had any specific intention of leaving his employment as at end November/early December 2019.

Relevant Case Law

101. It is well recognised and established law that there is an implied term in the contract of employment that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. A breach of that implied term is a fundamental breach going to the root of the contract, which would amount to a repudiation of that contract, allowing the employee to accept that breach and claim constructive dismissal. **(Malik v BCCI [1997] IRLR 462**)

102. Both parties' representatives cited the case of **London Borough of Waltham Forest v Omilaju [2005] IRLR,** and in particular the quote from that decision which states "*in order to result in a breach of the implied term of trust and confidence, a final straw is not itself a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term…. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial*."

103. Ms Johns also cited the cases of **Blackburn v Aldi Stores Ltd [2013] IRLR 846 (**employer acting in breach of disciplinary/grievance procedures); **BBC v Beckett [1983] IRLR 43 (**imposing disciplinary sanction out of al proportion to the alleged offence) and **Garner v Grange Furnishing [1977] IRLR 206** (failing to treat a long serving employee with dignity and consideration).

Conclusions

104. The first element which the claimant must establish is whether there has been a repudiatory breach of the implied term of trust and confidence, based on the last straw doctrine.

105. As set out in the issues above, the claimant said that for him, the last straw was being told for the first time, in the appeal outcome letter that his actions amounted to "Gross Misconduct" and that although he would be reinstated, with a final written warning. The claimant felt that the respondent's conduct put him under intolerable pressure as any future minor misdemeanour could result in a further dismissal and he could not continue in employment on those terms.

106. The claimant relied on a series of other acts/breaches of contract by the respondent namely:

- that he had never previously been told of any impropriety:
- he had originally been warned that he was being placed on a capability process (he disputed there were any justified performance issues).
- he was summarily dismissed on 5 December 2019, whilst on sick leave due to anxiety and depression, without any investigation or proper process.

107. I accept, based on my findings of fact set out above that prior to the appeal outcome letter, the respondent had never raised with the claimant any issue regarding impropriety, such that it could be described as gross misconduct. In fact this was accepted by both Mrs Harvey and Mr Davies in their evidence.

108. I have also found (as set out above) that the respondent's conduct with regards to managing the alleged poor performance by the claimant was far from optimal. It may well be that there are criticisms which can be levelled at both parties, as the claimant appeared reluctant to accept any potential performance issues. However, it is the responsibility of an employer to ensure that an employee is made aware that their performance is falling short of expected standards and given a clear indication as to the level of performance they must attain, and given support (and if necessary training) to achieve the desired level of performance.

109. The respondent recognises as much in the capability procedures set out in their Employee Handbook, but that process was not followed in the case of the claimant. I understand that a senior employee may be expected to have a greater understanding of what is required of them, but it is still for an employer to make the position clear, especially if they intend to implement a performance management process, which may have the eventual consequence of dismissal.

110. As regards the claimant's dismissal on 5 December, I refer to my findings of fact above. The evidence shows on the balance of probabilities that this dismissal was unfair. The respondent was made aware by their external advisers that there should be an investigation, the results of which should then

be discussed with the claimant prior to making a disciplinary decision, which could have resulted in dismissal. Mrs Harvey accepted that she had not followed that process. Mrs Harvey accepted the significant failures of communication in the dismissal letter (see findings of fact above).

111. Mrs Harvey also accepted that the respondent was aware as at the time of the dismissal that the claimant had a medical certificate indicating that he was suffering from anxiety and depression. However, as this medical certificate had been issued the day after the claimant had returned from a trip to Dubai, this appeared to lead Mrs Harvey to the conclusion that she could disregard that medical certificate. Mrs Harvey was also influenced by the fact that she believed that the claimant's failure to communicate with Mr Renardson about his availability for the trip to Saudi had been a deliberate (and possibly malicious) refusal which had been the result of the claimant's dissatisfaction of being placed on a PIP. She believed that the claimant would have known of the consequences of having to cancel the Saudi meetings.

112. Mrs Harvey had not been prepared to wait to put this to the claimant when he returned to work following his sick leave because the company had suffered significant financial losses due to the failure of the Saudi trip. There was no evidence or explanation presented of any commercial imperative as to why the respondent could not wait till the claimant returned from sick leave. The respondent's evidence was that the financial damage to the company had already been done. Mrs Harvey and the respondent's other executives took the decision to summarily dismiss him. This was a clear breach of the respondent's disciplinary procedure. I have not accepted Mrs Harvey's evidence that as she believed the claimant was guilty of gross misconduct, no disciplinary procedure applied. Her belief is, in any event, contrary to the advice from her external HR consultants.

113. As regards the last straw, I refer to my findings of facts above with regards to the appeal conducted by Mr Davies in January 2020. I have found (see Findings of Fact above) that there were significant failings in the way in which that appeal was conducted and the way in which Mr Davies reached his decision/recommendation to overturn the dismissal decision but institute a final written warning for gross misconduct.

114. Whilst on the face of it, it may appear that overturning the original decision to dismiss should have appeased the claimant, I accept that the claimant has shown that the appeal (for the reasons set out in the Findings of Fact above) served to further undermine his trust and confidence in the respondent and so entitled him to treat this as the last straw, which when accumulated with the earlier acts, amounted to a repudiatory breach by the respondent, entitling him to terminate the contract of employment.

115. The appeal outcome did not address any of the matters complained of in the appeal letter and there was no coherent explanation for the reversal of the dismissal decision. Further there was a reference to gross misconduct, which had never been raised before and which was not particularised. As the claimant pointed out, if one looked at the examples given in the non-exhaustive list in the

Employee Handbook, these were all tainted with dishonesty or some other form of impropriety. No such allegation had ever been raised against him before.

116. I, therefore, find that the claimant has succeeded in his constructive unfair dismissal claim.

117. The claimant may not be blameless in the events leading to his dismissal on 5 December: he may well have been wilful in his refusal to engage with Mr Renardson as regards his availability to attend meetings in Saudi, knowing that he was causing financial loss to the respondent (though I make no specific finding of fact on this point). However, this point should have been put to the claimant as part of a discussion before taking the decision to dismiss him summarily.

118. The appeal was an attempt to reverse that decision, but while it imposed a lesser sanction, it did so in a manner which made matters worse, by not addressing any of the issues raised by the claimant and by introducing the allegation of gross misconduct.

119. The Tribunal will now proceed to a remedies hearing, which had been provisionally agreed with the parties for 28 January 2021 (one day). I have given directions for that remedies hearing set out in the decision above. The respondent conceded that the claimant was owed two days" pay. The respondent also conceded that the EDT was 10 February 2020, but the documentation presented to the Tribunal was based on an EDT of 9 February. 2020. At the remedies hearing the claimant claims as part of his unlawful deduction of wages claim a further one day's pay and also a basic award and compensatory award flowing from his unfair dismissal.

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Employment Judge Henderson

JUDGMENT SIGNED ON: 7 December 2020

JUDGMENT SENT TO THE PARTIES ON

.07/12/2020

FOR THE SECRETARY OF THE TRIBUNALS -