



EMPLOYMENT TRIBUNALS

Claimant

Mr M Acton Davis

Respondent

AND Ebury Partners UK Limited

Heard at: London Central -

On: 9-11 December 2020

Before: Employment Judge Nicolle

Representation

For the Claimant:

In person

Accompanied by his mother Lindsay Boswell.

For the Respondent:

Mr P Skinner, of Counsel.

JUDGMENT

The claims for constructive unfair and wrongful dismissal fail and are dismissed. No claims were pursued for unauthorised deductions from wages and accrued holiday entitlement and these claims are dismissed on withdrawal.

REASONS

The Hearing

1. Whilst the hearing took place in person the witness evidence of Juan Lobato, Co-Founder and Co-Founder CEO (Mr Lobato), Jane Sim, Chief People Officer, (Ms Sim) and Duane Swailes, Head of Sales Acceleration (Mr Swailes) was given by video link. The Claimant and Aliz Simon, the Respondent's former Manager of Special Projects and Incentive Team (Ms Simon), gave evidence in person. Whilst the Respondent served a witness statement on behalf of Paolo Giabardo, Chief Commercial Officer (Mr Giabardo) he was not called to give evidence.

2. There was an agreed bundle comprising of 485 pages. During the hearing, a small amount of additional documentation was added to the bundle pertaining to an exchange between the parties regarding the disclosure process.

3. In advance of the hearing the Claimant produced a list of issues and a chronology. Whilst neither of these documents were agreed by the Respondent, they nevertheless contained what was accepted to be a factually accurate chronology of principal events. Mr Skinner also provided the Tribunal with an opening proposed reading list, list of key dates, list of issues and summary of the legal framework. Both parties provided the Tribunal with written closing submissions in respect of which they extemporised during oral submissions.

The Issues

4. There was no agreed list of issues and no list of issues set out in any earlier case management order. Nevertheless, I consider that the issues to be determined were clear from the pleadings and by opening discussions with the parties. In short:

- a. Was the Claimant constructively dismissed on 3 July 2019 because of a breach by the Respondent of an express and/or implied term of his employment relating to its decision to end the payment of commission as first communicated to him at a meeting on 10 May 2019?
- b. Did the Claimant affirm the contract prior to his resignation?
- c. If not, was the alleged repudiation the reason for the Claimant's resignation?

5. In his closing submissions Mr Skinner argued that events after the meeting between the Claimant and Mr Lobato on 10 May 2019 were outside the scope of the Claimant's pleaded case. He referred specifically to the Claimant's reliance in evidence and his submissions to subsequent events to include email communications, the receipt of his payslip on 27 June 2019 and his telephone and email communications with Mr Lobato in the period 1-3 July 2019.

Findings of Fact

6. The Respondent was co-founded by Mr Lobato and Salvador Garcia (Mr Garcia) in 2009. It provides a global transaction banking platform for FX risk management, international payments, trade finance and currency accounts. It has grown rapidly and now has approximately 1000 employees based in 24 offices across twenty countries. Its Headquarters are in London.

The Claimant

7. The Claimant commenced employment with the Respondent on 15 April 2013 as a Business Developer. In December 2013 he was promoted to Senior FX Sales and in July 2014 to Head of Desk – FX Sales.

8. In May 2016 he was appointed as a Partner. The Respondent promotes a very small number of Partners to reflect their outstanding financial contribution to the business. At the time of the Claimant's promotion, he was one of only four or five Partners within the business. This has now increased to 10.

9. In May 2017, the Claimant was appointed Co-Head of Sales UK.

The Claimant's Contract of Employment

10. The contract provides for a commencement date of 26 October 2017 (the Contract) and states that the Claimant's position is Head of Sales UK.

11. Clause 1.7.1 provides that the terms and conditions in the Contract are valid for an indeterminate period.

12. Clause 1.12 headed Commission provides as follows:

1.12.1 at the Employer's discretion you may earn commission that may be notified to you from time to time.

1.12.2 any previous payments or payments to you of commission will not act to establish a right for you to be paid commission.

1.12.4 the Employer reserves the right to amend their commission policy from time to time.

13. 1.14.1 provides for four weeks' written notice to be given by either party.

The Claimant's Secondment to Canada

14. In late October 2017, the Claimant was approached by Mr Giabardo and Mr Lobato asking him if he was willing to become Country Manager in Canada. This opportunity arose because of a decision made by the Respondent that Ian Taylor, who had been appointed to the position was not the right fit for the post.

15. The Claimant accepted the offer. He saw the secondment to Canada as a steppingstone to his wish to work in the US where the Respondent did not at that time have an office.

Work Permit Application

16. In a letter dated 30 October 2017 to Canada Border Services Agency the Respondent applied for a one-year work permit – ICT Start-Up for the Claimant. This included the following details of the Claimant:

“Within nine months, due to his excellent performance, he was promoted to the role of Senior FX Sales. After that, he has had several promotions and was the Head of Desk, Head of Sales, Partner and now, Country Manager.”

Commencement in Toronto

17. The Claimant arrived in Toronto on or about 2 November 2017. He was responsible for setting up and developing the Respondent’s office.

Side Letter

18. Negotiations took place between the Claimant and the Respondent as to the terms of a Side Letter to his Contract of Employment. The bundle contained three drafts of the Letter.

19. The first draft dated 3 November 2017 provided for a one-year fixed term ending 26 October 2018. It did not provide for the payment of commission to the Claimant.

20. Version two of the Letter, also dated 3 November 2017, again provided for a one-year fixed term but included a provision regarding the payment of commission. The final version of the Side Letter is dated 29 November 2017. Its material provisions in the context of this claim are:

- a. It is subject to and governed by the Contract.
- b. Its terms are legally binding.
- c. The Claimant shall be Interim Country Manager commencing from 26 October 2017 and after 12 months, shall continue on a rolling basis until the parties agree otherwise.
- d. The terms of this Side Letter shall apply for 12 months and will continue on a rolling basis until the parties agree otherwise. Upon the terms of this Side Letter ceasing to apply, the terms of the Contract of Employment shall apply instead.
- e. Clause 1.10.1 of the Contract shall be amended and during the Appointment you shall not receive the salary stated within clause 1.10.1 of the Contract and instead, you shall receive an annual salary of \$170,000 (CAD equivalent of £100,000 per annum).
- f. You will continue to receive commissions due to you on UK accounts and receive 10% commissions on all new business from Canada for the duration of the one-year secondment.
- g. No variation of this Side Letter shall be effective unless it is in writing and signed by the Parties.

The Claimant’s Role in Canada

21. The Claimant's role was in effect to develop the Respondent's Canadian office from scratch as well as developing client relationships this included setting up the office, hiring a team of employees, the setting up of required technology, a bank account, necessary regulatory and compliance authorisation and processes.

22. The Claimant says that he lacked required support from the Respondent in the establishment and development of the office. This is disputed by the Respondent.

23. He says that it was difficult to generate significant profits in Canada partly because of the very small margin between US and Canadian interest rates but also because of what he considered to be the difficulty recruiting employees of the required calibre because of what he thought to be the Respondent's uncompetitive remuneration. He also referred to the Canadian marketplace being crowded and the difficulty of developing a business in a competitive market.

24. The Claimant says that despite the above difficulties that revenue and profitability were progressing. He says that January 2019 was the first month in which revenue hit \$100,000 and that \$200,000 was achieved for the first time in April 2019.

25. Whilst the Respondent considered that the financial performance of the Toronto office was below expectations there was no direct criticism of the Claimant. Mr Lobato says that the Claimant was a highly valued employee, and it was his and the Respondent's wish that he should continue as Canadian Country Manager.

26. I find that notwithstanding the difficulties which the Claimant experienced that he remained committed to using his best endeavors to develop the Canadian office. Further, I find that the Respondent remained supportive of the Claimant and did not effect changes to his remuneration on a punitive basis because of shortcomings in his performance.

Extension of Visa

27. In a letter dated 6 September 2018 the Respondent applied for an extension of the Claimant's Canadian visa. The letter set out details of the Claimant's role in Canada as follows:

- Building commercial strategy for Ebury's entrance into the Canadian market including assessing viability of key verticals/sectors.
- Liaising with stakeholders in the market including regulators, trade groups, banks and other partners.

- Day to day management of the office including setting targets, hiring, coaching and training.

Driving the soliciting and marketing process including conducting relevant meetings and calls.

28. The letter stated that the Claimant received an annual base salary of \$170,000 CAD.

Commission Payments

29. It is acknowledged that commission comprised a significant part of the Claimant's remuneration. For the year 2 April 2016 his total gross earnings were £147,463 of which £40,000 was base salary. In the tax year to 5th April 2017 his total gross earnings were £164,684 of which £50,000 was base salary.

30. The bundle included a copy of the Respondent's Commission SOP dated 1 May 2019. It includes the following disclaimer on the first page:

"Commissions by nature are considered variable compensation and therefore, commission payouts remain discretionary and subject to managerial approval at all times. SOP document is subject to change based on managerial decisions".

31. The remainder of the commission SOP document contains details of the basis upon which commission payments are calculated. In principle commission is payable to those employees who obtain sales at various defined rates for up to five years after the first trade is booked.

32. Most of the revenue that the Respondent generates is on forward contracts. It offers forwards for up to seven years, and the commission is paid to the salesperson when the transaction closed.

33. The effect of this was that whilst the Claimant's entitlement to commission based on his UK sales would gradually diminish his attributable to Canadian clients would progressively increase.

Country Manager Contracts

34. The bundle contained several offer letters for various Country Managers. These were redacted to protect confidentiality. The Claimant referred to them with a view to demonstrating that the Country Managers were engaged on disparate remuneration terms with some receiving significant payments of commission. The Respondent's position is that the remuneration of Country Managers would vary dependent on whether they were new recruits to the Respondent or had previously been employed but in a sales position. The Respondent says that for all Country Managers it was always an expectation that any entitlement to residual commission based on previous sales positions would have a finite duration and last no longer than 12 or 18 months. The Respondent

says that this was common knowledge amongst all staff to include Country Managers.

Process leading to change in the Claimant's remuneration in 2019

The use of the square brackets below reflects redactions in the documents included in the bundle.

35. In an email from Mr Lobato to Mr Giabardo on 20 March 2019 he stated:

"I think we can stop all commission payments next year (despite being booked in trades this year) this would be cleaner for the CMs.

I would not cause conflicts with [] for the last six weeks of the year, and I would impose a new comp package for all CMs based on your targets to drive them where we want to drive them".

36. In an email of 20 March 2019 to Ms Simon, Mr Giabardo stated:

"For clarity if we want to stop from 1 May we have two options:

- We won't pay any commissions next year.
- We still pay commissions on drawdowns for trades of the [] office booked until 1 May. This is potentially 10% of [] m so very significant.

37. In an email from Mr Lobato to Mr Giabardo of 1 May 2019 he stated:

"I would like to stop CM commissions from today.

In my mind you should tell all your CMs in EMEA that from this year everyone moves to a fixed plus bonus, no one is to receive any commissions from new or older clients. So, a clean start".

38. Also, that day in reply to Mr. Lobato, Mr. Giabardo stated:

"I agree CM commissions should stop from this year. Does any CM have different agreements? I know [] was an issue last year to stop because of [] law, where pay could not go down".

39. I find it to be clear from the above exchange of emails that the Respondent was proposing a change to Country Managers' existing remuneration and that this was not part of the normal annual review process but rather because of a change in the Respondent's policy. This may in part have arisen because of the previous flurry of new office openings having stabilised and all the Country Managers therefore having been in situ for several years.

Meeting between Claimant and Mr Lobato on 10 May 2019

40. There was inconsistency in the evidence as to whether this meeting took place on 10 or 17 May 2019. However, based on the conversation chain from Google Chat contained in the bundle it is apparent that it was on 10 May 2019.

41. The meeting took place in the Respondent's London office and lasted for approximately 15 minutes. As well as a general discussion regarding the Respondent's business in Canada Mr Lobato informed the Claimant that his entitlement to commission would cease with effect from 1 May 2019, but he would be compensated by an increased basic salary, a discretionary bonus and eligibility for being granted equity.

42. Following the meeting with Mr Lobato the Claimant spoke with Mr Giabardo. In his witness statement Mr Giabardo says that during this meeting with the Claimant he told him that the Canadian office was not doing well and that he was lucky to still have a job. Also, in his statement Mr Giabardo refers to the Claimant having told him during this meeting that he was not very happy with his compensation. Mr Giabardo did not take the matter further and was of the view that if the Claimant had an issue, he should take it up with Mr Lobato.

43. On 10 May 2019, the Claimant had an exchange with Patrick Hodge (Mr Hodge) regarding his meeting that day with Mr. Lobato. This included the Claimant stating:

“Going to summarise our conversation and ask for the bonus structure in writing”.

Mark Hewlet – Visit to Toronto Office

44. Mark Hewlet, Wholesale Banking Relationship Director (Mr Hewlet) visited the Toronto office and reported in an email of 14 May 2019. There is no need for me to provide details of his findings save to say that he identified strengths of the office to include the Claimant and weaknesses to include salaries and the commission structure.

Email from Ms Simon dated 31 May 2019

45. In an email of 31 May 2019 Ms Simon in the Commissions Team set out details of Country Managers' remuneration to Mr Giabardo and Martin Fest. This document is largely redacted albeit capable of a process of inference based on the size of the redacted columns. The Claimant sought to highlight other Country Managers who he believed continued to receive commission. In her email Ms Simon asked:

“Can you please confirm which should be continued and which should be stopped for FY 2019?”

46. In an email from Mr Fest to the Commissions Team, and copied to Mr. Giabardo, of 3 June 2019 he stated:

“I understood the plan was to stop paying commission. Was this for all or just new business?”

47. Later that day Mr Giabardo replied:

“We will stop all commission payments to all Country Manager, excluding Rick. This includes all commissions, including sales commissions. To clarify: CMs should get only base salary and no commission payments whatsoever”.

48. In an email from Mr Giabardo to the Commissions Team and copied to Mr Fest dated 12 June 2019 he stated:

“They all know they are not receiving commissions any longer, all reviews are done”.

Claimant’s query regarding commission payments of 14 June 2019

49. The Claimant raised a query with the Commission Team regarding his not having received a commission statement for the previous month and in respect of some missing information that needed to be added for various trades which he contended should be paid at 10%. In response the Claimant was advised in an email of 17 June 2019 from the Commissions Team that commissions would not be paid to Country Managers for May 2019. The Claimant clarified in reply that this was to rectify errors made for April 2019.

Salary review letter

50. In a letter dated 17 June 2019 Suzie Yong, Head of HR advised the Claimant that his salary had been increased to \$202,800 CAD per annum. This was back dated to 1 May 2019 and that payment would be made in the June payroll. He was advised that all other terms and conditions of his employment remained unchanged.

51. Mr Lobato said that this was a standard letter, but it should have come with a revised contract. He said that he had not seen or approved the letter.

Mr Giabardo email of 20 June 2019

52. In an email of 20 June 2019 from Mr Giabardo to Mr Lobato he included the following comments:

“Main issue is that the deals we gave CMs in the last two years have multiple wordings with some suggesting that they would receive commission.

Our commissions are earned or locked in when booking, e.g., a trade booked last year and DD next month could fall under the agreement (again depending on wording), this is an issue mainly for: Tom, Matthew, Nils (to a lesser extent to Wolfgang and Cyril). The three of them are kicking off now.

The real issue here is that it could very well be that we legally cannot effectively stop paying them.

There is another issue that is less immediate but potentially more problematic, a CM or a big hub gets [] bonus on average in a good year. These guys are used to much higher levels of pay (like everyone in front office). The usual argument would be that CMs get less cash but get shares, but that cannot really be used because they all got shares on top of the cash.

EG [] was on [] there is no way I can pay him that next year”.

53. Mr Lobato replied later that day as follows:

“In any case I think you are in a good place.

CMs have a lot in shares. If they resign, they lose the shares as they are bad leavers. If they do not perform and we fire them they lose the component that has not yet vested (also a lot).

The same time your quarterly bonus scheme should make them work very hard to achieve it. Failing to achieve they can work hard to get their annual bonus.

Think that we are in a good spot and we can push them harder”.

27 June 2019 Pay Slip

54. The Claimant says that he was surprised to receive this pay slip which stated that he had received nil commission for the preceding month. He complains that his basic pay had not been increased to reflect the salary increase effective from 1 May 2019.

55. The pay slip stated that the Claimant received over \$87,000 CAD of commission for the first five months of 2019. The majority of this related to UK trades.

56. In summary the Claimant says that his pre-1 May 2019 remuneration comprised a base salary of circa £100,000 together with commission payments of circa £100,000 so a total package worth approximately £200,000. He says that because of the changes effected by the Respondent effective from 1 May 2019 his base salary was circa £120,000 with potential entitlement to quarterly discretionary bonus payments of an undetermined amount. Mr. Lobato says that the Claimant would have been in a no less advantageous position. He referred repeatedly to Country Managers doing extremely well and becoming very wealthy both because of bonuses but also the grant of equity.

1 July 2019

57. The Claimant had a nine-minute telephone conversation with Mr Lobato. He expressed dissatisfaction regarding losing his UK commission. Mr Lobato accused him of lying about this and saying that he was aware that the change was going to be made. Mr Lobato perceived that the Claimant had been satisfied with the proposal made at his meeting with him on 10 May 2019. Mr Lobato says that he was surprised by the Claimant's unusual tone during this call.

58. Shortly after the call the Claimant sent, under cover of an email, a four-page letter to Mr. Lobato. Given the brief time between the call and the letter being sent it is apparent that it had been largely prepared in advance. The Claimant referred to there having been a fundamental breach of his contract of employment. He said that the Respondent had unilaterally forced through its decision to withdraw the commission arrangements which in effect represented a 50% cut to his remuneration.

59. In an email a few moments after receipt of the letter Mr Lobato said to the Claimant:

“Good luck with whatever you do in the future, you are a talented guy, I hope you make the right calls for the future”.

60. In an email of 16:03 to Ms Yong, Ms Sim, Mr Swailes and Mr Giabardo. Mr Lobato stated:

“It is not clear from his letter whether he is resigning or not, perhaps the best way to play it is to offer him to be back in UK with a HOD role and hence ending his secondment in Canada.

Let's play it well”.

61. In an email from Mr Lobato to Mr Swailes, Ms Sim, Mr Giabardo and Ms Yong of 16:54 he included the following:

“Quite sad to see how Matt has behaved and how little attachment he had for what has been built in Toronto so far.

Jane to contact him, making clear to him that we are not going to change any of the conditions communicated to him several times over the last few weeks (from May this year he is on a CM package with his base plus bonus, bonus to run quarterly and annually based on Canada hitting targets). Hence, we are happy for him to resign as soon as possible”.

62. Mr Lobato says that his comments in respect of being happy for the Claimant to resign related to his position as a Country Manager in Canada rather than from the Respondent Group. He says that the Claimant remained a valued employee. He also says that this email was sent in the heat of the moment and that his position changed on further reflection. In an email of 21:54 to the Claimant Mr Lobato included the following:

“When I last met with you in London a few week ago, I thought that moving you to our more standard Country Manager compensation structure was going to be a better incentive for you. I thought you were ok with them (clearly I was wrong to assume that).

I have thought hard about what to do that is best for you and the company. I am going to revert back to your previous compensation structure once your secondment in Toronto is over, I would like to you to be back in the UK where you will resume your role as HOD”.

63. The Claimant says that he was insulted by the proposal. He says that reverting to his position as Head of Desk would have been a demotion given that he had previously been Head of Sales. He also says that it had always been clear that he did not want to return to the UK but regarded Canada as a steppingstone to the US.

2 July 2019

64. The Claimant sent a further two-page letter to Mr. Lobato. He complained that Mr Lobato had accused him of lying regarding the proposed change to the UK commission terms and that he would not be welcome in the London office again. Mr Lobato disputes making this second comment. He says that the relationship of trust and confidence between him and the Respondent had been destroyed.

65. Mr Lobato sent the Claimant an email at 18:29 to say that he wanted him to continue working in the Toronto office on his pre-1 May 2019 terms and then to return to the London office to resume his role as HOD.

3 July 2019

66. The Claimant sent Mr. Lobato a two-page letter saying that he wished to resign because of the Respondent’s fundamental breach of his contract of employment. He referred to Mr Lobato’s action since the review meeting in May and his accusation on 1 July that he way lying. He says that the alternative role as Head of Desk would be a demotion given his previous position as Head of UK Sales. He referred to his pay slip received on 27 June 2019 not including commission.

Subsequent Events

67. In an email of 4 July 2019 Mr Lobato advised the Claimant that the Respondent did not wish him to resign.

68. In an email of 4 July 2019 from Ms Sim to Mr Lobato she referred to having spoken with Tom who was also aggrieved regarding changes to the bonuses. She said that Lloyd and Niels were also upset. She also stated that it sounds like Alpha is where the Claimant was going.

69. Alpha is a direct competitor of the Respondent which has a history of aggressive recruitment. However, neither Mr Lobato nor Ms Sim had any actual evidence that Alpha had approached the Claimant or that the Claimant was in negotiations with them. The Claimant say this was not the case. I find no evidence that the Claimant was in negotiations with Alpha whilst still employed by the Respondent.

70. Ms Sim sent the Claimant an email on 10 July 2019 saying she hoped that the situation could be resolved and that he would remain with the Respondent. She then travelled to Toronto with the intention of meeting with him. However, he had already left and travelled to France.

71. On 28 November 2019, the Claimant was sent an email by Ellie Stringer, Senior HR Generalist setting out his entitlements to commission payments up to the termination of his employment on 3 July 2019.

Future Employment

72. The bundle included a printout from the Claimant's LinkedIn showing various positions applied for. It was not until 7 April 2020 that he was successful in commencing employment as Head of Corporate Product Sales with Revolut in London.

Mr Giabardo's Evidence

73. As Mr Giabardo did not attend to give evidence limited weight attaches to his statement. Nevertheless, it is relevant to highlight the following points from paragraphs 17-19 of his statement:

- "The plan was that any Country Manager who earned commission (and was not on the basic salary plus bonus compensation structure) would change from being paid a basic salary plus commission to a basic salary plus a bonus – which would be paid out quarterly and annually".
- "Juan's view was that we could move any Country Manager who received commission on to the bonus scheme".
- I remember being surprised that so many Country Managers earned commissions, particularly those who have been Country Managers for over 12 months. It had always been my understanding that any individual would only receive commission for a limited period (i.e., 12 months), unless there was extenuating circumstances, however, it had been extended in some cases.

Eligibility for Bonuses

74. Mr Lobato says that bonuses are discretionary. They generally reflect financial performance. However, in the case of the Claimant he was willing to

use KPIs, based on the Claimant's effort rather than solely financial performance, as a reflection of the difficulties the Canadian office had encountered. Mr Swailes was not aware of any other occasions where nonfinancial metrics were used as KPIs to determine the size of a bonus.

75. The Respondent has a Remuneration Committee which determines and approves the size of individual bonuses and aggregate remuneration packages for senior employees, to include Country Managers.

The Law

76. Section 95 (1) (c) of the Employment Rights Act 1996 (the ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

77. The leading authority is Western Excavating ECC Ltd v Sharp [1978] ICR 221. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

"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 then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed."

78. In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

79. I also note Bournemouth University v Buckland 2010 IRLR 445 CA. The head note reads:

"In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.

The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement..."

80. In Malik v Bank of Credit and Commerce International SA 1997 IRLR 462. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

"the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

81. I note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust, either requirement is sufficient.

82. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, i.e., from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

Last Straw

83. In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

84. In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, I may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.

85. Omilaju v London Borough of Waltham Forrest is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct,

although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable but satisfies the last straw test.

Reason for Resignation

86. I must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

87. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (*Nottinghamshire County Council v Meikle* [2004] IRLR 703, CA; *Wright v North Ayrshire Council* UKEATS/0017/13.)

88. I note that where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principal reason for the resignation, but it must be part of it and the breach must be accepted.

Waiver

89. The question of waiver must be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

Submissions

The Respondent

90. Mr Skinner contends that the case is predicated on a misunderstanding that has been blown out of proportion. He says that the Claimant knew about the changes from 10 May 2019 but failed to put his concerns in writing until after his telephone call with Mr Lobato on 1 July 2019.

91. He says that there was no breach of the express terms of the Contract as commission is stated to be discretionary and the Side Letter is subject to the terms of the Contract. He also says there was no breach of the implied term of trust and confidence. He says that moving the Claimant on to a standard Country Manager package was unquestionably a reasonable and proper cause for making the changes proposed.

92. He says that by continuing in employment for a further eight weeks after the meeting with Mr Lobato on 10 May 2019 that the Claimant had affirmed the

Contract. He referred to Chindove v William Morrison Supermarket [2014] UK EAT /02/01/13/BA which indicated that four weeks was a benchmark period for affirmation.

The Claimant

93. The Claimant's closing submissions largely represented a further detailed summary of the chronology and events upon which he relies. I should, however, note that at paragraphs 1-3 of his submissions on pages 11-12 he includes reference to events after the meeting with Mr Lobato on 10 May 2019 and as stated above Mr Skinner contends that these are not expressly included within his ground of claim.

Conclusions

What acts are relied on by the Claimant as constituting a repudiatory breach or breaches?

94. Before I consider whether there was a repudiatory breach, or breaches, of the express and/or implied terms of the Claimant's employment I will consider what acts or omissions he is entitled to rely on. Mr Skinner submits that his claim as pleaded relates solely to what was communicated to him by Mr Lobato at the meeting on 10 May 2019. The Claimant seeks to rely on matters up to and including his telephone call and subsequent email communications with Mr Lobato on 1 July 2019.

95. I have revisited the Grounds of Complaint appended to the Claimant's Claim Form. Whilst at paragraph 11 he refers to the meeting on 10 May 2019 (wrongly stated as 17 May) it is notable that paragraph 15 refers to the letter of 17 June 2019 notifying him his revised salary, paragraph 17 refers to the statement of earnings received on 28 June 2019 and paragraph 18 refers to his communications with Mr. Lobato on 1 July 2019.

96. Whilst paragraph 21 under the heading "The Claims" refers to changing the terms of the Side Letter as being the breach which the Claimant accepted when he resigned, I do not consider that this should be narrowly construed to what was communicated to him on 10 May 2019. I consider that the claim as pleaded includes the subsequent matters which involve the implementation of what was proposed, to include the reduction in salary paid to the Claimant as notified to him on 28 June 2019, and subsequent communications with Mr Lobato relating thereto. I do not, however, consider that the claim includes the Claimant alleging that being called a liar, and that he was not wanted in the London office, were separate breaches of the implied term of trust and confidence in respect of which he resigned.

Was the change in remuneration arrangements i.e., the cessation of commission payments in breach of the Claimant's contractual terms?

97. Mr Skinner argues that there was no contractual breach. I find that neither the Contract nor the SOP Commission Plan provided a contractual entitlement to the payment of commission. I reach this finding for the following reasons:

- (a) Clause 1.12 of the Contract expressly states that commission is discretionary, previous payments of commission establish no right to future payments and that the Respondent reserves the right to amend its commission policy.
- (b) Further, the Commission SOP Plan includes a disclaimer stating that commissions are discretionary and subject to change based on managerial decisions.

98. I then need to consider whether the terms of the Contract and the Commission SOP regarding discretionary commission payments were varied by the Side Letter. I accept the Claimant's evidence that the terms of his secondment were important, and it is apparent that there was a process of dialogue between him and the Respondent regarding its terms prior to being finalised in the version dated 29 November 2017.

99. I find that the terms of the Side Letter had contractual effect and continued to have such effect in the period up to the Claimant's resignation on 3 July 2019. I reach this finding based on the following:

- a) It provides that its terms are legally binding (clause 1).
- b) It provides that it continues on a rolling basis until the parties otherwise agree (clause 2).
- c) It provides for a substitution of clause 1.10.1 of the Contract for the duration of the secondment under the Side Letter and that the Claimant would continue to receive commissions due on UK accounts and receive 10% commissions on all new business from Canada (clause 4(e)).
- d) No variation of the Side Letter shall be effective unless it is agreed in writing and signed by the parties (clause 9).

100. It is, however, significant that the sub paragraph in respect of commissions in clause 4(e) refers to "this one-year secondment". As this clause was inserted at the Claimant's request, and the reference to a one-year secondment was included in the previous draft, I find this inconsistency between the other terms of the Side Letter continuing on a rolling basis and the express limitation of the entitlement to commissions to a one-year secondment as significant. Whilst I acknowledge this may have been because of an oversight on the Claimant's behalf, I nevertheless need to interpret the terms of the contractual arrangements between the parties as written.

101. I consider that the express reference to a one-year secondment in the Side Letter, during which entitlement to commission would arise, is particularly significant in the context of the Respondent's evidence, and particularly that of Mr Lobato, that this represented the Respondent's practice. Further, this is relevant in my interpretation of what the parties would have intended by the drafting.

Whilst I was referred to what the Claimant says are disparate terms for Country Managers, I do not consider that any clear evidence exists that Country Managers transferred from previous sales-based roles continued to receive commission on a long-term basis. I rather find that the Respondent's practice was that there would be an initial period, sometimes longer than one year, but not ongoing for significantly beyond two years, for a transition from remuneration, to include significant retrospectively earned commission, to a system based on performance related bonuses.

102. I therefore find that when read in totality the terms of the Contract, the SOP Commission and the Side Letter did not provide for an ongoing entitlement to the payment of commission for the duration of the Claimant's secondment to Canada as Country Manager. I therefore find that the proposed cessation, and then implementation of the cessation of commission, did not constitute a breach of an express term of the Contract and other contractual documents relating to his employment and secondment.

Implied term of trust and confidence

103. As well as considering the express terms of the contractual documentation I need to consider whether by its actions in the communication and timing of the change to the Claimant's remuneration the Respondent breached the implied term of trust and confidence. As I have set out in my findings of fact, I find that the Respondent was seeking to consolidate terms and conditions for its Country Managers to include the cessation of commission payments from 1 May 2019. I do not, however, find that Mr. Lobato's communication regarding this change, during his short meeting with the Claimant on 10 May 2019, breached the implied term of trust and confidence. I reach this finding for the following reasons:

- (a) At that stage it remained a proposal, and the option would have existed for the Claimant to challenge the proposal or put forward a counter proposal or KPIs against which his entitlement to a quarterly bonus could be assessed, but he failed to do so.
- (b) Whilst the Claimant undoubtedly had a subjective perception that the proposed change was to his detriment, I do not consider it of a sufficient magnitude that considered objectively it was likely to destroy or damage the relationship of trust and confidence.
- (c) It is necessary to consider the alleged repudiatory breach from an objective perspective. In considering whether the Respondent conducted itself without reasonable and proper cause I need to consider the proposed change in the context of the framework of contractual documents. I find that moving the Claimant to what the Respondent says was a standard Country Manager package was a reasonable and proper cause for making the changes proposed.
- (d) Whilst the Claimant was undoubtedly surprised to receive his pay slip on 28 June 2019, I do not find that this was a sufficiently serious breach to constitute a repudiatory breach of his terms of employment. This is

based on my findings that the Respondent had the contractual discretion to vary, or cease, the payment of commission. Whilst the Claimant had an expectation that he would receive the higher salary with effect from 1 May 2019 as part of his June salary (and this was not paid) I find that this represented an oversight which would have been rectified by the Respondent on the matter being brought to its attention. This is consistent with the approach the Respondent took when the Claimant questioned shortfalls in his commission payments in the period up to 30 April 2019.

- (e) I do not consider the Claimant's telephone conversation with Mr. Lobato and the email sent by Mr. Lobato on 1 July 2019 breached the implied term of trust and confidence. Whilst Mr Lobato's initial reaction to the Claimant's letter of 1 July 2019 was of annoyance, and arguably somewhat petulant, I do not find it to have been of a magnitude to breach the implied term of trust and confidence. I also find that by the time he sent his four-page letter on 1 July 2019 the Claimant's mind was made up and therefore when he ultimately resigned on 3 July 2019, it was not in response to Mr Lobato's conduct on 1 July 2019, but the implementation of a decision he had reached by the time he received his pay slip on 28 June 2019 or arguably earlier.
- (f) As I have decided that the Respondent did not breach an express or an implied term of the Claimant's employment it is not strictly necessary for me to consider the question of affirmation or in respect of what matter the Claimant resigned. However, for completeness I will address these matters briefly.

Affirmation

104. Had I found that the proposed change in remuneration communicated to the Claimant at the meeting on 10 May 2019 constituted a repudiatory breach I would have found that he had not affirmed this breach and the Contract by remaining in employment until his resignation on 3 July 2019. I would have reached this decision as result of the ongoing communications throughout June between the Respondent's managers regarding changes to commission arrangements but also because of the impact of the change on the Claimant having crystallised on receipt of his pay slip on 28 June 2019.

Reason for resignation

105. I do find that the Claimant resigned in response to his sense of grievance regarding the cessation of commission payments. This represents an important matter for him. I do not accept the Respondent's suggestion that the Claimant manipulated a potential constructive dismissal situation to facilitate his exit and release from restrictive covenants with a view to joining a competitor.

106. It was also relevant that Mr Lobato was willing to discuss remuneration arrangements with the Claimant. In other words, it was not a done deal. First, he proposed quarterly rather than an annual bonus to address any cash flow

concerns the Claimant had. He was also willing for the Claimant to propose KPIs. Whilst it would not follow that there was a guarantee of the payment of a bonus equivalent to the Claimant's commission if performance was poor this would in my view be consistent with the Respondent's reasonable business objectives and the terms of its remuneration arrangements. It is also consistent with the terms generally applicable to Country Managers. The Respondent understandably considers that it is important that they are incentivised and remunerated based on their performance as Country Managers rather than being able to rely on an ongoing revenue stream based on past performance.

107. It is also relevant that Mr Lobato, once it became apparent as to the extent of the Claimant's dissatisfaction, was willing for him to revert to his previous commission arrangements whether continuing in Canada or returning to London. Whilst I accept the Claimant's grounds for rejecting a position in London as a Head of Desk as a demotion, he was not compelled to do this, it was merely an option presented to him, should he wish to return to London. He had the option of remaining in Canada for the duration of the secondment on his existing terms but nevertheless declined this.

Conclusion

108. I therefore find that the claims for constructive unfair dismissal and wrongful dismissal fail and are dismissed.

109. It is, however, relevant to note that Mr Lobato confirmed in evidence that the Claimant could keep his shares and was not treated as a Bad Leaver, as would have been an option for the Respondent, but it exercised its discretion to allow him to retain his shares based on his contribution to the business and as an exercise of its good will towards him.

Employment Judge Nicole

Dated: 10 February 2021

Judgment and Reasons sent to the parties on:

16 February 2021

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For the Tribunal Office