EMPLOYMENT TRIBUNALS

Claimant: **Mr S Lowden**

Respondent: **Artel Rubber Holdings Limited**

Heard at: **Birmingham (by CVP)** **On:** **25 and 26 January 2021**

Before: **Employment Judge Edmonds**

Representation
Claimant: In person
Respondent: Mr J Munro, solicitor

JUDGMENT having been sent to the parties on 28 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

This has been a remote hearing which has been consented to by the parties. The form of the hearing was V (fully remote). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Introduction

1. The Claimant was employed by the Respondent as a Trimmer. His employment had commenced on 1 February 2019 and ended on 15 January 2020 with immediate effect. This case concerns whether or not the Respondent was entitled to dismiss him with immediate effect, as opposed to paying him for a period of notice, and whether or not the Claimant was entitled to a bonus relating to specific work he had done for the Respondent.

2. The Claimant started a period of early conciliation with ACAS on 17 January 2020, which ended on 5 February 2020, and submitted his claim form on 6 February 2020.

Claims and Issues

3. The Claimant had originally brought claims for unfair dismissal, notice pay and a bonus. However, the Claimant had less than two years' service with the Respondent. At a Preliminary Hearing on 5 June 2020 it was determined that the Claimant did not have the required length of service for an unfair dismissal claim and it was accordingly dismissed by the Employment Tribunal. That said, because the Claimant seeks an uplift in compensation for failure to follow the ACAS Code of Practice, it has been necessary for me to consider the procedure followed by the Respondent in relation to the termination of his employment in that context.

4. This left two claims: for notice pay and for a bonus. In respect of the notice pay claim, it was unclear at the Preliminary Hearing whether it was being argued that the Claimant had resigned or whether he had in fact been dismissed by the Respondent, and therefore both issues fell to be considered at the final hearing.

5. At the Preliminary Hearing, the issues to be considered at the final hearing were determined to be as follows:

   Wrongful dismissal / breach of contract

   i. To how much notice was the Claimant entitled?

   ii. Was there a fundamental breach of the contract of employment, and/or did the Respondent breach the so-called "trust and confidence term" (i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to seriously to damage the relationship of trust and confidence between it and the claimant)?

   iii. The conduct the Claimant relies on as breaching the trust and confidence term is that the respondent refused to reconsider its decision to impose a final written warning at an appeal meeting on 12 January 2020?

   iv. Did the Claimant resign on 12 January 2020?

   v. If the Claimant resigned, was it because of a breach on the part of the Respondent as identified in (ii) above?

   vi. If so, was he entitled to do so without notice?

   vii. Alternatively, did the Claimant fundamentally breach the contract of employment by an act of so-called gross misconduct in that he refused to accept the imposition of a final written warning by the Respondent at an appeal meeting on 12 January 2020? (NB this requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the gross misconduct: if so, did the Respondent affirm the contract of employment prior to dismissal?)

   viii. Did the Respondent pay the Claimant any notice pay upon the termination of his employment?

ix. If not, how much should the Claimant receive, if any? (Taking into acocunt the decisions reached in relation to paragraphs (vi) and (vii) above).

Unauthorised deductions

x. Was the Claimant, on or about 12 January 2020, paid less in wages than he was entitled to be paid and if so, how much less? In considering this issue, the Tribunal will consider the Claimant's claim that he was entitled to a "bonus" of up to £3,500 in respect of savings that he achieved for the Respondent by recommending a savings plan concerning the way in which rubber was cut during production.

Remedy

xi. If the Claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.

Procedure

6. I heard evidence from the Claimant and on his behalf, David Piotrowski and Neil Jones, who were both employees of the Respondent at the time of the alleged incidents. The Claimant had also provided a witness statement from another colleague, Eddie Smith. During the first day of the hearing I was informed that Mr Smith would be able to join the following day to give evidence, however on the second day I was notified that Mr Smith felt unwell and unable to attend. I was provided with no medical evidence, but saw a message from Mr Smith to the Claimant to that effect.

7. I explained to the parties that I would need to consider whether I should attach any weight to Mr Smith's statement, given that he was not present at the hearing to be questioned on his evidence. I invited representations from the parties. The Claimant said that he expected the statement to be void, and the Respondent's representative explained that there were specific points he would have wished to question him on and that he was therefore disadvantaged by his non-attendance. I decided not to attach any weight to that statement.

8. I heard evidence from Simon Lavin, Director and Co-owner, Antony Curtis, Factory Manager and line manager of the Claimant, and Amanda Holmes, Finance Manager, on behalf of the Respondent.

9. At the start of the hearing I raised two concerns with the parties about the Claimant's Schedule of Loss: first, it included loss of earnings but the Claimant's claim for unfair dismissal had been dismissed. The Claimant accepted that he could not claim this. Secondly, it included a claim for holiday pay, but I could not see any claim for holiday pay on the face of the Claimant's claim. I asked the Claimant whether he sought to make an application to amend his claim to include holiday pay, but he confirmed that he did not.

10. There was a bundle of documents comprising 108 pages, and certain additional documents were submitted via email during the course of the hearing. Both parties also provided me with written closing submissions.

Findings of Fact

11. The Claimant commenced employment with the Respondent on 1 February 2019 as a "Trimmer" which involved measuring hoses and cutting them to the right size. The Respondent is a hose manufacturer employing around 38 people. The Claimant's employment ended on 15 January 2020. At the Preliminary Hearing on 5 June 2020 it had been suggested that the termination date was 12 January 2020 but both parties confirmed it was 15 January 2020 at the final hearing: in any event it makes no difference to the matters to be determined in this case.

12. In short this claim relates to a dispute around the circumstances in which the Claimant's employment ended, and therefore whether or not he was entitled to notice pay. There was also a dispute about an alleged bonus payment that the Claimant says would have been due to him on or around 1 February 2020. I also heard evidence about an unrelated type of bonus, which could have resulted in intermittent payments of around £20 to the Claimant and other colleagues (although that bonus was not part of his claim): it is clear that there was a general feeling that the Respondent would avoid paying out these bonuses for one reason or another to the Trimmers, including the Claimant.

13. The Claimant was employed under a written contract of employment. There was an unsigned contract of employment in the Bundle: the Claimant raised a concern that he had signed a copy previously, and that he could not say for certain whether the version in the Bundle had the same content or not. The Claimant did however accept that there was nothing in either written contract entitling him to a bonus.

Bonus

14. The Claimant says that, sometime during the course of 2019, he came up with an idea to save the Respondent money. He accepts that he was not aware of any specific bonus before he presented the idea, but said that Mr Lavin had previously said that if anyone saved the company money then he would pay them a bonus, and gave an example of a colleague who had received a bonus for saving costs on deliveries. The Claimant says that he discussed the proposal with Mr Lavin, and provided to the Tribunal during the lunch break on the first day of the hearing a copy of a presentation he says he presented to Mr Lavin.

15. The Claimant says that Mr Lavin told him in front of colleagues that he would be entitled to receive 10% of whatever saving he achieved by way of bonus. He said that the amount would be dependent on how much money was actually saved (and therefore could not be calculated upfront). Neil Jones and David Piotrowski also said that this was the case in their witness statements, although when giving evidence neither confirmed that they had directly heard Mr Lavin say this to the Claimant: what did appear to have been heard was a conversation encouraging the Claimant to draw up plans.

16. Mr Lavin said that the factory was a new build and subject to continuous improvement: as part of that he wanted to "tidy it up" and stop it being so messy. He said that the Claimant and other colleagues did a good job of this, but that there was no bonus attributable to it and he had never said anything about 10% or in fact any payment whatsoever. He said that he would not have been able to authorise any bonus without further director approval.

17. The Claimant says that his colleagues made his life difficult because they did not like this arrangement, particularly managers Gary Badger and Antony Curtis, but that after the first full month it could clearly be seen that savings could be made. The Claimant prepared a wastage report which showed a saving of £2,938.19, not including any sums for wages or other matters such as the reduction in rubber required or time finding hoses. The Claimant said that he provided this report to Mr Lavin via his mobile phone and emailed it to him and to "dispatch". I heard from Mr Jones who confirmed that he had seen the documentation. I saw evidence in the form of an email showing that it had indeed been sent to "dispatch" on 4 July 2019, although this did not indicate whether or not it had been also sent to Mr Lavin and Mr Lavin said he had no recollection of it.

18. The Claimant said that within three months he had saved around £8,000 for the Respondent. He said that Mr Lavin was shocked by the level of savings, which the Claimant estimated to be £45-50k but Mr Lavin allegedly said could be "in the region of £60k" (although I note that the three month figure provided, when extrapolated, would instead work out at about £32,000).

19. The Claimant said that instead of the 10% previously agreed Mr Lavin then told him he would instead earn "up to £3,500" across a year and changed it to a yearly payment, to be paid on the first Friday of February. Mr Lavin denied this: he said that this would not have made sense because the customer in question did £500,000 worth of business in a year, which translated into around £60,000 profit. He said that there was not £60,000 wastage in any case and that the Respondent would always try to keep every last bit of hose. Mr Lavin denies agreeing anything with the Claimant about either a 10% bonus or a £3,500 one. Mr Curtis and Ms Holmes, giving evidence for the Respondent, explained that they also had no knowledge of any such bonus.

20. It was common ground that there were other types of bonus within the Respondent, which generally led to smaller payments of around £20 each time issued. For those, the agreed process is that managers would make a recommendation to Mr Lavin who would agree to take it forward. I believe that the Claimant had genuine reason to be upset that he was rarely awarded one of these bonuses, and indeed I heard from Mr Curtis that he himself had put the Claimant forward on occasion but Mr Badger had potentially removed the Claimant from the submission to Mr Lavin. I have sympathy with the Claimant's frustrations on this, however it is not relevant to the issues in this particular case. I heard evidence about other payments that had been made to other individuals, showing me that it was not unheard of for individuals to receive significant bonuses, but I am satisfied that the circumstances surrounding those were different, for example a rubber scrapings "bonus" which was a payment based on a

specific "per kilo" calculation of work done rather than a bonus in the traditional sense.

21. I have found the background to the potential bonus to be the most troubling aspect of this case. There is a significant discrepancy between what the Claimant and his witnesses, and the Respondent's witnesses, say about this matter, which is not easily reconciled. It is not simply that the details are disputed, but the very underlying arrangement itself. Having given careful consideration to everything that was presented to me, both in evidence and through documentation, I find as follows:

22. I believe that there was a conversation between Mr Lavin and the Claimant, during which Mr Lavin said that he wanted to make some changes around the trimming area, and during which the Claimant indicated that he had what he thought was a good idea. I find that Mr Lavin encouraged the Claimant to draw up his plans, which he then did.

23. I think that the Claimant genuinely believed that, in doing this, he would be eligible for some kind of bonus – I accept that he put his own time and effort into it, and that he told his colleagues he would be eligible for a bonus: I do not see why he would have done this if he did not think that this would be the case. However, I do not think that there was any formal agreement to say that he definitely would be eligible for a bonus (whether 10% of any savings or up to £3,500): Mr Curtis was the Claimant's line manager and he knew nothing of any such arrangement, and neither did Ms Holmes as the finance manager – although Mr Curtis did say that he heard the Claimant and his colleagues talking about it. Were there a formal arrangement in place, which both parties seemed to suggest would be an unusual kind of bonus and very different from the other types of bonuses generally paid out, I would have expected Mr Lavin to have communicated it to them. In addition, Mr Lavin made the point that up to 1 February would have been a strange period of time to have chosen to calculate the bonus, and I agree – I would have expected there to have been either a monthly or annual bonus from the point when the arrangement was put in place, but this was neither.

24. In any case, even if a bonus were agreed, it is clear that this was not a fixed payment but a maximum payment, only to be made if the savings continued at the level they were initially. There was no documentation setting out the potential bonus amount, criteria for payment, or payment mechanism / timing. There was further no agreement (verbal or written) about how the payment would be calculated: simply that it was "up to £3,500" if the scheme continued to save the Respondent money at the level it was doing and no agreement about what would happen if the Claimant left the Respondent's employment before 1 February: the Claimant said that he didn't think about this because he had no plans to leave. In reality, I think that if Mr Lavin had truly intended to create a bespoke bonus scheme for the Claimant then he would have addressed his mind to at least some of these questions with the Claimant.

The incident

25. Over time, the Claimant says that working relationships with some of his colleagues were strained. In particular he pointed to a disagreement with

Mr Badger relating to football in which Mr Badger had allegedly indicated he might hit the Claimant. He said that Mr Badger was responsible for assigning weekly bonuses and always made it so that the Claimant did not get one. The Claimant also alleged that Mr Curtis had called him a "fucking pussy". The Respondent's position is that it was in fact the Claimant who would behave inappropriately towards colleagues on occasion. From what I have heard I believe that the behaviour went both ways: I accept that the Claimant may have on occasion behaved inappropriately, but I also believe that others did too: specifically Mr Curtis said in evidence that the incident with Mr Badger had taken place (albeit he had not heard the whole incident) and that there had been some informal action taken in relation to Mr Badger over his behaviour at some point.

26. An incident occurred on 5 December 2019 involving the Claimant. What happened during that incident is disputed, but it centered around the Claimant being asked to move hoses off a table so that his colleague, Jaroslaw Legutko, could use the table. The Claimant was angry about this because he felt that Mr Curtis had watched him put the hoses on the table, knowing that he would ask them to be moved. The Claimant accepts that he said "fucking wanker" to his colleague Neil about the situation, and that he made some comments about Mr Legutko always getting what he wanted, but denies going any further than that.

27. In the bundle there were documents prepared by managers within the Respondent suggesting that more had in fact been said. In particular there was one statement from Katherine Hands, Quality Manager, in which she said that the Claimant mumbled "I'll slit his throat". She also raised concerns that the Claimant had been racist and sexist on occasion. There was also a statement from Mr Badger raising concerns about the incident, although he was not there, and more generally about the Claimant's alleged lack of respect for him and behaviours to others, again citing racism. Paulina Rossa, a colleague, gave a statement saying that the Claimant did not treat him fairly and that she thought this was because she was Polish and a woman (although I also saw a later screenshot of a conversation between Mr Rossa and the Claimant appearing to suggest that they were friends and that she disagreed with what happened to him after the incident). I come to the timing of these statements later. It was explained to me by Mr Lavin in evidence that this was not the first time issues had been raised about the Claimant's behaviour: whether or not that is the case, the Claimant did not appear to have had any formal sanction previously.

28. At the end of that shift, the Claimant was asked to go to the office, but explained that he needed to go home to his children for childcare reasons. The Claimant was not scheduled to work again until Monday 9th December 2019. There was some confusion about exactly what happened on what day between 9 and 11 December 2019 but this is not material to the claim and it is clear that there was a meeting about the incident with Mr Lavin and Jacques Commeny, another director at the Respondent, on 11 December 2019. The Claimant said that Mr Curtis told him that it was about a potential pay rise. However, under evidence, he appeared to accept that he did think it might be about the incident, and he said in his witness statement that Mr Curtis had told him that he would know in the

meeting if he needed representation or not. He also decided to record the meeting, which suggests to me that he thought it was about something significant. On balance, I believe the Claimant did at the very least suspect that the meeting would discuss what had happened previously.

29. The meeting took place the following Monday on 11 December 2019. A transcript from a recording of the meeting was in the Bundle. Present at the meeting were the Claimant, Mr Lavin and Mr Commeny. There has been significant confusion about the status of that meeting. The transcript of the meeting is headed "Minutes for disciplinary 1" however this was added by the Claimant and is not in itself determinitive. At no point during the meeting or before it was the Claimant told that it was a disciplinary meeting. The Respondent's position was that it was in fact an informal meeting to discuss what had happened. That said, following the meeting the Claimant was sent a letter dated 18 December 2019 in which it was stated "Further to your disciplinary hearing of 11th December 2019...". When questioned about this, Mr Lavin appeared to backtrack from what was said in this letter and instead said that the meeting itself was an informal investigation, but that after the Claimant "stormed out" at the end of the meeting, a decision was made to nevertheless issue a disciplinary sanction despite it not having been a disciplinary meeting, taking account of the storming out itself. I deal with the alleged "storming out" below. This was also the explanation he had given in a separate letter to the Claimant on 23 December 2019. Overall, I find that Mr Lavin did initially genuinely believe that the matter could be dealt with informally and therefore the meeting was not a formal disciplinary meeting – I believe that he had some understanding that he should have had a disciplinary hearing before issuing a sanction, and therefore tried retrospectively to argue that the meeting on 11 December was a disciplinary one, later backtracking when he realised that this would still not render the process fair.

30. At the meeting, the Claimant was asked to put forward his version of what had happened. The Claimant says that he had been angry because he had been asked to move the hoses and he felt that Mr Curtis was laughing at him. He agreed he called Mr Curtis a "wanker" but nothing more than that. During the meeting the Claimant asked that his colleague Neil Jones appear as his witness. This was denied, and Mr Lavin also said that he did not want to hear from David Piotrowski about what happened. During the hearing the Claimant submitted that in refusing this, he was being denied the right to a representative. I do not agree that this was the case: in any event this was not a disciplinary hearing at this stage, but what he was denied was the right to call a witness to provide evidence about the incident in question. That said, I do think a reasonable employer would have afforded him that opportunity – either through speaking with them or allowing them to provide a written statement of some sort. It does appear to me that the Respondent was presented with the possibility of further evidence, but chose not to take account of it – having decided in advance that the evidence of its managers would be preferred over that of the Claimant's witnesses.

31. In relation to the Respondent's evidence, the witness statements from Ms Hands, Mr Badger, and Ms Rossa post date this meeting. Mr Lavin told me that this was because those statements were originally verbal, and then put in writing subsequently, and therefore there was nothing

inconsistent in this. However, whether or not that is the case, the clear implication given to the Claimant at the meeting was that Mr Lavin already had statements: in line 62 of the notes from the meeting he said "we got witness statements from people to say...": I believe that Mr Lavin's intention was for the Claimant to believe there were written statements. Regardless, the other consequence of these being prepared after the meeting was of course that the Claimant did not have the opportunity to review them and/or to respond to them: at the hearing I heard from the Claimant and his witness, Mr Jones, that Ms Hands would in fact have been too far from the Claimant to hear what was said properly given the levels of noise on the floor. There was also no statement from Mr Legutko, who had apparently only given a verbal statement. Overall, I do not find the evidence provided by the Respondent in relation to the allegations against the Claimant to be particularly convincing: some of the allegations made were general in nature, and the Claimant was not given any real opportunity to comment upon them.

32. The Claimant says that he was called a "fucking racist" during the meeting. Mr Lavin for the Respondent submitted that, in fact, what was being said was that a court would think that the Claimant was a "fucking racist" and that any misunderstanding was because of linguistic issues with Mr Commeny being French. Whatever the intention, I do find that the Claimant believed that he was being called a racist without being given a fair hearing and this in part prompted what happened at the end of the meeting.

33. There was continued discussion about what had or had not been said during the incident and when Mr Lavin repeated to the Claimant that he had witnesses the Claimant decided he could not remain in the meeting. The Claimant said "until this is sorted out I don't want to be here because that is bang out of order". Mr Lavin replied "ok" following which the Claimant said that Mr Lavin could call him once he had sorted things with Mr Legutko, and then left. The Claimant says that he had permission to leave from the words "ok", whereas Mr Lavin submits that he did not, and that the "ok" was more of a resigned "ok" because the Claimant had already got up and was leaving the room. The Claimant denies this. In my view, having regard to some discussions about the incident at the later appeal meeting, I think that at this point the Claimant had stood up, with the clear intention of leaving the room, albeit he had not yet walked out. I find that Mr Lavin's comment "ok" was more of an exasperated "ok", reflecting that he thought the Claimant had already made the decision to leave at that point, rather than that he was authorising it. Fundamentally, if he had authorised it, it would make no sense for him to then keep raising the point that he left without permission at later stages in the process, as he went on to do.

34. After the meeting, the Claimant texted Mr Lavin and asked him if he could attend work the next day, and Mr Lavin confirmed he could.

35. The Claimant was then provided with a letter dated 18 December 2019 (the one which said "further to your disciplinary hearing of 11 December 2019"), which issued him with a final written warning for two things:

- Harassment and abusive behaviour; and

- Failure to carry out a management instruction.

36. No detail was provided to expand on what specifically the warning related to, and I find that in reality neither the Claimant nor Mr Lavin was entirely clear on this. During evidence, Mr Lavin submitted that the harassment related to the incident with Mr Legutko and the information provided by other witnesses. In relation to the finding about failure to carry out a management instruction, Mr Lavin admitted at the hearing that he was not sure what this related to: he initially said that he thought it was about the Claimant not removing hoses, but when the Claimant challenged by saying that he had in fact removed them, Mr Lavin said that he had constantly failed to carry out instructions and that it had been reported to him but he did not know specifics. Later in his evidence he said that the warning was because the Claimant had walked out, and then when challenged that it was both. I find that it was in reality a mixture of everything: the original issues which led to the meeting on 11 December 2019 (namely the swearing, alleged racism and alleged threats to slit a colleague's throat), and the storming out. The Respondent's position is that it could in fact have chosen to sack the Claimant at this point, and the only reason they did not was because the Claimant was a good worker, because it was Christmas and they did not want to dimiss him when he had a family at that time of year. I accept that the Respondent felt that way.

The appeal

37. The Claimant was given the right of appeal. The Claimant did appeal against the warning, by letter dated 19 December 2019. This surprised and somewhat stumped the Respondent: no one had appealed a warning before and they were not sure what to do. The Respondent invited the Claimant to an appeal meeting by letter dated 23 December 2019 and the Claimant replied to that letter on 30 December 2019, saying that he was denied the right to a representative at the first meeting, and denying that he had walked out without permission.

38. The appeal meeting took place on 15 January 2020. The Claimant was not provided with the witness statements from management at or before this meeting. The Claimant was accompanied by Damien Kushner and Mr Lavin and Mr Commeny were in attendance for the Respondent – the same individuals who had conducted the meeting on 11 December 2019. The invitation to meeting had referred to this as an appeal meeting but the transcript was headed "disciplinary meeting 2". In reality it is clear to me that it was an appeal meeting.

39. At the meeting, Mr Lavin started by explaining that he was not entirely sure how to deal with an appeal because this situation hadn't arisen before, but he said that it was the Claimant's opportunity to have his say. During the meeting, Mr Commeny told the Claimant that threats are taken very seriously and that he should have been sacked for it, and also pointed out that the Claimant had walked out of the meeting. There was then some debate about what had happened at the previous meeting, following which Mr Commeny told the Claimant that he had expected the Claimant to apologise for his behaviour and promise that it wouldn't happen again. The Claimant said that he was fighting the charge because he hadn't done

what he was accused of. He accepted again saying that his colleague was a "fucking wanker" but no more. The Claimant said that his colleague, Mr Curtis, had previously called him a "fucking pussy" but was not going to be issued with a warning: Mr Lavin sought to distinguish that as being a comment made in jest not anger.

40. Ultimately, Mr Commeny said that he was not going to take the Claimant's statements from witnesses into account, that the Respondent's position was not going to change and that either he had to accept the final warning or be sacked. The Claimant said that he could not sign his warning and, after some debate on the point, Mr Commeny told the Claimant that he was sacked. There was some debate earlier in these proceedings about whether the Claimant in fact resigned but the evidence before me was clear that the Claimant was dismissed at his appeal meeting, and this was confirmed to me by Mr Lavin on behalf of the Respondent. The Respondent's position is that the Claimant's behaviour amounted to gross misconduct.

41. As to what that "behaviour" was, Mr Lavin suggested that it was the Claimant's refusal to accept the seriousness of the matter and the evidence against him. Given that the Claimant had already been issued with a final written warning in respect of the behaviour towards colleagues and allegedly storming out of the meeting, I believe that the "behaviour" for which he was dismissed was for not agreeing to accept the warning.

42. The Claimant did not receive any notice pay. The Claimant's contract of employment had a notice section which cross-referred to an Employee Handbook. I was not provided with a copy of that Handbook but the Claimant gave evidence that his notice period was one week. As this aligns with the statutory minimum I accept this to be the case. One week's pay would amount to £290 gross, which amounted to £266.20 net (from the Claimant's Schedule of Loss). The Claimant also said that he would receive benefits to the value of £12.48 net: I heard no evidence to suggest this was incorrect and so I agree with this calculation.

Law

Wrongful dismissal / Breach of Contract

43. Under section 86 of the Employment Rights Act 1996 ("ERA"), an employee is ordinarily entitled to notice of termination of employment. The statutory minimum period under that section for an employee with under two years' service is one week's notice. If there is a contractual provision for greater notice, that will take precedence, and in the absence of any contractual provision, the employee will be entitled to "reasonable notice".

44. A failure to pay the required amount of notice due under the contract of employment will be a breach of contract, known as wrongful dismissal, unless the employee has fundamentally breached the contract i.e. committed an act of gross misconduct. In accordance with *Jackson v Invicta Plastics Limited [1987] BCLC 329*, the conduct must be so serious as to strike at the root of the confidence which must exist for the contract of employment to be effective.

45. In considering a claim for wrongful dismissal, the reasonableness of the employer's actions is irrelevant: the question is whether the contract of employment has been breached: this is a factual question for the Tribunal to determine: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice? (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*).

46. In addition, a failure to pay a bonus may be a breach of contract, if there was a contractual entitlement to that bonus. Any contractual terms in that regard are to be interpreted in line with what a reasonable person, having all the background knowledge that the parties had, would understand to be the position. An employee may still be entitled to the bonus where there is express agreement as to the fact that a bonus would be received, but the exact amount was to be determined at a later date (*Gutermann Messtechnik and anor v Hartley and anor 2012 EWHC 1697*]. A requirement to be in employment on the bonus payment date will not necessarily be implied into a bonus arrangement (*Rutherford v Seymour Pierce Ltd 2010 IRLR 606*).

47. Damages for breach of contract should seek to put the Claimant back in the position they would have been in had the contract not been breached, however damages for injury to feelings and/or psychiatric injury caused by the dismissal or manner of dismissal may not be recovered (*Johnson v Unisys [2001] ICR 480*). The Claimant must seek to mitigate their loss, but may include contractual benefits in their claim.

48. Compensation can be increased or decreased by up to 25% to reflect any failure to follow the ACAS Code of Practice on disciplinary and grievance procedures, in accordance with s207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Wages

49. Section 13(1) of the ERA sets out that an employer must not make a deduction from a worker's wages unless the deduction is either required to be made, or is authorised, under either statute or a provision of the worker's contract, or the worker has consented in writing to the deduction in advance.

50. Section 27 of the ERA details what amounts to wages. This includes bonuses.

51. Section 13(3) of the ERA provides that

> "*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*."

52. It is for the worker to show that the wages were properly payable to him. To establish what is "properly payable" to the worker, the Tribunal must have regard to all of the relevant terms of the contract, including implied terms (*Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714*). It must be possible to quantify the payment for it to be "properly payable" as a specific sum - *Delaney v Staples (t/a De Montfort Recruitment) 1992 ICR 483 and Coors Brewers Ltd v Adcock and ors 2007 ICR 983*.

53. Payment earned for the completion of specific tasks will only become "properly payable" once the task is completed otherwise it is in effect damages for the loss of the opportunity to earn it which is sought: *Lucy and ors v British Airways plc EAT 0033/08*.

54. A discretionary bonus will become "wages" when it is declared and quantified (*Mouradian v Tradition Securities and Futures [2009] EWCA Civ 60*).

55. Payments in lieu of notice do not constitute "wages": *Delaney v Staples [1992] IRLR 191*.

56. Again, compensation can be increased or decreased by up to 25% to reflect any failure to follow the ACAS Code.

The ACAS Code

57. The ACAS Code of Practice on disciplinary and grievance procedures sets out the procedure that employers should follow when dealing with disciplinary matters. Core principles include the right to be notified in advance of a disciplinary meeting, the right to be heard before any decision is reached, the right to be accompanied and the right of appeal which should be dealt with impartially.

Conclusions

Notice Pay

58. I deal first with the issue as to whether or not the Claimant was entitled to notice. The first question is the amount of notice to which the Claimant was, in principle, entitled. I have found that this was one week.

59. The next question is whether there was a fundamental breach of contract. Initially, it appeared that there may have been an argument that the Claimant resigned and therefore that we would need to address whether the Respondent, through its conduct, had fundamentally breached the contract. However, it was confirmed during the hearing that there was in fact agreement that the Claimant had been actively dismissed by the Respondent. This therefore instead requires me to consider whether or not the Claimant was guilty of gross misconduct. The Respondent says he was, both because of his behaviour towards colleagues and because he stormed out of a meeting and later refused to accept the warning.

60. However, initially, the Respondent issued him with a final written warning in respect of his behaviours. On appeal, the only thing that had changed in reality was that the Claimant had exercised his right of appeal: there was

no suggestion that any further acts of misconduct had arisen other than him not accepting his warning.

61. The Respondent argued that the Claimant's initial behaviour was indeed gross misconduct, and that it would have been entitled to dismiss him on 18 December 2020: and indeed in their letter dated 23 December 2019 they referred to the Claimant's conduct as amounting to gross misconduct. Their position is that they exercised their discretion not to dismiss him because he was a good worker and it was Christmas.

62. In my view, the Claimant had not however committed an act of gross misconduct even looking at those acts alone. Taking each of the potential acts of gross misconduct in turn:

    i. I have concluded that the Claimant did in fact call his colleague a "fucking wanker". Whilst inappropriate, I do not think that this was gross misconduct, in circumstances where swear words appear to have been used generally within the organisation.

    ii. I do not accept that the Claimant behaved in a racist way or that he threatened to slit a colleague's throat. I do not know exactly what was said, but I do not believe that the Respondent had sufficient evidence to demonstrate this.

    iii. Whilst the Claimant had left the meeting prematurely, and I do think to some extent unauthorised, I do not believe that this was an act of gross misconduct. I find that this was the act of someone who was frustrated and upset by being asked to respond to allegations against them but had their evidence completely disregarded and, whether or not intended, felt that he had been called a "fucking racist". It was understandable that he would be upset and would need some time to think: even though his exit was unauthorised he also explained why he was leaving and said that he could be contacted in future.

63. I have also considered whether the Claimant's actions overall could constitute gross misconduct, and again I conclude they do not. In any event, I also find that, by issuing the final warning, the Respondent had affirmed the contract of employment. That means that, by their conduct (i.e. choosing to issue a warning and not dismiss the Claimant), the Respondent had confirmed an intention for the contract to continue.

64. In any case, however, it is my view that the act that the Claimant was in fact dismissed for was not the behaviour above. The Respondent submits it was because the Claimant refused to accept the final warning, but in my view, looking at it another way, it was in reality because he appealed against the warning and would not in effect withdraw that appeal. I have no hesitation in finding that the Claimant was perfectly entitled to appeal against the warning, and that no pressure should be placed on an employee who does so to retract that appeal. The proper course of events would have been for the Respondent to have considered his appeal properly and then, if the appeal was not upheld, to have confirmed to the Claimant that the warning stood, whether or not he accepted it / signed it.

It simply cannot be gross misconduct to pursue the right to appeal which has been expressly offered to the employee.

65. Having concluded that he was not guilty of gross misconduct, I also conclude that he was therefore entitled to notice of one week. Whilst there is a duty to mitigate loss, I find that with such a short notice period there could be no real expectation that he would be able to do so.

66. I must now consider whether or not the compensation to which the Claimant is entitled should be increased to reflect any failure to follow the ACAS Code. In his Schedule of Loss the Claimant has referred to an uplift of 10% in one section, and 20% in another. There was in reality no disciplinary meeting and the Claimant had no opportunity at all to respond to the allegation that he stormed out before any sanction was issued. The written statements of witnesses were gathered after the investigation meeting but it was suggested to the Claimant that it had been before, and the Claimant's own witnesses were not permitted to be heard. The conduct in relation to the appeal was a clear failure to follow the Code in my view: the appeal was, in my view, just the Respondent going through the motions of what was required with no real ability for the Claimant to clear his name. It was also conducted by the very same people who issued the warning. That said, the Claimant did at least attend two meetings with the Respondent, albeit not conducted correctly, and was given the right to a representative at the appeal meeting: the Respondent is a relatively small employer and as such I must take into account that its understanding of procedures may be more limited than large corporate organisations. In these circumstances, I find that it is appropriate to award an increase of 20% and not the full 25% available to me.

67. Although damages for breach of contract are calculated on a net basis, since the payment of notice pay is taxable I use the gross figure in my calculation. I find that the Claimant was entitled to his one week's salary, plus benefits. His gross weekly pay was £290, equating to 266.20 net. This means that his take home pay was approximately 92% of the gross figure. His net benefits in his schedule of loss were £12.48, which applying the same percentage grossing up, would be £13.56, making a total gross payment of £303.56. Applying the increase of 20% for failure to follow the ACAS Code, this results in a payment of **£364.27**. The Respondent may deduct such tax and national insurance contributions as are appropriate on this sum.

68. The Respondent's representative also made submissions regarding notice pay as a claim for unlawful deductions from wages. Payments in lieu of notice do not constitute wages, however as I have already found in the Claimant's favour as a breach of contract I do not need to explore this point further or address the fact that this was not included in the original List of Issues at the Preliminary Hearing in June 2020.

Bonus

69. I now turn to consider whether there was any entitlement to a bonus. If there was, then this constitutes wages under the ERA and can form the basis of an unlawful deductions from wages claim.

70. At the time of his dismissal, it is clear to me that the Claimant had no expectation of any bonus based on 10% of the savings achieved and does not seek to argue that he was so entitled: the question is whether he was entitled to a bonus of "up to £3,500", payable on or around 1 February 2020.

71. For a claim for unlawful deductions from wages to succeed, the bonus must have been "properly payable" to the Claimant. Having regard to all of the relevant terms between the Claimant and Respondent, both oral and written, express and implied, I do not find that there was a term requiring this sum to be paid. In particular:

    i. Even if taken at its highest level (i.e. accepting what the Claimant has said in full), the bonus was not a fixed sum but "up to £3,500". For a payment to be properly payable, it must be quantifiable, and a figure of "up to" a certain amount is not. This is particularly so where, as in this case, there was no mechanism agreed for determining whether the Claimant should be paid the full amount or a lesser sum.

    ii. If the bonus existed in principle, the bonus period had not yet ended (it being due to end around 1 February) and therefore again it cannot be properly payable as the tasks that were required in order to qualify for the bonus have not been completed. It was clear to me that even the Claimant believed that a bonus was only payable if savings were maintained at the level they had been initially across the whole bonus period.

    iii. In addition to the above, in my findings I have explained that I do not accept that there was in fact an agreement that the Claimant would be eligible for a bonus: there may have been some hope of one on the Claimant's part but I do not believe that anything specific was agreed about this and certainly not to the extent that it became a binding agreement on the parties.

72. I therefore find that the failure to pay a bonus to the Claimant was not an unlawful deduction from wages.

73. The Respondent also made submissions based on whether or not there was a contractual entitlement to a bonus. I am mindful that again the List of Issues did not frame the bonus claim as one for breach of contract, however having given the issue due consideration I do not believe that there was a breach of contract in relation to the bonus payment in any case. Here, the key difference is that the fact the payment amount had not been specifically quantified and that the employment had ended before the bonus period had finished would not necessarily be fatal to the claim: what matters is what was agreed between the parties and whether that was contractual in nature. Ultimately, however I find that there was no contractual entitlement to any bonus: I have seen no evidence other than the Claimant's witness evidence of any firm agreement between the parties and I believe that, had there been an intention to create a contractual entitlement to a bonus, there would have been something somewhere setting the arrangement up: even if not a documented contractual agreement, some discussion with the Claimant's line manager or Finance Manager, and/or an email exchange referring to the

arrangement, or something to that effect. Whilst an agreement of this nature could theoretically be verbal, I do not believe that Mr Lavin would seek to agree something of this size in this way, given that the Respondent appears to have had clear processes for determining bonus payments of even as little as £20. Even based on the Claimant's evidence, there had been no discussions with the Claimant about how the bonus would operate: such as the criteria for payment, level of payment, and what would happen if the Claimant left employment. Even if there were some discussions about the potential for a bonus, I find that those discussions did not go far enough to create any kind of legal obligation. Therefore I find that there was no breach of contract on the part of the Respondent in not paying this bonus.

Employment Judge Edmonds

Date 13 February 2021