EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr MARK HEWLETT	**v**	**EBURY PARTNERS UK LIMITED**

Heard at: London Central (by video) **On**: 15,16 & 17 June 2021

Before: Employment Judge P. Klimov, sitting alone

Representation

For the Claimant: Mr Adam Ohringer (of Counsel)

For the Respondent: Mr Peter Linstead (of Counsel)

JUDGMENT having been announced to the parties and the reasons having been given orally at the hearing on 17 June 2021, and written reasons having been requested by the parties at the end of the hearing, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form presented on 23 October 2020 the Claimant brought claims for unfair (constructive) dismissal and unlawful deduction from wages with respect to the Respondent's failure to transfer to the Claimant 2,000 shares in the Respondent.

2. The Respondent denies dismissing the Claimant. It avers that the Claimant resigned and was not dismissed. It denies that the Respondent's treatment of the Claimant amounted to a breach of any express or implied terms of the Claimant's contract of employment.

3. The Respondent did not plead in the alternative that if it were found that the Claimant was dismissed, the dismissal was fair.

4. The Respondent denies making any unlawful deduction from the Claimant's wages. It avers that it did not promise to transfer to the Claimant 2,000 shares, as alleged or at all. It further contends that shares do not fall within the concept of "wages properly payable" for the purposes of Part II of the Employment Rights Act 1996 (the "ERA"), and therefore the tribunal does not have jurisdiction to consider the Claimant's claim for unlawful deduction from wages.

5. At the hearing, the Claimant was represented by Mr Ohringer, and the Respondent by Mr Linstead. I am grateful to both counsels for their cogent submissions and assistance to the tribunal.

6. Before the hearing, the Claimant presented an amended witness statement containing two substantive changes to his earlier exchanged witness statement. The Respondent did not oppose the Claimant's amendments. I allowed the Claimant's amended witness statement. There were two further minor corrections made by the Claimant to his witness statement at the start of his evidence.

7. The Claimant also called Mr Andras Mecser (a former Chief Financial Officer of the Respondent) and Mr Martin Fest (another former Chief Financial Officer of the Respondent). The Claimant also presented a witness statement of Mr Paolo Giabardo (a former Chief Commercial Officer of the Respondent) but did not call him to give oral evidence to the tribunal. The witness statement was presented late, on the eve of the hearing. The Respondent objected to Mr Giabardo's statement being introduced in evidence. After a short adjournment Mr Oringher confirmed that the Claimant would not pursue an application to admit Mr Giabardo's witness statement and was content to withdraw it. The Respondent called Mr Juan Lobato (a co-founder and a co-CEO of the Respondent). All witnesses gave sworn evidence and were cross-examined.

8. I was referred to various documents in the common bundle of documents of 276 pages the parties introduced in evidence.

9. At the start of the hearing, the Respondent applied to amend its Grounds of Resistance. The main sought amendment was in paragraph 13. It was to clarify the Respondent's position that Mr Lobato had indicated to the Claimant that he hoped to give the Claimant a pay rise to £100,000, and not that he had confirmed the pay rise. The Respondent submitted that the original paragraph 13 was wrongly drafted by an oversight. The Claimant opposed the application, arguing that it was made late, and the Respondent should be asked to explain on whose instructions the original defence was pleaded.

10. After hearing the parties' submissions, I decided to allow the amendment. It was a minor amendment and did not change the substance of the Respondent's defence on the key issues in the case. The parties' witness statements were

consistent with the position as pleaded in the amended Grounds of Resistance. More importantly, the Claimant was not brining any claim in these proceedings in relation to the alleged promise to increase his salary to £100,000 (whether by way of a money claim or in support of his constructive dismissal claim). Therefore, the issue of whether Mr Lobato promised to increase the Claimant's salary to £100,000 was not one of the issues I needed to determine in these proceedings. On that basis, I decided that the Claimant would not suffer any prejudice if the Respondent were allowed to amend its Grounds of Resistance.

11. There was an agreed list of issues:

> **"*Terms of the contract***
>
> *1. Was the Claimant contractually entitled to receive 2,000 shares? This engages the following questions:*
>
> *a. Did Mr Lobato make a promise to the Claimant in December 2017 that he would receive an additional 2,000 shares?*
>
> *b. Did Mr Lobato make a promise to the Claimant on any subsequent occasions that he would receive an additional 2,000 shares?*
>
> *c. If did he make any such promise, was it made behalf of the Company?*
>
> *d. Was there consideration for any such promise sufficient to make it a contractual obligation?*
>
> *e. Was there sufficient certainty of terms to create a contractual obligation?*
>
> *f. If there was a contractual obligation, when did it come into existence?*
>
> *g. If there was a contractual obligation, what were its terms?*
>
> *2. There being no claim for breach of contract before the employment tribunal, the above questions are relevant only to the issues of constructive dismissal and unauthorised deduction from wages.*
>
> *3. It cannot be disputed that the contract of employment between the parties included the implied term of trust and confidence that an employer should 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. This includes the obligation to maintain trust and confidence in relation to both contractual and non-contractual promises relating to remuneration.*
>
> ***Constructive dismissal***
>
> *4. Was the Claimant constructively dismissed on 8 June 2020 (taking effect on 8 September 2020)? This engages the following questions:*

a. On 6 to 8 June 2020 did Mr Lobato deny the Claimant's entitlement to shares which it is alleged he promised the Claimant in December 2017, or the remaining balance of those shares?

b. If so, did that constitute:

i. A repudiatory breach of an express term of the contract concerning this arrangement as referred to in paragraph 1; and/or,

ii. A breach of the implied term of trust and confidence.

c. If so, did the Claimant resign at least in part because of the alleged repudiatory breach?

d. If so, did the Claimant affirm the contract of employment before terminating it?

Unfair Dismissal

5. If the Claimant was constructively dismissed, what was the reason or principal reason for his dismissal?

6. Was the reason of principal reason a potentially fair one under s.98(2) ERA?

7. If so, was the dismissal for that reason fair in the circumstances pursuant to s.98(4) ERA?

Remedy for unfair dismissal

8. If the Claimant was unfairly dismissed:

a. What basic award is he entitled to?

b. What compensatory award is he entitled to taking into account any financial losses suffered as a consequence of the dismissal?

9. Should any award be adjusted under s.207A of Trade Union and Labour Relations (Consolidation) Act 1992 on account of a failure to follow an applicable ACAS Code? If so, by how much?

Unauthorised deductions from wages

10. If the Claimant was promised 2,000 shares from Mr Lobato as alleged in paragraph 1(a), did that constitute 'wages' properly payable to the Claimant whether under his contract or otherwise pursuant to s.13 and s.27 ERA?

11. If so, when were those wages properly payable?

12. If there was such a promise, was Mr Lobato's denial of the Claimants entitlement to those shares on 6-8 June 2020, an unauthorised deduction from pay under s.13 ERA or merely a confirmation of his position in relation to a deduction which had

been made in the past?

13. Having regard to the above, has any claim for unauthorised deduction been made in time or is it out of time pursuant to s.23 ERA.

14. What if any sum should be awarded in favour of the Claimant under s.24 of the ERA 1996?"

12. At the start of the hearing, I discussed with the parties the list of issues. As the Respondent was not advancing, in the alternative, a defence that if the Claimant were dismissed the dismissal was fair, it was agreed that issues 5 – 7 were not relevant. If I found that the Claimant was dismissed by the Respondent, the dismissal would be unfair, and I would not need to go on and find a reason for the dismissal.

13. It was also agreed that I should deal with the liability issues first, and, time permitting, with the remedies issues (if relevant) after I have given my judgment on liability. At the end of the hearing, there was insufficient time for me to deal with the remedies issues. These will be decided at a remedies hearing, if not agreed by the parties.

14. I have also confirmed with the parties that they were content with this tribunal making findings of fact on issues 1(a) - (g), considering that the Claimant was not brining a claim for breach of contract and was specifically reserving the right to bring a breach of contract claim for the value of the shares in the civil courts.

Findings of Fact

15. The Respondent is a financial technology company, specialising in corporate global transactions. It was co-founded by Mr Salvador Garcia and Mr Juan Lobato, who are also co-CEOs of the Respondent. They exercise day-to-day control of the Respondent's operations.

16. The Claimant was employed by the Respondent from 13 February 2013 to 8 September 2020. He worked first as a Business Developer and later as a Wholesale Banking Relationship Director. The Claimant was originally managed by Mr Garcia and from late 2015 by Mr Lobato.

17. The Claimant's most recent terms of employment contained the following terms concerning his remuneration:

1.10 Salary
1. 10. 1 The Employer will pay you, during the continuance of your employment, an annual salary of £90,000 (less deductions for income tax and national insurance), which shall accrue from day one.
1.10.2 Your salary may be reviewed during your employment and you will be notified of any changes in writing. The Employer is under no obligation to award

an increase in following a salary review. There will be no salary review atter notice has been given by either part to terminate the Appointment.

1.12 Bonus
1. 12. l The Employer may in its absolute discretion pay you a bonus of such amount, at such intervals and subject to such conditions as the Employer may in its absolute discretion determine from time to time.
1.12.2 Any bonus payment to you shall be purely discretionary and shall not form part of your contractual remuneration under this agreement. If the Employer makes a bonus payment to you, it shall not be obliged to make subsequent bonus payments.

18. The Respondent operates a management incentive plan (the "MIP"), under which it grants shares to its senior staff from time to time. The process of granting shares to an employee involves the employee's manager making a recommendation to the Respondent's board's remuneration committee to award a specified number of shares to the employee. The award is subject to the remuneration committee's approval. The committee may refuse to make any award or change the number of shares recommended by the manager.

19. If the remuneration committee approved the award, to receive the shares the employee would be required to sign an Acquisition and Nominee agreement and to make a nominal payment for the awarded shares.

20. The Respondent's shares are not freely tradable. The employee is able to sell shares only on certain "exit events" (such as disposal of the Respondent's business) and upon leaving the employment of the Respondent. Conditions regulating the sale of the shares, including determination of the sale price, are set out in the Acquisition and Nominee agreement and the Respondent's Article of Association.

21. There are different classes of shares, attracting different rights and valuation. The Claimant was awarded 500 class D shares on 1 December 2015 and a further 500 class D shares on 1 May 2017.

22. In June 2017, during his performance review with Mr Lobato, the Claimant expressed dissatisfaction with his remuneration. He was looking for the Respondent to increase his pay package, otherwise he was planning to leave the Respondent. He booked a follow-up meeting with Mr Lobato in six months.

23. On 5 December 2017, in advance of the follow-up meeting the Claimant sent Mr Lobato an email arguing that in light of his achievements and anticipated efforts he would have to make in 2018 he deserved a pay increase of £15,000 and a bonus of £15,000, to be paid in December 2017. He also said that he was disappointed with the 500 shares award in May 2017 and wanted a further 1,000 shares awarded to him.

24. On 7 December 2017, the Claimant had the follow-up meeting with Mr Lobato, at which Mr Lobato agreed that:

a. The Claimant's pay would increase from £75,000 to £90,000 per annum;
b. That a bonus of £15,000 would be paid in the May 2018 pay review; and,
c. Mr Lobato would arrange for 2,000 shares to be transferred to the Claimant in May 2018. Mr Lobato said that if he could not get the Respondent's board's authority to award the shares to the Claimant, he would arrange to transfer 2,000 of his own shares to the Claimant.

25. On 5 March 2018, in advance of the regular May pay review, the Claimant emailed Mr Lobato reminding him of their December agreement. In his email he wrote:
"I wanted to grab you before you left today. Are we OK now on the comp from now as discussed in Dec as I've got a few expenses coming in over the short term that I'm going to need to cover and my breakeven's going up!
To remind you, we agreed £15k increase, £15K bonus and you kindly offered 2,000 of your shares (which I'm still very grateful for)."

26. On 8 March 2018, Mr Lobato sent an email to the Claimant under the subject "Comp". In that email he wrote:

"*Mark*

Here is what I am going to do

Your base I want to raise to £100k:
plus cash component probably over £20k (final number depends of final numbers)
Shares as discussed

My plan is to do this at the same time i do reviews for rest of company and make changes to apply from 1st of May

This is what I plan to do for you

Now you can plan

When are we both in London next?"

27. On 27 June 2018, the Claimant was awarded a bonus of £17,500. He did not receive a pay raise, and no shares were awarded to him.

28. Later that summer, the Claimant raised the issue with Mr Lobato of him not delivering on the December 2017 agreement. The conversation was in an open plan office in the presence of Mr Mecser. The Claimant asked Mr Lobato about the 2,000 shares and Mr Lobato responded by telling the Claimant not to worry and that the shares would be given to him.

29. On 27 November 2018, the Claimant was awarded 1,275 shares, bringing his total to 2,275 shares.

30. On 30 November 2018, the Claimant wrote to Mr Mecser arguing that his allocation should have been 2,500 shares "*as that's what agreed with [Mr Lobato] on annual discussion.*" Mr Mecser forward the Claimant's email to Mr Lobato, who responded to the Claimant as follows:

    "*mark, I have you in my last file at 1,275 shares awarded this year, in addition you should have 500 for year before and 500 for year before, so a total 2,275 but it i have found the second to last file where you are at 1,500 shares for this year, so a total of 2,500*
    i will check with andras [Mecser] to see what i sent to him back in June/July"

31. The Claimant replied stating that he was "*either way*" "*worse off than he thought*".

32. There was a further exchange of emails between the Claimant and Mr Lobato on 20 December 2018 on this subject. Mr Lobato confirmed that the number of shares awarded to the Claimant matched what Mr Lobato had in his last record.

33. On 7 June 2019, following the annual pay review, the Claimant's salary was increased to £90,000 per annum and he was awarded a bonus of £12,500.

34. In mid-2019, the Claimant raised the issue of the promised 2,000 shares with Mr Lobato again. This time he raised the issue in the presence of Mr Fest, who had replaced Mr Mecser as the Respondent's CFO. Mr Lobato said that he would transfer the shares to the Claimant, but the transfer could only happen after the completion of the investment deal with Santander.

35. The investment deal with Santander was signed in October 2019. As part of the deal the Claimant was invited to sell a portion of his total 2,275 shares.

36. On 5 October 2019, the Claimant wrote to Mr Fest asking him to sell 46% of his shares. He also asked Mr Fest to speak with Mr Lobato regarding the 2,000 shares promised to the Claimant in December 2017. When Mr Fest raised the issue with Mr Lobato, Mr Lobato told Mr Fest that he would handle the matter with the Claimant.

37. On 7 October 2019, the Claimant wrote to Mr Fest saying that he had discussed the 2,000 shares with Mr Lobato and that Mr Lobato was going to transfer the shares to the Claimant through the new MIP ("the 18% vehicle").

38. In November 2019, the Santander deal was announced. At a meeting between the Claimant, Mr Lobato, Mr Fest and Ms Mutado (the Respondent's Head of Corporate Development), the Claimant was asked if he wanted to sell all his shares. The Claimant said that he did, including the 2,000 that had been promised to him by Mr Lobato in December 2017.

39. In April 2020, the Santander deal was completed. The establishment of the 18% vehicle became known to the Respondent's senior management and employees close to the Santander deal, and to the Claimant.

40. On 6 June 2020, the Claimant wrote to Mr Lobato asking him to confirm that the 2,000 would be allocated to the Claimant.

41. On 8 June 2020, Mr Lobato replied, telling the Claimant that he had been allocated all the shares, and there were no pending shares to be allocated to the Claimant. The Claimant responded, reminding Mr Lobato of their previous discussions concerning the promised 2,000 shares, including in the presence of Mr Mecser and Mr Fest. At the end of his email, he wrote: "*When I saw again after Santander announcement we discussed together and with Martin, you told me to trust you and that you would make me good in the next MIV [MIP] that you were looking into/working on.*"

42. Mr Lobato replied: "*Mark, i checked then all the shares that you had allocated and the count was right otherwise i would have done it,*". The Claimant replied by return email saying that he had not received the promised 2,000 shares and that he would be sending a letter of resignation later that date.

43. On 8 June 2020, the Claimant sent his letter of resignation. He stated the reason for his resignation as follows:

    "*As per email conversation today regarding share allocations and your refusal to acknowledge and honour the additional 2,000 shares that you promised me in 2018 and our discussions in 2019 and 2020 with subsequent CFOs to trust you on this matter, I feel that I have no option but to resign as my trust has obviously evaporated.*"

44. On 12 June 2020, there was a further exchange of emails between the Claimant and Mr Lobato, in which the Claimant confirmed his reason for resigning, namely the loss of trust in Mr Lobato due to Mr Lobato going back on his promise to give the Claimant 2,000 shares.

45. On 15 June 2020, the Claimant was put on garden leave.

46. On 1 July 2020, the Claimant wrote directly to the Respondent's board, recounting the events leading up to his resignation and complaining about Mr Lobato breaking the promise to transfer 2,000 shares. He sought to agree compensation of £100,000 to close the matter amicably.

47. On 13 July 2020, the Claimant was informed that the board had decided to refer his complaint to Ms Jane Sim, the Respondent's Chief People Officer. Ms Sim, having spoken with Mr Lobato, did not take any further steps.

The Law

Contract formation/variation

48. The usual contract law principles apply to formation/variation of employment contracts. There must:
    a. an offer and acceptance;
    b. sufficiently certain terms to create a contractual obligation;
    c. consideration; and
    d. intention to create legal relations.

49. An agreement to vary the terms of a contract is not required to be in writing to have legal effect. Regardless of whether an employee's statutory statement of terms and conditions is altered to reflect the change, whether there has been a consensual variation of the terms of the employment depends on the evidence in the particular case (see Simmonds v Dowty Seals Ltd 1978 IRLR 211, EAT).

50. A promise to enhance the terms of employment will usually be contractually binding. The consideration in return is the continuation of the employee's work. (Attril v Dresdner Kleinwort Ltd [2013] IRLR 548).

51. *"Where, in the context of pay negotiations, increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim and the continuation of the same employee in the same employment." (*per LJ Connell Lee and others v GEC Plessey Telecommunications [1993] IRLR 383 [118].*)*

Constructive dismissal

52. Under Section 95(1)(c) of the Employment Rights Act 1996 (ERA) an employee will be treated as dismissed if he or she "*terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*."

53. In order to claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer,

    b. the employer's breach caused the employee to resign, and

    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal

    (Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA).

54. A deliberate refusal to pay an employee what he is owed is a repudiatory breach of the express terms of a contract of employment. (Cantor Fitzgerald International v Callahan [1999] ICR 639)

55. The implied term of trust and confidence is so fundamental to a contract of employment that a breach of it goes to the root of the contract and therefore will 'inevitably' be fundamental (see Morrow v Safeway Stores plc 2002 IRLR 9, EAT).

Implied term of trust and confidence

56. There are two questions to be asked when determining whether the implied term of trust and confidence has, in fact, been breached. These are:
    a. was there "reasonable and proper cause" for the conduct in question?
    b. if not, was the conduct "calculated or likely to destroy or seriously damage trust and confidence"? (Malik v Bank of Credit & Commerce International SA 1997 ICR 606 (HL)

57. The questions are to be answered objectively, and not by applying a range of reasonable responses test (Sharfudeen v T J Morris LTD t/a Home Bargains UKEAT/0272/16/LA).

58. Even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if — viewed objectively — the employer's conduct was not such as to satisfy the two limbs of the test (Tullett Prebon plc and ors v BGC Brokers LP and ors 2011 IRLR 420, CA).

59. Equally, the employer's subjective intention for the conduct in question is not determinative (see Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT).

60. If a fundamental breach has occurred, it cannot be cured. However, there is a difference between trying to remedy an occurred fundamental breach and taking actions to prevent the breach occurring in the first place or attaining the level of seriousness to make it fundamental. (Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA)

Affirmation

61. The employee "*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*" (per Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA)

62. Passage of time alone might not be sufficient to establish affirmation. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. (Chindove v William Morrison Supermarkets plc EAT 0201/13)

Unauthorised deduction from wages

63. Part II, Section 13 of the Employment Rights Act 1996 (ERA) prohibits an employer from making a deduction from wages of a worker employed by him "*unless—*

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

64. A deduction is a complete or partial failure to pay what was properly payable on a particular occasion (section 13(3) ERA).

65. In New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA the Court of Appeal held that in order for a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question.

66. Section 27 ERA contains the following provisions related to the meaning of the term "wages" (***my emphasis***):

*27(1) In this Part "wages", in relation to a worker, means **any sums payable** to the worker in connection with his employment, including—*
*(a) any fee, bonus, commission, holiday pay **or other emolument referable to his employment**, whether payable under his contract or otherwise,*

27(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—
(a) be treated as wages of the worker, and
(b) be treated as payable to him as such on the day on which the payment is made.

*27(5) For the purposes of this Part any monetary value attaching to any payment **or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is**—*
*(a) **of a fixed value expressed in monetary terms**, and*
(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).

67. The underlying premise on which a case under Part II ERA is brought is that the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him. It is designed for essentially straightforward claims where the employee can point to such a quantified loss (see Coors Brewers v Adcock [2007] IRLR 447).

68. "*If on his "pay day", when an employee is due to be paid, a worker receives less wages than he should have done, the deficiency is to be regarded as a deduction for the purposes of the Act.*" (per Nicholls LJ (as he then was) in Delaney v Staples (1991) ICR 331 [340E]).

69. "*The critical point which emerges from those cases, particularly **Adcock**, is that a claim under Part II is not appropriate where recovery of an unquantified sum is sought; that is a claim properly brought for breach of contract and where employment is continuing that must lie in the civil courts, not the Employment Tribunal.*" (see *Tradition Securities & Futures SA v Mouradian* (UKEAT0570/07) at para 15)

Analysis and Conclusions

Was the Claimant contractually entitled to receive 2,000 shares?

a. Did Mr Lobato make a promise to the Claimant in December 2017 that he would receive an additional 2,000 shares?

70. Having heard oral evidence of the parties and having considered contemporaneous documents in the bundle, and bearing in mind that I need to make my findings of fact on a balance of probabilities, I am more than satisfied that at the meeting on 7 December 2017 Mr Lobato did make a promise to the Claimant that he would receive 2,000 shares in addition to 1,000 shares previously awarded to the Claimant.

71. Mr Linstead on behalf of the Respondent invites me to find as a fact that Mr Lobato said at the meeting in December 2017 that he planned in the next round of awards to bring the Claimant's total shareholding to over 2,000, and that Mr Lobato did not promise to transfer 2,000 of his own shares. In support of this contention, Mr Linstead refers me to various background issues, other circumstantial evidence, and the fact that it was what eventually happened. I am not persuaded for the following reasons.

72. The Claimant was clear and consistent in his evidence on what was promised to him by Mr Lobato at the meeting on 7 December 2017. I found the Claimant a credible witness.

73. In his evidence Mr Lobato accepted that at the meeting on 7 December 2017 the issue of the Claimant receiving more shares was discussed. Mr Lobato said that he could not recall what exactly was agreed at the meeting. This, however, appears at odds with his evidence that he remembers all remuneration discussions with his staff and does not need to take any notes, and when it comes to him making recommendations to the Respondent's remuneration committee, he simply goes by his memory.

74. When asked about details of his discussions with the Claimant about 2,000 shares, including the two conversations in the presence of Mr Mecser and Mr Fest, Mr Lobato was vague in his answers. He was arguing why it would have been unlikely for him to make a promise to give the Claimant 2,000 shares, rather than telling the tribunal what he actually said at those meetings. In general, in giving evidence Mr Lobato was more arguing the Respondent's case than answering direct questions posed to him. In short, I prefer the Claimant's witness evidence on what was said at the meeting on 7 December 2017.

75. The Claimant's evidence is consistent with the relevant background, that is him being unhappy with his remuneration and the last allocation of shares.

76. I do not accept Mr Linstead's submission that because the December meeting was a normal six months' performance review and the allocation of shares was due to happen later in 2018, "*it is inherently unlikely that [Mr Lobato] made a promise of a fixed number [of shares]*". The Claimant's case is that the promise to transfer 2,000 shares was made at the December 2017 meeting. He, however, accepts that the transfer was not going to happen instantaneously and was due to take place in the next round of allocations. Therefore, I do not see why it would be inherently unlikely for Mr Lobato to make a promise of a particular number of shares to be given at the next allocations round in 2018. That is also consistent with the promises of a specific amount of pay rise (£15,000) and a specific amount of bonus (£15,000) made by Mr Lobato at the same meeting to be implemented later in 2018.

77. More importantly, the Claimant's evidence is supported by contemporaneous documents, in particular his email of 5 March 2018, in which the first reference to the promise to transfer 2,000 shares is recorded. I find it would be extraordinary for an employee to write to the CEO saying thank you for your promise to give me 2,000 of your own shares, where in fact no such promise was made by the CEO.

78. In responding to the Claimant on 8 March 2018, Mr Lobato is not correcting the Claimant about his understanding of the agreement. If it were not what had been promised by him to the Claimant at the meeting, or if the Claimant had otherwise misunderstood what Mr Lobato had said at the meeting, I would have expected Mr Lobato in his email to put the record straight, and not just respond with "*shares as discussed*", which implies his acceptance of the Claimant's understanding of their agreement.

79. Further, Mr Lobato had numerous other occasions to put the record straight, both verbally and in writing. Him not doing that in clear terms further supports my conclusion that the promise to transfer 2,000 shares to the Claimant was made at the meeting on 7 December 2017.

80. In his email of 30 November 2018, in response to the Claimant saying that his allocation should have been 2500 shares, Mr Lobato appears to acknowledge the total figure of 2,500, albeit counting 1,000 shares the Claimant had received

before the promise was made. He, however, does not deny in that email that the Claimant was due additional shares by reason of their December 2017 agreement. If the Claimant was wrong in his understanding of what had been agreed in December 2017, this was a perfect opportunity for Mr Lobato to correct him and put the record straight.

81. The existence of the promise to transfer 2,000 shares to the Claimant is further corroborated by evidence of Mr Mecser and Mr Fest. The Claimant was raising the issue of 2,000 shares and Mr Lobato telling him not to worry. If the transfer of 2,000 shares were not what had been promised to the Claimant, I would have expected Mr Lobato to make it clear that the Claimant was mistaken about that, instead of telling him not to worry about getting his additional shares.

82. I do not accept Mr Linstead's submission that the absence of the Claimant's documentary confirmation of the position should be taken as showing that no promise to transfer 2,000 shares was made.

83. Firstly, there are such documents: his email of 5 March 2018, his subsequent emails to Mr Mecser and Mr Fest, which Mr Lobato saw and responded to.

84. Secondly, it is the Claimant's case that he trusted Mr Lobato to keep his word, and therefore at the time saw no need to have the promise recorded in a formal written contract. His 5 March 2018 email is simply a reminder to Mr Lobato in advance of the annual pay review cycle. Therefore, the three months gap between the December 2017 meeting and the 5 March 2018 email is not surprising.

85. Finally, when the Claimant wrote to Mr Lobato on 5 March 2018 clearly recording the promise of 2,000 shares and thanking him for that, on 8 March 2018 he received an email from Mr Lobato stating: "*shares as discussed*". In the context of employment relationship and an email exchange between an employee and the most senior person in the organisation, I find this was sufficient as a documentary confirmation of the agreed position.

86. Mr Linstead submits that it is implausible that Mr Lobato would have made a promise to transfer his own shares because he had never done that before and that would have been "*extraordinary generous*" of him. I do not accept that.

87. Mr Lobato accepted in his evidence that in the past he used his own shares to increase a pool of shares to be allocated to the Respondent's employees by transferring his shares into a trust vehicle for subsequent distribution to the employees. I find that this was what he intended to do when he said to the Claimant that he would give his personal shares. In any event, whatever potential difficulties there might have been for Mr Lobato to transfer his own shares to the Claimant, does not mean that he could not have made such a promise.

88. I also do not accept that the perceived generosity of the offer should be taken as evidence that it was not made. One needs to look at things as they were at the time when the promise was made in December 2017. That well was before the Santander deal, and therefore the value of the Respondent's shares was at best unknown. As Mr Lobato admitted in his evidence that in December 2017 the value of shares was uncertain and depending on fortunes of the business, they could have become very valuable or worthless.

89. In light of other and stronger evidence that the promise was made, potential technical difficulties with transferring the shares to the Claimant and the perceived generosity of the offer are not sufficient as evidence for me to conclude that no such offer was made.

90. I also find that the promise created a legitimated expectation on the part of Claimant that 2,000 shares would be allocated to him in due course. The promise also became an essential element of the relationship of trust and confidence between the Claimant and the Respondent.

b. Did Mr Lobato make a promise to the Claimant on any subsequent occasions that he would receive an additional 2,000 shares?

91. I find that the promise that the Claimant will receive an additional 2,000 shares was made on 7 December 2017. It was re-affirmed by Mr Lobato in subsequent conversations with the Claimant in the summer of 2018 and in October 2019 by him telling the Claimant not to worry about getting the shares and that the shares would be transferred through the 18% vehicle.

92. However, I find that on subsequent occasions there were no promises made to allocate further 2,000 shares in addition to the 2,000 shares promised on 7 December 2017, or in addition to 1,275 shares allocated to the Claimant in November 2018.

c. If did he make any such promise, was it made behalf of the Company?

93. I reject the Respondent's submission that Mr Lobato made the promise in personal capacity. The December 2017 meeting was clearly in the context of the Claimant's employment with the Respondent. The Claimant and Mr Lobato were talking about the Claimant's future remuneration package in return for the Claimant continuing to work for the Respondent and not for Mr Lobato personally. The fact that Mr Lobato said that he would transfer his personal shares to the Claimant if he could not get the board approval to allocate shares through the MIP, does not mean that the promise was not made on behalf of the company, by Mr Lobato as the co-CEO of the Respondent. There were no other reasons for Mr Lobato to promise to the Claimant his personal shares, expect as a reward for the Claimant's work for the Respondent.

d. Was there consideration for any such promise sufficient to make it a contractual obligation?

94. I find that all the necessary ingredients to make it a contractually binding promise were present:
    a. An offer to transfer 2,000 shares was made by Mr Lobato on behalf of the Respondent,
    b. It was accepted by the Claimant,
    c. In reliance on the offer the Claimant continued to work for the Respondent, and that was sufficient consideration, and
    d. It was made in the context of the employment relationship between the parties, and therefore the intent to create legal relations was clearly present.

95. Having heard the parties' evidence, I also find that if the Claimant had not been promised 2,000 shares together £15,000 pay rise and £15,000 bonus, he would have resigned shortly after December 2017, and Mr Lobato was aware of that possibility. The Claimant not resigning in reliance on the promises made at the December 2017 meeting was further consideration on his part.

e. Was there sufficient certainty of terms to create a contractual obligation?

96. I find the terms of the agreement were sufficiently clear to create a contractual obligation. The parties knew what the subject matter of the shares promise was. It was 2,000 shares in the Respondent. The fact that the Respondent had different classes of shares does not make the promise "*too vague*" to create a contractual obligation, as it was argued by Mr Linstead for the Respondent. The Claimant was given class D shares in the past. Therefore, it would have been in the parties' reasonable contemplation at the time when the promise was made that what was promised were 2,000 class D shares.

97. I do not accept Mr Linstead's submission that an agreement to give shares "*is too vague and cannot be enforced or valued*". Even if there could be certain difficulties in assessing the Claimant's financial loss arising from the broken promise, this does not mean that the promise, by itself, is not contractually binding or unenforceable in law.

98. I also do not accept the Respondent's argument that the fact that no specific time for performance was specified makes the agreement uncertain.

99. Firstly, the law implies the term of reasonable time for performance. Further, there were regular June/July annual allocation rounds. Therefore, I find, it would have been in the parties' reasonable contemplation that the promise would be made good at the next round of allocations in 2018. The performance was delayed first until 2019 and then again due to the Santander deal until 2020, when the 18% vehicle was established. This, however, does not mean

that the promise was uncertain when it was made, or through the delay of performance somehow became no longer contractually enforceable.

100. The fact that the Claimant would have had to pay a nominal consideration for the shares ("the subscription price"), does not mean that the promise to transfer 2,000 shares lacked sufficient certainty to make it contractual, or that there was no consideration given by the Claimant in return for the promise.

101. Equally, the absence of formalities with respect to the actual allocation of shares does not mean that the promise to allocate 2,000 additional shares was not legally binding on the Respondent.

102. I do not accept Mr Linstead's submission that the absence of formalities shows that there was no intent at that stage to make a legally binding promise. It was well known to Mr Lobato and the Claimant that certain formalities would need to be dealt with to perfect the transfer of 2,000 shares. That was the usual process. Before the December 2017 promise was made, the Claimant had already received two allocations of 500 shares each through that process. The promise to give him 2,000 additional shares was not made on a "subject to" basis or otherwise caveated by Mr Lobato to demonstrate that it was not intended to be legally binding. Therefore, in my judgment, the need to attend to certain formalities to perfect the transfer of the shares cannot be said to demonstrate that there was no intent to make the promise to transfer the shares contractually binding on the Respondent.

103. Finally, I do not accept the Respondent's submission that the Claimant must show that the promise had effect either as varying the terms of his employment contract or as a collateral contract. Mr Linstead argues that because the promise to allocate shares was a bonus and his contract of employment (clause 1.12.2) expressly states that any bonus payment is "*purely discretionary and shall not form part of your contractual remuneration under this agreement*", the offer of shares could only be a collateral contract, which requires a separate consideration.

104. Once the offer was made and accepted and consideration by way of continuous work tendered by the Claimant, the promise became part of the overall "wage-work bargain" between the Respondent and the Claimant. One may analyse it as a variation of the Claimant's contract of employment by way of incorporating the promised award of 2,000 shares into his contract of employment, or as a collateral contract to the main terms of employment. Nothing turns on that. The legal effect is the same – the Respondent becomes contractually obliged to allocate to the Claimant 2,000 shares in return for the Claimant's continuing performance of his work duties for the Respondent.

105. Even if share awards can be viewed as being akin to a discretionary bonus, once the employer has exercised its discretion and made a promise to the employee to award a specific number of shares, as in the case of

discretionary bonus awards, that promise becomes legally binding on the employer and can be enforced by the employee.

f. If there was a contractual obligation, when did it come into existence?

106. It came into existence at the meeting on 7 December 2017. Mr Lobato made his offer and the Claimant accepted it. In return for the promise the Claimant did not resign and continued to work for the Respondent. The contractual obligation was thus formed.

g. If there was a contractual obligation, what were its terms?

107. The terms of the contractual obligation were that the Respondent shall transfer to the Claimant 2,000 shares in addition to 1,000 he then already held. The transfer of the shares shall be made by the Respondent at the next allocation round in May 2018 or within a reasonable period of time thereafter.

108. I do not accept Mr Ohringer's submission that the 2,000 shares were "ringfenced" and were always going to come in addition to whatever "usual" allocations were made in the annual allocation rounds. Just because Mr Lobato said he would use his own shares to fund the promise, if so required, does not mean that such shares must be disregarded in the total count of subsequent shares given to the Claimant.

109. Further, the Claimant himself appears to accept that part of 1,275 shares allocated to him in November 2018 should count toward the total of 2,000 shares promised to him by Mr Lobato. In his email of 30 November 2018 to Mr Mecser he says that the allocation should have been 2,500. In his evidence to the tribunal, he explained that figure as 500 "usual" allocation based on the previous years' allocations, plus 2,000 promised by Mr Lobato on 7 December 2017. This necessarily means that he must have considered that part of 1,275 shares (being 775 = 1,275 – 500) went towards satisfying the December 2017 promise of 2,000 shares.

110. However, the Claimant had no contractual or other legal entitlement to the "usual" allocation of 500 shares. Therefore, I find that all of 1,275 shares must be taken as partial performance of the promise to allocate 2,000 made by Mr Lobato to the Claimant on 7 December 2017. This means that after the allocation of 1,275, the Respondent was still obliged under the 7 December 2017 agreement to give to the Claimant 725 shares.

Constructive dismissal

4. **Was the Claimant constructively dismissed on 8 June 2020 (taking effect on 8 September 2020)? This engages the following questions:**

a. On 6 to 8 June 2020 did Mr Lobato deny the Claimant's entitlement to shares which it is alleged he promised the Claimant in December 2017, or the

remaining balance of those shares?

b. If so, did that constitute:
i. A repudiatory breach of an express term of the contract concerning this arrangement as referred to in paragraph 1; and/or,
ii. A breach of the implied term of trust and confidence.

111. I find that Mr Lobato emails of 8 June 2020, read objectively, amount to both anticipatory breach of the express term of the agreement to transfer to the Claimant the balance of the promised 2,000 shares (i.e. 725 shares) and a breach of the implied term of trust and confidence.

112. In these emails Mr Lobato reneges on his December 2017 promise and on his subsequent assurances to the Claimant not to worry about getting 2,000 shares and that the shares would be transferred to him through the 18% vehicle. Mr Lobato clearly tells the Claimant that he has what has and there is nothing else that the Respondent owes him – "*No pending shares to be allocated"*.

113. I do not accept Mr Linstead argument that the fact that the Claimant did not ask the Respondent to actually transfer the shares but only to confirm his entitlement means that there was no failure to perform the contract. I accept that at that time, based on the parties' understanding that the transfer should happen through the 18% vehicle, the time for the contractual performance in so far as the actual transfer of the shares was concerned, did not yet arrive. However, Mr Lobato denied that the Respondent had any obligation to perform now or in the future anything in relation to the December 2017 agreement. He clearly stated that the Respondent was not going to perform the December 2017 agreement when the time for the performance arrives.

114. As the Claimant put it himself in his evidence, Mr Lobato stated that he had no intention to fulfil his promise. That, in my judgment, was an anticipatory and repudiatory breach of the December 2017 agreement, because it was an anticipatory breach of a fundamental term of the Claimant's employment contract, as it related to the Claimant's remuneration. That gave the Claimant a choice of either accepting the breach as brining the contract to an end or affirming the contract by continuing to work for the Respondent. He chose the former.

115. I do not accept the Respondent's submission that by 8 June 2020 the breach had already happened, and therefore the Claimant had waived the breach and affirmed the contract by not resigning earlier. In November 2019, the Claimant accepted, albeit reluctantly, that the actual transfer of shares would take place through the 18% vehicle, when it was up and running. More importantly, until his email of 8 June 2020, Mr Lobato never denied that the Claimant would receive the promised 2,000 shares. On the contrary, he

assured the Claimant that he would receive them through the 18% vehicle in 2020. Therefore, there was nothing for the Claimant to waive until 8 June 2020.

116. It was also clearly a breach of the implied term of trust and confidence. Although the Respondent might have had a reasonable cause to delay the transfer of the remaining 725 shares to the Claimant until the 18% vehicle was set up, I find that it had no reasonable and proper cause to deny that the Claimant was entitled to 725 shares as part of the December 2017 agreement.

117. The conduct in question, considering it objectively, even if not calculated, was certainly likely to destroy or seriously damaged the relationship of trust and confidence, and it, in fact, did.

118. An employee in reliance on a promise made by his employer's co-CEO continues to work for the employer, patiently waiting for the promise to be made good. The promise is very important to the employee and is a key factor in his decision to stay with the employer. The co-CEO reassures him on several occasions that the promise will be made good, and the employee need not to worry about that. Then, when time to make the promise good finally comes, the co-CEO suddenly tells the employee that he will not be getting what was promised to him by the very same co-CEO. It is little surprising that the employee's trust and confidence in the employer "*has obviously evaporated*" (as the Claimant put in his resignation letter).

c. If so, did the Claimant resign at least in part because of the alleged repudiatory breach?

119. Claimant clearly resigned in response to the Respondent's fundamental breach. His resignation letter of 8 June 2020 is the best evidence of that.

d. If so, did the Claimant affirm the contract of employment before terminating it?

120. He did not affirm the contract because he resigned almost immediately after the breach.

Overall conclusion

121. For these reasons, I find that the Claimant was constructively dismissed by the Respondent.

Unfair Dismissal

122. The Respondent does not advance any potentially fair reason for the dismissal. Therefore, I find that the dismissal was unfair.

Unauthorised deductions from wages

10. If the Claimant was promised 2,000 shares from Mr Lobato as alleged in paragraph 1(a), did that constitute 'wages' properly payable to the Claimant whether under his contract or otherwise pursuant to s.13 and s.27 ERA?

123. Mr Ohringer submits on behalf of the Claimant that *"[s]hares can constitute wages because they form part of the remuneration for a worker's work which is capable of quantification*". He argues that *"[t]he quantifiable value of the shares is their price on the date when they should have been transferred*". By denying the entitlement to the shares on 6-8 June 2020 the Respondent has made an unauthorised deduction from the Claimant's wages, and the Claimant is entitled to compensation reflecting the value of the shares at that time.

124. I disagree with his analysis for the following reasons:

a. In my judgment, shares do not fall within the definition of "wages" under s.27(1) ERA. The definition refers to "*any sums payable*". Even if a monetary value of the shares can be ascertained on a particular day when they should have been transferred to the Claimant, in my judgment, it would still be contrary to the natural meaning of the words "*any sums payable*" to read them as to include the instance of the transfer of the shares.

b. I accept that "*emolument*" is a broader concept than a cash payment and could include other types of benefits. However, even if the benefit of legal entitlement to have a certain number of shares transferred can be said to be an "emolument", for such benefit to fall within the definition of "wages" under s27(1) ERA it must still satisfy the qualification of "*any sum payable*".

c. It is not sufficient for the value of the benefit of being capable of quantification (see s27(5) ERA), unless the benefit falls within one of the exceptions satisfying both conditions in ss 27(5)(a) and (b) ERA. Even if a Respondent's shares have a "face value", their true value (the value claimed by the Claimant) was not a fixed value expressed in monetary terms. Their true value requires a detailed valuation of the Respondent's business. It will also be fluctuating based on various factors and the adopted valuation method. Therefore, in my judgment, the shares in the Respondent do not satisfy the condition s27(5)(a) ERA.

d. I shall also observe that s 27(5) ERA, while specifically referring to "*voucher, stamp or similar document*", contains no reference to shares or other corporate instruments. This suggests to me that the exception in s 27(5) ERA was not intended to cover shares and other corporate

instruments. Neither Mr Ohringer nor Mr Linstead was able to refer me to any case law on the issue as to whether shares fall within the definition of wages. In Tradition Securities & Futures SA v Mouradian (UKEAT0570/07), the EAT specifically declined to engage on the issue of whether share options come within the definition of wages.

e. Further, while the value of the Respondent's business, and accordingly the price of the Respondent's share, might be capable of valuation on a particular date, at the time of the allocation of the shares, the Claimant did not have a claim against the Respondent for a "quantified sum". The Claimant was not entitled to sell back to the Respondent the shares immediately upon their transfer, at a pre-determined price. Therefore, there were no sums payable to the Claimant by the Respondent on the date when the shares should have been transferred to him. How much money the Claimant would eventually be entitled to receive for his shares was dependent on various conditions and future uncertain events, most of which were outside the Claimant's control. Therefore, at the moment of the failure to allocate the promised shares, the Claimant was not owed a "specific sum of money".

f. Finally, considering the case law on the definition of wages it appears what was held to constitute "wages" were cash payments in relation to different types of benefits and not different types of benefits as such. In the present case, the Claimant argues that the failure to transfer the shares was a deduction from his wages, not the failure to make a cash payment in relation to the unallocated shares. For the reasons stated in (a) above, I do not accept that the transfer of shares can be said to be "any sum payable". Therefore, by not transferring the shares to the Claimant the Respondent did not make "a deductions" from "any sums payable" to the Claimant.

11. If so, when were those wages properly payable?

125. In any event, on the facts of the case, even if it can be said that the transfer of shares is a payment of a sum to the Claimant, the occasion for such payment had not occurred by the date of his resignation because the 18% vehicle allocation round had not yet been completed.

126. Given my finding on issues 10 and 11, issues 12-14 fall away.

127. For these reasons, the Claimant's claim for unauthorised deduction from wages fails.

128. To summarise, I find that:

a. By virtue of the promise made by Mr Lobato to the Claimant on 7 December 2017, the Claimant was contractually entitled to receive 2,000

shares from the Respondent. In partial satisfaction of its obligation the Respondent transferred to the Claimant 1,275 shares.

b. Therefore, the Respondent was contractually obliged to transfer to the Claimant the balance of 725 shares through the 18% vehicle in the next round of allocations in 2020.

c. By denying that the Claimant was entitled to the balance of the shares promised to the Claimant by the Respondent on 7 December 2017 the Respondent:

    (I) committed a fundamental (anticipatory) breach of the express term of the Claimant's contract; and
    (II) breached the implied term of trust and confidence.

d. The Claimant resigned in response to the Respondent's breach. He did not affirm the contract. Therefore, he was constructively dismissed by the Respondent.

e. The Respondent dismissed the Claimant unfairly and must pay to the Claimant compensation for unfair dismissal to be determined at a remedies hearing to be listed by the tribunal, if not agreed by the parties.

f. Shares do not constitute "wages" within the meaning of s27(1) of ERA. If I am wrong on that, the "occasion" when the balance of the promised 2,000 shares (725 shares) was "payable" to the Claimant had not occurred before the Claimant's resignation on 8 June 2020. Therefore, the Claimant's claim for unauthorised deduction from wages fails and is dismissed.

Employment Judge P Klimov
7 July 2021

Sent to the parties on:

08/07/2021.

For the Tribunals Office

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