EMPLOYMENT TRIBUNALS

Claimant: Mr E Jonas

Respondent: Bidvest Noonan (UK) Ltd

Heard at: London Central Employment Tribunal **On:** 9th-11th August 2021

Before: Employment Judge Hopton

Appearances (by video):

For the Claimant: In person
For the Respondent: Mr R Santy (Solicitor)

JUDGMENT having been sent to the parties on 11th August 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

Claims

1. The respondent provides outsourced services to UK businesses, including security services. The claimant worked as a Regional Manager. The claimant started his employment with Incentive Lynx Security on 6th May 2015 and TUPE transferred to the respondent on 7th February 2020.

2. The claimant resigned without notice on 13th October 2020 and claims constructive dismissal under s.95(1)(c) of the Employment Rights Act 1996. He cites a number of reasons for resigning including: failure to pay bonus; an attempt by one of the respondent's managers to have a without prejudice conversation with him during a disciplinary process; and an incident at the Respondent's client site, 14 Cornhill. He says the last straw was the respondent's failure to support him when he tried to ensure the safety of staff under his care at the 14 Cornhill site, and removing him from that contract. He also claims breach of contract for notice pay and unlawful deduction from wages for unpaid annual bonus.

Issues

3. At the beginning of the hearing I clarified the issues with the parties. The hearing was one of liability only and included arguments and submissions on contributory fault.

Constructive dismissal

3.1. Can the claimant show that his resignation should be construed as a dismissal under section 95(1)(c) ERA 1996 in that:

3.1.1. The respondent breached the implied term of trust and confidence through the following matters, whether considered individually or cumulatively:

3.1.1.1. By failing to support the claimant around risk assessments at 14 Cornhill and allowing the 14 Cornhill client to request that the claimant was removed from their contract;

3.1.1.2. By Mr Kempster's attempt to have a without prejudice conversation with the claimant in order to force the claimant's resignation;

3.1.1.3. By the failure to pay the claimant an annual bonus to which he was entitled.

3.1.2. That breach was a reason for the claimant's resignation; and

3.1.3. The claimant had not lost the right to resign by affirming the contract after the breach, whether by delay or otherwise.

3.2. If the claimant was dismissed, can the respondent show that the reason or principal reason for his dismissal was a potentially fair reason, being a reason related to his conduct?

3.3. If so, was the dismissal fair or unfair under section 98(4) ERA 1996?

Notice pay

3.4. The claimant claims breach of contract for unpaid notice pay. There was no dispute over notice pay. The parties agreed it would follow the decision on constructive dismissal.

Unlawful deduction from wages

3.5. The claimant claims a bonus payment of 6.7% of his annual salary. He says this was a contractual bonus from Incentive Lynx Security. The respondent says that the bonus was not contractual, that if the claimant was entitled to be part of the respondent's bonus scheme he was not entitled to a bonus that year as he had not been in the scheme long enough, and that in the alternative, if he had been entitled to a bonus from Incentive Lynx Security, one was not payable for that year in any event due to company performance.

Procedure, documents and evidence heard

4. I was referred to an agreed bundle of 561 pages. I was also sent an additional document by the claimant: a letter the respondent sent to him dated 4th August 2020.
5. I was referred to witness statements from:
   5.1. For the claimant:
      5.1.1. The claimant – numbering 90 paragraphs
      5.1.2. Mr Mercer – numbering 19 paragraphs
      5.1.3. Mr A Moore – numbering 11 paragraphs
      5.1.4. Mr Ali – numbering 32 paragraphs
      5.1.5. Mr Reeds – unnumbered paragraphs, 2 pages
      5.1.6. Mr Morrison – unnumbered paragraphs, 1 page
      5.1.7. Ms Phillips – numbering 6 paragraphs
   5.2. For the respondent:
      5.2.1. Mr Pradhan – numbering 15 paragraphs
      5.2.2. Mr Hobden – numbering 9 paragraphs
      5.2.3. Mr Harrington – numbering 11 paragraphs
      5.2.4. Mr J Moore – numbering 12 paragraphs

6. I heard oral evidence from the claimant and all the witnesses except: Mr Reeds, and Mr Ali as the respondent had no questions for them, and Mr A Moore who did not attend. I took into account that Mr A Moore's evidence had not been tested by the respondent when considering his statement.

The facts

7. These findings are confined to the facts relevant to the legal issues.

<u>The claimant's role</u>

8. The claimant worked at the respondent company as a Regional Manager. He started his employment with Incentive Lynx Security on 6th May 2015 and TUPE transferred to the respondent on 7th February 2020. He resigned with immediate effect on 13th October 2020.

9. The claimant was responsible for managing around 14 client sites. His role involved managing the security officers on site and liaising with the clients.

10. The claimant refers to three main issues that contributed towards his decision to resign:

    10.1. Mr Kempster's attempt to have a without prejudice conversation with him in order to force his resignation;

    10.2. the respondent's failure to support him around risk assessments at 14 Cornhill and allowing the 14 Cornhill client to request that he was removed from their contract;

10.3. The failure to pay the claimant an annual bonus to which he was entitled.

The disciplinary process and 'without prejudice' incident

11. On 25 June 2020 there was an incident with the respondent's client, De Beers, when a security officer failed to deal with valuables in the way expected by the client. The respondent felt that the claimant had failed to escalate this appropriately to more senior management and conducted an investigation.

12. Before the claimant was told that the investigation had concluded, and before being invited to a disciplinary hearing, the claimant was contacted by Mr Kempster, Key Account Director. Mr Kempster left a message on the claimant's voicemail asking if he would be available to speak the next day. The claimant was surprised because he was not aware that Mr Kempster was involved in the case. Despite the claimant providing his availability to Mr Kempster, Mr Kempster did not contact the claimant by phone again.

13. Shortly after this, the claimant was invited to a disciplinary hearing with Mr Kempster as the hearing manager. This made the claimant suspicious because he believed that Mr Kempster had a reputation for having without prejudice conversations with people and causing them to resign before disciplinary hearings. He felt this meant the outcome of the disciplinary hearing would be predetermined.

14. The claimant raised his concerns to HR in the form of a grievance. Mr Harrington heard the grievance and interviewed Mr Kempster. Mr Kempster told Mr Harrington that he had intended to contact the claimant to find a mutually agreeable time for the disciplinary hearing. The grievance was not upheld.

15. The claimant appealed the grievance. This was heard by Mr J Moore. Mr Moore interviewed Mr Kempster. In his meeting with Mr Moore, and after some careful questioning by Mr Moore, Mr Kempster admitted that his intention had been to have a without prejudice conversation with the claimant. He said that he had spoken to HR, they had advised him not to, so he had not contacted the claimant again. Mr Moore upheld the grievance appeal and Mr Kempster was removed as disciplinary hearing manager.

16. The disciplinary process then proceeded without incident. Mr Hobden chaired the meeting. Following the disciplinary hearing, the allegation was upheld and the claimant was issued with a final written warning. I make no further findings of fact in connection with the disciplinary process as the main concern of the claimant was in connection with Mr Kempster's actions and the claimant has made clear that he does not dispute the disciplinary warning, and he did not appeal it at the time.

17. The claimant felt aggrieved by Mr Kempster's actions and felt that Mr Kempster's intention was to force him to resign. However, no discussion with Mr Kempster took place, and the respondent resolved the issue by removing Mr Kempster from the disciplinary process. The claimant raised no concerns about Mr Hobden's independence.

14 Cornhill incident

18. An incident arose at the 14 Cornhill site on Saturday 5th October 2020. The client there asked the security team to patrol the low voltage switch room (LV room) which was part of the building's electricity provision, containing electricity of a high voltage. That room had a water leak and there was a risk assessment in place stating that the security team were not to enter it. The client insisted that the security team should patrol the area and the claimant, as the team's manager, refused. He was concerned for the health and safety of his team and felt there was a significant risk of injury or death if they had been required to enter that room. There were a number of email exchanges on this topic on the Saturday evening between the claimant and the client into which the claimant's manager, Mr Pradhan, was copied.

19. Mr Pradhan did not see those emails until Monday, and in a team call on Monday 5th of October, criticised the claimant for not telephoning him on the Saturday evening to notify him of the problem.

20. Mr Pradhan's view was that the room was safe to enter due to rubber matting on the floor. He based this on his long experience in the industry.

21. As a result of Mr Pradhan's public criticism, and his contrary view to the claimant's that the room was safe to enter, the claimant felt that Mr Pradhan was unsupportive of him.

22. However, Mr Pradhan had backed the claimant by agreeing the content of an email the claimant sent to the clients explaining that the security officers would not be entering the LV room due to the risk assessment in place. (p.272-273)

23. Therefore, although Mr Pradhan had criticised the claimant and disagreed with his view of the situation, when it came to the safety of staff, and communication with the client, Mr Pradhan supported the claimant and the risk assessment in place. The staff were not required to enter the LV room at that time.

24. Following this incident, on 7th October the client asked for the claimant to be removed from their contract. In an email to Mr Pradhan dated 8th October 2020, the client referred to concerns with the proactiveness and complacency of the claimant. Mr Pradhan confirmed in cross-examination that he had a two-hour meeting with the client to discuss their concerns and to try to persuade them that the claimant should remain their account manager. He said in cross-examination he did not feel it was right to remove the claimant from the contract just based on those circumstances. However, the client was adamant, and Mr Pradhan contacted the claimant on 12th October to discuss this and let him know he was removed from the 14 Cornhill contract.

25. Mr Pradhan wrote to the claimant on 12th October (p418). His email concerned the practicalities of transferring the account from the claimant to another account manager it also said, *"as discussed once I have details from [the client] I will need to speak to you and get more details on their complaint"*.

26. The claimant believed that the incident at 14 Cornhill, and his removal from that contract was going to lead to another disciplinary process and that the respondent intended to dismiss him. Mr Pradham said in cross-examination that he did not feel that there was any need for disciplinary procedures and he had not invited the claimant to a disciplinary procedure. If the claimant had not resigned, his employment would have continued. Mr Pradham said he had no issue with the claimant being part of his account management team.

27. The claimant made it clear in his evidence that he felt Mr Pradhan should have done more to enable him to stay at 14 Cornhill. He felt he was removed for insisting on a health and safety requirement, the breach of which would have put the lives of his staff in danger. However, the claimant also agreed in cross-examination that it was the client's prerogative to ask for individuals to be removed from contracts, and that it was common for contracts to be moved between account managers.

28. The claimant was responsible for managing 14 sites including 14 Cornhill. The loss of the 14 Cornhill site resulted in no reduction in salary, and no other disadvantage to the claimant. There was no attempt to penalise or discipline the claimant as a result of the incident or his removal from the contract, and it was relatively normal for individuals to be moved between contracts.

<u>The claimant's bonus</u>

29. When he was employed by Incentive Lynx Security, the claimant was entitled to an annual bonus. The claimant put this in his claim form at 6.7% of annual salary. The Incentive Lynx Security scheme ran from April to March. It was based, in equal thirds on: achievement of business unit meeting contribution budget, group achieving EBITDA budget and personal performance.

30. The respondent says that the bonus was not contractual and that no money was payable under it in any event because Incentive Lynx Security had not performed well enough. The respondent contends that the claimant was entitled to *a* bonus rather than *that* bonus, and he had been put into the respondent's bonus scheme, but had not been in the scheme long enough to be eligible for a bonus in 2020.

31. The claimant raised the issue of his bonus with the respondent a number of times. The claimant first queried the lack of payment on 27 August 2020 as he expected to be paid the bonus in his August payslip. He was told by letters on 10th and 15th September 2020 that no bonus would be paid. The last email from the claimant to Mr Pradhan regarding the bonus was dated 28th September 2020, and included a copy of the TUPE Employee Liability Information document (ELI).

32. Mr Pradhan was not involved in the TUPE documentation, but he confirmed his understanding that the ELI spreadsheet was not provided at the point of transfer, and that the bonus was not referred to in the claimant's contract of employment with Incentive Lynx Security.

33. Three of the claimant's witnesses, including Ms Phillips, the HR director at Incentive Lynx Security, told me the bonus was contractual. She and the claimant explained that the contract of employment in the bundle was his original contract with Incentive Lynx Security and he had been promoted since then to terms which

included a higher salary and contractual bonus. Ms Phillips said that the claimant would have received a 5% bonus. She referred to the ELI document in the bundle starting at page 233. She confirmed that the ELI at page 236 was the same as the one sent to the respondent at the time of the transfer, and that it contained details about employees' contractual rights. This document contains reference to a bonus, paid annually based on company performance. It demonstrates that the respondent was aware, at the time of the transfer, of the claimant's right to a bonus. There is also an email chain in the bundle dated 9th October 2020 from a Linda Roberts at Incentive Lynx Security, confirming the 3 part split of the bonus calculation referred to above, and confirming that the bonus is contractual. Despite the claimant querying the issue at the end of August, the respondent does not appear to have made enquiries with Incentive Lynx Security until early October. When it did make those enquires it was told by Incentive Lynx Security that the bonus was contractual.

34. I have concluded that the bonus was contractual. Ms Phillips had direct knowledge of the claimant's contract at Incentive Lynx Security and his bonus arrangements. Her evidence was consistent with Mr Morrison's and Mr Mirza's evidence that the bonus was contractual.

35. Regulation 4 of TUPE 2006 provides that contracts of employment 'shall have effect after the transfer as if originally made between the person so employed and the transferee.' The bonus obligation therefore transferred to the respondent on 7th February 2020.

36. Regarding the performance of Incentive Lynx Security, Mr Morrison, former Director of Operations at Incentive Lynx Security gave evidence to say that Incentive Lynx Security had sold certain contracts as it needed some cash. However, it had been planning to pay a bonus at the end of the year and was due to hit its profit targets. Ms Philips said that it 'wasn't a bad year for Incentive Lynx Security'. Mr Pradhan's understanding was that Incentive Lynx Security was operating at a loss in the financial year relevant to the bonus.

37. Overall, I prefer the claimant's evidence on the bonus. Mr Morrison gave credible evidence on Incentive Lynx's performance and reasons for its intention to pay a bonus and this was consistent with the claimant's and Ms Philips' evidence. The bonus was therefore contractual and the claimant was entitled to receive 5% of his salary, based on the three-part split.

<u>Claimant's resignation</u>

38. The claimant resigned by email on 13th October (p.422-3). He said he felt there was a fundamental breach of the employment contract and the duty of trust and confidence. He referred to: the failure to pay bonus; the disciplinary procedure and the attempt at a without prejudice conversation; the 14 Cornhill incident; his belief that management had failed to support him; his removal from the 14 Cornhill contract; and the fact he felt constantly criticised in front of his peers and targeted for dismissal.

39. In his claim form, the claimant also refers to a toxic work environment and attempts to discredit him. His evidence on this referred to some communications with HR,

his feeling that in the office he was walking on eggshells and colleagues were unfriendly, and general criticism he received on calls. However, he was not able to give many specific examples of the poor culture. Those examples that were given, for example the email from HR checking the claimant had done certain tasks in relation to managing a particular employee, did not objectively amount to inappropriate communications, although the claimant did perceive them as such.

Lunch and travel allowances

40. Payment for lunch and travel allowances came up during the hearing. Mr Morrison gave evidence, which I accept, that when travelling to client sites the claimant's travel and lunch would be paid for. These were expense payments for costs the claimant incurred, and not an allowance to which he was entitled. They do not form part of his deduction from wages claim.

Law

41. Section 13 Employment Rights Act 1996 refers to unpaid wages:
s.13(1) An employer shall not make a deduction from wages of a worker employed by him…

(3) 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.

42. The claimant claims constructive unfair dismissal under section 95(1)(c) Employment Rights Act 1996:

Section 95
(1) … an employee is dismissed by his employer if…
(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

43. The relevant case law is **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**, CA "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitle to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

44. TUPE 2006 regulation 4 provides:

1. Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or

employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

2. Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer-

a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee;

Conclusions

45. The claimant was due an annual bonus under his contract of employment. This was an accruing contractual right that existed but had not crystallised at the point of transfer and which therefore transferred to the respondent on the 7th February 2020. The bonus was due in the summer of 2020. The claimant first queried this on 27 August. He was told by letters on 10th and 15th September 2020 that no bonus would be paid. He pursued this bonus payment up to and beyond resignation.

46. I have taken into account *Cantor Fitzgerald International v Callaghan and ors* 1999 ICR 639, CA which held that: *"an emphatic denial by an employer of his obligation to pay the agreed salary or wage... would normally be regarded as repudiatory*." The respondent's letters of 10th and 15th September amount to this emphatic denial. I distinguish *Small v Boots* 2009 WL 6488 (2009) as the claimant's bonus in that case was discretionary rather than contractual. The failure to pay the bonus was therefore a significant breach which showed that the employer no longer intended to be bound by one of the essential terms of the contract (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221), namely a term relating to pay. That breach was a reason for the claimant's resignation.

47. The last email from the claimant to Mr Pradhan regarding the bonus was dated 28th September 2020, and included a copy of the TUPE ELI. He had not received a response to that email before his resignation, although the respondent was still investigating the issue in early October. It was reasonable of the claimant to try to resolve the issue with his employer so the delay between the respondent's refusal to pay the bonus on 15th September, and his resignation on 13th October, did not amount to an affirmation of the contract. He was entitled to terminate the contract by reason of the employer's conduct and was therefore constructively dismissed under s.95(1)(c) ERA 1996.

48. I have concluded that the other acts the claimant refers to, namely the incident with Mr Kempster and the 14 Cornhill incident did not amount to breaches of contract.

49. Mr Kempster did not have a without prejudice discussion with the claimant as the respondent's HR officers advised him against it. Mr Kempster was then removed from his role as disciplinary chair as a result of the claimant's successful grievance against him. The respondent therefore avoided any breach of contract as a result

of the way it dealt with this incident before Mr Kempster had further contact with the claimant.

50. Regarding the 14 Cornhill incident, regardless of Mr Pradhan's own view of the safety of the LV room, he was supportive of the claimant in relation to the client. He did not overrule the claimant or force the security staff to enter the LV room. He spent two hours trying to persuade the client that the claimant should not be removed from their contract, and had no intention of sanctioning the claimant as a result of the incident or his removal from that contract. Overall, and despite his criticism of the claimant on the team call on the 5th October, Mr Pradhan was supportive of the claimant in relation to the 14 Cornhill incident and his actions did not amount to a breach of contract.

51. Regarding the working environment, the claimant found some of the respondent's styles and practices not to his liking, but I do not conclude that there was a toxic environment, or that there were attempts to discredit the claimant.

52. The only breach of contract was therefore the failure to pay bonus. None of the other acts the claimant complains of were serious enough to amount to a breach of contract in themselves, or cumulatively as part of a series of actions which entitled the claimant to repudiate his contract.

Was the dismissal fair in any event?

53. The respondent argues in the alternative that the dismissal was fair in any event, due to the De Beers incident and for Some Other Substantial Reason because the claimant resigned without notice. I do not accept this. The respondent issued the claimant with a final written warning for the De Beers incident, so clearly did not see the matter as grounds for dismissal. The claimant resigned in response to the breach of contract and was therefore entitled to do so without notice. The respondent has not brought a counter claim for breach of contract.

Contributory Fault and ACAS reduction

54. The respondent also argues that in the event the dismissal was unfair any compensation should be reduced due to the claimant's contributory fault and because he did not follow the ACAS code in respect of events on 3rd and 12th October. 3rd October being the discussions with the client at 14 Cornhill and 12th October being his removal from the 14 Cornhill contract.

55. As the only reason for the breach of contract was the failure to pay bonus, the claimant's conduct and his alleged failure to follow the ACAS code in respect of the October incidents are not relevant. Mr Pradham made it clear in his evidence that the claimant would not have been dismissed for the 14 Cornhill incident or the removal from that contract. The 14 Cornhill incident was irrelevant to the unfair dismissal. No reduction should therefore be made to any compensatory award.

56. The claimant is therefore successful in his constructive unfair dismissal claim, his claim for notice pay and for unlawful deduction from wages.

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Employment Judge Hopton

_8th September 2021

REASONS SENT TO THE PARTIES ON

08/09/2021.

FOR THE TRIBUNAL OFFICE