EMPLOYMENT TRIBUNALS

Claimant: **Mr D Jones**

Respondent: **Cherry & White Limited**

Heard at: **Bristol (by video)** **On: 15 to 17 November 2021**

Before: **Employment Judge C H O'Rourke**

Representation
Claimant: **Mr P Kerslake – HR consultant**
Respondent: **Ms W Miller - counsel**

JUDGMENT

The Claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

(Judgment having been given on 17 November 2021 and written reasons having been requested, the same day, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:)

Background and Issues

1. The Claimant was employed, latterly as a technical sales manager, for approximately six years, until his resignation, with immediate effect, on 13 November 2020. As a consequence, he brings a claim of constructive unfair dismissal.

2. The issues in respect of that claim are as follows (and as set out in an agreed list of issues):

   Constructive Unfair Dismissal

   (1) Did the Claimant resign because of an act or omission of the Respondent? The Claimant stated that the following acts or omissions of the Respondent caused his resignation:

a. The Respondent's adverse reaction in July to October 2020 to the Claimant's childcare issues;
b. A failure by the Respondent to pay the correct rate of commission;
c. A failure by the Respondent, in 2018 and 2019, to award the Claimant a pay rise and being informed that nobody else was given a rise, when one other employee was;
d. An ongoing failure to pay the Claimant an on-call bonus;
e. A failure, on 28 October 2020, to allow the Claimant to work alternate hours, or pay overtime, for extra hours worked;
f. A failure to deal properly with a grievance against a manager, culminating on 12 November 2020, which, in conjunction with the 28 October 'alternate hours' issue, constituted a 'final straw'.

(2) Were any such acts or omissions a breach of the implied term of trust and confidence between employer and employee and therefore a fundamental breach? The Claimant accepted, via Mr Kerslake, in closing submissions that the acts or omissions prior to September/October 2020, could not individually constitute fundamental breaches, but could do so cumulatively, in conjunction with the later events.

(3) Did the Claimant affirm the contract?

(4) The Respondent does not seek to rely on any such dismissal being otherwise fair, within s.98 of the Employment Rights Act 1996 ('ERA')?

The Law

3. I reminded myself, firstly that the burden of proof is on the Claimant in such cases and also of the following well-known authorities:

a. The case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA**, which sets out the test for constructive unfair dismissal and which has been itemised already by me, in my explanation above of the issues.

b. The case of **Mahmud v BCCI International [1997] UKHL ICR 606**, which stated (as subsequently clarified) that:

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

The Facts

4. I heard evidence from the Claimant. On the Respondent's behalf, I heard evidence from Mr Steve Slim, the managing director; Mr Ian Spindler, a sales director and against whom the Claimant brought his grievance; Ms Janice Wood, the finance and operations director, with HR responsibilities, who dealt with the Claimant's grievance and Mr Taylor Davies, a technical support engineer, who gave evidence as to the dispute between the Claimant and Mr Spindler.

5. Alleged Breaches. I deal now, in turn, with each of the breaches of contract alleged by the Claimant.

6. On-Call Bonus. I start with this issue as, chronologically, it is the first, but also because the Claimant states that what he asserts to be the subsequent adverse treatment of him by the Respondent, stemmed from this issue. It is not in dispute that the Respondent had a 24/7 support rota for customer support, the policy for which is set out in the bundle [B50 onwards]. That policy does not allow for any additional payment for such duty, apart from recovery of expenses incurred [B55]. The Claimant said that he had been told that the Respondent '*would be paying an on-call bonus imminently'* (WS5). In cross-examination, he said that he had been told by Mr Slim that the Company was considering an on-call bonus. He said that in 2018, he and his manager, a Mr Bircham, were approached by members of their team as to payment of such a bonus. Some discussions subsequently ensued with Mr Slim, following which he said that no bonus would be paid, as he was of the view that the employee's salary already allowed for completion of such duties. The Claimant said that he'd no option but to accept that decision and therefore didn't raise a grievance but also said that '*since that meeting I was treated very differently compared to other employees and being increasingly ostracised.'* Mr Slim denied any such different or adverse treatment. My findings in respect of this matter are as follows:

   a. Clearly, as accepted by the Claimant at the time, he and the others had no contractual entitlement to an on-call bonus and that once Mr Slim had decided on the matter, there was nothing more to be done about it, hence him not bringing a grievance.

   b. As to this matter leading to him being ostracised and treated very differently from other employees, from that point on, there is, apart from his own assertion to that effect, no persuasive evidence to support this allegation. While he points to a lack of a pay rise in 2018 and 2019 and disputes the level of commission he was paid (and which matters I will deal with separately), the following did occur:

      i. He was given a pay rise in 2020, backdated several months;
      ii. He did receive commission payments through 2018-2020 [B68], which on his own evidence, while he considered that they should have been at 3%, not 1.5%, were, he accepted, entirely at Mr Slim's discretion;
      iii. When COVID struck in March 2020, he was, he accepted both now and at the time, shown great flexibility by the Respondent, for at least six months, as to his hours of work in relation to his childcare responsibilities.

      The Claimant provided no corroborative evidence whatsoever as to him being treated differently to other employees. These actions of the Respondent, unless shown to be somehow less favourable treatment of the Claimant, do not, on their face, indicate an employer seeking to ostracise or victimise an employee, but indeed the opposite. An employer seeking to make life difficult for an employee could have

chosen not to award a pay rise, or to exercise their discretion negatively, as to commission payments and also hours of work to suit childcare.

c. I don't, therefore, accept that this incident lead to any subsequent adverse treatment of the Claimant.

7. Pay Review. The Claimant said that the Respondent's failure to award him pay rises in 2018 and 2019 was linked to the 'on-call bonus' issue, which for the reasons stated above, I don't accept. In any event, however, he states that in relation to a possible pay rise in 2019, he was told by Mr Slim that nobody was getting a pay rise that year, due to the Company's performance, which he, the Claimant, confirmed back to Mr Slim, in an email of 29 May [C72]. However, he said that '*shortly after that appraisal a colleague informed me that he had received one this year'* and that this was subsequently confirmed to him by Mr Bircham (WS13 & 14). Mr Slim said that the Claimant had not received a pay rise in 2018 because he had received a pay rise on being promoted a year before and that he needed to have more time to assess his performance. In relation to 2019, he confirmed the reason given to the Claimant as to being company performance overall and also confirmed that no other employees had been awarded pay rises in that year. My findings in respect of this issue are as follows:

a. There was no dispute that there was no contractual entitlement to a pay rise;

b. The Claimant provided no corroborative evidence to support his assertion that others had received pay rises, when he had not. Bearing in mind that the burden of proof is upon him and that this is evidence that could have been provided, by obliging disclosure from the Respondent, or by calling Mr Bircham to give evidence, I see no reason to disbelieve Mr Slim on this point. While there was an effort on the Claimant's part to argue that in fact the Company's performance was not poor in 2019 and Mr Slim accepted that he and other shareholders may have received a dividend, firstly, none of that financial evidence was before me and secondly, in any event, it's not for me to second-guess how an employer runs his business and decides whether or not to award pay rises, even if shareholders do, nonetheless, receive a dividend. What is crucial, instead, is whether or not the Claimant was singled out in this respect, indicating possibly a malicious motivation by the Respondent, but there is no such compelling evidence in this case.

c. He did not bring a grievance at that point, despite now saying that he considered that he'd been lied to.

d. He received a pay rise the following year, countering his assertion that the Respondent was choosing for adverse reasons to refuse such rises.

e. I don't therefore accept that the fact that he did not receive a pay rise in 2018 or 2019 was in any way a breach of the implied term of trust and confidence, or that it could contribute, cumulatively, to such a breach.

8. Commission. The Claimant's contract of employment states that '*regarding commission for projects and tenders this will be set as mutually agreed with the Managing Director. Based upon a target of £1m the following rates apply against invoiced sales – up to £499,000 a rate of 3%* (with higher rates for sales above that level) [B57]. The Claimant stated that he put together and led a successful tender bid to a customer called UKPN, on a project called PakNet and that he should, therefore, have been awarded a 3% commission on that contract, but that subsequently he was told by Mr Slim, in an appraisal in 2018 that the commission rate would be 1.5%, as the Company wasn't performing well. He asserted that he was the only member of the sales team that took a commission reduction. Mr Slim's evidence on this point was that the Claimant was not responsible for the tender, as he was not the sales manager, a Mr Travis-Cosgrove was (to whom the contractual documentation had been addressed [C70]). He also said that he had agreed the 1.5% rate in the October 2018 appraisal meeting [B62], as a reward for the Claimant's role in project-managing modifications to some of the equipment, but that this was not 'new business'. He commented that the Claimant accepted this arrangement at the time, raising no concerns or grievance about it, subsequently receiving six such payments at that rate, over the following two years. My findings on this issue are as follows:

    a. The Respondent's criteria for awarding commission were unclear and obviously much was at the discretion of Mr Slim. Apart from the brief reference in the employment contract referred to above, I was pointed to no other documentation that set out how commission should be awarded, when, normally, there might be an entire section in an employee handbook detailing the criteria, in particular in relation to what constituted new business, or who was involved in securing it. Such vagueness may be an entirely deliberate decision by the Respondent, '*will be set as mutually agreed with the Managing Director'*, in order to allow them leeway in making such awards. But this is not, of itself, a breach of the implied term of trust and confidence, unless it can be shown that the decision to reduce a percentage paid, or not to pay commission, was exercised in a manner calculated or likely to destroy the employment relationship, by, for example, other employees equally or even less-deserving, receiving such awards. There is, however, as with the pay awards, no evidence of such.

    b. It seems to me that the Respondent had a deliberately vague commission structure, enabling Mr Slim wide exercise of his discretion and that there is no evidence that his exercise of that discretion in the Claimant's case was motivated by any desire to destroy or seriously damage the employment relationship (which it clearly didn't, as the Claimant remained in employment for a further two years, accepting six subsequent payments at that rate, without complaint), but, instead by a desire to manage the Company's finances as he saw fit (giving the Respondent 'reasonable and proper cause' (as per **Mahmud**)).

    c. No corroborative evidence was provided as to the extent of the Claimant's involvement in the main tender, or in any of the work which he stated attracted commission. While Mr Kerslake made a very belated application in this hearing for specific disclosure of the tender document,

which of course he could have done many months ago, I was not satisfied that at this late stage, any such disclosure would be feasible, both in terms of the delay caused to the hearing of this matter and also due to commercial sensitivity of its contents, requiring the need for extensive redaction and no doubt challenge as to that redaction, which the three-day listing of this hearing would not allow. I thought it unlikely also that even if disclosed that it would be apparent to me the extent of the Claimant's involvement in it. I refused the application, therefore, as I did not consider it proportionate or in the interests of justice to allow it.

d. I conclude, therefore that while it is perfectly possible that the Claimant may not have been paid the full extent of commission that he felt was his due, he could and perhaps should have challenged that point, at the time, obliging the Respondent to be less opaque about the criteria, but he didn't, instead accepting the payments awarded over the following two years and only first raising this issue in his resignation letter [C122]. Mr Slim, as stated, exercised the wide discretion he was afforded and there is no evidence that he did so in a capricious manner towards the Claimant.

9. Flexible Working Arrangements. The Claimant said in his resignation letter that he had '*been victimised and unfairly treated for having a role as primary carer for my youngest child which is causing me a great deal of worry, anxiety and affecting my home life'.* It was common ground that from when the COVID pandemic struck, in March 2020, until September/October that year, arrangements were made by the Respondent for the Claimant to work flexibly and from home, with which he was content and indeed for which he had expressed, on several occasions, his gratitude (on 28 September '*I appreciate the help, I really do ..'* [C93] and on 24 September '*thank you for being understanding during this time'* [C95]. Mr Slim considered that the Respondent had been '*extremely accommodating'* of the Claimant's circumstances and that he was not aware of any employee afforded the same flexibility. Ms Wood said that there were other employees with children who had additional childcare responsibilities due to the pandemic and thus required flexibility, but who nonetheless were able to make arrangements which meant that their contractual hours were not impacted and that no other employee was permitted to alter their working hours to the extent that the Claimant had been permitted to. She said that once the initial lockdown was over, the Company needed to get back as close as possible to previous work levels, particularly in view of their support to crucial national telecoms infrastructure and on 12 June, all employees were informed that normal contractual hours would resume [C76]. She said that nonetheless, the Claimant had requested and was permitted to continue to vary his hours until early October. In cross-examination, she said that the Company had to '*draw a line and that the Claimant managed other employees and needed to be there when they were. He was missing vital meetings and we needed him in full time. We were trying to manage the business despite the effects of COVID, but that if we didn't effectively do so, redundancies may have been necessary'.* She went on to say that the Claimant '*managed the engineering team and that by the nature of the company's products, lots happened first thing in the morning, following incidents overnight, which he was not there to deal with.'* My findings in respect of this issue are as follows:

a. The Claimant had no entitlement to demand or expect flexible working and did not, at any point, make a formal application for such, under the Flexible Working Regulations;

b. There was no evidence whatsoever that he had been '*victimised and unfairly treated'* in this respect, or been treated less favourably than others. In fact, all the evidence pointed to the opposite – that he had been more favourably treated than others. The Claimant provided no evidence to the contrary.

c. The Respondent was entitled, after six months of flexibility, to expect the Claimant to return to his normal hours and while this may have caused the Claimant childcare problems, that is not, with respect to him, the Respondent's problem. They had a business to run and within reasonable parameters they had to give that concern priority over the Claimant's needs.

d. I considered Ms Wood's evidence on this point to be compelling. It was clear from that evidence that the Respondent had done as much as they could for the Claimant, but had reached the end of the road in this respect. He was a manager of a technical team, who needed to be there to lead them, particularly first thing in the day and there was no way round that requirement.

e. I don't therefore consider this matter to be either, on its own, a breach of the implied term, or, cumulatively to contribute to one.

10. Grievance against Mr Spindler. It was undisputed evidence that following a disagreement between he and Mr Spindler on Friday 9 October 2020, as to the Claimant's prospective involvement in a call with a potential new client, Mr Spindler had called Mr Bircham, via Teams and used abusive language in relation to the Claimant, to include that '*he could fuck off*'. The extent of the abusive language used and whether it was aimed at the Claimant, as opposed to being overheard by him in the Teams call is in dispute, with the Claimant stating that it was directed at him as soon as he appeared on screen, in the background, with references to his '*stupid face'*. The Claimant brought a grievance the following Monday [C106], which detailed this incident and what was said, so I am inclined to accept his version of events. He said that he had been humiliated and bullied. In any event, however, Mr Spindler accepted in evidence that he had used abusive language, had behaved unprofessionally and regretted that behaviour.

11. In his grievance, the Claimant asked for a formal written apology from Mr Spindler and said '*that I would like to hope that we can amend things and build a professional relationship.'* He said that when he came into work on 12 October that Mr Bircham told him that disciplinary action was to be taken against him, which was denied by Mr Slim and for which there was no corroborative evidence and which was not part of his pleaded claim (which I don't therefore accept). He submitted his grievance to Mr Bircham and after a couple of meetings with him confirmed that he wished to submit it formally (as noted by Mr Bircham in his notes of the time [B64]), as Mr Bircham was suggesting that it be resolved informally. Mr Slim was informed also on the

12th and Mr Bircham wrote to the Claimant on 13 October, to inform him that Ms Wood would deal with the grievance and that she would be in contact [C112].

12. On 14 October, he was instructed by Mr Slim to attend a Teams meeting with him. When he asked what the meeting was about, he was told by Mr Slim it related to '*emails yesterday'* [C114]. No notes of that meeting were kept, but the Claimant emailed Mr Slim after it, stating '*thank you for the call this morning, I am very appreciative of being able to discuss the matter with you and how we discussed how to resolve the issue. I am happy to withdraw my grievance against Ian Spindler on the basis that I receive an apology and that the incident is still logged/recorded. I would also like the opportunity to have a call with Ian Spindler to clear the air between us and enable us to move forward from this'.* [C113]. Mr Slim responded to thank him and to state that Mr Spindler would call him.

13. It was common evidence that Mr Spindler did call and apologised. Mr Spindler said they discussed putting the matter behind them, that it was a one-off incident and that they would have a few drinks when they next met.

14. On 16 October, Mr Slim came into the office and he and the Claimant spoke. Mr Slim said that he asked the Claimant '*if matters had now been finally resolved'* and that the Claimant replied that they had been '*now that he'd spoken to Ian'*. This conversation took place in front of two other employees, a Mr Finch and a Mr Davies. Mr Davies gave evidence at this hearing that while he didn't hear the whole conversation, he was close enough to hear some of it and said that Mr Slim asked the Claimant if he was happy with the apology received from Ian and that the Claimant said he was. Near contemporaneous statements from both employees, belatedly disclosed, broadly support this account, with Mr Finch recording that the Claimant agreed '*that it had been sorted'*. The Claimant said that he felt pressured by Mr Slim discussing the matter in the office and that all he said was that he and Mr Spindler had spoken. Thereafter, the evidence indicates that working relationships returned to normal, albeit that much of the contact was conducted over Teams and by phone.

15. On 28 October, the Claimant requested that he be permitted to leave work early that Friday to attend an appointment, as he had started an hour early that day [C118]. That request was however denied by Mr Bircham, as he said he was already scheduled to be off on that day and they shouldn't both be out of the office and he also reminded the Claimant of his contractual duties in this respect. Mr Slim agreed that he had been involved in this decision and said that rather than perhaps deal with it more informally, he felt is necessary, as the Claimant had previously brought a written grievance that matters be put in writing. The Claimant responded that that was '*a shame'* and that he would re-arrange the appointment.

16. In respect of his grievance, he said, in evidence that he was, nonetheless, still awaiting a formal written apology from Mr Spindler and sought updates from Mr Bircham, over the following three weeks as to the progress of the grievance, as he had not withdrawn it. It is common evidence that Ms Wood had not written to him about it. On 12 November he wrote to Mr Bircham

[C120] complaining of this, stating that his grievance was not being taken seriously and that a written apology was important and referring to the 28 October incident, in some detail and also his childcare issues. Mr Bircham acknowledged receipt and said he would respond early the following week. However, the Claimant resigned by letter the following day, with immediate effect [C122], referring to the grievance and other matters. I make the following findings in respect of this issue:

a. The Apology – there is no dispute that an apology was made by Mr Spindler, but not in writing. While there is no doubt that the Claimant specified this requirement in his grievance, he made no further written reference to it, until his email of 12 November, nearly a month after his discussions with Messrs Slim and Spindler, resigning promptly thereafter. There is no corroborative evidence that as he asserted that he discussed this requirement verbally with Mr Bircham in the preceding three weeks and indeed I note that he makes no reference to such enquiries in his email to Mr Bircham, when it would have been a convenient method of recording that fact. There is, however, evidence from three witnesses, Mr Spindler, Mr Slim and Mr Davies that the Claimant had, in one form or another, expressed his satisfaction with Mr Spindler's verbal apology and regarded the matter 'as sorted'. He certainly didn't say anything to the contrary, until his resignation and in the meantime resumed work with Mr Spindler. While, in this hearing, he asserted that Mr Spindler was not genuinely remorseful, he did not say that at the time, even in his final grievance or his resignation letter. Also, I found Mr Spindler's evidence on this point to be persuasive. I note that the Claimant's email with Mr Slim following their telephone discussion did imply that two steps were necessary to resolve his concerns, an apology and a discussion with Mr Spindler, but, it seems to me that that was overtaken by his and Mr Spindler's subsequent telephone conversation, in which, I find, based on subsequent evidence from three witnesses, he accepted the verbal apology and agreed to move on, by implication without further written apology. His evidence that he needed the written apology because that would somehow be '*more heartfelt'* on Mr Spindler's part, as opposed to a verbal discussion was, I found, implausible. I consider it much easier for a person making a written apology to be insincere about their feelings, as opposed to in person. It seemed to me more likely that the Claimant was reviving his previous request, as it was an alleged failure by the Respondent that he could point to and perhaps also for evidential reasons.

b. The Claimant therefore effectively followed through on his agreement with Mr Slim to withdraw his grievance and accordingly, apart perhaps from the lack of Ms Woods having sensibly written to him to record that fact, no further action was required. She gave evidence that she had, in respect of the Claimant's other requirement that a note to that effect be kept on file, done so and the note was provided in the bundle [B66]. Ms Woods said that it was her error to have dated 15 October, rather than the 16th. She agreed that it had not been shown to the Claimant, before these proceedings. Mr Kerslake belatedly sought to contend that this note was not genuine, but I had no reason to doubt Ms Woods' evidence on this point and if the Claimant sought to challenge it, a request could

have been made for a Word 'properties' report as to its date of production, but none was.

c. It was suggested in closing submissions that the Respondent, instead of seeking to deal properly with the grievance, as it had a duty to, instead tried to suppress it. Reference was made to the fact that the following of a grievance procedure was a contractual requirement, the Claimant's contract stating that '*in the event you wish to make a formal complaint, this should in the first instance be raised with your Head of Department either orally, or in writing. Should you then be unable to resolve matters you are free to pursue the matter in writing with the Managing Director* (my emphasis) [B59]. However, as I have found, in this case the Claimant was 'able to resolve matters' (although he subsequently contended he hadn't) and accordingly the policy had been complied with. The Foreword to the ACAS Code of Practice on Disciplinary and Grievance Procedures (to which authority the Claimant referred) states:

'*Many potential disciplinary or grievance issues can be resolved informally. A quiet word is often all that is required to resolve an issue.'*

and the Code itself also emphasises that '*employees should aim to settle most grievances informally'*. I can see, therefore, no legitimate criticism of Mr Slim in attempting and succeeding in doing just that, despite, subsequently the Claimant appearing to wish to go back on that arrangement.

d. What intervened was the refusal of the 28th to be allowed leave work early and that and the refusal email's 'official' tone and perhaps ongoing concerns the Claimant had as to childcare is what, I consider, lead to his decision to resign, not the handling of the grievance. The refusal was entirely reasonable, particularly as the Claimant was wildly misinterpreting his contractual entitlements in this respect and therefore it cannot have been a breach, or even a 'last straw', entitling him to resign. It is perfectly understandable that by this point, the Claimant having previously brought a grievance, the Respondent would seek to record such decisions in writing. I have already considered the childcare situation.

e. Finally, it was suggested that the fact that the Respondent did not seek to 'reach out' to the Claimant, on sight of his resignation letter, to attempt to clarify the position with him, or to dissuade him from resigning, is an indication of the Respondent's adverse attitude towards him. Firstly, however, there is no obligation on an employer to do so in such circumstances, it being the employee's choice to resign and nothing the employer can say can alter that fact. Secondly, the tone of the letter is one implying pending tribunal proceedings, by use of terms such as breach of contract, victimisation, unfair treatment, bullying and of trust being irreparable and many employers would see no point in any amelioratory response to such and which may even, they might fear, be used against them.

17. I conclude therefore that the Claimant did not resign in response to any fundamental breach or breaches of contract by the Respondent, but instead for reasons of his own, for which the Respondent cannot be held accountable.

18. Conclusion. The Claimant's claim of constructive unfair dismissal fails and is dismissed.

Employment Judge O'Rourke
Date: 18 November 2021

Judgment & Reasons sent to the parties: 13 December 2021

FOR THE TRIBUNAL OFFICE