EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112407/2021

Held in Glasgow on 21 – 23 March 2022

Employment Judge R Mackay

Mr A Cannon	**Claimant** **In Person**
Re-Tek UK Ltd	**Respondent** **Represented by** **Mr Jagpal -** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Claimant was unfairly dismissed and the Respondent shall pay to the Claimant compensation of **ELEVEN THOUSAND NINE HUNDRED AND THIRTY FIVE POUNDS AND SIXTEEN PENCE (£11,935.16)**.

REASONS

Background

1. This is a claim for constructive unfair dismissal. The Respondent defended the claim on the basis that the Claimant had not been dismissed. In the alternative, it argued that the dismissal was fair by reason of capability or some other substantial reason.

2. The Claimant gave evidence on his own behalf. As he was unrepresented, it was agreed that he could read from a prepared statement, a copy of which was provided to the Tribunal and to the Respondent's representative.

3. For the Respondent, evidence was heard from Mr Kevin Culligan (the Respondent's Chairman and principal shareholder), Mr Gordon Lowrie (Managing Director) and Ms Natalie Hunter (an external HR Consultant).

4. Parties prepared a joint bundle of documents which was lodged in advance of the hearing.

5. During the course of the evidence, the Claimant was questioned about a conversation and follow up correspondence which it appeared might relate to a without prejudice conversation. The Tribunal agreed to hear limited evidence from the Claimant and the other party to the conversation (Ms Hunter) before determining admissibility.

6. The Claimant, in lay person's terms, stated that he thought the conversation was confidential between him and Ms Hunter and would not go any further. Ms Hunter initially gave evidence that there was no framing of the conversation as being without prejudice. That was, however, inconsistent with her own follow-up letter which refers to a without prejudice conversation as having taken place. It was also clear that the nature of the conversation centred around a possible settlement as a means of avoiding the present claim.

7. The Tribunal was satisfied that the discussions about settlement were conducted on a without prejudice basis, and determined that the content of the conversation and the passages of the follow-up letters, so far as they related to the without prejudice conversation, should be excluded from the Tribunal's consideration.

Observations on the Evidence

8. The Tribunal found the Claimant to be a credible and reliable witness. He gave his evidence in a way which was clear and unhesitant and consistent with the documentary evidence.

9. The witnesses for the Respondent were less reliable in a number of respects. Both Mr Culligan and Mr Lowrie had a tendency to avoid making concessions which they considered might be detrimental to the Respondent's position,

even in circumstances where the position was clear. Both also expressed some reluctance to respond to certain legitimate questions.

10. Whilst much of the Claimant' evidence was not challenged, or otherwise in dispute, a number of conflicts of evidence emerged. In each case, the Tribunal resolved these in favour of the Claimant (as set out in the **Findings-In-Fact** section which follows).

Findings-In-Fact

11. The Respondent is involved in the recycling of used IT equipment. It is based in East Kilbride and employs approximately 40 people.

12. The Claimant commenced employment on 11 October 2011. He was employed throughout as Warehouse Manager.

13. He reported to the managing director, latterly Mr Lowrie, who took on that role in 2018.

14. All of the warehouse staff reported to the Claimant for the majority of his time in post. As part of his role, the Claimant was responsible for selecting, training and developing all of the warehouse staff. He created a series of technical processes which remained in use throughout his employment. He was afforded a significant degree of autonomy.

15. The Claimant was initially contracted to work 35 hours per week. That is reflected in a written (albeit unsigned) contract of employment. He routinely worked in excess of those hours and following agreement with Mr Lowrie, his hours (and pay) were increased to 37 hours per week with effect from 1 January 2019. One feature of the Claimant's role was opening and closing the premises which in part explained the longer hours.

16. As a result of the COVID pandemic, the Respondent's operations were closed for approximately two months from 23 March 2020.

17. At the time of this initial closure, the Claimant was vocal in his view that he should not be expected to attend the workplace. He was concerned to follow Government guidance as well as to avoid risk to his elderly father and

severely disabled son. The Claimant perceived that the Respondent, and Mr Culligan in particular, resented his approach. He attributed subsequent treatment, which he viewed as detrimental, to his having taken the approach he did.

18. In support of his perception, the Claimant pointed to an all staff email from Mr Culligan which was overtly critical of national lockdown strategy.

19. Prior to the closure, the Claimant's working pattern was Tuesday to Friday each week. He was a highly performing employee, reflected in bonuses allocated to him each year. In 2018 and 2019, the Claimant was given exceptional bonuses of £2,000 and £3,000 respectively, paid into his pension scheme. These were awarded in respect of exceptional performance and were in addition to cash bonuses awarded each year. In 2019, he received a cash bonus of £5,500.

20. The awards ran in tandem with very positive appraisals of the Claimant. Although a grading system was not in place at that time, the Respondent's witnesses accepted under cross-examination that the levels of bonuses would have been consistent with the highest scoring under the grading system subsequently introduced by them.

21. During the course of his employment, the Claimant had various discussions about obtaining a shareholding in the Respondent. In 2016, he asked the then managing director who agreed that he should be allocated 5%. That did not come to pass.

22. Subsequent discussions took place where three existing shareholders, Mr Lowrie, and two others, agreed to relinquish 1% in favour of the Claimant, provided that Mr Culligan and the then managing director did likewise. This did not come to pass.

23. On the appointment of Mr Lowrie as managing director in 2018, the issue was revisited. In around June 2018, Mr Lowrie advised the Claimant that he would be awarded 5% but that the structure of the company would require to be

changed first. In July 2019, the Claimant was again informed by Mr Lowrie that he would be awarded a 5% shareholding.

24. Prior to the COVID closure, the Claimant had regular day-to-day contact with Mr Culligan who performed an executive function as well as being Chairman. The two had studied together and kept in touch thereafter. He was given a very significant degree of autonomy over the operation of the warehouse and the management of the staff.

25. The Claimant was involved in communicating with staff at the time of the COVID closure, including placing staff on furlough. A dispute arose as to whether the Claimant himself was placed on furlough. He gave evidence that he had not been. The Respondent's witnesses suggested that he had. There was, however, no documentation to suggest that the Claimant had been placed on furlough. During his period of absence from the workplace, the Claimant provided services to the Respondent including devising a system for the return of skeleton staff in May 2020. He also provided advice by telephone when requested. He remained on full pay throughout. On balance, the Tribunal was satisfied that the Claimant was working from home and was not on furlough leave.

26. In June 2020, the Claimant contacted Mr Lowrie with suggestions as to who should return to supplement skeleton staff already in place. Ultimately, the Respondent put in place a new shift system whereby warehouse employees would work four days on and four days off. They did so without consulting the Claimant.

27. In light of his previous autonomy in dealing with staffing issues relating to the warehouse, the Claimant properly expected to have been given a greater role in introducing the new regime.

28. The Claimant returned to the workplace in July 2020.

29. On his return, the Claimant's relationship with Mr Culligan changed. From having had almost daily verbal communication with Mr Culligan, the Claimant went to having almost no verbal communication at all. In one particularly

marked example, when the Claimant's father passed away, Mr Culligan did not acknowledge the fact or express any condolences (in contrast with all other colleagues of the Claimant who did so).

30. On a number of occasions, the Claimant asked Mr Lowrie about the reason for the change in relationship. Mr Lowrie responded with words to the effect that "*You know what he's like*." He was not given a concrete reason.

31. Mr Lowrie and another shareholding employee, Mr Steven, stated to the Claimant on a number of occasions that Mr Culligan wanted "*rid of him*".

32. Mr Lowrie denied making such comments. The Claimant gave evidence, which was not disputed, that he and Mr Lowrie had a very open relationship and could speak freely on a wide range of issues. The Tribunal was satisfied that such comments had been made. Notably, despite the Claimant having expressly referred to such comments in an email to Ms Hunter on 29 July 2021, the subsequent letter from Ms Hunter did not contain any denial.

33. In September 2020, the Claimant discovered that his pay had been reduced from 37 hours per week to 35 hours per week. No discussion or consultation took place with the Claimant about this. He raised the issue with Mr Lowrie who stated that his contract stated 35 hours per week only. The Claimant responded to the effect that he was still operating in the same way such that his hours exceeded 35. Mr Lowrie did nothing to reverse the change in pay.

34. The Claimant also saw a substantial reduction in bonus payments. In December 2020, he received a bonus of £750. The Claimant had previously had access to the bonuses paid to his direct reports. Whilst this was removed from him, he was made aware from colleagues that his bonus was at a level lower than some of those direct reports.

35. In July 2021, the Claimant was advised that he would receive no bonus payment at all. He was on sick leave at that time. He was not given a reason as to why no bonus was paid.

36. In November 2020, the Claimant completed an annual goals and appraisal form. This set out a number of goals which were to be achieved over the subsequent 12 month period.

37. Later that year, a new appraisal system was introduced for the Claimant's staff. This was done without reference to the Clamant. He had previously been given sole responsibility for devising the appraisal system. It was not made clear to the Claimant whether the new system would apply to him or not. It was, ultimately, applied to him retrospectively.

38. The new appraisal system involved quarterly meetings whereby interim scores were to be issued. The Claimant met Mr Lowrie in December 2020 for his belated Q1 and Q2 reviews. A dispute arose as to whether he was given scorings at that time. The Claimant advised that he was not. Mr Lowrie stated that he had (awarding scores of 3 and 2 representing mediocre or below average performance).

39. The Tribunal had no hesitation in concluding that scores were not given in December. It accepted the Claimant's evidence that they were first given at a meeting on 13 May 2021.

40. At that time, the Claimant was aggrieved and challenged the scorings and asked for reasons. None were provided. He also challenged how he could be expected to improve if he was not told that he was not performing to the standards expected. The Tribunal was satisfied that the first the Claimant was told of his Q1 and Q2 scores was at his Q3 meeting on 13 May 2021 (itself six weeks into Q4). Had the Claimant been advised of low scorings before, it is inconceivable that he would not have questioned or challenged the scorings at the time.

41. The only reason put forward for the Claimant's scoring relatively badly (he was also awarded a 2 (below standard) for Q3) was an issue in Q4 relating to communication with a particular member of staff. The Claimant put forward a written explanation as to why there had been unavoidable delays in communicating with that employee. Those were not taken into account in the scoring process.

42. Objectively, looking at the goals set out in the Claimant's appraisal form, there was nothing to suggest that he was performing inadequately. He gave evidence that he was hitting all of the relevant targets. No evidence was given from the Respondent to suggest otherwise.

43. In December 2020, Mr Lowrie advised the Claimant that the 5% share award would no longer be happening. On being asked for a reason, Mr Lowrie responded to the effect "*You know why*". The Claimant interpreted this as a signal of Mr Culligan's antipathy towards him. He saw it as consistent with the comments from Mr Lowrie and Mr Steven to the effect that Mr Culligan wished him to leave.

44. The Claimant, amongst others, was invited to a meeting on 19 April 2021. The Claimant's perception of the meeting was that it was aggressive. He described feeling "attacked" in relation to an issue over holiday cover.

45. During the course of the meeting, it was stated that responsibility for the management of warehouse staff and service delivery would transfer from the Claimant to another manager (who had been seconded in to provide additional cover).

46. A follow-up email from Mr Lowrie suggested that this action agreed. The Claimant gave evidence that it was not agreed and that he found it undermining. The Tribunal accepted the Claimant's account. Having previously had sole autonomy for the management of his team, for that to be removed amounted to a significant diminution in status and responsibility.

47. As noted above, the Claimant's Q3 appraisal meeting took place on 13 May 2021.

48. Several days after the Q3 meeting, the Claimant met with Mr Lowrie again. He expressed considerable practical difficulties he was having at home given the needs of his disabled son, particularly at weekends. He had done so several times before. He made a request to revert to the pre-pandemic pattern whereby he would work during the week, with overall responsibility for all warehouse employees. The seconded manager and two new supervisors

would report in to him. Mr Lowrie agreed with the proposal and indicated that he would run it past Mr Culligan.

49. On Friday 21 May 2021, Mr Lowrie met with the Claimant and told him that t the shift pattern would not be changed. Both parties became heated during this meeting.

50. The shift pattern suggested by the Claimant was ultimately introduced after he resigned.

51. With effect from 25 May 2021, the Claimant was signed off as unfit for work due to stress.

52. By letter of 26 May 2021, the Claimant was invited to a performance management investigation meeting. That did not ultimately take place. Instead, the Claimant was invited to attend a meeting with Ms Hunter. The Claimant questioned why after being absent for less than two weeks, he was being asked in her letter to "*discuss any changes in your circumstances and the options that the company may consider relating to your employment*". He saw this as a threat of dismissal.

53. The meeting was delayed on a number of occasions and ultimately took place on 21 July 2021. As noted above, certain aspects of the meeting were conducted on a without prejudice basis and as such were disregarded.

54. The remainder of the meeting principally involved the Claimant giving an account of various instances of unfair treatment leading him to consider resigning.

55. Ms Hunter was due to leave on holiday so had some preliminary discussions with Mr Lowrie and Mr Culligan with a view to providing an initial response to the Claimant's allegations. It was her intention to provide a fuller response in due course. By email of 29 July 2021, Ms Hunter emailed the Claimant. Amongst other things, she countered certain of the allegations made by the Claimant and made the broader comment that "*the business*" unreservedly refuted the Claimant's allegations.

56. By email of 1 August 2021, the Claimant emailed Mr Lowrie resigning with immediate effect. He described it as "*an almost impossible decision to make*". He referred to the email of 29 July 2021 which he stated bore little or any resemblance to the actual facts leading him to feel that his position was untenable.

57. He also responded to Ms Hunter, highlighting aspects of her email which he considered inaccurate or untrue. These included a mischaracterisation of his request to change shift patters and an inaccurate suggesting that he went off sick after receiving an invitation to a performance review meeting (the reverse being true). He also questioned the apparent desire for him to return, quoting the comments made by Mr Lowrie and Mr Stephen to the effect that Mr Culligan wanted him removed.

58. By letter of 11 August 2021, Ms Hunter sent a more detailed letter to the Claimant.

59. Findings-in-Fact as they relate to remedy are made in the **Remedy** Section which follows.

Relevant Law and Submissions

60. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 Employment Rights Act 1996 ("**ERA**"). 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).

61. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the

implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce international Ltd*** [1998] AC 20).

62. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

63. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

64. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason – see ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

65. The Court of Appeal ***in Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term?

e. Did the employee resign in response (or partly in response) to that breach?

66. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

67. Given that the Claimant was unrepresented, the Respondent's representative agreed to make his submissions first. After outlining the basic legal principles, he invited the Tribunal to find that there had been no breach of contract such as to entitle the Claimant to resign. He submitted that none of the allegations made by the Claimant amounted to a breach of any express term. In relation to bonus, he referred to the terms of the contract and the discretionary nature of the scheme. In relation to the shareholding, there was never any certainty that an award would be made.

68. In relation to the Claimant's role and his participation in the appraisal system, it was submitted that no breach of contract arose. In relation to the salary reduction, it was suggested that had there been a breach of contract, the Claimant by his continuing employment, accepted the breach.

69. So far as any "last straw" is concerned, the Respondent's representative submitted that the email of 29 July 2021 should not be considered in this way given that it was clear from the earlier meeting that the Claimant had already decided to resign.

70. In the alternative, the Respondent's representative submitted that if the Claimant was dismissed, the dismissal was fair either for capability or some other substantial reason. In relation to capability, he pointed to what he said were the Respondent's genuine concerns about performance. For some other substantial reason, he pointed to what he said amounted to a breach of trust and confidence arising from the Claimant's conduct at his meetings with Mr Lowrie in May 2021.

71. The Claimant gave a short submission on his own behalf. He pointed to the significant change pre and post-pandemic whereby he went from being a valued and highly rewarded member of staff to one who faced a number of detriments as outlined in his evidence.

72. He described being in a position where a "*whole list of things*" led to him finding the situation untenable.

Decision

73. This is a case where the Claimant argues that a series of events led to him taking the decision to resign. Although he did not refer to it in legal terms, it was clear that he was pointing to a series of events, including a last straw, which led to the destruction of the mutual term of trust and confidence. The last straw identified by the Claimant was the content of the email of 29 July 2021 from Ms Hunter. In particular, he found aspects of the response to be untrue, reinforcing his belief that his position was untenable.

74. In response to the Respondent's representative's submission that the email could not be the last straw given that the Claimant had already decided to leave, the Tribunal was satisfied that whilst the Claimant was clearly minded to leave by the time of the meeting on 21 July 2021, he had not at that point made a final decision; nor had he communicated any express resignation. It accepted the Claimant's evidence (which is consistent with his own resignation email) that the final straw was in fact the content of the email he received following the meeting.

75. The Claimant resigned almost immediately following receipt of the email (on 1 August 2021). There is, therefore, no suggestion that the Claimant affirmed the contract following that act.

76. The Tribunal then considered whether that act in itself was a repudiatory breach of contract and held that it was not. Whilst the Claimant was clearly aggrieved by the terms of the letter, it was issued as something of a holding response pending a more complete response to the Claimant's allegations and in other circumstances might have been a precursor to a full grievance process at which all of the issues might have been explored.

77. The Tribunal was, however, satisfied that the terms of the letter were not entirely innocuous. Standing the Tribunal's findings as to the course of events leading to that point, the information in the letter portraying the position of Mr Culligan and Mr Lowrie, was inaccurate in certain respects and misrepresented the Claimant's position. Morever, the bold assertion that the Respondent unreservedly refuted the Claimant's claims (at a time when no meaningful investigation had been conducted) demonstrated an unwillingness to address the Claimant's concerns in a meaningful way.

78. The Tribunal then considered whether there was a course of conduct prior to the final straw which viewed cumulatively amounted to a repudiatory breach of contract. The Tribunal had no hesitation in finding that such a breach occurred. A distinct change in approach to the Claimant arose following the COVID shutdown. Whether or not that was due to the Claimant's strict approach to remaining away from work is not certain. Whatever the reason,

however, the Respondent acted in a way which was likely (and in many respects calculated) to destroy the mutual trust and confidence between the parties.

79. The first issue arose in June 2020 when, in discussing the return of employees to the workplace, decisions were taken without consulting the Claimant. This was undermining standing the autonomy previously given to the Claimant in staffing matters.

80. On his return, Mr Culligan adopted a fundamentally different approach to the Claimant. He went from having almost daily verbal communication to having almost none at all. For the chairman and principal shareholder to cut off a senior manager in this way was undermining and meant the Claimant felt excluded.

81. The comments from Mr Lowrie and Mr Steven to the effect that Mr Culligan wanted the Claimant to leave were highly likely to destroy trust and confidence.

82. The reduction of the Claimant's pay without discussion or consultation was itself a material breach of contract. Had the Claimant resigned in response to that breach, it alone might well have given rise to a successful claim for unfair dismissal. The Claimant elected to continue in employment after that change thus accepting the breach. It is, however, another example of an act calculated or likely to destroy trust and confidence.

83. The Respondent's approach to the Claimant's bonuses was also unwarranted. To award the Claimant a bonus lower than those paid to certain of his subordinates, in circumstances where there were no performance issues to warrant doing so was capricious. Similarly, to inform the Claimant in July 2021, whilst he was absent due to sickness, that he would receive no bonus without any explanation or justification, was equally capricious and unwarranted.

84. The Respondent's approach to the appraisal system was deeply flawed. To introduce a new system without involving the Claimant and without making

clear whether it applied to him was undermining. To apply scorings retrospectively was wholly unreasonable. To apply low scores in circumstances where there was no evidence to justify doing so, was capricious and calculated to undermine the Claimant.

85. The Respondent's approach to the Claimant's shareholding has a long history and it is clear that various expectations were set at different times. Whilst the Tribunal accepted that there was no obligation on the Respondent to make any award of shares to the Claimant, to lead him to a position whereby he expected an award to be made only for that to be quashed with no reason other than a signal that Mr Culligan no longer supported the Claimant, was an act likely to destroy the term of trust and confidence.

86. To remove the Claimant's line management responsibility for warehouse staff was a significantly undermining step to take. It represented a major diminution in the role and status of the Claimant. To take that step without any consultation or agreement was capricious.

87. The conduct of the Claimant's Q3 appraisal meeting on 13 May 2021 was unsatisfactory for the reasons outlined above, as was the Respondent's approach to the Claimant's requests for support in dealing with his situation at home – with Mr Lowrie agreeing to a proposed solution only for that to be rejected without reason by Mr Culligan – was calculated or likely to destroy the trust and confidence in the relationship.

88. This pattern of conduct, which led to the Claimant becoming absent due to stress, is a clear course of conduct amounting cumulatively – with the final straw - to a breach of the ***Malik*** term.

89. The Tribunal then considered whether the Claimant resigned in response to that breach and had no hesitation in finding that he did. No other reason was advanced. The Claimant clearly found it a difficult decision and regretted leaving a role which prior to the COVID pandemic he had enjoyed, and in which he had performed very successfully.

90. The Tribunal considered whether, the Claimant having been constructively dismissed, the dismissal was fair or unfair. The Respondent's suggestion that the dismissal was fair by reason of capability is without merit. Similarly, the suggestion that it was fair for some other substantial reason arising from a breakdown in trust and confidence inevitably fails given that the reason for the breakdown in trust and confidence was the course of conduct of the Respondent, and not any misconduct on the part of the Claimant.

91. The dismissal was, accordingly, unfair.

Remedy

92. The Claimant commenced new employment in mid-August 2021. At that point, his earnings were still covered by a payment in lieu of notice received by him. His earnings in the new position are slightly lower than those with the Respondent. The Claimant and the Respondent's representative helpfully agreed the shortfall figure as being £132.93 net per month.

93. Whilst the Claimant initially claimed loss of pension entitlement, he withdrew that element of the claim on the basis that he has a comparable pension in his new employment. His new role does not carry with it any bonus entitlement. In his schedule of loss, the Claimant sought compensation for the loss of the promised shareholding.

94. The Claimant has not made any effort to secure a higher paid role.

Basic Award

95. Having been unfair dismissed, the Claimant is entitled to a basic award. The parties helpfully agreed the calculation of this (£7,340). This is based on an effective date of termination of 1 August 2021. At that time the Claimant was 53 and had nine years' service. His gross pay was £482.81.

Compensatory Award

96. The Claimant sought ongoing losses for a period of several years until his proposed retirement. The Respondent's representative rightly highlighted the Claimant's ongoing duty to mitigate his losses and pointed to his failure to do

so. Having regard to the Claimant's ongoing duty, the Tribunal determined that it was appropriate to award compensation for a period of 12 months from the effective date of termination only. This comprises net loss of earnings of £1,595.16 (12 x £132.93). Having regard to the recent pattern of the Claimant's bonuses (when properly awarded) the Tribunal considered it just and equitable to award £3,000 for loss of bonus.

97. So far as the shareholding is concerned, it was not considered appropriate to award any compensation. To do so would be a wholly speculative exercise for which the Tribunal had no meaningful evidence on which to make a calculation. The total compensatory award is accordingly £4,595.16.

Employment Judge: **R Mackay**
Date of Judgment: **25 April 2022**
Entered in register: **27 April 2022**
and copied to parties