EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101671/2022

Held in Glasgow on 27, 28 and 29 June 2022

Employment Judge B Campbell

Mr M Reid	**Claimant** **In Person**
Hugh Stirling Limited	**Respondent 1** **Represented by:** **Mr B Brown - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that:

1. the claimant was not constructively unfairly dismissed by the respondent;

2. The separate claims for monetary payments are either out of time or not established on the facts as claims of unlawful deductions from wages;

3. The same claims for monetary payments did not amount to a breach of contract under common law; and

4. The claims are therefore dismissed.

REASONS

Introduction

1. This claim arises out of the claimant's employment with the respondent which ended with his resignation on 28 March 2022. The claimant alleges that he was constructively unfairly dismissed. He also alleges that certain payments are due to him. The respondent denies the claims.

2. The hearing took place over three days in person. The claimant represented himself and the respondent was represented by Mr Brown who is a solicitor. I took time at various stages to explain where necessary the rules and practices which operate in relation to employment tribunal hearings, in keeping with the overriding objective of employment tribunals as set out in rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3. The claimant gave evidence on his own behalf. For the respondent, evidence was led from Mr Brian Muslek, a director and employee, and Mr Chris Nugent, the respondent's former Managing Director who had been employed at the time of the events referred to by the claimant. Generally the evidence of each witness was found to be credible and reliable, but where there was conflict over a material matter that is dealt with below as part of the findings of fact and/or discussion and decision.

4. Both parties provided their own inventory of documents for reference at the hearing. Where it is necessary to refer to a document below, 'C' indicates a document in the claimant's bundle and 'R' denotes an item in the respondent's bundle. Numbers following are page numbers of the relevant bundle.

5. The hearing was to determine both liability and, if relevant, remedy. The claimant provided a schedule of loss.

6. After all of the evidence was heard, each party delivered oral submissions which were noted in reaching the conclusions in this judgment.

Legal issues

7. The legal issues to be decided were as follows:

a. Did the respondent materially breach one or more express or implied term of the claimant's contract of employment?

b. If so, when did each breach take place, and did it occur in isolation or as part of a continuing act?

c. Did the claimant resign in response to the breach?

d. If so, did he do so promptly and without affirming any breach so that he was constructively dismissed within the terms of section 95(1)(c) of the Employment Rights Act 1996 ('ERA')?

e. If yes, was the dismissal fair or unfair, taking into account the requirements of section 98 ERA?

f. Did the respondent pay the claimant less than he was contractually entitled, or not at all in a way which was either a breach of contract or an unlawful deduction from wages under section 13 ERA?

g. If so when did such breach or deduction take place?

h. What compensation or damages are payable to the claimant as a result of any claim which succeeds?

Applicable law

Constructive unfair dismissal

8. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

9. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or repudiatory, breach of the contract. The breach may take place or be anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. The employee must resign in response to the breach,

and not delay unduly in doing so or they may be deemed to have accepted or 'affirmed' the breach.

10. Unless the reason for dismissal is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA.

11. Whether a dismissal is direct or constructive, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4) ERA, taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

Unlawful deduction from wages

12. By virtue of section 13 of the ERA a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not.

13. Examples of lawful deductions would include PAYE income tax properly deducted or a sum which the worker had explicitly consented to having deducted in advance by writing. Section 14(1) of ERA expressly states that an employer may recover a previous overpayment from a worker's wages, and this will not be treated as an unlawful deduction.

14. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 of ERA. There are detailed requirements as to the timing of complaints to ensure that a tribunal can determine them. In short, if a claim is about a single deduction the claim process (initiated by way of commencement of Early Conciliation through ACAS) must be presented must begin within three months of it

occurring. If a claim is about a series of deductions, the process must begin within 3 months of the last alleged deduction.

Breach of contract

15. Non-payment of a sum due under an employee's contract may also be a breach of the contract under common law. The claim must exist or arise when their contract comes to an end. A claim cannot be made while the claimant is still in employment. There is a statutory limit of £25,000 on the amount which an employment tribunal can grant in damages if the claim is successful. A claim must be initiated within three months of the effective date of termination of the claimant's employment.

Findings in fact

16. The following are found to be established as fact based on the evidence presented and as relevant to the above issues in the claim.

17. The claimant was employed by the respondent between the dates on 1 September 2008 and 28 March 2022. The claimant resigned from his employment by giving four weeks' notice which ended on the latter date.

18. The respondent's business is carrying out refurbishment and fitting out of commercial premises. It also undertakes facilities management services. The claimant worked for the respondent latterly as a Senior Contracts Manager. He had responsibility for managing the respondent's relationships with certain clients, including Whitbread plc and Wetherspoons. His main role was to estimate the nature and cost of works to be carried out on clients' premises, provide quotes for the works, and then oversee the works if the client instructed the respondent. He would also deal with invoicing and generally manage the process.

19. The claimant's salary latterly was £52,000 per annum and he was also paid a car allowance of £4,500 per year. He was a member of the respondent's occupational pension scheme. Bonuses had been paid to staff historically, although not in the two or three years leading up to his resignation. The last bonus the claimant received was £1,000 in December 2018.

20. The claimant was entitled to 34 days of annual leave in total per year, with the respondent's holiday year being the calendar year.

21. The claimant was issued with a written statement of his terms and conditions of employment [R39-48]. This is referred to below as his 'contract'.

22. The claimant originally reported to the two owners of the respondent, Jamie Stewart and David Hogg. In early 2018 Brian Muslek and Chris Nugent joined the business as part of a plan to undertake a buyout. Mr Muslek became Operations Director and the claimant's line manager. Mr Nugent became the Managing Director.

23. The claimant had a good working relationship with Mr Muslek. The latter had come in from another industry and relied heavily on the claimant's experience. He would be open with the claimant about some matters that were discussed at board level within the respondent. There was a large degree of respect and trust in their relationship.

24. The claimant got on less well with Mr Nugent, who had a wider area of responsibility and appeared to have little time to deal with any concerns raised by the claimant. He preferred that those be dealt with by Mr Muslek and that contact between himself and the claimant be minimal. However, what relationship there was was on the whole professional.

Removal of fuel card

25. In or around August 2018 the respondent changed the way it reimbursed employees for fuel used in connection with their work. Previously, those who undertook work-related driving were issued with a company charge card which they used to purchase fuel when needed. The cards were removed and a policy introduced whereby staff would pay for any fuel and record the number of miles they covered on work business. They would then claim back their travelling costs at the rate of 45 pence per mile at the end of each month by filling in a form. Payment was made by the middle of the following month.

26. The above policy change affected the claimant. He was covering between 20,000 and 25,000 miles per year at the time. The new process was less convenient to him but did not cause him financial hardship.

27. The claimant's contract stated:

"Fuel Card:

You will be provided with a fuel card, for use with your Company Car. The Company reserves the right to withdraw any fuel card from you or to restrict your use of the card without giving notice or reasons."

Removal of company cars

28. At the beginning of 2020 the respondent announced that it had decided to cease the practice of providing employees with company cars. This was to be replaced by the provision of either an annual car allowance, paid in monthly instalments or the ongoing provision of a work vehicle but only a van.

29. The claimant had been the recipient of a company car since starting with the respondent. He wished to continue driving a car and a van was not suitable to him.

30. The claimant's contract stated:

"Company Car:

The Company operates a Company Car Scheme and due to your position within the Company, you will be provided with a car to assist you in the performance of your duties.

The vehicle can be used for private purposes, and whilst the cost of fuel consumed while the vehicle is being used for business purposes will be met by the Company, fuel costs incurred for private purposes will also be met by the Company. The Company will also meet all expenses incurred in your use of the vehicle including road tax, insurance and servicing costs.

…

The provision of a Company vehicle is entirely at the discretion of the Company and the vehicle may be withdrawn or the conditions under which you are entitled to use it may be changed at any time. In particular, the Company reserves the right to retain the vehicle for Company use while you are absent from work."

31. The policy change applied to all employees, but affected the claimant disproportionately as he covered a particularly large number of miles compared to his colleagues in general. He was unhappy at the prospect of using his own vehicle to cover so many work-related miles. He would also have to undertake servicing and repairs at his own expense, and change his insurance cover terms. Mr Muslek said that the respondent had decided to change its policy and there was nothing that could be done about it. It was part of a series of policy changes being implemented by the new owners to make the respondent a more efficiently run business.

32. The claimant negotiated an annual allowance of £4,500 and sourced a lease car, which was a new Mercedes E-Class. Mr Nugent disapproved of the model and specification the claimant had chosen as believed it would create the impression with clients that the respondent was indulging more in the standard of vehicles than was prudent. He drove a more modest model himself. An arrangement was reached involving the claimant ordering a bespoke model with a similar specification but with a more discreet appearance.

33. In or around December 2020 the respondent decided to trial the use of electric vehicles as part of its fleet. One model was ordered up which Mr Nugent used on a trial basis. The claimant saw this as going back on the policy decision announced at the beginning of the year not to operate any company cars.

34. The respondent opted not to purchase more electric vehicles. The trial car was given to Mr Muslek to use as a company vehicle.

Salary increase and role change

35. The claimant received a pay rise with effect from 1 January 2020, which was confirmed to him by letter dated 8 January 2020 [C30]. It said that all other terms of his contract remained the same.

36. The claimant had originally been appointed as a Contracts Manager and that is what his contract said. However, also some time in early 2020 the respondent decided to change his title to Senior Contracts Manager. This was not directly intimated to him in a letter or email, or verbally, but his email signature was changed so that this was shown as his title. The claimant said in evidence that he could not agree or disagree that the role change had happened, but that nobody had formally confirmed it to him. He was given additional responsibilities around this time in relation to liaising with other departments.

37. The claimant had asked to attend training courses on more than one occasion but he had been told there was no budget for them. During 2018 Mr Muslek asked the claimant if he would like to undertake an SVQ course and the claimant agreed. He began the course, completed the majority of it during 2020 and finished the last part, a written piece, in 2021. Both parties accepted that the qualification had value to the claimant and the respondent, for example in bidding for work in tender processes.

38. During 2020 and in the course of the Covid-19 pandemic the respondent recruited a number of staff into various roles. The positions were not always publicly advertised and some were filled by way of direct recruitment of individuals known to management, or through recruitment consultants. The claimant considered that recruitment of new staff was inconsistent with the respondent being in 'survival mode', as he had been told that it was because of the effects of the pandemic. He also believed that it was not right that, as he perceived it, senior management were recruiting 'friends of friends' and existing contacts rather than conducting a fully open and competitive recruitment process each time a new role needed to be filled. He accepted that some roles were advertised on LinkedIn or the respondent's own website, but not others. Only one role filled since 2020 was more senior to the claimant's namely a Divisional Manager position in another area of the business which was filled by a James Murphy.

39. On one occasion the claimant proposed to Mr Muslek that he could head up the projects division of the business. That was a different area from where both of them worked. Mr Muslek said that this could not be agreed. The claimant believed that he was not being allowed to develop fully because Mr

Muslek relied heavily on him in his existing role. He aimed to become a director of the respondent but he believed that he was being held back.

Covid-19 and salary adjustment

40. As a result of the Covid-19 pandemic the respondent had to close its premises in late March 2020. It was possible for some employees to perform at least some of their duties from home. Other employees who could not carry out their work were placed on furlough under the terms of the UK government's Coronavirus Job Retention Scheme (CJRS) and received a proportion of their pay which the respondent recovered under the scheme rules.

41. The claimant received a letter dated 31 March 2020, signed by Mr Muslek [R61]. It was sent to him by email. This was in similar terms to letters issued to a number of staff at the time. It was headed 'Furlough Worker' and indicated that the claimant was being put on furlough on a temporary basis. This step was described as being an alternative to the respondent making redundancies. The letter stated that the claimant had agreed to the measure, although the claimant had not.

42. The letter purported to place the claimant on furlough for an initial period of 12 weeks as from 1 April 2020. He would receive 80% of his salary up to a maximum of £2,500, as permitted by the scheme rules.

43. The claimant spoke to Mr Muslek about the matter and then responded by email the same day [C27]. He pointed out a number of aspects of the letter he did not agree with, including that he had not consented to be on furlough for 12 weeks, and he had not agreed to be on furlough as an alternative to redundancy. He also set out examples of work that he could or should still be undertaking by working form home. During the conversation, Mr Muslek had invited him to put forward his grounds for being allowed to continuing working on full pay, albeit from home, and this is what the email was intended to do.

44. Later that day Mr Muslek telephoned the claimant to say that he had discussed the matter with Mr Nugent, who had agreed that the claimant could go on working from home but would need to agree to a 20% pay cut. This would apply to both his salary and car allowance. It was viewed as more attractive than furlough pay as his monthly salary

would not be capped at £2,500. The claimant said in evidence that he refused. He said he raised with Mr Muslek on a number of later occasions that he did not accept the deductions. He did so approximately weekly, and that Mr Muslek replied that the respondent would try its hardest to pay the difference back at a point in the future when it could afford to do so, but for the time being the business was in 'survival mode'.

45. Mr Muslek's evidence was different. He said that the claimant had reluctantly agreed to the pay reduction. The evidence of each conflicts. It is found that the claimant did reluctantly accept the change, on the basis that he thought it would be for the short term and that the respondent would be able to make up the shortfall at a later point when trading picked up again. This was the respondent's intention and it had been discussed at board level. It is likely, as Mr Nugent said in his evidence, that at the time the parties expected the pandemic to be much shorter-term than it turned out to be. As it was, restrictions continued into 2021 and the amount that everyone would need to have been paid back became too much. It is also noted that there is no documentary evidence of the claimant directly challenging the pay reduction, for example around the time he received his April 2020 salary and payslip, or at any later time until his full pay was reinstated. There are references in later correspondence to his seeking to recover the difference, but this is consistent with him holding the respondent to their word that they would try to pay it back at a later date.

46. The claimant carried out work duties from home. As and when permitted he also attended client sites and carried out surveys. The next time he was paid was on 28 April 2020. His payslip [R67] showed that 20% had been deducted from his salary. He was paid £3,500 gross in salary and £360 gross by way of car allowance, rather than £4,375 and £450.

47. One other employee of the respondent who was required to work around this time rather than being placed on furlough was subject to a 20% reduction in salary. Two other employees named Graeme and Louise Robertson were required to work but did not have their pay reduced. They were perceived as being different from the claimant as they were deemed to be performing essential services and carrying out 100% of their role. The claimant was aware that they were

each spending part of their working time working from home. However they were still performing their roles fully.

48. The claimant's full pay and car allowance were reinstated in August 2020. The reductions were therefore made for three months. By the time the claimant left the respondent the difference had not been paid back to him.

Furlough scheme in the latter part of 2020

49. The claimant stated in evidence that Mr Muslek asked to meet with him on 29 or 30 October 2020. Mr Muslek said he was meeting with everyone he managed individually at that time. The claimant said that Mr Muslek told him that the company was claiming part of his pay back from the government as furlough pay and that he would see a reference to furlough pay in future payslips, but was not to worry about it and just do nothing. At the time the claimant was working full time and so the respondent would not have been entitled to make such a claim according to the rules of the scheme.

50. The claimant said that he told Mr Muslek in response that this was fraudulent and that both the respondent and he personally would suffer reputational damage if it became public. He believed that contractors, particularly those in the public sector, would cancel their orders and take their business elsewhere. He was very unhappy with what he was being told.

51. Mr Muslek in his evidence did not accept any of what the claimant says about the above matter. He did not recall any discussion between the two exclusively about furlough. He denied telling the claimant that entries would appear on his payslips showing furlough pay, which he should simply ignore. He said that he was not involved in the operation of the furlough scheme, or any decisions made about how it would be relied on by the respondent. He said that was dealt with by Mr Stuart MacLachlan, the respondent's Financial Director and Mr Nugent. He would have expected the claimant to take up any issues with either of them.

52. The claimant's November 2020 payslip shows an entry stating 'Furlough Salary 80%' and a corresponding amount of £1,917.70 making up part of his gross

monthly pay [C51]. The balance of his monthly salary of £4,375, namely £2,457.30 appears under a separate entry simply stating 'Salary'.

53. Between December 2020 and March 2021 the claimant's monthly payslips showed an amount under 'Furlough Salary 80%', although the amounts differed each time [C52-55]. The claimant always received a total gross salary payment of £4,375.

54. The claimant believed that the respondent wrongly claimed back other employees' pay under the CJRS around the same time period. However he had no supporting evidence of this and provided no specific details. His belief was based on what he said Mr Muslek had told him at the meeting in late October 2020.

55. The respondent's payroll is overseen by its external accountants. Its claims for compensation under the CJRS were also checked by those accountants.

56. There was no direct evidence that the respondent did fraudulently or mistakenly claim part of the claimant's salary back through the furlough scheme. Mr Nugent claimed to have no direct knowledge of, or involvement in, furlough arrangements for individual employees. He also said that the matter was administered under the company's Finance Director and scrutinised by its external auditors.

57. It is difficult to reach a conclusion on whether the respondent wrongly claimed reimbursement of furlough pay in relation to the claimant, or not. There is no direct evidence that they did, but the claimant's oral evidence was that he was told this is what they were doing. In addition to that, his payslips clearly refer to furlough pay being part of his monthly salary for a number of months even though the claimant was not on furlough at any time.

58. On the basis of the evidence available it is found that the claimant was both truthful and reliable in his account of the meeting with Mr Muslek, at which he was told that the respondent intended to claim part of his salary back under the furlough scheme. His account was clear and detailed. There was no obvious reason to fabricate it, in the sense that the success of his case does not turn on it. The claimant's

evidence is supported by the references to furlough pay in his payslips, which could not be explained by either of the respondent's witnesses. The most probable reason for their existence is that the respondent was claiming a portion of the claimant's pay back as furlough pay, or at least planned to do so.

59. Whilst it is accepted that the respondent's furlough claims were examined by their external accountants, according to the evidence of Mr Nugent that would essentially have been a checking exercise after the information had been provided by the respondent. There was no evidence of the accountants verifying the respondent's primary records such as timesheets or rotas to a level of detail required to identify where an individual such as the claimant had been working as normal rather than under a flexible furlough arrangement. The claimant was not asked by anyone about the patterns he worked at any point. Therefore, the involvement of external accountants in the process did not preclude that the system could be manipulated.

Carry-over of annual holidays

60. The claimant wished to carry over ten days of accrued annual leave from 2020 into 2021. He wished to plan a holiday in Australia for his wife's 50th birthday. It would be for two weeks between April and May 2021. In December 2020 he asked Mr Muslek for permission to do so and Mr Muslek agreed. The respondent's normal policy is to allow no more than five days to be carried forward, subject to line manager approval. This is an unwritten practice and there was nothing in the claimant's contract dealing with it.

61. Again there is conflict between the claimant's evidence and the respondent's in relation to what happened next. The claimant's evidence is that on his return to work in January 2021 Mr Muslek told him that Mr Nugent was no longer allowing the holidays to be carried forward. Mr Muslek stated in hids evidence that the board were looking at the year to come and trying to find ways to ensure the business was on the best footing possible. As part of that review

they decided that all employees who had holidays to carry over from 2020 would be asked if they would given them up for the good of the business. There was a

larger number than normal of untaken days because the pandemic had restricted people's travel options, and it would be better for the business if people didn't take all of those days in the coming year, and were productively working instead. Mr Muslek went on to state that all heads of division spoke to their employees who had outstanding holidays and asked them if they would give them up. People would be encouraged to do so for the sake of the business but not forced. In this context the claimant was asked to give up his ten accrued days, and although he was initially disgruntled he agreed that he would. He did not make any complaint, at least not until some time later at the end of the year.

62. It is found that the respondent did intend to speak to employees with holidays to carry over as Mr Muslek described. The most likely course of events based on the evidence is that Mr Muslek conveyed to the claimant that as a senior manager, it would be better for him not to take the holidays he had requested. Again therefore it is found that the claimant reluctantly accepted this change to the position that Mr Muslek had stated before the Christmas break.

63. The respondent's records showed that seven employees had been allowed to carry holidays over from 2020 into 2021. In each case, the number was five days [C23]. Mr Muslek spoke to some of those individuals to ask them if they would give the holidays up. His recollection is that they did. He did not speak to all of them as they were not all within his area of responsibility. It is therefore found that the note does not prove that others were allowed to carry forward holidays and take those holidays in 2021. In any event it is noted that the list does not show any employee carrying as many as 10 days.

Meeting with Mr Muslek on or around 27 January 2021

64. The claimant and Mr Muslek met on or around 27 January 2021. They discussed various work matters in the way which they normally would. In the course of the discussion Mr Muslek disclosed that Mr Nugent had told him in confidence that he should sack the claimant, or get him out of the business.

This had been said in the heat of the moment after Mr Nugent had been given to understand that there had not been a properly qualified supervisor from the respondent on a client site, which had drawn a compliant. Mr Nugent had formed the

view that this was the claimant's responsibility. In Mr Muslek's view he had taken an oversimplified view of the matter and overreacted.

65. Mr Muslek did not tell the claimant why Mr Nugent had made the remark. The claimant was upset to hear what Mr Nugent had said. He believed Mr Nugent had no justification for feeling that way towards him and saying what he did. He could no think of anything he had done wrong. He saw himself as a good performer and the most profitable manager in the business.

66. The claimant asked Mr Muslek to put the comment in the minute he was making of the meeting but Mr Muslek refused. No further similar remarks by Mr Nugent were made of which the claimant was aware. There was no evidence of Mr Nugent making any further such remarks at all.

Claim for bonus in relation to Whitbread contract

67. The company Whitbread plc had been a client of the respondent for a number of years. The claimant took over as the main relationship manager around 2019 or 2020 when the previous manager left. Unlike other clients at that time who had scaled down their activity in response to the pandemic, Whitbread were investing in improvements to their properties in anticipation of more people using the domestic hospitality industry rather than going abroad. They were a valuable client for the respondent to have at that time.

68. The claimant was happy to develop the Whitbread relationship. In December 2020 he attended a meeting with Mr Muslek at which that was discussed. Mr Muslek asked him to 'push' the relationship, in other words maximise income from it. The claimant wished to be rewarded for good performance and suggested that he should be paid a bonus if certain targets were met. The amount of income from the client had risen from around £200,000 per year to £440,000 per year since the claimant had taken over.

69. At this point the evidence of the claimant and that of Mr Muslek diverges. The claimant said that he proposed that if revenue increased to £1 million in the year 2021 and the profit margin on that figure was at least 25%, he should receive a

bonus of £10,000. It would be paid in December 2021 once the annual figures had been calculated. He said that he and Mr Muslek shook hands to agree those terms.

70. Nothing was put in writing. There were no further discussions about the bonus through the year. The claimant did not believe there needed to be as he was clear on what he had to do.

71. Mr Muslek for his part recalls discussion more generally in late 2020 about targets for the coming year, including the Whitbread account. He accepts he would have said that if performance was 'out of the park' for the year then there would be discussion about a possible bonus, but that would come at the end of the year. He did not agree any terms up front and would have needed board approval if he had wanted to do so. He also considered that the increase in client spend was due to the client's own strategy which was a reaction to the pandemic, and less as a result of the claimant's particular efforts.

72. Mr Nugent was not aware of any specific arrangements between the claimant and Mr Muslek. He said there were no discussions about bonuses for anyone in the business after Covid-19 took effect. Any discretionary payment to an employee over the value of £5,000 would require sign-off by the respondent's chairman after discussion at board level. No such process occurred for any bonus in relation to the claimant, or any other employee for that matter in 2020 or after.

73. By December 2021 the income from the client had reached £1.46 million. The profit margin was just over 30%. The claimant obtained a copy of the figures and took them to Mr Muslek to discuss. His version is that he was merely revisiting the agreement that had been made the year before, and providing evidence that he had met the requirement to earn a bonus. Mr Muslek believed he was making a more general case for a bonus, not based on any

terms or targets already agreed. Mr Muslek said he would need to discuss the matter with Mr Nugent.

74. Around two days later Mr Muslek told the claimant that Mr Nugent had said the company was not performing well enough overall and that no bonus would be paid. The claimant was very disappointed and his discussion with Mr Muslek became heated, with voices raised. Mr Muslek asked the claimant to give him the chance to speak again to Mr Nugent, and see if he could be persuaded to change his mind. The claimant agreed, but Mr Nugent's position remained unchanged and no bonus was to be paid.

75. Historically the respondent had paid bonuses to staff from time to time. Those tended to be modest amounts and given to all employees, usually at the end of the calendar year. The last set of bonus payments were in 2018 and a note of the recipients and amounts was produced [R72]. All staff received a payment. The amounts ranged from £100 to £1,000. The claimant received £1,000.

76. This is another area of evidence in which the claimant's account is materially different from Mr Muslek's. It is found on the evidence available that Mr Muslek did encourage the claimant to work as hard as he could on the Whitbread account and did suggest that a bonus would be possible on the terms described by the claimant if the figures by year end were favourable enough. However, Mr Muslek did not have authority to guarantee that a bonus would be payable in those circumstances, and as such the best he could to was to assure the claimant that a bonus would be a possibility. It is therefore found that Mr Muslek discussed the bonus terms as a potential outcome rather than a guarantee, and to the extent that the claimant understood the terms were assured, it was not competent for Mr Muslek to bind the respondent in that way.

Meeting to discuss claimant's concerns

77. The claimant was particularly aggrieved at not being paid a bonus when he believed he was entitled to one. He prepared a document setting out a number of events which had caused him to be unhappy in relation to his position with

the respondent [R79-80]. He emailed this to Mr Muslek on 22 December 2021. The claimant was considering resigning at this point, but instead provided the document to Mr Muslek to consider and took his Christmas break.

78. The document outlined a number of the matters described above, including his 20% salary deduction for three months in 2020, the non-payment of a bonus at the end of 2021 and lack of career progression. He also raised some additional criticisms of the way the business was structured and operated. It is evident that he believed it unfair and inconsistent for the respondent to be described as having a difficult year by Mr Nugent whilst recruiting new staff, and also that money could not be allocated for a bonus whilst at the same time salaries of new recruits were being paid.

79. A meeting was arranged between the claimant, Mr Muslek, Mr Nugent and John Connolly, Operations Director. In an email of 24 December 2021 Mr Nugent acknowledged the claimant's list of concerns and said that *'I take responsibility for those and have considered my approach to make you feel more valued and rewarded. I will speak to you when you get back and we will take it from there.'*

80. The meeting took place on 17 January 2022. The claimant discussed the issues he had put in his note. It was recognised that owing to the nature of the concerns, it would need to be Mr Nugent rather than Mr Muslek who could provide a substantive response, and make any changes required. He agreed to give the issues consideration and come back to the claimant with a response. Based on the initial reaction he received, the claimant was hopeful of some changes being made.

81. Some time passed after the meeting without any update from Mr Nugent. The claimant requested progress a number of times by email through late January and February 2022.

82. The discussion had included the claimant's request for a bonus and what he saw as the respondent going back on a promise it had given. The claimant was

still hopeful that the initial decision not to make any payment would be reversed. Some time in late February or thereafter Mr Muslek came back to

him to say that no bonus was going to be paid, and effectively this was the end of the matter.

Reduction of business mileage rate

83. On Friday 25 February 2022 the respondent notified employees that it would be reducing the business mileage rate payable from 45 pence per mile to 14 pence. This was a delayed measure which had been under consideration preCovid. The change was designed to fit with HMRC guidance for individuals who received a car allowance. The respondent's vehicle providers were surprised that the 45 pence rate was being paid as well as car allowances, as part of that rate is deemed to cover vehicle running costs. The change would take effect from the end of March 2022 [C110-111]. The email was sent to all employees although only around five, including the claimant, incurred business mileage to any relevant degree.

84. The claimant was undertaking around 1,000 to 1,300 business miles at that time and viewed the financial impact as significant. As well as the reduction in the amount, the process for reclaiming amounts was more complex and involved a longer lead time before full payment would be made. There had been no previous indication of the proposed change, and no offer of consultation.

85. The claimant went to see Mr Muslek and explained his disappointment at the proposal. He pointed out that he would be disproportionately affected because of the amount of work-related travel he undertook. He asked for a week's holiday so that he could clear his thoughts and evaluate his position. He revisited some of the other issues he had raised at the end of the previous year. He told Mr Muslek that he was already looking at other job alternatives.

Mr Muslek said he could take the following Monday off.

86. The respondent decided not to implement the 14 pence rate and instead reduce the rate to 25 pence per mile. This was decided on and intimated to staff in the latter part of March and after the claimant had tendered his resignation as discussed below.

Resignation

87. On Friday 25 February 2022 Mr Muslek explored whether there was a way the claimant could be incentivised to continue with the respondent and refocus on his role. He sent an email to Mr MacLachlan the Finance Director after he had met with the claimant. He pointed out what he saw as the potential risk to the business of the claimant leaving in terms of lost client revenue and skills. He said he wanted to work with Mr MacLachlan to 'get a resolve on this to keep a key staff member happy and driven to help us achieve our target growth and associated margin which I know you have seen first hand.' He went on to summarise what he understood the claimant was looking for financially, or at least what he believed he had lost over the past two years. That was based on what the claimant had told him earlier that day, and was described as follows:

'Matt is looking for 10k performance related pay, he lost 2655 [in] furlough money, lost holidays £2192.30, salary reduction £2,192.30 which is circa £18k.'

88. The reference to performance related pay was in relation to the bonus the claimant believed he had earned.

89. Mr Muslek went on to say that he had told the claimant it was unrealistic to expect a payment of that size, especially given that some employees had not received a pay rise for four years. He explained that he had asked the claimant what would be a realistic figure to persuade him to reconsider his resignation, and the claimant had replied to say £9,000. Mr Muslek was not advocating that this should be offered to the claimant, but wished to have authority to make him some kind of proposal. The claimant had indicated to Mr Muslek that he would accept a payment of £9,000 in compensation for the sums he believed

he was due, although that had been done before the announcement of the mileage rate being reduced.

90. Over the weekend of 26 and 27 February 2022 the claimant discussed his position at the respondent with his wife. He reached the decision to resign. By this point he had been pursuing job opportunities elsewhere and had received

a job offer from another employer (which he ultimately took up). He emailed a summary of the offer terms, anonymised to remove the name of the organisation, to Mr Muslek on 26 February 2022 [R81-83]. Mr Muslek recognised that the terms were more than the respondent could afford to pay him, particularly as they would have exceeded those provided to some directors.

91. On Monday 28 February 2022 the claimant returned to work and he and Mr Muslek met to discuss his situation. The claimant had decided to resign and told Mr Muslek that. They discussed a number of issues that been ongoing for months which the claimant said had contributed to his decision. Those were essentially the matters he had put in his written note of 22 December 2021, and which he considered had not been resolved since. He also said that he believed his time with the respondent had run its course, that the job market was buoyant, and that it was time to move on to pastures new. Mr Muslek was not particularly surprised to hear the claimant say this, but he was disappointed. The claimant said he planned to raise a claim for constructive unfair dismissal.

92. He emailed Mr Muslek that afternoon to confirm formally that he was resigning, saying that he would serve his four week notice period [R87]. He thanked Mr Muslek for his support and wished him and the respondent success for the future. He did not give any specific reasons why he was resigning, although expected that Mr Muslek would know given their discussion earlier in the day.

93. Mr Muslek sent a further email to Mr MacLachlan on 28 February 2022 in which he said *'You are right the way he feels just now maybe there is no way back but something need to be tried to retain such a key player.'* He gave illustrative figures showing how the claimant had performed on key client accounts. He listed some of the claimant's key skills. He proposed that approval be given to offer the claimant a salary increase from £52,000 to between £57,500 and £60,000. He also wanted authority to offer the claimant a one-off bonus of £7,500 for his performance in 2021 [R89].

94. The final authority given to Mr Muslek was to offer a one-off bonus of £5,000 and a salary increase to £57,500. Mr Muslek said he conveyed this to the claimant,

but the claimant recalled only being told about the bonus and not the pay rise. In any event he did not withdraw his resignation.

95. Mr Muslek confirmed by email on 3 March 2022 that the claimant's resignation was accepted *'with great regret'.* A termination date of 28 March 2022 was agreed. Mr Muslek thanked the claimant for his hard work and wished him success for the future.

Post-resignation employment

96. The claimant began a new role with another company on 29 March 2022, the day after his resignation took effect. His salary and car allowance are greater than the equivalent amounts in his role with the respondent. He is able to claim business mileage at 45 pence per mile. He is eligible to join his employer's contributory occupational pension scheme. He will receive a one-off bonus of £5,000 in December 2022 irrespective of his personal performance, and has the option to participate in a share of profits. The position is permanent. Overall his benefits are greater than those with the respondent. He has fully mitigated any financial losses associated with his resignation.

Discussion and decision

Did the respondent materially breach the claimant's contract of employment?

97. The claimant alleges he was constructively unfairly dismissed. This entails first that he establishes that his contract of employment was materially breached by the respondent. The breach can be of a specific term, or of the underlying relationship of mutual trust and confidence. The concept of the latter is described in ***Malik v Bank of Credit and Commerce International SA [1998] AC 20***. It is an underlying and permanent feature of every employer-employee relationship. Implicit in that is that at all times the parties will not act in a way calculated to destroy the relationship. It is possible for a breach of this type to occur even if no express term is broken. So, for example,

> an employer exercising a contractual power in a particularly malicious or capricious way may breach the implied duty.

98. The breach must be material in the sense that it has to be sufficiently fundamental or serious. It must go 'to the root' of the contract. A minor infringement will not be enough.

99. It should also be recognised that in constructive unfair dismissal cases, a material breach may be established by a series of events which cause sufficient damage to the relationship when considered together. By extension, the 'last straw' in such a sequence may not be a breach of contract in itself, or a material breach, and yet when viewed along with related previous conduct it may count towards establishing a breach overall.

100. The claimant's case is that the following, individually and/or cumulatively, were a material breach of his contract:

a. Replacement of the company fuel card with a mileage allowance in or around August 2018;

b. Removal of company cars and provision of car allowances at the beginning of 2020, but continuing to provide a company car to others in December 2020;

c. Blocking or not adequately assisting his career progression between August 2018 and February 2022;

d. Reducing his salary and car allowance by 20% between April and June 2020;

e. Being forced to give up 10 days of accrued annual leave for 2020 in January 2021

f. Mr Nugent telling Mr Muslek to get the claimant out of the business on 27 January 2021;

g. Fraudulently claiming payments under the CJRS between November 2020 and March 2021;

h. Non-payment of an agreed bonus for performance of the Whitbread account in January or February 2022; and

i. Proposing to reduce the business mileage rate from 45p to 14p, as intimated 22 February 2022.

101. Each of those matters is discussed in turn below in relation firstly to the issues of (a) whether a breach of the claimant's contract of employment occurred, and (b) if so, when. Remaining issues are dealt with following that discussion.

102. The **replacement of fuel cards** with a mileage allowance was permitted within the claimant's contract. It was not therefore a breach of an express term. Nor was it a breach of mutual trust and confidence. The change was made for valid business reasons universally across the workforce and it was replaced by a process which if anything would benefit employees more in financial terms. There would be a small amount of additional administration each month but otherwise no adverse effect.

103. Similarly, the respondent's decision to **replace company cars** with a car allowance was not a breach of any specific term of the claimant's contract. Again the respondent had the express power to do so. Nor again was the discretion exercised in a way that could undermine mutual trust and confidence. The respondent had a business case and the clamant was not singled out. The amount of the claimant's allowance and directions given to him as to the vehicle he may choose were not unreasonable.

104. Equally, the respondent's choice at the end of 2020 to take on one electric vehicle as a trial did not undermine the validity of their policy to remove company cars generally. The trial was with a view to exploring whether the respondent could switch some or all of its fleet of vehicles to electric. It needed to see how such a vehicle would perform in practice, in relation to matters such as range of travel and charging logistics. The terms of that arrangement were not comparable to the claimant's circumstances.

105. The evidence which the claimant was able to give specifically in support of his argument about restricted **career progression** related to a number of broad

areas. First, he said that he either had not in fact been promoted to Senior Contracts Manager, or if he had, it was not properly communicated. There was sufficient

evidence to conclude that the claimant had been promoted in this way. His email signature was changed, signalling to both internal colleagues and external parties that this was his title. He received a pay rise at the same time. He was given additional responsibilities. The respondent's witnesses in evidence acknowledged that the change could have been better communicated, but that is a different matter from whether it happened. The promotion was clearly a positive change.

106. In relation to the matter of communication of the change in title, it is found that this ought to have been handled in a way which made more clear that the claimant was being promoted, and connected to his pay rise and additional responsibilities. However, this was not a breach of an express term of his contract and if was not a material breach of mutual trust in confidence. There was no evidence of the matter being handled in a particularly cynical or careless way, and the claimant did not indicate that he was particularly aggrieved at any point, merely that he was unsure of whether the change in his title was formal, and if it was, whether it represented a promotion.

107. Secondly, the claimant felt that by the recruitment of other staff, his own development was being held back. He also believed it undermined the respondent's case that it was in 'survival mode', which was relevant when for example he was being asked to take a pay cut during lockdown. He also believed that by recruitment of candidates by way of their reputation or personal connections, the respondent was in some way not acting properly. There was not sufficient evidence to prove that this was the case. The evidence of the respondent's witnesses was effectively that, despite the challenges of the pandemic, the respondent had to diversify and grow in certain areas to ensure it was on a more stable organisational and financial footing. Decisions such as this are very much down to each individual employer to take. There is a body of case law which reminds employment tribunals that they are not to sit in judgment on business decisions, however

> reckless or speculative. Provided individuals' employment rights are not infringed, a business by and large is free to recruit in whatever way it chooses.

108. In the circumstances of this case it is difficult to see how the claimant was placed at any disadvantage by the respondent's recruitment decisions, even indirectly.

Those recruited were brought into other areas of the business and, with one exception, were less senior than the claimant.

109. The claimant cited requests he had made in the past to go on training courses, which had been declined. However, the respondent latterly supported him to obtain an SVQ qualification between 2018 and 2021. The qualification was relevant and meaningful in relation to the claimant's role.

110. The claimant recognised himself that the logical form of progression for him would have been to take on Mr Muslek's role, but there were no indications of that happening. This is not an unfamiliar situation in many different types of workplace.

111. It is therefore found that whilst the claimant's promotion options may have been limited in the latter years of his service with the respondent, this was not caused by, and did not amount to, a breach of his contract. They were simply a result of the way that the respondent changed and grew, initially after the buy-out which brought Mr Nugent and Mr Muslek on board, and then latterly as a reaction to the effects of Covid-19 on the industry.

112. It is found as fact that the claimant agreed to the **salary reduction of 20%** which was implemented in April 2020 and operated until June 2020. As such, there was an agreed variation to his contract rather than a breach of a contractual term. Nor was there a breach of mutual trust and confidence, particularly as the matter had been raised with him in advance, that he had been given the chance to respond, and also as the alternative would have been that he would have been formally furloughed, earning even less money.

113. In essentially the same way, the claimant's relinquishing of **10 days of accrued leave from 2020** was a matter ultimately of agreement. He had no contractual right to carry any number of holidays from one year to the next,

and so there could not have been a breach of an explicit term. However, it is recognised that he asked Mr Muslek for permission to carry his holidays and Mr Muslek agreed. The apparent change in position could be argued to amount to a breach of trust and confidence. Again, however, it is found that the claimant agreed, albeit reluctantly,

that he would give up those holidays. Considering whether the respondent breached the bond of mutual trust and confidence, it is noted that, as with the 20% salary reduction, there was a business case for the request. The respondent was faced with a higher than usual number of days potentially to be carried over by staff at a time when it was relying on productivity to recover from the worst effects of the pandemic. Further, the claimant was being treated in the same way as other employees with outstanding holidays. The matter was put to each individual, at least initially, as a request rather than an order.

114. The next matter is **Mr Nugent's comment to Mr Muslek** about getting rid of the claimant, or getting him out of the business. The comment was made by Mr Nugent when emotions were running high, most likely after a valuable client had raised a default on the part of the respondent's contract team. It was not intended for the claimant's ears, and it was only through Mr Muslek relating the incident to the claimant that he found out about it. He was naturally shocked and unsettled.

115. This act is found to have amounted to a breach of mutual trust and confidence. Whilst senior managers are entitled to discuss in private the need to remove employees under certain circumstances, the comment did not sit in the context of circumstances which would have realistically warranted the claimant's dismissal. Nor was there any recognition of due process – the comment was not to the effect that a disciplinary procedure should be initiated, but rather that the claimant should be dismissed regardless of process or justification. By conveying Mr Nugent's remarks to the claimant, Mr Muslek compounded the breach. To tell the claimant, even as someone relatively senior, that the Managing Director wished them out of the business without any fair process had the effect of destroying the mutual trust and

confidence that the claimant had in his employer at that time. This breach occurred on 27 February 2021.

116. The claimant also cites the respondent's apparent reclaiming of part of his salary as furlough pay. Given the factual findings made, it is found that the respondent also acted in material breach of the underlying duty of mutual trust and confidence in this respect. Although the claimant was not impacted financially, his request that the respondent not proceed was ignored and he was justified in his belief that his professional reputation was potentially jeopardised, and that the security of his role with the respondent could be at risk if clients ended their relationships with the respondent.

117. The matter was first raised in the meeting between Mr Muslek and the claimant on either 29 or 30 October 2020. This is when the claimant voiced his opposition to the action proposed. The practice of claiming furlough pay against the claimant's salary went on until March 2021.

118. The next matter relied upon by the claimant was what he saw as the respondent reneging on the promise of a **£10,000 bonus** in relation to the performance of the Whitbread account. Given the factual findings made there was no contractual term entitling him to a bonus. Mr Muslek offered no guarantee of a bonus, and he had no power to do so in any event.

119. It is possible that in certain circumstances an employer may cause an employee to believe they have a favourable prospect of receiving a bonus, even when discretionary, and then deny them payment of that bonus in a way which would undermine mutual trust and confidence. On the facts of this case I am unable to find that a sufficiently material breach of mutual trust and confidence took place. The claimant clearly, and genuinely, had it in mind that if he oversaw performance of the Whitbread account to the point that it matched certain financial targets, he would receive a bonus in an agreed amount. Equally, his disappointment at being told that he would not receive a bonus was genuine. However, his understanding and his assumptions about

payment of any bonus were based on one conversation with Mr Muslek in December 2020. Any terms were not put in writing and nor it seems were they ever referred to again by either party despite the daily contact between them in the year to follow. This was not a case where an employee was repeatedly and firmly assured of an advantage or benefit, only for it to be unexpectedly denied at the last moment. It is the respondent's conduct which must be evaluated rather than the claimant's expectations. The respondent did not do anything sufficiently improper to amount to a breach of the implied term.

120. The final matter referred to by the claimant as a potential breach of contract was the respondent's **change to the business mileage rate** from 45 pence to 14 pence. This was communicated to him on 25 February 2022 with a view to being implemented on 1 April 2022. The claimant intimated his resignation on 28 February and left the respondent's service on 28 March 2022. The policy change could therefore be argued as an actual or anticipatory breach.

121. There was no term in the claimant's contract entitling him to payment in respect of business mileage at any particular rate. The respondent therefore did not breach an express term of his contract by proposing the change. It was entitled to do so in that sense.

122. In terms of whether the change was a breach of mutual trust and confidence, the respondent's evidence is accepted to the effect that it was advised to make the change in order to conform to normal HMRC and industry practice, and it followed that advice in good faith. Although the claimant would be especially hard hit compared to the majority of his colleagues, he was not targeted and there was no evidence to suggest the change was intended to put him at a disadvantage personally. The respondent had planned to make the change two years before but had held back when the Covid-19 pandemic developed. Employees were being given over a month's notice before the change took effect at the beginning of the next tax year.

123. Therefore the respondent did not breach the underlying relationship of mutual trust and confidence when proposing the change to its mileage rate.

Cumulative effect of the alleged breaches

124. The claimant has succeeded in establishing two material breaches of contract, namely:

a. Mr Nugent's comment to Mr Muslek about removing him from the business on 27 February 2021; and

b. The respondent claiming furlough pay against the claimant's salary between November 2020 and March 2021 against his wishes and despite him working his full hours during that period.

125. Both were material breaches of mutual trust and confidence.

126. For completeness, the last alleged breach of contract was the proposed mileage rate change which was to take effect on 1 April 2022. Although this was not a breach of contract in its own right, it could amount to a 'last straw' in a longer sequence of events. If so, it would not need to be a breach in itself, but would need to be more than completely minor or trivial.

127. It can be readily appreciated that the two contractual breached occurred almost a year before the claimant decided to resign. Considering both events, the claimant was aware of each at the time, voiced his concern and disappointment, and then continued to work for the respondent as normal.

128. It is also noted that the claimant did not raise either breach as part of his written note of concerns as forwarded to management on 22 December 2021. He did not revisit those matters along with other issues causing him disquiet.

129. Considering all of the evidence, it is concluded that the claimant tacitly accepted both breaches by continuing to work for a sufficiently long period after they had occurred.

130. Considering the potential last straw of the mileage rate change, this is not in any event sufficiently closely connected to the previous breaches in nature or circumstances. Further, too long had passed by the time it arose to allow it to be used to resurrect the affirmed breaches as part of a course of conduct. The evidence as a whole does not support this.

Did the claimant resign promptly in response to a material breach?

131. By his own evidence the claimant resigned in response to a number of matters, which were effectively those listed within paragraph 83 above. Not all were material breaches of his contract.

132. It was not possible to understand whether each event played an equal part in his decision, or whether some were more prominent than others. In any event this is immaterial as he did not resign promptly in relation to any breach. The last of those ended in March 2021 at the latest.

133. As a consequence the claimant has not established that he was constructively dismissed, and there is no need therefore to go on and determine whether such dismissal was fair or unfair, or calculate compensation.

Claims in respect of payments

134. The claimant seeks payment in respect of the following:

a. The amount of his salary reduction between April and June 2020;

b. The value of the 10 days of accrued annual leave he forfeited in January 2021; and

c. The bonus of £10,000 he sought in return for his work on the Whitbread account.

135. Considering first whether each was an unlawful deduction from wages under section 13 ERA, it is clear that the first two alleged deductions occurred more than three months before the claimant commenced his claim by entering ACAS Early Conciliation, which he did on 28 February 2022. As free standing claim they are therefore out of time. There was no reason why it would not have been practicable for them to be raised within time.

136. The third sum claimed, namely the bonus, would have been due at the end of December 2021 according to the claimant's evidence. As such, by not being paid at that time the claim is within time as a potential unlawful deduction from wages. However, a claim can only succeed under section 13 ERA if it is for

'wages properly payable' – section 13(3). In other words, the sum must be lawfully due. Based on the factual findings made, the bonus was not properly payable to the claimant.

137. As the last alleged deduction chronologically speaking does not qualify, it cannot be considered the last of a series of deductions bringing the earlier ones within time.

138. It follows therefore that none of the claims can succeed as complaints of unlawful deduction from wages.

139. Dealing next with whether any of the three monetary claims was a breach of his contract at common law, on the facts found each sum was not an amount the claimant was contractually entitled to receive. Whilst he was originally entitled to his full pay during the months of April to June 2020, he agreed to a reduction. The respondent did not therefore breach his contract by implementing the reduction.

140. The claimant had no contractual right to carry accrued holidays from one holiday year to the next, and no right to payment for unused holidays. He cannot therefore be awarded damages for the loss of those holidays.

141. It has been established that he had no entitlement to a bonus and therefore it could not have been a breach of his contract when one was not paid to him.

142. For completeness it is recorded that the claimant's claim in respect of the cost of his attending the tribunal hearing cannot be awarded as compensation or damages, although he may be able to seek at least some of that amount back from the tribunal as an expenses claim.

143. Given the findings made in paragraphs 49 to 59 in relation to the respondent's use of the CJRS a copy of, or link to, this judgment may be given to HMRC.

Employment Judge: B Campbell
Date of Judgment: 10 August 2022
Entered in register: 10 August 2022
and copied to parties