EMPLOYMENT TRIBUNALS

Claimant: Mr Y BENZAHOUANE
Respondent: IOET LTD T/A TOKYOESQUE

Heard at: London Central **On:** 7 & 8 November 2022

Before: EJ Isaacson

Representation
Claimant: Ms S Murphy, solicitor
Respondent: Mr R Ross, counsel

RESERVED JUDGMENT

1. The claimant's claim for constructive unfair dismissal succeeds.

2. There will be a remedy hearing on 20 February 2023.

3. The claimant is to send to the respondent and to the Tribunal a mitigation statement and updated schedule of loss by 6 February 2023.

REASONS

Evidence before the Tribunal

1. The Tribunal was presented with a joint bundle of documents of over 700 pages and a further mitigation bundle which was not read. It was agreed at the beginning of the hearing that certain documents, together with certain paragraphs of the witness statements, would not be read on the basis they maybe privileged.

2. There was a written witness statement and oral evidence from both witnesses - the claimant Mr Benzahouane and Ms Meyer, the sole Director and CEO of the respondent company.

3. Both representatives gave oral submissions on liability.

Claims and issues

4. A draft list of issues was prepared by Mr Ross and agreed at the beginning of the hearing:

Constructive dismissal.

1. Has the Claimant shown that the Respondent did the following acts:

- **a.** Subject the Claimant to spurious allegations of misconduct.
- **b.** State that the Claimant's place of work was in the UK, despite the UK office having closed in 2020 and there being no other place of work listed in his contract of employment.
- **c.** Fail to follow a fair and reasonable disciplinary process, particularly in respect of Natalie Meyer's conduct of the investigatory, disciplinary and appeal hearing, despite the Claimant raising an issue about her impartiality.
- **d.** Monitor the Claimant's personal devices, without the Claimant's knowledge and without their being any relevant policy in place to allow such monitoring.
- **e.** Attempt to alter the appeal minutes.
- **f.** Remove the Claimant from the board meeting on 21 February 2022 despite this not having been discussed previously.
- **g.** Put the Claimant under the supervision of a coach, despite the Respondent having never previously identified any issues with his performance.
- **h.** Send to the Claimant on 10 March 2022 an email containing the outcome of his appeal and an invite to a further disciplinary hearing regarding allegations that had never previously been made, without any investigation having taken place and despite Natalie Meyer's stated support for rebuilding trust.

2. Did the above conduct amount to a breach of the implied term of mutual trust and confidence?

- **a.** The Claimant will say that para 1h (above) was the final straw. The Tribunal will consider whether this act itself amounted to a breach of the implied term of mutual trust and confidence.
- **b.** Alternatively, the Tribunal will consider whether the 'final straw' was nevertheless part of a course of conduct, as set out at para 1a to 1g, that cumulatively amounted to a breach of the implied term of mutual trust and confidence.

In considering, whether under para 2a or 2b, the final straw or the course of conduct amounted to a breach of the implied term of mutual trust and confidence, the Tribunal will need to consider:

- **c.** Viewed objectively, whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between Claimant and Respondent; and
- **d.** Whether the Respondent had reasonable and proper cause for doing what it did.

3. If there was a breach, was it a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

4. Did the Claimant resign in response to the breach?

5. Did the Claimant affirm the contract before resigning?

6. If the Claimant was dismissed:

- **a.** What was the reason or principal reason for dismissal?
- **b.** Was the reason for the dismissal within the band of reasonable responses?

Remedy.

7. What basic award is payable to the Claimant, if any?

8. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

9. Should there be any reductions to the compensatory award?

- **a.** Should there be a Polkey deduction – i.e., is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- **b.** If so, should the Claimant's compensation be reduced? By how much?
- **c.** If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
- **d.** If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

10. What should be the amount of the compensatory award? The Tribunal will decide:

- **a.** What financial losses has the dismissal caused the Claimant?
- **b.** Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- **c.** If not, for what period of loss should the claimant be compensated?
- **d.** Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

11. Should there be any uplift to the compensatory award?

- **a.** Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? The parties agree that it did.
- **b.** Did the Respondent or the Claimant unreasonably fail to comply with it?
- **c.** If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

The Law

5. The above list of issues sets out the relevant law and was agreed between the parties. The right not to be constructively dismissed is set out in s95(1)(c) of the Employment Rights Act 1996 (ERA). There needs to be a breach of a contractual term. The breach needs to be fundamental. The breach needs to be the reason for the resignation and the claimant must not have affirmed the contract, despite the breach.

6. It is an implied term of any contract of employment that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

7. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik v Bank of Credit and Commerce International SA [1997] IRLR 462* at p.464, the conduct relied on as constituting the breach must "*impinge on the relationship in the sense that, looked at* objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer*".

8. The last straw doctrine can be pursued in the alternative. The last straw need not itself be repudiatory as long as it adds something. A relatively

minor act may be sufficient to entitle the employee to resign and leave his employment, if it is the last straw in a series of incidents, although it must not be utterly trivial.

Findings of fact

9. The respondent company provides market research and translation services for businesses going into and out of the Japanese market. It is a small company, between 7 and 5 employees. Since the end of 2019 Ms Meyer, the sole Director and CEO of the respondent company, has lived in the Netherlands. The company has registered offices in both the UK and the Netherlands.

10. The claimant was first employed by the respondent as an operations manager in June 2018 and then promoted to head of operations & finances in July 2020. At that time he was the most senior employee reporting directly to Ms Meyer. In his role the claimant had oversight of the company's finances, HR and legal matters in the UK. Dutch accounting firms dealt with these matters in the Netherlands.

11. The claimant's contract stated at paragraphs 29 to 31 (p54) that his place of work was the company's registered office in the UK at that time. At the end of April 2020 the UK office was closed and the registered address became the claimant's home in the UK. The contract provided that the claimant would not be required to work outside the UK for more than a month at a time but was required to work anywhere in the UK within a reasonable traveling distance of his home. The contract was governed by UK law.

12. Prior to covid Ms Meyer had worked from abroad and the claimant had worked for a few weeks from Australia and other employees had also worked from abroad. The claimant usually worked 2 days from home prior to the covid lockdowns.

13. The claimant's contract did not state that the claimant had to work in the UK but the claimant was aware that there were potential tax implications and financial risks for the company if he worked from abroad for more than a certain number of days. Having an employee located in a different jurisdiction long term can expose a company to that jurisdiction's tax and regulations.

14. Ms Meyer had given the claimant the impression that she did not mind where the claimant worked as long as he was doing his job. The claimant had been transparent about working from France and until January 2022 Ms Meyer had not given the claimant any indication she was concerned about him working form France.

15. I find that although the claimant's contract does not state that he must work from the UK and Ms Meyer had indicated that she did not mind where the claimant worked from as long as he was doing his job, it was implied into his contract that, as a senior employee of a UK company, he would not work from one country outside the UK for a period which would put the company at any potential financial or tax risk.

16. On 15 March 2020 the claimant emailed all staff to ask them to work from home until further notice. Ms Meyer confirmed the instruction and stated that as the office lease in the UK was soon to expire it would not be renewed in April.

17. The claimant obtained UK citizenship in December 2020. Ms Meyer went on maternity leave in December 2020 and the claimant and Ms McWilliams, head of accounts, were given responsibility to run and grow the business during her absence. Ms Meyer asked not to be contacted more than one email a week during her maternity leave.

18. In May 2021 Ms Meyer returned part time but stayed pulled back from the day to day activities. She returned to the monthly meetings with the claimant and Ms McWilliams, which were referred to, at the hearing, as strategy meetings.

19. From the beginning of 2021 the claimant was working from France as he had gone to visit family and was unable to return due to covid travel restrictions. Ms Meyer was aware the claimant was working from France at this time. She thought that the claimant was regularly returning to the UK to check the post and deal with other company matters. Ms Meyer never told the claimant, at this time, she had an issue with him being in France or that she wanted the claimant to return to the UK.

20. On 24 May 2021 the claimant had a performance review with Ms Meyer. The claimant was congratulated for his teamwork and maintaining profitability and he was given a pay increase from £40,000 to £50,000 per annum. His contract was revised to remove a training benefit and commission on sales. It was agreed that the claimant would recruit a fulltime project manager as he was so busy. There was also discussion about the claimant opening a French office. The claimant was under the impression that there was no time restriction on him working from France at this time.

21. Ms Meyer asked the claimant to open a virtual office in Netherlands as she had moved from the original registered address and wanted post to be sent by a remote address. This was set up in October 2021. The claimant was very busy at this time, having managed a trade mission of 30 companies for the British Government, along with other contracts. He was feeling that Ms Meyer was making reproaches about his work and being less encouraging.

22. During a telephone call with the claimant on 12 October 2021 Ms Meyer confirmed they would not be opening a French office and later emailed the claimant to confirm his travel expenses to the UK from France could not be claimed as travel expenses as he was on the UK pay roll. I find that Ms Meyer was reminding the claimant that he was under a UK contract.

23. At this time Ms Meyer wanted the claimant to concentrate on his core role as head of operations and finance to ensure they were profitable. Ms Meyer arranged an accountant to take over most of the accounting day to day activities. The claimant was dealing with operations and Ms McWilliams was handling business development and some project delivery. Ms Meyer also appointed Ms Armstrong as an operations mentor and consultant to improve the operational processes, working with the claimant for an hour a week.

24. On 17 November 2021 the claimant had a further review with Ms Meyer. The claimant was praised for his initiative and bringing in new business but asked to focus on his core job. The claimant was given a bonus of £3900 which he was upset about as Ms McWilliams had been given £4400. He was offered a one-off bonus if he hit his KIPs relating to profitability. Ms Meyer was worried about how unhappy the claimant appeared to be and felt he seemed overwhelmed and frustrated.

25. The claimant got positive feedback from Ms Armstrong in December 2021.

Post

26. The Dutch accountants had responsibility to deal with the Dutch post from when Ms Meyer went on maternity leave. The respondent argued that the claimant was responsible for the UK post. The claimant argued that Ms Meyer retained responsibility for the UK post. There is no clear written instruction from Ms Meyer to the claimant regarding the post. Once the office in the UK had been closed post was dealt with remotely through a company Hoxton Mix. Both the claimant and Ms Meyer would receive a notification when post had arrived. Most of the post that the claimant had to deal with to do his job was digital post from HMRC and the company's bank. Both the claimant and Ms Meyer confirmed in evidence that the post was sent to Ms Meyer who would scan it and forward it on to the claimant. In an email dated 14 January 2022 the claimant confirmed he normally collected the British mail and received it by scan (p173). I find that it was part of the claimant's role to collect the UK post.

27. On 3 January 2022 Ms Meyer received a notification from Hoxton Mix, the company who dealt with the company's UK post remotely, that there was post. Ms Meyer was in the UK at the time so asked if the claimant wanted her to pick up any physical post from the London virtual office.

28. The claimant asked Hoxton Mix for the UK post to be forwarded to his French address and Ms Meyer saw the email confirming the post being forwarded to France on 14 January 2022. This email made Ms Meyer worried that the claimant was not returning to the UK regularly enough to collect the UK mail. Ms Meyer was aware that having an employee located in a different jurisdiction long term could expose a company to that jurisdiction's tax and regulations. I find that from this moment Ms Meyer became concerned about the fact that the claimant was working from France. Up until then she was not concerned about where the claimant was working from as long as he was doing his work, which in her mind included regular trips back to the UK to check the post.

29. Ms Meyer emailed the claimant on 14 January 2022 to say she noticed the post was being sent to France and she thought the claimant being in France was a temporary thing as it was important for the documents to be sent to a UK address. She asked for him to arrange a time to speak about it. The claimant replied he had been confused as he had meant to transfer the Dutch and not the British mail.

Telephone call 17 January 2022

30. On 17 January Ms Meyer and the claimant had a telephone conversation. There are no notes taken by either of them at the time before the Tribunal but there is a transcript of a verbal note sent to Ms Armstrong by Ms Meyer on the same day. Two people can attend the same meeting and recall it differently. I find that both the claimant and Ms Meyer were genuine when they gave evidence regarding what they remember was said during the telephone call. The transcript is a useful contemporaneous record.

31. The claimant recalls Ms Meyer starting the call by saying the conversation was informal and she was not taking any action now. This is reflected in the transcript, not how she started the call, but how she ended it. I find that from this conversation the claimant could not have known that Ms Meyer's was viewing the conversation as part of a formal investigation. He had been told it was an informal conversation.

32. Ms Meyer said that the claimant working abroad put the business at risk in terms of taxation and she should have spotted it earlier. She asked the claimant to give her an estimate of his time in and out of France and anything he could provide about the taxation implications. The claimant recalls her asking for a rough estimate but in the transcript Ms Meyer records asking the claimant for a line by line note of where he was last year so she had a more clear idea of what the liability was and in her follow up email she asks for a timeline, not a rough estimate.

33. She asked the claimant about his situation in France and if he was intending to stay in France long term. The claimant mentioned that his mum had been unwell, and they were awaiting test results and he would need some time to return to the UK. I accept the claimant's evidence that he never stated in the conversation that he had no intention of returning to live in the UK.

34. However, I find that Ms Meyer got the impression from the call that the claimant probably intended to stay long term in France, that he wanted to be there for his mother and that he had said to her he had a two month notice period on his residential rental agreement even though the transcript suggests the claimant was more vague about his rental agreement.

35. Another reason why Ms Meyer came away from the conversation believing the claimant intended to remain in France was because she recalled that he suggested that he could work as a contractor in France rather than be on the UK pay roll. The claimant says in his witness statement that he suggested a contractor could replace him while he got ready to return to the UK. I find that Ms Meyer was under the impression from the call that the claimant wanted to remain living in France and his preference was to become a contractor, even if the claimant had not in fact said he wanted to remain in France and would not return to the UK.

36. The claimant had told her that he was aware of the tax implication and had been careful to not make himself a tax resident in France by going back to the UK. Because of covid exemptions in place at this time the claimant may not have put the company at risk but neither Ms Meyer or the claimant seemed to know about the exemptions at the time of this conversation.

37. Ms Meyer told the claimant she would need to get some more formal advice and she was not making any decisions now. Ms Meyer was concerned that as her most senior employee he should have been aware of the potential tax implications to the company and should have taken the issue seriously.

38. Ms Meyer followed up the conversation by sending an email to the claimant asking him to send a timeline of his entries into and out of France since 2021 and she would get back to him once she had gathered more information.

39. The claimant replied a few hours later confirming that he had spent 204 days outside France, was registered as a foreign resident in France and was using his UK bank account and telephone number. He stated that business taxation was payable where the permanent establishment was located which was not in France.

40. The claimant sent a table of where he had been in 2021 (p192). His summary stated he was 160 days in France and 204 outside France. The claimant told the Tribunal that his timeline was inaccurate because he had mistakenly thought he had been in the UK in January but was in fact already in France from December.

First Disciplinary hearing

41. Having sought advice from an employment lawyer on 8 February 2022 Ms Meyer sent an invite to the claimant to attend a disciplinary meeting the next day.

42. The invite said the purpose of the hearing was to consider a number of serious allegations of breach of contract and misconduct. The allegations were: 1) having permanently relocated to France without informing the respondent; 2) not recognising the financial and commercial consequences for the company by setting up a permanent establishment in France, either intentionally or otherwise, or were aware of the risks but chose to ignore them; 3) disregarding his role raising issues of how much trust and confidence Ms Meyer and the company could place in him.

43. The claimant was warned that the hearing could result in his dismissal and was informed he could be accompanied, could call any witnesses and could produce any documents. The claimant was given just 28 hours notice. I find this notice unreasonable in the circumstances. It is not practicable to expect a person to be able to find a companion, witnesses and produce documents in such a short time period. Ms Meyer eventually agreed to delay the hearing, shortly before the disciplinary hearing was scheduled, in an email dated 9 February 2022, in which she confirmed the claimant was suspended until the hearing because of her concerns about the continuing risk to the business.

44. The claimant emailed Ms Meyer shortly after receiving the invite. He said that he had never stated his intention or plan to permanently relocate to France. Since his mum had been given the all clear he had booked a one way ticket back to the UK for 23 February 2022. He hoped the matter was settled and there was no need for a disciplinary hearing.

45. Ms Meyer refused to halt the disciplinary process. Ms Meyer felt that the claimant's email of 8 February contradicted what he had said to her on the telephone on 17 January 2022. She felt she could not trust that he would really return to or remain in the UK. She emailed the claimant and said she would be referring to the telephone call on 17 January 2022, email of 24 May 2021 performance review notes and the phone call on 12 October 2021 when she stated she would not be opening a French office.

46. The claimant paid for a union representative to accompany him to the disciplinary hearing. In advance his rep sent an email on 12 February 2022 raising a number of concerns regarding the impartiality of the process. He argued that a different person should be conducting the disciplinary hearing to the person who investigated and that the evidence relied upon in relation to the alleged financial risk due to tax implications should be provided. He alleged that both Ms Meyer and Ms Armstrong had made allegations which were unfounded and should not be involved in the disciplinary process. He advised the respondent of the services of outside consultants and asked the respondent to postpone the hearing until an outside consultant had been appointed to chair the hearing.

47. Ms Meyer's responded on the 14 February saying the claimant had all the documents and as the company was small it was appropriate for her to chair the hearing.

48. The claimant alleges that Ms McWilliams could have chaired the disciplinary hearing as she was a senior manager with direct line reporting to Ms Meyer and 2 other employees who could have taken notes.

49. The ACAS code of practice for disciplinary and grievance procedures provides that "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing."* Although Ms Meyer stated in her witness statement that she already felt she could not trust the claimant before the disciplinary hearing, considering the size of the company and the claimant's seniority I find that it was reasonable for Ms Meyer to chair the first disciplinary hearing. At the Tribunal hearing Ms Murphy suggested that Ms Armstrong could have chaired the hearing but the claimant had indicated, prior to the disciplinary hearing, that he did not think Ms Armstrong should even be the note taker.

50. The disciplinary hearing was chaired by Ms Meyer and notes taken by Ms Armstrong (p224). The claimant produced a statement of case in which the claimant alleged that Ms Meyer intended to remove the claimant from the business, they had breached the acas code and had failed to provide the claimant with details of the alleged consequences of the claimant working from France. The note set out each allegation and the claimant's responses to them.

51. The claimant alleges that he wasn't allowed to ask questions at the disciplinary hearing and was not authorised to discuss the evidence mentioned prior to the hearing. This is not reflected in the minutes. Looking at the whole process, including the claimant's statement of case, I find that the claimant was given sufficient information about the allegations to

prepare to answer the case and did so in both his statement of case and at the disciplinary hearing. The claimant was accompanied.

52. Ms Meyer felt that the claimant was contradictory at the disciplinary hearing and would not answer many questions directly.

53. An email confirming the outcome to the disciplinary hearing was sent to the claimant on 18 February 2022. Each of the allegations were set out with Ms Meyer's findings. She had concluded that the claimant had indicated on 17 January 2022 that he intended to stay in France and that he was aware of the financial risk to the company of creating a permanent establishment in France. If he wasn't then it caused doubt in his ability in his role as Head of Operations in France. She concluded that the claimant had been disingenuous, contradictory and changed facts to best fit his version of events. She stated: "*Given the seniority of your role and the high levels of responsibility you have had and continue to have in your role, it will be exceptionally difficult, if not impossible, for me to be confident in your ability to recognise potential risk the company is or may be exposed to*".

54. Ms Meyer told the Tribunal that she decided not to dismiss the claimant because they had worked together for 3 years and she believed he was still a valuable asset to the company. She concluded that the claimant should be given a final written warning which would stay on his record for 12 months and stated: *"As you have lost my trust, I will no longer be managing you. Your new line manager will temporarily be Becks Armstrong, until you are placed under management of another employee in the company".* The claimant was required to return to the UK and his performance would be closely monitored. This was the first time the claimant had been specifically instructed to return to live in the UK.

55. The claimant took 5 days holiday and was then signed off sick for work related stress from 27 February 2022 for 2 weeks.

56. On 22 February 2022 the claimant was not invited to the usual monthly strategy meeting with Ms Armstrong and Ms Meyer. The claimant told the Tribunal that this was because the claimant was no longer under her direct line management, but it is understandable that the claimant viewed this as a removal of part of his responsibility.

Appeal

57. The claimant sent an appeal to the respondent on 24 February 2022 based on unfair procedure and unfounded allegations. On 25 February Ms Meyer invited the claimant to attend an appeal hearing on 2 March 2022. The email confirmed that Ms Meyer would be conducting the appeal and Ms Armstrong would be taking notes despite the claimant concerns about impartiality of the process.

58. I find that Ms Meyer's decision to chair the appeal was unreasonable in the circumstances. Although the respondent is a small company it is possible for a small company to ask a third party to conduct appeals and disciplinary hearings. The company may not have been profitable, but it was and is still trading. Ms Meyer had made it clear in her outcome to the disciplinary hearing letter that she had lost her trust in the claimant. She referred to the

claimant as disingenuous and contradictory. Having made it clear she did not trust the claimant it is difficult to see how Ms Meyer could have fairly and impartially chaired the claimant's appeal, especially as the appeal was alleging that Ms Meyer had acted unfairly.

59. Ms Meyer offered to postpone the appeal hearing in light of the claimant's sick note, but he wanted to go ahead with the appeal.

60. On 25 February 2022 Ms Meyer contacted Google and other internet searches to ascertain from which location the company's online system had been accessed by the claimant as the providers automatically tracked the user's location. I do not find this a breach of the claimant's contract of employment. She was not monitoring the claimant at the time he was using the devices but using the fact that the companies tracked the use of the devices to establish in which country the claimant had previously used his devices as part of her investigation. Ms Meyer informed the claimant this information would be considered at the appeal hearing and copied the information to the claimant. The claimant asked for some information from slack and Ms Meyer asked the claimant to clarify what he was asking for.

61. The appeal hearing took place on 2 March 2022 (p325). There is a dispute about the accuracy of the notes but the claimant's requests for amendment were included in the minutes and I find that the minutes had been agreed. Before the appeal hearing Ms Meyer had concluded that due to further evidence the claimant had purposefully misled her about the days he was in the UK and lied about the days he had actually been in France. Although the claimant was accompanied and given an opportunity to state his case I find that the appeal was not fair as it was chaired by Ms Meyer, who had investigated the claimant and heard the claimant's disciplinary hearing and had already stated she did not trust the claimant and had concluded that the claimant had lied and misled her. I find she could not have impartially chair the claimant's appeal.

62. The claimant received the outcome letter to his appeal on 10 March 2022 which was not upheld. In the appeal outcome letter of 10/03/2022, the Respondent offered to rebuild trust. However, the same day, in the very same email which the appeal outcome was attached to, the respondent attached an invitation to a new disciplinary hearing. The respondent alleged the claimant:

    a) had failed to properly deal with the handling of the company's Dutch branch mail & reporting requirements, which led to over 900 EUR in overdue fees and nearly 7,000 EUR in overdue taxes, resulting in court orders;

    b) had failed to manage or have mismanaged the Dutch payroll & payments processes and/or prior to August 2021 failed to effectively manage the accountants responsible for informing Tokyoesque of such payments;

    c) had failed to properly deal with the handling of UK mail, including notices from HMRC that have not been picked up or dealt with;

    d) had failed to manage and/or take the required action in invoice reconciliation and invoice collection, leading to money not being collected from clients;

e) had failed to maintain basic HR records, specifically related to sick leave and holiday leave policies, leading to and or including the over-payment of employees.

63. The claimant believed there were inconsistencies in the new invitation to the second disciplinary hearing:

a) these new facts came as a surprise because he was not made aware that he was under investigation and the respondent confirmed multiple times throughout the first disciplinary hearing that this was not about his performance (pages 232-233 of the bundle);

b) the respondent confirmed again that she would chair the new disciplinary hearing and appoint Becks Armstrong as note taker;

c) the respondent falsely claimed that 'these are new allegations which have come to light since the disciplinary proceedings which commenced on 14 February 2022'.

d) the respondent also referred to past Court orders in the Netherlands that Ms Meyer knew about.

e) the respondent also had full access to the company's HMRC accountant and mail in the UK;

f) Ms Meyer knew that the Finance and HR processes were still in progress and they were working on it with the operations coach;

g) the respondent held the claimant responsible for the external suppliers' mistakes;

h) Ms Meyer further knew that it was the responsibility of the Dutch accountant to receive Dutch mail and look after all administrative procedures in the Netherlands;

i) the Dutch accountant also confirmed that the claimant contacted him in January 2022 to know the status of the payments, he only informed him that only 3 payments were due and he acted as soon as he knew the information.

Resignation

64. The claimant believed he should have been invited to an investigation meeting at the time Ms Meyer became aware of the new allegations. He thought she was already aware of some of the allegation during the first disciplinary process. He felt Ms Meyer wanted to get rid of him out of the business and wanted to control the whole process by appointing herself as investigator and disciplinary officer. He considered the fact that he had only been given 24 hours' notice of the first disciplinary hearing. He believed Ms Meyer had based her decision on spurious allegations. He felt the process had been unfair and inconsistent. He believed Ms Meyer had lied about what was said in the conversation on 17 January 2022 and breached her duty of confidentiality during the process.

65. He felt that his employment had become unbearable, and he was unable to execute his duties and feared for his safety. He felt he had no option but to resign as the respondent had made his position untenable, the last straw being the invite to a further disciplinary hearing being sent together with the appeal outcome. At this point he had lost all trust and confidence that he would be treated fairly by Ms Meyer, and as such there was a complete and irrevocable breakdown of the working relationship.

66. The claimant sent his resignation letter to the respondent on 11 March 2022 (p498) setting out in detail the reasons for his resignation. The respondent accepted the resignation and arranged for the collection of the company property from the claimant on 16 March 2022.

67. I accept Ms Meyer's evidence that she thought the claimant refused to address the login location data at the appeal hearing, which she considered accurate. I find that it is reasonable for Ms Meyer to conclude that the claimant had misled her when he sent his timeline as the login location data does not reflect the information provided by the claimant, even with his exclamation about mistakenly thinking he was in the UK in January 2021. The claimant argued that the login data can be inaccurate but even with that suggestion I find it reasonable for a third party looking at the timeline compared to the login data to conclude the claimant had not been accurate about his location in his timeline.

68. I find that Ms Meyer genuinely believed that the claimant was guilty of the new allegations, after she and Ms Armstrong had taken on the claimant's tasks while he was suspended, on holiday and on sick leave. She believed the claimant had neglected his duties in an extremely dangerous manner for the company. Ms Meyer also felt that the claimant had become antagonistic and belligerent.

69. Ms Meyer collated evidence, during her investigation whilst the claimant was on leave and after the first disciplinary hearing. She believed the claimant had failed to collect the post despite receiving regular notifications. She believed the claimant had not completed claiming a refund, and that he had wrongly registered his home address as the registered address for contents insurance.

70. Had the respondent carried out a reasonable disciplinary hearing into the further allegations set out in the email dated 10 March 2022, conducted by an independent third party, I believe it is likely that the claimant would have been fairly dismissed for misconduct. Although the claimant may have been able to give an explanation for each of the allegations, and in particular argued that the Dutch accountants were responsible for the Dutch post, from the limited information available to me it appears that it would fall within a band of reasonable responses for an independent chair to conclude that the claimant had not properly dealt with the UK post, failed to manage the debt collection and failed to maintain the other employees leave records. These failings resulted in financial loss to the company. It would also be reasonable to take into account the claimant's written warning when considering the appropriate penalty.

Submissions

Claimant

71. In summary, the claimant alleges that the respondent fundamentally breached the claimant's contract of employment, as set out in the list of issues paragraphs 1 a) to h) and the last straw being when he received the notice of a second disciplinary hearing, attached to the outcome to his appeal, regarding allegations he had not been made previously aware, without an investigation, despite Ms Meyer mentioning in the appeal outcome about rebuilding trust with the claimant.

72. The claimant alleges that the first disciplinary hearing was based on spurious allegations of misconduct as he was allowed to work flexibly from France and the UK and the claimant had never stated he was permanently relocating to France. There is no requirement within his contract of employment to work in the UK.

73. The respondent failed to follow a fair and reasonable disciplinary procedure. Ms Meyer should not have chaired the disciplinary hearing and someone impartial should have been appointed. The respondent should not have monitored the claimant's personal devices. His removal from the monthly meetings was a demotion and the respondent refused to deal with this issue at the appeal hearing.

74. The respondent behaved in a way calculated or likely to destroy the claimant's trust and confidence in the respondent. The claimant resigned as a direct response and without delay.

Respondent

75. In summary, the respondent denies the central charge that the respondent acted in a manner calculated or likely to destroy and seriously damage the implied term of mutual trust and confidence, and in any event, the respondent had reasonable and proper cause to do what they did.

76. The respondent's fallback position is if the Tribunal finds there was a dismissal, then they say the dismissal was for misconduct or some other substantial reason and fell within the band of reasonable responses. The alleged misconduct was enough to justify dismissal.

77. Mere unreasonableness on the part of the respondent is not enough. The Tribunal must view objectively, whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the parties. If the respondent had reasonable or proper cause for what they did then there can be no breach. The respondent accepts that the claimant resigned quickly and did not affirm the contract.

78. The respondent invites the Tribunal to find that it was reasonable for the respondent to say to the claimant his place of work ought to be the UK.

79. The respondent argues that the respondent followed a fair procedure and there was no one else other than Ms Meyer to chair the claimant's disciplinary and appeal hearings as the claimant was the most senior

employee. She reached a reasonable decision- she had lost trust in the claimant's ability to appreciate the risk to the business of him working from France. Further evidence from the log in data suggested his timeline was inaccurate and possibly deceptive. Ms Meyer wanted to rebuild trust. The further allegations had only been discovered after the claimant went on sick leave/holiday. The further allegations were not challenged in cross examination.

80. The original allegation was well grounded and serious. There were serious potential tax and other financial risks and the claimant didn't seem to appreciate the risk and issues of trust, integrity and honesty.

81. The respondent did not monitor the claimant but asked for the log in details over the twelve-month period.

82. The meeting the claimant was not invited to was not a board meeting, was one meeting and was because he was no longer under Ms Meyer's direct line management. There was no demotion or change in title or reduction in salary.

83. Ms Armstrong was not just brought in to supervise the claimant but to help the organisation and the claimant enjoyed her supervision.

Applying the law to the facts

84. I find that the allegations of misconduct at the first disciplinary process were not spurious. Ms Meyer genuinely believed that the claimant did not intend to return to work in the UK, there were serious potential tax and other financial risks and she believed the claimant didn't seem to appreciate the risk and issues of trust, integrity and honesty.

85. I find that the claimant was required to ensure that where he worked did not put the company at any potential financial and tax risks and that it was reasonable for him, as a senior employee, to have known about the potential risks of being in one country for a certain period of time where he could be deemed to be within that country's tax jurisdiction.

86. I find that the respondent did fundamentally breach the contract of employment by having Ms Meyer hear both the claimant's first disciplinary hearing and then his appeal and then to write to the claimant at the same time and say she would be chairing a second disciplinary hearing. Her evidence was clear that at the time of the appeal and further disciplinary hearing she did not trust the claimant and although she may have said she was looking to rebuild trust, she had already concluded that the claimant had been contradictory, could not trust that he would really return to the UK or remain there, had failed to take responsibility for risks, lied about his timeline and neglecting his duties in an extremely dangerous manner for the company. Ms Meyer should have instructed a third party to come in and chair the hearings. Although the respondent company is small she could not bring in someone else at this stage of the process.

87. Although I find that the respondent gave the claimant too short notice for his first disciplinary hearing this was remedied by allowing the claimant more

time after requests. However I find that this played as a factor in the mind of the claimant when deciding to resign.

88. I find that the respondent was not monitoring the claimant's personal devices and that it was reasonable to ask Google to provide the log in details as part of Ms Meyer's investigation.

89. The claimant conceded that the appeal minutes were agreed. I find there was no attempt to alter the appeal minutes.

90. I don't find the removal of the claimant from the monthly meeting a fundamental breach of the contract but understand it was a factor in his mind when he resigned. He felt that his removal was a form of demotion.

91. I find it was reasonable for the claimant to be put under the supervision of Ms Armstrong and the reason was not because of performance issues but was appointed as an operations mentor and consultant to improve the operational processes.

92. I find sending to the claimant on 10 March 2022 an email containing the outcome of his appeal and an invite to a further disciplinary hearing regarding allegations that had never previously been made, despite Ms Meyer's stated support for rebuilding trust, and stating that Ms Meyer would be chairing the hearing was the final straw that cumulatively amounted to a breach of the implied term of mutual trust and confidence.

93. I find, viewed objectively, the respondent behaved in a way calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. Ms Meyer refused the claimant's request for an impartial chair to his appeal and had stated she would chair the second disciplinary hearing, despite already concluding that she had no trust in the claimant. This refusal to appoint an independent chair was likely to destroy or seriously damage the trust and confidence between the parties.

94. I do not accept that Ms Meyer had reasonable and proper cause for doing what she did. Although the company was small it was unreasonable of her to refuse to appoint an independent chair to hear the claimant's appeal and second disciplinary hearing. It was clear from her evidence that even if the claimant had asked for an independent chair for the second disciplinary hearing Ms Meyer would have refused as she believed she could chair it impartially.

95. Not having an impartial chair to an appeal or a second disciplinary hearing is a fundamental breach, especially combined with being notified of new allegations at the same time as getting the appeal outcome. I also consider the cumulative effect of the claimant being told the telephone call on 17 January 2022 was informal although Ms Meyer went on to see it as part of a formal investigation and the claimant initially being given 28 hours' notice of the first disciplinary hearing and only being allowed more time shortly before the first disciplinary hearing was to start. In addition, the claimant being removed from the monthly meeting and his view that he should have been shown the evidence relied upon in relation to the allegation of financial risk due to tax implication. All together cumulatively these factors amounted to a breach of the implied term of mutual trust and confidence.

96. I do not find that the respondent had reasonable and proper cause for doing what it did. As stated above the respondent should have appointed an independent chair to hear the claimant's appeal and his second disciplinary hearing. I find that the breach was so serious that the claimant was entitled to treat the contract as being at an end.

97. It is not disputed that the claimant resigned in response to the final straw email and that the claimant acted swiftly and did not affirm his contract.

98. I find that the reason for the claimant's dismissal was conduct. However a fair procedure was not followed and therefore the respondent did not otherwise act reasonably and the dismissal did not fall within the band of reasonable responses. The respondent had decided not to dismiss the claimant after the first disciplinary hearing. The new allegations needed to be considered within the context of a fair and impartial disciplinary hearing.

99. I find that the further allegations were discovered by Ms Meyer after the first disciplinary hearing whilst the claimant was on annual leave/ sick leave. Ms Meyer may have been aware of some aspects to the further allegations prior to the first disciplinary hearing but only concluded that they had become a real issue after.

100. There was not time during the final hearing to hear submissions from both representatives regarding remedy. A remedy hearing has been listed for the 20 February 2023. I encourage the parties to sit down and negotiate a settlement in light of my above findings. The Tribunal should be notified if a settlement is reached so that the remedy hearing can be vacated.

EJ - Isaacson

20 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21/11/2022

FOR EMPLOYMENT TRIBUNALS