EMPLOYMENT TRIBUNALS

Claimant: Mr Darren Layton

Respondent: City Plumbing Supplies Holdings Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 1, 2 and 8 November 2021 and, in chambers on 12 and 16 November 2021

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: Mr Khan of counsel
For the respondent: Ms Dawson, solicitor

JUDGMENT

The judgment of the Tribunal is that:

The claimant was unfairly dismissed.

The respondent breached the claimant's contract of employment. The claimant is entitled to payment of notice pay and bonus payment.

REASONS

1. By a claim presented on 12 June 20, after a period of early conciliation, the claimant claimed constructive unfair dismissal and for breach of contract, being claims for notice pay and a bonus payment.

2. This was a remote hearing. The parties did not object to a remote hearing format. The form of remote hearing was V. A face to face hearing was not held because it was not practicable and no-one requested it.

3. We heard evidence from the claimant and, for the respondent, from Chris Williams (CW), who was Regional Director for the respondent's West Midlands Region at time of the events and the claimant's line manager, and Christina Dell (CD), who was a Regional Sales Director for a sister division or company at the time of the events, and who heard the claimant's appeal against dismissal. Two other witnesses provided unsigned statements for the respondent and did not attend to be cross examined on them, Philip Dock (PD), formerly Commercial Director, who had left the respondent's business, and who made the decision to dismiss the claimant, and Phillip Cham (PC), Head of Finance.

4. We were provided with a bundle of documents exceeding 200 pages to which the respondent sought to add substantial documents on the morning of the first day of the hearing. The claimant objected to many of those additions. We heard evidence on some of them after which the claimant did not object to their admission. Others were not admitted for reasons given orally. References to page numbers below are to pages of the bundle.

5. We were supplied with a cast list and chronology prepared by the claimant and by an opening statement prepared by the respondent. Both parties submitted written closing submissions, as well as making oral submissions.

6. At start of the hearing, the claimant clarified his unfair dismissal case as follows. The factual background was that the claimant was dismissed for the stated reason of gross misconduct. He appealed and he was reinstated with a final written warning substituted for the dismissal. The claimant then resigned. The claimant's unfair dismissal claim related to that resignation which he said was a constructive dismissal. He did not bring an unfair dismissal claim in relation to his actual dismissal. The matters which the claimant relied on as being a fundamental breach of his contract of employment in response to which he resigned were as follows:

    6.1. Decision to impose a final written warning;

    6.2. Decision to withhold bonus for 2019;

    6.3. Failure to thoroughly investigate his complaint that CW had instructed him to account for charity donations in a particular way;

    6.4. As the final straws:

        6.4.1. On 6 March, in a phone call between the claimant and CW, CW said to the claimant that the respondent was starting a new investigation into the claimant in relation to three issues.

        6.4.2. On 12 Mar, Kevin Williams (KW), MD of Operations, emailed the claimant dismissing the claimant's concerns. In closing submissions, the respondent objected to this being taken into account as it was not pleaded. However, as the respondent had not objected at the start of the hearing when the issues were discussed, we decided that it could go forward as an issue.

7. In closing submissions, the claimant relied on the failure to pay bonus as a breach of a contractual term as to remuneration, and the other matters listed above, plus the withholding of bonus, as all breaching the implied term of trust and confidence.

8. The respondent's case was that, if a constructive dismissal were found, the dismissal was fair by reason of misconduct; its case was that the claimant had admitted to having fraudulently and intentionally entered transactions under customer accounts when no such transactions took place.

9. It was agreed at the start of the hearing that we would hear evidence on liability and contributory fault only. Neither party made closing submissions on contributory fault and so we will not consider it in our conclusions. We note, however, that we have reached conclusions below relevant to this issue.

What happened

10. The following are the primary facts in the case relevant to the issues.

11. The claimant began employment with the respondent on 1 Jun 2011 and, at the time of his actual dismissal was an experienced branch manager of the respondent's plumber's merchant at Malvern. Until the events dealt with below, the claimant had a clean disciplinary record.

Bonus scheme

12. The claimant participated in a bonus scheme for branch managers. It was made up of two elements being controllable profit and average customer numbers. The second part was worth considerably more to the claimant than first part. It related to the number of trading accounts which customers had at the branch.

13. In June 2019, the Malvern branch's average customer numbers were at a low point for the year of 2.8% less than the previous year (although the figures had been much better earlier in the year, for example, 19.5% in January, 16.5% in February more than the previous year's figures). The claimant needed a positive figure to get any average customer numbers bonus at the end of the year and 5% over what was achieved in the previous year to get the highest level of bonus. Over that 5% threshold, there was no increase in the bonus. By July 2019, the average customer number at the Malvern branch had increased above the previous year's figures by 3.1% and by Aug it was by 11%. By the end of the year, it was 17.5% over the previous year. (p56A).

14. It was the claimant's unchallenged evidence which we accept that, as an experienced branch manager, he knew that June was a low point for sales; the respondent was a plumbing supplier and June was the slowest point in the year for sales. Given this, we accept the claimant's evidence that he had no concerns that the figures would allow him to achieve his maximum bonus by the year end.

15. By the end of the year, the claimant had in fact achieved figures such that he qualified for maximum bonus, even if the disputed trading accounts which we refer to below were stripped out of his figures.

16. The relevant terms of the bonus scheme included as follows:

    16.1. The Branch Manager Annual Bonus Plan 2019 (p154) stated that:

        16.1.1. The plan was subject to the 2019 Annual Bonus Plan Rules;

        16.1.2. Any deliberate manipulation of metrics to achieve bonus will deem outside the spirit of the plan and bonus payments may be withheld at the discretion of the Deputy CEO.

    16.2. The 2019 Bonus Plan Rules (p164b) included as follows:

        16.2.1. These rules applied to bonus plans in the Travis Perkins Group. Any specific deviations or additional rules will be detailed in individual plans;

        16.2.2. The Group may in its absolute discretion pay a bonus of such amount and subject to such conditions as the Group may in its absolute discretion decide;

        16.2.3. Bonus is not contractual and payments are at the absolute discretion of the Group;

        16.2.4. Group has a discretion to reduce, withdraw or otherwise not pay bonus either to an individual or group of individuals, for example, in light of individual or business performance;

        16.2.5. Individual payments may be adjusted downwards or withdrawn during the bonus authorisation process if the individual is not achieving an acceptable level of performance, for example, if the colleague has a live disciplinary warning.

<u>Practice with charity chocolate bars</u>

17. The respondent had a practice of having chocolate in its stores which those entering its stores could have in return for a cash donation to a charity collection. The cash donations accumulated and had to be accounted for.

<u>Allocation of payments</u>

18. There was to be a stock take in July 2019.

19. There was no dispute that, in July 2019, the claimant allocated 80 charity payments received from unknown customers as payments made by specified random dormant customers. This reactivated the trading accounts of the dormant customers and increased the figure for the branch's trading account numbers. He also allocated 18 courier transactions to randomly dormant customers which had the same effect. The claimant did not make these allocations to just one dormant customer but to multiple dormant customers.

20. For months, at every branch managers' meeting, it had been drummed into them that nothing went through a branch without being attached to a customer's account because the focus of the business that year was trading account numbers.

21. The claimant's explanation for the allocation of charity payments and courier transactions to dormant accounts was that it was to clear the payments off the system prior to stock take. He said that he dealt with the charity payments in this way on the instruction of CW. He had come up with the mechanism for dealing with the courier transactions himself.

22. In the disciplinary hearing on 19 Dec 2020 (p98), the claimant dealt with the question of when he said he was instructed by CW to account for the charity payments in the way he did. He said he could not remember when the first conversation was. He said he thought RH had assumed it was in a branch managers' meeting (see para 41 below). He did not know whether CW had told all his branch managers in the region to do it. In the Tribunal hearing, he said he had received the instruction it was when CW was in the branch, but did not say when this was.

23. The claimant had been sent a branch stock take guide although he said he had not read it. This stated that, if there was no stock, the manager must key 0 (p202). The claimant said that this only applied during the actual stock take process and not to the process of preparing for stock take, and the rule did not apply to what he had done. The guide did not mention charity payments or courier charges at all nor any other non-sale transactions. At no time in the disciplinary process did the respondent refer the claimant to any policy procedure on how to account for charity donations and courier charges. We conclude that there was no such guide.

24. CW's evidence, under cross examination, was that, from 2018 and prior to that, he told the claimant and other branch managers that, when processing charity donations, they should link them to trading accounts. He said this was to increase the number of trading accounts. Under further questioning from the Tribunal, he explained that the number of trading accounts increased through this practice because the charity money was to be allocated to a customer who came into the branch and donated to the charity but did not have a trading account. He explained that it was fine to reactivate a trading account because the customer had made a small donation to charity, but it was not acceptable to allocate a charitable donation to a customer who had never been into the branch, thus reactivating their trading account. He did not deal with this in his witness statement. It took three questions from the Tribunal to CW to elicit an answer on this point which was comprehensible. He did not say anything about this practice allowing the respondent to carry out a legitimate marketing activity by setting the customer up with a discount card, which the respondent said was the position in closing submissions.

25. CW also gave evidence that charity money was used as an honesty box if a customer did not have the money to pay, so that a receipt was created.

26. CW said that no other branches were processing charity money to unknown trading accounts who never used the branch. He said that other branches in his region were investigated for incorrectly increasing the number of trading accounts in other

ways, such as by selling low value clips, and two other branch managers were dismissed for manipulating trading accounts. Across the business, 22 branch managers were dismissed for manipulating trading accounts. We accept CW's evidence on this, although it was not substantiated by documents. We think it unlikely that Ms Dawson, as an (in house) solicitor, would disregard her professional duties to the Tribunal so far as to allow information of this nature, which could easily be objectively checked, to be given to the Tribunal, if it were untrue.

HSPR Meeting

27. There was a Health and Safety Performance Review ('HSPR') meeting in the claimant's branch on 14 November 2019. Despite the fact that the evidence of what was said in or after this meeting was a key part of the case, neither the claimant nor CW gave evidence of this in their witness statements, and we heard oral evidence on it. The claimant and CW discussed the claimant's branch figures. CW noted that the number of trading accounts at the claimant's branch was exceptionally high and celebrated the high number with the claimant. CW said he was not suspicious of the high number. CW admitted that the claimant had explained the growth partly as being due to the use of charity donations as transactions.

Phone calls between CW and claimant of 28 Nov 2019

28. After this, the respondent started to investigate branch managers with large increases in the number of trading accounts at their branches. According to the information which CW gave to an investigation of 24 Dec 2019 (p118), when he heard of this investigation on 28 Nov 2019, he thought of the claimant and his use of charity money. He called the claimant and asked him to confirm the process he used for charity money. The claimant was unsure and asked, 'what's the problem?' CW said to him, 'if you've been doing anything wrong, stop immediately.' This call took place on 28 Nov 2019, at 17.47, out of hours. It was unusual for CW to call the claimant out of hours. There is further information given on the content of the call by the claimant at para 36 below.

29. The claimant's version of the conversation during this call, as given to an investigation chaired by Pete Woodward (PW), national account sales director and investigating officer, on 6 Dec 2019 (p62), was as follows. CW called him to say an investigation was taking place and told him to stop with the charity money. The claimant called CW back and said to him that he was annoyed because CW had told him to do it IE to treat the charity money as he had been doing. CW said to him there was a miscommunication.

30. The claimant's phone records for 28 November (p122) show a call at 17.47 from CW to the claimant lasting 2 mins and 39 seconds. There were subsequently two 2 second calls from the claimant to CW, IE the claimant tried to call CW back unsuccessfully. At 18.01, there was a further call from CW to the claimant of 2 mins and 12 seconds.

31. In a meeting with CD on 7 Feb 2020 (p148b), CW said he could not recall what the reason for the second call was. Under Tribunal cross examination, CW said that both his calls with the claimant were on the same subject and covered the same points. He thought that maybe they lost reception, tried to continue the call and then continued the same conversation.

32. In the hearing, it was put to CW that he may have said to the claimant there had been a miscommunication. CW answered, 'I may have said - you may have been misunderstood. No. I'm suggesting words, solutionising'.

33. CW was asked in the hearing why, when he learned that the Malvern branch was under investigation, his first instinct was to think it had something to do with the claimant's accounting for charity money, when he had previously thought nothing of the Malvern branch's exceptionally high figures. CW said that, when his manager brought it to light, he associated it with his conversation with the claimant two weeks' prior and so he called the claimant.

Investigation meeting held by CW

34. On 3 Dec 2019, CW held what is described in its notes as an Investigation Hearing with the claimant (p58). According to these notes, the claimant said the £1 cash transactions were courier charges that he wanted to write off before stock take and he processed the charity money through account transactions to increase trading accounts, and he thought of the idea himself. CW suspended the claimant at the end of the meeting. The claimant disputed the accuracy of the notes despite admitting signing them. In an investigation meeting on 6 Dec 2019, the claimant said that CW told him 'off the record' he would support him. He said he was concerned about what CW was writing down in the meeting but he signed the notes because he did not think 'it would come to this'. The claimant's evidence was that CW said to him that he should not worry about it and he would get it sorted.

35. Unlike for any other investigation meetings, there was no HR representative at this meeting to make notes. CW made the notes in the meeting. He admitted in the Tribunal hearing that he knew a note taker should have been present. The notes of a meeting which lasted 53 minutes were only two pages long.

36. On 4 Dec 2019 at 8.31am, as recorded in an HR log, the claimant called HR and said that the claimant was following CW's instructions and CW was not impartial; that CW said his message could have been misunderstood; and that CW told him he was not going to include in the notes of the previous day's investigation meeting that the claimant said that he acted on CW's instruction. He also said that CW called him out of hours, IE on 28 Nov 2019, and said 'you know that thing I told you to do, don't do it anymore.'

37. CW was removed as investigator and replaced by PW with effect from 4 December. After that, he had no further involvement in the investigation.

Further investigations

38. PW had an investigation meeting with the claimant on 6 Dec 2019 (p61). The claimant said the notes of investigation with CW on 3 Dec 2019 were not a fair reflection of the meeting. He said he processed the courier charges in the way he did to 'get them off' and CW instructed him to process the charity money as he had done.

39. In the Tribunal hearing, CW said that HR had only made him aware that the claimant had said he, CW, was not impartial to do the hearing. He denied that HR or PW told him that the claimant had accused CW of telling him to account for the charity money in the way he did.

40. PW interviewed CW on 11 Dec 2019 (p69). During the course of the interview, CW made derogatory comments about the claimant, CW said the claimant was abrasive, dealt with change negatively, was given a managers role due to his location, was 'not the strongest' etc. PW asked him what the claimant would have meant by referring to CW's involvement. The notes as written record that PW then asked, 'why would he feel that way?' and that CW did not answer at all. CW said the notes were wrong and suggested that his answer to the question was, 'why would he feel that way?'. On either case, PW did not probe CW on it or specifically ask him what he had instructed the claimant to do with regard to charity money.

41. PW interviewed Rob Horrell (RH), Assistant Branch Manager, on 13 Dec 2019 (p77). RH said that 10p charity monies were going through onto dormant accounts to refresh the accounts. All he knew was that the claimant was told he could do that in order to make the monies up. He said from what he had heard, they had all picked this up from a branch managers' meeting. 'They all seemed to think they could do this.' There was pressure to get live trading account numbers up. He thought that the instruction had come in February or March 2019, at a meeting, as the claimant did not seem to know about it before then.

Disciplinary hearing and further investigations

42. On 17 Dec 2019, the claimant was invited to a disciplinary hearing regarding allegations of falsifying trading account numbers by raising cash sale transactions against non spending customer accounts, for potential financial gain (p82). The disciplinary hearing took place on 19 Dec 2019, chaired by Phil Dock (PD), Commercial Manager.

43. PD interviewed RH on 23 Dec 2019 (p111). RH said that CW called him after investigators came to their branch and asked him if the investigation was about 'the conversation that me and [the claimant] had'. Then he asked about something else and did not pursue the topic.

44. PD interviewed CW on 24 Dec 2019 (p117)6. He specifically asked CW whether there was any conversation where the use of charity money could have been misunderstood by the claimant. CW said the instruction was that the charity money could be 'booked against the correct customer accounts that have ever and are not trading with us'. CW subsequently described the conversation with the claimant at

the December HSPR. He said that he noted the claimant's trading accounts were looking really strong and congratulated him on it. He asked the claimant how he achieved it and the claimant responded that it was 'customer contact plan' and 'he had been booking charity fridge as transactions'. PD did not ask any further questions on this topic.

Claimant's dismissal

45. By letter of 7 Jan 2020, PD wrote to the claimant dismissing him without notice (p135). He concluded that the claimant had committed gross misconduct in that he:

    45.1. Put through multiple transactions against customer accounts to write off 18 courier charge and processed charity donations against non-trading customer accounts;

    45.2. Directed his sales assistant to process charity donations against non-trading customer accounts (which the claimant had admitted);

    45.3. Wrote off courier charges as customer transactions against a number of different customers without instruction to do so; and well before he knew if he were in line for maximum bonus;

    45.4. As a long standing manager, should have understood that falsifying transactions in order to improve a performance metric was not acceptable;

    45.5. If he had been instructed by his manager to carry out a fraudulent process, he was able to challenge the instruction.

46. The letter noted that the claimant's explanation was:

    46.1. He wrote off the courier charges prior to stocktake;

    46.2. His manager told him to process the charity donations in the way he did;

    46.3. He did not increase his bonus because he would have hit his targets without these transactions.

Appeal against dismissal

47. By letter of 8 Jan 2020 (p136), the claimant appealed. In relation to the charity transactions, he said he treated them in the way he did because he was told to do so by CW, not because he thought it would alter his bonus, which he thought was secure from looking at management accounts. He said he did not know that what he was doing would be fraudulent. He said that CW had not been questioned adequately on the issue.

48. The appeal meeting took place before CD on 15 Jan 2020 (p142).

49. On 7 Feb 2020, CD interviewed CW (p148b). She put to him that the claimant mentioned two calls on 28 November and asked him what the reason was for the

second call. CW said that he could not recall this. She did not ask him about the claimant's allegation that CW had instructed him to act as he did.

50. Having established that there was no financial gain to the claimant in respect of the bonus, and that the disputed transactions did not impact on the level of bonus the claimant received, CD reinstated the claimant and substituted a disciplinary penalty of a final written warning, by letter of 2 Mar 2020 (p150).

51. In the Tribunal, the claimant said he was overjoyed when he got the appeal outcome letter because he loved his job.

Respondent raises new matters to be investigated with the claimant

52. On 6 Mar 2020, CW called the claimant to discuss his return to work (p155). The claimant's evidence was that, when he got this call, he was in the process of deciding whether to take up the reinstatement offer. We accept this is true given what the claimant said during the call, as noted below.

53. During the call, the claimant said he had another employment position. CW asked the claimant if he was in a position to return to work. The claimant said it depended on a few things. He said there was 'a massive trust issue' and he would like a meeting to go through it all, and he was not sure that CW wanted him back. CW said he wanted to make the claimant aware of an ongoing security investigation involving three things. He mentioned purchase of fuel for cash from within the branch. The claimant then cut him off and said he would take this up with his solicitor.

54. CW gave evidence relating to the further matters to be investigated in relation to the claimant. He said it was brought to his attention, in February 2020, that a couple of things did not look right at the Malvern branch concerning 'love to shop' vouchers and football tickets.

    54.1. He said that temporary staff at the branch forwarded an email raising the issues to him. He said that a user of love to shop vouchers emailed the branch with a complaint that a voucher had not been paid. He said that he forwarded the email to HR and 'security' and they started an investigation and it was nothing to do with him.

    54.2. On the subject of the football tickets, CW gave evidence that the claimant had been ordering football tickets as incentives. Normally, the invoices would be sent to purchase ledger, but the invoices had been sent to the claimant. The respondent then received a chaser for payment for the tickets. CW said he sent this to HR and 'security'. CW explained that, any football ticket purchases with a value of more than £150 needed to be approved by senior management. The value of the tickets which came to light was £300 to £650 and no approval had been sought.

55. Issues relating to fuel purchases also came to light during the claimant's suspension. CW said these were the kind of issues which the claimant could have covered up if he were at work, and it happened that, when managers were out of the business, issues would come to light. He said that the investigation stopped

when the claimant resigned, at which point, it had barely started. He could not explain why the investigation stopped at that stage, saying it was not his decision.

56. The Tribunal did not allow in as evidence documents which the respondent wished to produce in relation to these further issues, for reasons given orally.

Claimant's resignation

57. On 9 Mar 2020, the claimant wrote to the respondent saying that, after the call of 6 March with CW, he considered he was being intimidated by CW to scare him off returning to work. He said he did not accept the terms of the return to work with any warning against his name. He proposed he be trained to ensure everyone was happy about how things would operate in the future. He asked why investigations into new issues had taken place and who instigated them. He complained about the 'character assassination' against him by CW in the 6 Dec 2019 interview. He repeated that CW had instructed him to carry out the transactions but understood this had been hard to prove. He proposed a mutual agreement to leave the business.

58. KW responded to the claimant on 12 Mar 2020 (p160) referring to a call with the claimant the contents of which were not noted. He said he had been asked to discuss how the respondent could support the claimant's return to work. The respondent was not considering a mutual exit, but offered mediation between the claimant and CW. He offered to pay the claimant the difference in his pay caused by his dismissal. He told the claimant that his bonus would not be paid – 'as you have a final written warning the business reserves the right not to pay bonus'. If they did not hear from the claimant, he would be viewed as having resigned and his notice pay would be paid.

59. On 13 Mar 2020, the claimant wrote to the respondent resigning due to the following: he did not accept the terms associated with his return to work IE the final written warning which he felt would make it easy for the respondent to dismiss him. He disputed the withholding of his bonus. He felt the investigation into his allegations that CW had told him to process the transactions had been inadequate; CW had changed his version of events and in his last statement said he did not remember certain things. He had never been provided with evidence of the processes he was said to have breached. The only credible explanation was that he was doing as instructed. To conclude otherwise made the relationship untenable.

60. The claimant was paid neither notice pay nor bonus. We did not hear evidence from the manager who made the decision to withhold the bonus as to their reason for doing so. Indeed, we were not told who that manager was.

CD's evidence

61. CD's witness statement, at para 21, said, 'upon review of Mr Cham's findings, it was established that Darren's actions by falsification of the figures inflated his bonus, there was a clear and substantial financial gain…if I had been provided with that information at that time of making my decision, I would have agreed with Phillip Dock's …decision to dismiss the claimant…' She was referring to a further

investigation of the bonus figures by Mr Cham, apparently due to the litigation. Under questioning in the Tribunal, CD accepted that the disputed trading account figures for the claimant in fact made no difference to his bonus figures and there was no clear and substantial gain made by him. She retracted the part of her witness statement asserting the clear and substantial financial gain. She said, on that basis, her decision to substitute the dismissal with a final written warning was correct. Ms Dawson asked leading questions during re-examination to try to 'correct' this evidence but we take no account of the answers given because the leading nature of the questions.

62. CD also said she reached no conclusion on whether the claimant was told to treat the charity monies in the way he did. She said she was unable to do so as it was one person's word against another.

63. Under cross examination, CD accepted that, with hindsight, a lot of managers were falling foul of accounts policies and it was more a training issue.

Summary of relevant law

64. Under section 95(1)(c) Employment Rights Act 1996 (ERA), an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is known as a constructive dismissal.

65. To succeed in a constructive dismissal claim, the claimant must show as follows:

    65.1. A fundamental breach of contract going to the heart of the employment relationship.

    65.2. The employee resigned in response to the breach.

    65.3. The employee did not waive the right to resign before doing so.

66. In the case of *Omilaju v Waltham Forest LBC [2005] ICR 481*, the Court of Appeal made the following comments:

    66.1. "The test for constructive dismissal is whether the employer's actions amounted to a repudiatory breach of the contract of employment…

    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…

    Any breach of the implied term of trust and confidence will amount to a repudiation of the contract…

    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…the repudiatory conduct may consist of a series of acts or

> incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence…
>
> Although the final straw may be relatively insignificant, it must not be utterly trivial…
>
> The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term…Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant…
>
> Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test is whether the employee's trust and confidence has been undermined is objective."

67. Under section 94(1) ERA an employee has the right not to be unfairly dismissed by his employer.

68. Under section 98(1) ERA, in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

69. Under section 98(4) ERA, where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

70. Under Rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an employment Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131 (2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine, (b) the claim is not one to which article 5 applies and, (c) the claim arises or is outstanding on the termination of the employee's employment.

71. An employer is entitled to dismiss an employee without notice or payment in lieu of notice in circumstances where this is allowed under the contract of employment or where there has been a repudiation of the contract by the employee which is

accepted by the employer. In *British Heart Foundation v Roy (Debarred)* EAT 0049/15 it was stated to be an objective test as to whether the employee had acted in serious breach of contract such as to entitle the employer to dismiss summarily.

72. *Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 Ch. D. 339* provides that an employer can rely on gross misconduct discovered after termination to defend a claim for wrongful dismissal.

73. The claimant relied on *Hills v Niksun Inc CA [2016] EWCA Cic 115* in relation to his bonus claim. This case concerns a claim for allegedly underpaid commission where the main issue in the appeal was whether the judge had been right to interfere with Niksun's exercise of discretion as to such payments in the contractual documents. The Judgment addresses the following issues:

    73.1. It referred, (para 19) to the Supreme Court's recent decision in *Braganza v. BP Shipping Limited [2015] UKSC 17* where it was held by the majority that a contractual discretion is to be exercised in accordance with both limbs of the *Wednesbury* test, namely that it was not unreasonable and that all relevant matters and no irrelevant matters had been taken into account (paragraphs 24 and 53). Moreover, the burden was on the employer to show that its decision was a reasonable one, and if the employer has acted in such a way as to engender particular expectations in an employee, those expectations are a relevant consideration in assessing whether an employer has acted rationally. (see paragraphs 115-117 of Brogden v. Investec Bank plc [2014] EWHC 2785 per Leggatt J). The Court further held (para 23) that the claimant's submission was consistent with the decision in *Braganza,* namely that 'Mr Hills, had the burden of proof, but once he demonstrated that there were grounds for thinking that Niksun's decision was not reasonable, … the evidential burden shifted to Niksun to show that its decision was reasonable.'

    73.2. In this case, Niksun did not call the decision maker in relation to the bonus. The Court noted that, 'the absence of any evidence as to the way the decision was taken is problematic for Niksun. The decision might have been taken rationally and it might not. The judge could not decide that the decision was taken rationally unless he at least knew what was actually taken into account. Otherwise, as was suggested in argument, the commission level might have been picked by throwing darts at a dart board – or perhaps by tossing coins.' (para 25) The Court concluded that, 'the absence of evidence from Niksun as to the decision-making process meant that he could not assume that the decision was a rational one...' (para 26).

Conclusions

74. As PC and PD did not attend to be cross examined on their evidence and did not even sign their statements, we have discounted their evidence.

75. We found the respondent's approach to its presentation of its evidence to lack credibility and transparency:

75.1. The respondent produced multiple documents relating to the alleged further allegations against the claimant at the start of the first day of the hearing, in very serious breach of a discovery order of 1 November 2020 to produce all documents relevant to the case 4 weeks from the date of the order. By the second day of the hearing, it was still unable to give confirmation to the Tribunal that the documents it had produced were all those relevant to the issue which it had.

75.2. Para 21 of CD's witness statement appeared to have been written for her in a blatantly self-serving manner by the respondent given CD's inability to explain her conclusion that there had been a 'clear and substantial financial gain' by the claimant, and CD's subsequent withdrawal of that part of her statement.

75.3. We found that CD was an honest witness, given her admission that her statement was wrong and her withdrawal of part of it, but that she was totally out of her depth in her role as appeal manager, being apparently influenced to include in her statement information which was wrong, and admitting that she had not decided whether or not the claimant had been instructed to do by CW the matters for which he had been dismissed, despite this being the crux of the basis of the claimant's appeal.

75.4. We found that CW lacked credibility in his evidence.

75.4.1. In the Tribunal Hearing, he came up with an explanation for the second call with the claimant on 28 Nov 2019 and what it covered, when he was unable to answer that point on 7 Feb 2020 much nearer the date of the events.

75.4.2. In his answer to the question of whether he had suggested to the claimant that he had misunderstood, we witnessed his process of testing out what answer to give, trying different ones out and then rejecting his previous response.

76. We did not observe any particular inconsistencies in the claimant's evidence to lead us to doubt his credibility.

77. The respondent submitted that the claimant's actions with regard to charity donations and courier charges were clearly dishonest and a falsification of documents. We found CW's evidence on the acceptable allocation and use of charity donations extraordinary. The practice which he supported of reactivating a trading account (whose numbers would be taken into account for calculating bonus) because a customer had donated to a charity appears to us to be dishonest and a falsification of documents. The difference between this and what the claimant had done appears to us subtle. We note that what CW said was acceptable fell under the same description of a gross misconduct offence as per PD's dismissal letter of 7 Jan 2020 IE processing charity donations against non-trading customer accounts.

78. We also found CW's statement that charity money was used as an honesty box if a customer did not have the money to pay incomprehensible and highly unlikely; we

find it entirely incredible that a customer would be able to take an item without paying for it because they had made a donation to charity. In short, the whole issue of the treatment by the respondent of the charity money was opaque and suspect.

Final written warning

79. At the heart of this case is the question of whether or not the respondent's manager, CW, knew that the claimant had been following his instructions in the claimant's treatment of the charity money. CW consistently denied that this was the case and the claimant consistently said it was. We must therefore look at other evidence to reach a conclusion. Since the claimant is claiming constructive dismissal, the burden of proof is on him to prove his case.

80. We consider that the following point to CW not having instructed the claimant in this way:

    80.1. No other managers in CW's region were found to have dealt with charity money in the same way;

    80.2. The claimant was unable to say when CW gave him these instructions

    80.3. The claimant signed notes which CW produced at the meeting on 3 Dec 2019, which did not reflect how the claimant said the meeting went. However, we consider this is explained, if the claimant's version of events is accepted, by the fact that the claimant was trusting CW's assurances that he would get the issue sorted for him.

81. We consider that the following point to CW having instructed the claimant to deal with charity money in the say he did:

    81.1. CW's explanation of treatment of charity money which was acceptable was fundamentally similar to what the claimant was doing in that charity money donations were allocated to dormant accounts with the effect of reinstating them, when the person donating had not in fact bought anything from the store. We do not accept that there is some fundamental difference between making this allocation if the person walked into the store and it they were randomly selected. Although the respondent suggested in closing submissions that the former was a legitimate marketing activity to provide a discount card, we heard no evidence supporting this;

    81.2. CW did not react to the claimant telling him on 14 Nov 2019 that the exceptionally high number of branch trading accounts was due in part to the use of charity donations as transactions;

    81.3. CW called the claimant on 28 Nov 2019 after hearing that there was an investigation into the increase in the number of trading accounts at several branches. We do not find it likely that CW would have reacted to this news to suddenly consider that the claimant was abusing charity donations when he did not react at all on 14 Nov 2021; unless he knew that there was something questionable about the claimant's use of charity money;

81.4. In a meeting with CD on 7 Feb 2020, CW said he could not remember what the second call with the claimant had been about on 28 Nov 2019. However, in the Tribunal, he said it was of the same content as the first call. We consider that the inconsistency, with CW apparently having a better recollection by November 2020 than he had in February 2020, reflects the fact that CW had something to conceal about the content of those calls. We consider it most likely that what he had to conceal was the fact that the claimant's account of the calls was accurate;

81.5. CW failed to have a note taker with him in his investigation meeting on 3 Dec 2019, despite admitting that he knew he should have had one. The notes he produced were only two pages long despite the meeting lasting 53 minutes suggesting they did not represent a true reflection of the meeting. We consider it likely that CW held the meeting alone because he knew that the claimant would say he was acting on CW's instructions and he wanted to control the situation, and that the notes were so short because they did not reflect all that was said in the meeting.

81.6. Immediately after this, the following morning, the claimant called HR and informed them that CW had refused to include in the previous day's notes the fact that the claimant said he acted on CW's instructions, and that CW called him on 28 Nov 2019 and told him to stop doing that thing he had told him to do.

81.7. RH's evidence to PW was that the claimant had been told to handle the charity money in the way he had. We are not concerned that RH said that the claimant learned this at a branch manager's meeting whereas the claimant said this was not the case and RH must have assumed this. The essential important point is that the claimant had clearly informed RH he had been told to handle the charity money in this way.

81.8. CW asked RH on 23 Dec 2019 if the investigation was about the 'conversation which me and [the claimant] had'. CW was taken off the investigation on 4 Dec 2019. Unless CW had had a suspect conversation with the claimant, or the claimant had alleged to him in the meeting on 3 Dec 2019 that this was the case, we do not see how CW would have known to have asked about such a conversation.

81.9. We have found CW's evidence to have been of questionable credibility.

82. Weighing the balance of the evidence, we find that it overwhelming supports the claimant's version of events and that the claimant has fulfilled the burden of proof of proving that he was instructed by CW to account for the charity monies in the way he did. We accept the claimant' account that CW told him that he would sort the issue and that CW did not need to worry about it.

83. We that there was a breach of trust and confidence by the employer in imposing a final written warning, in circumstances where the line manager, who was in a very senior position, as Regional Director, had instructed the claimant to act as he did. The claimant would naturally have felt a complete lack of trust in an organisation where he was given a final written warning for something which a senior manager had instructed him to do, and that senior manager had not defended him. This is

reflected in the claimant saying to CW in the call on 6 Mar 2020 that there was a 'massive trust issue'. If PD had listened to what CW told him on 24 Dec 2019, he would have realised that CW was telling that charity money was being booked against accounts that were not trading, and this was essentially the gross misconduct he accused the claimant of in the dismissal letter.

84. The respondent argued that it should have been clear to the claimant that what he was doing was wrong, because it was clearly dishonest and false accounting, and that he should have questioned it with someone else. We do not accept this. What CW said was acceptable treatment of the charity money appears to us to be dishonest and false accounting. We do not see, therefore, how the claimant could be expected to distinguish. Moreover, his manager was in a senior position as Regional Director.

85. The claimant's handling of the courier charges was not the focus of the Tribunal hearing, but for completeness, there was no dispute that the claimant came up with the idea of applying them to dormant accounts to reactivate them. Given what CW had told him to do with charity money, we consider it reasonable that he should have viewed his idea as acceptable.

86. We do not consider that the claimant waived the giving of the final warning prior to resigning. Although he gave evidence in the Tribunal that he was overjoyed when the appeal was overturned, his communications to the respondent after that expressed his lack of trust and the need to resolve matters before he could return to work.

<u>Alleged failure to thoroughly investigate the complaint that CW had instructed the claimant to account for charity donations in a particular way</u>

87. This is clearly connected to the issue we have gone through above.

88. In the meeting with CW on 11 Dec 2019, PW did not specifically question CW about the claimant's allegation that CW instructed him to act as he did. He allowed CW to get away without addressing the issue.

89. In PD's meeting with CW on 24 Dec 2019, CW's responses to PD should have alerted PD to the fact that something was amiss. On the one hand, CW said that it had never been suggested that managers could select non trading accounts and put charity fridge donations through them. On the other hand, CW had told him that he used charity fridge donations to increase the number of trading accounts. Clearly, these two pieces of information are contradictory. PD did not ask any further questions.

90. CD did not ask CW about the claimant's allegation that CW had instructed the claimant to act as he did. She did not decide the issue.

91. We consider that the respondent did fail adequately to investigate the complaint that CW had instructed the claimant to account for charity donations in a particular way. Given that this was the claimant's fundamental defence against a gross misconduct, the failure breached the claimant's trust and confidence in the respondent.

CW informed the claimant that the respondent was starting a new investigation into three issues, on 6 Mar 2020

92. We do not consider that CW informing the claimant of the three issues which were being investigated was a breach of trust and confidence. We do not find that the investigations were started in bad faith to get rid of the claimant. We found CW's oral evidence on how he came to know the issues to be investigated to be credible. It seems to us unlikely that he would have been able to make up the account he gave on the spot in the Tribunal hearing.

93. We find it reasonable to inform an employee in the claimant's position, who was in new employment, that there were further investigations, so that he can make a decision on whether to give up that job and return to his former employment, being aware of all the facts.

94. This is not to say that we do not understand that the claimant was concerned that the investigations may be an attempt to dismiss him the context of his lack of trust in the respondent from previous events. However, we do not consider that there was a breach of trust and confidence by the respondent in its actions.

Kevin Williams dismissing the claimant's concerns

95. We accept that KW did not address at all the claimant's voiced concerns that he was being intimidated to scare him off returning to work, the claimant's statement that he would not return with a warning against his name, his proposal that he be trained instead, and his questions about the further investigations.

96. We consider that, in the context of discussions with the claimant about his return to work, this indicated that the respondent was not interested in addressing his important concerns, and that it amounted to a breach of trust and confidence. If it is not serious enough to amount to a breach of trust and confidence in its own right, we consider it a last straw in the sense set out in *Omilaju.* Taken in conjunction with the earlier acts, on which the claimant relied, it contributed to the breach of the implied term of trust and confidence. It was not an entirely innocuous act by the respondent.

Bonus

97. The issue of the bonus entitlement is relevant to the constructive dismissal claim and the independent claim for breach of contract in failure to pay the bonus.

98. We note the guidance from *Braganza* as referred to in *Hills* that contractual discretion must be exercised in accordance with both limbs of the *Wednesbury* test, namely that it was not unreasonable and that all relevant matters and no irrelevant matters were to be taken into account. The respondent did not contest that this guidance was correct.

99. We therefore consider that the claimant was contractually entitled to his bonus payment for the following reasons:

    99.1. We consider that the section of the branch manager annual bonus plan 2019 we have set out at para 16.1.2 is a key provision ('Manipulation Rule').

The overarching Travis Perkins Group plan ('Group Plan') was subject to any additional rules in the individual plans of which the Manipulation Rule was one. The Manipulation Rule was directly relevant to the factual nexus as the respondent's case against the claimant was fundamentally that he had misapplied the charity money donations to increase his bonus entitlement. Given the presence of this rule relevant to the factual nexus, we consider it outside the discretion of the respondent to apply general rules in the Group Plan giving discretion over payment of bonus in light of individual performance or the presence of a live disciplinary warning.

99.1.1. The Manipulation Rule' states that the discretion of the Deputy CEO is required to withhold bonus in these circumstances. The respondent was unable to give evidence that the Deputy CEO had been involved in the decision and this person certainly did not attend to give evidence as to his exercise of the discretion so that we could judge if the *Wednesbury* test had been satisfied in a decision to withhold bonus.

99.1.2. There are therefore grounds for thinking that the respondent's decision was not reasonable and so the burden of proof shifts to the respondent to show that its decision was reasonable.

99.2. Even in the absence of the Manipulation Rule, we had no evidence from the decision maker in relation to the bonus. As in the case of *Hills*, this is problematic for the respondent. We cannot assess whether the decision to withhold bonus was taken rationally. The only information on the decision is KW's statement in his email of 12 Mar 2020 that 'as you have a final written warning, the business reserves the right not to pay bonus'. We do not know if this was the grounds relied on by the decision maker as that person did not give evidence, and we do not know whether they took all relevant matters into account.

99.3. We consider that that the claimant should not have been issued with a final written warning as we have set out above. Therefore, it is not reasonable for the respondent to withhold the bonus because of a final written warning against him.

100. Because the claimant was entitled to his bonus, it was a breach of trust and confidence for the respondent to withhold it, and also a fundamental breach of his contractual right to the bonus.

<u>Constructive dismissal claim</u>

101. We have found two fundamental breaches of contract by the respondent, breach of the claimant's right to be paid his bonus and breach of trust and confidence.

102. The respondent argued that the claimant did not resign in response to these breaches, but because he knew he was going to have further disciplinary investigations and he knew he was culpable in these matters. We do not accept this. Had this been the case, we consider it far more likely that the claimant would have resigned after his call with CW on 6 Mar 2020, when he was told about the

further investigations, rather than writing to KW to try to get resolution of his concerns.

103. We find that the claimant resigned because of the matters he referred to in his resignation letter. These were: Imposition of a final written warning; the withholding of bonus; and the inadequate investigation into CW. These are matters which we have found to be fundamental breaches of contract. We do not find that any other fundamental breach of contract resulted in the dismissal; if they had, we consider the claimant would have referred to them in the letter. We know from his comment to CW in the call on 6 Mar 2020.

104. Accordingly, we find that the claimant was constructively dismissed.

Unfair dismissal claim

105. We find that the claimant was unfairly dismissed. The respondent cannot successfully rely on misconduct as the potentially fair reason for dismissal. The claimant did not commit misconduct. The respondent's own process did not find that dismissal was warranted, since it was overturned on appeal. The respondent's investigation process was inadequate in its failure to thoroughly investigate the claimant's complaint against CW.

Claim for notice pay

106. As above, the claimant did not commit a gross misconduct in respect of his treatment of charity and courier payments.

107. We should address, for completeness, the allegation that the claimant deliberately manipulated the trading account figures in order to be paid a bonus and this made his action misconduct. We do not accept this point for three reasons:

107.1. The culture and instructions to branch managers was to increase the number of trading accounts; this was what was drummed into them. Therefore, the claimant doing this was complying with those instructions. This is consistent with his allocating the payments to multiple accounts, not just one;

107.2. The practices which CW advocated with regard to charity accounts may be seen as fraudulent and false accounting, but the apparently business accepted them. We cannot see that something fundamentally similar done by the claimant can be viewed as misconduct in those circumstances;

107.3. The claimant as an experienced branch manger knew that he was on target to get his maximum bonus in any event and this is supported by the fact that, stripping out the disputed accounts, he earned his maximum bonus by the end of the year.

108. The claimant would not be entitled to notice pay if he had committed any gross misconduct prior to his dismissal, as per *Boston Deep Sea Fishing*. We do not find that there is the evidence to show that the claimant committed gross misconduct in relation to the matters raised by the respondent in it further three investigations.

The investigations were dropped when they had barely started and the claimant did not have a chance to state his case on them.

109. Therefore, the respondent breached the claimant's contract when it withheld his notice payment and his notice pay is due to the claimant.

Signed electronically by me
16 November 2021
Employment Judge Kelly