EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104691/2020 and 4104688/2020

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Held in Glasgow on 30 and 31 August; 1 and 2 September; 3 and 4 October 2022

Employment Judge B Campbell

10 **Mr Neil Morrison** — **First Claimant Represented by: Ms L Cartwright - Solicitor**

15 **Mr Peter Irvine** — **Second Claimant Represented by: Ms L Cartwright - Solicitor**

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Monarch Transport Limited — **Respondent Represented by: Mr P Kerfoot - Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that:

1. Unlawful deductions were made from the claimants' wages and the respondent is ordered to pay to each claimant the amount unlawfully deducted
30 as follows, net of lawful deductions for income tax and National Insurance contributions:

    a. £6,283.22 to Neil Morrison; and

    b. £1,917.67 to Peter Irvine,

with interest at the rate of 8% per annum from 30 April 2020 until payment.

35 2. The claimants were constructively unfairly dismissed by the respondent and the respondent is ordered to pay compensation of:

a. £1,914.00 to Mr Morrison and

b. £1,914.00 to Mr Irvine.

REASONS

Introduction

5 1. These claims arise out of the claimants' employment with the respondent which ended with their resignation. Mr Morrison resigned on 1 May 2020 and Mr Irvine resigned on 30 April 2020, both by giving notice. Both claimants allege that they were constructively unfairly dismissed. They also claim that certain payments were due to them and have been unlawfully deducted from 10 their pay. The respondent denies the claims.

2. The hearing took place over six days in person. Both parties were legally represented.

3. The claimants each gave evidence on their own behalf. In addition, they called a Ms Amanda Robertson and a Mr Thomson Gracie, both former employees 15 of the respondent.

4. For the respondent, evidence was heard from Mr John Weir and Mr Derek Anderson, both of whom are directors, and from Mr Anthony Owens and Mr Gordon Martin, who are current employees of the respondent.

5. Generally, the evidence of each witness was found to be credible and reliable, 20 but where there was conflict over a material matter that is dealt with below as part of the findings of fact and/or discussion and decision.

6. The parties had prepared a joint bundle of documents. Numbers appearing in square brackets below are references to the page numbers of the bundle. A small number of items were added as the hearing progressed.

7. The hearing was to determine both liability and, if relevant, remedy. The claimants each provided a schedule of loss.

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

are both thanked for the detail and quality of their submissions, as well as the assistance they provided generally to the tribunal and the manner in which they presented their respective cases.

Legal issues

A list of issues was agreed between the parties and is attached to this judgment as an appendix.

Applicable law

Constructive unfair dismissal

9. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

10. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or repudiatory, breach of the contract. The breach may take place or be

anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. The employee must resign in response to the breach, and not delay unduly in doing so or they may be deemed to have accepted or 'affirmed' the breach.

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

12. Whether a dismissal is direct or constructive, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4)

ERA, taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

Unlawful deduction from wages

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

14. Section 27(1)(a) of ERA clarifies that a bonus payment will fall within the definition of 'wages', whether payable under a claimant's contract of employment or other terms of engagement or otherwise.

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

16. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 of ERA. There

are detailed requirements as to the timing of complaints to ensure that a tribunal can determine them. In short, if a claim is about a single deduction

25 the claim process (initiated by way of commencement of Early Conciliation through ACAS) must be presented must begin within three months of it occurring. If a claim is about a series of deductions, the process must begin within 3 months of the last alleged deduction.

Findings in fact

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

General/background

1. Mr Morrison was employed by the respondent between the dates of 1 March 5 2017 and 1 May 2020 Mr Irvine was employed between 23 April 2018 and 30 April 2020. Both claimants resigned from their employment by giving notice.

2. The respondent is a transport logistics or 'freight forwarding' business. It effectively acts as a broker between clients who require goods and third-party hauliers. Both claimants were employed as Traffic Managers (or Traffic 10 Account Managers – in this judgment the term adopted is Traffic Manager). They each had a set (or 'book') of clients for whom they would arrange transport services on a job-by-job basis. The respondent had between five and six Traffic Managers in total from time to time.

3. In simple terms, a client would contact a Traffic Manager to request a quote 15 for a particular transport job with the details of the load, start point and destination. The Traffic Manager would then seek quotes for the job from available hauliers and provide their own quote to the client, incorporating the haulier's cost and a profit element for the respondent. The Traffic Managers had a degree of discretion in the price they quoted for the job, and therefore 20 the amount of profit earned.

4. The respondent is run by two directors, John Weir and Derek Anderson. They both were essentially the line managers of the claimants. They are also the owners of the respondent. They bought out the previous owner, Mr David McFarlane in December 2017.

25 **Contracts of employment and bonus arrangements**

5. Mr Morrison was provided with a written statement of terms of employment [69-82]. He signed it on 1 September 2017. Clause 6 of the document sets out terms in relation to possible bonus payments. It states:

   '6. BONUS

   6.1 The Company may in its absolute discretion pay to you a bonus of such amount, at such intervals and subject to such conditions as the Company may in its absolute discretion determine from time to time.

5 *6.2 Any bonus payment to you will be purely discretionary and shall not form part of your contractual remuneration under this agreement.*

   6.2 If the Company makes a bonus payment to you in one particular year it shall not be obliged to make subsequent bonus
10 *payments in subsequent years.'*

6. Mr Irvine was provided with a similar but not identical statement of his terms, which he signed on 23 April 2018 [92-106]. His contract has a clause 6 in identical terms to Mr Morrison's contract, save that it goes on to say that he was to be paid no bonus for the period between his start date and 31
15 December 2018.

7. There is a clause 7 in Mr Irvine's contract, which does not appear in Mr Morrison's contract. It states:

   '7. START DATE 23RD APRIL 2018 TO DEC 31ST 2018 PAID AT THE EQUIVALENT OF £40K PER ANNUM (PRO RATA) NO BONUS.

20 *Jan 2019-December 2019 will be £40k salary + bonus (3% of annual gross profit after yearly target of £72,000 is taken off)'*

8. Both claimants considered a bonus to be a significant part of their package of terms, as did other Transport Managers. It was possible to earn an amount equivalent to a significant proportion of annual salary as bonus.

25 9. Mr Morrison's starting salary was £30,000 per annum. In 2018 it increased to £35,000. In January 2020 it was increased to £40,000.

10. Mr Irvine's salary was £40,000 from the beginning until the end of his employment with the respondent. On joining the respondent it was understood and agreed that he would not be eligible to receive a bonus in that year – 2018

– but would become eligible from the beginning of 2019. This was the effect of clause 7 in his contract, quoted above.

11. From year to year the respondent adopted different methods and criteria for calculating what its Traffic Managers had to do in order to receive a bonus, 5 and if so, how much they would earn. There was always a bonus scheme of some sort and it was always based on the individual performance of each eligible employee.

12. In 2017 the bonus scheme involved quarterly bonus payment based on profit earned by the individual in the quarter. Each quarterly bonus was paid in the 10 following quarter. The amount of bonus per quarter was a percentage of salary based on the amount of profit earned. The percentage of salary would increase as profit increased in bands, i.e. between £30,000 and £60,000 profit, £60,000 to £90,000 profit, £90,000 to £120,000 profit, or over £120,000.

13. In December 2017 Mr Weir and Mr Anderson bought the respondent's 15 business from Mr MacFarlane. They had been employees before then, but also became directors and shareholders. Mr MacFarlane had owned the business essentially debt-free with cash reserves, but Mr Weir and Ms Anderson needed to take out a loan to fund the purchase. Mr MacFarlane stayed on in a consultancy role for six months. Before the buyout, Mr Weir 20 and Mr Anderson were Traffic Managers themselves, as well as being joint office managers working under Mr MacFarlane. In that capacity they were the line managers of the other Traffic Managers, including the claimants.

14. Mr Weir and Mr Anderson as the new owners of the business reached the view that the bonus scheme would need to be adjusted. This was part of an 25 initiative to grow the business and make it more efficient, related at least partly to the fact that there was now debt to pay off. The bonus scheme was viewed as being

'unbalanced' in terms of the reward it provided to employees compared to the return gained for the business itself. In 2018 some changes were made. First, any bonus was to be paid at the end of the year and based on the whole year's profit. It would be calculated as 7% of all profit earned in excess of £72,000 by each individual.

15. The 2018 bonus was paid around the middle of December 2018. Mr Morrison earned around £20,000 for the year. This was a lower amount than the year before, when he had only worked ten months of the year. In addition, he had been busier in 2018 than 2017.

16. The bonus scheme adopted in 2019 was the same as for 2018, save that the year was split into two periods of six months, and so a bonus was paid for each half of the year. The £72,000 profit threshold was converted to a figure of £6,000 per month. The bonus was paid at the end of June and around 14 December. Bonus was calculated to, and paid on, the latter date so that employees could receive it before Christmas. Any sales for the remainder of December 2019 were eligible for a bonus under the rules of the next period.

17. A further change for 2018 was that aged or bad debts were not to be deducted from profit figures when bonus was calculated. This had happened previously, meaning that some bonus for a given period could be held back until the customer paid. From 1 January 2018, bonus would be calculated on profit for each period in terms of invoices rendered to clients, and not affected by whether and when those invoices were paid. This was confirmed to Mr Morrison by letter from the respondent in early 2018 [82a].

18. Mr Irvine earned around £9,000 net in bonus during 2019. Mr Morrison earned around £24,500 in gross terms.

Conduct of Mr Weir in latter part of 2021

19. Sometime in the latter half of 2019 Mr Weir became angry and members of staff continually leaving the office kitchen untidy. He threw a grill pan out of the kitchen window, which landed on a grass verge outside. He said that if

25 people did not clean up after themselves, he would remove the right to use the kitchen. This was witnessed by Mr Thomson Gracie, a Traffic Manager at the time. Someone had to go outside and bring the grill pan back in.

20. Around December 2019 Mr Weir and Mr Anthony Owens, a Traffic Manager had an altercation in Mr Weir's office. This was heard by others as their voices 30 were raised. Mr Owen perceived that Mr Weir had criticised him for not handling a customer complaint quickly enough. Mr Owens aggressively approached Mr Weir, who appeared to be restraining himself by holding his hands down at his sides or behind his back. Mr Anderson calmed both of them down. Mr Owens left the building to have a cigarette and regain his 5 composure. On his way out he said he was 'finished' with the company, although he did not leave his role. The individuals made up the next day.

21. Mr Weir was having a conversation with a haulier by telephone in the open plan office space one day. The haulier appeared not to be understanding or accepting what he was saying. Mr Weir became more exasperated as the 10 conversation continued. He banged the telephone receiver against the side of his head in frustration. This was witnesses by staff nearby.

22. Also in the later part of 2019, Mr Weir took hold of a hammer which was to hand in the office and said in front of staff that he was going to go and smash up the Portakabins used by a particular client who had raised what he

15 believed were unfounded concerns about the respondent's service, and who were stalling on payment. This was just a gesture and he did not follow through on the statement.

23. At times there was a sense of tension in the office when Mr Weir was present. He was seen as the more direct and dominant of the two directors. He had a

20 forthright manner. People did not want to upset him. This was not a constant state, and he spent a proportion of his working time out of the office.

24. There were occasions when the atmosphere could be tense in the office in the absence of Mr Weir. There was a culture of working hard to meet targets. There was an element of competition among some of the Traffic Managers,

25 who could be vying for the services of the same hauliers on their jobs. The role could be stressful or frustrating at times, and people could be irritable. Those situations could boil over into arguments but tended to be short-lived and there were no longer-term issues between staff. Strong language and swearing were commonplace among colleagues, for example when 30 expressing frustration with clients or hauliers.

25. Neither claimant was the recipient of any of the behaviour or unfair treatment they alleged against Mr Weir in 2019.

26. Neither claimant made a complaint about the conduct of Mr Weir. Whether informally or as a grievance. Neither raised it confidentially with Mr Anderson, 5 the other owner-director of the business.

27. An administrator and bookkeeper with the respondent named Amanda Robertson resigned from her role on 6 January 2020. She decided to do so during the morning of her first day back of the new year, after hearing of a colleague Mr Jones being dismissed, discussed below. She had a medical 10 condition and felt the role was causing her too much stress. She had been allowed to reduce her working hours, but still felt that she did not want to carry on in her role.

28. A copy of her email was produced, although it was in the form of an unsent draft. Her evidence was that she did email at least Mr Weir on those terms.

15 She said that she was resigning with immediate effect, that that the last meeting at which her salary was discussed did not go well, and that she had been 'terribly upset'. She went on to say that:

“The way I was spoken to was unacceptable and I felt that the manner was aggressive. I feel I do so much within my office – I have been doing Book 20 *Keeping and Administration, I feel that I am overworked and under appreciated.*

'Subject to the Equalities Act 2010 I also feel that you have not made any reasonable adjustments for parking which I have been requesting a space for a while. I have been given a space at the bins however my car has been 25 *getting damaged. This is not acceptable.*

'I no longer feel comfortable working in this environment. Job security and staff morale is at an all-time low and I no longer feel my job is secure."

29. Ms Robertson felt that Mr Weir had been intimidating in his response to her request for a pay increase during the meeting referred to, which was in

30 October 2019. She felt that he challenged her on her value and contribution to the business. She had had to deal with new office systems which had multiple teething problems, and had asked for the pay increase to reflect the additional work she had put in. She had walked out of the meeting because of how upset she had become.

5 30. Ms Robertson witnessed Mr Weir being in a bad temper in the office. This would usually be caused by contractors. She noticed this particularly from the point he and Mr Anderson took over the business. She could not say how frequently this occurred. She said that on those occasions his face would be red and he would appear annoyed. One of the other office assistants named

10 Louise would often speak to him and this would calm him down. Ms Robertson did not witness him raising his voice or behaving aggressively towards any employee of the respondent. She occasionally heard raised voices coming from Mr Weir's office but was unaware of who he was speaking to. The doors had opaque glass.

15 31. Ms Robertson stated in her evidence that from the beginning of January 2020 the atmosphere in the office was more subdued. People were trying to get their work done as normal, but were unhappy.

Introduction of the respondent's own trucks

32. Around October 2019 the respondent purchased four trucks of its own. They 20 were initially planned for use on a regular run between London and Scotland, but this was part of a joint venture with another business which turned out not be feasible. The respondent encouraged its Traffic Managers to give priority to using one of the trucks on any jobs they were asked to quote for. Whether one of the trucks was an option would be subject to the client's specifications

25 in terms of load and location. The truck had to be the right size and type for the load, and it had to be available in or near the location where the client's goods were

to be collected. Under normal circumstances each truck was capable of making one longer trip per day, for example from Birmingham to Glasgow, or possibly two shorter trips.

30 33. The Traffic Managers were generally reluctant to book a Monarch truck on a job, as they had to accept a flat profit rate of 10% on the job if they did so,

whereas by using a third party haulier they were likely to be able to make a higher profit, typically around 20% and sometimes more. It did however make sense from the respondent's point of view that its own trucks be used rather than hauliers where circumstances allowed. Both claimants accepted that the respondent had the contractual power to ask them to use its trucks on their jobs. The claimants were each booking between 75 and 100 jobs per week on average.

34. The directors of the respondent considered that the Monarch trucks were not being fully utilised by the Traffic Managers for the above reason. On 4 March 2020 they told the Traffic Managers that they had to give priority to Monarch trucks wherever possible. This was a firmer line on the practice than they had taken before. The effect on morale was negative, coming on the back of the new bonus rules, discussed below.

Changes to bonus scheme and other events in January 2020

35. At the beginning of 2020 the respondent had the following Traffic Managers – Mr Morrison, Mr Irvine, Anthony Owens, Gordon Martin, Eddie Jones, Thomson Gracie (working part time) and Robbie Irvine (working in a junior role). All but the latter two were eligible for the bonus scheme. Robbie Irvine is the son of the claimant Mr Irvine.

36. In early January 2020 the respondent dismissed Mr Jones. He had not been performing adequately against his targets and had caused some issues with clients by making mistakes. He had less than two years of service. The respondent planned to redistribute his clients among the other Traffic Managers. One of his clients, Doorset Technology Limited was given to Mr Irvine around 9 January 2020. Mr Irvine had not done any work for that client before then.

37. Also at the beginning of that month, all of the Traffic Managers were individually asked to meet with the directors. New bonus arrangements were explained to them. The changes had been disclosed in a more general way in December 2019, but the specifics were now being explained. They were given personal

profit targets which had to be met before a bonus would be earned. The targets were weekly profit figures, but profits would be measured on a monthly basis. Targets were linked to the salary of the individual. Four salary rates were listed, at £5,000 intervals between £25,000 and £40,000. On a pro rata basis the new targets were more demanding than the £72,000 annual target of the previous years. If the target was exceeded in one month, any excess would not carry over to the next month. Each month was therefore assessed in isolation.

38. Bonus was to be calculated on a monthly basis, but paid quarterly in the month following the end of the quarter (other than in December, when it would be paid in that month). The amount of bonus payable for each month was 7% of the excess above the same figure as before, namely £72,000 per annum, but split as £18,000 per quarter (or £6,000 per month). As such, the way a bonus was calculated did not change, but there was an additional initial hurdle of first reaching a given profit target each month, which was higher the more the individual earned in salary.

39. Another key aspect of the rules for 2020 was that profit figures would be deducted from an individual's monthly totals if the customer became insolvent and therefore could not pay the relevant invoices. This had not been specified before, although the situation was rare.

40. The respondent's rationale for the new terms was that the Traffic Managers would be motivated to maintain sales levels more consistently throughout the year. Where their client base was more seasonal they would be given new clients to fill in the gaps when work was quieter, for example from Mr Jones' former client list. Their weekly or monthly sales target would be set at a level below their busiest period, but still enough to stretch them. The model was also designed to open up a more transparent route to salary increases if targets were consistently met. Lower and more easily achievable targets were set for people on lower salaries, which was intended to lead to a step up in salary band after 12 months of consistent performance. To continue to earn bonuses, higher paid individuals would have to exceed higher targets. The respondent took advice on the new

terms from an external company which was installing a new customer relationship management system.

41. Despite the increased profit targets being set, the respondent believed that the Traffic Managers would still be able to quality for a bonus. They believed that the targets were demanding but achievable. They did not want their employees to stop earning bonuses, but wanted the respondent to make more 5 income at the same time. They were prepared to review how the scheme was working after a period, and planned to have quarterly review meetings with those eligible. They were willing to look at cases where an individual had narrowly missed out in a given month. However, they did not make employees aware of this. They also believed that by spreading Mr Jones' clients among 10 the other Traffic Managers, their numbers of jobs would be boosted.

42. After the meetings an email was sent to the Traffic Managers on 9 January 2020 [65-66]. This was the key document containing the details of the 2020 scheme, as summarised above.

43. The new bonus terms were not well received by the Traffic Managers. It was 15 perceived as being more difficult to hit the sales target consistently. The move to monthly calculations meant that there was a greater risk of no bonus being earned in a given month, for example if the individual was on holiday or off ill, or if their client base was particularly seasonal in their operations, creating peaks and troughs in activity levels. There was concern that the rules were 20 overly complex and had not considered all possible scenarios.

44. Mr Morrison was confident that he could meet his new targets, but realised there was a smaller margin of error. Mr Irvine was more concerned and believed he would struggle to meet his new targets.

45. In mid-January the directors told the claimants individually what their weekly 25 profit targets would be. Mr Morrison's weekly target was set at £8,000. Mr Irvine's was to be £7,000.

46. On 22 January 2020 Mr Irvine sent an email from his work account to his personal account containing a list of actions required in order to set up his own freight forwarding business, which he had drafted [108a]. This was indicative of the level of disquiet the new bonus terms had caused him. He was seriously considering working options elsewhere, including setting up on his own. He had also sounded out other parties about potential roles they could offer him.

Mr Irvine's email of 12 February 2020 and subsequent meetings

47. On 12 February 2020 Mr Irvine stayed behind after work and drafted an email 5 to the directors [109]. It began by saying that he liked working with the respondent and saw his longer-term future there. He went on to say that he had, however, been offered a 'good package elsewhere' which he was considering seriously. This was a genuine job offer from another company with a higher starting salary but less generous bonus terms, although that was
10 not said in the email. He asked for clarity in relation to what was required for him to receive a quarterly bonus. He wanted it to be calculated as 7% after achieving £72,000 per year, or £18,000 per quarter, i.e. the method used in 2019 but split through the year. He did not want it to be subject to attaining the new weekly or monthly targets which the respondent had just introduced.

15 48. On his arrival at work the next morning, Mr Irvine was asked by Mr Weir to meet and discuss the email. Mr Irvine considered that Mr Weir was 'seething' at the email. Mr Weir agreed he was irritated, but more because Mr Irvine had not raised his concerns verbally and face to face. Mr Weir discussed some aspects of the email with Mr Irvine. He asked Mr Irvine why he had not been
20 'man enough' to make the points face to face. Mr Irvine replied that he felt more comfortable setting things out that way and wanted to get all of his points across without being interrupted. Mr Weir asked about the other job opportunity. Mr Irvine felt uncomfortable discussing it. Mr Weir said that Mr Irvine had 'shat it' when told his new targets. He also said he was sick of the

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bonus scheme, and that nobody newly joining the respondent would be offered it. The meeting ended by Mr Weir forcefully closing his laptop and leaving the room. This left Mr Irvine uncertain over where things stood.

49. Mr Weir had raised his voice in the meeting to the extent that Mr Owens heard him from outside the room. When Mr Irvine returned to his desk Mr Owens remarked that that was why nobody else had bothered to voice their concerns about the new bonus terms.

50. Very soon after Mr Irvine returned to his desk Mr Anderson telephoned him. He had been told by Mr Weir about the meeting. Mr Anderson said not to worry, and things would be smoothed over. Mr Irvine said he was very unhappy with how he had been spoken to by Mr Weir.

51. In an attempt to resolve matters, Mr Irvine met with Mr Weir and Mr Anderson the following day, 14 February 2020. The mood of the meeting was calmer, although there was no further progress over the matters Mr Irvine raised in his email. The bonus rules were not going to revert back to those of the previous year and the new targets would apply. He felt himself that he did not want to revisit the bonus scheme for fear of upsetting Mr Weir again. Mr Weir considered it agreed that a line had been drawn under the previous heated exchange of views.

52. Mr Irvine's position on the alternative job offer he had received was that it was a genuine option, but he would have preferred to remain with the respondent on bonus terms identical to those of 2019.

Review meetings in early March 2020

53. Both claimants attended a monthly review meeting with the respondent's two directors in early March 2020. Those were principally to discuss sales performance against targets for December 2019 and January and February 2020, as well as to look forward to the coming months.

54. Mr Morrison's review meeting was on 6 March 2020. In it he was accused by Mr Weir of being a 'bad apple' on account of the effect Mr Weir believed he was having

on the morale of the Traffic Managers as a whole following introduction of the new bonus rules, and because Mr Weir believed he was 25 disregarding the instruction to use Monarch trucks on his jobs. Mr Weir said he believed Mr Irvine and another Traffic Manager named Gordon Martin were also 'bad apples' for similar reasons. Mr Weir said that the door was open if he wished to go and work elsewhere. He said he could take Mr Morrison's best client away from him, although this was more an indication of where the power lay in the relationship than a real threat. Had he done so, Mr Morrison would not be able to earn a bonus. At times Mr Weir's voice was raised and

people outside the office where the meeting was taking place could hear. Mr Morrison was not expecting to be addressed in this way in the meeting. He thought it would be a more normal discussion about monthly performance figures. As his figures were good, he expected no issues to be raised. He was
5 taken aback.

55. Mr Weir had prepared a note ahead of the meeting on his notepad. Mr Morrison later took a photograph of it [83]. It is headed up 'Neil – BAD APPLE'. It has bullet points which Mr Weir put to Mr Morrison in the meeting. It contained Mr Morrison's sales figures for January and February, which
10 suggested he had earned a bonus in those months. It had a note that the claimant had not used Monarch trucks on any jobs in January, he had used them on seven jobs in February and in March to the date of the meeting he had used them twice. This was less than the respondent expected.

56. The evidence from Mr Weir in relation to what was said at the 6 March 2020
15 review meeting was different. He said that he had merely asked Mr Morrison if there were any bad apples, but did not accuse Mr Morrison (or anyone else) of being one. His account of the meeting was a more positive and calm discussion. Mr Morrison's recollection is preferred, particularly as it is more consistent with Mr Weir's own note and because raised voices were heard by 20 third parties from outside of the room.

57. Mr Irvine's review meeting with the directors was also on 6 March 2020, but later in the day than Mr Morrison's meeting. It was discussed that his profit figures for 15

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to 31 December 2019 would be assessed under the 2020 bonus scheme rules to determine whether anything was payable. Mr Irvine calculated that on this basis he would earn £270. He had also calculated that he had earned £1,250 for December 2019 and January 2020 combined. The directors accepted his calculation as correct. He was told he would be paid a bonus of some description for February, even though he had been on holiday for a week and had not reached his monthly target. No amount was discussed at that time, but he was to be given something based on his average performance level.

58. There was also discussion about morale in the office. It was recognised to be low as a result of the new bonus rules. Mr Irvine had heard voices being raised in Mr Morrison's review meeting. Mr Irvine was also called a 'bad apple' by Mr Weir, and Mr Morrison and Gordon Martin were also referred to as bad apples.

5 It was not discussed or explained why he was viewed in this way. Mr Weir said he would not take so long to get rid of the bad apples as he had taken getting rid of Eddie Jones. This was a reference to Mr Jones being dismissed at the beginning of January 2020 for inadequate performance, although at the time of this meeting Mr Irvine did not know why he had been dismissed.

10 59. At one point the parties discussed a complaint made by the client Doorset Technology Limited. This was the client which had been given to Mr Irvine from Mr Jones' list. There were issues with a particular delivery, which had been taken to the wrong location initially, and some of the load had been damaged. Mr Weir said how he would have handled the complaint differently. 15 Mr Irvine took his words as criticism of his own way of handling the client. He believed he had put significant effort into resolving the client's issues. In the meeting Mr Weir again said he was sick of the bonus scheme, and that it would not be made available to any new employees.

60. The Traffic Manager Anthony Owens had a review meeting in March 2020. 20 He was asked by Mr Weir and Mr Anderson whether he felt there was a 'bad apple' in the team. He said no. He was asked whether he thought there was a bad atmosphere in the office. He replied that there was, as a result of other Traffic Managers being concerned about their potential to earn bonus. His understanding was that the claimants as the highest paid Traffic Managers 25 with the most demanding targets were the most unhappy.

61. Gordon Martin had a review meeting at this time, and was also asked if he knew of any bad apples in the office. He said he didn't think there were any.

62. Some time in or around March 2020 Mr Owens emailed a list of details of hauliers used by the respondent to various individuals, including himself and 30 both claimants at their personal email accounts. The list consisted of the hauliers' names and email addresses. The information was publicly available.

Both claimants were known to be unhappy about the new bonus terms and had discussed potentially leaving the respondent. They asked Mr Owens for a copy of their contacts, which was a list of each of the businesses that they had added to the respondent's list of hauliers. Mr Owens was more familiar 5 with the respondent's IT system and knew where to find them. He sent the whole of the respondent's list rather than just the names each claimant had added.

Mid- to late-March 2020 - Covid-19

63. As a result of the emergence of the Covid-19 pandemic in March 2020, the 10 respondent took the decision to defer payment of any bonus payments indefinitely. There was increased uncertainty in relation to whether its clients would pay on time, whether they would remain open and whether they would continue to be solvent. Before that it was not uncommon for clients to take 60 days or more to pay their invoices. The respondent was being advised by its 15 external accountants, who warned that their cashflow would be drastically reduced within 6 weeks of going into lockdown.

64. Around 17 March 2020 Mr Weir addressed employees about the effect of the pandemic. He did so via a conference call as he was isolating at home. He was asked by one person about the effect on bonuses. Mr Weir said it was 20 not the respondent's immediate priority.

65. On or about 20 March 2020 Mr Irvine woke up in the morning feeling unwell. He offered to work from home. Mr Anderson asked him to telephone NHS direct, which he did. He was told that his symptoms were not consistent with Covid-19, but to monitor how he felt. Mr Anderson took the decision to place 25 Mr Irvine on two weeks' illness leave. Mr Irvine's son Robbie, also an employee of the respondent, lived with Mr Irvine at the time. Mr Anderson said that he would also have to take two weeks of sick leave. Both were paid statutory sick pay for those periods.

66. Mr Irvine (senior) emailed Mr Anderson about this [110]. He queried why he 30 could not be allowed to work from home as he said other colleagues had been allowed to do. He said that he and his son were *'both feeling rather confused*

and let down with our employer by this current decision and situation given that 1 of the company directors has self isolated himself for 7 days this week and is due to return after 1 week isolation…'. This was a reference to Mr Weir who had returned from a large public event and had been self-isolating as a precaution. Mr Irvine asked for a response to his email in writing.

67. Mr Anderson replied by email later that day [111]. He said he considered Mr Irvine to be sick and unable to work, judging by the symptoms he had described. He had asked Mr Irvine's son to stay at home as a precaution. He believed the advice given by NHS 24 was consistent with that given to someone potentially showing the symptoms of Covid-19. He said that those of Mr Irvine's colleagues who were allowed to work from home were parents or parents-to-be of children. He said that advice given to Mr Weir at the time seeking medical advice was to isolate for seven days, and he would have isolated for 11 days by the time he returned. He did not agree that Mr Irvine or his son had been inconsistently or unfairly treated.

68. Mr Irvine decided to cancel a week of holiday he had arranged in August 2020, to take those days as annual leave as part of the period he had been ordered not to work. He did so to lessen the financial impact of the absence.

69. On 24 March 2020 Mr Weir sent an email to various members of staff including the claimants, attaching a document and asking them to get in touch [111bc]. The document said that the respondent would be going into a lockdown period and that in order to safeguard the business all recipients would be asked to accept being placed on furlough. They would therefore receive 80% of their pay for that time. In doing so they were following the rules of the UK government's Coronavirus Job Retention Scheme ('CJRS'). It was acknowledged that it was a stressful time for employees, and their support was appreciated. It was clarified that Mr Anderson would be working from one of the offices in an attempt to maintain use of the Monarch trucks, and one of the accounts staff would be working from home. Two other employees based in Spain would be working almost as normal. Full salary was to be paid up until the end of the month and furlough pay would

apply from 1 April onwards. All recipients were asked to reply with their confirmation of acceptance, or to get in touch if they were not in a position to comply. A link was provided to government guidance on the furlough scheme.

70. Mr Anderson had contacted ACAS for assistance in utilising the furlough scheme. It was believed by the respondent that in sending the email of 24 March 2020 it was operating within the rules of the scheme.

71. Neither claimant went back to the respondent to confirm their agreement to being put on furlough.

72. The decision to put Mr Morrison on furlough was reversed when the respondent became aware that one of his main clients was continuing to operate. This happened after the email of 24 March 2020, but before Mr Morrison resigned on 2 April 2020 (dealt with below).

The claimants' resignations

73. Mr Irvine emailed his resignation to the respondent's directors on the morning of 1 April 2020 [112]. He gave notice and offered to work up until his last day of service, which he calculated to be 30 April 2020. He said he had enjoyed being part of the respondent's team. In evidence he said he had to be careful about how the email was worded, as he may have been asked to work his notice period and because his son was still working there.

74. Mr Irvine sad he believed that his notice period would be paid at full pay and not at 80% under the CJRS rules. He also asked when and if he would receive his bonus payments for 15 December 2019 to 31 January 2020, which he had previously calculated to be £1,250.

75. Mr Anderson emailed Mr Irvine back later that morning [113]. He said that he was disappointed, but would reluctantly accept Mr Irvine's resignation. He said that *'all company bonus payments have been suspended indefinitely due to the current situation with Covid-19 so unfortunately there will be no bonus*

payments made'. He said he would check whether Mr Irvine had any holidays accrued or owing, that Mr Irvine would not need to do any work during his notice period, and that he would check and let Mr Irvine know the situation

with payment of notice pay. He signed off by wishing Mr Irvine all the best for the future.

76. It was generally expected among the Traffic Managers that going forward the scheme would have to be suspended as it was not possible to make the necessary sales levels, but the expectation was that bonuses earned until the end of March 2020 would be paid. This included not only the months of January, February and March but also the last two weeks of December 2019, since the 2019 bonus had been calculated up until the mid-way point in that month.

77. This was the first that Mr Irvine had heard of bonuses not being paid for the first quarter of 2020 or the last two weeks of 2019. He had understood from his review meeting on 6 March that those would be paid to him in April 2020. The directors had agreed the figures he had calculated. He was surprised at the change in approach. However, it did not contribute to his decision to resign, as he was only told about it after he had communicated that decision.

78. Mr Irvine was paid furlough pay at 80% of full salary for April 2020.

79. On 1 April Mr Irvine telephoned Mr Morrison to say that he had resigned. He mentioned what he had been told about bonuses not being paid in April. Mr Morrison emailed both directors in the evening of 1 April 2021 to ask if this was the case [82b]. He said he needed to know where he stood, and that he believed he had earned a bonus for the latter part of December 2019, plus January and February 2020. He calculated that the amount he had earned in that time was £5,520.41. Mr Anderson telephoned Mr Morrison within minutes of the email being sent to say that all 2020 bonuses (and by inference anything earned in December 2019 and not already paid) were being deferred indefinitely.

80. Mr Morrison sent an email to confirm his decision to resign the next day [84]. He said he would honour his one month notice period, making his last day of service 1 May 2020. He mentioned that the respondent's decision not to pay any bonus in April had left him 'disillusioned'. He was however appreciative of the role he had been given and had enjoyed his time working there. He made clear that he expected to be paid the £5,520.41 bonus he considered he had already earned.

81. The respondent accepted Mr Morrison's resignation by way of an email from Mr Anderson also on 2 April 2020 [85]. He said that Mr Morrison would not need to do any work during his notice period, and would be put on furlough under the CJRS for its duration. He would therefore receive 80% of his normal gross pay. He would not be paid any of the bonus amount he had requested. Mr Morrison's main client was still operating at this time, and he would have been working, and paid, as normal but for his resignation. There continued to be work which he could have done during his notice period, but the respondent wanted to cut his contact with its clients.

82. Mr Morrison received 80% of his gross salary during his notice period.

83. Mr Anderson contacted ACAS in relation to the question of what payments he should make during their notice periods. His understanding based on that was that since they had given notice, they could be paid furlough pay rather than full pay. He believed this was different from the situation with another employee at the time, who was given notice by the respondent. He recognised that she had to be paid at her full salary level for her notice.

Post-resignation matters

84. Both claimants decided to remain operative in the freight forwarding market, and set up a company in order to do so. It was named Galaxy Traffic Limited and was incorporated on 22 May 2020. They became directors and took ownership of its issued shares. It competed with the respondent. The claimants approached customers of the

respondent on behalf of the new 25 company. At least one customer raised this with the respondent.

85. Doorset Technology Limited appointed provisional liquidators on 7 July 2020 and was later wound up.

86. Mr Morrison received a letter on 15 July 2020 which was sent by solicitors acting for the respondent [85a-c]. It enclosed copies of Mr Morrison's

30 contractual documents and made specific reference to post-termination restrictions within them. It went on to narrate that he had set up Galaxy Traffic Limited on or around 22 May 2020 as a director and shareholder. It alleged that he was using the respondent's confidential information in doing so, and that he was soliciting the custom of the respondent's clients, doing business 5 with them and enticing employees of the respondent to leave their service, all in breach of his contractual restrictions. It asked him to cease any activity in breach of his obligations, deliver up to the respondent any of their proprietary materials and to give certain written undertakings.

87. Mr Irvine received a substantially identical letter from the respondent's 10 solicitors, but on 14 July 2020 [113a-c].

88. In response to receiving his letter, Mr Irvine deleted the haulier contact list which Mr Owens had sent him earlier in the year. Mr Morrison had done so some time before, after adding the details to a database he was preparing for the new business.

15 89. The respondent brought its employees back to working following lockdown. Mr Martin returned in late April 2020. Mr Owens came back around June 2020. By this point they were only two Traffic Managers left who were eligible for a bonus. They were paid any bonuses they earned in 2020, including from 14 December 2019. Both received a bonus payment around August which 20 included what

they had earned from 14 December 2019 up until that point. They received another payment in or around December 2020 for the remainder of that year.

90. Mr Owens and Mr Martin hit their targets under the 2020 rules between January and March, and then between August and December of that year. Mr Owen's monthly target based on his salary was £17,500 of gross profit. Mr Martin had a higher salary and his monthly target was between £22,500 and £25,000. The months when each did not reach their target coincided with lockdown and other Covid-19 related restrictions in activity.

91. Mr Owens was moved up to the next salary band and bonus target rate at the beginning of 2021. This meant he earned £30,000 per annum rather than £25,000, and had a monthly profit target between £17,000 and £20,000. He moved up a further band midway through 2021 to £35,000 with a target of between £22,500 and £25,000, although this was a departure from the scheme rules which required targets to be met consistently over a 12-month period before the employee would be moved up. He benefitted from taking on some of the clients of the claimants.

Discussion and decision

Claims of unlawful deduction from wages under section 13 ERA

Mr Morrison

92. Mr Morrison claimed that non-payment of the following sums was in each case an unlawful deduction from his wages:

a. Non-payment of any bonus earned by him between 15 December 2019 and 29 February 2020;

b. Non-payment of full pay between 3 and 30 April 2020 inclusive (he received furlough pay and claims the difference);

c. A day's pay for 2 April 2020 which he alleges was not paid at all; and

d. A day's pay for 1 May 2020 which is also said to be unpaid.

93. A bonus can be included in the term 'wages' for the purposes of part II of ERA – section 27(1)(a). Furthermore, that provision makes clear that this includes sums *'referable to [the worker's] employment, whether payable under his* 20 *contract or otherwise.'*

94. Additionally, section 27(3) specifically covers non-contractual bonus payments, which are to be treated as wages.

95. The respondent did not ever deny that any bonus earned by any employee under the prevailing rules of its scheme was payable. It merely decided to 25 defer payment. It accepted that it would have had to pay the claimants whatever they had earned by the end of 2020 at the latest. The two Traffic Managers who earned bonuses and did not resign were paid, albeit later in that year. There was never a term of the bonus scheme which rendered a

bonus no longer payable if the employee was under notice of termination or had left the respondent's service.

96. The original contractual terms in relation to each claimant's eligibility for a bonus were contained in the written statements of terms and conditions they 5 were issue with, and signed. In summary, those made clear that the respondent could, in its absolute discretion, pay a bonus in whatever amount, at whatever intervals and subject to whatever conditions it chose. Any bonus payment was discretionary and would not form part of contractual remuneration. Nor would a payment create a precedent for any future period.

10 97. The reality however was that for as long as each claimant had been employed, a bonus scheme was in place and they were eligible as Traffic Managers to participate in it. Although certain details changed from year to year a pattern formed whereby at the start of the year the respondent set targets, told the Traffic Managers what they would be paid if they met those 15 targets, and when they would be paid. It was then for them to

work to achieve those targets. Once the terms for the year had been decided upon, the respondent did not change them until the next year and it made good on its undertakings.

98. Furthermore, The Traffic Managers considered in reality that their bonus was a material part of their earnings. It would never become part of their salary as the contract stated, but it offered a clear and achievable opportunity to enhance their earnings to a significant degree, in a way which could be clearly calculated and dictated by them.

99. Looking at the details provided to Traffic Managers on 9 January 2020 [65-66] it is clear that the respondent was indicating its intention to be bound by those terms. Thus, the word 'will' is used to say what would happen on targets being met, rather than 'may'. This occurs in the outlining of the way that bonus amounts would be calculated and also when payment would be made.

100. It follows that, given the terms of section 27(1) and (3) ERA, any bonus earned under the 2020 rules was a sum referable to each claimant's employment, whether or not strictly speaking made under the terms of their contract. It was payable according to the terms which the respondent had discretion to put in place, but which equally it was bound by after it did so.

101. The consequence for Mr Morrison is that he was entitled to payment of the bonus sums he earned under the 2020 rules, no later than the end of April 2020. He was not paid that amount then, or on any later date. An unlawful deduction was made. The amount is **£5,520.41** gross of any necessary deductions.

102. Turning to the claim in relation to his furlough period between 3 and 30 April 2020, this claim is also well-founded.

103. The first Treasury Directive from the UK Government under sections 71 and 76 of the Coronavirus Act 2020, dated 15 April 2020, stated as follows:

Furloughed employees

6.1 An employee is a furloughed employee if:

(a) the employee has been instructed by the employer to cease all work in relation to their employment,

(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

(c) the instruction is given by reason of circumstances arising as a
20 *result of coronavirus or coronavirus disease.*

…

6.7 An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) 25 *that the employee will cease all work in relation to their employment.*

104. Paragraph 6.1 is to be read with the benefit of the clarification provided in paragraph 6.7. This means that an employee can only be considered to be

'instructed by [their] employer to cease all work in relation to their employment' if that has been agreed by both parties in writing.

105. Mr Morrison never agreed to being placed on furlough in writing. He offered the opposite in writing - to work his full notice period. He was furloughed unilaterally (and therefore technically was not furloughed at all).

106. Mr Morrison is therefore entitled to the balance of his full pay, adjusted for any income tax and National Insurance deductions which would have been made.

107. Mr Morrison claims that he was not paid for 2 April 2020. His payslip for April 2020 [88] shows that he was paid for one day at his full rate of pay. This is the entry under 'Salary' in the sum of £153.85. This covers 1 April 2020.

108. Taking those two claims together, Mr Morrison's normal gross monthly salary was £3,333.33, as evidenced by his payslip for January 2020 [89]. In the month of April 2020 he should have received the same, but through a combination of normal salary and furlough pay he received £2,570.52. The difference is **£762.81** which is the gross value of these claims.

109. Income tax and employee National Insurance contributions will require to be deducted from the amounts awarded.

110. Mr Morrison also claims that he was not paid for his last day of service, 1 May 2020. The position was explained however by Mr Anderson. The claimant had accrued 2.5 days up to his last day of service. His pay for 1 May 2020 was added to his April 2020 payslip as an additional day of holiday pay. He had therefore received payment for that day.

111. An employment tribunal has the power to award interest on an award in compensation for unlawful deductions from wages, for example under section 24(2) ERA. Interest is awarded at the statutory rate of 8% and will run from 30 April 2020, being the date when payment ought to have been made. In doing so it was considered that the respondent ought to have known that both sums unlawfully deducted

should have been paid. In each case it was a matter of interpretation, whether of its own bonus rules or the rules of the CJRS as they applied at the time.

Mr Irvine

112. Mr Irvine claims that he suffered unlawful deductions from his wages in the following ways:

    a. Non-payment of a bonus earned between 15 December 2019 and 31 January 2020; and

    b. The difference between full salary and furlough pay for the month of April 2020.

113. For the reasons set out above, Mr Irvine was also entitled to be paid any bonus he earned under the 2020 scheme rules. He calculated the amount in gross terms to be £1,250.00. That calculation was not disputed by the respondent either in his review meeting or at this hearing.

114. However, the respondent argued that, even had Mr Irvine earned a bonus, the 2020 rules made clear that sales and profits on invoices rendered to clients who became insolvent would not count towards monthly targets. This was stated in the email of 9 January 2020 setting out the rules for that year. Deducting profits on sales to Doorset Technology Limited, which was later wound up, would result in him falling short of his targets for each month. He would earn no bonus.

115. Whilst this is correct as far as it goes, the timing of events is important. Mr Irvine's bonus earned between 15 December 2019 and 29 February 2020 was payable on or before 30 April 2020. Although sales to Doorset Technology Limited contributed to that, the company only began winding up proceedings in July 2020. When 30 April arrived, the bonus became payable. As it was not paid on or before that date, an unlawful deduction was made. Had Mr Irvine remained in employment until July 2020 or beyond the respondent would have been entitled to recalculate his earlier bonus to remove profits on Doorset jobs and make an adjustment to a future bonus, but that was a separate matter for a later point in time.

116. Mr Irvine therefore was subject to an unlawful deduction of **£1,250.00** in gross terms on 30 April 2020.

117. Mr Irvine makes a similar claim to that of Mr Morrison in relation to furlough pay. Like Mr Morrison, he was ordered to go on furlough but never agreed in writing to do so. He was also therefore entitled to full pay for the month of April 2020. Assuming that he received 80% of his salary for the month, he is due the other 20%. Based on a monthly gross figure of £3,333.33 that is **£666.67**.

118. Again, it is appropriate to award interest at the rate of 8% from 30 April 2020, which is when Mr Irvine should have been paid the sums which were deducted.

Claims of unfair constructive dismissal under section 95(1)(c) of ERA

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

119. The claimants both allege that they were constructively unfairly dismissed. This entails first that each establishes that his contract of employment was materially breached by the respondent. The breach can be of a specific term, or of the underlying relationship of mutual trust and confidence.

120. The concept of the latter is described in ***Malik v Bank of Credit and Commerce International SA [1998] AC 20***. It is an underlying and permanent feature of every employer-employee relationship. Implicit in that is that at all times the parties will not act in a way calculated to destroy the relationship. It is possible for a breach of this type to occur even if no express term is broken. So, for example, an employer exercising a contractual power in a particularly malicious or capricious way may breach the implied duty. Whether the duty has been breached is to be objectively tested. The views of the parties may assist but they will not determine the question.

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

122. A material breach may be committed by the employer, or it may be threatened, amounting to an anticipatory breach.

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

Mr Morrison's claim

124. Mr Morrison's case is that the following, individually and/or cumulatively, were a material breach of his contract:

a. The intimidating and aggressive conduct of Mr Weir in late 2019 and early 2020;

b. The introduction of new bonus terms on 9 January 2020;

c. The subsequent increase in his weekly profit target from £8,000 to £9,000;

d. The order on 4 March 2020 to prioritise the use of the respondent's own trucks on compatible client jobs;

e. Mr Weir's conduct in his review meeting on 6 March 2020, including calling him a 'bad apple', challenging him to leave his role and threatening to remove his best customer; and

f. Being told on 1 April 2020 that bonus payments would be suspended indefinitely.

125. Each was said to be a breach of mutual trust and confidence in its own right and therefore a material breach of contract. Event (f) was also said to be an anticipatory material breach of an explicit contractual term, namely that bonus once earned under the rules as intimated by the respondent from time to time would be paid.

Mr Irvine's claim

126. Mr Irvine alleged that the following amounted to material breach of his contract:

a. The intimidating and aggressive conduct of Mr Weir in late 2019 and early 2020;

b. The introduction of new bonus terms on 9 January 2020;

c. Mr Weir's conduct during the meeting of 13 February 2020 following Mr Irvine's email raising questions about the new bonus scheme;

d. The subsequent increase in his weekly profit target from £7,000 to £8,000;

e. The order on 4 March 2020 to prioritise the use of the respondent's own trucks on compatible client jobs; and

f. Mr Weir's conduct in his review meeting on 6 March 2020, including calling him a 'bad apple' and saying that the respondent would not take as long to get rid of bad apples as it did in dismissing Mr Jones.

127. Each was said to be a breach of mutual trust and confidence in its own right and therefore a material breach of contract.

Analysis of alleged breaches of contract by the respondent

Mr Weir's conduct

128. The first event, or set of circumstances, relied upon by both claimants is the way in which Mr Weir conducted himself in the workplace in the latter half of 2019 and at the beginning of 2020. Mr Weir was said to have been intimidating and

aggressive, which had a negative impact on the claimants' working environment.

129. It is found on the evidence that this was not a material breach of mutual trust

25 and confidence in relation to either claimant.

130. Not all of the events alleged by them in support of their argument occurred, or happened in the way they described them. So, for example, Mr Weir did

throw the kitchen grill pan out of the window to make a point about the cleanliness of the kitchen, he did repeatedly hit a telephone receiver off the side of his head in frustration with a haulier and he was involved in a heated stand-off with Mr Owens, albeit more as the target rather than the aggressor. He did reduce Ms Robertson to tears in a meeting she had requested in an attempt to secure a pay rise, in October 2019. He did not kick a water cooler bottle aggressively as was alleged and he did not threaten to take a hammer to a client's property and smash it up in any realistic sense.

131. However, none of this conduct was directed at either claimant. Nor were they witnesses to all of it directly. Mr Weir was known to be a forthright person in nature and especially so in the workplace after he became a co-owner of the business. The atmosphere in the office could be tense at times because the role could be difficult and people were working hard towards meeting their targets. People other than Mr Weir had arguments with each other from time to time. The claimants worked on under those conditions. They have not made out an adequate case that the bond of mutual trust and confidence was broken by Mr Weir's conduct on the evidence.

2020 bonus scheme

132. The next event relied upon by the claimants is the introduction of the 2020 bonus terms. This had been informally intimated in December 2019 but the details were provided verbally at the start of January, and then emailed to all eligible employees on 6 January. This is said to be the arbitrary or irrational exercise of an existing discretion the respondent had, as the introduction of weekly and monthly profit targets placed at risk their ability to earn a bonus on comparable levels to previous years.

133. The claimants do not take issue with the respondent's power to introduce new bonus terms in January 2020. By virtue of both claimants' contracts the power was there. It is the effect of the new terms which caused an issue.

134. Again, on the basis of the evidence it is found that this was not a breach of mutual trust and confidence.

135. The claimants expected but were not guaranteed to be able to earn similar amounts from year to year under the bonus scheme. The respondent's directors, on taking over the business, realised that they did not have the cash reserves to pay bonuses in the same way as the previous owner, but equally 5 recognised that they could not remove or drastically reduce the scheme, as employees had come to rely on it as part of their income (whatever their contracts said). The did not radically change the scheme in their first or second year of ownership of the respondent. By 2020 they therefore tried to strike a balance between awarding bonuses on the same formula as before

10 (i.e. 7% of profit above an annual figure of £72,000 or its pro rata equivalent) and ensuring that the individual had earned the company enough money first – hence the individual monthly targets.

136. It was not irrational or arbitrary for the respondent to assess employees against monthly targets. It wanted to ensure people were busy all year round 15 and undertook to help any individual with a client base which was more seasonal by giving them new clients which would provide work during quieter spells. Nor was it irrational for individual targets to increase with an employee's salary. It offered a clear route to career progression for more junior members of the team and it recognised that more experienced and well20 paid employees should be able to achieve higher sales.

137. An aspect where the rules had the potential to cause disadvantage was in relation to any prolonged period of absence from work, such as through illness or when holidays were taken. An individual not working for say a week or more in a given month might find it challenging to meet their target for that month, 25 and therefore earn a bonus. The respondent expected that periods of not being at work would be balanced out by periods when the individual would have to cover others' absences, and therefore be busier. It was prepared to consider cases where a Traffic Manager narrowly missed out on meeting their target, as made clear to Mr Irvine in relation to the holiday he took in February

30 2020. Ultimately it was open to the respondent to take this approach, provided the monthly targets themselves were set at sensible limits.

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Meeting between Mr Weir and Mr Irvine on 13 February 2020

138. Mr Irvine also relied on the meeting of 13 February 2020. He was challenged by Mr Weir over why he had raised his concerns and questions as an email rather than being 'man enough' to raise them verbally face to face. He was accused of having 'shat it' in response to being given new targets – i.e. given up too easily.

139. The meeting was called without notice and in response to Mr Irvine's email of 12 February 2020. That email is frank and open about Mr Irvine's concerns, and measured in the way he expressed his thoughts at the time he wrote it. A reasonable employer would recognise the level of concern in Mr Irvine's mind. It was not usual for him to write emails like this. Mr Weir's response was disproportionate and needlessly antagonistic. He was entitled to hold the view that Mr Irvine could have approached him in person, but did not respect his valid reasons for not doing so. Rather than take Mr Irvine through the company's reasons for the 2020 bonus terms, as explained to the tribunal, he accused Mr Irvine of defeatism. This was a breach of mutual trust and confidence.

Increase in weekly sales targets

140. The next matter cited by both claimants as a breach of mutual trust and confidence was the increasing of their weekly targets after the 2020 terms had been intimated. Mr Irvine's weekly target was increased from £8,000 to £9,000 and Mr Irvine's was increased from £7,000 to £8,000. In both cases this happened at their review meeting on 6 March 2020. It is therefore dealt with below in relation to the separate allegation related to Mr Weir's conduct in each meeting.

Instruction to use respondent's own trucks

141. The claimants next refer to the respondent's instruction on 4 March 2020 to give priority to its own trucks wherever they were capable of carrying out a delivery. The evidence was that there were four trucks and, at the time, five Traffic Managers (one of whom, Mr Gracie, worked part-time). Evidence varied among the witnesses as to how many jobs they arranged in a week,

with the figure being stated between 60 and 100. Mr Irvine dealt with between 300 and 400 jobs per month. Mr Morrison dealt with at least as many.

142. The financial effect on a given Traffic Manager was that they were credited with a 10% profit margin on the job. By using a haulier, they would typically 5 make around double that margin, and in some cases up to 30%.

143. The claimants accepted that it made sense for the respondent to utilise its own vehicles after it had bought them and following the breakdown of their plan to establish a regular route between London and Glasgow on which the truck were to be used. They didn't want to have to use them on their jobs, 10 however, as doing so would make the job less profitable for them.

144. It was within the respondent's power to ask the Traffic Managers to use its own vehicles where suitable for a given job. The proportion of their jobs where this would happen was small – less than one a day on average. As partial compensation for the lower profit margin, it would have been less time-
15 consuming to book a Monarch truck for a job than to contact one or more hauliers for quotes. It was not a completely new request which was being made by the respondent. It first did so in the last quarter of 2019, but more as a request than a strict order. When it became clear that some of the Traffic Managers were avoiding doing so, and the trucks were going unused, it 20 became an instruction.

145. In the circumstances the respondent was entitled to instruct its Traffic Managers to use its own trucks when the nature of a job allowed, and the number of times this realistically would have happened, and the financial difference, were not excessive. This was not therefore a breach of mutual 25 trust and confidence.

Mr Weir's conduct in review meetings on 6 March 2020

146. Both claimants alleged that the way Mr Weir conducted himself in their respective review meetings on 6 March 2020 constituted a breach of mutual trust and confidence. It is found that the respondent, through the actions of 30 Mr Weir, did breach that duty in each meeting.

147. For Mr Morrison, the duty was breached by way of the following:

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a. Calling him a 'bad apple' and suggesting the company was seeking to get rid of bad apples; and

b. Raising his weekly sales target from £8,000 to £9,000. Both are dealt

5 with below.

148. In the meeting Mr Weir asked Mr Morrison if there was an atmosphere in the workplace. This was a question he was entitled to ask. He was also entitled to raise with Mr Morrison his view that the respondent's trucks had not been sufficiently utilised. There was clearly discussion about whether Mr Morrison's 10 role with the company was one he was content to continue with in light of the more demanding bonus targets. Mr Weir said that Mr Morrison was welcome to go and work elsewhere, and that he could take away Mr Morrison's best customer. Those were unsupportive, but part of the general discussion in which each individual was asserting his position. They did not amount to a 15 breach of mutual trust and confidence.

149. However, to call Mr Morrison a 'bad apple' was to go further. It was to suggest that he was being disloyal to the respondent and, in the context, that he was motivating others over whom he had influence to do likewise. It crossed a line and by its nature it did undermine the trust and confidence between the 20 parties. To then say that the company was getting rid of bad apples was a further threat, and the breach was compounded by Mr Weir raising his voice in the meeting and by bringing up the subject without prior notice in a meeting which was supposed to be a review of Mr Morrison's sales performance in the first two months of the year.

25 150. It is also found that the increasing of Mr Morrison's sales target so soon after implementation of already stretching targets in January of that year was an irrational and arbitrary exercise of the respondent's discretion. Whilst they were entitled to set the rules at the beginning of the year, this represented a moving of the goalposts. It was done unilaterally and without consultation or explanation. Against the background of the claimants adjusting to the new and already demanding bonus rules, it was demoralising to have the bar set

even higher so soon. The respondent had never changed the rules of its bonus scheme part way through a year before.

151. Therefore, the respondent breached the obligation of mutual trust and confidence when increasing each claimant's targets in the review meeting.

5 152. For Mr Irvine the position is similar. That is to say, not everything Mr Weir said in his review meeting constituted, or contributed towards, a breach of mutual trust and confidence but the following did:

a. Accusing him of being a 'bad apple' and stating that the company was looking to get rid of bad apples (albeit there was no evidence that Mr
10 Weir raised his voice in this meeting); and

b. Increasing Mr Irvine's weekly sales target from £7,000 to £8,000.

153. Those matters are found to be breaches of mutual trust and confidence for the same reasons as applied to Mr Morrison.

Intimation of indefinite postponement of bonus payments

15 154. Finally, Mr Morrison referred to being notified on 1 April 2020 that any bonus earned up to that point would not be paid at the end of that month.

155. For essentially the same reasons that this decision ultimately amounted to an unlawful deduction from Mr Morrison's wages, it was also an anticipatory breach of an express term of his contract. The respondent had bound itself by 20 issuing its email of 9 January 2020 to paying bonuses earned in the first quarter of the year by the end of April. Mr Anderson told Mr Morrison on the evening of 1 April 2020 that this would no longer be the case.

156. It was also a breach of mutual trust and confidence. Mr Morrison had literally trusted the respondent to make good on the terms of the 2020 bonus scheme, 25 and he had worked hard to meet the targets set in the expectation of the respondent doing what it said it would in the email of 9 January 2020. Less than a month before at his review meeting he had been given to expect he would be paid the bonus.

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Did the claimants resign in response to the breach of contract

157. Taking Mr Morrison first, it is quite clear that he resigned in response to the breaches of his contract by the respondent, namely:

a. Mr Weir's conduct of the review meeting on 6 March 2020; and

5 b. Mr Anderson's intimation on 1 April 2020 that his bonus for the first quarter of 2020 would not be paid in that month, and would be deferred indefinitely.

158. His resignation email on 2 April 2020 [82d] expressly refers to the second and most recent of those matters. Although that would be sufficient, his evidence 10 was that what happened at the meeting of 6 March 2020 also contributed to his decision. He felt he was no longer a valued employee.

159. Mr Irvine did not give any reasons for resigning when he did so by email on 1 April 2020. He was reluctant to go into detail as he may have been asked to work his notice period, and his son remained employed by the respondent.

15 160. In his evidence he cited the build up of the new bonus terms, the way he was spoken to by Mr Weir, being told to take two weeks of sick leave on Statutory Sick Pay, then being placed on furlough with effect from 1 April 2020, and finally how his son was treated (a reference to him also being made to take two weeks' sick leave).

20 161. Mr Irvine's reasons for resigning therefore were a combination of the material breaches of his contract and other factors which were not alleged in themselves to be breaches. It is sufficient that at least part of the reason for resigning was the breach or breaches, as confirmed for example by the Court of Appeal in ***Nottinghamshire County Council v Meikle [2004] IRLR 703***.

25 162. In any event, the placing of Mr Irvine on furlough and the insistence that he take two weeks of sick leave at a lower rate of pay rather than work from home would count as 'last straws' in the respondent's repudiatory course of conduct.

163. The respondent submitted that the claimants had different reasons for resigning. It believed they had been planning to leave since the new bonus

rules were divulged in January 2020 and had taken some steps to set up their own business before resigning. They said the fact that the claimants' company was registered so soon after their resignations took effect – 22 May 2020 – supported this.

5 164. The claimants' evidence on their reasons for resigning is preferred. They did explore options for working away from the respondent, including Mr Irvine obtaining a job offer from another organisation as they were entitled to do, but there was no evidence of a definite plan to leave their employment until the time that they resigned. On the evidence, they would have preferred to stay 10 with the respondent had matters not developed the way they did from the beginning of January 2020.

Did the claimants resign promptly in response to a breach

165. On the evidence it is clear that the claimants both resigned promptly in response to the breaches of their respective contracts. In Mr Morrison's case 15 he resigned the day after the last breach.

166. In between his review meeting on 6 March 2020 and his resignation date, Mr Irvine was ill and was ordered to stay at home on Statutory Sick pay for two weeks. The gap between the meeting and his resignation is sufficiently short for him not to have affirmed the breach, particularly given he was not at work 20 for the majority of it. The effect of his absence on his pay generally and his ability to earn a bonus for that month emphasised the effect of the breaches which occurred at the review meeting. As last straws they reduced the time between the last relevant event and intimation of resignation to a matter of days.

25 167. Both claimants were therefore constructively dismissed with effect from their respective effective dates of termination of employment.

Were the constructive dismissals fair?

168. A constructive dismissal can nevertheless be fair if it meets the criteria of section 98(1) or (2), and section 98(4) of ERA.

169. First therefore it must be considered whether the respondent had a fair reason to dismiss each claimant, such reason being permitted under subsections (1) or (2) of section 98.

170. The claimants were not dismissed for capability, conduct, redundancy or by reason of any fundamental illegality in their contracts. The only potentially fair reason for their dismissals would be 'some other substantive reason'. That would not be easy to categorise, although it could be generally described as a breakdown in the relationship between the parties, or an inability to reach agreement on what were acceptable bonus terms.

171. If the dismissals were implemented for some other substantial reason it would have to be determined whether they were carried out reasonably in all of the circumstances, including the respondent's size and administrative resources under section 98(4) of ERA.

172. The respondent did not put forward in submissions that there was a potentially fair reason for constructively dismissing the claimants, or that the respondent conducted the dismissals reasonably. It is for any respondent to prove that the dismissals which it carries out were for a potentially fair reason. The respondent in these claims is unable to do so.

173. Even if the reason for the claimants' dismissals can be phrased in a way which constitutes some other substantial reason, they were not implemented in a reasonable way. This goes back to Mr Weir's conduct in the March 2020 review meetings, as well as Mr Irvine's earlier meeting on 13 February 2020, and the way in which the claimants' targets were increased once the bonus year was underway. There was not a reasonable and sufficiently thorough attempt to address the concerns the claimants had.

174. It follows that the claimants were unfairly constructively dismissed by the respondent.

Losses, mitigation and remedy

175. The claimants' stated losses arising from their dismissal were as follows.

a. Mr Morrison – a basic award of £1,614.00; loss of statutory rights - £300

b. Mr Irvine – a basic award of £1,614.00; loss of statutory rights - £300

176. Neither claimed for loss of earnings following dismissal, or a compensatory award on any other basis.

177. Given the findings above and the relatively modest sums claimed, there is no reason why the claimants should not be awarded the compensation they seek.

178. The respondent had argued that it may have been just and equitable to reduce their compensation to reflect their conduct after dismissal, for example with reference to their breach of post-termination restrictions. Ultimately however there was inadequate evidence before the tribunal to make findings as to whether any putative restrictions were valid and binding, if so whether they were breached, and if they were breached the severity of that conduct.

179. Accordingly, the claimants are awarded the full sums above which they sought as compensation for their unfair constructive dismissals.

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Employment Judge

28 November 2022

Date of Judgment

Date sent to parties 28 November 2022

Appendix – Agreed List of Issues

In respect of the claim brought by each claimant, Neil Morrison and Peter Irvine:

<u>Unlawful deduction from wages</u>

1. It is not in dispute that the Respondent did not make any payment of bonus pay to the Claimants for the period 15 December 2019 to 28 February 2020.

In relation to that bonus pay:-

a. What amount was properly payable to the Claimant and when was that amount payable to the Claimant?

i. In deciding this, the Tribunal must determine whether bonus was contractually due.

ii. In looking at this, the Tribunal must consider

1. the express terms of the contract for each Claimant;

2. the extent of the discretion expressed in the contracts, as applied to the facts and taking account of all of the relevant circumstances;

3. what the applicable contractual terms were (including implied terms) and what conditions required to be satisfied in relation to the Respondent's bonus scheme for the period from 15 December 2019 onwards;

4. what the Claimants' bonus earnings for the period 15 December 2019 to 28 February 2020 were and when they were due to be paid.

iii. If the Tribunal considers that the question of making payment of bonus, once all other conditions of the bonus were satisfied, was discretionary (which is denied by the Claimants), did the Respondent exercise that discretion in a way which was rational, not arbitrary or

capricious, was in good faith and which did not breach the implied term of trust and confidence.

Constructive dismissal

1. Did the respondent breach an explicit or implied term of the claimant's contract of employment?

In relation to **Neil Morrison**, the claimant alleges that the following explicit term(s) were breached:

i. There was an anticipatory breach of contract by intimating that bonus pay earned in the period 15 December 2019 to 28 February 2020 would not be paid in the April payroll. This turned into an actual breach of contract when payment was not in fact made.

AND

The claimant alleges that the following implied term was breached

ii. There was a breach of the implied term of mutual trust and confidence.

In relation to **Peter Irvine**, the claimant alleges that the following implied term(s) was/were breached

i. There was a breach of the implied term of mutual trust and confidence.

Re both Claimants:-

1.1. To the extent there was a breach of contract, was such breach material?

1.2. For any material breach of contract, when did it occur?

1.2.1. In relation to Neil Morrison, the claimant alleges that the breach(es) occurred on the following date(s):

In the period from late 2019 to early 2020, the behaviour of the Respondent's John Weir was intimidating and aggressive around the office, impacting upon the atmosphere in the office, and therefore the working environment for the Claimant. This undermined the Claimant's trust and confidence in the Respondent.

9th January 2020 - when the Respondent introduced, for the first time, weekly and monthly mandatory targets which had to be met before bonus would be paid, thus placing at risk the Claimant's ability to earn bonus at a comparable level with that applicable in previous years. Later, the Respondent increased the Claimant's weekly target from £8,000 per week to £9,000 per week without explanation. This was an exercise of discretion done in an arbitrary and irrational way by the Respondent and was a breach of trust and confidence.

4th March 2020 - mandating the use of Monarch trucks for all jobs out of Scotland, thus placing another barrier in the way of meeting weekly and monthly targets, due to lower profit margins being realised on such work. Taken together with the imposition of weekly/monthly targets, the effect of this was to make the attainment of bonus even more difficult, and undermined the Claimant's trust and confidence in the Respondent.

6th March 2020 - at the review meeting, in which the Respondent's John Weir behaved aggressively towards the Claimant, raising his voice, saying that there was a "bad apple" and referring to the Claimant as a "bad apple", invited the Claimant to leave, accused the Claimant of not being supportive around the use of Monarch trucks so far, and threatened to remove the Claimant's best customer from him and give them to another Traffic Account Manager. This was a breach of trust and confidence by the Respondent.

1 April 2020 - being told that bonus earned since 15 December 2019 would be "suspended indefinitely". This was an anticipatory breach of

contract. It was also a material breach of contract, being an intimation that earned remuneration would not be paid as and when it fell due.

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1.2.2. In relation to **Peter Irvine**, the claimant alleges that the breach(es) occurred on the following date(s):

In the period from late 2019 to early 2020, the behaviour of the Respondent's John Weir was intimidating and aggressive around the 5 office, impacting upon the atmosphere in the office, and therefore the working environment for the Claimant. This undermined the Claimant's trust and confidence in the Respondent.

9th January 2020 - when the Respondent introduced, for the first time, weekly and monthly mandatory targets which had to be met before 10 bonus would be paid, thus limiting the Claimant's ability to earn bonus at a comparable level with that set out in his contract of employment for January to December 2019. Later, the Respondent increased the Claimant's weekly target from £7,000 per week to £8,000 per week without explanation. This was an exercise of discretion done in an 15 arbitrary and irrational way by the Respondent and was a breach of trust and confidence.

13th February 2020 - at a meeting following up an email sent by the Claimant to the Respondent, when John Weir behaved aggressively towards the Claimant as follows:- expressing anger at him seeking 20 clarity on the bonus arrangements; ridiculing the Claimant, telling him he had seen the targets and "shat it", saying he was not man enough to discuss it face to face, and calling his explanation "bullshit"; suggesting he could leave the Respondent's employment "right now"; swearing at him (for example "nobody new will be getting bonus -
25 there'll be no fucking bonus"; and storming away. This was a breach of trust and confidence by the Respondent.

4th March 2020 - mandating the use of Monarch trucks for all jobs out of Scotland, thus placing another barrier in the way of meeting weekly and monthly targets, due to lower profit margins being realised on such 30 work. Taken together with

the imposition of weekly/monthly targets, the effect of this was to make the attainment of bonus even more

difficult, and undermined the Claimant's trust and confidence in the Respondent.

6th March 2020 - at the review meeting, in which the Respondent's John Weir behaved aggressively towards the Claimant, raising his

5 voice, saying that there was a "bad apple" and referring to the Claimant as a "bad apple", and that they would be "getting rid of bad apples", and that they wouldn't wait as long as they did with Eddie, then increasing the Claimant's weekly target from £7000 to £8000 per week. This was a breach of trust and confidence by the Respondent.

10 *Re both Claimants:-*

1.3. Did the claimant resign promptly in response to a material breach of contract, so that he was constructively dismissed within the terms of section 95(1)(c) of the Employment Rights Act 1996 ('ERA')?

1.4. If yes, was the dismissal fair or unfair, taking into account the

15 requirements of section 98 ERA?

1.5. If it was unfair, what compensation should be awarded?

Employment Judge: B Campbell
Date of Judgment: 28 November 2022
20 **Entered in register: 28 November 2022 and copied to parties**