EMPLOYMENT TRIBUNALS

Claimant: Mrs S Lightfoot-Webber

First Respondent: Lawcommercial Trading Ltd t/a Lawcomm Solicitors

Second Respondent: Lawcommercial Services Limited

Heard at: Video Hearing On: 21 and 22 February 2023

Before: First Tier Tribunal Judge Volkmer sitting as Employment Judge

Representation
Claimant: Mr Goodwin (Counsel)
Respondent: Mr Dhariwal (Director of the First and Second Respondent) in person.

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deduction from wages is out of time and the Tribunal has no jurisdiction to hear the claim. It is dismissed.
2. The Claimant's claim for breach of contract in relation to the Q1 2022 bonus is upheld against the First Respondent.
3. The Claimant's claim of constructive unfair dismissal is upheld against the First Respondent.
4. All claims against the Second Respondent are dismissed.
5. Remedy is to be determined at a separate remedies hearing.

REASONS

1. By a claim form presented on 10 September 2022 the Claimant claims constructive unfair dismissal, makes a claim for unlawful deduction from wages in relation to a bonus payment and makes a claim for a failure to provide a statement of terms of employment.

2. The Respondents filed a response on 11 October 2022 resisting the Claim.

3. The Claimant brings a claim against the First and Second Respondents on the basis that she is not sure which was the correct employer, in light of a purported transfer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") during her employment. The Respondents operate as a law firm.

4. The Claimant was employed from 26 September 2017 as a Family Law Executive, later being promoted to Head of Family Law. Her employment ended on 28 July 2022. The Respondents' position is that the Claimant was initially employed by the Second Respondent and that her employment was transferred under TUPE from the Second Respondent to the First Respondent on 29 January 2021.

5. I heard evidence under oath from the Claimant and, on behalf of the Respondents, Mrs Anita Dhariwal, Practice Administrator for the First Respondents, Mr David Alan Roper, Director of both Respondents and Ms Xanthe Fox-Noble, a self employed bookkeeper acting as the First Respondent's Account Manager. I did not consider the Respondents' witness evidence as it had been submitted prior to the reduction to the word count required as set out in paragraph 10 below, but only the evidence submitted after the reduction had taken place.

6. I received a bundle of 263 paginated pages from the Respondents, a skeleton argument from the Claimant, a list of issues from the Claimant, and written submissions on preliminary matters from the Respondents.

Preliminary matters

7. There was no preliminary hearing in relation to this Claim. A number of preliminary issues were raised by the parties as follows:
    a. the Claimant seeking an adjournment with costs, or in the alternative that the Respondent's witness evidence over the prescribed wordcount was struck out on the basis that, on the Claimant's account, the Respondent had refused to provide the Claimant with the witness evidence until 16.49 on the day before the hearing and had exceeded the word limit of 5,000 words (the evidence running to 7,085 words). The Claimant pointing out that the Respondent holds itself out as being a law firm conducting litigation, including Employment Litigation;
    b. the Claimant making an application to remove the document at page 232 of the Hearing Bundle on the basis that it was a hearsay statement governed by litigation privilege;
    c. the Claimant making an application to amend the Claim to include a breach of contract claim. This is opposed by the Respondent;
    d. the Respondent raising a jurisdictional issue in relation to the First Respondent on the basis that the Claimant had not obtained an ACAS Early Conciliation Certificate in respect of the First Respondent;
    e. the Respondents raising a jurisdictional issue in relation to the First Respondent on the basis that the Claimant did not have sufficient service to pursue an unfair dismissal claim;

f. the Respondents raising a jurisdictional issue in relation to the Second Respondent on the basis that the entire Claim is not brought within three months of the transfer under TUPE of the Claimant's employment to the First Respondent; and
g. the Respondents raising a jurisdictional issue in relation to the unlawful deduction from wages claim on the basis that, on their account, the last deduction was on 29 April 2022 and that the claim is therefore out of time.

8. Following discussion with the Judge, the Respondent withdrew the following issues
   a. 7(d) on the basis that there was an ACAS Early Conciliation Certificate in relation to the First Respondent, which had initially not been sent to the Respondents by HMCTS;
   b. 7(e) on the basis they accepted that the Respondents' position that a TUPE transfer had taken place would mean that the Claimant's continuity of service would have transferred; and
   c. 7(f) on the basis that the Respondents accepted that the issue of the identity of the employer related to liability rather than limitation.

Adjournment and Witness Evidence

9. The Claimant's application for an adjournment was refused. It was clear that the Respondents providing the witness statement at such an unacceptably late stage had put significant pressure on the Claimant's Counsel. However, Mr Goodwin had informed the Tribunal that he had been able to prepare for the cross examination of one of the Respondent's witnesses, Mrs Dhariwal.

10. I considered that it was not in the interests of the overriding objective to adjourn the hearing. Significant delay would not be in the interest of either party, all of the parties were in attendance and the Tribunal could hear the evidence of Mrs Dhariwal only on the afternoon of the first day of the hearing to rebalance the position. This, together with a requirement for the Respondents to reduce their witness evidence to the 5,000 word limit by 2pm on the first day of the hearing, would give the Claimant's Counsel sufficient time to prepare to cross examine the other witnesses for the Respondents. I indicated that Mr Dhariwal would not be permitted to "adopt" documents such as the Respondents' chronology as his witness statement, without the words in the chronology being counted towards the relevant word count.

Removal of Document from the Bundle

11. The Claimant's application to remove the document at page 232 of the Hearing Bundle was allowed. The document in question was an email, from an individual whom the Respondents had asked to appear as a witness. In the email the prospective witness refused to give evidence on the basis that she did not wish to attend the Tribunal hearing and set out the witness's opinions of the Claimant.

12. The document was a communication between the Respondents and a third party for the purpose of obtaining information in connection with this litigation which was existing at the time that the email was created. This brought it within litigation privilege. The Respondents confirmed that they had not disclosed all documents

covered by litigation privilege (such as emails with other witnesses), and sought to differentiate this document on the basis that it had been put on the writer's personnel file.

13. The Respondents should not be able to cherry pick documents covered by privilege, since this did not put the Claimant on an equal footing. This document was said to be prejudicial to the Claimant but the Claimant was not able to ascertain whether there were other documents which had not been disclosed which were helpful to her, because of the way in which this document had been disclosed in isolation. This was not in the interests of the overriding objective so I determined that the document should be removed from the Hearing Bundle and not considered by me in deciding liability.

Application to amend the Claim

14. In an application made on 17 February 2023, two working days before the hearing, the Claimant sought to amend her Claim with the addition of the following paragraph.

> In the alternative, I seek recovery of the non-payment of my Q1 2022 bonus as a breach of contract claim, pursuant to section 3 of the Employment Tribunals Act 1996. I rely on the facts as set out above in these particulars. Specifically: (1) There was a contractual obligation to pay that bonus; (2) the Respondents breached that obligation by failing to pay it, in part or at all; and (3) that breach was outstanding on the termination of my employment. This is a claim for damages for breach of contract (s3(2)(a)) or a sum due under a contract (s3(2)(b)).

15. Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC laid down a general procedure for Tribunals to follow when deciding whether to allow amendments. The key principle is that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it.

16. Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT set out that the Tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Factors identified in Selkent as being generally relevant to the assessment were: the nature of the amendment, the applicability of time limits and the timing and manner of the application.

17. Vaughan v Modality Partnership [2021] ICR 535 further clarifies that the key test for the Tribunal to consider is to assess where the balance of prejudice lies. The factors derived from Selkent are illustrative only and not definitive. The Tribunal therefore needs to ask itself what the real practical consequences of allowing or refusing the amendment would be.

18. As set out in Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209 the Tribunal must focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old. The greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that the amendment will be permitted.

19. The substitution of other labels for facts already pleaded is an example of the kind of case where - other things being equal - amendment should readily be permitted, by contrast with the making of entirely new factual allegations which change the basis of the existing claim. Part of the original Claim in this case relates to the non-payment of the Claimant's Q1 2022 bonus. The bonus claim is set out in detail in the original Claim, and is labelled as an unlawful deduction from wages. The amendment seeks to plead this in the alternative as a contractual claim, but does not seek to add any new pleaded facts. The failure to pay the Q1 2022 bonus is also relied on in relation to the constructive dismissal allegation made by the Claimant.

20. The Respondents seek to argue that the amendment is "entirely different" to the pleaded Claim, saying that mitigation is relevant to a contractual claim and not to an unlawful deduction from wages claim, and would have led to a different focus for pleadings and witness evidence.

21. Whilst mitigation is relevant to the breach of contract claim and not to the unlawful deduction from wages claim, an alleged failure to mitigate in relation to the relevant bonus had been specifically pleaded in the Respondent's Grounds of Resistance at paragraph 26. There are no new areas of enquiry in relation to the amendment. The facts were already pleaded, and the issues have already been dealt with by the Respondents. In my finding this is a relabelling of facts which were already pleaded.

22. It is well established that it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from 'relabelling' the existing claim, see Foxtons Ltd v Ruwiel UKEAT/0056/08. If made separately now, the contract claim for the Q1 2022 bonus would be out of time. This is not a strong factor weighing in favour of rejecting the amendment because the amendment is merely a relabelling of a claim which has already been pleaded.

23. The timing of the Claimant's application was very late, the application to amend was made two working days before the substantive hearing. The Claimant says that this was because she had not had the benefit of legal advice before that. I take the lateness of the application into account in balancing of all of the circumstances.

24. In weighing up all of the circumstances, I have considered what the real practical consequences of allowing or refusing the amendment would be. The Claimant says that there is no real consequence for the Respondents but that there is a real danger that the Claimant's unlawful deductions claim for the Q1 2022 bonus may fail if it is found to be out of time. Therefore, the Claimant may lose her opportunity to recover the bonus if the amendment is not permintted. The Respondents' position is that the prejudice weighs heavily on them because they have lost the opportunity to have focused witness evidence on mitigation, although there would be no difference in terms of documentary evidence. The Respondent submits that there is a clause in the Claimant's employment contract allowing training expenses and practicing certificate expenses to be reclaimed by the Respondents from the Claimant and assert that they would lose the opportunity to counterclaim for these. The Respondent says that the Claimant would suffer very little prejudice as she could pursue the Q1 2022 bonus as a contractual claim in the County Court.

25. In relation to the real practical consequences for the parties, I find that the Claimant would suffer a prejudice if the amendment was not allowed as there is a potential time bar in relation to the label of unlawful deduction from wages which would not be problematic in relation to the contractual claim. In my finding, if the amendment is permitted, there is no new area of enquiry, see paragraph 21 above. I do not accept that there is any real prejudice to the Respondents in relation to mitigation. A failure to mitigate is pleaded at paragraph 26 of the Grounds of Resistance and no new documentary evidence is relevant. The Respondents say that they have missed the chance to counterclaim for training expenses and practising certificate, but have shown no evidence of such potential claim – other than a relevant clause in the employment contract. In Vaughan it is made clear that parties must provide evidence of pleaded prejudice. Further, the point the Respondents make regarding County Court claims being a possible route for the Claimant, applies equally to the Respondents. It is open to the Respondents to pursue their own breach of contract claim in the County Court.

26. Taking all of the circumstances into consideration I do allow the amendment.

Jurisdictional Issue in relation to the unlawful deduction from wages claim

27. I decided to deal with this with liability, since it relied on findings of fact in relation to the payment date.

Issues

28. The issues for the Tribunal to determine are as follows.

Jurisdiction

29. Did the Claimant bring her claim against the First and Second Respondents in time in respect of the unlawful deductions claim:
    a. What was the date of the last deduction?
    b. Was the claim brought within three months of that date?
    c. If not, was it not reasonably practicable to bring the claim in time?
    d. If not, in what period should the claim have been brought in?
    e. Was the claim brought within that period?

Employment status

30. Was the Claimant an employee of the First Respondent or the Second Respondent within the meaning of section 230 of the Employment Rights Act 1996 ("ERA 1996")?
    a. The Respondent contends that the Claimant was employed by the First Respondent at the relevant time.

Unfair Dismissal

31. Was the Claimant dismissed? The Claimant alleges that she was constructively dismissed (s95(1)(c) ERA 1996). The Claimant alleges that the Respondents acted in fundamental breach of contract. She relies on the following alleged breaches.

a. The Respondents' failure to adhere to the April 2021 agreement as to the Claimant's role and benefits, which the Claimant says was a breach of an express contractual agreement.
b. In the alternative to (a), such failure amounted to a breach by the Respondents of the implied duty of mutual trust and confidence.
c. The imposition of unilateral changes to her remuneration, which the Claimant says is a breach of the express terms of the bonus.
d. In the alternative to (c), imposition of such unilateral changes amounted to a breach by the Respondents of the implied duty of mutual trust and confidence.
e. The failure by the Respondents to pay the Claimant's bonus, which the Claimant says is a breach of the express terms of the bonus.
f. In the alternative to (e), failing to pay the bonus amounted to a breach by the Respondents of the implied duty of mutual trust and confidence.

32. The Tribunal will need to decide:
    a. whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
    b. whether it had reasonable and proper cause for doing so.

33. Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

34. Did the Claimant delay before resigning and affirm the contract?

35. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

36. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? (Polkey)

37. If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?

Unlawful Deductions

38. Did the Q1, 2022 bonus amount to wages for the purpose of s13 ERA 1996?

39. If so, to what bonus was the Claimant entitled?

40. The Respondents admit no payment was made. It is not alleged by the Respondents that ss13(1)(a) or (b) ERA 1996 apply.

Breach of Contract

41. Did the Claimant have a contractual entitlement to receive a bonus?

42. If so, on what basis was that bonus calculated?

43. Did the Respondent's failure to pay that bonus amount to a breach of contract?

44. If so, was such breach outstanding at termination?

Failure to Provide a Statement of Terms

45. Did the Respondents fail to provide a s4 ERA 1996 compliant statement of changes when the Claimant's role was changed on or around 12 April 2021?

46. If so, was such failure still outstanding at the date this claim was presented?

47. If so, what compensation should be awarded under s38 Employment Act 2002?

Findings of Fact

48. The Claimant was employed by the Second Respondent as a Family Law Executive from 26 September 2017. On 12 October 2017 she signed a Statement of Terms and conditions which applied retrospectively to the date of starting her employment.

49. In an email dated 21 November 2018 sent from Mrs Dhariwal to the Claimant, Mrs Dhariwal set out terms which were offered by the Second Respondent in response to an increase in the Claimant's hours, these were to apply with effect from 1 January 2019. One of the terms related to a bonus, it stated the following:

    "Your target for the financial year shall be £48,000 net billing per annum.

    As a discretionary bonus, should you exceed your target in any quarter, you shall be entitled to a bonus equivalent to 33% of the net billing above your target. The bonus scheme is discretionary. It is based on current targets and resourcing levels. It is not payable in the event of breach of practice rules, justified complaints, breach of employment contract or staff handbook, submission of notice or a failure to comply with the firm's quality standards. The above scheme is non-contractual and may be revoked or altered at any time upon immediate notice."

50. These terms were repeated, in an email from Mrs Dhariwal to the Claimant on 25 January 2019. When the Claimant queried the variability of the bonus, Mrs Dhariwal responded by email on the same day that "I'm not saying that your target will change monthly, I am saying that I will advise you and all fee earners at the end of each month what your "variance on target" is i.e. whether you hit target, fell short of target or exceeded target".

51. In November 2019, the Claimant resigned. In response, on 22 November 2019, Mrs Dhariwal sent an email to the Claimant asking her to stay and saying: "After some consideration, we would be able to offer you £32,5k plus the current bonus scheme. We would also agree to an assistant and continued funding for training.". After a discussion between the parties, the Claimant sent an email to Mr and Mrs Dhariwal on 3 December 2019 saying "I hereby retract my resignation and confirm my acceptance of your below offer". In cross examination, Mrs Dhariwal agreed that the bonus was considered to be "part of [the Claimant's] package".

52. In the period between November 2019 and December 2020, two graduate assistants worked for the Claimant, and left the firm. In a review meeting in early January 2021, Mr Dhariwal raised with the Claimant that he considered there was an issue with the Claimant's communication with one of her assistants and had "had a go" at one of them. The Claimant sent an email on 15 January 2021 asking for more details in relation to this comment. There was no response or further follow up by the Second Respondent.

53. On 29 January 2021 Mrs Dhariwal sent an email to the Claimant stating the following:

> "Re: Notice of Transfer
>
> I am writing to advise you that your employment contract will be transferred from Lawcommercial Services Limited ("LSL") to Lawcommercial Trading Limited trading as Lawcomm Solicitors ("LTL") within the next 14 days. Payroll changes have already been implemented.
>
> This is because we are likely to cease the use of a service company for employing our personnel. Your employment will continue with LTL who are the regulated trading entity.
>
> Your contract of employment will automatically transfer to LSL to LTL pursuant to the TUPE regulations."

54. No consultation with the Claimant followed this, nor any confirmation of the transfer or the date of transfer. The Respondents' position is that the Claimant's employment transferred from the Second Respondent to the First Respondent on the same day as the email was sent, on 29 January 2021. The Claimant did not take a position on this, and it was not the subject of much evidence or argument. In my finding, based on the evidence of the Respondents' there was a service provision change under TUPE 2006 which operated to bring in-house the employment of staff, transferring the service provision from the Second Respondent to the First Respondent. In my finding, based on the time period set out in the email dated 29 January 2021, the Claimant's employment transferred from the Second Respondent to the First Respondent between 29 January 2021 and 12 February 2021, 14 days after the email.

55. The First Respondent did not provide the Claimant with a written statement confirming the change to the identity of her employer.

56. On 4 March 2021 the Claimant emailed Mr and Mrs Dhariwal explaining that she had been approached by another firm. After discussions between the parties, on 8 March 2021, the Claimant tendered her resignation by email.

57. On 12 April 2021, Mr Dhariwal sent the Claimant an email with the heading "Final Offer (STC)" saying the following.

"On condition that you withdraw your notice before 12 p.m. on 14 April 2021, we are willing to agree the following:

- An increase in your salary to £40,000 gross per annum. You will appreciate that your target will also have to increase as a result of your increased salary.

- You will-be formally announced as Head of Family Law which shall be a standalone department to litigation.
- Please confirm whether you will be working full time hours?
- A new discretionary bonus scheme will be introduced by the new accounts manager. (Gerald Ingram unfortunately has had a stroke so we have to replace him).
- We shall recruit a legal secretary for you. In time, we shalt move you to opposite Billie McClelland. Billie is leaving shortly. Your new secretary will be sat where Billie sits. David Roper does not dictate but may need some assistance with printing and file maintenance from time to time. He now has a remote helper for wills and LPA's. I would expect his usage of the new legal secretary to be about 25%.

…

- You have a parking space in line with all other HoD's.
- We are willing to spend between £250 to £500 per month on digital marketing when case number become low. However, you will have to agree to have a system for capturing and responding to marketing leads so none are wasted.
- We agree for you to be mentored by the new accounts manager.
- Subject to SRA clearance and ongoing performance under your contract of employment, you will be made a director upon your qualification. You are able to contribute to the firm's management via HoD meetings which shall recommence once our new accounts manager is in situ."

58. On 13 April 2021, the Claimant replied to the email saying "This is to confirm I accept your offer as detailed above.". The terms set out in the email of 12 April 2021 became terms of the Claimant's employment contract.

59. On 20 April 2021 the Claimant followed up with a further email saying that she wanted to work full time hours with Mondays treated as flexi-time in order to enable her to offer evening and weekend appointments. Mrs Dhariwal responded on 21 April 2021 saying the following.

    "Great news that you have decided to stay!

    Full time hours are fine and yes Monday can be flexi to allow for you to meet clients at other times.

    This will be effective from 1st May 2021."

60. Mrs Dhariwal gave evidence that at this point the Claimant was considered to be a good employee, a valuable asset, and that the First Respondent wanted her to stay.

61. Following this, the Claimant received the increased pay, a new job title of Head of Family. The anticipated new accounts manager did not start work with the First Respondent and as a result there was no new bonus scheme or mentoring provided. The Claimant continued to receive bonuses in accordance with the bonus scheme in place prior to this offer being made and accepted.

62. The Claimant also began to use an assistant, who also worked with Mr Roper. At the end of September, this individual raised concerns with Mrs Dhariwal, which Mrs Dhariwal passed on to the Claimant. These concerns related to the type of work, some of which she did not wish to do, saying she was not being given adequate training and

instructions, as well as raising concerns with social distancing. Discussions took place between the Claimant and Mrs Dhariwal regarding how to deal with this, and it appeared from the emails that Mrs Dhariwal was happy with the Claimant's approach.

63. In July 2021, the Claimant obtained her CiLEx fellowship. The quarterly review document dated 8 September 2021 did not indicate any concerns with her performance.

64. Between January 2019 and December 2021, the Claimant received a bonus for exceeding billing targets in 6 out of 12 quarters. This finding is based on the evidence of Mrs Dhariwal.

65. On 7 February 2022, Mrs Dhariwal sent the Claimant an email saying

> "I hope you had a good weekend. Are you around on Wednesday at 11am to have a meeting with Xanthe and I regarding your billing please? We need to discuss the way that your billing and forecasts are being reported. As an example, In January you had 20K worth of billing which gets put forward onto the reports but accounts have actually only received £6362 of that. This means that we are paying VAT on 20K but have only received a proportion of that amount. Your forecasts for February are 30k which is again being used as a figure on the cashflow but is providing an inaccurate picture.
>
> This will also affect your bonus scheme as we should not be paying bonus on money that we have not received."

66. There followed a meeting between the Claimant and Ms Fox-Noble on 14 February 2022, in which the Claimant's billing methods were discussed and it was agreed that a fee note should be created in the first instance rather than an invoice to deal with concerns regarding VAT liabilities. The Claimant then queried how her bonus would be affected in an email dated 15 February 2022. On 3 March 2022, Mrs Dhariwal responded in an email to the Claimant saying "Xanthe wants your bonus to now be paid on billing received. Hopefully you understand the requirement for this.".

67. The Claimant responded by email on 4 March 2022 challenging the change to her bonus structure and making clear that she was unhappy with this. Mrs Dhariwal responded on the same day saying "Bonus structures are as I'm sure you are aware discretionary, and as per your bonus letter can be altered with immediate effect…I am happy to keep this quarter bonus scheme in its current form due to the late notice, but would like to propose that the changes are made from 1st April onward. Invoices raised in March should not exceed the target of £6.71K… The bonus scheme remains discretionary".

68. The Claimant replied with an email on 9 March 2022, making clear that she did not agree that the bonus was discretionary, including by saying that it had been established by custom and practice. She referred to not having been made a director despite achieving the CiLEx qualification and also referred to the failure by the Respondent to provide mentoring. She went on to say that the change to the bonus structure was a breach of the implied term of trust and confidence and a breach of contract.

69. In an email on 14 April 2022, responding to various points in the Claimant's email, Mrs Dhariwal said "For one reason or another the three Assistants did not work out. You then decided that you would be better working on your own due to the time and effort required to train another person. You were given a new desk albeit not your own office. This is because there is no separate office and It was that best that could be done in the circumstances…..2. I personally have never said you are not a team player. I am not sure where this has come from. I have also never criticised you for training and issues with the Assistants. Any issues have been discussed and improvements suggested. Everybody, no matter what their level should be in a position to learn, develop and be better. That applies to us all as nobody is perfect by any means. Any discussions that have been had with you would be on this basis.". This email demonstrates that at the time, Mrs Dhariwal's view, contrary to her witness evidence, is that she was not concerned about the Claimant's interactions with other staff members. I prefer this evidence to that given after the fact in Mrs Dhariwal's witness evidence.

70. Later in the email of 14 April 2022, in relation to the bonus Mrs Dhariwal stated that the bonus was non-contractual, discretionary and could be withdrawn or changed at any time, she denied that a breach of contract had occurred.

71. Mrs Dhariwal emailed the Claimant on 25 April saying that in line with communications at the beginning of March, £6,700 of what had been billed in March would be eligible for the bonus, the rest would only be eligible on receipt of payment. The Claimant objected to this by email on 26 April 2022. In relation to the Q1 bonus, the Claimant said that she calculated that she was owed a total of £7,035.75 based on 33% of her billing over target that quarter. Mrs Dhariwal replied on 27 April 2022 suggesting that the Claimant meet with Mr Dhariwal, saying that payment of the bonus would be delayed until the matter had been resolved. The First Respondent did not pay any bonus sum to the Claimant on 29 April 2022, the payment date for the Q1 2022 bonus.

72. There was a meeting on 10 May 2022, in which the Claimant gave Mr Dhariwal a note, which the Tribunal has not seen a copy of. Mr Dhariwal produced a memorandum dated 20 May 2022 in response. This stated that the Claimant's note said that she had been made an offer of alternative employment.

73. The memorandum also referred to the discretionary bonus, saying that it was not contractual and could be revoked or altered at any time. Mr Dhariwal stated that the Claimant was seeking £6,184.75 but that the First Respondent's position was that only £3,026.25 should be paid, reflecting the cap of £6,700 of billing for March. Mr Dhariwal went on to say that he had concerns regarding the Claimant offering clients payment plans, saying that the position was unsatisfactory.

74. The memorandum also said, in terms, that the Claimant needed to change her approach to dealing with staff, and would need a detailed review of her performance, before she would be made director. In the final paragraph Mr Dhariwal stated "You are a valued employee….I would like to seek a remedy….in order that you can continue to work effectively."

75. On 9 June 2022 the Claimant resigned, saying that she considered herself to be constructively dismissed, referring to (i) the failure to make her a director; (ii) breach of trust and confidence; (iii) the change to her bonus structure without consultation; and (iv) criticism in an email which was also addressed to the firm's IT consultant. The Claimant again asserted that she was owed £7,035.75 based on 33% of the figure over target. The Claimant gave 6 weeks' notice of the termination of her employment. Her last working day was on 15 July 2022 and her employment ended on 28 July 2022.

76. The First Respondent's conduct was reason for the Claimant's resignation. This finding is based on the Claimant's witness evidence. The Tribunal also accepts the Claimant's evidence that she sought other work because of her intention to resign in response to that conduct and not the other way around.

Claims Against the Second Respondent

77. The Claimant's employment had transferred under TUPE to the First Respondent, therefore all claims against the Second Respondent fail.

Q1 2022 Bonus: The Law

78. I have been referred to Noble Enterprises Ltd v Lieberum [1998] 6WLUK420. There, although the employer had a discretion whether to operate the bonus scheme from year to year – once the bonus scheme had begun, the discretion was limited. It was made clear that if an employer wished to deprive an employee of the benefit of a bonus payment which he had earned through extra effort, then it was incumbent on the employer to make such a term clear in advance of the work being done.

79. Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank [2010] IRLR 715 is a Court of Appeal case relating to a formula based bonus arrangement. The bonus clause included the following wording: "The Bank maintains the right to review or remove this formula linked bonus arrangement at any time.". Lord Justice Jacob was clear that the question of bonus entitlement was purely one of construction:

    "It falls to be decided by how the words would be understood by a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract. The background includes anything which would have affected the way in which the language of the document would have been understood by the reasonable man."

80. The language of entitlement and the circumstances, including that the bonus was a means of enticing the claimant in that case to stay with the employer, where taken into account when interpreting the bonus clause and making a finding that it was contractual.

81. In Small & Ors v Boots Company plc and another [2009] IRLR 328 it was found that all of the relevant circumstances should be taken into account, including the employer's practice of making payments over many years, in deciding whether the discretion in the documentation was to be construed as having contractual content.

Further, discretion could be construed to apply to particular elements or to the bonus in its entirety.

Q1 2022 Bonus: Applying the Law to the Facts

82. The express terms of the bonus scheme are as follows:
"As a discretionary bonus, should you exceed your target in any quarter, you shall be entitled to a bonus equivalent to 33% of the net billing above your target. The bonus scheme is discretionary. It is based on current targets and resourcing levels. It is not payable in the event of breach of practice rules, justified complaints, breach of employment contract or staff handbook, submission of notice or a failure to comply with the firm's quality standards. The above scheme is non-contractual and may be revoked or altered at any time upon immediate notice.

83. The relevant background on re-incorporation of the bonus into the Claimant's contract in December 2019 was that:
    a. the use of the language of entitlement "you shall be entitled to a bonus";
    b. the calculation was formulaic and had been applied during 2019 in a consistent, straightforward, mathematical manner;
    c. the bonus was intended to incentivise the Claimant to generate more billing; and
    d. the bonus had been put forward as part of the Claimant's improved "package" to retain her when she was planning to leave for a competitor, and relied on by her in withdrawing her resignation as consideration in return.

84. Taking the relevant background into account, and upon reasonable construction, the bonus scheme, did have contractual effect. The wording of the bonus clause stated at the end that the scheme was "non-contractual and may be revoked or altered at any time upon immediate notice". I find that this wording entitled the First Respondent to alter the calculation of, or indeed revoke, the scheme in advance of each quarter, without giving notice. However, a reasonable person would not understand this wording to mean that where an employee had begun work for a relevant quarter, the bonus could be altered or revoked part-way through that quarter. Once the relevant quarter had begun, and the employee had begun work in reliance on it being in place, its payment could only be withheld in circumstances where there had been a "breach of practice rules, justified complaints, breach of employment contract or staff handbook, submission of notice or a failure to comply with the firm's quality standards". Whilst the First Defendant referred to emails relating to alleged complaints, the Grounds of Resistance and submissions did not seek to rely on this carve out.

85. As is clear from Noble, if the First Respondent had wished to deprive an employee of the benefit of a bonus payment earned through extra effort, then it was incumbent on them to make such a term clear in advance of the work (or part of the work) being done. In line with Khatri if the First Respondent "decide[s] to reward their employees by means of purely discretionary bonuses then they should say so openly and not seek to dress up such a bonus with the language of entitlement qualified by a slight phrase which does not make it absolutely clear that there is in fact no entitlement at all."

86. It was not, therefore, open to the First Respondent to seek to change the basis on which the Claimant's bonus for Q1 2022 was calculated, in February 2022. Any change for Q1 2022 had to be notified to the Claimant by 31 December 2021. Accordingly, in my finding the Claimant was entitled to have had her bonus calculated by reference to 33% of billing over target for Q1 2022. In my finding, this sum equated to £7,035.75 based on the evidence and calculation of the Claimant. The First Defendant did not put forward any evidence which would indicate that a different calculation was correct. The relevant payment date was 29 April 2022.

87. The First Defendant's actions seeking to unilaterally amend the Q1 2022 were in breach of contract. Whilst there was some discussion between the parties after Mrs Dhariwal's email on 3 March 2022 indicating the bonus would be calculated based on receipts, there was no sufficiently clear statement of intention to breach the contract before 25 April 2022. The email of 25 April 2022 was the first clear statement of the First Respondent's intention not to pay the Claimant the relevant bonus. This was an anticipatory breach of contract. The First Respondent then did not make the bonus payment on 29 April 2022, in breach of contract.

88. The Claimant seeks to argue that throughout the discussions, each time a payment was offered but not paid, this was an occasion on which the payment was due for unlawful deductions purposes. I find that since there was no agreement between the parties on this matter which operated to vary the contractual due date of the bonus, the only date on which the payment was due was the 29 April 2022. This breach was still outstanding at the date on which the Claimant's employment ended on 28 July 2022, and at the date of the hearing no bonus payment had been made.

<u>The Tribunal's Jurisdiction in relation to the Unlawful Deduction from Wages</u> <u>Claim</u>

89. The Respondents raise a jurisdictional issue in relation to the unlawful deduction from wages claim for the Q1 2022 bonus on the basis that, on their account, the last deduction was on 29 April 2022 and that the claim is therefore out of time.

90. The Claimant's position is that there were ongoing discussions about the payment of the bonus, and various promises to pay it were made. Therefore, the "occasion" on which the bonus was due, and therefore a deduction made, was each monthly payroll and again with the Claimant's final payslip or alternatively each time a payment was offered but not paid. Therefore, the Claimant says, the claim is in time. In the alternative, the Claimant says that it was not reasonably practicable to bring the claim in time, as doing so would damage the employment relationship.

91. Since the position in relation to whether the primary limitation period has expired is a question which depends on my findings of fact, I decided to deal with the issue of jurisdiction together with my decision on liability.

92. Under section 23 ERA 1996, a Tribunal "shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made". Pursuant to section 207A ERA 1996, this is extended by the ACAS conciliation period.

93. In my findings, set out above at paragraph 88, I determined that the bonus was due on 29 April 2022. It is common ground between the parties that this means that the unlawful deduction from wages claim is out of time.

94. Under section 23(4) ERA 1996 where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable. The burden of proof is on the Claimant to prove that it was not reasonably practicable to bring the claim within the primary limitation period. This was not addressed in the Claimant's witness statement. In the circumstances, I find that it was reasonably practicable for her to have brought the claim.

95. The Tribunal has no jurisdiction to hear the unlawful deduction from wages claim and it is therefore dismissed.

Constructive Dismissal: The Law

96. Under section 95(1)(c) of ERA 1996, an employee is dismissed if they terminate the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct. This is often referred to as a "constructive dismissal".

97. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of ERA 1996 which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

98. The leading authority in relation to constructive dismissal and the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

99. The Tribunal must therefore establish that there is a relevant contractual term and decide if it has been breached. If there has been a breach of contract, the question is

then whether the breach is fundamental, in other words whether it repudiated the whole contract. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

100. In Star Newspapers Ltd v Jordan EAT 344/93 it was found that there was an implied term that the employer, when reducing the geographical area in relation to which the employee would receive commission, would come to some agreement with the Applicant that she would not have a reduction in her finances. It was found to be a breach of that implied term when that the employers paid no attention whatsoever to her financial situation in making the relevant change. The employee was entitled to treat a substantial reduction in the income as a fundamental breach of contract.

101. In Cantor Fitzgerald International v Callaghan and ors 1999 ICR 639, CA, the Court of Appeal found that where an employer unilaterally reduces his employee's pay, or diminishes the value of their salary package, the entire foundation of the contract of employment is undermined. A denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory regardless of the amount involved.

102. As set out in Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493 it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. This is known as the implied term of trust and confident. The test of whether there has been a breach of the implied term of trust and confidence is objective, and any breach of it will amount to a fundamental breach. That is because the essence of the breach of this implied term is that it is calculated or likely to destroy or seriously damage the relationship.

103. If a fundamental breach of contract has been established, the employee may accept the breach and resign, or affirm the contract. If the employee resigns, in order to amount to constructive dismissal, such resignation must be caused by the breach of contract in question.

104. Jones v F Sirl and Son (Furnishers) Ltd 1997 IRLR 493, EAT, in order to decide whether an employee has left in consequence of fundamental breach, the tribunal must look to see whether the employer's repudiatory breach was the effective cause of the resignation. There may have been concurrent causes operating on the mind of an employee whose employer had committed fundamental breaches of contract (including, in this case the offer of an alternative job). Where there was more than one cause operating on the mind of an employee it is the task of the tribunal to determine whether the employer's actions were the effective cause of the resignation.

105. The Court of Appeal in Meikle v Nottinghamshire County Council 2005 ICR 1, CA made clear that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being

"the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.

Constructive Dismissal: Applying the Law to the Facts

106. I have made a finding that the Respondent breached a clause of the Claimant's contract regarding the payment of the Q1 2022 bonus. This alone was sufficient to constitute a fundamental breach of the Claimant's employment contract, Cantor Fitzgerald applied.

107. The parties had agreed a term of the Claimant's contract in relation to directorship as follows.

"Subject to SRA clearance and ongoing performance under your contract of employment, you will be made a director upon your qualification."

108. The only qualification to the contractual obligation to make the Claimant a director of the firm, is "ongoing performance under your contract of employment". The Claimant qualified in July 2021. The quarterly review document dated 8 September 2021 did not indicate any concerns with her performance. Therefore, in my finding the performance element of the clause was met. The Respondent conceded that the SRA element was also met. Nevertheless, the Claimant was not made a director upon qualification.

109. The First Respondent's attempts to cast the Claimant's people management skills in a bad light from Mr Dhariwal's memorandum of 20 May 2022 onwards, are not borne out by the contemporaneous evidence, and in two of the three examples, pre-date the incorporation of the term regarding the directorship. In any case this is not relevant to the operation of the clause itself. If concerns regarding people management were relevant to performance of the Claimant's contract, as understood by the First Respondent, they would have been raised in 8 September 2021 review. They were not. Attempts to raise these concerns later are not credible. It is not the Tribunal's role to assist the First Respondent to escape a bad bargain. It cannot now add further caveats to the contractual obligation to make the Claimant a director on qualification.

110. The First Respondent breached the Claimant's contract in that she was not made a director on qualification. In my finding, this should have taken place within a reasonable period after the Claimant's qualification, with the First Respondent taking active steps to make the Claimant a director by the end of September 2021. This breach was ongoing – despite not taking any active steps to make the Claimant a director, there were ongoing discussions in which Mr Dhariwal indicated that he was still willing to make the Claimant a director. On 20 May 2022, in his memorandum, Mr Dhariwal stated that the Claimant would not be made director unless she changed her approach to dealing with staff, and a detailed performance review was satisfactory. This crystallised the breach. This breach went to the heart of the contract with the Claimant and constituted a fundamental breach of contract.

111. I do not go on to consider the alleged breach of the implied duty of trust and confidence given the two breaches of express terms, which have been found to be fundamental breaches, outlined above.

112. The Claimant resigned on 9 June 2022 because of the First Respondent's conduct. The First Respondent argued that the Claimant's job offer pre-dated the breach because a job offer had been received by 20 May 2022. However, the date of one of the relevant breaches was 29 April 2022 when the First Respondent did not make the payment of the Q1 2022 bonus on its due date, therefore I do not accept this argument. Indeed Mrs Dhariwal said in oral evidence that she thought the Claimant had resigned because of the bonus issue.

113. The Respondent referred alleged that the Claimant had affirmed the contract in the Grounds of Resistance but did not particularise the point. I have nevertheless considered it. Given the Claimant's active protests in relation to the breaches, the delay between the breaches on 29 April 2022 and 20 May 2022, and the Claimant's resignation on 9 June 2022 is not sufficient to constitute an affirmation of the contract. A resignation on notice is envisaged by section 95(1)(c) of ERA 1996. The offer to work an additional two weeks (rather than using annual leave) in circumstances where the Claimant has been so clear about her objections to her treatment, and has already resigned in response to it, cannot in my finding imply an affirmation of the contract.

114. Taking all of the above into account, the Claimant was constructively dismissed by the First Respondent.

Unfair dismissal

115. In order to establish that the dismissal was fair, the First Respondent must show that there was a potentially valid reason for dismissal within the terms of section 98(1) and (2) ERA 1996. The First Respondent has pleaded misconduct, which is not particularised in the Grounds of Resistance. In submissions it was said to refer to the Claimant not being in the office, other issues raised in the 20 May 2022 memorandum, and breach of confidentiality obligations in discussing the bonus dispute with other staff members.

116. The First Respondent's submission is that the reason for the dismissal was misconduct, a potentially fair reason. This is not credible. Much of Mr Roper's statement on this point is couched in the language of second hand information "I have been advised". In the memorandum of 20 May 2022, Mr Dhariwal states "You are a valued employee….I would like to seek a remedy….in order that you can continue to work effectively." In my finding, the First Respondent did not intend to dismiss the Claimant. The reason for the dismissal cannot therefore credibly be said to be misconduct. The Respondent now seeks to amplify largely historic matters, in relation to which no disciplinary steps were ever taken or intended to be taken, in order to seek to construct a misconduct argument.

117. In the absence of a potentially fair reason for dismissal, the dismissal was unfair.

118. Potential reductions to the compensatory award are dealt with in section 123 of the Act. Section 123(6) provides: "where the tribunal finds that the dismissal was to

any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

119. If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. Considering Polkey v A E Dayton Services Ltd [1988] ICR 142 HL and applying Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT the Tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal.

120. It would not be appropriate to make a Polkey reduction in this case. The misconduct argument made by the First Respondent is unconvincing and consequently there is no basis, which would have justified a fair dismissal. I find no contributory fault on the part of the Claimant.

Requirement to Provide Written Particulars

121. Section s 4(6)(b) ERA 1996, provides that where, the identity of the employer is changed in circumstances in which the continuity of the employee's period of employment is not broken, and there is no change in any of the other particulars which must be contained within the written particulars, then the new employer must give a statement noting the change of employer (section 1(3)(a); s4(6)(b) ERA 1996). This applies in relation to the TUPE transfer of the Claimant from the First Respondent to the Second Respondent. Such a statement must also specify the date on which the employee's period of continuous employment began (section 1(3)(b); s4(6)(b) ERA 1996).

122. The First Respondent did not comply with the above obligation to provide a written statement of change after the relevant TUPE transfer, see paragraph 55 above.

123. In relation to the Claimant's claims that there should have also a statement of change in relation to the rate of remuneration post-April 2021, changes to benefits, the change of job title as Head of Family Law and details of training entitlements, in my finding, these changes were provided to the Claimant in writing with sufficient particularity – albeit by email, on 12 April 2021.

Conclusions

124. The Claimant was initially employed by the Second Respondent, and her employment transferred under TUPE to the First Respondent between 29 January 2021 and 12 February 2021, it is unclear exactly when.

125. As a result of the TUPE transfer, the Second Respondent was not the Claimant's employer at the time the claims arose, so the claims against the Second Respondent are dismissed.

126. Following the transfer, the First Respondent did not provide a compliant statement of update of terms as required under sections 1 and 4 of ERA 1996.

127. The Claimant brought a contractual claim for a quarterly bonus in relation to the first quarter of 2022. The Claimant alleged that the bonus was contractual. The First Respondent argued that it was discretionary and could be withdrawn or amended at any time. I determined that there was an element of discretion open to the First Respondent, but once the quarter had begun, the contractual wording did not permit the First Respondent to amend or withdraw the bonus part way through the quarter. In this case, the First Respondent had attempted to make changes in February 2022, after the quarter had begun. I found that the Claimant was therefore contractually entitled to the Q1 2022 bonus, which was due on 29 April 2022.

128. I found that the Tribunal did not have jurisdiction to consider the Claimant's unlawful deduction from wages claim in relation to the Q1 2022 bonus, because it was reasonably practicable for her to have brought the Claim in the limitation period, and she did not.

129. The First Respondent did not pay the Claimant anything in relation to the Q1 2022 bonus. This was a fundamental breach of contract. The breach was outstanding on the termination of the Claimant's employment.

130. The Claimant's contract contained an express term that the Claimant would be made a director on obtaining her CiLEX qualification. The Claimant achieved this in July 2021, I have made a finding that the caveat regarding performance was not made out, and consequently the First Respondent was under a contractual obligation to make the Claimant a director of the firm. In my finding, this breach was crystallised on 20 May 2022 when the First Respondent made clear that it would not comply with this express contractual term. This was a fundamental breach of contract.

131. The Claimant resigned on 9 June 2022 and her employment ended on 28 July 2022. I found that the fundamental breaches by the First Respondent were the effective cause of the resignation, even though the Claimant did hold a job offer by the time of her resignation. She had sought other work as a result of the First Respondent's conduct. There was no affirmation of the contract by the Claimant.

132. Based on these findings, the Claimant was constructively dismissed.

133. The First Respondent argued that the dismissal was fair, relying on misconduct as a potentially fair reason. I found that the First Respondent had not intended to dismiss the Claimant, and the argument regarding misconduct was not credible. Based on these findings, the Claimant was unfairly dismissed.

Remedy

134. Remedy shall be considered at a separate remedies hearing.

Case No: 1402947/2022

First Tier Tribunal Judge Volkmer sitting as Employment Judge

Date 22 March 2023

Reserved judgment & reasons sent to the Parties on 30 March 2023

For the Employment Tribunals