EMPLOYMENT TRIBUNALS

Claimant: Mr A Kenney

Respondent: Infor (United Kingdom) Limited

Heard at: Manchester (by CVP) **On:** 1-4 June 2021 And on reconsideration on 31 January 2023

Before: Employment Judge Warren

REPRESENTATION:

Claimant: Mr M Stephens of Counsel
Respondent: Ms C Davis KC

RESERVED JUDGMENT
ON RECONSIDERATION

The judgment of the Tribunal is that the claimant's claim of constructive unfair dismissal succeeds.

REASONS

The respondent applied for this judgement to be reconsidered on several grounds.
The claimant objected to the application.
Following a further Hearing in public I agreed that I would reconsider my judgement as follows.

The original reasons stand other than where the wording appears in italics where I have reconsidered and either reached different conclusions or at the least amended my conclusions.

The respondent's leading counsel had prepared lengthy written submissions and addressed me at the hearing. The claimant's counsel addressed me orally.
I regret that I cannot address the delay in the original judgement other than to say it was brought about by illness and I apologise once again for that.

I have added specific references to Mr Samuelson and Mr Johnson. I do not consider their evidence to have been helpful. The claimant accepted that he was subject to the 'normal' terms about his commission, unless there was an exception.

He pleaded that he was told he had an exception. None of the respondent's witnesses could say more than that it was unlikely he had an exception, as Mr Phillips was expected to put it in writing, or normally to discuss it with Mr Samuelson. The respondent's case was that neither happened. We also know that Mr Phillips resigned within 24 hours of the signing of the JDS deal, and have no evidence as to why, and why he could not provide evidence of his consent or otherwise.
The American evidence was not persuasive in the face of emails from senior managers, telling the claimant that there was an exception in place, issued by Mr Phillips.

I have reconsidered all of the evidence in this case and reached some different conclusions, based on the written and oral representations made by both parties. I do still find there has been a breach of the fundamental term of trust and confidence which entitled the claimant to resign and claim unfair dismissal. I have fine tuned the Reasons so as to remove any suggestion at all that any of this judgement is based on any breach of a term of the claimant's employment contract other than the breach of the fundamental term of trust and confidence based on the claimant's legitimate expectations.

I do not accept the respondent's point that the normal business practices of the respondent should have been given more weight. In the circumstances of this case, where the claimant could be expected to be able to trust Mr Berry and Mr Tollefson to be giving him an accurate statement of the position. An exception is just that – something beyond the norm.

Where I have changed my Reasons I have done so by using italics to highlight the changes.

The Judgement remains the same although my reasoning has changed to some degree.

Background

1. By an ET1 dated 1 May 2020 the claimant alleged unfair constructive dismissal and an unlawful deduction from wages by the respondent company. The respondent denied the claims.

2. The grounds of complaint were later amended on 15 January 2021 to make it clear that the claimant was seeking to bring claims of unfair constructive dismissal but not an unlawful deduction from wages claim (the nature of the existing claim would exceed the compensatory provisions of the Employment Tribunal and he will seek to recover those losses in the High Court).

3. There is an element of loss of wages (commission) falling from his unfair constructive dismissal claim in relation to commission due (the claimant alleges) on a contract relating to Barbour. The unfair constructive dismissal claim itself, however, relates only to a contract between the respondent company and JD Sports Fashion PLC (referred to as JDS throughout the case).

The Evidence

4. The agreed bundle of documents extended to 700 pages or thereabouts.

5. The claimant gave evidence in his own regard and called Mr Berry. The respondent called Joe Dufty, Loretta Clark, Craig Pearcy (who made two witness statements), *Mr Samuelson and Mr Johnson*. The timings of the hearing were amended to assist the respondent witnesses who gave evidence from the United States of America and predating the guidance on witnesses giving evidence from abroad).

6. I decided this case on the evidential test, the balance of probabilities. I did not find any of the witnesses to be lying, but found that the respondent witnesses were generally unable to assist me with regard to some of the key evidence, which they did not appear to have researched. In particular, whether Charles Phillips had in fact given the authority that was asserted by the claimant's management team to vary the normal terms of the set commission structure. This hampered the response as there was nothing to challenge the evidence given by the claimant's line manager and countersigning officer.

7. I therefore preferred the evidence of the claimant and Mr Berry, which was supported by various emails and which could not be countered by the evidence of the respondent’s witnesses, who were not party to those conversations at the time.

The Facts

8. These are the facts as I have found them.

9. The claimant began employment for the respondent on 16 May 2016. The respondent is a substantial multinational company providing software solutions for commercial organisations. The claimant is a Software Executive specialising in sales. A substantial part of his earnings was to be made up from bonuses paid for bringing in new contracts. A detailed bonus structure existed for the respondent and was set out in a document entitled “Terms and conditions governing commission and bonus plans, sales and presales” (page 128).

10. In addition (and separately to the bonus scheme) the respondent had what was referred to as compensation exceptions. These meant that an employee would

be paid a bonus on different terms to the bonus scheme for a specific contract. This gives further flexibility when working to secure high value contracts. *This required the approval of the chief executive officer at the time.*

11. *Under normal circumstances the claimant was used to having* bonus payments made in the payroll run the month after the respondent received the first payment from the customer who had signed up to the contract.

12. The claimant and his team (he being the most senior in the team, *but managed by Mr Berry and Mr Tollefson*) negotiated for a contract with JD Sports over a period of about 14 months. The contract was signed and concluded on 20 August 2019 after a flurry of overnight negotiations and calls. The contract was worth £2.1million for the respondent. There had been a number of discussions between the parties to the contract. The claimant and his team wanted a contract length of more than three years as they would then receive a significantly greater bonus (the claimant would receive roughly 15% of the value of the contract). He would also receive a sales specific performance incentive sum if the contract was signed in August 2019. If the contract length was for less than three years, the claimant would receive a bonus of 5% of the value of the contract. JD Sports wanted a five year contract but with a two year break clause. That would pay only 5% of the value of the contract.

13. The claimant raised the issue of a compensation exception and on 31 July 2019 he spoke to his line manager, Mr Berry, to request the following exception:

(1) The claimant to be paid a bonus based on a 3+ year deal rather than a two year deal.

(2) He would therefore be paid 15% on a sliding scale of the value of the JD contract plus a sale specific bonus if the contract was signed in August 2019; and

(3) He would be paid the bonus in full on the payroll date one month after the respondent received the first payment from JD Sports (as usual).

14. *Such an exception required the written authority of Mr Phillips*. Mr Berry assured the claimant that he had spoken to others more senior and confirmed this exception for the claimant. Mr Berry confirmed to the claimant that he had obtained approval from his own line manager, Corey Tollefson, and he also confirmed that the compensation exception had been agreed by Mr Charles Phillips, the CEO of Infor at the time of the JD contract being agreed. *These comments were in writing in an email.* It was worthy of note that Mr Phillips left the business within a very short space of time thereafter, and it was unclear to me on what terms he had left. The terms of the exception would apply to the rest of the claimant's team as well.

15. Mr Berry sent an email in response to an email from Brad Steiner who was stating that the deal could turn into a two year only deal. Mr Berry sent an email on 16 August 2019 confirming “a comp exception has been agreed at the highest level” (page 184). On 20 August 2019 the claimant confirmed the following in an email (page 195):

> "The deal has been recorded in CRM as a five year deal though the actual contract contains a break clause at the end of year two. I have discussed this with my manager (Jason Berry) and SVP (Corey Tollefson) who has had a conversation with Charles Phillips confirming that an exceptional compensation approval is in place so that sales should get paid at the three year rate of commission (as a five year deal)."

16. The claimant emailed again on 22 August 2019 (page 196) stating:

> "Given the pace the deal was moving at and the pressure to secure it late into the night, a lot of the approvals were done verbally, though attached is Jason's note to HQ app confirming the approval was for a comp to be paid out at the three year rate. The deal was a five year deal at £2.1million per year – TCV £10.5million, with a 90 day break clause at year two. We had to grant this given the Infor demand management suite really doesn't have a proven track record in the UK. Corey, Charles (Phillips) and Kevin (*Samuelson*) were all aware of this and had in depth discussions with Corey who assured us that the comp exception had approvals are in place [stet]."

17. Mr Berry, the claimant's line manager, replied on 22 August 2019 (the same day) (page 197) saying:

> "Hi Craig,
>
> You asked me to inform you when we had compensation exceptions. In this deal we do. Corey agreed with Charles Phillips that this deal would be paid at the full ACV three year plus rate. We are expecting client payment within 21 days of signature. Please can you log this exception."

18. Mr Tollefson's email dated 28 August 2019 (page 213) stated:

> "Hi Kev,
>
> Charles has approved the standard compensation on this deal even though it was 24 months. He had approved this days before his departure."

19. Mr Tollefson's further email on 29 August 2019 (page 212), in reply to a query by the new CEO Kevin Samuelson on the compensation exception, stated:

> "I understand the confusion, let me bring clarity. CP (Charles Phillips) called me two weeks ago and had asked me what was the hold-up from their CEO. I told him two concepts: we wanted a three year ACV comments and a clean SOW. He asked me why we were pushing them so hard for three years when he knew we had two years in the bag. I told him that it was related to compensation and that we had held the three year line the entire month of August. He said to take it down for two years and he had approved the same comp as if it was three. The deal signed five days later. That is the situation."

20. The claimant wrote on 7 October 2019 (page 230) saying he would like to request that the entire commission value be paid in October as was agreed and clearly communicated by Jason Berry, Corey Tollefson and Charles Phillips.

21. Craig Pearcy wrote on 4 November 2019 (page 239) stating:

> "It appears they did tell Andy it was approved."

22. There then followed a flurry of emails between Mr Johnson, Mr Oriema, Mr Samuelson and Ms Clark. These formed the new management team after Mr Phillips left. They begin to discuss between them on email (page 224 onwards) how much the claimant should be paid and when, Mr Samuelson at one point confirming:

> "I am good with the delayed approach."

23. Mr Pearcy suggested that the simplest way to deal with the compensation exception terms was to pay per the two year rate once the first payment has been made by the company, then once it 'goes live' they could update the deal to be three years. All parties confirmed that none of this had been discussed prior to 20 August 2019. Infor received the first payment from JD Sports of £1.89million on 13 September 2019.

24. On 28 August 2019 the claimant had noticed that Infor had amended the internal computer database for the contract by changing it from a five year deal with a two year break clause to solely a two year deal. He did not understand how or why that had changed, but he believed it was in an attempt to pay him 5% rather than 15% of the contract price as his bonus.

25. When JD Sports made their first payment on 13 September 2019 the claimant received a commission statement showing only a 5% bonus not at 15% bonus. He immediately queried it with Mr Pearcy, who did not explain the change. The claimant was advised by Mr Pearcy (page 232) of the change to the terms, Mr Pearcy suggesting that there had never been an exception granted. An exception was now to be granted, but on the terms of the split payment – 5% immediately and the rest later.

26. The claimant believed that by 14 October 2019 all of the rest of his team had been advised that the compensation exception which he believed stood, would be honoured for them, and that only he was being treated differently. He thought this was because his bonus was the largest amount. On 18 October 2019 the claimant asked for a draft payslip, which when he saw it suggested that he would receive two thirds of his bonus, but he was given no explanation as to why a third was being withheld. When the claimant received his pay on 28 October 2019 in fact he was only paid one third of the agreed bonus. He raised a grievance on 2 November 2019, setting out why he should have been paid in accordance with the agreed compensation exception (page 238). He sent his grievance to Mr Watters, the Vice President (International) of the Leadership Team.

27. Two months after the claimant had raised his grievance he had not received a reply and his grievance he believed was being ignored and so he engaged solicitors.

From the emails it is obvious that Infor were debating between themselves what the terms of the exception agreement had been.

28. The claimant during this period was approached by Google through an internal recruiter. Google sent an offer of employment on 25 October 2019 and agreed that the claimant could join them any time in the following 12 months. The claimant appears to have kept this offer as an insurance policy, but a provisional start date of 20 January 2020 was agreed. The claimant felt by then his grievance should have been resolved and he should have been paid by the respondent for the outstanding bonus that he believed he was due.

29. Once the claimant had lodged the grievance and not had a reply and having engaged solicitors, his solicitors provided a deadline for the resolution of the grievance of 17 January 2020. The claimant felt that he had lost all trust and confidence in Infor and resigned and claimed constructive dismissal on 17 January 2020 when the issue had not been resolved. The claimant began work for Google the following week.

30. The claimant sustained other losses following his resignation. He had been working on a contract with J Barbour & Sons Limited. The contract was finalised on 31 January 2020 and would have been worth £51,000 to the claimant in his March 2020 payroll.

31. In support of the claimant, Mr Berry gave evidence. He was reluctant to do so as he had been the subject of a compromise agreement in relation to his own departure from the company. However, he had made a witness statement and that contained sufficient information for me to establish that he had been the claimant's line manager from May 2016 to October 2019. On 31 July 2019 he had verbally confirmed with the claimant that he would be paid a bonus for the JD Sports contract based on a three year plus deal rather than a two year, based on confirmation provided to him (i.e. Mr Berry) by his line manager, Corey Tollefson, who in turn had obtained his confirmation from his line manager and the CEO, Charles Phillips. The bonus was to be paid on the payroll date in the calendar month after Infor received the client's first contractual payment. Mr Tollefson had told Mr Berry that this was a compensation exception and he had approval for it. Mr Berry understood that the additional approval had come from Charles Phillips, who at the time was the CEO for Infor.

32. The respondent's evidence all related to what happened after 20 August. It would seem that probably within around 24 hours of the deal being done with JD Sports Limited, the Chief Executive, *Mr Phillips*, left. It was very difficult to find out anything more than that. However he having left, the issue of the exception arrangement with the claimant and his team was considered by the new Chief Executive (*Mr Kevin Samuelson*) along with his senior team not to have been a valid agreement, or there having been no agreement. They started from this premise and therefore decided amongst themselves what the exception should be. The claimant was told that he would receive one third within the usual timespan (and he duly did), and the other two thirds of the commission (based on a three year plus deal) at a

later date. All parties appear to have thought that that was fair except for the claimant.

33. When Charles Phillips left the business, he was replaced by Kevin Samuelson (on 21 August 2019 i.e. within 24 hours of the deal having been done). The respondent then restructured its business. Cormac Watters took over as General Manager of International Markets (including Infor's sales operations). Corey Tollefson and Jason Berry both left the business in October 2019 and the claimant had two new managers, namely Simon Quinton and Warren Jenkins. It is to be noted that none of those new members of staff had been involved in the negotiations with the claimant before the JDS contract was signed.

34. The new structure included an Exceptions Committee who would, in the future, deal with any exception arrangement outside of the normal terms of the bonus scheme. The claimant's situation had been put to this Exceptions Committee and they would deal with it before there was a grievance hearing. However, the Exceptions Committee meetings did not take place when they were due to, in December 2020, *(and the claimant had not agreed to this delay in any event).*

The Law

35. Case law put forward by the claimant's representative was as follows: **Cantor Fitzgerald International v Callaghan [1999] IRLR 234**, with Judge LJ stating:

> "In reality it's difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms the employee offers his skills and efforts in exchange for his pay. That is the understanding at the heart of the contractual arrangement between him and his employer."

36. Case law considering the failure to deal with a grievance as a breach of contract – **Goold WA (Pearmak) Limited v McConnell [1995] IRLR 516**:

> "Instead of being considered and dealt with promptly [the grievance] were allowed to fester in an atmosphere of prevarication and indecision."

Was it open to the claimant to find alternative work before he resigned?

37. There is no need for the repudiatory breach of contract to be the principal reason for the resignation. **Nottinghamshire County Council v Meikle [2004] EWCA Civ 859** states:

> "The proper approach once a repudiation of the contract by the employer has been established is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that in the present case it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

38. **Abbey Cars (West Horndon) Limited v Ford UKEAT/0472/07**, Elias P suggested that the breach must have played a part in the dismissal. The "played a part" test was endorsed by the EAT (Langstaff P) in **Wright v North Ayrshire Council [2014] IRLR 4**.

Representations by the parties

The Claimant

39. *The claimant's representative asserted that there had been two fundamental breaches of the implied term of trust and confidence and that he had thus lost trust and confidence in the respondent and was entitled to resign and assert that he had been constructively dismissed. His case was based on the facts as the claimant presented them and the evidence in the emails, and from Mr Berry*.

The Respondent

40. The respondent denied that that the claimant could snhow that there had been fundamental breaches of the implied trust and confidence. It considered that there was no evidence of any agreement to deal with the claimant and his team on an exception basis prior to 21 August and that he should not have had any expectation based on an exception commission. That being the case, the respondent considered that the claimant's first head of claim should be dismissed.

41. In relation to the second, that there was a delay in dealing with the grievance, the respondent asserted that in fact the claimant was kept up to date with what was happening, that the grievance was being investigated and that the proposal was in fact that the second part of the payment which the claimant asserted he was due to receive would be paid to him in September 2020. He had no reason therefore to resign. The respondent sought to persuade the Tribunal that the fact the claimant began work for Google within a working day of resigning from the respondent would suggest that his principal motivation for resignation was the offer of an alternative job.

Conclusions

42. Having heard all of the evidence and read the relevant emails that were before me, and having also heard in particular the evidence of Mr Berry, I am satisfied that the claimant had every reason to believe that his employer, through his line manager, his countersigning manager, and the then Chief Executive, had in fact agreed an exception in relation to his commission. The claimant was entitled to trust those who managed him to give him accurate information. The information he was given was that the JDS deal would be paid out to him in commission on the basis of a three year break clause, not a two year break clause. That being the case, when the respondent prevaricated and seemed to be attempting to create new terms for the exception after the date of signature of the agreement with JDS, they were "shutting the stable door after the horse had bolted".

43. Both Mr Berry and Mr Tollefson remained in the employ of the respondent for several weeks after the issue of payment had been raised by the claimant. Had

there been a *swift investigation with them into the claimant's grievance, the respondent's senior management team would have heard what I heard: that the claimant had been told he had an exception deal, both by his line manager and further by his countersigning officer*. I asked myself if the claimant could not trust his managers, who could he trust? *If the senior management team now appeared to him to renege on a deal which the claimant legitimately expected them to confirm, what greater breach of trust and confidence could there be? This did not relate to a few pounds but to a sum in excess of £250,000.*

44. The claimant believed that the new senior management team, after the departure of the CEO, were trying to redecide the terms under which he would be paid, simply because they did not like how much money they were going to have to pay the claimant.

45. I have deleted the entirety of paragraph 45 as requested by the respondent and make the following findings in its place:-

45.1 – the claimant had a reasonable expectation that he would be paid commission on the JDA deal under an exception to normal commission terms, because he had been told so by Mr Berry and Mr Tollefson, both managers senior to him.

45.2 – following the departure of Mr Phillips, and the introduction of a reorganised management team who questioned his entitlement, he reasonably believed that they were attempting to renege on that exception.

45.3 – as a result he lost trust and confidence in his employer and duly resigned when his attempt to resolve the matter by grievance appeared to have stalled.

45.4 – he was entitled to resign in the circumstances as his legitimate expectations had not been met and the respondent's failure to provide an answer to the grievance (whatever that may have been), or even to arrange and hold an effective grievance meeting, left the claimant feeling again that he could not have trust and confidence in the respondent. The respondent's conduct overall led to the claimant being justified in handing in his notice and claiming unfair dismissal

46. Whilst I am satisfied that there was some movement on the grievance, the grievance began in October 2019 and by the end of December 2019 the claimant was no nearer having the matter resolved. His solicitors set a deadline for the respondent of 17 January 2020. The respondent did not react to that, and the claimant resigned on the same day. I asked myself therefore the remaining questions in an unfair constructive dismissal claim:

(1) Did the respondent have reasonable and proper cause for the acts or omissions, and if not behave in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and respondent?

(2) Was the breach a fundamental one i.e. was it so serious that the claimant was entitled to treat the claimant as being at an end?

(3) Was that fundamental breach of contract a reason for the claimant's resignation?

(4) Did the claimant affirm the contract before resigning, by delay or otherwise?

(5) Has the respondent shown the reason or principal reason for the fundamental breach of contract?

(6) Was it potentially fair within section 98 of the Employment Rights Act 1996?

(7) Did the respondent act reasonably in all of the circumstances in treating that reason as a sufficient reason to dismiss the claimant?

47. My conclusions are as follow.

Working under a contract of employment

48. The claimant had been told the terms of an exception agreement and had a legitimate expectation of a commission exception. The respondent then appeared to the claimant to attempt to create a different exception which was not what the claimant believed had been agreed, and was after the event.

49. The respondent further did not deal with the claimant's grievance in a satisfactory manner. the claimant could expect that the grievance would be considered within a reasonable period of time and in good faith. The claimant submitted a grievance to the General Manager of the International Markets (Cormac Watters) on 2 November 2019, seeking his assistance in receiving what he believed was the outstanding payment to him of over £200,000. The claimant asked for payment by 15 November 2019. Eventually that was redesignated 17 January 2020 by the claimant's solicitors. By that date the claimant had not received the outcome of his grievance. The only matters which had been raised with him were within the terms of what the respondent had attempted to dictate to the claimant as to how his exception commission would be paid i.e. in September 2020 (a whole year after he believed it was due to be paid).

Did that breach the implied term of trust and confidence?

50. This related to the claimant's pay, and in accordance with case law it did. The claimant quite reasonably, bearing in mind what he had been told by his managers, considered that respondent did not have reasonable and proper cause for failing to pay it. There were several weeks during which the respondent could have spoken to both of the claimant's line managers, and confirmed that they had told the claimant that an exception had been agreed, and the terms of it

51. Whilst the respondent can and does say that in fact they were working hard to investigate the grievance and to try and reach a solution to it, the fact remains that the claimant wanted paying for what he believed he was due. Under the terms he had been told he expected the payment in either September or October. He did not

see the grievance being progressed and believed that the grievance was not being handled in good faith.

52. Was the breach fundamental?

53. The breach was fundamental.

54. I am satisfied, having heard the claimant's evidence, that these fundamental breaches of the implied terms of trust and confidence were the reasons for the claimant's resignation which followed immediately after that date. I am further satisfied that the claimant did not affirm the contract before resigning by delay or otherwise. The claimant kept the contract alive only until such time as he believed that the respondent had failed to meet his legitimate expectation and thus breached the fundamental term of trust and confidence.

55. The respondent did not show a potentially fair reason for this, and the respondent did not act reasonably in all of the circumstances.

56. That being the case, I find this to be a constructive unfair dismissal.

57. Did the claimant actually resign because he had another job to go to, with Google. I found the claimant's evidence on this point to be credible. He believed he was owed a six figure sum, which on resignation may be placed in jeopardy, along with other commissions on different contracts. It made no sense for him to resign and 'start again' building up new business from scratch. He had a 12 month window in which to take up the contract with Google and but for the respondent's breach of the fundamental term of trust and confidence, would at the least have waited longer. The issue of how much longer will be measured at the remedy hearing.

Remedy

58. This matter will now be listed for a one hour telephone case management discussion to prepare the matter for a remedy hearing. The parties are asked within 14 days of receipt of this Judgment to notify the Tribunal of their non availability through to June 2023.

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Employment Judge Warren

Date: 10 October 2022

Reconsidered and re – signed on 4 May 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 12 MAY 2023

FOR THE TRIBUNAL OFFICE

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