Case No: 2304094/2018
2300937/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr M Anthony-Akah

Respondent: Sequence (UK) Limited

Heard at: London South
On: 30 May 2023 , 1 and 2 June 2023

Before:
Employment Judge Heath
Ms N Beeston
Mr C Wilby

Representation
Claimant: Did not attend
Respondent: Mr M Greaves (Counsel)

JUDGMENT having been sent to the parties on ***9 June 2023*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is the claimant's claim for constructive unfair dismissal and race discrimination. He says that there were systematic failings in the way the respondent conducted a disciplinary process against him (which led to his dismissal, but which was reduced on appeal to a final written warning) and that confidential details in relation to the disciplinary were disclosed by the respondent. He says this was a repudiatory breach of his contract of employment which led him to resign and claim constructive dismissal. He further says that the respondent discriminated against him in a number of ways because of his race. He claims that the respondent has failed to pay him £10,000 bonus in breach of contract. The respondent counterclaims for sums paid, effectively, as advance commission to the claimant, which it says it was entitled to recoup when his employment ended.

Issues

2. The issues were set out in a Case Management Summary of a Preliminary Hearing held on 30 April 2019 before EJ Andrews. Following this, the claimant provided a Response to Counterclaim ("RCC"), a Catalogue of Particular Treatment from Martin Coombs ("the Catalogue") and the respondent amended its Response.

3. The respondent prepared Draft List of Issues for the hearing which were never agreed by the claimant. We considered, on a reading of the pleadings, that this draft represented a fair List of Issues, and we adopted it. We annexe it to this decision (Appendix 1).

Procedure

4. This is a case where the claim was presented on 14 November 2018, and which concerns events in that year and even 2017. The final hearing of the claim had been adjourned twice at the claimant's request. In the week before this final hearing was listed there were a number of further applications made by the claimant to postpone this hearing. Initially these applications were made on the basis of witness availability, and subsequently on grounds of ill-health. The applications for a postponement were rejected by the Acting Regional Employment Judge, and the final hearing remained listed to start on 30 May 2023.

5. The claimant did not attend the hearing on 30 May 2023. A friend of his called Mikila Coley had corresponded on the claimant's behalf, indicating that he was unfit to attend with depression, anxiety and suicidal thoughts. The respondent considered this as an implicit further application for a postponement, and objected to it. The tribunal took the course urged upon it by the respondent to adjourn the hearing until 10 am 1 June 2023 with orders for the claimant to produce further evidence in support of any application to postpone. The orders were emailed to the claimant and to Mikila Coley, followed by a letter setting out the reasoning behind the making of the orders.

6. Mikila Coley sent further emails and produced further evidence. The tribunal found that the evidence was insufficient to support the granting of a postponement, having regard to the *Presidential Guidance – Seeking a Postponement of a Hearing* and case law. The tribunal decided not to dismiss the claims in the claimant's absence, but to proceed to hear the claim in his absence, together with the respondent's counterclaim.

7. We annexe the orders and letters the tribunal sent to the claimant on 30 and 31 May and 1 June 2023, which set out how the tribunal approached these issues and its reasoning for taking the course it did. (These are at Appendix 2).

8. The tribunal proceeded to hear the claims and counterclaim in the absence of the claimant. We heard evidence on 1 June 2023 (having used the non-sitting day of 31 may 2023 to read into the case). We were provided with a 536 page bundle. We heard from the following witnesses for the respondent, who provided witness statements:

    a. Mr Martin Coombs (formerly Area Manager);

    b. Mr Paul Kenny (Divisional Managing Director);

    c. Mr Kevin Day (Divisional Managing Director – Lettings South);

    d. Mr Ian Fry (National Managing Director for Estate Agency).

9. Mr Simon Arnes was due to fly from Portugal to give evidence in this case. After it became clear that the claimant would not be attending the hearing, the respondent took the view that his live evidence was not needed, and invited the tribunal to read his witness statement.

10. We also read the following witness statements provided on behalf of the claimant:

    a. The claimant (undated);

    b. Ms Natasha Ebanks (letter dated 15 August 2018);

    c. Mr Michael Fyffe (letter dated 6 July 2019);

    d. Mr Alan Latchana (letter dated 17 September 2018);

    e. Mr Stephen Ofori (letter dated 23 July 2018);

    f. Mr Ryan Osman (letter dated 11 September 2018).

11. Mr Greaves provided written closing submissions which he added to orally. The tribunal deliberated and gave an oral decision on the afternoon of 2 June 2023.

12. The respondent requested written reasons by email of 15 June 2023.

Facts

13. The respondent is one of the largest national networks of estate agents in the UK, operating under various trading names, which include numerous well-known estate agents.

14. The claimant was employed by the respondent from 16 July 2012, initially (or at least at some stage) in a sales negotiator role at Barnard Marcus, which is part of the respondent group. The evidence suggests the claimant was good at his job and won various awards. In March 2017 he was

promoted to the role of branch manager of the Battersea branch of Barnard Marcus.

15. A significant element of a sales negotiator or manager's remuneration is commission, which can be calculated based on various incentives. The nature of the respondent's business is that an individual's commission is not always generated instantly and is payable a month in arrears. The respondent therefore operated an "underpin" of commission, which would provide a guaranteed minimum income for a limited period whilst a sales pipeline builds. Any actual commission received would be offset against such underpin commission payments. The respondent, however, would put in place written provisions which would ensure that any underpinned commission payments in excess of actual commission earned could be recouped from an employee if he or she left employment within a certain period of time.

16. On 9 March 2017 the claimant was provided with a letter from his area manager, Mr MF, confirming a "Change to Contractual Details" effective from 8 March 2017 the letter set out new commission details as follows:

> *Commission details:*
>
> *FROM 1.9.17 -30.11.17 (Maternity Cover)*
> *5% residential banking*
> *5% mortgage services bankings*
> *5% new bankings (site dependent)*
> *5% personal commission*
>
> *Incentive:*
>
> *To be paid current sales pipeline until 31.5.17.*
> *Underpin £60k from 1.6.17 – 31.8.17.*
> *Instruction Incentive £100 per instruction (excluding repossessions and new homes) 1.8.17 – 31.10.17*
>
> *Should your employment be terminated either by yourself or the Company for whatever reason during the next 24 months of employment, any incentive payments in excess of actual commission will be deducted from any outstanding remuneration due to you with any shortfall being reimbursed to the company prior to last working day.*

17. On 10 March 2017 a Change of Contractual Details form was filled out in respect of the above change of contractual terms, which was signed by the Divisional Managing Director Mr Paul Kenny. The form was provided to payroll. In October 2017 the claimant's remuneration was further enhanced to match an offer from a rival firm.

18. The claimant's case is that on 21 December 2017 Mr MF, Area Manager and the claimant's line manager, wrote to him by letter ("the underpin cancellation letter") concerning the underpin repayment as follows:

> *"Further to our recent meeting on 13 December 2017, I am writing to confirm our revised agreement regarding payment underpin should you leave the company for any reason.*
>
> *As discussed, I can confirm the previous repayment agreement is null and void. Whilst we hope that you remain at Barnard Marcus for many years come, should you leave the company for any reason; there will be no repayable debt. This new agreement has been put in place as a reward for the superb progress which has been made within the Battersea branch since your arrival."*

19. The claimant's case is that Mr MF wrote again by letter ("the bonus letter") on 8 January 2018 as follows:

> *"Further to our recent meeting on 4 January 2018 and your discussions with Paul Kenny, I am writing to confirm your profit incentive.*
>
> *I can confirm that should the Battersea office manage to reduce the previous year's losses and remain in profit by the end of quarter two (July), a bonus of £10,000 (ten thousand pounds) will become payable.*
>
> *This incentive will not affect any other contractual profit payment agreements".*

20. For reasons we will deal with later, we do not accept that either of these letters are genuine, or that the respondent reached an agreement with the claimant in respect of underpin repayment or profit bonus.

21. On 1 February 2018 Mr MF attended a disciplinary meeting chaired by Mr Fry. He faced a disciplinary allegation that he had produced a fraudulent employment reference in which he had falsely confirmed to an inquiring landlord that a Mr AC was employed as a senior sales negotiator earning £39,000 per annum (AC was an acquaintance of Mr MF's who was not employed by the respondent). During both the investigation, conducted by Mr Kelly, and the disciplinary hearing, conducted by Mr Fry, Mr MF admitted that he had supplied the fraudulent reference and acknowledged that he knew it was gross misconduct. We accept Mr Fry's evidence that he accepted Mr MF's request to be allowed to resign, and that otherwise he would have been dismissed for gross misconduct.

22. Following Mr MF's resignation Mr Martin Coombs took over as Area Manager in March 2018, and thus became the claimant's line manager.

23. In the Catalogue the claimant claims that in March 2018 he was "*Singled out in management meeting – highlighted negatively despite my good performance*". This alleged conduct was not particularised and not referred to in the claimant's witness statement. We do not find that he was singled out and mistreated during this period. There is no evidence of this. The

claimant made no contemporaneous complaint and did not refer to such conduct in a grievance which he was to make. Indeed, he asserted in his grievance that he and Mr Coombs had "*no issues initially when he took over the patch*". We accept Mr Coombs' evidence that he did not single the claimant out or treat him negatively. We note, despite the lack of particularity in the claimant's case on this point, that Mr Coombs does recall a management meeting on 2 March 2018 when he invited the claimant to talk to the rest of the branch managers on a particular issue at which he excelled.

24. In the Catalogue claimant claims that Mr Coombs made "*derogatory statements "you like chicken… don't you?*"" in a monthly one-to-one meeting. In his RCC he states Mr Coombs said "*oh, I bet you like chicken Mike*…". In his witness statement the claimant states that Mr Coombs "*felt it appropriate to make a comment that he knew black people like me love chicken and he would bet that I will work harder if he incentivised me and Ryan Morgan with KFC if we had figures needed in branch*".

25. Despite his subsequent grievance, in which he raised race discrimination, this allegation (in any of the different ways the claimant puts it) is not one that the claimant set out in his grievance or referred to in grievance meetings. The explanation that best fits the facts is, as set out in Mr Coombs' witness statement and expanded upon in oral evidence, that Mr Coombs may have made a factual observation (which he did not even remember) about the fact that the claimant and Mr Osman bought roast chicken from Asda on most days. While we recognise that there are negative stereotypes around the food that people eat, we found nothing in the evidence to suggest any racial slant to any such observation that may have been made by Mr Coombs.

26. In his Catalogue, the claimant asserted that Mr Coombs made the inappropriate comment "*A white female face is needed for client meetings with vendors*" in April 2018. This is not referred to in the claimant's witness statement and is not something he mentioned in his grievance. Mr Coombs' evidence is that he did discuss growing market share within the area, and that he said that having more women in what was a male oriented and "laddish" branch would have a positive effect. He denies mentioning race. We find that Mr Coombs did not mention race when he referred to the desire to have more women working in the branch. Had he done so, the claimant is likely to have raised it in his grievance.

27. In his Catalogue the claimant complains that in May 2018 in a monthly one-to-one meeting Mr Coombs, discussing the claimant's new contract, said "*If you don't sign I make sure you won't get paid*".

28. The context for this is as follows;

    a. The claimant's underpin commission agreement ended on 31 March 2018, and the claimant requested that it continue because

he could not afford to live. He indicated that he might leave the job if some sort of further financial arrangement was not offered.

b. Mr Coombs was not prepared to offer an extension to the underpin arrangement, but was prepared to offer a Key Performance Indicator Incentive ("KPI Incentive") instead. This would mean that a bonus would became payable upon the claimant hitting certain targets.

c. On 2 May 2018 a further Change to Contractual Details letter was sent to the claimant signed by Mr Coombs. The letter set out the new terms.

d. As with other Change to Contractual Details letters, there was a confirmation of acceptance of the variance of terms and conditions of employment section for the claimant to sign.

e. For any changes to be actioned by payroll for that month, the claimant would have had to sign his agreement to the terms by around the middle of the month.

f. On 14 May 2018 a Regional PA, Akbinder Chana, emailed the claimant asking him to sign the change to contractual details letter "*and return asap together with the completed payroll amendment form and signed copies of contracts. Payroll cut-off is 12 noon today*".

g. The claimant signed the Change to Contractual details letter on 14 May 2018.

29. We do not find that Mr Coombs intimidated the claimant in the way he has alleged. We find that he may well have pointed out to the claimant that if he did not sign the change form before the payroll cut-off then changes would not take effect until the following month. We do not find that there was any racial component to any such conversation.

30. The claimant alleges in the Catalogue that Mr Coombs said in a managers meeting in June 2018 "*Your too loud and talk too much, just shut it*" (*sic*).

31. Again, we refer to the claimant saying that his issues began with Mr Coombs on 3 July 2018. We find that Mr Coombs may well have asked the claimant to stop talking during a meeting, as he may well have asked others. We do not find that there was a racial component to any such request.

Disciplinary matters

32. On 2 July 2018 there was an incident which subsequently became the subject matter of a disciplinary process.

33. On 2 July 2018 at 21.56 Ms AL emailed the respondent's Public Relations email address as follows:

> "*I have just called the police I relation to an assault I just witnessed by one of your employees form the Lavender Hill office, Clapham Junction.*
>
> *He drives a pale blue Mercedes and sometimes parks outside the front of your office. After a severely aggressive conversation with a woman inside his parked car on Kathleen Road he grabbed her by the throat and hit the back of her head against the back of the window. He kicked her out of the car, and they continued to scream at each other in the street she walked away and he spat on her back.*
>
> *He then proceeded to drive out of Kathleen Road, parked outside the front of your office, go in and collect something then drive away.*
>
> *The police have his number plate and will be speaking with him. Multiple other people came out of their houses on Kathleen Road and nearby restaurant as they heard the commotion.*
>
> *I wanted to make you aware that I can only assume that you do not want someone like this representing your office or brand*".

34. At 1.41am on 3 July 2018 Ms NE emailed the Public relations email address to make the following complaint:

> *"I write to make a formal complaint against Michael Anthony who felt it was appropriate to put his hands around a member of staff throat because we were in disagreement. I wish to make a formal complaint and if the business has any respect for itself and clients it will be checked. As it was not taken note of my compilation on the website*".

35. Ms NE followed this up with an email at 2.01am stating:

> *"I write to advise I wish to make a formal complaint and will not be letting the situation go. The manager of your Battersea office felt it was appropriate when he disagreed with my opinion to wrap his hands around my throat and shake me.*
>
> *I would never sell my property through this agency after my experience and will be sharing it with any individual who is willing to listen. I would advise as a company to employ a new manager and if you do not see fit to do so I will be taking img (sic) this to my social media network of over 7000 individuals.*
>
> *Under no circumstances this behaviour is acceptable."*

36. At 7.02am one of the Public Relations partners emailed Ms Hayter, a human resources professional, forwarding the complaints. Senior management at the highest levels were made aware of the complaints on the morning of 3 July 2018.

37. The complainants were both emailed by the Public Relations partner saying that they had been escalated and someone will be in touch.

38. At 1607 Ms Hayter emailed Ms NE to thank her for bringing the matter to the respondent's attention. She said that an investigation was underway into the allegations, and that she was asking for Ms NE's consent to pass on her contact details to the director carrying out the investigation. She was asked if she was comfortable with this and asked her she'd prefer to communicate. Ms NE's response was "*I have decided to retract my complaint*". Ms Hayter thanked Ms NE for letting her know this, saying that she would inform the investigating director of the decision.

39. At 1607 Ms Hayter emailed Ms AL in identical terms to her first email to Ms NE. Ms AL provided her telephone number and Ms Hayter gave her details of the investigating officer, Mr Coombs.

40. At some point on 3 July 2018, Mr Coombs telephoned the claimant to discuss the allegations. At 18.12 Ms Hayter emailed Mr Coombs, forwarding Ms AL's complaint email, and letting him know that Ms NE did not want to be part of the investigation. She asked him to send notes of his suspension meeting with the claimant, and asked for notes from his investigation when he carried it out.

41. Mr Coombs met with the claimant on 3 July 2023, and the claimant confirmed the incident taking place on 2 July 2018 when he had had a disagreement with Ms NE, a woman he had had an on/off relationship with for the past 12 months. He disagreed that he had put his hands around Ms NE's throat, but he confirmed that he did spit at her. He said that he had driven around the corner and stopped at the Battersea branch and picked up Mr Ofori, the Mortgage Consultant at the branch, who was living with him at the time.

42. Mr Coombs sought advice from human resources, who recommended that he suspend the claimant. There was concern that there may be adverse publicity because of the threat to put this on social media. Mr Coombs met the claimant on 3 July 2018 and confirmed that, given the serious nature of the allegation, the claimant would be suspended on full pay while a disciplinary investigation was carried out.

43. Mr Coombs was informed that Ms NE had withdrawn her complaint, but that Ms AL was prepared to be contacted by telephone.

44. Mr Coombs spoke to Ms AL on 4 July 2018. Ms AL confirmed that she did not know either the victim or the claimant. She described where she lived and that she saw the incident taking place in her parked car on the

opposite side of the road. She said she could hear what was going on, and that she saw the woman shouting at a man who appeared calm. She said he suddenly got very cross and the argument went up in tempo. She said the man became aggressive and grabbed the upper part of the woman's body and slammed her into the passenger door, at which point Ms AL called the police. Ms AL said the woman got out of the car "losing her shit", that staff from a nearby restaurant came out, and that the man spotted the woman and she left. She described how he got into the car, drove the wrong way into Lavender Gardens and turned round, got out and went into the office for a short while, before coming out and driving off. She saw no one coming out with him. She recognised the car as one she had seen parked this regularly, and she realised he must work there. She described what she saw as an assault. She said the woman was slammed against the car door hard. She was unsure whether it was the woman's head or back which it car. She said that this assault was severe enough that she would be scared if she met a man again, and that what he did was really bad.

45. Mr Coombs spoke to Mr Ofori on 4 July 2018. Mr Ofori said he saw an incident from his office. He saw the claimant parking outside and that he had a girl in his car that Mr Ofori had met before. They were having an argument. The claimant got out of the car and open the passenger door, the word got out and spat at the claimant, who spat back at her. Mr Ofori said it looked like a "lover's tiff". The claimant came into the office and said the woman had smelt of alcohol and coke. Mr Ofori told the claimant he needed to "act right" around the office. Mr Ofori had seen the claimant arguing with the woman before at the claimant's home.

46. The claimant also sent through to Mr Coombs part of a text message he received from Ms NE. Part of the text message was cut off, all that can be seen is the last few words of a sentence "…exaggerating the story for my own benefit"" with those quotation marks. The rest read:

> *"Baby, I just wanted to reach and say sorry for what happened on Monday. I didn't mean for things to go as far as they did. I should never have put my hands on you. At the time I was angry and wanted to hurt you. I'm not sure what has happened but I've made a complaint to your company out of anger. This is a personal matter that we should have dealt with ourselves. I truly hope I haven't done any lasting damage and I want us to sort things out. I'm so sorry and hope you can forgive me. I have emailed your company to retract my complaint and do whatever is needed to make it right. I'm sorry"*

47. Mr Coombs decided that a disciplinary hearing should take place in respect of this allegation. He believed that even though the incident took place outside of working hours, it took place close to the Battersea office and the claimant was identified as the respondent's employee by an independent witness. He considered that this potentially constituted

damage to the brand and bringing the company into disrepute, and this was not behaviour which would be expected of a branch manager in the street outside their branch. He sent the copy of his notes and investigation and recommendations to human resources on 6 July 2018.

48. At the start of his investigation Mr Coombs was sceptical that this was a genuine complaint. On 9 July 2018 he expressed his concern to Ms Hayter that both the victim and the witness came through the PR inbox, which seemed like a coincidence. However, his concern that the two women may be connected receded when Ms AL did not withdraw her complaint. Ms AL also was passionate when she spoke to Mr Coombs, and considered that the claimant had done something wrong. She also never withdrew her statement and was willing to speak and give further details. From an initial position of scepticism, Mr Coombs became convinced that the complaint was a genuine one. He considered Ms AL was a credible witness.

49. On 9 July 2018 Mr Kelly, then divisional Managing Director, wrote to the claimant inviting him to a disciplinary hearing. He set out why disciplinary action was being considered and summarised the allegations. He set out that the behaviour could constitute gross misconduct, which could lead to summary dismissal. Mr Kenny said that he would like to have a meeting the following day, but acknowledged that if this did not give the claimant sufficient time to prepare, the meeting would instead take place on 13 July 2018. The claimant was informed of his right to be accompanied by a work colleague or trade union representative.

50. The claimant accepted the invitation to the meeting on 13 July 2018.

51. The disciplinary meeting took place on 13 July 2018. The claimant attended and confirmed that he chose not to bring a representative. Mr Kenny chaired the meeting, and his PA, Ms Hammond took notes. The meeting included the following:

    a. The claimant was given the opportunity to present his version of events concerning 2 July 2018. The claimant explained that he picked up Ms NE from a bar and whilst en route from the bar to the Battersea office, that Ms NE got out of the car twice and screamed abuse at him. The last stop was on Kathleen Road opposite the Battersea branch, where he said Ms NE got out of the car and spat in his face, and that he proceeded to spit in her direction. He admitted that an aggressive incident had happened after the altercation. The claimant said that he was conscious that the incident took place in his local area and did not want to bring negative attention to himself for the business.

    b. The claimant probed about the independent witness and questioned whether she was genuine.

    c. The claimant stated that this was the first incident in his career. Mr Kenny corrected him and referred to an incident three weeks

previously where a local estate agent had complained about the claimant's aggressive behaviour.

52. Mr Kenny adjourned the meeting and considered various factors, including the claimant's account of events and his length of service. He spoke with human resources and his line manager during the adjournment, but came to an independent conclusion about the appropriate sanction. Mr Kenny determined the appropriate sanction should be that the claimant be dismissed for gross misconduct. Mr Kenny considered that a final written warning would not be sufficient sanction, given that this was the second aggressive public altercation that had taken place within a short space of time. The incident was also linked to the branch, as it had taken place just outside of it, and events could lead to damage of the company's brand. He considered that the claimant's actions were not acceptable and reflected very poorly on the company's reputation and on the claimant as the manager of the branch.

53. Mr Kenny reconvened the meeting, and communicated his decision to the claimant. The claimant was upset when the decision was conveyed to him. Mr Kenny told the claimant of his right of appeal.

54. Later that day the claimant emailed his appeal. He believed he had been victimised and unfairly treated in regards to the investigation leading to the dismissal. He said he was denied a union representative or a friend at each hearing he attended. He did not believe the witness statement to be a factual or true one. He did not believe he committed a gross misconduct offence as he was on his own private time after working hours. He was not aware of any other circumstances that would constitute gross misconduct resulting in his immediate dismissal.

55. Mr Arnes, Group Operations Director, was appointed to hear the appeal. On 16 July Ms Hayter emailed the claimant to inform him that Mr Arnes would hear the appeal on 19 July 2018 in Hertford.

56. On 17 July 2018 the claimant's emailed Ms Hayter to say that 19 July 2018 did not give him sufficient time to prepare with his trade union representative. He requested various documents.

57. Mr Arnes asked the claimant if he would be prepared to have an informal discussion about his appeal on 19 July. The claimant agreed to this.

58. During this informal meeting Mr Arnes and the claimant discussed the claimant's version of events, and the claimant drew a map of the location of events. At the end of the meeting it was agreed that a formal appeal meeting would be scheduled on 26 July.

59. On 20 July 2018 Mr Arnes contacted Mr Ofori to ask him for a signed statement saying exactly what he saw using his own words.

60. On 23 July 2018 Mr Kenny's dismissal letter was sent to the claimant confirming the outcome of the disciplinary meeting. Mr Kenny set out the claimant's description of the incident, highlighting the claimant's denial that he had got hold of Ms NE by the throat and banged her head against his car, asserting that he was attempting to defuse the situation. He referred to the claimant's acknowledgement that he was mindful of the potential to damage his own and the respondent's reputations. He mentioned the claimant saying that he and Ms NE had gone their separate ways, and that the claimant did not want to be associated with Ms NE's drinking and drug-taking. He referred to the claimant's acknowledgement that he needed to act as an ambassador for the brand and needed to "act right around the office". Mr Kenny highlighted the seriousness of the incident and the potential for reputational damage. He said the claimant had not acted within the standards of professionalism expected by the company and that this was witnessed by a member of the public who submitted a formal complaint. As events could lead to damage of personal and brand reputation, he concluded that the claimant's actions were prejudicial to the company's interests and undermined the respondent's trust and confidence in the claimant as an employee. The actions constituted gross misconduct which merited summary dismissal. Mr Kenny referred to the letters of 9 March 2017 and 13 October 2017 which set out the company's right to seek reimbursement of any underpinning guarantee commission payments in excess of actual personal commission earned during the period underpinning guarantee commission was paid. He said that payroll would calculate the appropriate amount which would be confirmed in writing. He gave the claimant a right of appeal

61. On 23 July 2018 Mr Ofori provided his statement.

62. By 24 July 2018, Mr Arnes had not received confirmation from the claimant that he would be attending the appeal meeting. Mr Arnes emailed the claimant requesting such confirmation, setting out a timeline of events leading to the appeal meeting being scheduled for that date, and explaining that it would be conducted in his absence.

63. Later that day the claimant emailed to say that he would not be able to attend the appeal meeting for health reasons, providing a fit note. He requested that the appeal hearing be stayed and scheduled for a further date.

64. Mr Arnes discussed the matter with Ms Hayter, and decided to conduct the hearing in the claimant's absence on 26 July 2018. The reason he took this approach was that the claimant had requested the specific date, and Mr Arnes' diary had been arranged to accommodate it. He was shortly to be going on holiday for three weeks and considered delaying the appeal would actually prejudice the claimant as he had been dismissed from his employment.

65. Mr Arnes investigated a complaint made by the claimant that he did not receive a copy of the investigation notes and statements when he was invited to his disciplinary meeting. Mr Arnes concluded that the claimant had received everything by post and his work email address. Mr Arnes concluded that the claimant had been given adequate time to review all of the evidence and documentation relevant to the disciplinary hearing.

66. On 27 July 2018 Mr Arnes wrote with his outcome of the appeal. He communicated his decision to overturn the decision taken by Mr Kenny to dismiss him. He considered the correct decision should have been to issue the claimant with a final written warning requiring him to ensure that he did not in any way bring the company into disrepute, and this to be on file for 12 months. He communicated his decision that there was overwhelming evidence that the claimant had been given adequate time to review the notes and relevant documentation. The claimant was to be reinstated backdated to 13 July 2018 with exactly the same terms and conditions. He noted the claimant had been signed off to 10 August 2018, and as a gesture of goodwill indicated that the respondent would pay the claimant in full through to this date. The claimant was urged to make contact with Mr Kenny for a return to work meeting when he was fit for work.

67. On 8 August 2018 the claimant emailed Mr Arnes acknowledging his decision to reinstate him, but saying that he could not accept that a warning was appropriate. He contended that if Mr Arnes had accepted "*the entire investigation was flawed*" and the grounds for the disciplinary "*was subsequently found to be non-existent*", then no warning was appropriate. The claimant suggested that he was being set up to fail and would be micromanaged from thereon, with the warning acting as a "*noose hanging round my neck for the next 12 months*". He indicated that a failure to expunge the warning "*will lead to a fundamental breakdown in the mutual trust and confidence between myself and the company*".

68. 10 August 2018 Mr Arnes wrote to the claimant indicating that the decision to dismiss was reasonable based on the evidence gathered, a written warning was more suitable given previous service conduct. He said that he did not conclude that the grounds for bringing disciplinary action were non-existent. He said that the respondent was looking forward to rebuilding relationships and that the warning would not be referred to again if there was no repeat unprofessional or unacceptable conduct, which he firmly believed would not be an issue.

69. On 10 September 2018 the claimant returned to work, and had a return to work meeting with Mr Coombs.

70. On 14 September 2018 the claimant attended a managers' conference at a hotel.

71. The claimant asserts that Mr Coombs was responsible for leaking confidential information about his disciplinary process. He relies on

statements from Mr Osman, and Mr Latchana. Mr Osman said that "*there was a lot of speculation and gossip in regards to what Michael had done what the end result was going to be*" and that "*at [the managers' meeting venue] where multiple groups were informing me of what happened under the assumption that was common knowledge and that even Michael knew he would not be coming back*". Mr Latchana says "*I heard three members of staff in the business that Michael had been suspended due to incident that supposedly took place*" and that "*a lot of people are talking about this and were aware of this*".

72. We find that this was a workplace where there were multiple friendships among staff. Indeed, the claimant has a child with a colleague and Mr Ofori lived with him in the summer of 2018. We find it highly likely that there would have been gossip and speculation about the claimant's circumstances at the time. We find it likely that the claimant's colleagues and friends would have discussed the issues with him and, as likely as not, amongst each other. But we accept the respondent's evidence that management were maintaining the line that the claimant was off on long term sick leave, and we do not find that any of the managers were divulging confidential information. In this regard we note that even on Mr Osman's and Mr Latchana's evidence there is no allegation that management breached confidentiality.

73. On 14 September 2018 the claimant submitted a grievance. He asserted that there were "*failures from senior management in the disciplinary and equal opportunities procedures within the company, with a culture of bullying, intimidation as well as breach of confidential information amongst other things*". He suggested that Mr Coombs had embarked on a "*hateful malicious campaign to destroy my reputation, livelihood career for no other reason than his own personal prejudices against me as a person of colour*". He indicated that he would expand on other grievances such as being given a 12 month warning which affected his mental and physical health. He indicated that if this were not resolved to his satisfaction, he would take a legal route and "*go public with this matter on all social media outlets as well as the local press*".

74. A grievance hearing took place before Mr Day, Head of Lettings, on 5 October 2018. The claimant was accompanied by a trade union representative. The focus of the claimant's grievance at this meeting was the disciplinary investigation and hearing, which he considered "a shambles". He asserted that he had been treated differently because of his race, and suggested that other members of staff who had left the respondent were treated similarly, and which he believed demonstrated a wider racist culture within the business. The claimant did not mention any breach of confidentiality by Mr Coombs of details of the disciplinary. The claimant raised during this meeting that Mr MF agreed that he would get a £10,000 bonus if the branch was profit by 2018. He did not provide any written evidence at this point. Mr Day indicated to the claimant that he would investigate his complaints.

75. Mr Day reviewed all documentation relating to the original investigation, suspension disciplinary hearing and appeal. He also spoke to Mr Coombs and Mr Kenny, focusing on the investigation and disciplinary hearings.

76. On 8 October 2018 the claimant resigned by email to Mr Plumtree (the Chief Executive) and Mr Fry. He said "*I reluctantly and regretfully have to write this email as I could no longer work under the conditions I have endured the last few months now have me on antidepressants and sleeping pills. I have an ongoing grievance which involves Martin Coombs and Paul Kenny I hope this will be taken and dealt with seriously regardless*". He mentioned that he would work his notice giving a last day of 3 November 2018, and said that this was not how he envisaged his management career would pan out, and said that this "*is not what I wanted but I feel my position [is] untenable*".

77. On 10 October 2018 Mr Fry acknowledged and accepted the claimant's resignation. He set out calculations of guaranteed underpinned commission in excess of actual personal commission earned. He confirmed that the claimant received £29,499.99 guarantee commission, and had earned £9239.22 actual personal commission. The amount of £20,260.77 would be reclaimed from the claimant. Payroll had confirmed that there would be insufficient monies in the claimant's final pay to cover this, and that payroll would calculate the net sum owing to the company which would be communicated to the claimant in due course. Attached to the letter were the claimant's continuing obligations relating to confidentiality, and a spreadsheet setting out the calculations of the underpin clawback.

78. On 3 November 2018 the claimant's employment ended, although he was not required to work his notice.

79. While the claimant in his RCC claimed that since leaving the respondent he was unable to attain a role on a comparable income, it would appear from payslips in the bundle that he secured a job with Spicerhaart in Crystal Palace from November 2018 to April 2019 on a more or less equivalent remuneration package.

80. On the 19 November 2018 Mr Day provided an outcome letter relating to the grievance.

    a. He could not find any major procedural failures in the disciplinary process. He believed documents were sent to the claimant in a timely manner and did not find that the process or the investigation undertaken was flawed.

    b. He considered that it was reasonable for the claimant to be reinstated on appeal and issued with a final written warning. He did not feel that the warning was unjust in the circumstances, as the incident was a serious one which could impact on the company's brand reputation.

c. Mr Day looked at the departure of Mr MF and three other managers. Mr MF (who is Black) was the only one named by the claimant, and it was clear to Mr Day that his departure related to disciplinary proceedings for producing a fraudulent reference. Mr Day found no evidence that any part of the disciplinary procedure or any decisions from anyone involved in the investigation, disciplinary or appeal were motivated by race. There was no evidence that he was bullied.

81. On 26 November 2018 the claimant appealed this decision. On 28 February 2019 Mr Fry, National Operations Director (South) heard the grievance appeal. This appeal took place after the claimant presented his ET1, and it is appropriate only to make a few findings in respect of it. The claimant produced for the first time at the appeal hearing the letters of 21 December 2017 and 8 January 2018 to say the underpin commission would not be recouped and he would be paid £10,000 bonus. Mr Fry asked the claimant for copies of the letters but the claimant refused to hand them over. Mr Fry was able to read these letters briefly during the meeting.

82. Mr Fry did not uphold the claimant's appeal against grievance and an outcome letter was sent to him on 16 May 2019.

83. Returning to the underpin cancellation letter and the bonus letter. We have a number of concerns about their authenticity:

    a. We accept the respondent's evidence that there is no record of them in the respondent's systems;

    b. There is no record of any supporting documentation which clearly accompanies other contractual variation letters (the contractual variation letters of 9 March 2017 and 13 October 2017 both have accompanying forms for payroll to process);

    c. We accept the evidence of the respondent's witnesses that cancelling underpin and offering a substantial bonus would be matters requiring sign-off from senior managers (Mr Kenny, Mr Fry, and perhaps even Mr Plumtree), and we accept the evidence from the Mr Kenny and Mr Fry that no senior manager was ever made aware of the arrangements set out in these letters. The claimant's case, put for the first time in his RCC, that Mr Kenny approved such arrangements, makes little sense. Mr Kenny had no authority to write off large sums of debt or make significant bonus offers and it is not apparent why he would seek to attempt to do so without more senior management approval;

    d. We accept the respondent's evidence that bonuses would be given for annual performance and not awarded mid-year;

e. Cancelling underpin commission makes no business sense for the respondent, especially as the claimant had indicated that he may have had an alternative offer of employment. As Mr Greaves puts it in his closing submissions, "*It makes no business sense to grant an employee a benefit worth tens of thousands of pounds whose sole effect is to make it easier them to leave (by enabling them to do so without being financially disadvantaged)*".

f. It seems odd that the claimant would not produce these documents until a very late stage. In the case of the underpin cancellation letter, he did not refer to it until 31 October 2018. It makes little sense that he did not raise that at the time of his resignation to ensure his final pay packet reflected the arrangement, rather than leaving until after the respondent raised the issue of clawback;

g. The KPI incentive letter of 2 May 2018 contains a clawback provision. The claimant signed his agreement to these terms. It is odd in the extreme that he would agree to such terms if he had a prior agreement cancelling his underpin repayment;

h. It is more or less inconceivable that the claimant would not have asked for £10,000 bonus which he considered was owing to him by end of July 2018. He was on his own admission (at the grievance hearing) buying a property at the time and struggling with his mortgage payments;

i. We also note that Mr MF had resigned from the respondent's employment having admitted to the fact that he had produced a fraudulent reference.

84. For all these reasons we do not find that the underpin cancellation letter and the bonus letter were genuine. We cannot make positive findings as to who produced them.

<u>The calculations</u>

85. Mr Fry's letter of 10 October 2018 attached a spreadsheet setting out the details of the clawback of underpin. The claimant defended the counterclaim by alleging that no underpin was payable by virtue of the underpin cancelling letter. He did not challenge the figures.

86. We were taken through the spreadsheet attached to Mr Fry's letter, and to the payslips of October and November 2018. It became clear that a further deduction, relating to a tax refund in November 2018 was to be applied. We find that the total repayment of underpin is £17.727.86.

The law

Constructive unfair dismissal

87. In order for there to have been a constructive dismissal there must have been:-

    a. a repudiatory or fundamental breach of the contract of employment by the employer;

    b. a termination of the contract by the employee because of that breach; and

    c. the employee must not have affirmed the contract after the breach, for example by delaying their resignation.

88. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, it was said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, 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 the employer's conduct. He is constructively dismissed*".

89. An employee can rely on breach of an express or implied term of the contract of employment. In cases of alleged breach of the implied term of trust and confidence the test is set out in the case of *Malik v Bank of Credit and Commerce International Ltd* [1998] AC 20; namely, has the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee? The test of whether there has been such a breach is an objective one (see *Leeds Dental Team Ltd v Rose* [2014] IRLR 8).

90. The EAT in *Frenkel Topping v King* UKEAT/0106/15/LA set out that simply acting in an unreasonable way is not sufficient to satisfy the test. The employer "*must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term*". (See also *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168.)

91. It is open to an employee to rely on a series of events which individually do not amount to a repudiation of contract, but when taken cumulatively are considered repudiatory. In these sorts of cases the "last straw" in this sequence of events must add something, however minor, to the sequence (*London Borough of Waltham Forest v Omilaju* [2005] ICR 481).

92. The employer's breach must be an effective cause of the resignation (*Wright v North Ayrshire Council [2014] ICR 77*).

93. On the question of waiving the breach, the *Western Excavating* case makes clear that the employee "*must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving,*

he will lose his right to treat himself as discharged. He will regarded as having elected to affirm the contract".

Direct race discrimination

94. Section 13(1) of the equality Act 2010 ("EA") provides as follows:

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

95. Section 23(1) of the EA deals with comparisons, and provides:-

> *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

96. The burden of proof provisions (which apply equally to harassment) are set out in section 136 EA:-

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

97. When considering direct discrimination, the tribunal must examine the "reason why" the alleged discriminator acted as they did. This will involve a consideration of the mental processes, whether conscious or unconscious, of the individual concerned (*Amnesty International v Ahmed* [2009] IRLR 884). The protected characteristic need not be the only reason why the individual acted as they did, the question is whether it was an "effective cause" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1996] IRLR 372).

98. Guidance on the application of the burden of proof provisions of the Sex Discrimination Act 1975 (which is applicable to the EA) were given by the Court of Appeal in *Igen v Wong* [2005] IRLR 258.

99. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council* [2006] ICR 1519). The Supreme Court has observed that provisions "*will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other*" (*Hewage v Grampion Health Board* [2012] UKSC 37).

100. The Court of Appeal has emphasised that "*The bare facts of a difference in treatment, without more, sufficient material from which the tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"* (*Madarassy v Nomura International plc* [2007] IRLR 246). "Something more" is needed for the burden to shift.

Conclusions

101. We will make our conclusions based upon the draft list of issues prepared by the respondent.

Constructive dismissal

Breach of confidentiality

102. We have found as a fact that Mr Coombs did not breach confidentiality in respect of the disciplinary process. We have found that he outwardly held the line that the claimant was off on long-term sick leave. There was a fair degree of speculation and gossip in the workplace in which there were a number of friendships. We find that information about the claimant circumstances could have come from any number of sources.

103. We do not find that there was a fundamental breach of any implied term of confidentiality.

Trust and confidence

104. Mr Greaves has sought to tease out the course of conduct which the claimant appears to rely on as damaging or destroying the relationship of trust and confidence between employer and employee. We've considered that he has fairly extracted this, and that it appears to revolve around the conduct of the disciplinary process.

Not informing the claimant of his rights

105. We have found the fact that the claimant was informed of his right to be accompanied in the disciplinary invitation letter. He also confirmed at the disciplinary meeting that he was happy to proceed unaccompanied. We have found that he was provided all relevant documents through his work email and by post before the disciplinary meeting. We note he did not complain at the meeting that he was disadvantaged in any way and he did not say that he had not received the documentation. The documentation was again provided to him at appeal.

Not contacting Ms NE

106. The evidence is clear that Ms NE withdrew her complaint swiftly and did not give the permission to the respondent to contact her. The respondent cannot be criticised for not contacting her.

Not meeting Ms AL in person

107. There is nothing within the respondent's disciplinary policy, in the **ACAS code of practice on disciplinary and grievance procedures**, or case law to suggest that it is a requirement to meet witnesses in person. Mr Coombs made contact with Ms AL by telephone, and made a not unreasonable assessment of her credibility. He found that her account of events corresponded with a number of the things mentioned in Mr Ofori's statement and matters which the claimant himself admitted. Mr Coombs did not uncritically accept the evidence, but showed a healthy scepticism towards matters which struck him as odd. We find that there was no need to meet the witness face-to-face, and not to do so was not unreasonable.

Not investigating whether the matter had been reported to the police

108. We conclude that there does not have to be a police report for there to be potential misconduct. We consider that it was indeed debatable whether the police would have supplied any information, which is likely to be considered confidential, to third party. Furthermore, the lack a report to the police does not necessarily exonerate the claimant as he might suggest. We consider that it was not unreasonable for Mr Coombs not to contact the police.

Oral rather than written evidence

109. Again, there is no requirement in the respondent's disciplinary policy or in ACAS guidance for evidence to be taken orally rather than reduced to writing. It might be observed that it is good practice to do so, but we conclude that in the circumstances of a speedy enquiry it was not unreasonable for Mr Coombs to take oral evidence.

Not giving sufficient weight to Ms NE's text

110. This is a criticism which the claimant levels at Mr Coombs. We bear in mind, however, that he only had to decide whether or not there was a case to answer. The text message was one of many things for him to consider.

111. Furthermore the claimant in his witness statement seeks to suggest that the text confirms that Ms NE said that he had done nothing wrong. Looking at the text message it is clear that the claimant has substantially mischaracterised what she was saying. The claimant also ignores that this was just one aspect of the evidence, and that there was evidence from an independent witness and Mr Ofori which suggested disciplinary case to answer.

Dismissal disproportionate

112. At the disciplinary hearing the claimant himself accepted that the disciplinary matters he faced were serious. Mr Kenny acknowledged that

the decision he was making was a finely balanced one. However, we consider that Mr Kenny was entitled to reach a conclusion that the claimant had committed an act of gross misconduct in that he behaved in a way that was likely to damage his own and the respondent's image and reputation. We also consider the disciplinary process as a whole, and note that the sanction was downgraded on appeal to a final written warning.

Conclusion

113. Looking at the overall course of conduct, we do not consider that the respondent conducted itself without reasonable cause in a manner calculated or likely to seriously damage or destroy trust and confidence. Whether considered as part of this, or a freestanding breach of any term relating to confidentiality, we do not consider that there was a breach of confidentiality either. In the circumstances we do not find a repudiatory breach of the contract of employment.

Affirmation

114. While it is not strictly necessary for us to decide this issue, we considered that the disciplinary concluded on 13 July 2018 and the appeal outcomes communicated on 27 July 2018. The claimant left it until 8 October 2018 to resign. We consider there was a strong argument that he has affirmed the contract with his delay.

Race discrimination

115. As a general point we have regard to the fact that there has been a substantial inconsistency in the way the claimant's allegations of race discrimination have been advanced. In his grievance he said the discrimination began on 3 July 2018, and that Mr Coombs had no issues with him when he took over managing the claimant. The claimant never raised any complaints about discrimination prior to his grievance. His allegations morph in his witness statement to systematic targeting by Mr Coombs in a racist campaign. We take the elements of his allegations in turn.

Being singled out by Mr Coombs

116. We have found as a fact that the claimant was not singled out and not mistreated in the way he suggests. There is no less favourable treatment, and no evidence to suggest that any treatment was because of his race.

The chicken comment

117. Again, there is an inconsistency in the way the claimant has put these allegations. His first suggestion is a comment "*I bet you like chicken don't you Mike*". By the time of his witness statement this has morphed into Mr Coombs saying that black people like the claimant love chicken,

and making a suggestion of incentivising him and Mr Morgan with KFC if they hit their figures.

118. We recognise that there are crude stereotypes made about food people eat. However, we have found is the fact that Mr Coombs may have made a factual observation about the claimant enjoying chicken based on the fact that he had it for lunch most days. There is no less favourable treatment, and the comment was nothing to do with the claimant's race.

White female face

119. We have found as a fact that Mr Coombs simply made a comment about the desirability of having more women working in the branch. There was no reference to race and this comment was not less favourable treatment and was nothing to do with race.

If you don't sign you don't get paid

120. We have found as a fact that the claimant was just being told that he needed to sign his contractual variation letter before the payroll cut-off on the 14th of the month for it to be processed in that month's pay. This was not less favourable treatment and had nothing to with race.

Too loud

121. We have found as a fact about it is likely that the claimant may well have made the comment to the claimant about talking during meeting. We do not find that he made the comment the claimant alleges he did. We find that Mr Coombs would have made an appropriate and similar comment had anyone else been talking during the meeting, regardless of race. We conclude that there was no less favourable treatment and any such comment was nothing to do with the claimant's race.

Breach of confidentiality

122. We have found is that that there was no breach of the claimant's confidentiality. There was just generalised gossip within the branch amongst a group of people who were friends outside of work. There was no less favourable treatment, and the line taken by the respondent that the claimant was off sick had nothing to do with his race.

Disciplinary process

123. The findings of fact we have made and the conclusions we have reached relating to constructive unfair dismissal are to the effect that we do not consider that the respondent's handling of the process was unfair or unreasonable. As with any process within the workplace there are always things which could have been done differently, or better. However overall we consider that there was nothing within the disciplinary process which amounted to less favourable treatment because of the claimant's race.

Overall conclusions on race discrimination

124. Both examining the facts up close, and standing back and looking at the overall picture, we have found no facts from which we could conclude in the absence of explanation that the respondent discriminated against the claimant. The burden does not shift to the respondent to disprove direct race discrimination. In any event, we find its explanations for the allegations the claimant levels against it as being credible, reasonable and untainted by race discrimination. This claim is dismissed.

The claimant's contract claimant

125. We have found as a fact that the bonus letter was not an authentic document. We find that there was no such agreement between the claimant and the respondent. The claimant's claim that the respondent has failed to pay £10,000 in breach of contract is not made out on the facts and is dismissed.

Employers counterclaim

126. We have found as a fact that the underpin cancellation letter is not an authentic document.

127. The respondent is entitled, on the basis of its documentation, to recoup any underpin paid to the claimant in excess of his actual commission.

128. We have found that the appropriate figures are those set out in the spreadsheet attached to Mr Fry's letter of 10 October 2018 (as adjusted by the November 2018 payslip). We find that the counterclaim is well-founded and the claimant must pay the respondent the sum of £17,727.86.

_____

Employment Judge **Heath**

16 June 2023_____
Date