EMPLOYMENT TRIBUNALS

Claimant: **Mr D White**

Respondent: **Forest Master Limited**

Heard at: **Newcastle** **On: 1 and 2 August 2023**

Before: **Employment Judge Loy**

Representation

Claimant: **Miss Hicken of counsel**
Respondent: **Mr Johnson, Managing Director**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's claim of unfair dismissal is well-founded and succeeds.
2. The claimant's claim for unpaid notice pay is well-founded and succeeds.
3. The claim for unlawful deduction from wages is well-founded and succeeds.

REASONS

Introduction

1. By a claim presented on 9 February 2023, the claimant complains of constructive unfair dismissal, unlawful deduction from wages and a failure to pay notice pay.

2. The respondent denied all liability to the claimant.

Procedure and evidence

3. The Tribunal had before it an agreed bundle of documents comprising 251 pages. References in this judgment to page numbers are references to page numbers in the bundle.

4. The Tribunal heard from the following witnesses:

(a) The claimant, who produced a written statement of 20 pages numbered 1-20 and who was cross-examined by Mr Johnson;

(b) Mr Peter Johnson, the respondent's Managing Director, who produced a written statement of 8 pages numbered 1-8 and who was cross-examined by Miss Hicken. Mr Johnson also represented the respondent.

5. References in this judgement to pages in the witness statements are expressly referred to as such to avoid confusion with reference to the pages in the bundle of documents.

6. Standard case management orders were made on 16 February 2023.

Issues to be determined

7. No formal list of issues was ordered or produced by the parties.

8. Given the claims presented, the issues to be determined by the Tribunal are as follows:

9. **Constructive unfair dismissal**

Was the claimant dismissed or did he resign?

9.1. Did the respondent, without reasonable or proper cause, behave in a way that was calculated or likely to destroy or seriously damage the relationship of confidence and trust?

9.2. If the respondent did so conduct itself, did it repudiate the claimant's contract of employment such that the claimant was entitled to terminate the contract without notice.

9.3. Was the repudiatory breach at least a substantial part of the claimant's reason for resigning?

9.4. Did the claimant affirm the contract before resigning?

If the claimant was dismissed:

9.5. What was the reason or principal reason for dismissal – that is, what was the reason for the breach of contract?

9.6. Was it a potentially fair reason? The respondent relies on conduct.

9.7. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

10. **Wrongful dismissal / Notice pay**

What was the claimant's notice period?

10.1. Was the claimant paid for that notice period?

10.2. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

11. **Unauthorised deductions**

11.1. Did the respondent make unauthorised deductions in the form of unpaid outstanding sales commission from the claimant's wages and, if so, how much was deducted?

Factual findings

12. The respondent is a small business with around 16 employees. The company produces electric, petrol and manual log splitters, wood chippers and related accessories. The business is family owned by Mr Andrew and Mrs Helen Martin. The claimant commenced employment with the respondent on 3 February 2020. He was employed as a Sales Executive/Administrator. The claimant's role was to manage and develop the respondent's online business on platforms such as Amazon, eBay and ManoMano. The claimant resigned from his employment with the company on 31 October 2022 with immediate effect.

13. The respondent did not dispute the evidence in the claimant's witness statement that prior to Mr Johnson joining the company the claimant had a clean disciplinary record and had enjoyed a good working relationship with Mr Martin. The claimant received salary increases in March 2021 and October 2021 based on increased sales on the company's eBay accounts and other online platforms. The claimant salary increased over this period from £18,000 per annum to £28,000 per annum.

14. The claimant's uncontested evidence was that he reached an undocumented verbal agreement with Mr Martin in October 2021 to the effect that his performance based salary increases would continue. The claimant understood that his earnings would increase as a percentage of gross increased online platform sales subject to an overall cap of £50,000 per annum. The claimant was expecting a salary increase along these lines should the financial year ending September 2022 confirm an uplift in online sales.

15. On 21 March 2022, Mr Peter Johnson joined the business as its managing director. Mr Johnson was employed so that the owners were able to step back and take a less active role in the management of the company. Mr Johnson is a retired Police Inspector from Northumbria Police. It was also not in dispute that the claimant's relationship with Mr Johnson was difficult and fractious. The claimant's claim that he was constructively dismissed by the respondent is based on the treatment that he says he received at the hands of Mr Johnson after the latter's appointment as managing director.

16. On 6 April 2022, the claimant was part of a group Skype chat with colleagues. A printout/screenshot of the Skype chat is at pages 36 to 37.

17. At 10:45 on 6 April 2022, the claimant was invited to attend a meeting with Mr Martin. The claimant was asked by Mr Martin to take on additional duties covering tradeshows. The tradeshow season for the respondent's industry sector is between May and September. The respondent had been trying to recruit a candidate specifically for this role, but had been unsuccessful. The claimant and Mr Martin agreed that the claimant would remain in his current role, but take on additional tradeshow duties for which he would be remunerated as follows:

    17.1. a 5% commission for any sales that were made during a show ('at show sales');

    17.2. a 2% commission for any sales where leads were generated at a show but the actual sale was made afterwards ('after show sales'); and

    17.3. £1,000 per month for the five months of the show season.

18. On 8 April 2022, the claimant was asked by Mr Martin (who was at home at the time) to go and speak with his wife Mrs Helen Martin (who was in the office at the time) - see page 175. The claimant was told that the purpose of speaking to Mrs Martin was to discuss insurance applications and planning for the shows. Mr Johnson was also present at that meeting. The claimant was told by Mr Johnson that he would not be attending the shows as he had earlier agreed with Mr Martin. Mr Johnson said that the tradeshow role was to be a new and discrete position which required a dedicated employee. Mr Johnson said that it was effectively an 'either or' for the claimant and the claimant should bear in mind that if he should not be successful in the tradeshow role he might become unemployed. This was not to be the last implicit or explicit threat by Mr Johnson to the claimant's continued employment. The claimant explained that he started to feel like a pawn in between Mr Martin and Mr Johnson.

19. On 13 April 2022, the claimant was asked to attend a further meeting with Mr Martin and Mr Johnson. There was another discussion about how the tradeshows were to be covered. Mr Martin and Mr Johnson were againin disagreement about the role the claimant should play at the forthcoming tradeshows. Mr Johnson claimed that he had an outstanding candidate for the substantive tradeshow position that the company had been looking to fill. The claimant had reason to doubt that Mr Johnson was being candid about that since Mr Johnson subsequently had to readvertise the role.

20. On 14 April 2022, all of the office staff with the exception of Mr Chambers (who was asked to look after incoming calls) were called to a meeting with Mr Johnson. Mr Johnson told the staff that he would dismiss anyone who failed to meet his expected level of administrative performance. The claimant felt that Mr Johnson was aiming this remark specifically at him. On 12 April 2022, the claimant had asked Mr Jefferies (General Manager) for assistance with administration so that he could concentrate on sales. Mr Johnson delivered his rather blunt message on expected levels of administrative efficiency two days later.

21. Mr Jefferies, Mr McDougall (Marketing Manager) and the claimant were asked by Mr Johnson to stay behind after the meeting. Mr Johnson sought an explanation why 4 emails had not been answered from one of the company's email accounts on the same day they had arrived. The claimant was responsible for that email account. This fortified the claimant's concern that he was being targeted by Mr Johnson. The claimant attempted to explain to Mr Johnson that occasionally there was a delay between emails dropping into his work email accounts and when they were received from the external application (Thunderbird) that the respondent used to manage its email. The claimant further explained that his working day finished at 17:00 whereas the company remained open for business until 17:30. It was perfectly possible that the emails had been received in his inbox after he had left but before close of business. The claimant gave evidence, which the tribunal accepted, that he felt that Mr Johnson was reluctant to accept his explanation and only did so when his explanation was supported by Mr McDougall.

22. On 8 April 2022, the claimant attended a football match with the work colleague (Steven, a Repair Technician) with whom he had been interacting on the Skype chat of 6 April 2022. Steven did not raise any work-related concerns with the claimant while the two were together that day.

23. On 14 April 2022, Mr Johnson introduced a new Disciplinary Policy and Procedure. A copy of this new policy is at pages 38-50.

24. On 16 April 2022, Mr Johnson placed the job advert for the tradeshow/events coordinator role (page 179).

25. On 26 April 2022, the claimant was asked to attend a formal discussion with Mr Jefferies. The purpose of the discussion was to consider a grievance brought by Steven, the Repair Technician with whom the claimant had been corresponding on the group Skype chat on 6 April 2022 and with whom the claimant had been socialising on 8 April 2022. The respondent said that Steven had alleged that the claimant had conducted himself inappropriately during the group Skype chat on 6 April 2022. Specifically, it was alleged that the claimant had sent the following inappropriate messages on the group Skype chat:

    "FFS you leave instruction. Place is full of idiots;

    Two draft cunts telling me how to change the work sheet the other day, same fuckers cannot use the simple version;

    He gave plenty advice with Michael. they wanted to go back to b paper WTF."

26. A printout of the group Skype chat is at pages 36-37. That printout includes the three sentences set out at paragraph 25 above. The respondent's File Note (Record of Formal Discussion) relating to this incident is at pages 51 to 54. The claimant asked to be accompanied by his trade union representative at that formal meeting. The meeting nevertheless proceeded. Page 36 records that a "formal complaint" Had been made on 26 April 2022 alleging that the claimant had made inappropriate comments. The claimant's position was that he could not remember off the top of his head the detail of his Skype chat with Steven. He explained that he was undergoing

some personal stress at the time and could not recall precisely the languages he had used. The claimant also said that it was far from uncommon for bad language to be used in the workplace.

27. On 27th of April 2022, the claimant was informed that no further action was to be taken against him regarding the language used on the group Skype chat on 6 April 2022. The claimant noted that during the meeting at which the claimant was apologising for his own bad language Steven said the word 'fuck' several times without demur.

28. On 29 April 2022, Mr Jefferies asked the claimant to go to see Mr Johnson. This was to discuss the respondent's changing position on who, if anyone, was to attend the summer tradeshows. The claimant says this was the first one-to-one meeting he had with Mr Johnson after the latter's arrival in the business.

29. On 13 June 2022, the claimant asked which tradeshows he was to be attending. Mr Martin said that the claimant would be going to all of them. However, Mr Johnson and Mr Jefferies told him that he would not be going to any of them. Business cards for the tradeshows had been ordered and printed in the name of a work colleague, Keith Hamblett. No cards were printed in the claimant's name at any stage.

30. Between 22 and 25 June 2022, the claimant attended a tradeshow at the Highland Centre near Edinburgh. He was accompanied by two colleagues, Keith Hamblett and Tom (a warehouse worker). The claimant was to be provided with an expense allowance of £40.00 per day for food and accommodation. The claimant slept in a company vehicle while he was at the tradeshow due to the respondent's refusal to pay for a hotel or other accommodation.

31. On 27 June 2022, the claimant was told by Mr Johnson that he would not be attending the Norfolk tradeshow which was due to start the following day and end on 1 July 2022. Due to the lateness of being told he would not be attending the Norfolk show, the claimant had already incurred the expense of arranging for his dog to be put in kennels.

32. On 30 June 2022, the claimant received £200 expenses for the Edinburgh tradeshow. That represented 5 x £40.00.

33. On 4 July 2022, the claimant found out during a phone call to Mr Martin (a call which mainly concerned other matters) that he would not be attending the Kent tradeshow between 7-11 July 2022. On 5 July 2022, the claimant was told by Mr Martin that he would definitely be going to the Wales tradeshow between 17-22 July 2022. This did not transpire.

34. On 6 July 2022, the claimant was asked by Tom from the warehouse to support Tom in a meeting that Tom had been asked to attend with Mrs Martin and Mr Jefferies. The meeting had been called because of a dispute between Tom and the respondent about the number of hours overtime Tom had claimed for attendance at the Highland Centre in Edinburgh between 22-25 June 2022. The respondent was unwilling to pay Tom the 25 hours overtime he had claimed and was only willing to pay him for 18 hours. The claimant confirmed that Tom had, to the claimant's own knowledge, worked all of the 25 hours of overtime that he had claimed. Tom subsequently

resigned after having been given a final written warning for spending £1.50 on a bottle of pop on an earlier occasion (the claimant understood it to have been before the Edinburgh trade show) using a company expense card.

35. On 7 July 2022, the claimant was asked to attend a meeting at 08:30 with Mr Martin. The Tribunal did not hear any evidence from Mr Martin. The Tribunal accepted the claimant's evidence that the discussion with Mr Martin was heated and that Mr Martin said that his wife was furious with the claimant for defending Tom over the overtime hours. The claimant was also told by Mr Martin that all future outside events were to be cancelled.

36. At 11:30 7 July 2022, the claimant was called into a meeting with Mr Jefferies. The claimant was told by Mr Jefferies that Mr Martin had now decided that he wanted the claimant to go to the Harrogate tradeshow between 11-15 July 2022. The claimant would be accompanied by Michael Dalton (Office Administrator). It was agreed that the claimant and Mr Dalton would take an equal split of the show sales' commission. Accordingly, the claimant and Mr Dalton would each receive 2.5% commission for at show sales and 1% commission for after show sales.

37. Between 11 – 15 July 2022, the claimant attended the Harrogate tradeshow. He was again to receive £40.00 a day in expenses for food and accommodation. Mr Dalton was to receive the same amount. The claimant again slept in a company vehicle on the nights in between the show days.

38. On 25 July 2022, Mr Jefferies resigned. A new General Manager, Ronnie Hall, was to be appointed and would arrive in October 2022.

39. On 5 September 2022, Mr Martin asked the claimant to attend the APF Birmingham tradeshow between 21-25 September 2022. The claimant was authorised by Mr Martin to buy a tent to sleep in on the nights between the show days.

40. The claimant attended the Birmingham tradeshow as arranged. He was accompanied by Sean Forster (Warehouse Labourer). The claimant again received a daily expenses allowance of £40.00 for food and accommodation. The same commission arrangements (5% commission for at show sales and 2% commission for after show sales) that had applied at the Edinburgh tradeshow were agreed for the Birmingham tradeshow.

41. The claimant therefore attended a total of 3 tradeshows: the Highland Centre at Edinburgh; the Harrogate show and the APF Birmingham show.

42. On 28 September 2022, Mr Johnson undertook a check of the company vehicles that had been used at the APF Birmingham tradeshow the previous week. The claimant was called into Mr Johnson's office and told that the drivers logbook for the Birmingham event have not been filled in correctly. Mr Johnson said to the claimant,

> *"I can sack you for this but I will give you a written warning and you will have to sign it."*

43. The Tribunal accepts the claimant's evidence at paragraph 65 of his witness statement in which he says that he signed the written warning because he was fearful

of stronger action (however unfairly) being taken against him by Mr Johnson. The claimant explained that this was not just because of Mr Johnson's indication that he might sack him for this particular matter, but also to the previous threat he perceived that Mr Johnson had made to dismiss him.

44. The record of the discussion and the written warning given to the claimant is recorded in a document entitled "File Note (Record of Formal Discussion)". That document is to be found at pages 61-63. It is signed by Mr Johnson and by the claimant. It is dated 27 September 2022. It may be that the claimant is mistaken about the date of the disciplinary meeting or that this is a reference to the date which Mr Johnson checked the vehicle logbooks. However, nothing turns on the difference in dates.

45. Looking first at what Mr Johnson believed the claimant had done wrong. Mr Johnson refers to a Pre-Policy Driving at Work agreement of 28 June 2022. At page 61, Mr Johnson says that this document

> *"…clearly states the following.*
>
> *Drivers must comply with the following instructions to ensure it is known by Forest Master senior management who is driving what vehicle at any given time*
>
> - *Always complete the driver's logbook accounting for all driving activity*
> - *It must be clear who was driving a vehicle at a specific time, therefore the times and dates must be clearly completed*
> - *The vehicle registration must be clearly legible*
> - *The mileage must be added at the start and finish of each driver's tour of duty, if the driver does not change in a whole day, this can be captured in one day entry only, with the start and finish time covering that driver*

46. The File Note goes on to say that

> *"[The claimant] has failed to comply to (sic) this signed agreement*
>
> *[The claimant] is also fully aware of the Disciplinary Procedure which he signed for on 20 April 2022*
>
> *This is a record of formal written warning for this misconduct and will be held on file for a period of no less than 12 months and may be referred to and taken into consideration in any future misconduct."*

47. The way in which Mr Johnson handled this matter was of significant concern to the Tribunal. The respondent did not disclose in these proceedings any document correlating to the Pre-Policy Driving at Work agreement. It was therefore not possible for the Tribunal to make any assessment as to whether or not the claimant had breached it. The Tribunal could not make any assessment of the seriousness of any breach by the claimant. Nor could it assess the proportionality of Mr Johnson's claim that it was a potentially dismissible offence or whether it could only reasonably merit a lesser (or indeed no) formal action under the disciplinary procedure. However, as a matter of common sense, this matter taken at its highest did not appear to have

anywhere near the degree of seriousness that Mr Johnson claimed when telling the claimant that he could be sacked for it. It was common ground that the claimant had a clean disciplinary record at this stage.

48. Furthermore, it would appear that Mr Johnson himself was also not fully aware of the Disciplinary Policy and Procedure which Mr Johnson had himself introduced on 14 April 2022. The claimant says that the Disciplinary Policy and Procedure was not followed when this warning was given to him. The claimant is plainly correct about that. For example,

    48.1. there was no investigation into the misconduct being considered;

    48.2. the claimant was not informed of his right to be accompanied by an accredited Trade Union Representatives or work colleague at the disciplinary hearing;

    48.3. the claimant was not informed in writing that he was required to attend a disciplinary hearing;

    48.4. the claimant was not given two working days' notification that he was required to attend the disciplinary hearing;

    48.5. the claimant was not advised in writing of the alleged misconduct which had led to the contemplation of disciplinary action being taken against him;

    48.6. the claimant was not advised in writing of the time and place of the disciplinary hearing;

    48.7. there was no letter referring to the relevant evidence that was to be considered;

    48.8. the claimant was not given every opportunity to state his case and answer the allegations made, rather he was threatened with "the sack" by Mr Johnson as Mr Johnson's way of opening the meeting;

    48.9. there appeared to be no consideration as to why a verbal warning or other less serious sanction might have been more appropriate;

    48.10. there was no opportunity for the claimant put anything forward by way of mitigation;

    48.11. the claimant was not provided with a copy of the written warning that was issued to him; and

    48.12. the claimant was not provided with any opportunity to appeal Mr Johnson's decision to issue him with a written warning.

49. This is not an exhaustive list of the ways in which Mr Johnson failed to comply with the provisions of his own Disciplinary Policy and Procedure. It is intended simply to illustrate the many and varied procedural failings in the way in which Mr Johnson chose to take disciplinary action against the claimant. Indeed, many of those procedural failures are also failures to comply with the ACAS Code of Practice on

disciplinary and grievance procedures, in particular the failures at paragraphs 49.1, 49.2, 49.3, 49.5 and 49.12).

50. At Section 4 of the File Note on page 62, the claimant is recorded as saying,

    "I have no defence".

51. As the claimant explained in his evidence, he felt ambushed by Mr Johnson and accepted the punishment he was given because he was fearful that should he not do so he might be sacked. In the circumstances, the Tribunal can understand why the claimant decided to do as he did. The Tribunal also finds that in these circumstances the claimant cannot be understood to have either accepted that a written warning was merited or that he had waived any of the procedural benefits or safeguards that were contained in the Disciplinary Policy and Procedure that Mr Johnson had so recently introduced.

52. In short, Mr Johnson wholly disregarded his own disciplinary policy and failed to provide the Tribunal with a copy of the Driving Policy which he says was breached by the claimant and which he says merited a formal written warning being given to the claimant. At paragraph 3 of his witness statement, Mr Johnson says that he was "very proud" to issue the Disciplinary Policy and Procedure on 14 April 2022. However, Mr Johnson provided no explanation to the Tribunal why he decided when taking disciplinary action against the claimant to proceed in total disregard of it.

53. On 30 September 2022, the claimant was paid his expenses for food and accommodation relating to the Birmingham tradeshow.

54. On 7 October 2022, the claimant was again asked to attend a meeting with Mr Johnson. Mrs Martin was also present. The claimant was asked to hand over the cash and cash invoices from the Birmingham tradeshow on 22 - 25 September 2022. After the cash and invoices had been verified, Mr Johnson suggested to the claimant that,

    "…he could easily have fiddled cash sales and pocketed money."

55. While this fell short of directly accusing the claimant of dishonesty, the claimant was understandably concerned about why Mr Johnson would make such a remark. It was agreed that the company's system was not foolproof and that improvements could be made. However, this was the next in a sequence of unfounded allegations (albeit implied on this occasion) of dishonesty being made by Mr Johnson against the claimant without any factual foundation.

56. On 14 October 2022, the new General Manager, Ronnie Hall, commenced employment with the respondent.

57. On 18 October 2022, the claimant discovered that a colleague, Mr McDougall (Marketing Manager), had received a pay rise. This surprised the claimant as the claimant had not received a pay rise despite his expectations based on the agreement he believed he had reached with Mr Martin the previous October. The claimant was aware that sales had increased by 16.6% in the financial year. The claimant was expecting a salary increase of £4,648.00 on the basis of the agreement he considered he had reached with Mr Martin.

58. On 26 October 2022, the claimant went into Mr Martin's office to ask about his pay rise. The claimant was told that Mr Johnson would be talking to him about it. Later that morning, Mr Johnson announced in the main office that everybody would be getting a pay rise of £1,000.00. This was substantially less than the claimant believed he was due to be given. When the claimant asked Mr Johnson about his expected pay rise later that day, Mr Johnson told him that he was not aware of any agreement with Mr Martin and that the claimant should take it up with Mr Martin. The claimant then did just that. He went to see Mr Martin in Mr Martin's office. When the claimant raised his expected pay rise, Mr Martin responded:

    "*You are under investigation and it [the claimant's pay rise] will be discussed after that."*

59. This was the first that the claimant had heard about any investigation. The claimant pressed Mr Martin to inform him why he was being investigated. Mr Martin declined to tell the claimant why he was being investigated and replied,

    "You will find out soon enough that is all I have to say."

60. That response left the claimant anxious and concerned.

61. Nevertheless, two days later on 28 October 2022, the claimant was asked by Mr Martin to get the sales figures ready for the previous year so that the pay rise the claimant was expecting could be worked out. Later that same morning, Mr Johnson came to the claimant's desk and made the same request i.e. for the claimant to have the sales figures ready for a meeting to discuss his annual pay rise.

62. When the claimant attended the meeting it transpired that he had been deceived by both Mr Martin and Mr Johnson. The meeting had not been arranged to discuss the claimant's pay rise at all. Mr Martin was not at the meeting. The meeting quickly took the form of a disciplinary hearing which proceeded to consider allegations of which the claimant had been given no prior warning and which resulted in the claimant receiving a final written warning the same day. That final written warning was ostensibly being given under the respondent's Disciplinary Policy and Procedure. The claimant was understandably shocked. In his evidence, the claimant described this process as an ambush. When that was put to him in cross-examination, Mr Johnson objected and said it was not as a fair description of the meeting. However, when the Tribunal asked Mr Johnson whether he would agree that this meeting took the claimant completely by surprise about a very serious matter, Mr Johnson accepted that was a fair description.

63. The meeting on 28 October 2022 was attended on behalf of the respondent by Mr Johnson and the new General Manager, Mr Hall. The at show sales commissions were presented and agreed upon as correct. The after show sales were then presented and the claimant invited to agree them. The claimant said he would need to take Mr Johnson's word for the after show sales figures since the claimant had not had access to that management information. By definition, the after show sales would have come in subsequent to the tradeshows that the claimant attended and the claimant would not necessarily be aware of those after show sales.

64. Mr Johnson then repeated the threat he had made on 28 September 2022 when he issued the claimant with a written warning for failing to complete the drivers' logbook correctly. Mr Johnson said to the claimant,

> "*I am considering sacking you today*."

65. The claimant goes on to describe the remainder of the meeting as *"an interrogation lasting 90 minutes"* during which he was constantly accused of attempting to claim commissions dishonestly without being given any meaningful opportunity to respond to the accusations being made.

66. Mr Johnson repeatedly accused the claimant of deliberately giving out a discount code to customers on the telephone to obtain additional after show commissions dishonestly. Discount codes were given to attendees at the tradeshows who had shown an interest in the company's products. If an after show sale was made when the customer had such a discount code, then that would generate an after show sale commission for the claimant. Mr Johnson (inaccurately) said that the claimant was the only employee who stood to gain financially from any sales that were linked to the tradeshows.

67. Mr Johnson said that he had telephoned eight customers from the tradeshows and that three of those customers had told him that they had been given a discount code over the telephone by an unnamed male employee of the respondent. The claimant tried to explain that it was not his job to do telephone sales since his job was online sales. Mr Dalton was called into the meeting by Mr Johnson. Mr Dalton confirmed the claimant's account that it would be very rare for the claimant to be involved in telephone sales. He explained that it was his and Donna Somer's (a co-worker) role to do that. The claimant also noted that Mr Dalton might also gain from any after show sales commissions that was reached for the Harrogate tradeshow. The claimant decided not to raise this at the meeting on 28 October 2022 out of fear that it might cause problems for Mr Dalton.

68. The meeting was adjourned for lunch with Mr Johnson saying to the claimant,

> *"Go for your dinner now and I will consider if I am going to sack you."*

69. At 16:00 on 28 October 2022, the meeting was reconvened. Mr Hall and Mr Johnson were again in attendance. Mr Johnson told the claimant that he would not be sacked because there was,

> ***"…** no evidence but [the claimant] would remain under suspicion so would be given a final written warning."*

70. The claimant was also instructed not to bring up his agreed annual pay rise again with Mr Martin and informed that he would not be given any outstanding sales commission payments because of Mr Johnson's continued suspicions.

71. The File Note (Record of Discussion) of the meeting of 28 October 2022 is at pages 64-68. The File Note records the four allegations that were put to the claimant at this meeting and also records Mr Johnson's decision to uphold or not uphold each of them as follows:

71.1. Inappropriate use of TR1 code on a sale machine - upheld

71.2. Inappropriate use of TR1 code on sales related to 3 separate customers - not upheld

71.3. Inappropriate comments made of a sexually explicit nature in the presence of others – upheld

71.4. Inappropriate outburst towards [Mr Johnson] in the presence of others – upheld

72. The claimant provided his response to each of those allegations at paragraphs 96-127 of his witness statement. The Tribunal accepted the claimant's responses for three reasons: first, the claimant's responses made sense on their own terms; secondly, at no stage either during the meeting on 28 October or in these proceedings did the respondent provide any meaningful evidence that the allegations were well-founded; and, thirdly, Mr Johnson (despite his experience as an Inspector in the police service) did not cross-examine the claimant at this hearing on the explanations that are very clearly set out in the claimant's witness statement.

73. Dealing with each of the allegations in turn.

Allegation 1: inappropriate use of TR1 code on a sale of a machine

74. This allegation relates to a customer called Ms Connolly. The claimant explained that Ms Connolly was an elderly lady who phoned the technical phone. That phone was the claimant's responsibility. Ms Connolly expressed disappointment with a recent product price increase of 10%. The claimant told Ms Connolly that he would arrange for a discount code to be provided to her so that her son (Ms Connolly was not IT proficient) could place an online order with a discount of 10%. The claimant explained that discounting prices immediately after price increases was not uncommon. It avoided negative online reviews which could damage the claimant's online reputation. None of that was contested by the respondent.

75. As it transpired, the code given out by the claimant to Ms Connolly was not the correct discount code. The code provided by the claimant was 'TR1' without a hyphen in between TR and the number 1. The correct discount code was 'TR-1' with the hyphen included. The claimant goes on to say that because Ms Connolly's son had placed an order for the increased price (because the incorrect discount code he had been given by the claimant did not work) the claimant requested a manual 10% refund to arrive at the agreed reduced price. The claimant obtained authority for this refund from Mr Johnson.

76. This allegation of fraudulent conduct by the claimant was upheld by Mr Johnson, based according to Mr Johnson on the claimant's own admissions. Mr Johnson's position is at the bottom of page 64. He says:

> *"[This was] the application of discount code TR1 to a customer… Which if not noticed would have resulted in [the claimant] gaining 2% commission on that sale fraudulently…. I had to refund the customer £47.95…*meaning the company is down that amount of money based on [the claimant's] actions."

77. At page 65 Mr Johnson then says:

> *"[The claimant] admitted he was the one that gave Ms Connolly the TR1 code and admitted that he knew the TR1 code was for the post-show sales only. He further admitted that I was in the building when he did this, he should have asked me for permission (which would have been denied). If this was not admitted, and the[n] proof was there to show that the other male salesperson Michael Dalton was out of the country at the time.*
>
> *Decision -upheld as an act of misconduct."*

78. An allegation of attempting to obtain a commission by fraud is a very serious matter. It is an allegation of dishonesty. However, Mr Johnson's conclusion that the claimant admitted fraudulent (or any dishonest) wrongdoing is seriously flawed. It does not follow that by admitting that he was attempting to use a discount code, that the claimant was accepting he was acting dishonestly. On the contrary, the claimant gave an entirely innocent explanation. That explanation was that he wanted to give a 10% discount to a potential customer shortly after a 10% price increase. His evidence (which was again not contested) was that this was not an uncommon practice. Mr Johnson makes no attempt whatsoever on page 65 (or elsewhere, including in his witness statement) to explain whether he accepted that account and, if not, why not.

79. Rather, Mr Johnson put words into the claimant's mouth by misrepresenting his "admission" as one an admission of misconduct. It was nothing of the sort. The claimant's was not 'admitting' to anything at all. He was simply trying as best he could in the face of Mr Johnson's assertiveness to provide an innocent explanation for the allegation that was being made against him. That explanation was all the more credible because it was Mr Johnson himself to whom the claimant had gone to make the manual correction necessary to give the customer the 10% discount when it transpired that the claimant had given the wrong discount code to the customer.

80. The Tribunal concluded that there was simply no reasonable basis upon which Mr Johnson could uphold this allegation against the claimant. Mr Johnson had made an unjustified assumption that the use of (or attempted use of) a 'TR-1' code by the claimant was in an effort to obtain an after show sales commission for himself to which he was not entitled. The claimant provided a clear and consistent explanation why this was not the case and was able to identify the customer and the transaction in question. Mr Johnson made no effort to review the order or track the information which, as the claimant says, verified his own account. In the Tribunal's view, Mr Johnson had already made up his mind before the meeting on 28 October 2022 that this is what the claimant must be doing and he was not receptive to what the claimant had to say about the matter . As a result, Mr Johnson acted in a blinkered way on 28 October 2022 deciding not to fact check the claimant's innocent explanation because that did not fit with the conclusion at which Mr Johnson had already arrived.

Allegation 2: inappropriate use of TR1 code on sales related to 3 separate customers

81. The respondent produced a TR1 sales table in relation to this allegation (page 152). This was the document that was used by Mr Johnson as the basis for allegation 2 at the disciplinary meeting on 28 October 2022.

82. Allegation 2 is also an allegation of attempted fraudulent activity on the part of the claimant. Again, a very serious matter involving as it does a further allegation of dishonesty. Mr Johnson's position is set out at paragraph 9 of his witness statement. Mr Johnson says as follows:

> *"I personally investigated the matter as it was apparent that fraudulent activity was taking place by Mr White… I deployed the application of the more difficult to establish burden of proof, namely did he attempt to fraudulently obtain commission dishonestly, beyond any reasonable doubt, and the answer to that was no, which is why I did not uphold that part of the investigation in his favour. Mr White did in fact attempt to fraudulently obtain commission dishonestly on the lesser burden of proof being on the balance of probabilities, because he was the only benefactor to the miss-represented (sic) sales as being part of a trade show. I must reiterate that Mr White received no sanction for the fraudulent activity. Page 152 refers to my investigation findings in relation to eight separate customers where post show sales discounts of 10% were issued meaning Mr White would benefit from 2% commission on the full sale. Of the eight, only two of them were genuine customers. Four of them have never attended a show… The remaining two were genuine but Mr Hamblett, a previous employee was responsible for those sales meaning that commission was not Mr White's."*

83. It may well be that Mr Johnson is used to dealing with a burden of proof of beyond all reasonable doubt from his days as a Police Inspector. At pages 65-66 the File Note of the disciplinary meeting draws the same distinction as that set out above, albeit in slightly less forthcoming terms. In his File Note, Mr Johnson says as follows:

> *"All the above is only circumstantial evidence and the list of three can not only be attributed to Mr White beyond 'any reasonable doubt' without such evidence, although [it] could be argued that 'on the balance of probabilities' it was Mr White who gave the customers the codes...*
>
> *… No further action would be taken other than not paying Mr White the commission based on the integrity of the sales being lost as they had never been to any of our shows."*
>
> *Decision – to give Mr White the benefit of the doubt."*

84. There is a good deal of equivocation and inconsistency in Mr Johnson's position. Mr Johnson accepts there is insufficient evidence to the criminal standard of proof of 'beyond reasonable doubt' that the claimant was acting dishonestly. However, Mr Johnston (at least by the time of his witness statement) considers that there was sufficient evidence to the civil standard of proof of 'the balance of probabilities' that the claimant was acting dishonestly. This leads to the allegation not being upheld per se, but at the same time to the withholding of the claimant's commissions (of

which see more below). It is difficult to understand exactly in what way Mr Johnson is giving 'the benefit of the doubt' to the claimant. What is clear is that Mr Johnson actually believed the claimant was attempting by fraud to obtain commission payments. It was for that reason that Mr Johnson decided that sales commissions (which the claimant says he earned legitimately) were to be withheld from him unless the claimant could prove that he had earned the commissions honestly. The Tribunal (and no doubt the claimant as well) found the references to different standards of proof, the shifting of the onus of proof to the claimant to prove he had earned commission payments honestly, the claimant being given 'the benefit of the doubt' and yet remaining under suspicion and having his commission payments withheld bewildering.

85. The claimant's position on the three customers covered by allegation 2 is set out at paragraphs 104-1 to 5 of his witness statement. The claimant deals in sequence with each of the eight customers to whom Mr Johnson had spoken.

Customer Mary Connolly

86. The Tribunal prefers the claimant's account of what happened in respect of this customer to that of Mr Johnson for the reasons already set out at paragraphs 74 to 80 above.

Customers Jacqueline Gardner and Jonathan Crabb

87. The claimant's position was that he was not the person who gave the codes to either Jacqueline Gardner or Jonathan Crabb. It seemed also to be Mr Johnson's position that it was Mr Hamblett, not the claimant, who did so. Indeed, nowhere in Mr Johnson's document at page 152, in the File Note of the final written warning disciplinary meeting at pages 64-68 or in Mr Johnson's own witness statement is it suggested that it was the claimant who gave out the codes to either of these customers. Clearly, the claimant cannot sensibly be considered to be making a fraudulent attempt to obtain commissions for himself when it was not the claimant who gave the code to either customer in the first place.

Customer Jackie Pickles (5 transactions)

88. The claimant had a simple explanation why he could not on any view be responsible for any of these 5 transactions. The claimant's evidence was that he was on holiday between Monday 1 and Friday 5 August 2022. That evidence is supported by the claimant's diary entries on pages 221 and 222 and was not contested in cross examination. It was common ground that the same code had been used by Jackie Pickles for each of the five transactions attributable to her on page 152. It was also common ground that the single code in question had been issued to the customer on 4 August 2022. The claimant was on holiday that day and could not logically be the employee responsible for issuing the code to the customer.

89. It follows that none of the transactions made by Jackie Pickles on 4, 5 August 2022, 9 September 2022 or the two transactions on 11 September 2022 could have been the responsibility of the claimant. The standard of proof applied can make no difference at all to that conclusion.

Customer Ian Spedding

90. It was common ground that the code given to Mr Spedding was provided to him on 13 July 2022 (page 152). It was common ground that the claimant was at the Harrogate tradeshow on 13 July 2022 with Mr Dalton. It was common ground that the discount code was given out by the telephone from the respondent's office in Newcastle. Plainly, it is not possible to attribute responsibility to the claimant for this transaction since he was some 100 miles from the respondent's office at a tradeshow in Yorkshire at the time. It follows that there is no basis upon which to conclude that the claimant was attempting to fraudulently obtain a commission regardless of the standard of proof applied.

Customers Alistair Gault and Fiona Beveridge

91. In both cases Mr Johnson's enquiries revealed that both of these customers attended the Edinburgh tradeshow and had received business cards in the name of Keith Hamblett (the co-worker who had attended the show with the claimant). It was common ground that all of the business cards for the Edinburgh tradeshow were printed in the name of Mr Hamblett, and not separately for Mr Hamblett and the claimant. It inevitably follows that any customer attending the Edinburgh show would have received a business card bearing Mr Hamblett's name. No other business cards had been printed in the claimant's own name. That was unsurprising given the respondent's ever changing position on which, if any, shows the claimant was to attend.

92. The claimant agreed that he handed out business cards in Mr Hamblett's name to a number of customers. This is what had been expected of him by the company. However, that cannot be taken as any basis for drawing any conclusions that it was not in fact the claimant's own work at the Edinburgh tradeshow which generated this after show sale. The only evidence on the legitimacy of the sale is that of the claimant. Mr Johnson can provide no evidence at all since he wasn't there. Mr Hamblett, who was there, had left the company very shortly after he had arrived. Again, there were plainly no grounds upon which to sustain an allegation that the claimant was attempting to obtain commissions fraudulently regardless of the standard of proof applied.

Customers William Chappell and Tim Hook

93. Both of these customers attended the Harrogate tradeshow and received a TR-1 code. The claimant's position was that both of these commissions were legitimate and based on after show sales generated from his efforts at Harrogate.

94. Mr Johnson's position regarding these two customers remained unclear both from his File Note and his witness statement. Mr Johnson did not contest the claimant's explanation that the commissions were legitimately earned from Mr Chappell and Mr Hook when cross-examining the claimant. The Tribunal again concluded that there was no sustainable basis upon which to allege that the claimant had done anything other than legitimately earn commission in respect of the after show purchases made by both of these customers.

95. In the Tribunal's view the claimant was being told by Mr Johnson that he had on the balance of the evidence (including such explanation as the claimant was allowed to

give at the meeting of 28 October 2022) attempted fraudulently to obtain commissions and it was on that basis that Mr Johnson told the claimant that he would not be paid any after show sales commissions. For the reasons referred to above, there was no factual basis upon which to make such an extremely serious allegation against the claimant and no legitimate basis upon which to refuse to pay him the commissions he had earned.

96. **Allegations 3 and 4** – both of these allegations related to the claimant's alleged behaviour in the workplace. In his evidence, the claimant disputed Mr Johnson's version of events on both matters. According to the claimant, the allegation 3 of making a sexually explicit remark has been deliberately misconstrued by Mr Johnson in an effort to distance himself from inappropriate remarks of his own. On allegation 4, Mr Johnson has clearly not properly understood the claimant's position on his pay rise. The suggestion that the claimant was expecting a pay rise to £50k per annum is simply wrong. That has never been the claimant's position. £50k was to be a cap on any pay rise based on a percentage of increased sales. The claimant's expectations were a rise to c £33k per annum based on an agreement he thought he had reached with Mr Martin. In any event, the claimant was taken by surprise by both of these allegations and there is no evidence that Mr Johnson made any attempt to consider the claimant's explanations.

97. The way in which Mr Johnson approached this disciplinary meeting with the claimant was again in wholescale breach of the respondent's Disciplinary Policy and Procedure. By way of example:

    97.1. There was no investigation whatsoever into any of the allegations made against the claimant, including those that were upheld, before the meeting on 28 October 2022;

    97.2. the claimant was not informed in writing that he was required to attend a disciplinary hearing ;

    97.3. the claimant was not given two days' advance notification that he was required to attend the hearing despite it plainly been possible to do so;

    97.4. the claimant was not advised in writing of the alleged conduct which led the respondent to contemplate disciplinary action;

    97.5. the claimant was not provided with the relevant evidence to be considered at the hearing or provided with the possible outcomes of the hearing;

    97.6. the claimant was not given every opportunity to state his case and to answer the allegations that have been made;

    97.7. the claimant was not allowed to ask questions, present evidence and call witnesses or given an opportunity to raise points on any information provided by witnesses;

    97.8. the claimant was not advised of his statutory right to make a reasonable

request to be accompanied by a fellow worker or an accredited trade union official despite the fact that the respondent knew by that stage that the claimant was a member of a trade union.

98. This is not an exhaustive list. However, each of the failures identified above is a breach of an express requirement of the respondent's own Disciplinary Policy and Procedure. Several of those breaches are also breaches of the ACAS Code of Practice on disciplinary and grievance procedures. Put simply, the claimant was ambushed and given no fair opportunity to respond to the various highly sensitive and extremely serious allegations being made against him. Those allegations were brought to his attention for the first time during the disciplinary meeting on 28 October 2022 and not before it.

99. At 07:40 on Monday 31 October 2022, the claimant handed in a letter of resignation to Mr Hall (copied to Mrs Martin). This was early in the morning on the next working day after the disciplinary meeting on Friday 28 October 2022.

100. The claimant sets out a number of reasons for his resignation.

101. He says that his position at the respondent had become

"… Untenable and intolerable leaving [him] no option but to resign."

102. The claimant goes on to refer to a number of matters which he says have led to his decision to resign, including:

102.1. Serious reprimands and threats over the past six months;

102.2. Unfounded accusations being made against him;

102.3. The respondent not delivering upon previously agreed pay increases;

102.4. Being threatened with the sack during the course of meetings on 27 September 2022 and 28 October 2022 with Mr Johnson and Mr Hall;

102.5. Being interrogated on 28 October 2021 by Mr Johnson in an aggressive and intimidating manner, having his integrity questioned and being wrongly accused of fraudulently attempting to obtain commission payments;

102.6. Being told that his tradeshow commission payments would not be paid unless the claimant could prove that he had obtained them honestly;

102.7. Being told that allegations of dishonesty would remain against him;

102.8. Being given a final written warning for no justifiable reason; and

102.9. Having his self-confidence shattered by events since Mr Johnson's appointment.

103. In a letter of 3 November 2022, Mr Johnson acknowledged the claimant's resignation. Mr Johnson starts that letter as follows:

"I acknowledge with sadness, receipt of your resignation letter handed to Mr Ronnie Hall, General Manager on Monday, 31 October 2022.

I say with sadness based on the fact I am surprised and genuinely upset by your decision, especially following my efforts to Friday, 28 October 2022 to close out what was a very difficult meeting with what I thought was a very positive outcome for you. The facts of that meeting and discussing them with you could not have been avoided."

104. In the light of Mr Johnson's

104.1. attitude and approach towards the claimant, including repeated breaches of the Disciplinary Policy and Procedure he had introduced;

104.2. the number of unfounded allegations including allegations of dishonesty made against the claimant;

104.3. the aggressive and threatening way in which the claimant was questioned by Mr Johnson;

104.4. the repeated and cavalier way in which Mr Johnson threatened to (or intimated that he might) sack the claimant; and

104.5. the way in which Mr Johnson described in his witness statement how he saw the claimant during the period they worked together (see section paragraphs 105 and following).

the Tribunal has concluded that Mr Johnson was being disingenuous when expressing his regret at the claimant's resignation.

Mr Johnson's description of the claimant in his witness statement

105. This is a case in which the claimant says that he was constructively dismissed by the respondent. That claim depends in large part on the claimant being able to sustain the contention that the implied term of mutual trust and confidence in the claimant's contract of employment was broken by the respondent acting through its managing director, Mr Johnson.

106. Mr Johnston denies that he acted in fundamental breach of the claimant's contract of employment. Nevertheless, in Mr Johnson's witness statement he has a number of highly critical things to say about the claimant which bear directly upon how he regarded the claimant at the time he manged him including regarding a number of the matters that led to the claimant's departure.

107. At paragraph 10 of his witness statement, Mr Johnson says that when he received the claimant's letter of resignation he added in red what he described as his own "counter representative notes" (the 'amended resignation letter'). The amended resignation letter is at pages 143-148. Mr Johnson explains in the same paragraph of his witness statement that he shared the amended letter resignation

letter with Mr and Mrs Martin, the business owners. Mr Johnson then goes on to say,

"I shared my comments with Mr and Mrs Martin who were unfazed by [the claimant's] resignation and quite relieved as we no longer had a bully and a thief in our employment."

108. At paragraph 15 of his witness statement, Mr Johnson says that,

"*Mr White was responsible for attempting to fraudulently obtain commission for sales to customers who had been nowhere near any shows…*"

and that,

"Mr White was also evidently a bully and if allowed to would continue in his ways in making certain individuals life at work difficult and unbearable.

109. There was not a shred of meaningful evidence in Mr Johnson's witness statement, evidence elicited through cross-examination or in the documents that were provided to the Tribunal to support Mr Johnson's assessment that the claimant had committed any fraud, theft or engaged in any bullying. Plainly those are all very serious accusations.

110. Mr Johnson also made other personal criticisms of the claimant in his witness statement. These included the allegation that according to Mr Johnson, it was evident from the claimant's texts and his diary entries in the bundle that he

"…is a hate filled individual who does not like management and is often fuelled by his wife in that regard."

111. The Tribunal considered Mr Johnson's remarks in his witness statement reflected poorly on his credibility as a witness. Mr Johnson was prone to exaggeration, making assumptions, browbeating the claimant in meetings and coming to conclusions without first considering all the evidence. There was a stark contrast between what Mr Johnson said in his witness statement and what Mr Johnson said when replying to the claimant's letter of resignation. Plainly, if what Mr Johnson says in his witness statement is true, then he would not have been in any way saddened or 'genuinely upset' to receive the claimant's resignation. Mr Johnson can't have it both ways.

The Relevant Law

112. **<u>Dismissal</u>**

112.1. Section 95 Employment Rights Act 1996 (ERA) sets out the circumstances in which an employee is dismissed:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –

a. the contract under which he is employed is terminated by the employer (whether with or without notice),
b. he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract,
or
c. the employee terminates the contract under which he is employed (with or without notice] in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

112.2. Plainly, if an employee has been expressly dismissed by his employer
then section 95(1)(a) applies, and there is no need for the employee to show that he has been constructively dismissed. The test of whether an employee has been constructively dismissal is set out in section 95(1)(c) ERA and is the statutory version of a principle originally established at common law. However, where there has been no express dismissal and there has been no termination by virtue of a limiting event under section 95(1)(b), it will be for the employee to show that the provisions of section 95(1)(c) have been satisfied and that he has been constructively dismissed.

112.3. If an employee who has resigned his employment is unable to show that the provisions of section 95 (1)(c) have been satisfied, that employee will not be treated as having been dismissed. It follows that if an employee has resigned and not been dismissed he cannot assert a right not to have been unfairly dismissed. If an employee does satisfy the provisions of section 95(1)(c) then his resignation would be treated as a dismissal for the purposes of the law of unfair dismissal set out in Part X ERA.

112.4. Importantly, satisfying section 95(1)(c) establishes only that a claimant has been dismissed. Provided that the employee satisfies the other qualifying conditions to bringing a claim of unfair dismissal (such as any requirement for a qualifying period of service), that employee has the right not to be unfairly dismissed and the right to bring proceedings in the employment Tribunal complaining of unfair dismissal. An Employment Tribunal might nevertheless find in appropriate circumstances that a constructive dismissal is fair where that dismissal is for a potentially fair reason under section 98 (1) or (2) ERA and that the claimant's constructive dismissal for that reason meets the requirements of fairness under section 98(4) ERA.

112.5. In order to establish that the requirements of subsection 95(1)(c) are met, the employee must show:

112.5.1. there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment;

112.5.2. the employer's breach caused the employee to resign; and

112.5.3. the employee did not delay too long before resigning, thereby affirming the contract.

Breach of contract

113. The first step is to identify the term which is said to have been breached by the employer, and to consider whether there has been a breach of that term. The breach relied upon may be of either an express or implied or, if the breach is not yet occurred, anticipatory.

114. The term relied upon by the claimant in this case is the implied term of trust and confidence. Breach of the implied term of mutual trust and confidence is the breach most frequently relied on in constructive dismissal cases. The term provides that employers (and employees) will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties – Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.

115. In cases where a breach of the implied term is alleged, the Tribunal's function is not the same as the range of reasonable responses test. That applies in relation to the statutory test for unfair dismissal, not the contractual test for constructive dismissal.

116. An example given by the EAT to illustrate the reasonable and proper cause element of the test is that in any employer who proposes to discipline an employee for misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process, but if the employer had reasonable and proper cause for taking the disciplinary action, the employer cannot be said to be in breach of the term of trust and confidence - Hilton v Shiner Ltd Builders Merchants 2001 IRLR 727, EAT.

117. The second element of the test is whether the conduct was calculated or likely to destroy or seriously damaged trust and confidence. This requires the Tribunal to consider the circumstances objectively, from the perspective of a reasonable person in the claimant's position Tullett Prebon plc v BGC Brokers LLP 2011 IRLR 420, CA. The test is met where the employer's intention is to destroy or seriously damaged trust and confidence, or whether employer's conduct was likely to have that effect.

118. A breach of the implied term of trust and confidence can be caused by one act, or by the cumulative effect of a number of acts or a course of conduct. A last straw incident which triggered the resignation must contribute something to the breach of trust and confidence itself - Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA. There is no need for there to be proximity in time or in nature between the last straw and previous acts - Logan v Commissioners of Customs and Excise 2004 ICR 1, CA.

Fundamental breach

119. If there has been a breach of contract, the breach must be fundamental. This requires considering whether the conduct 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." Western Excavating (ECC) Ltd v Sharp 1998 ICR 221, CA.

120. Fundamental breach is probably synonymous with repudiatory breach, that is a breach which is a repudiation of the whole contract - Photo Production Ltd v Securicor Transport Ltd 1980 ACA 27, HL.

121. The stage is not needed where the Tribunal has found that there was a breach of the implied term of trust and confidence: any breach of that term is a fundamental breach necessarily going to the root of the contract – Morrow v Safeway Stores plc 2002 IRLR, EAT.

122. Whether a breach of a term is a fundamental breach is a question of fact and degree. Some points about this:

122.1. the effect on the employee is relevant;

122.2. the employer's subjective intention is not a key part of the test. It may be relevant, but the intention must be judged objectively - Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT.

123. Some cases have considered whether an employer can remedy a fundamental breach of contract before the employee accepts it. Other than an anticipatory breach of contract, which may be withdrawn up to the moment of acceptance, a fundamental breach of contract cannot be remedied by the wrongdoer. After a fundamental breach has occurred, it remains open to the employee to agree to affirm the contract, or to accept the fundamental breach once it has occurred, whatever action the employer takes. This means that the only option available to the employer who wants to correct their action is to invite the employee to affirm the contract - Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA.

124. However, there is a distinction between a fundamental breach of contract that cannot be remedied, and action taken by an employer that prevents the breach of contract occurring or becoming a fundamental breach – Assamoi v Spirit Pub Company (Services) Ltd *EAT 0059/11.*

Resignation

125. If the employer fundamentally breaches the contract of employment, the employee may accept the repudiation and terminate the contract by resigning, either with or without notice. The contract comes to an end at the time of the communication of the resignation to the employer. If the employer is in

continuing breach of contract, the employee can resign at any point to while it is continuing – Reid v Camphill Engravers 1990 ICR, EAT.

126. The employee may resign by words or conduct. For example, an employee's failure to return to work following maternity leave was sufficient to communicate acceptance of the employer's fundamental breaches of contract.

127. There are some conflicting authorities as to the relevance of an earlier fundamental breach by the employee, with some authority suggesting that an employee cannot allege constructive dismissal if he is in breach of contract himself - RDF media group plc v Clements 2008 IRLR 207, QBD . However, there appears to be acceptance that if one party commits a fundamental or repeated breach that the other does not accepted as bringing the contract to an end, the contract and the obligations under it continue. The obligation of trust and confidence is not suspended when one party breaches the contract, and so it remains open to an employee who has committed a fundamental breach to accept a later repudiation by the employer and end the contract -Atkinson v Community Gateway Association 2015 ICR 1, EAT.

128. In Aberdeen City Council v McNeill 2015 ICR 27 the claimant committed acts of gross misconduct, including sexual harassment and being intoxicated at work. He claimed constructive dismissal in relation to the disciplinary investigation, which the employer carried out in a way which breached the implied term of trust and confidence. The Court of session rejected the employer's argument that the employees breaches prevented the employee from relying on a later breach of trust and confidence by the employer. However, the employee's own breach could be relevant to compensation For example, in a complaint of constructive unfair dismissal, breaches such as misconduct could be found to be contributory conduct resulting in a reduction to the basic and compensatory awards.

Resignation caused by breach of contract

129. The breach must have caused the resignation, but it need not be the only cause. The test is whether the employee resigned in response to the conduct which constituted the breach. This is a question of fact for the Tribunal.

130. Once an employer's fundamental breach has been established, the Tribunal should ask whether the employee has accepted the breach and treated the contract of employment as at an end. It does not matter if the employee also objected to other actions (or inactions) by the employer that were not a breach of contract. Constructive dismissal is made out if the employee resigned at least partly in response to the employer's fundamental breach of contract - Logan V Celyn House Ltd EAT 0069/12. The crucial question is whether the repudiatory breach played a part in the dismissal, that is whether it was one of the factors relied on Abbycars (West Hornden) Ltd v Ford EAT 0427/07.

Delay and affirmation

131. If the employee waits too long after becoming aware of the breach of contract before resigning, he may be taken to have affirmed the contract. The question is whether the employee has shown an intention to continue in employment, rather than an intention to resign. This will depend on the particular circumstances of the case. Factors relevant to this question include the employee's conduct, as well as the length of time which has passed since the breach.

132. In addition to affirmation by delaying, the employee may affirm the contract by taking action which is consistent with employment continuing, irrespective of the timeframe, for example, considering alternative roles, accepting a promotion or pay rise.

133. Where there is a continuing cumulative breach of the implied term, the employee is entitled to rely on the totality of the employer's acts even if she has previously affirmed the contract. The effect of the last straw is to revive the employee's rights to resign.

134. In a case where a number of breaches of contract relied on by the claimant, the Tribunal is assisted by the step-by-step approach of Lord Justice Underhill in Kaur v Leeds Teaching Hospitals [2018] E WCA Civ 978:

    134.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, the resignation?

    134.2. Has the employee affirmed the contract since the act? If so, there cannot be a constructive dismissal in respect of that act or earlier acts.

    134.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

    134.4. If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation.

135. Did the employee resign in response (or partly in response) to that breach?

136. If the last straw was part of a course of conduct which cumulatively amounted to a breach of the implied term, affirmation of the earlier acts does not need to be considered: the last straw revives the right to resign even if there has been an earlier affirmation. However, if the last straw is not part of a course of conduct which breaches the implied term, the Tribunal will have to consider whether earlier acts have been affirmed. In that case, the claimant can succeed in establishing constructive dismissal if:

    136.1. there has been no affirmation of the contract by the claimant;

136.2. the earlier act or course of conduct was repudiated; and

136.3. the earlier act or course of conduct at least contributed to the eventual decision to resign.

137. If the claimant establishes that he has been constructively dismissed, the Tribunal then needs to go on to consider (depending on what complaints the claimant is pursuing) whether dismissal was fair and/or whether dismissal was in breach of notice obligations.

138. **Unfair dismissal**

The statutory provisions

139. Section 98 ERA is in the following terms:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it relates to amongst other things the claimant's conduct.

The reason for dismissal

140. In a claim for unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996, it is for the employer to prove that it is show the reason or the principal reason for the dismissal. That is the result of section 98(1)(a). In order to be fair reason the reason must be one which falls within section 98(2) which includes conduct or some other substantial meaning within 98(1)(b). What is the reason for the dismissal is the subject of some helpful caselaw. It is often the case that an employer dismisses an employee for what could be regarded as several reasons. In Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this: "a reason for the dismissal of an employee is a set of facts known to the employer or it may be if beliefs held by him which caused him to dismiss."

The fairness of the dismissal

141. Where the employer has satisfied the Tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the Employment Rights Act 1996 which provides this:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and it should be determined in accordance with equity and the substantial merits of the case.

The range of reasonable responses of a reasonable employer test

142. Section 98 of the Employment Rights Act 1998 has been subject of much caselaw. The effect of which can be summarised by saying that the key question when a fairness of a dismissal is in issue is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed. However, particular considerations arose in relation to the different reasons for dismissal. This was a conduct dismissal. In a case where the employer relies on conduct as the reason for the employee's dismissal the following questions arise:

- Has the employer satisfied the Tribunal on the balance of probabilities that the reason for which the employee was dismissed was indeed the employee's conduct.
- Did the employer before concluding that the employee had done that for which he or she was dismissed carry out an investigation which was within the range of reasonable responses of a reasonable employer to conduct. The best authority in that respect is the case of **Sainsbury's v Hitt** which confirms that the bands of reasonable responses also applies to the investigation stage.

The range of reasonable responses of a reasonable employer test applied to conduct dismissals.

143. The severity of the consequences to an employee of dismissal are a relevant factor. So is the employee's length of service. So is his or her past record as an employee of the employer whether good or bad. Those things are stated helpfully in Harvey in which it says as follows:

"In paragraph of the ACAS code it is stated that where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. See also the ACAS guide. There are a whole range of potential factors which might make a dismissal unfair. In misconduct cases they include especially the employee's length of service and the need for consistency by the employer. The importance of length of service and past conduct were emphasised by the Employment Appeal Tribunal in ***Trusthouse Forte v Adonis*** *as being proper factors for a Tribunal to take into account. This is an area however where the EAT has said it must be tread very carefully and it is an error of law for the Tribunal to substitute its own view for the facts before the Tribunal. Of course the mere fact that where an appropriate self-direction is made doesn't make the application of that particular test fair on the facts of any particular case for what must always be borne in mind is that the*

Tribunal must not step into the shoes of the employer and must ask itself whether what the employer did and concluded was an option open to a reasonable employer acting reasonable."

144. **Wrongful dismissal/Failure to pay notice**

145. Wrongful dismissal is dismissal where the employer is in breach of contract. Termination without notice (or with inadequate notice) will amount to a wrongful dismissal.

146. Dismissal without proper notice is not a wrongful dismissal if it follows a repudiatory breach of contract by the employee. In those cases, the employer is entitled to dismiss the employee summarily. The test in wrongful dismissal cases of summary dismissal is not the same as the test for unfair dismissal: the Tribunal does not consider the reasonableness of the employer's decision to dismiss. Instead, in the case of wrongful dismissal, the Tribunal must consider:

"Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?"

147. Conduct by the employee which amounts to a repudiatory breach is sufficient to justify summary dismissal. The employee

"must show a complete disregard of a condition essential to the contract" Laws v London Chronicle Ltd 1959 1 WLR, CA

or:

"must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." Briscoe v Lubrizol Ltd 2002 IRLR 607.

148. Most frequently, the justification for summary dismissal relied on by the employer is misconduct by the employee or dishonesty, although this may be described as gross misconduct or gross negligence, the legal test is not whether the conduct can be labelled serious misconduct or gross misconduct. Instead, the question is whether the employee's behaviour amounts to a repudiation of the whole contract.

149. This is a question of fact for the Tribunal. The Tribunal must decide (on the balance of probabilities) what the employee did and whether it amounted to a repudiatory breach of the contract by the employee. This is not the same as assessing the reasonable belief of the employer is required in a complaint of unfair dismissal. Here, the employee's plea for mitigation is not relevant to the question of whether the employee's conduct amounts to a repudiation. For this reason, the employee can rely on a repudiatory breach by an employee to defend a claim for wrongful dismissal, even if it only discovers the breach after it has dismissed the employee - Boston Deep Sea Fishing and Ice Co- v Ansell 1888 39 ChD, CA.

150. A breach by the employer before the repudiatory conduct by the employee does not affect the employer's entitlement to rely on the later repudiatory action by the employee – Palmeri and ors v Charles Stanley and Co Ltd 2020 EWHC 2934, QBD.

151. The terms of the contract of employment may be relevant to the question of whether the employee is in repudiatory breach of the contract, for example whether the conduct falls within an express definition of misconduct justifying summary dismissal - Dietman v Brent London Borough Council 1988 ICR 842, CA.

152. Where there is a repudiatory breach by the employee, the employer can choose to waive the breach and affirm the contract. Inaction by the employer following a breach by the employee may be taken as affirmation, unless the employer has reserved its position in respect of the breach - Cook v MS HK Ltd EWCA Civ 624, CA.

153. **Unlawful deduction from wages**

154. Section 13 Employment Rights Act 1996 sets out the circumstances in which an employer will have made an unlawful deduction from the employee's wages. It provides:

> *13 Right not to suffer unauthorised deductions.*
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part*

as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

155. Section 27 defines what are wages for the purposes of the law against the making of unlawful deduction from wage.

156. Section 27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

Conclusions

157. Applying the law to the facts as the Tribunal have found them.

158. The issues have been dealt with in turn set out in paragraphs 9 to 11 above.

Constructive unfair dismissal

Was the claimant dismissed or did he resign?

Did the respondent, without reasonable or proper cause, behave in a way calculated or likely to destroy or seriously damage the relationship of confidence and trust?

159. The claimant relies on a breach of the implied term of trust confidence in his contract of employment. That term recognises that it is imperative that the

employer and employee continue to have trust and confidence in one another as a basis for continuing the relationship as a whole.

160. Tribunal has concluded that the respondent did act in a way that was likely to destroy or seriously damage the relationship of confidence and trust for the following reasons.

161. The repeated threats made by Mr Johnson to sack the claimant were designed to intimidate and force the claimant into accepting disciplinary sanctions and to cause instil fear into him. Neither is compatible with the claimant maintaining confidence and trust in his employer.

162. The Tribunal has set out at paragraphs 48.1 to 48.12 examples of the serious disregard that Mr Johnson had to the Disciplinary Policy and Procedure when carrying out a disciplinary hearing and taking disciplinary action on 28 September 2022 which led to a written warning being given to the claimant.

163. The Tribunal has set out at paragraphs 97.1 to 97.8 examples of the serious disregard that Mr Johnson had to the Disciplinary Policy and Procedure when carrying out a disciplinary hearing and taking disciplinary action on 28 October 2022 which led to the claimant receiving a final written warning.

164. The failures in both disciplinary processes were fundamental and highly prejudicial to the claimant. The claimant was taken entirely by surprise despite the procedural safeguards in the disciplinary policy and procedure intended to give him advance notice of both an investigation and disciplinary hearing. The Tribunal has concluded that Mr Johnson did this deliberately in an effort to ambush the claimant with extremely serious allegations in the hope he might procure admissions from the claimant.

165. The claimant was not provided with an opportunity to be accompanied at the disciplinary hearings despite the respondent being aware that the claimant was a member of a trade union. This was again a fundamental disregard of a procedural safeguard regulating the sensitive matter of taking disciplinary action in a way that is fair to all concerned. It is also a denial of the claimant's statutory right to be accompanied which is embodied in legislation in order to guarantee fairness in these difficult situations. The Tribunal accepted the claimant's evidence that at the meeting on 28 September 2022 he felt coerced into accepting a written warning out of fear of stronger action being taken against him as a result of inappropriate and prejudicial threats to his continued employment as a whole.

166. At the meeting on 28 October 2022, the claimant was also not given any advance opportunity to consider any of the allegations or evidence the respondent considered to be against him in order to prepare for the disciplinary hearing and to prepare his responses to those allegations. This together with the aggressive way in which the claimant was questioned put the claimant in an impossible situation. As was clear by the explanations that the claimant was able to give in evidence to this Tribunal, had the procedural safeguards in the Disciplinary Policy and Procedure been complied with, the claimant would have been able to

demonstrate that there was no sound factual basis to any of the numerous allegations in which the claimant's honesty was being questioned.

167. It is also important to bear in mind that the majority of the matters being considered by Mr Johnson on 28 October 2022 were allegations of fraud and dishonesty. Making allegations of this nature, which carried with them the allegation that the claimant was trying to obtain money from the respondent dishonestly, need to be made carefully. The Tribunal has concluded that Mr Johnson did not do so . Rather, he made these allegations in an ill-considered, intimidatory and highly prejudicial way.

168. Mr Johnson issued the claimant with a final written warning on 28 October 2022 in circumstances where no such disciplinary sanction was warranted. The Tribunal has already explained its conclusions that the respondent had no reasonable basis to consider that the claimant had committed any acts of dishonesty made against him. It follows that the disciplinary sanction of a final written warning was therefore imposed without any reasonable justification and in the absence of basic procedural safeguards and wholesale breaches of the respondent's own procedures.

169. The Tribunal is fortified in reaching this conclusion by the contradictory and inconsistent reasoning that Mr Johnson gave for issuing the claimant with a final written warning. The distinction drawn by Mr Johnson between a standard of proof of beyond reasonable doubt and a standard of balance of probabilities was somewhat difficult to follow and impossible to reconcile with his contradictory decision not to uphold certain allegations yet rely on the same accusations to withhold commission payments from the claimant. In any event, the Tribunal has found that there was no reasonable basis to conclude that there had been any wrongdoing at all by the claimant whatever standard of proof may be applied.

170. In overall terms, the Tribunal has concluded on the basis of its factual findings that Mr Johnson used the disciplinary proceedings as a management tool to intimidate the claimant and to issue him with unjustified sanctions as a means of asserting his managerial authority over him and with the intention of dismissing him when circumstances gave him the opportunity to do so. A disciplinary policy and procedure is a tool to help maintain the working relationships during periods when it is often under greatest strain. The way in which Mr Johnson used it was to the opposite effect. The Tribunal concluded that it was this misuse of the disciplinary procedure by Mr Johnson which caused him to disregard fundamental requirements of a policy and procedure that he had himself only recently introduced.

171. In these circumstances, the respondent acted in a way which was intended to seriously damage the relationship of confidence and trust.

172. The Tribunal next considered whether the respondent had reasonable and proper cause to behave in the way it did. The Tribunal has concluded that it did not.

173. The Tribunal acknowledges that conducting investigations into alleged acts of misconduct by an employee and conducting hearings to consider those allegations can be difficult matters to manage sensitively. Taking those steps are likely to amount to an employer acting in a way likely to destroy or seriously damage the relationship of trust and confidence. An employer may at the same time have reasonable and proper cause to do so since there will be unfortunate circumstances when taking those steps is justified and those steps are then carried out responsibly. However, the Tribunal does not consider this particular case to be one of those situations.

174. First, there was no reasonable cause for Mr Johnson repeatedly threatening the claimant with 'the sack' on three separate occasions in connection with two separate disciplinary matters. The initial occasion on which Mr Johnson did so was 28 September 2022 (paragraph 43 above) when addressing the apparent failure by the claimant to fill in the drivers' logbook. At no stage was it suggested that failing to do so on a first occasion could remotely amount to a potentially dismissal offence. The Tribunal has concluded that this was simply an example of the high-handed and oppressive way in which Mr Johnson chose to manage the claimant. The Tribunal concluded that it was Mr Johnson's intention to instil fear into the claimant and to use that fear as a way of exercising control over him. The intended (and actual) effect of which was to cause the claimant distress and anxiety.

175. The next occasion on which Mr Johnson threatened the claimant with 'the sack' was on 28 October 2022 when the claimant was confronted without any prior notification with allegations (among others) of attempting to fraudulently obtain commissions. Again, the Tribunal has concluded that this was a conscious intimidatory tactic used in an aggressive way in order to get the claimant to admit to wrongdoing for which on any fair-minded assessment the claimant was not in fact responsible.

176. Secondly, there was no reasonable or proper cause for Mr Johnson's failure to make any meaningful attempt to comply with the respondent's Disciplinary Policy and Procedure which Mr Johnson had himself introduced only a matter of months earlier. It is vital for an employer to comply substantively with a disciplinary policy that has been introduced into the workplace. A disciplinary policy provides an important framework setting out expected standards of behaviour both for the employee and for the employer. The process of taking disciplinary action is one where the employer must take very great care so as not to destroy or seriously damage the relationship of trust and confidence. Mr Johnston chose to disregard it because it was never his intention to treat the claimant fairly.

177. Thirdly, there was no reasonable or proper cause to accuse the claimant of acting dishonestly without first undertaking an investigation taking into account the claimant's own explanation for any perceived wrongdoing. Instead, Mr Johnson chose to ambush the claimant in an aggressive and oppressive disciplinary hearing the purpose of which was to obtain admissions from the

claimant rather than to carry out any sort of fair-minded objective assessment of the matters of concern.

178. Fourthly, there was no reasonable or proper cause to issue the claimant with a written warning and a final written warning without first complying with the disciplinary policy and procedure. In relation to the final written warning, the respondent had no reasonable or proper cause to issue it at all. Furthermore, Mr Johnson decision not to pay the claimant his after sales commission was also without reasonable proper cause coming as it did on the back of an allegation of fraudulently attempting to obtain commissions which on Mr Johnson's own case he decided not to uphold.

If the respondent did so conduct itself, did it repudiate the claimant's contract of employment such that the claimant was entitled to terminate the contract without notice.

179. Looking at the circumstances objectively from the perspective of a reasonable person in the claimant's position the Tribunal has concluded that it was no longer possible for the claimant to have trust and confidence in his employer in the light of the behaviour of the respondent identified at paragraphs 161 – 169 above.

180. Taking into consideration Morrow v Safeway Stores plc 2002 IRLR, EAT any breach of the implied term of mutual trust and confidence is to be considered a fundamental breach which necessarily goes to the root of the contract.

181. In the circumstances, the respondent repudiated the claimant's contract of employment such that the claimant was entitled to terminate the contract without notice.

Was the repudiatory breach at least a substantial part of the claimant's reason for resigning?

182. The Tribunal has set out the reasons that the claimant gave for his resignation in his letter of 31 October 2022. It is plain from the terms of that letter, as recorded at paragraph102 above, that the claimant resigned in direct response to a number of the matters that we have found, after objective consideration, to be a repudiation of the claimant's contract of employment. Those matters include unfounded accusations being made against the claimant; threatening him with the sack; withholding of his commissions on inadequate grounds; and being given a final written warning for no justifiable reason.

183. The Tribunal is satisfied that the main reason for the claimant's resignation was the matters constituting the respondent's repudiatory breach of his contract of employment.

Did the claimant affirm the contract before resigning?

184. The claimant resigned with immediate effect on the next working day after the second disciplinary hearing which led to him receiving a final written warning. The second disciplinary hearing took place on Friday 28 October 2022 and the claimant's resignation letter was personally delivered to the respondent early in the morning on Monday 31 October 2022.

185. The behaviour of Mr Johnson at the disciplinary meeting on 28 October 2022 and the treatment of the claimant during that meeting (including issuing final written warning) was itself a repudiatory breach of contract. In the circumstances, no question arises as to whether or not the claimant affirmed the contract of employment. He did not.

186. Accordingly, the Tribunal concludes that the claimant was dismissed within the terms of section 95 (1) (c) ERA.

If the claimant was dismissed:

What was the reason or principal reason for dismissal – that is, what was the reason for the breach of contract?

187. As was said by Cairns LJ in Abernethy v Mott Hay and Anderson, a reason for dismissal is the set of facts known to the employer or beliefs held by him which caused him to dismiss. In the context of a constructive dismissal the tribunal must consider the reason (or if more than one the principal reason) for the employer's breach of contract in order to identify the reason for dismissal.

188. In this matter, the reason for the respondent's breach of contract are the reasons why Mr Johnson acted in the way that he did towards the claimant. The Tribunal has found that the reason why Mr Johnson acted the way that he did was because he sought to intimidate the claimant as a way of asserting his managerial authority over him and to use fear of dismissal and tool to that end. This is what gave rise to the repeated threats of dismissal, the disregard for the respondent's own policy and procedures and the decisions to give the claimant a final written warning and to withhold his commission payments.

Was it a potentially fair reason? The respondent relies on conduct.

189. In order for a reason for dismissal to be potentially fair, it must fall within section 98(1)(b) or 98(2) ERA. The respondent relies on conduct.

190. The Tribunal's findings about the reason for dismissal set out at paragraph 188 above does not relate to the claimant's conduct. The context in which Mr Johnson acted in breach of the claimant's contract was Mr Johnson's distorted view of the claimant's conduct. However, that was not the reason for Mr Johnson's breach of the claimant's contract. Mr Johnson's reason for dismissing the claimant was to assert his managerial authority over the claimant. That does not relate to any genuine belief in the claimant's conduct.

191. The Tribunal also considered whether the reason for dismissal might fall within 'some of the substantial reason' but again the Tribunal concluded that there was no substantiality in Mr Johnson's reasons.

192. In the absence of a potentially fair reason for dismissal, the claimant's dismissal was unfair. The Tribunal does not need to consider reasonableness under section 98(3) ERA.

Wrongful dismissal / Notice pay

What was the claimant's notice period?

Was the claimant paid for that notice period?

If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

193. In the light of the Tribunal's finding that the claimant was dismissed within the meaning of section 95 (1)(c) ERA, the Tribunal finds that the claimant acceptance of the respondent's repudiatory breach of contract entitled him to terminate the contract of employment at common law.

194. It has not been contended that the claimant was himself in repudiatory breach of the contract of employment. In those circumstances, the claimant was wrongfully dismissal by the respondent. That conclusion follows from the findings of the Tribunal that the respondent repudiated the claimant's contract and that the claimant was entitled to accept, and did accept, the respondent's repudiatory breach.

195. It follows that the claimant is entitled to recover damages for breach of contract equivalent to the least burdensome way that the employer could have lawfully terminated the contract. That equates to the notice period that the claimant was entitled to receive from the respondent in order to lawfully terminate the contract.

196. The Tribunal has not been provided with a written contract of employment. The claimant in his witness statement claims three weeks' notice pay. At page 151, the respondent, when replying to the claimant's letter of resignation, says that the claimant ought have given four weeks' contracted notice of his intention to terminate his employment.

197. The parties are encouraged to resolve between themselves the appropriate level of compensation for the wrongful dismissal of the claimant. If that cannot be achieved, the matter will be decided by the Tribunal at a remedy hearing.

Unauthorised deductions

Did the respondent make unauthorised deductions in the form of unpaid outstanding sales commission from the claimant's wages and if so how much was deducted?

198. It follows from the Tribunal's findings that:

    a. the claimant did not make any fraudulent claim for at sale or after sales commissions;

    b. the claimant was not in repudiatory breach of the contract of employment;

    c. the respondent had no grounds for withholding the commissions earned by the claimant in respect of sales generated as a result of his efforts at trade shows; and

    d. there was an agreement between the parties for the claimant to be paid commissions on at show and after show sales

    that the claimant ought to have been paid any outstanding commission to which he was entitled in respect of the at sale and/or after sale commissions on sales related to the three tradeshows which he attended.

199. The claimant claims £340.00 representing 5% commission on at show sales and £49.00 representing 2% commission on after show sales.

200. The respondent did not disclose any documents suggesting that these figures were inaccurate. The respondent's case, which the Tribunal has rejected, was that the claimant became disentitled to commissions as a result of the claimant's alleged attempt to obtain commissions fraudulently.

201. The parties are encouraged to resolve between themselves the claimant's claim for unlawful deductions from his wages of the commissions in question. The starting point is the claimant's claim for £349.00 by way of commission in respect of which the respondent has provided no contrary evidence.

Summary conclusions

202. The Tribunal therefore concludes that:

    a. The claimant was constructively dismissed by the respondent.

    b. The respondent has failed to show a potentially fair reason for the claimant's dismissal.

    c. The claimant's dismissal was therefore unfair within the terms of sections 94 and 98 ERA.

d. The claimant was entitled to receive commissions on at show sales and on after show sales in respect of sales generated at or following the tradeshows at Edinburgh, Harrogate and Birmingham. The respondent's failure to pay the claimant all and any such outstanding commissions was an unlawful deduction from the claimant's wages contrary to section 13 ERA.

e. The respondent has wrongfully dismissed the claimant. The claimant is entitled to damages for his period of statutory/contractual notice.

203. A hearing for remedy will be listed. If the parties are able to resolve the issue of remedy between themselves in advance of that hearing (which they are encouraged to do) they must inform the Tribunal and make a joint request for the remedy hearing to be vacated.

Employment Judge Loy

Date 27 November 2023