



EMPLOYMENT TRIBUNALS

Claimant: Mr A Gifford

Respondent: British Airways Holidays Ltd

Heard at: London South via CVP **On:** 13th and 14th November 2023

Before: Employment Judge A Frazer

Representation

Claimant: Mrs S Gifford (Claimant's wife)

Respondent: Mrs Grace (Counsel)

JUDGMENT

The Claimant's claims for constructive unfair dismissal and breach of contract are not well founded and do stand dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Duty Office Team Leader from 7 July 2005 until 11 August 2022. The early conciliation notification was made on 18th October 2022 and the certificate was issued on 20th October 2022. The claim form was presented on 29th October 2022 and the Claimant claims unfair dismissal and breach of contract relating to a bonus payment relating to work done in 2021. The hearing was listed before EJ Cawthray on 11th and 12th May 2023 but unfortunately could not go ahead owing to the Respondent's counsel being taken ill. However, the time was used constructively as EJ Cawthray identified the issues which are as follows:

Constructive Dismissal

- 1.1 Was the Claimant dismissed?
- 1.2 Did the Respondent do the following things:

- 1.2.1 Dismiss the Claimant's concerns in August 2021 regarding a change in overtime rates;
 - 1.2.2 Give the Claimant a performance rating in January 2022 for the previous year that was more than 20 per cent lower than the previous two decades;
 - 1.2.3 Not raise any performance concerns with the Claimant;
 - 1.2.4 Not provide any feedback on the appraisal scoring. The Claimant says that no feedback was provided prior to his resignation;
 - 1.2.5 Not provide the Claimant with any documents in its response (approximately July 2022) to the subject access request.
- 1.3 Did that breach the implied term of trust and confidence? The Tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between claimant and respondent and whether it had reasonable and proper cause for doing so.
- 1.4 Did the Claimant resign in response to the breach(es)?
- 1.5 Did the Claimant affirm the contract before resigning?

Breach of Contract

- 1.6 Did the claim arise or was it outstanding when the claimant's employment ended?
- 1.7 Did the respondent do the following:
 - 1.7.1 Not pay the claimant the second instalment of a bonus payment. The Claimant says that he is owed 2500.
- 1.8 Was that a breach of contract?
- 1.9 How much should be awarded as damages?

The Law

Constructive Dismissal

2. In **Western Excavating Ltd (ECC) Ltd v Sharp [177] EWCA Civ 2** Lord Denning set out the test for a constructive dismissal. If an employer commits a repudiatory breach of contract (that is, a breach which is considered to be fundamental and which goes to the root of the contract) then the employee is entitled to resign in response so long as he or she does not delay as doing so may amount to an affirmation of the breach. The reason for the resignation must be the fundamental breach of contract and not some other reason.
3. In **Malik v BCCI SA [1998] AC HL** it was held that it is an implied term in any contract of employment that an employer shall not without reasonable and proper cause conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employer's conduct must be judged objectively.
4. In **Kaur v Leeds Teaching Hospitals NHS Trust EWCA Civ 978** at paragraph 55 Underhill LJ provided a summary on the questions that were required to be asked to determine whether a constructive dismissal had taken place:

- 4.1 What was the most recent act or omission on the part of the employer which the employee says caused the resignation?
- 4.2 Has the Claimant since affirmed the contract?
- 4.3 If not, was that act (or omission) by itself a repudiatory breach of contract?
- 4.4 If not, was it nevertheless a part (applying the approach explained in **Omilaju v Waltham Forest LBC (No. 2) [2004] EWCA 1493**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term?
- 4.5 Did the employee resign in response (or partly in response) to that breach?

Submissions

Respondent

5. The Claimant's complaints concerned the flat rate of overtime pay and whether his concerns were dismissed without proper consideration, the PDR appraisal and that he got scores of two on two of the heads. The Respondent looked into each matter fully and thoroughly and did more than most to make the Claimant feel better. There is nothing that arises without proper cause. The Respondent is entitled to manage the Claimant and to set a rate of overtime pay. It was not a matter for the Claimant as an individual employee. As concerned the DSAR allegation, which arises after resignation, one document being missed was human error.
6. The first allegation was about the flat rate for overtime, which was applied company wide. If the Claimant didn't think it was fair, he was not obliged to do any overtime. The Claimant's complaint was that his concerns were dismissed. Not only were they not dismissed but the Claimant was provided with hours of management time from senior managers all of whom were concerned that he was upset. That Claimant raised a grievance and appeal. The Respondent took the Claimant's concerns seriously and gave them detailed consideration. In respect of the first allegation, it was not a breach of contract.
7. There were three allegations relating to the PDR. There were no serious performance issues raised. The Claimant was a good performer. He was a very good performer when it came to customer service. There was nothing that required performance management. It is not a breach of contract for a manager to award a low score provided it comes from a reasonable assessment of performance. Here there was a great performer with areas where he can improve and that is it. At the heart of this allegation was the Claimant's subjective interpretation that the scores were not reflective of his performance. Employees will often feel like that but it's not a breach of contract. The Claimant had received feedback since 2019. He had not developed the underscored areas so it was natural that the score continued to drop. This is not a person who takes feedback well. According to page 446 grievance outcome and 447 the findings are that the Claimant was not receptive to feedback. He walked out of the meeting with Ms Quinn. In addition Ms Quinn was close to the Claimant. She wanted him to improve and delivered feedback sensitively and supportively and now, by contrast, it is said that things should have been

put to him more starkly as he didn't understand that. The first of PDR breaches cannot be a breach of contract. It is a complaint about reasonable management at its highest.

8. The second element is that the Respondent failed to raise performance concerns with the Claimant beforehand. There is something misleading in this assertion as it invites one to view the evidence as being that there were problems more generally. There weren't any performance management issues. The score amounted to good performance. It is not right to say that there was a failure to raise performance concerns. Even on the Claimant's copy of the PDR he knew that he needed to work on clarity of communications and critical judgment. There was no evidence to support the contention that there was a concoction of scores between Ms Onions and Ms Quinn.
9. The Claimant contended that he should have been provided with formal evidence in the form of personal notes from his manager. That is not reasonable and sensible for a standard performance review. That cannot be a breach of contract. The DSAR error arises after dismissal and so is not relevant. It was human error and did not form part of the Claimant's resignation.
10. In any event the Claimant didn't resign in response to any alleged breach. There was an email from March 2022 which was in respect of the pay overtime issue where the Claimant refers multiple times to ACAS. If the breach is said to be PDR and given to him in February, he is chatting to ACAS in March about the pay issue. Therefore when he resigns in July he is not resigning in response to that. The timeline and rationale is unclear on his part. He resigned not because of a breach or final straw. It was because he had another job. The *Polkey* point is that point that on the basis of C's evidence, he had found a new job or would have left shortly thereafter.
11. Whether there was a breach of contract with reference to the bonus is to be decided objectively on the documents. The payment of the second tranche of the bonus was contingent on someone being in employment at the time. Bonuses are discretionary so it is difficult to see how this could amount to a breach of contract particularly since this arises after the contract ceases to exist. That claim has to fail.

Claimant

12. The Claimant acknowledges overtime is discretionary. It was understood that the Respondent was entitled to make these decisions. However, the Claimant was simply stating that the Respondent was adversely affecting him and a small number of people who were doing overtime and who would be helping the Respondent out. The Claimant's concerns were dismissed without due consideration as the Respondent did not consider the impact on him as an individual.
13. The drop in the Claimant's scores was 0.8. Ratings in business awareness, planning and organisation were marked down by more than 20 per cent. He had previously had 5 but these had gone down to 3. This

was despite the Respondent saying that they did not have any concerns over the Claimant's performance.

14. The Respondent's case has been that it was very rare for a BA employee to achieve a score of 4 or 5. Yet there is evidence that this claimant consistently achieved scores of 4 or 5. There was a 16 per cent drop between 83 and 67 per cent. The Respondent said how well regarded he was until he voiced and challenged authority. The floodgates open in 2021 and this was when the vitriol started.
15. Rena Quinn did not complete the interim review completed by the Claimant on 30th July in dereliction of duty. It would have been normal for the Claimant to think it was all ok as she had not come back with anything. Performance concerns were not raised with the Claimant. Rena's failure to complete any review is against best practice and she was questioned by Melanie Watts. At the start of the Claimant's second employment period that started in July 2015 he had regular 121s that continued for 3 or so years (para 4). In the thirteen years prior to the Claimant ceasing to be employed those 121s became less formal and reverted to information, business updates and general chats. Both parties were very happy to do that. The Respondent has not disputed this and has been at great pains to emphasise that Rena prefers informality. You can't rely on that as a reason for being an ineffective manager. If you are rating someone down you need to give them feedback. The Claimant has provided extensive evidence that feedback was not provided to him. The Respondent tried to state that the Claimant made requests for feedback but the Claimant has not been challenged as the Respondent cannot dispute this.
16. It is acknowledged that the failure to provide DSAR documents was post resignation. However the Respondent has repeatedly referenced feedback during the course of the hearing. Rena referenced feedback but it was never provided.
17. The Claimant has provided evidence that the Respondent didn't raise performance concerns. The Respondent said that there was no performance issues. We saw Catherine Onions saying 'you are seriously amazing' and the context is we just need to make sure that there are no legal issues. We all know the document was not included. We know however that the Respondent consistently relied upon it.
18. There was a breach of the implied term of trust and confidence regarding the manner in which the Respondent behaved in asserting 'you are amazing' etc to the Claimant, until he starts to challenge senior management on the way that they do things. They did not adhere to their own processes or policies. They did not adhere to ACAS. The Claimant was compelled to resign. The only thing that the Claimant wanted was dialogue and clarity as to why he was being treated differently to everyone else. The impact was on the Claimant's remuneration. The Claimant believed that he was committing to the organisation. His concern was that the integrity and the trust that his employer had shown him had vanished. He did not want to leave the organisation. The fact that he engaged with ACAS was not an indication that he was planning to leave. It was an indication that he wanted to understand what was going on. These

mentions of 'I feel like I have to leave' were cries for help. These cries were primarily towards Rena to support him and help him to understand what was going on. Where were these documents that she kept referencing? She failed him and hung him out to dry and her manager supported this. Engaging with ACAS is absolutely evidence of his unswerving desire to save this relationship and remain in an organisation he loved. Even after the breaches he wanted to stay in the organisation.

19. There is no evidence that the Claimant had another job to go to. This was longstanding employment – it was a big risk for the Claimant to resign and not have a job to go to. It was fortunate that he was snapped up. He did not leave because he had a job to go to. He no longer trusted BA and had no trust for Rena and no respect for her ability to manage anyone.

Findings of Fact

20. The Claimant worked for the Respondent from 2005 having been re-hired. He was a Duty Office Team Leader and reported directly to Rena Quinn, Customer Service Manager. His job description is at page 510. This shows that he had a number of principle accountabilities to include coaching members of the duty office team; reporting and feedback; process and system development; incident and disruption handling; managing resource and workloads; ascertain; escalated customer service issues and recruitment and induction.
21. During the global pandemic there was increased disruption to the Respondent's business owing to the cancellation of flights and holidays. Consequently, there was a need for the Respondent to provide manpower to service customer enquiries about holidays, refunds and bookings. At this time the Respondent introduced a flat rate for overtime of £20 per hour. This was announced by Catherine Onions to staff on 13th March 2020 (page 93). This would apply regardless of the employee's regular salary or position or the time of day worked. Since the Claimant was a higher paid employee he stood not to benefit as compared to how he had been paid for overtime in the past. He had previously received overtime at the rate of time and a half his actual pay. He says that in the past where there had been crises in the industry such as the volcanic ash cloud, nine eleven or Heathrow closed because of snow, he received time and a half or double time. He did not think that it was a fair policy. In August 2021 the Claimant reported his concerns about the fairness of the rate to Catherine Onions and Sarah Gray since the SSR Team in Newcastle, who were providing a similar service, were earning 2.5 times the hourly rate. He was told that the Newcastle team were a different owned subsidiary of British Airways Plc. I am satisfied and indeed find that this was in fact the case.
22. In February 2020 the Respondent also decided to pay BAH officers a one-off payment of £300 instead of commission with the commission scheme ending. On 31st March 2000 Rena Quinn informed the BAH Duty Office Team of this (p.100). This was to be reconsidered when everything was more stable. On 4th August 2021 the matter was revisited by Ms Quinn and she wrote to everyone in the team to say that while there was no reinstatement of the commission scheme there would be a one-off payment in the following month's pay of £300. Since the Claimant did not

earn individual commission as he was a team leader he was not entitled to the payment. The Claimant raised issues about the overtime and commission to Ms Quinn. There was some attempt by Sarah Gray, Head of People, and Ms Quinn to resolve this by discussion. Ms Quinn urged the Claimant to have a chat with Sarah Gray. She expressed in a whatsapp message that she was concerned about how much the matters were affecting the Claimant and she did not want to leave it (122).

23. On 27th September 2021 the Claimant raised these concerns with Catherine Onions. In particular, he stated that while the one-off payment of £300 was made to the duty team, there was no recognition for the team leaders. The Claimant also stated that owing to the flat rate he was receiving less than his standard fee for overtime despite providing coaching and support to the team. Catherine Onions arranged an informal meeting with the Claimant on 5th October 2021. Her response was provided on 9th October 2021 (130). The email was supportive and empathetic and set out the rationale behind the business decisions behind the payments. She counselled within that email that it might be worth agreeing the boundaries of his role with his line manager so that he was not engaging with anything that would not reasonably be undertaken by a duty officer when working overtime and that it was clear that he was not on shift as Team leader. I find that there was a reasonable and sympathetic approach to the Claimant's concerns.
24. On 2nd November 2021 the Claimant made a formal subject access request in respect of documents pertaining to the implementation of the flat rate overtime cap. I find that the Claimant was dissatisfied with his work at this time and had communicated to his line manager that he was planning to resign in December and leave in the January. In her email dated 1st November 2021 Ms Quinn invited the Claimant to discuss things with her and indicated that she wanted to resolve things for him. She pointed him in the direction of Mental Health First Aiders and Helpdirect. The email was supportive. The Claimant in his evidence stated that he felt that Ms Quinn was not supportive as she was off on furlough for most of the pandemic so most of the responsibility lay with him and his colleague, Jose. In my finding she was seeking to assist the Claimant at this time. The Claimant accepted under cross-examination that Ms Quinn was emotionally supportive.
25. On 30th January 2022 the Claimant raised a formal grievance (169). The grievance was heard by Mr Pell Stevens and the outcome was promulgated on 4th March 2022. It was not upheld. The claimant accepted in evidence that Mr Pell Stevens took his grievance seriously and engaged with him. He said that Mr Pell Stevens was extremely competent in his handling of the grievance. The Claimant is not raising any breach of contract in relation to the handling of the grievance. He appealed the decision on 25th March 2022 and John Price was appointed as the appeal chair. He had a discussion with the Claimant on 20th April 2022.
26. The Claimant accepted that overtime was entirely voluntary. However he elected to do it as he wanted to support his team at that time and because he had an affinity for dealing with customers. He said that for him he felt that raising this was a matter of principle as he felt that it was not fair.

27. The Claimant was a loyal employee in my finding. He offered to take a greater pay cut during COVID to help out. He stayed to support his team and did overtime to help out. He was hard-working and conscientious. Indeed his work ethic was recognised by Catherine Onions in the email of 27th January 2021 as being second to none. The Claimant was furloughed in March and April 2021 and was then 50 per cent in May 2021.
28. The Respondent has a Performance Management Policy (page 512). At paragraph 3.5 this provides that all employees, unless in probation or under formal performance management, will have an interim and year end performance development discussion. The policy sets out the steps to be taken by management in the event that an employee under-performs and the manager is envisaging taking formal action under the policy which includes where the employee has been informed about improvement and does not improve or where he or she scores less than 60 per cent. In cases short of formal action the policy envisages informal discussion will take place between the employee and the line manager to be clear about the standard required, how they are not meeting the standards and what can be done to improve performance. An example of the process for PDDs is at page 520. The employee is involved in submitting 360 feedback. The employee does their own rating sheet. There is then a discussion. The employee fills in the sheet again and the manager adds his or own comments. The employee then submits final rating sheet. It is accepted that the Claimant was never an under-performer in accordance with that policy such that he required performance management. That has never been either party's case.
29. Performance development reviews (PDRs) are undertaken annually by employees and their line managers. During this process an employee completes a self-assessment, which is considered by the line manager undertaking the review. Managers and employees fill out a performance rating sheet where various skills and behaviours are given ratings between 1 and 5. Unacceptable performance is 1, good performance is 3 and 5 is outstanding performance. The final performance development review scores determine the pay rise that the employee receives for that year.
30. The Claimant did very well in his performance development reviews in 2018 and 2019. He scored overall 4.2 in 2018 and 4.1 in 2019 out of 5. He did not have an appraisal in 2020 because of the pandemic. He had an end of year PDD with Madelene Palling which took place on 28th January 2021 (page 78). The Claimant accepted under cross-examination that the coaching aspects of his role were highlighted for development in 2019 but he stated that there was no poor performance in that respect. In 2020 there was some reflection about how he may be perceived as being judgmental. It was put to the Claimant in cross-examination that in his performance review at page 178 there was a development comment in relation to communication. He accepted that this may have been relevant in relation to one email.
31. His line manager, Ms Quinn, was furloughed from May 2020 through to April 2021. She returned on a percentage basis until returning full time in September 2021. The Claimant remained in contact with her and on one

occasion went for a walk with her. The Claimant felt that during this period Ms Quinn was detached or disinterested in the duty office and when he raised the overtime issue had said 'just play the game and don't let it bother you'.

32. The Claimant received email feedback from Catherine Onions on 27th January 2021. She recognised a number of performance qualities in the Claimant: his work ethic, his efficiency, how he put himself out to help others, how he would not shy away from having a challenging conversation with a customer, his stoic response to an email sent by Margaret and his eye for detail. She listed also things for improvement which included clarity of communication and that he could be a little critical and judgmental. Mention was made of pace and that sometimes it could put him at a risk of making rash decisions. She made a comment that the Claimant was overdeveloped in some areas at the expense of some others. She said that often when people have very strong skills their development areas can be due to an overplayed strength. I found this to be an objective assessment. I found that this email was significant and that it served to highlight to the Claimant where there were areas for development and improvement.
33. The Claimant provided Ms Quinn with his self-assessment form on 8th February 2022. He had given himself an average rating of 4.6 out of 5 (176). Ms Quinn then had a meeting with the Claimant on 10th February 2022 to go through his performance for the year. Ms Quinn identified to the Claimant areas where she felt a lower score would be appropriate and requested the Claimant to go away and re-score his self-assessment. The Claimant re-scored himself and submitted a revised score of 4.4 (page 171). She responded to the Claimant on 15th March 2022 (202).
34. In particular, in the feedback the Claimant had said that he had mentioned that he had not received adequate 121s. She commented that the Claimant had always said that he did not want formal 121s and preferred to talk as and when things came up. She suggested that if the Claimant wanted more structured 121s she would happy to diarise these regularly. She went on to say *'we discussed your scores at the meeting. You agreed that you would re-consider how you'd scored yourself given the feedback we talked through. We had agreed your focus areas for your development were around team work, people management and communication, which as we talked about, I really need you to focus on. Your strengths, as always, remain your exceptional specialist knowledge and expertise and your customer service – skills that really are a huge asset to BAH and the Duty Office.'* Ms Quinn's overall score for the Claimant was 3.3 which was in the 'good' bracket (see page 299). The scores that were given for collaboration and team work and for communication, influence and relating to others were 2 whereas other headings were scored 3, 4 and 5.
35. The Claimant sent Ms Quinn an email dated 16th March 2022. He stated that the feedback that he had in relation to communication and teamwork was strong and positive and that he had cited specific examples of value that he brought to the team. He disputed that his approach around a duty team employee was below par and took issue with Ms Quinn not having raised any issues with him about this before. There was an issue that had

been raised about the Claimant's participation in a Teams chat and his attitude where the Claimant had apologised. The Claimant agreed for a further meeting to take place and suggested that HR be present. Ms Quinn arranged a meeting with Sarah Gray from HR and Laura Wilsher, People and Payroll Advisor, which took place on 29th April 2022. The Claimant walked out of that meeting.

36. On 5th April 2022 Ms Quinn emailed Catherine Onions to inform her that she and the Claimant had not been able to agree the PDR scores (251). Her reply was dated 13th April 2022 (247). She did a sense check of the Claimant's scores and communicated to Rena Quinn that she was comfortable that Ms Quinn had got the scores relatively right. She said *'As we've talked about before, I think Andrew's ratings can be especially tricky as he demonstrates extremes of very good performance and some clear development areas in the same heading which will inevitably result in the final rating being somewhere between the two to be balanced'*. She provided her comments on the scoring (248). It was initially agreed that owing to the dispute about the scores, the Claimant's pay award would be deferred until the scoring process had been concluded and he would receive backdated pay.
37. On 13th May 2022 Mrs Quinn wrote to the Claimant saying that she was sorry that they had not been able to agree on the scores and that she would like an opportunity to discuss it one more time. She said that she remained open to talking and that she would *'really like to have the opportunity to support you to develop in the areas that have been identified for you to work on'*. The Claimant was informed that he could appeal if he wished. The Claimant emailed Laura Wilsher on 19th May 2022 to raise an appeal against the scoring. He sent a formal appeal on 23rd May 2022 to Rena Quinn and Sarah Gray with bullet points about how he considered it was unfair, in particular that no discussion or coaching had been conducted with him previously to appraise him of any concerns and there was no evidence to support the lower scores. In addition, he stated that he had been awarded a 14 per cent bonus which was inconsistent with any under-performance. The Claimant emailed Sarah Gray on 23rd May 2022 to make a subject access request. Sarah Gray queried with the Claimant whether he was raising a grievance about his management and he confirmed that it was. On 27th May 2022 the Claimant emailed Sarah Gray to say that *'... there is quite evidently a serious disconnect in the reality of my performance and the personal views of both Rena and Cath, leading to a complete breakdown in my trust and confidence that either of them are being rational, fair or professional. To be frank the situation has deteriorated into one of bullying, intimidation and victimisation, which is why I am very uncomfortable at the prospect of their attendance at a PDR appeal. I am in no doubt that it would simply be another meeting where I would be talked down, dominated and have their view presented as a 'fait accompli'*.
38. On 20th May 2022 the Respondent wrote to the Claimant to advise him that his salary increase would be 1 per cent. It was stated that the salary process was discretionary and non-contractual in the email.

39. Sarah Gray had a meeting with the Claimant on 30th May 2022. At that meeting the Claimant indicated that there were other issues with Ms Quinn. They discussed potential resolutions included a facilitated meeting, a grievance and mediation. She emailed the Claimant on 8th June 2022 to ask whether he had any further thoughts about sharing behaviours and events and whether he wished to pursue a grievance. They met on 10th June 2022 and the Claimant indicated that he would want to raise a grievance but wanted to receive the SAR documents first. These were provided to him on 15th June 2022 save for one document that was omitted in error but such omission was discovered and communicated to the Claimant after he had resigned (see below paragraph 41).
40. The Claimant raised a formal grievance against Catherine Onions and Rena Quinn on 1st July 2022, sent on 3rd July 2022 (p.351). Ms Gray acknowledged the grievance on 4th July 2022 to check whether the grievance covered his core concerns and to discuss how the Claimant and Ms Quinn would work together during the process. This was about the scoring of his performance in the main. The Claimant emailed Catherine Onions about his pay and she contacted the Claimant on 10th July 2022 to arrange a catch up meeting to discuss the recent pay adjustment.
41. On 11th July 2022 Melanie Watts emailed the Claimant to invite him to a meeting to discuss his grievance on 14th July 2022. On 12th July 2022 the Claimant tendered his resignation. He mentioned specifically being challenged on his working practices such as his active status on TEAMS when his peers and management did not comply and remained unchallenged. He stated that he believed that he was being managed out of the business. The grievance hearing then took place on 20th July 2022 and the Claimant was notified of the outcome on 13th August 2022. The grievance was not upheld. It was concluded that examples were provided for the Claimant's scores and there was no evidence of bullying by Ms Quinn or Ms Onions. There was an inconclusive finding on whether Ms Quinn had provided sufficient discussion or coaching to the Claimant but it was determined that it was more likely than not that conversations took place. The Claimant appealed on 8th August 2022. One of the points raised by the Claimant was that Ms Quinn's screenshots of Teams messages which contained examples of feedback for the Claimant's 2021 performance were not provided to the Claimant as part of the SAR or as part of the grievance process. Laura Wilsher emailed the Claimant these documents on 17th August 2022. These documents had been missing when the Respondent had responded to the Claimant's subject access request and an apology was given for this to the Claimant on 6th September 2022.
42. Jonathan Smart was appointed as appeal manager and a hearing took place on 23rd September 2022. The outcome was sent to the Claimant by way of letter dated 17th October 2022. He found that the additional documents provided by Ms Quinn should have been included in the SAR response; that there was no physical evidence that performance feedback was given to the Claimant prior to the 2021 PDR meeting (although it was noted that this did not mean that feedback was not given verbally); that prior to a performance score of 2 an individual should be expected to

receive notification of their performance from their line manager with appropriate actions taken and that due diligence should have been taken on the additional documents provided by Rena as part of the grievance but having reviewed those, the information was not misleading or misrepresented.

43. The Claimant contends that the Respondent was in breach of contract for failing to pay him the second part of a bonus payment to the value of £2, 500 in November 2022. On 8th April 2022 the Claimant was informed that the company would be making him a bonus payment in recognition of his contribution during the pandemic months of 2020 and 2021. He was informed that the total bonus that he would receive would be £4,764. He was to be paid in two amounts of £2, 382. The Claimant was informed that the first part would be paid at the end of April 2022, which was in fact duly paid. He was told that the second part would be paid *'at the end of December 2022, subject to your continued employment with BAH at the end of each applicable month'*. This condition was in accordance with the Respondent's policy. He was informed in the same email that bonuses were discretionary and non-contractual.

Conclusions

44. In conclusion I find that the Respondent did not commit a repudiatory breach of the Claimant's contract of employment. In relation to the concerns raised by the Claimant about the overtime payment, Ms Quinn demonstrated an impetus to have these concerns resolved and Ms Onions addressed the concerns in a sympathetic manner providing some rationale for the business decision. In the circumstances there can be no criticism of the Respondent's handling of the Claimant's concerns or such as to amount to conduct likely to breach the implied term of trust and confidence. The rate was applied to all employees and while the Claimant was aggrieved because he stood to lose out, he was not obliged to carry out overtime. He felt that he wanted to do so to help his colleagues out who worked at the coal face in the duty team. Ms Onions suggested that one solution was to ensure that the boundaries of the Claimant's overtime activities were demarcated so that he was not engaging with anything that would not be reasonably be undertaken by a duty officer when working overtime and that he was not on shift as Team Leader. The rate was applied company-wide at a time when there was a need for all hands on deck because of the customer issues arising from the pandemic. In conclusion, neither the application of the rate to the Claimant nor the handling of the Claimant's concerns were examples of conduct which were of such degree that they were likely to breach the implied term of trust and confidence.
45. Judged objectively, I do not find that the scores allocated to the Claimant were likely to breach the implied term of trust and confidence. A manager is entitled to score an employee based on an assessment of their performance. In 2020 the Claimant was given feedback on the clarity of his communications, attention to detail (scanning information), being judgmental and his pace (see page 82) so there was some evidence before me that there were areas that were in need of development. The scores were sense checked by Catherine Onions and her rationale

supported them. Therefore they were not capricious or arbitrary and there was managerial accountability in the process. In any event, the Claimant's result was good overall and it did not trigger the Respondent's performance management policy.

46. The Claimant was affected because he had scored consistently extremely well beforehand and he says that he had not had any forewarning that he would be scored in this way. He makes criticism of his manager, Ms Quinn, for not drawing these development issues to his attention in advance. I find as a matter of fact that Ms Quinn did not forewarn the Claimant that he would be scored in this way. I find that there was a looser management relationship during the periods of time that Ms Quinn was furloughed and when she came back. I also find that the relationship was informal and both Ms Quinn and the Claimant had not wanted formal 121s. I find this likely because Miss Quinn and the Claimant were friends and the Claimant was an experienced employee where there was sufficient trust to enable him to get on with the job. There was no interim review. I accept that there was none required because the Claimant's performance was not such that formal action was going to be required. In conclusion, however, I do not find that the lack of interim review or forewarning of the likely scores was likely to breach the implied term of trust and confidence. There was evidence that Ms Quinn wanted to provide the Claimant with support to develop once the scores had been given to him. At most it could be said that management could have been more hands on but the Claimant's performance overall was good and any criticism about the level of engagement of Ms Quinn had with the Claimant is not sufficiently serious as to amount to a breach of the implied term of trust and confidence.
47. I accept that the Claimant says that the scores were a 'bolt from the blue' given his previous scores. However judged objectively, there was nothing that was likely to damage the relationship of trust and confidence. Some concerns had been raised with him before. The Claimant was still assessed overall as good. The scoring system was not there to demoralise employees but to identify areas for improvement and provide the necessary support to improve those areas. It is difficult to see how the scoring of an employee could amount to a breach of the implied term of trust and confidence. It is a necessary management task. Indeed it would be a dereliction of a manager's duty not to score an employee accurately during a performance development process because this would form the basis for any further developmental training that employee would require to improve. Ms Quinn had expressed to the Claimant a desire to assist him to develop in the areas which had not been scored as highly and to discuss matters further. A meeting was convened where this was to be discussed between the Claimant and Ms Quinn but the Claimant walked out. The evidence was that the Respondent valued the Claimant and wanted to resolve this issue with him.
48. It was accepted by the Claimant that the complaints about the missing DSAR document could not form part of the reasons for his resignation and therefore his constructive dismissal because he discovered this post-resignation.

49. In the circumstances I do not find that there was a repudiatory breach of contract.

50. The Respondent sought to remedy any concerns that the Claimant had via the grievance procedure. On 12th July 2022 the Claimant tendered his resignation. The letter relates to the Claimant being angry about the Respondent questioning his MS Teams status. This related to a conversation that Ms Quinn had had with the Claimant in June 2022 where he was advised that his status was set to 'away'. If this was a last straw, I do not consider that together with the previous actions of the Respondent, there was a cumulative breach of contract. I do not consider any of the issues either individually or cumulatively were sufficiently serious to amount to a repudiatory breach.

Bonus

51. I have considered the email in which the Claimant was allocated the bonus. This expressly states that the second part of the bonus was only due to the Claimant if he was in employment at that time. Given that the Claimant was not in employment when the second part of the bonus fell due, he was not entitled to it and I find that there was no breach of contract.

Employment Judge A Frazer
Dated: **16th January 2024**

JUDGMENT REASONS SENT TO THE PARTIES ON
23 January 2024

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS