EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr R Wall	v	Worldwide Currencies Limited

Heard at: London Central (via CVP) **On:** 27 & 28 February 2024

Before: Employment Judge Fredericks-Bowyer

Appearances
For the claimant: Mr M Maitland-Jones (Counsel - Direct Access)
For the respondent: Ms A Acheampong (Litigation Consultant - Peninsula UK)

JUDGMENT

1. The respondent's application to strike out the claim is refused.

2. The claimant was unfairly dismissed on 17 July 2023.

3. The respondent must pay the claimant the following awards in respect of unfair dismissal:-

   3.1. Basic award - £8,359.00

   3.2. Compensatory award - £52,834.80*

4. The respondent must pay the claimant an additional award for the loss of his statutory rights in the sum of £800.00.

5. The **total amount** the respondent must pay the claimant is **£61,993.80**.

6. ***** *The compensatory award is made up of 24 weeks' net pay for past losses (£51,584.88) and loss of pension contribution for the same period (£1,249.92)*.

REASONS

Background

1. The respondent is a deliverable foreign exchange company regulated by the FCA. It is owned by Mr David Tucker, the Chairman of the group, who is also a director of the respondent. The claimant was employed by the respondent from 2 September 2009 to 28 July 2023. He started his employment in business development, and then worked as a Trainee Foreign Exchange Consultant. He then became a Senior Foreign Exchange Consultant before reaching the level of Desk Manager in October 2022.

2. The claimant says he was dismissed in July 2023 when a restructure forcibly removed his Desk Manager role and placed him back into his old role as a Senior Foreign Exchange Consultant. He says he was dismissed in circumstances which are understood to constitute a ***Hogg v Dover College*** dismissal. Alternatively, he says that his demotion without consultation was a repudiatory breach of contract which he accepted by resigning two weeks thereafter, allowing him to complain of constructive dismissal.

3. The respondent denies that the elevation to Desk Manager was a new job for the claimant, and argues that he remained on his Senior Foreign Exchange Consultant contract after October 2022. In this way, the respondent says it was able to move him back to his previous role at any time, meaning that he was neither dismissed nor the victim of a repudiatory breach of contract when the restructure occurred. Alternatively, the respondent pleads that the restructure was a business necessity and so the claimant may have been fairly dismissed for 'some other substantial reason' as a result of the restructure process.

The hearing

4. I heard this case remotely over two days. The claimant was represented by Mr Maitland-Jones of Counsel. The claimant gave evidence twice during the hearing: first, in respect of the preliminary issue; and second, in support of his claim. The respondent was represented by Ms Acheampong, a litigation consultant. Mr Tucker gave evidence for the respondent. I also had access to a bundle of documents which ran to 277 pages.

5. The directions for this hearing required the parties to prepare to deal with liability and remedy at the same time. The parties had complied with that requirement through provision of documents in the bundle relating to remedy from each party, and the claimant had included evidence in chief about remedy in his main witness statement. Ms Acheampong cross examined on that statement. The hearing therefore dealt with both aspects, considering the documentation, hearing live evidence, and hearing submissions about that evidence.

6. During the hearing, Ms Acheampong sought to separate liability from remedy on the ground that *"that is what usually happens"*. Besides noting that, in fact, that is not what usually happens in two day unfair dismissal hearings where time allows, I

considered that the matters set out in paragraph 5 above meant that it was in line with the overriding objective to deal with both matters within the same hearing. It would not be so in line to adjourn remedy to a later date when all of the evidence is present to deal with it, and there was sufficient time on the second day to deal with it in full.

7. The respondent disclosed documentation on the first morning of the hearing. The respondent's representative's e-mail said:

> *"As we have an ongoing duty of disclosure, please see attached a very important document relevant to the proceedings which has come to light this morning."*

8. The documentation was indeed very important and went straight to the issue about whether or not the claimant's appointment as Desk Manager was a promotion, as he says, or a temporary assignment which could be revoked, as the respondent says. The document was not ultimately helpful to the respondent, and it is surprising that it did not 'come to light' rather earlier in the disclosure process.

Preliminary issue – respondent's application for the claim to be struck out

The application

9. At the start of the first day, the respondent presented an application for the claim to be struck out with reference to two grounds under *Rule 37(1) Employment Tribunals Rules of Procedure 2013*. The grounds were –

   9.1. The manner in which the proceedings have been conducted by the claimant were scandalous, unreasonable or vexatious (*Rule 31(1)(b)*); and/or

   9.2. That it is no longer possible to have a fair hearing (*Rule 31(1)(e)*).

10. Part of the application related to what was said to be an unreasonable approach from the claimant in respect of a specific disclosure application made on the eve of the date when the bundle was due to be finalised, and then the way in which that disclosure was pursued (including one instance of the claimant e-mailing outside of work hours with a short deadline). In my view, the matters submitted in this part of the application was not conduct which was scandalous, unreasonable or vexatious. It was plainly not appropriate to strike the claim out on the basis of the claimant requesting specific disclosure and then pursuing that request until the document was provided. It would have been preferable for relevant documents to have been disclosed at the appropriate time, rather than having to be chased by the claimant on the eve of trial, and then for some highly relevant documents to appear on the morning of that trial.

11. The substantive application, though, was orientated around the claimant's conduct in relation to witnesses for the hearing. The respondent submitted that the claimant had intimidated its employees, specifically Ms Bygrave, Ms Lark and Mr Ubhoo, with the intention or effect that she and other colleagues were intimidated from giving evidence which would, presumably, be favourable to the respondent. In this way, it

was said that the claimant had rendered it impossible to have a fair hearing because key witness evidence would not be presented to me in the hearing.

12. The claimant resisted the application. The claimant accepted making contact with Ms Bygrave, but denied that he had intended, or indeed had, affected the proceedings. He noted he was allowed to contact potential witnesses. He accepted that his approach to Ms Bygrave and what he said was regrettable. On his behalf, Mr Maitland-Jones noted that there was no direct evidence that Ms Bygrave or anyone else was going to give evidence, and then chose not to do so because of the claimant's conduct.

13. I was assisted in determining the application through a provision of a witness statement from the claimant about his conduct, and a file of documents from the respondent which included: (1) an e-mail from Mr Ubhoo (Head of Corporate Trading at the respondent); (2) an e-mail from Tonya Lark (Deputy Head of Front of Office at the respondent); e-mails between Mr Tucker and Peninsula over which privilege was not asserted; and (4) an un-dated note from Ms Bygrave.

14. The claimant gave evidence in chief and confirmed his statement. Ms Acheampong did not ask him any questions in cross examination, and so I accept his evidence in full because I have no reason not to. He was challenged on it and the respondent presented no direct evidence from anybody who contradicted his account. In submissions, Ms Acheampong then sought to infer ulterior motives and submit that the claimant was disingenuous in his evidence. That was, in my view, an improper submission following immediately after not challenging evidence, and I said so. If the respondent wished to undermine the claimant's evidence, it should have cross examined him in order to provide that challenge and give him the opportunity to explain why he was not being disingenuous.

Findings of Fact

15. The claimant provided evidence in chief through his witness statement, which he confirmed on the stand. As outlined above, I accept his evidence. I therefore find the following facts, drawn from the claimant's evidence and the documents I have seen. Where I have preferred the weight of one piece of evidence over another, I have explained why I have done so.

16. In early January 2024, the claimant contacted Mr Ubhoo and Ms Lark to see if they would give evidence in support of his case at this final hearing. Both were friendly conversations. Both individuals said they would not give evidence for either side in the hearing, which I consider to be an understandable stance given that (1) they had worked closely with the claimant, and (2) were still employed by the respondent.

17. At around this time, the claimant noticed that he had been blocked on social media by Ms Bygrave. On the evening of 7 February 2024, the claimant had been drinking. He sent her a whatsapp message referencing the fact he was blocked by her. He admits that he referenced the proceedings and referred to being blocked by her on social media. The respondent's note said to be from Ms Bygrave records the message as:-

> *"Good luck – everything is coming out now – cheers for the block…"*

18. Upon receipt of the message, Ms Bygrave called the claimant. The claimant did not initiate the conversation with Ms Bygrave; she initiated it with him. The claimant admits that he was irrational and upset when he answered the phone, being in a state of mental distress and having been drinking. He says that he does not remember specific details, but that the call lasted for over an hour. He says, and I accept, that he and Ms Bygrave had been good friends.

19. The note from Ms Bygrave says that she found comments made by the claimant to be very intimidating, that the claimant said he would: pursue the case with a barrister who would rip respondent witnesses to shreds; take 'us all' down with him; that she may suffer career implications following the case; that she had been involved with the events which had caused him damage; and that he would release whatsapp chat history with her and other colleagues.

20. I am hesitant to simply accept this evidence. It is a typed document without Ms Bygrave's name on it. It is not signed or verified as true. Ms Bygrave did not attend the hearing to answer questions about what she had written. However, I do accept that this is the general tenor of what was said by the claimant because he did not disagree that these are the sorts of thing he might have said in the state he was in. The note does not say that Ms Bygrave was planning to give evidence and now would not. It does not say that the claimant's call affected what Ms Bygrave would do in relation to the proceedings, either. It does not say that Ms Bygrave told anyone else about the conversation. I find that Ms Bygrave was not intending to give evidence in any event.

21. The parties were due to exchange witness statements two weeks before the start of the hearing, on Tuesday 13 February 2024. It is apparent to me that the respondent must have missed that deadline because on 15 February 2024 Peninsula's Mr Veimou made contact with Mr Tucker by e-mail. The e-mail explains that the witness statements need to be prepared and asked for a meeting to discuss that. The e-mail goes on to talk about potential witnesses, specifically:-

> *"I would also need to schedule a meeting with Tonya Lark… If there is anyone else that you believe should give evidence, let me know.*
>
> *It is my professional opinion that 2 (maximum three) witnesses are sufficient in order to establish our case. I believe that we are able to include all the relevant information in your own witness statement, supplemented by Tonya's."*

22. I find that, on 15 February 2024, the respondent's adviser is not proposing or advising to call Mr Ubhoo or Ms Bygrave either. It is clear that Ms Lark has been considered and decided upon as the possible additional respondent witness. The claimant knew at this time that Ms Lark also did not intend to give evidence in the hearing – I accept his evidence that she had already told him this in January 2024.

23. Mr Tucker replied on the same day to advise that he was finding it difficult to get the witness statements, because *"following Richard Wall's call with Stacey Bygrave last week with his threats and accusations, none of the key staff now want to be involved in any way with the case. I will try to talk with Tonya tomorrow and try to persuade*

her otherwise. Stacey has even told me she will leave the country during the tribunal dates as Richard has caused her so much distress by his comments and threats".

24. I consider that this e-mail likely led to this application, because both Mr Ubhoo and Ms Lark both e-mailed Mr Tucker on 20 February 2024 to say that they did not wish to take part in the proceedings. If it is right that Mr Tucker had spoken to them and knew this on 15 February 2024, then the only reason why a follow up e-mail would be required would be for the purpose of disclosure to support this application. The e-mails were:-

    24.1. Mr Ubhoo – *"I will be unable to contribute to the tribunal case concerning Richard Wall due to stress and anxiety it is causing me";* and

    24.2. Ms Lark – *"Regarding the tribunal case concerning Richard Wall due to stress and anxiety it is causing me, I do not wish to be involved".*

25. In this final hearing, only Mr Tucker gave evidence for the respondent.

Decision on application

26. In my view, it would be perverse to find that a request for specific disclosure for a document which was in existence constituted unreasonable conduct. It is not unreasonable to make that request when the bundle is being finalised – that is the most likely time that issues and missing documents or versions of it would be noticed. It is not unreasonable to send an e-mail pressuring for a response when the respondent is on holiday. A party is under no obligation to respect holiday where Tribunal proceedings have deadlines and matters need to be finalised. Finally, it is not unreasonable to send an e-mail after 5:00pm in the evening. The recipient is not forced to read the e-mail received or do anything about it. If a deadline is unreasonably short or a reply is demanded out of hours, then a proportionate response would be to say that the request will be answered in a reasonable time. It is certainly not proportionate to attempt to strike out the claim on the basis of the late e-mail, and it would consequently not be proportionate for me to strike out a claim for that reason.

27. Intimidating witnesses to the extent that there can be no fair hearing is clearly an entirely different matter, and a very serious one which may well have striking out a claim being a proportionate response. The difficulty for the respondent with its application is that there is no evidence, on the facts I have found, that the claimant's intervention (inadvisable though it was) caused any change of direction in terms of who the respondent presented to give evidence at the hearing. Mr Ubhoo and Ms Lark had decided before 7 February that they would not take part. The claimant's comments cannot be responsible for that decision because they came after that. Only the claimant has ever suggested in any of the evidence I have seen that he would wish to call Ms Bygrave to give evidence. Neither Peninsula nor Mr Tucker proposed to call her as a witness. Ms Bygrave does not say that she was going to give evidence until 7 February 2024, or that she might do so but changed her mind.

28. There is therefore no link between the claimant's actions and the evidence I heard or did not hear. Even if there was, I would then be required to consider whether strike out would be a proportionate response. It is tempting to say "yes of course" when

witness intimidation is the subject, but the answer is more nuanced than that. Mr Tucker is the controlling mind of the respondent. He is the person who was present and influencing every step of the interactions which led to the claimant's dismissal. The respondent's narrative, and all of its evidence, is best presented through him. The other witnesses may have supported some aspects of the evidence, but in truth it is clear to me that there is relatively little divergence between the parties on the facts in the case anyway. I do not consider that those witnesses, even if they were going to give evidence (which they were not), and were then intimidated out of that by the claimant (which they were not), would have assisted the respondent to a great deal in the hearing. I am not confident that the claim would have been struck out even if I accepted everything Ms Acheampong presented on the respondent's behalf.

29. I have then considered whether the claimant's conduct with Ms Bygrave on 7 February 2024 was unreasonable, scandalous or vexatious to such a degree that it is proportionate to strike out the claim. I consider the conduct unfortunate. The claimant accepts he should not have sent the whatsapp message and I agree with him. I do not, though, consider that sending that message was unreasonable or any conduct going to *Rule 37(1)(b)*. In my view, the tenor of what he said on the telephone call to Ms Bygrave would have been unreasonable if he had initiated that phone call. But he did not. Ms Bygrave called him, and the claimant found himself in a conversation he did not plan for when he himself was in a distressed and vulnerable state. He did not behave unreasonably in the circumstances. Even if he had, I do not consider that it would be proportionate to strike out the claim where he has not initiated the call and ultimately a fair trial is still possible.

30. For all of those reasons, I refused the application to strike out the claim.

Substantive issues to be decided

31. There was a discussion at the outset about the relevant issues. Ms Jennings had produced a list of issues, which was adopted, but had not appreciated that the claimant intended to pursue a claim for constructive unfair dismissal. Those issues were therefore added to the adopted list of issues.

32. The issues were:

32.1. ***Hogg v Dover dismissal –***

32.1.1. Did the respondent alter the claimant's employment contract?

32.1.2. Did the claimant agree to the alteration of his contract?

32.1.3. Was that alteration significant to the extent that the respondent introduced a new contract unilaterally?

32.1.4. If so, was the claimant dismissed when his role was changed on 17 July 2023?

32.2. ***Constructive dismissal –***

32.2.1. Did the respondent unilaterally demote the claimant and impose a restructure upon him?

32.2.2. Was that a breach of contract?

32.2.3. If the claimant was demoted, was there a reasonable and proper cause?

32.2.4. If not, did the respondent act in a way which was calculated or likely to destroy or seriously damage the implied term of mutual trust and confidence which exists between the claimant and the respondent?

32.3. ***Remedy (if he is dismissed)***

32.3.1. What remedy is the claimant owed?

32.3.2. Did the claimant unreasonably fail to mitigate his losses?

Findings of fact

33. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are references to the bundle of documents I was provided with prior to the hearing starting.

The claimant's employment with the respondent before his change in role

34. The claimant joined the respondent on 1 September 2009 as a Trainee FX Consultant with a salary of £25,000 (page 54 to 68). He was promoted to FX Consultant in May 2010 and a new contract and job description was issued (page 69 to 83). The signed contracts produced in the bundle indicate that the contracts were signed some years after the claimant started in the roles, but it was not disputed that the claimant was issued a new contract when he changed his role.

35. In January 2016, the claimant was promoted to a Senior FX Consultant role with a base salary of £30,000. In May 2021, that salary increased to £45,000 and a new contract was issued to him (page 146 to 160). That contract increased the claimant's notice period from one month to three months. The claimant performed well in this role at the respondent. Mr Tucker praised the claimant's attitude and performance when reflecting on the claimant's employment.

36. The claimant benefited from commission pay in these roles, where he would earn 20% of the profit the respondent made on his trades. The estimate that he gave in his witness statement indicated that he would earn in the region of £72,000 per year in commission.

The claimant's change in role to Desk Manager

37. Mr Tucker explained that, in around October or November 2022, Mr Duke, the previous CEO of the respondent had been demoted back to head of front office *"due to a lack of business planning and several management errors"*. This meant that

there appeared to be a layer of management missing within the respondent, which Mr Tucker considered should be filled to allow Mr Ubhoo to continue to focus on strategic matters. Mr Tucker explains the decision eloquently in his witness statement:-

> *"The aim of the change was to take away the day-to-day chores from senior management who were involved in company management decisions, but also had to spend time to encourage and mentor junior staff. We therefore gave these extra duties to two of our senior foreign exchange trading consultants, we issued new job descriptions although most of these duties were already included in their roles as senior foreign exchange consultants."*

38. The claimant was one of those two senior foreign exchange consultants. The respondent adopted a 'two desk' operation, with the claimant and Ms Lark being 'Desk Managers'. Mr Tucker said the hope was to introduce competition on the trading floor where each team would try to out-perform the other. The new structure required documentation, and the new roles (whatever their nature) were to be defined. The task of writing a 'job description' for the Desk Manager role fell to Mr Duke. The Desk Manager additional duties were (my underline):-

> *"Your respective desks will report directly to you*
>
> *Work with your respective desk to set, review and achieve all personal performance targets, as agreed by the Front Office Management Team*
>
> *Monitor overall desk performance – Targets, Sales and Trader call stats, and leads added to TW*
>
> *Monthly brainstorming sessions with the Front Office Management Team to discuss new initiatives, improve the working environment and performance*
>
> *Weekly desk performance update with the Front Office Management Team*
>
> *Authorise restricted currencies*
>
> *Ensure your desk continues to encourage their clients to leave Trustpilot reviews*
>
> *Monitor call-backs for members of your desk*
>
> *Allocate clients from business development staff to your desk to ensure fair distribution*
>
> *Assist with training and mentoring business development staff*
>
> *Report directly to the Deputy and Head of Front Office".*

39. I find that the underlined items were new to the Desk Manager role. This is clear because the person in the role must have desk management responsibility to carry out those duties. Mr Duke also spoke to the claimant about the new structure and his role in it. The claimant says that Mr Duke characterised the Desk Manager role

as a promotion and a new job. Mr Duke did not give evidence in the hearing and could not contradict the claimant's evidence. However, I consider it more likely than not that that is how Mr Duke characterised the role. This is how Mr Tucker, broadly, described the change in role. The claimant was to take on more responsibility. He was to have a more senior position. Mr Tucker says that the position was only reversed in July 2023 because it was not working, which rather suggests that it would have continued if it was considered to be working.

40. It was agreed that the new role would have a £5,000 basic pay rise attached. From November 2022, then, the claimant's base pay was £50,000. He remained part of the commission scheme. Mr Duke sent a job description to the claimant and Ms Lark on the morning of 24 October 2022. The e-mail sending it reads:-

> *"Further to our conversation regarding your promotion to Desk Manager, please find attached the job description.*
>
> *As discussed, your basic salary will increase by £5,000 to £50,000 PA.*
>
> *In addition to your base salary and commission, you will receive an annual performance bonus whereby WWC will pay desk managers 50% of net profits generated over and above the annual target.*
>
> *I will require confirm [sic] that you accept the role".*

41. The new job description was supplemented by Mr Tucker, who inserted more management responsibility. That description was sent to the claimant and Ms Lark on the afternoon of 24 October 2022 under cover of an e-mail which reads:-

> *"Hi Both*
>
> *DT made a couple of tweaks to the job description. Please see attached.*
>
> *As you know, this is new territory for us, so please understand that all terms are not fixed in stone and we will review them with your input as time goes on.*
>
> *I can also confirm that the increase in salary would take effect from November and will not be delayed – subject to you accepting the role."*

42. The claimant replied 12 minutes later with *"Thanks Arran"*. He stepped into the role as described. He was paid the additional salary. As a matter of fact, he accepted the 'role', which he understood to be a promotion on the basis that: (1) he had a new title, (2) he had more responsibility, and (3) he was getting paid more. It is clear to me that the respondent also considered this to be a promotion. There are the facts already found about Mr Duke's words and characterisation. Mr Duke then e-mailed all respondent staff on 27 October 2022 (page 168) to announce there had been a restructure, and that *"as part of this exciting restructuring, I am pleased to announce that Tonya Lark and Richard Wall will be joining the new Front Office Management Team as Desk Managers"*.

43. Upon taking the role, the claimant managed a desk of seven traders comprising two Senior Foreign Exchange Consultants (the role he had moved from), four Foreign Exchange Consultants and one junior Foreign Exchange Consultant.

The claimant's removal from Desk Manager role

44. The claimant performed well on an individual basis. It is not in dispute that the claimant was good at the revenue generating part of his role, and that the claimant was one of the highest earners and had one of the highest targets at the respondent. However, it is apparent to me that for whatever reason, the claimant's desk shrank in comparison to Ms Lark's. The claimant described how one of his team left because it was not something they wished to do. Another resigned. Another was dismissed. Another was put on a performance improvement plan. This meant that the claimant's desk started to fall behind the other in terms of performance because there were only four individuals left in it. The imbalance in numbers between the desks led to the seats in the office being moved so that all of the traders sat together, removing the physical desk separation. The claimant remained in his role of Desk Manager with oversight over those remaining within his desk.

45. There was some discussion about enhanced pay for the claimant and Ms Lark. A meeting took place on 15 June 2023 (without the claimant), and the notes (page 178) show that items for discussion included raising Desk Manager basic pay to £80,000, and giving the four front of house managers (Mr Ubhoo, Ms Lark, the claimant and Mr Russell) 5% shares in the respondent. Mr Tucker, who owns the respondent, disputes that he was ever intending to give away 20% of the respondent but does acknowledge that it is something that was discussed to see if it would raise performance. Page 178 shows an e-mail dated 17 May 2023 from Mr Tucker to Mr Ubhoo which outlines a share incentive scheme for the four front of house managers.

46. In June 2023, the claimant was performing behind his personal target and was managing a smaller desk than Ms Lark. The claimant says, and I accept, that his target was around double that of Ms Lark. In my view, this higher target likely explains why the claimant's desk was performing less well, as one of Mr Tucker's criticisms of the claimant during this period was that he was not providing mentoring or management to his desk. It is not clear to me how the claimant would be able to do that with such a high target in a culture where under-performance leads quickly to demotion (as with Mr Duke), or performance improvement or dismissal (as with members of the claimant's team).

47. As a result of the combination of (1) the claimant's smaller desk, (2) the overall performance of the respondent, and (3) the claimant's performance against his personal target, the respondent decided to revert back to the management and desk structure which had been in place prior to October 2022. In cross examination, Mr Tucker argued that this was a group decision started by the claimant and the three front of house managers deciding to combine desks. There was then a board meeting and decision to confirm that combining of desks, and then three phases of consultation with affected staff members.

48. I have found as a fact that the combination of desks was a physical alteration only, and have done so by accepting evidence from the claimant which was not contradicted by any documentary evidence. In doing so, I prefer the claimant's

account to that of Mr Tucker because (1) the claimant was present and Mr Tucker was relying on updates from others, and (2) if the respondent had documentary evidence demonstrating that the claimant and Ms Lark's direct reports were combined, then it would have been in the bundle as relevant disclosure. It was not, and so I infer that there is no documentary evidence to show a combining in the way alleged.

49. A meeting of the board of the respondent took place on 12 July 2023. Mr Tucker's meeting note, dated the following day, is at page 181. The attendees were Mr Tucker, Mr Stripling and Ms Bygrave. The meeting was marked as a 'casual meeting', but that does not make any difference to the ability of the directors to consider and agree plans. The relevant parts of Mr Tucker's notes, are:-

> *"This was brief meeting to update the Board on the progress with… the reorganization of Front Office following there just being on[e] desk and the cashflow…*
>
> *After looking at the numbers and performance of staff in Front Office, it is clear that certain FXCs are under performing and are not being managed. The FPMG have consolidated two desk[s] into one and we now have too many managers. We will revert the management structure back to how it was a few years ago where we have a Head of Front Office. Tonya is close to target and has the capacity and willingness to take on more responsibilities. SB pointed out that RW didn't want to do it in the first place. RW's terms and conditions will not change nor his pay. Desk bonus will revert to individuals. DT will discuss this with Manj [Mr Ubhoo] and then call the FOMG together to tell them about the restructure. Everyone was in agreement".*

50. Mr Tucker sought to present this meeting as him making a proposal to the board about the restructure, and all agreeing and resolving to follow through with it. I do not accept this characterisation for the following reasons:-

    50.1. That is not what his note says; the purpose of the meeting was to provide an 'update' about a number of matters which appear to have been already decided. There is nowhere in the note which suggested authorisation was seriously in doubt;

    50.2. Mr Tucker is the Group CEO of a number of companies of which the respondent is part and he is the owner of the companies including the respondent; it is not plausible to me that any of the other attendees would provide resistance to something he had, I find after hearing him speak about it, already set his mind to; and

    50.3. I had the benefit of seeing Mr Tucker in action over the course of the hearing – I do not consider that he would have acted as he claims after witnessing him consistently seeking to have the last word at every stage of proceedings, making points out of turn even when represented, and seeking to exert his power through devices such as continually addressing the claimant's barrister by his first name.

51. In my view, it is more likely than not that Mr Tucker presented his plan to the board, and they agreed with him without argument. That does not mean that it was an inappropriate or malevolent plan. It simply means that there was not the group or collaborative scrutiny of the proposal as Mr Tucker seeks to portray.

52. It is also informative, in my view, that Mr Tucker's words on 13 July 2023 were that he will *"tell them [the claimant and others] about the restructure"*. Mr Tucker sought to portray in his evidence that what followed was a consultation of sorts about a proposed or potential restructure. That is not correct, in my view, because it is factually apparent that the restructure had already been decided on by Mr Tucker, and page 181 shows that the respondent board had agreed to it.

53. Following the board meeting on 12 July 2023, Mr Tucker had two more meetings. He met first with Mr Ubhoo as was mentioned in the note from the board meeting. Mr Tucker says that he did so to tell him about the restructure proposal. I find, for the reasons outlined above, that the true purpose was to inform Mr Ubhoo about what had been decided. Then, Mr Tucker met with the rest of the management team (Ms Lark and the claimant). Mr Tucker explained that the two desks were going to be collapsed into one. Mr Ubhoo would be Front of House Manager. Ms Lark would be his deputy. The claimant would revert back to the Senior FX Consultant role he had vacated in October 2022.

54. Mr Tucker has produced a single meeting note which records an account of the meeting with Mr Ubhoo and the management team. It is a contested account, because it was produced very late before the trial and had not formed part of disclosure. Aspects of the wording could indicate that it was not written contemporaneously. It is dated 12 June 2023, rather than 12 July 2023 as it would have been if written on the day of the meetings. Mr Tucker was challenged about the truthfulness of the contents and Ms Acheampong rejected, indicating that it was a serious accusation and that the respondent had meta-data available to show that it was written at the time.

55. I take the respondent's objection no further because (1) Ms Acheampong is not allowed to give evidence in the way she sought to in that moment, (2) no such meta-data was disclosed which it should have been if such relevant material was in existence, and (3) I have not been provided with the evidence since.

56. As it happens, I do not consider that the entire document is a fabrication. It is Mr Tucker's habit to use such meeting notes, and I accept that this is how he keeps track of the meetings he is in and what happens in them. Additionally, the note does not particularly contradict the claimant's account anyway. The relevant part of the note, in relation to the claimant and his role, reads:-

> *"DT then outlined the management restructuring of the Front Office following the FOMG decision to merge the two desks due to the reduction in numbers on RWs desk. After discussing the management, MO, TL or RW did not object or comment when DT informed them about the planned restructuring. DT stressed that the restructuring was not a demotion for RW but a reorganisation of front office, as the current set up was not working with three managers on one desk. DT started talking about the next agenda item. RW stood up, said he was covering JR that day, and*

> *had a lot of client related work and trades to do so left the meeting. RW made no comments at the time or contacted DT to discuss any thoughts he had on the matter…"*

57. The last sentence is the part which gave rise to the challenge about the document's accuracy and time of its production. If, as Mr Tucker says, it was written at the time and that the claimant made no indication he was unhappy with the restructure, why would Mr Tucker think to record that the claimant had not objected or contacted him about it? Mr Tucker could not adequately explain this challenge, in my view. Either the claimant was visibly unhappy, so Mr Tucker made the record, or the comment was added much later when the claimant was clearly unhappy with the restructure because he brought these proceedings.

58. In my view, although I have reservations about the respondent's process in disclosure (which might be adviser introduced rather than deliberate by Mr Tucker, I do not consider that Mr Tucker has invented this document or these comments after the fact. Far more likely, in my view, and I find, was that the claimant was unhappy about the proposal, displayed that unhappiness, and so Mr Tucker felt the defensive need to record the comment. This means that the claimant was unhappy at the time, and Mr Tucker realised that he was, but has then sought to downplay that in this hearing. There is nothing conspicuously dishonest in this, and I do not find as a fact that the respondent has acted unreasonably or dishonestly in relation to this meeting and document, as I was invited to do.

59. Further support for the factual finding comes from Ms Lark, who messaged the claimant after he left to see whether he had stormed off from the meeting and to ask if he was ok (page 179). The claimant messaged Ms Lark later that evening to reassure her that he holds nothing against her but that he was very saddened and surprised by the announcement.

60. Mr Tucker sought to portray this period as a phase of consultation in a restructure. I find that the claimant's and others' views were not sought on 12 July 2023. As Mr Tucker records, and as he intended following the meetings earlier that day, he told the management team (and the claimant) about what would happen, and that was the end of it. Although any of the management team might have objected or raised queries, they did not do so because consultation was not the nature of the meeting. It was a communication of something which had already been decided, and I find that the claimant objecting would not have reversed the course of the restructure.

61. The claimant was upset in the days following the 12 July 2023 meeting, and approached Mr Tucker when he was in the office on 17 July 2023. There is divergence between the two witnesses about who approached whom and precisely what was said. The relevant parts are, though, agreed. Mr Tucker told the claimant that it was a management restructuring and that his Desk Manager role had been removed. He told the claimant that it was not a demotion, but the claimant said that it did feel like one. The claimant says he made it clear that he did not agree to the restructure. Mr Tucker does not agree that that was the case, but he did concede that the claimant had still not expressly agreed with the restructure by 17 July 2023.

62. The restructure was announced to the traders on, and was operational from, 17 July 2023 (page 184). Mr Ubhoo and Ms Lark's new roles were announced. The claimant was not mentioned, but the implication for him is clear. Mr Tucker wrote:

> *"I cannot stress enough that this is not in any way a demotion for those who were involved in the previous structure. Having a surplus of managers on one desk is never a sensible way to structure a department where it becomes a title rather than a role. This does not mean that as we grow and employ more staff in Front Office that we will not reintroduce desk managers back into the management structure".*

63. Mr Tucker is consistent that the restructure is a reversion back to the previous structure. The claimant would revert back to his previous role. The new duties given to him were removed. The Desk Manager title was removed. The term 'demotion' is a subjective term but, on any view, a reversion to a previous role from which someone has been promoted must be a demotion. I find that the claimant was demoted in the restructure. As is outlined on page 184, his Desk Manager role was not required. It was removed from the structure and the claimant was demoted without his express agreement. These are facts drawn from Mr Tucker's own evidence and his contemporaneous e-mails.

Events after 17 July 2024

64. On 21 July 2023, the claimant e-mailed Mr Tucker (page 187 to 188) to ask for clarity about his new role, to express his unhappiness, and to ask about how the decision had been taken given that he had been promoted and was now demoted. The claimant says his intention with this e-mail was to raise a grievance about the restructure. The respondent says the claimant failed to raise a grievance because the policy required him to go to his line manager. I find that the claimant had already consulted with those above him other than Mr Tucker, and none had had any prior warning of the restructure before 12 July 2023. Mr Tucker said in his evidence that he always encouraged staff to approach him directly. He had made the decision in question. I find that the claimant did raise a grievance with this e-mail, and that he acted appropriately in the circumstances.

65. Mr Tucker replied on the same day to justify the management restructure (page 187). He said that he was happy to continue paying the claimant £50,000 base salary as had been his salary in the Desk Manager role.

66. On 28 July 2023, the claimant resigned with immediate effect by e-mail to Mr Tucker (page 190). He wrote:-

> *"I refer to our recent emails regarding the restructuring and my demotion without any prior discussion or consultation. As you know, I am hugely disappointed and distressed by this and consider the Company's actions to amount to a fundamental breach of trust and confidence. I hereby tender my resignation with immoderate effect…"*

67. Mr Tucker replied to re-state the position and asked to talk about the issue. He told the claimant that he would need to work his notice (page 191) but the claimant stook by his resignation (page 192). Mr Tucker clearly wanted the claimant to stay.

68. On 28 July 2023, the respondent wrote to the claimant to remind him of his restrictive covenants which stop him from working for a competitors or contacting clients. It asked the claimant to sign an undertaking to this effect, which the claimant did not do (page 199). The claimant did say that he understood those obligations (page 197). I find that the respondent intended to enforce those obligations.

69. The respondent then e-mailed its clients to tell them that the claimant had left and that their personal data may have been breached because he could have taken that data with him (page 200). It asked the clients to report if the claimant made contact with them, in further support of the finding that it intended to enforce the obligations operative on the claimant. The e-mail also implies that the claimant might breach or could have breached laws relating to personal data of clients.

70. On 2 August 2023, the respondent wrote to the claimant to accuse him of a serious data breach which had been reported to the ICO. The letter accuses the claimant of having committed a criminal offence without providing any reasoning or evidence behind the accusation.

The claimant's search for new employment

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71. The respondent contends that the market for foreign exchange traders was buoyant at this time, such that the claimant should have been able to quickly find a new job and that he unreasonably failed to mitigate his losses by not finding such a job for some six months.

72. I find that the claimant was subject to restrictive covenants for the first three months following resignation. The respondent would hold him to that and he agreed that he was bound by them.

73. In October 2023, the claimant injured his back and slipped two discs. This, I find, limited his ability to job search. He then commenced employment elsewhere on 15 January 2023.

Remedy

74. The claimant's net weekly pay at the respondent at the end of his employment was £2,149.37.

75. The respondent paid 2 weeks' sick pay on a discretionary basis, following which an employee must claim statutory sick pay.

Relevant law

Variation of contractual terms

76. Variation to contractual terms may become effective by agreement. Such an agreement may be oral or implied from behaviour and the variation never committed to writing. The question is whether the tribunal is satisfied on the evidence available that a non-written agreement served to vary the contract of employment (*Simmonds v Dowty Deals Ltd [1978] IRLR 211)*. Naturally, the best form of evidence of a variation by agreement is through writing. Where terms are said to have been

imposed, working under protest will not be taken to mean that there is agreement by conduct (*Hepworth Heating Ltd v Akers and ors [2003] UKEAT)*.

77. Any variation of contract requires the exchange of consideration to be valid. Courts and tribunals have been able to find consideration for variations quite quickly, whether that is in relation to the settling of a pay claim where a pay rise is awarded (*Lee and ors v GC Plessey Telecommunications [1993] IRLR 383)*, or where the employer enjoys greater staff retention where guaranteed bonuses are promised (*Attrill and ors v Dresdner Kleinwort Ltd and anor [2013] EWCA Civ 394)*.

78. Each contract variation should be considered as a standalone event, and a unilateral reduction to working hours requires a contractual variation if the employer is not already permitted to act in this way. In *International Packaging Corporation (UK) Ltd v Balfour [2003] IRLR 11*, Lord Johnstone said (para 10):

> *"The fact that in the past there may have been agreements to vary the contract does not in itself create a power to enable the employer to do that unilaterally. Reduction in working hours is plainly a variation of a contract of employment and, unless expressly catered for within that contract, or allowed by implication again within the terms of the contract, any actual deduction of wages, even if related to the hours worked, is not authorised by the statute and can only be achieved by agreement."*

Interpretation of contractual terms which are disputed

79. In *Arnold v Britton [2015] UKSC 36*, Lord Neuberger outlined how a court or tribunal should approach disputes about the meaning of contractual terms. The correct way to do so is to interpret the intention of the parties as to the meaning of the terms by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"* (per Lord Hoffmann in *Charterbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38*).

80. To assist with this exercise, Lord Neuberger reviewed existing authorities and distilled them into six relevant factors to be considered in order to determine how a contract has been constructed and how it should be interpreted. Those factors are [para 15]:

    80.1. the natural and ordinary meaning of the clause;
    80.2. any other relevant provision of the contract (Lord Neuberger was considering a lease in *Arnold* but the same principles apply);
    80.3. the overall purpose of the clause and the contract;
    80.4. the facts and circumstances known or assumed by the parties at the time that the document was executed; and
    80.5. commercial common sense; but
    80.6. disregarding subjective evidence of any party's intentions.

81. Consequently, the interpretation is an objective exercise by design. Lord Neuberger emphasises the importance of the ordinary language of the provision being considered, which should not be undervalued by any reliance on what is said to be commercial common sense within the surrounding circumstances [para 17]. The

clearer the natural meaning of a clause, the more difficult it is to justify departing from that meaning [para 18].

"Hogg" unfair dismissal

82. In *Hogg v Dover College [1990] ICR 39*, a teacher was engaged under an employment contract to teach full time as head of a department. He fell unwell, and upon his return received a letter from the headteacher informing him that he could not return to his previous role because of his illness. Instead, the teacher would work on fewer hours for less pay. The teacher replied that he would work to the new hours but was not happy and considered that he had been dismissed from his original role. At first instance, the Tribunal found that he had not been unfairly dismissed because he remained in employment. Similarly, he had not been constructively dismissed because he had accepted repudiation by continuing to work at the school.

83. The EAT agreed with the Tribunal about unfair dismissal, but Mr Justice Garland set out that this did not mean that the teacher was without remedy for what had happened and in doing so established what is now generally referred to as the *Hogg v Dover* dismissal:-

> *"It seems to us, both as a matter of law and common sense, that he was being told that his former contract was from that moment gone. There was no question of any continued performance of it. It is suggested, on behalf of the respondents, that there was a variation, but again, it seems to us quite elementary, that you can vary by consent terms of a contract, but you simply cannot hold a pistol to someone's head and say henceforth 'you will be employed on wholly different terms which are in fact less than 50% of your previous contract. We, unhesitatingly, come to the conclusion that there was a dismissal on 31st July; the appellant's previous contract having been wholly withdrawn from him."*

84. There is a question of fact and degree about whether a unilateral variation in terms of employment are sufficient to stand as a wholly withdrawn contract and implementation of new terms. The question is whether change in terms is such a wholesale departure from the previous contract of employment as to amount to its withdrawal (*Bampouras & others v Edge Hill University (EAT 179/09)*. When judging fact and degree, the Tribunal should do a before and after examination comparison of the old role and the new role to ascertain whether or not there is sufficient difference of position to justify a finding that there is a new contract (*Jackson v The University Hospitals of North Midlands NHS Trust [2023] EAT 102*.

Constructive dismissal

85. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).

86. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law.

All employment contracts contain a term that *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (*Malik v BCCI SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).

87. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is likely to be able to accept that repudiatory breach and terminate the employment contract (*Morrow v Safeway Stores Plc [2002] IRLR 9*).

88. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (*Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131*). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (*Garner v Grange Furnishing [1977] IRLR 206*.

89. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (*Wright v North Ayrshire Council [2014] ICR 77*). The tribunal is able to ascertain the true reason for the employee's resignation (*Weathersfield Ltd v Sargent [1999] ICR 425*).

90. When faced with a repudiatory breach of contract, an employee could choose to either accept the breach, which ends the contract, or could affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (*WE Cox Turner (International) Ltd v Crook [1981] ICR 823*).

91. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In *Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB)*, Calver J said, at para 121:

> *"It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all*

depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case."

Remedy for unfair dismissal

92. *Section 122(2) of the Employment Rights Act 1996* provides that the tribunal should reduce the basic award to reflect any circumstances where the tribunal considers the conduct of the claimant before the dismissal makes it just and equitable to do so. By *s123(6) ERA 1996*, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The tribunal must make a reduction where there is a finding of contributory fault (*Optikinetics Limited v Whooley [1999] ICR 984*). The reduction may be as much as 100% (*W Devis & Sons Ltd v Atkins [1977] ICR 662*).

93. When considering whether or not to make a reduction to the compensatory award for contributory conduct, it is helpful to keep in mind guidance from *Nelson v BBC (No 2) [1980] ICR 110* which said:

    93.1. the relevant action must be culpable and blameworthy;

    93.2. it must have caused or contributed to the dismissal; and

    93.3. it must be just an equitable to reduce the award by the proportion specified.

94. Broadly, it is understood that the reduction should be: (1) 100% where the employee's conduct is wholly to blame for the dismissal; (2) 75% where the employee is mostly to blame; (3) 50% where there is equal blame; and (4) 25% where the employee is partly to blame.

95. The claimant is under a duty to mitigate losses during the period to which the compensatory award relates. Remaining unemployed unnecessarily or taking low paid employment when higher paid work is available is the sort of thing that can lead to a finding that a claimant has failed to mitigate their losses. It is generally accepted that a claimant would concentrate initially on finding work in a similar field, at a similar rate of pay, in a similar geographical area; thereafter, there would come a point where there is an expectation to broaden the parameters of that search.

96. The series of questions which should be asked when considering mitigation of losses are (*Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498 EAT*):-

    96.1. What steps were reasonable for the claimant to have to take in order to mitigate their loss;

    96.2. Whether the claimant did take reasonable steps to mitigate their loss; and

    96.3. To what extent, if any, the claimant would have actually mitigated their losses if they had taken those steps.

97. In *Cooper Contracting Ltd v Lindsey [2016] ICR EAT*, Mr Justice Langstaff provided the following guidance for Employment Judges in assessing arguments about mitigation of loss:-

    97.1. The burden of proof is on the wrongdoer (the employer);

    97.2. The responsibility of providing relevant information about what should reasonably have been done rests with the wrongdoer (the employer);

    97.3. The employer must show that the claimant has acted unreasonably, and it is not for the claimant to show they have acted reasonably (*Ministry of Defence v Mutton [1996] ICR 590 EAT)*;

    97.4. The Tribunal should not place too high a standard of expectation on the claimant, who is not at fault for the situation they are in; and

    97.5. It is for the employer to show that the claimant acted unreasonably in failing to mitigate.

98. Whether or not an employee has done enough to mitigate their losses is to be assessed subjectively in all the circumstances of the case (*Johnson v Hobart Manufacturing Co Ltd EAT 210/89)*. This will include taking into account the situation the employee is in at the time of dismissal *(Bennett v Tippins EAT 361/89)*, and might include the shock and health problems caused by the dismissal itself *(Beijing Ton Ren Tang (UK) Ltd v Wang EAT 0024/09)*. The focus should be on whether or not they have acted unreasonably in failing to find fresh employment or finding some other way to mitigate losses caused by the unfair dismissal (*Wang)*.

Discussion and conclusions - Liability

"Hogg" unfair dismissal

99. The respondent contends that there can be no *Hogg* dismissal because the claimant's promotion to Desk Manager did not bring any contractual change. This is the basis upon which the respondent decided (presumably having been so advised) to simply revert the claimant back to his Senior Foreign Exchange Consultant role without much thought. The notion that there has been no contractual change comes from the fact that the claimant had previously always been issued with a new contract upon a promotion. He had not been issued with a new contract of employment when promoted to the Desk Manager role. I refer to the change as a 'promotion' throughout these conclusions because I have found, as a fact, that that is how everybody viewed it at the time it occurred.

100. The claimant argues that there was a contractual change. There was a new job description, a new salary package, and the introduction of new terms and conditions relating to bonus. The claimant needs to establish that there was contractual change in order to successfully argue that there is a *Hogg* dismissal, because there can be no contractual reversion on demotion if there was no variation in the first instance. It is important, then, for me to consider whether the promotion to Desk Manager did alter the claimant's contract and, if so, what terms were introduced.

101. In my judgment, the promotion to Desk Manager did vary the terms and conditions of the claimant's employment contract. The job description and package put to the claimant by Mr Duke was an offer for the claimant to accept the Desk Manager role as defined in the job description. This was a different role, with a greater salary, and a bonus proposition which could be lucrative. Mr Duke invited the claimant to 'accept' the role, which he did by indicating acquiescence by e-mail and then by stepping into the role. In consideration of the variation, the claimant took on greater management responsibility and the respondent paid him an enhanced basic salary. The claimant then worked under these terms until 17 July 2023. He was judged against that job description by Mr Tucker, who considered that he was not properly fulfilling his particular management duties. In this way, both parties also recognised the obligations placed upon the claimant by the contractual variation.

102. Perhaps in anticipation of me making such a finding, the respondent submitted that, in any case, it reserved the right to revoke the promotion at any point through the words of Mr Duke when sending the final job description to the claimant. It is argued that the words *"as you know, this is new territory for us, so please understand that all terms are not fixed in stone and we will review them with your input as time goes on"* gave the respondent the power to remove the promotion because it was a term introduced upon the variation. I agree that that these words were a condition that the claimant must have agreed to when he accepted the role. I disagree that these words gave the respondent the unilateral ability to remove the promotion and I do so for several reasons:-

102.1. First, the wording does not clearly state that the whole arrangement might be revoked. It says that all of the terms are not fixed in stone, and in my view a plain reading means just that. The terms might be *altered* as might be expected to overcome minor issues with a new structure.

102.2. Second, the agreed term includes the provision that the respondent would review the terms *with the claimant's input as time goes on*. That does not provide a unilateral ability to do anything without the claimant's input. That is not "*giving the opportunity for input"*. That is *"receiving input"*.

102.3. Third, it is usual for there to be some room to tweak job duties and descriptions when the realities of a role are tested day to day. It is unusual for an employer to entirely reserve the right to revert a promotion back (which is not expressed to have a trial period), if it is also to have (as the respondent contends) the claimant's interests at heart, and a mind on development and retention.

103. As a matter of contract, then, by June 2023 the claimant was in the role of Desk Manager. The role could not be lawfully removed from him without his input into that process (agreement), or there being some other process which led to a fair dismissal for a potentially fair reason. When Mr Tucker decided to demote the claimant back to his previous role, he should have followed one of those paths. Instead, he told the board about his plan. He then told Mr Ubhoo about his plan. He then presented the plan to the claimant as a fait accompli and effected the demotion.

104. In submissions, the respondent sought to argue that the claimant had agreed to the restructure, and to his own demotion. Mr Tucker considered this to be the case

because the claimant did not object to the restructure when the fait accompli was presented on 12 July 2023. He says that the lack of objection meant that the claimant must have agreed. There are three problems with this analysis, which leads me to reject the submission:-

104.1. First, and most obviously, a lack of objection does not indicate an agreement to contractual variation in its own right. The respondent is unable to vary the terms of the Desk Manager role without the claimant's input. The claimant provided none. There was no consultation of the sort which provided an active input.

104.2. The claimant does not at any point indicate an agreement to the terms by his conduct. He leaves the meeting when he is told of the news. He protests to Mr Tucker about being demoted on 17 July 2023. He raises a grievance about the issue on 21 July 2023. He resigns with immediate effect on 28 July 2023.

104.3. The claimant left the respondent's employment precisely because of the unilateral change.

105. Instead, I consider that the respondent attempted to impose a unilateral change to the claimant's employment contract when it was not contractually able to do so. When it forced that change on 17 July 2023, it breached the claimant's contract. The question that follows goes to the question of the claimed ***Hogg*** dismissal. As a matter of fact and degree, did the reversion amount to the wholesale revocation of the Desk Manager contract and the attempted imposition of a new employment contract?

106. In paragraph 38, I identified the duties which the claimant gained when taking on the Desk Manager role. This was a new management layer in a new structure for the respondent, and the point of the restructure was to free those more senior for strategic work through delegating some of the people management functions they had held. This was plainly a significant change in emphasis for the claimant. There was an increase in base salary, although a fairly modest increase. There was inclusion of a new bonus structure which had not previously been available to the claimant and which would be very lucrative in future years if the respondent had met its ambitious targets.

107. The respondent suggests that the new role was not a different contract. It points to the base terms of the contract, outside of role and pay, as being identical to the previous role. The applicable staff handbook remained the same. The respondent does not consider, as a matter of fact and degree, that the removal of the desk manager role represented revocation of the contract and imposition of a new contract. That is obvious from the respondent's primary position – that there was no contractual change upon the promotion. This, though, is a double edged sword for the respondent. I do not see how, on the one hand, it can say that the step up from 'Foreign Exchange Consultant' to 'Senior Foreign Exchange Consultant' necessitated the provision of a new contract of employment, but on the other that the very significant managerial elevation to 'Desk Manager' did not.

108. I am required to compare the effect of the restructure to the claimant's role. On Mr Tucker's own words, this was a management restructure to address there being too many managers. In all but process and pleading, the claimant's Desk Manager

role was made redundant. It did not exist anymore, and all of the management emphasis found at paragraph 38 was removed from the claimant. He was to go and sit at a trading desk again as a Senior Foreign Exchange Consultant, a role that he had been responsible for managing when he was a Desk Manager. Mr Tucker did agree, after the fact, to leave the claimant's basic pay at the same level. However, the generous bonus model was removed from the claimant, which could have had a seriously detrimental effect on his future earnings.

109. Save for the £5,000 pay increase, every facet of the Desk Manager role which was an enhancement from the role to which he was demoted back was removed from the claimant. He was essentially returned to the contract he was on prior to his promotion. As a matter of fact and degree, I consider that the change of terms in the restructure was detrimental and significant enough to represent a wholesale revocation of his employment contract, and the provision of inferior terms instead. He had no choice or input into the matter. His choice was to accept the change or leave employment. This is the definition of a ***Hogg*** dismissal – the 'pistol to the head' that Garland J described in the originating case.

110. In my judgment, from the moment the restructure was announced and implemented on 17 July 2023, the claimant was dismissed from his employment as a Desk Manager at the respondent. He is entitled to unfair dismissal compensation in that circumstance.

Constructive dismissal

111. The claimant pleads alternative claims, and so I consider them. This also serves a useful purpose in that, if I am wrong that this situation is a "Hogg" unfair dismissal (and I do not think I am), a finding of constructive dismissal may be substituted, if found, upon appeal because full evidence and argument has been heard on it.

112. I have identified that the respondent acted in breach of the claimant's employment contract when it demoted him without this agreement or input. That breach went to the heart of the claimant's Desk Manager role and stripped him of title, status and responsibilities. If not a wholesale revocation of the contract, it certainly was an act which was likely to destroy or seriously damage the implied term of mutual trust and confidence between the claimant and the respondent, as descried by ***Malik***.

113. The respondent did not plead that it had a reasonable cause for acting as it did, but did suggest that the dismissal was due to *some other substantial reason*, which was to do with the reasons for the restructure. This was not a point which was argued during the hearing. In any event, I do not consider that the situation could be so desperate and urgent for the respondent that the claimant could not have been consulted or placed on some sort of interim or trial measure to see if the necessity for the restructure (if there really was any) could be alleviated. There was no reasonable cause for the respondent acting as it did. It did so because Mr Tucker decided to effect change and was either not properly advised or was not patient enough to follow a proper process.

114. The claimant resigned in response to the breach. That resignation came 16 days later, after the claimant had sought to understand the position and take stock of what

had happened. He raised his disquiet with Mr Tucker five days after being told what would happen. I do not consider that he did anything to affirm the contract in that time. I have directed myself about the guidance from *Quilter*, but consider that in this case there was no delay of the sort that might be of any concern. A claimant will rarely, if ever, be criticised for seeking understanding or redress through internal discussion before coming to the view that it would be wasted and resigning.

115. Even if the contractual change was not found to be sufficiently significant to result in a *Hogg* dismissal, then I consider that the claimant would have been constructively dismissed upon his resignation on 28 July 2023. In that circumstance, he would also be entitled to remedy for unfair dismissal.

Discussion and conclusions – Remedy

Ms Acheampong's approach

116. The claimant has been unfairly dismissed, and the basis for the awards is outlined in the 'relevant law' section under remedy. The claimant set out his remedy in a schedule of loss. His witness statement also gave evidence about remedy, what he did between dismissal and his new job, and what losses he suffered. Despite being invited to *"cross examine the claimant in relation to his evidence and his case"*, Ms Acheampong chose not to ask Mr Wall any questions about the remedy part of his witness statement precisely at the time she had the opportunity to ask questions about the witness statement. It was not for me to intervene at this point and draw attention to the omission, because to do so would mean entering the arena to assist a represented party. I am not permitted to do that. I assumed that the respondent had no challenge for the limited evidence offered about remedy.

117. The Orders preparing for the hearing made clear that liability and remedy would be considered together. At no point did I indicate that they would be separated in this two day case. Ms Acheampong did ask some questions going to remedy in her cross examination of the claimant, and so I considered she had the opportunity to put anything she wished to Mr Wall. I did not, therefore, allow Mr Wall to be recalled for further questions to be put.

118. For reason I do not understand, Ms Acheampong assumed that remedy would be considered in a whole separate phase of the hearing, to the extent that she had not taken any instructions from the respondent about submissions going to remedy. She therefore benefited from two breaks, in the middle of her closing submissions, in order to take instructions. The respondent had not introduced any of its own evidence which might go to remedy, other than one e-mail about the state of the recruitment market in the sector which I took into account in primary fact finding. It had not disputed the figures Mr Wall gave about his gross and net pay.

Basic award

119. There was a further error from Ms Acheampong in relation to the basic award, in that her submission was that the claimant had not applied a cap to the weekly earnings amount when calculating his basic award. In fact, he had applied the maximum cap of £643 per week which applies to his dismissal in July 2023. He had full twelve years' continuous service. He is entitled to the amount he claimed in his

schedule of loss. The respondent has not made submissions about a reduction to that for any culpable conduct from the claimant, and I do not consider any reduction appropriate, so I make none. I award £8,359.00.

Compensatory award

120. The claimant is also entitled to a compensatory award to compensate him for losses he would not have suffered if he had not been unfairly dismissed. The claimant claims his net weekly pay for 24 weeks, which is the time between his dismissal and his starting a new job in January 2024. The respondent queried whether the claimant would have earned commission but, as outlined above, there were no other figures available to me and the claimant was not challenged about the pay figures he had given. I consider his net weekly pay figure of £2,149.37 is appropriate. The question for me is whether it is just and equitable in all the circumstances for me to award that whole amount claimed, in the total sum of £51,584.88. He also claims pension contributions in the sum of £1,249.92. The respondent says I should not do that, for two reasons.

121. First, Ms Acheampong notes that the claimant says it took some more time for him to find a job than it would because he slipped two discs in his back in October 2023. On behalf of the respondent, she submits that the claimant should only be award statutory sick pay for the period between October 2023 and January 2024. Ms Acheampong could not give me any rationale for the submission, but agreed with me when I asked if it is because that is the provision in the employment contract. It is indeed the case that the respondent may pay 2 weeks of 'company sick pay', followed by statutory sick pay.

122. There is an absence of evidence about the working state of the claimant at the time. The injury is offered as a reason for a slowness to get a job. The claimant was not challenged about the evidence. Having difficulty finding a job is not the same as the claimant being unfit to do any work at all if he had remained in employment, which is the most appropriate factor to consider when I am considering a just and equitable award. I have discretion in the compensatory award to award what I consider just and equitable in the circumstances. In these circumstances, keeping in mind that there is no evidence that the claimant was unable to work if he was in employment, I make no reduction for a period of possible statutory sick pay.

123. The second reason the respondent says I should reduce the award is because of the claimant's unreasonable failure to mitigate his losses. It is said that he should have been able to find employment immediately and the fact there is no evidence of a job search indicates that he has not mitigated his losses. The respondent bears the burden of demonstrating there has been a failure to mitigate losses. To assist with that, it provided an e-mail from a recruiter indicating that foreign exchange consultants were in demand and were being paid well. The obvious problem for the respondent there is that it was set on enforcing the claimant's restrictive covenants which would have stopped him from working for a competitor for a period of three months. The respondent also accused the claimant of a criminal act and warned clients about him. It seems unlikely to me that this would not affect short term employment prospects in the sector should a prospective employer make enquiries about him.

124. To find a failure to mitigate losses, I must find that the claimant has acted unreasonably in failing to secure other work. I do not do so in this case. The claimant was told by Mr Tucker that he was unable to work for a competitor for a period of time because of his restrictive covenants. The respondent did imply, in my judgment, that the claimant posed a data protection risk to clients and indeed the claimant was told he had breached data protection by the respondent after the employment ended.

125. Taking into account the covenants, I do not consider it can be considered unreasonable for the claimant to not have found a job between mid-October 2023 and January 2024. The claimant admits that he was mentally struggling following his dismissal and into 2024. This is not unusual or surprising given that the claimant spent almost 13 years working at the claimant, from the start of his career, only to have been the victim of extremely poor treatment and an unfair dismissal. The law I have summarised requires me to consider all the circumstances of the case and the claimant's position, and I may take account of the impact of his treatment. I must also not apply too high a standard for what I consider he should have done.

126. In conclusion, I make no reduction for mitigation because the claimant has not unreasonably failed to mitigate his losses. He does not claim any loss from the beginning of his new role to date or into the future, either because he does not wish to disclosure his earnings or because he is not earning less in his new role – and so suffers no loss. The respondent made no other submissions in closing for a reduction because of any contributory conduct from the claimant to the position he found himself in. I do not perceive any such conduct and so I make no other sort of reduction. I award the claimant the full amount he claims, in the total sum of £52,834.80.

Statutory rights

127. The claimant has lost his statutory rights which protect him, among other things, being able to claim for unfair dismissal for a period of two years in his new role. If he had not been dismissed, he would still have the benefit of those rights. He is entitled to compensation for that loss and I consider it as a separate head of loss. The claimant claims £350 in his schedule of loss. I am not bound by that figure and may award more if I consider the request made is not adequate.

128. I consider that this is a sector where the risk of dismissal is greater than in most areas of work. It is apparent to me that the work is incredibly target driven. I have heard evidence which casually mentions several people who were dismissed, put on performance improvement plans, or demoted because their performance was not considered good enough. It is appropriate to uplift the compensation where I consider those unfair dismissal rights in particular might be more valuable. Consequently, I award £800 under this head of loss.

Overall disposal

129. The claimant has been unfairly dismissed. The respondent must pay him the grand total of £61,993.80 in consequence.

Employment Judge Fredericks-Bowyer

5 March 2024

Sent to the parties on:
03/06/2024
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For the Tribunal Office:

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