# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Chandrashekarappa

**Respondent:** Wipro Ltd

**Heard at:** Reading **On:** 29 & 30 April, 1 & 2 May 2024 & 9 May 2024 (in chambers)

**Before:** Employment Judge Anstis
Mrs H T Edwards
Ms D Ballard

**Representation:**
Claimant: Mr F McCombie (counsel)
Respondent: Mr E Beaver (counsel)

# RESERVED JUDGMENT

The claimant's claims are dismissed.

# REASONS

INTRODUCTION

1. The claimant originally joined the respondent as a "Consultant" – effectively a technical expert – but in 2013 moved into sales, initially as a Practitioner Sales Farmer. At the time we are concerned with, the claimant was employed by the respondent as Practitioner Sales Hunter Manager in its Cloud and Infrastructure Services (CIS) division. He held this position since April 2021.

2. The respondent is a large IT outsourcing organisation, part of a group operating worldwide with headquarters in India.

3. The respondent categorised sales work as either "hunting" or "farming". "Hunting" meant searching for and securing sales with new customers. This

was also known as new logo or "new new" business. "Farming" would be obtaining new work from existing customers.

4. The nature of the respondent's business was that new new business could be very valuable – potentially involving many millions of dollars of recurring revenue.

5. Some of this case concerns the different sales incentive schemes that applied to hunting and farming work. In principle, the respondent regarded hunting work as being of a different character to farming work. It was regarded as being higher risk work, in the sense that an individual sales person may have to dedicate months or even years of work to a large deal that eventually fell through or did not succeed at a late stage. With that higher risk came the possibility of higher reward for success.

6. The claimant was not simply a salesperson, nor would he typically be the lead salesperson on a deal. Each deal would be led by a "hunter" but they would need to draw on support from those in practitioner sales such as the claimant. They would be the technical experts in different disciplines who would need to work on the technical detail of implementing any deal, and would also need to persuade managers at the prospective client of the respondent's capacity to carry out the work and of the effectiveness of its plans. While the primary "hunter" might work with the client's CIO, those in practitioner sales would typically focus on work with individual managers or specialists within the client. No doubt this would be of significance in securing the deal, but the claimant and his colleagues in practitioner sales were not the primary salespeople for large deals. A large deal would typically involve the respondent providing services to its client from across different operating divisions, so may have practitioner sales input from a number of different divisions including CIS, which was the claimant's division (or sector).

7. It has never been in dispute that the claimant was very effective in both his sales and technical work. Much of what we have and heard seen shows that he was regarded as a very capable employee by the respondent.

8. The claimant's dispute with the respondent originates in the consequences of a very large and ultimately successful deal he worked on with the John Lewis Partnership. The claimant had been working on this deal since 2019 and it was signed by the client on 26 June 2020. This was considered to be a major success by the respondent, and was one of the largest deals secured in Europe that year. The John Lewis Partnership was a new customer, so this was "new new" work.

THE ISSUES

9. The claimant has brought two claims, which have been consolidated and are being heard together. It will occasionally be necessary for us to distinguish

between the claims, but in general it is not and we will not distinguish between them.

10. The parties agreed a list of issues for this hearing, which is set out in the appendix to our decision. Since it was agreed that at this stage we would address liability only we have omitted any points in relation to remedy. The claim that was at 1.1.3 was accepted by the claimant in closing submissions to be a matter of remedy in respect of wrongful dismissal, rather than as a claim of unlawful deductions from wages in its own right. There was also previously a claim of breach of contract in respect of unpaid expenses, but that has now been resolved by the respondent and was withdrawn at the start of the hearing.

11. Broadly speaking, the claims fall into the following categories:

**Unpaid incentive payments**

12. There are two claims of unpaid incentive payments. These are brought as claims of unlawful deductions from wages, not claims of breach of contract. The first concerns an exceptional “kitty bonus” and the respondent’s imposition of a cap on that bonus which had not previously been documented. The second is in relation to the standard incentive plan and relates to the respondent’s decision part-way through the 2020-21 financial year to adopt targets across two halves of the year, rather than the whole year.

**Direct race discrimination**

13. There is a claim of direct race discrimination in respect of how the claimant’s incentive payments were or were not paid and the currency conversion rate that applied. For the purposes of his claim the claimant describes himself as Indian and has a comparator who is white British.

**Victimisation**

14. Various aspects of the claimant’s treatment towards the end of his employment are alleged to amount to victimisation. The protected act is the claimant’s submission of his first claim. The respondent accepts this is a protected act.

**Constructive unfair dismissal and wrongful dismissal**

15. Finally, there are related claims of constructive unfair dismissal and wrongful dismissal.

THE FACTS

**Incentive payments generally**

16. The respondent has a complex series of incentive payments that may be available to those in sales roles.

17. Incentive arrangements in general are set out in a "Variable Pay Plan" or "VPP". This is presented to staff each financial year and will vary each financial year. The VPP encompasses "Sales Incentive Policies" or SIPs, that will vary between occupations and individuals. Following the yearly VPP presentation, individual SIPs will be sent to individual salespeople. There is a process for them to accept the SIP, and it seems that there is some limited scope for individuals to renegotiate the terms of their SIP, although this would seem to be more about the detail of targets rather than wholesale renegotiation of the SIP.

18. It is also apparent that the respondent was able to, and did, pay ad hoc bonuses that were not the subject of any documented bonus scheme as and when it considered it appropriate to do so.

19. The respondent accounted for sales in US dollars, regardless of where the sales were made. Incentive payments were calculated in dollars but paid in the employee's local currency. At least for the SIP, exchange rates were fixed by the respondent at the start of the financial year.

20. Little or no reference was made during the hearing to the claimant's written contract of employment, which remained in the form it had been when he first joined the respondent and so did not refer to any sales incentive scheme.

21. It appears that the respondent's VPPs could vary considerably from year to year, depending on what senior managers saw at the time as being priority areas.

22. This case concerns the incentive arrangements for the respondent's financial year 2020/21, which ran from April 2020 to March 2021.

**The kitty bonus**

23. The claimant says that Mr Garg told him prior to the presentation of the VPP for 2020/21 that there was to be a new "kitty bonus" available to individuals such as the claimant, and that "*if* [the claimant] *won the John Lewis business* [he] *would be getting this bonus and it would probably make* [him] *one of the highest-paid sales people globally …*". This was substantially confirmed by Sheekha Shah in her evidence.

24. The claimant attended a general presentation on the new VPP in March 2020. This "kitty bonus" was referenced in that presentation only as a footnote in one slide, as follows:

> *"A kitty of up to 1% of new logo invoicing against first 12 months can be paid to Practitioner Sales Hunter/Hunter manager contributing to deal win based on SL* [sector lead] *head approval. Applicable to DOP and CIS role holders."*

25. The terms on which this bonus may be paid were never documented beyond this, until the SIP was reissued for the second half of the year. It did not last into

FY2021/22 and seems to have been part of a drive to encourage new new business in FY2020/21. The claimant was, in fact, paid a bonus under this scheme, but he says he was paid less than he was entitled to under the scheme.

26. The start of the VPP presentation contains a disclaimer:

> *"This document serves to provide a broad overview and support an oral presentation. It is not a substitute for the policy document and cannot be considered complete or accurate without reference to the policy document. The presentation is only for information. The final policy document will overrule this presentation in case of a conflict."*

27. As the claimant points out, the "kitty bonus" is not referred to in the section of the VPP presentation that addresses "discretionary bonuses".

28. The John Lewis deal was signed on 26 June 2020. Within a week of that, on 1 July 2020 Manish Garg wrote to Kiran Desai, who at the time had the job title "Senior VP and Global Head – Cloud & Infrastructure Services", saying:

> *"Kiran, I would like to propose Pancham's name for the 1% commission for the JLP deal. This needs your approval as per the policy below. As you know he has contributed significantly towards this win and deserves this.*
>
> *Request your approvals.*
>
> *Pls see policy below in the highlight."*

29. "*Policy below in the highlight*" is Mr Garg attaching the extract from the presentation that we have referred to above.

30. Mr Desai replied almost immediately, saying "*I am ok. Go ahead.*"

31. This correspondence was copied to Ateet Khosa of HR (who at the time was Head of HR for CIS), and Mr Garg asked him to "*pls inform respective folks*".

32. The claimant says (and, in the absence of any evidence to contradict it, we accept) that he was told in a phone call from Mr Garg around that time that Mr Desai had "*provided his approval immediately and without hesitation*". The claimant acknowledges that "*there was of course no mention of the exact amount of the bonus, because the first year's invoicing wouldn't be known for over a year*".

33. On 14 July 2020 Mr Garg wrote to Mr Khosa and Mr Desai proposing wording for a congratulatory email to be sent by Mr Desai to accompany the payment to the claimant. Mr Desai says "*I will send only when the Gods* [i.e. more senior managers] *approve that this is approved.*" Mr Khosa says "*I am getting the details on mechanics of the payout so that we can set clear expectations.*"

34. By 15 July 2020 Mr Khosa asked a colleague to prepare a specially formatted email for the congratulations to the claimant, and this had been done for him. On the same day he wrote to Sukanya Ramachandran asking her to "*share the approach*" so that they could send the email to the claimant. Ms Ramachandran was the head of the HR section that dealt with compensation and benefits.

35. Later that day she replied to Mr Khosa saying:

> *"Here is the note:*
>
> *1. 1% of invoiced revenue is a discretionary reward for Practitioner sales hunter in CIS/ DOP for hunting deals that are largely SL led.*
>
> *2. The reward is based on approval from Nag – Head DOP&CIS*
>
> *3. Since this is a discretionary bonus, it is paid out as a one time bonus at the end of the year based on 12 month revenue invoiced *1%*
>
> *4. The cap applied on the payout is USD 150K p.a similar to hunting account cap."*

36. This is the first time that anyone had suggested either that Nag (that is, Nagendran Bandaru, at that time Global Head of CIS and DOP ("DOP" being digital operations and platforms), who Mr Desai reported to) rather than Mr Desai was the appropriate sector lead to determine the payment, or that there was a cap on the amount of the payment. Mr Garg, Mr Desai and Mr Khosa had so far proceeded on the basis that there was no cap and that Mr Desai was the appropriate person to decide on the payment. It does not appear that any of them were aware of any governing document setting out the terms of the kitty bonus other than the footnote on the presentation, and we have not been shown any document in existence at the time that referred to the appropriate manager being anyone other than the sector lead or that referred to a cap.

37. Mr Khosa reacted with some consternation to this, engaging in correspondence with Ms Ramachandran across the next few days, including the following:

> *"Sukanya - I do not think this is right, if we had such caps we should not communicate it communicated upfront while policy was getting communicated. If in past cap has not been hit that does not mean we have different cap for SL hunters and Vertical hunters.*
>
> *With such approach employee feel short changed. I remember during our sales incentive calls we had specific question on hunting commission at that time it was informed that it will be aligned to hunting policy except for it being 1% for 1 year."*

38. On 17 July 2020 Ms Ramachandran says:

> *"I have discussed with Sumit* [Sumit Govil – Head of Compensation and Benefits]*. The cap will continue to be 150k.*
>
> *Rationale being that this is a discretionary award and also the employee will get ACV* ["ACV" is "Actual Contract Value", and this is a reference to the conventional incentive payment under the SIP] *for the same amount."*

39. It is not clear when, if at all, the claimant was told of this intervention by Ms Ramachandran, or that the kitty bonus would not be paid in the way originally anticipated by Mr Gard and Mr Khosa. To some extent the point was academic as any payments were understood to be based on the value of the first twelve months' invoices to John Lewis, which was as yet unknown. Although the contract was signed in June 2020, invoicing only started in November 2020.

40. On 8 September 2020 Mr Garg wrote to Mr Khosa and Mr Desai asking for them to "*close the JLP bonus*", saying "*we need confirmation on Pancham 1% commission as well*". On 16 September 2020 Mr Garg wrote again with some calculations saying "*my recommendation is that we should not cap it in this instance as it won't be fair to the employee*". It is not clear if he is referring to the kitty bonus or the division into half years that was also occurring around this time, but in either event this email was supportive of the claimant. On 21 October 2020 Mr Garg wrote apparently suggesting a USD300k cap rather than the USD150k. Mr Khosa replied saying "*I do not think we will get sign off on a payout of 1% with a cap of 300k. For this deal already the commission payout has gone beyond 750k* [we think this is a reference to the total commission paid across all relevant salespeople] *as against a typical deal where commission payment is around 300k USD. In my view we should try to cover Pancham in large deal bonus which will cover another 25-30k USD.*" Mr Garg says "*ok, lets park this for $150k for now*".

41. On 20 October 2020 the claimant received draft calculations for checking. The claimant says there was nothing in there to alert him to the idea of a USD150k cap on the kitty bonus.

42. It is the claimant's case that the first he knew of a cap on the kitty bonus was on inspecting the new H2 plan that he was only able to access after 23 October 2020. The split of the VPP or SIP for the year 2020/21 into two halves is at the heart of the claimant's complaint in relation to his incentive payment more generally, but at this point we will look only at the question of the kitty payment.

43. Clause 6.5.3 of the H2 SIP applicable to the claimant says:

> *"Practitioner sales hunter and practitioner sales hunter manager roles holders in CIS and DOP can also receive up to 1% of invoiced revenue for hunting account. The maximum payout under this scheme is USD 150k p.a. The payout for this bonus is subject to approval from SL head of CIS and DOP."*

44. This is the first time that the two provisos identified by Ms Ramachandran had been documented: a cap of USD150k and approval by the head of CIS and DOP. The claimant says "*I was aghast when I saw it.*"

45. The claimant complained about the new H2 policy, and we will address this complaint in looking at the second element of his pay claim, but it seems nothing more was said about the cap on the kitty bonus until 15 December 2020 when Mr Garg emailed the claimant saying:

> *"I am very please to let you know that, basis your extraordinary contributions towards winning JLP deal, management has approved discretionary bonus of 1% commission of the monthly invoicing for the first 12 months. This amount will be paid to you in line with the monthly invoices and capped at $150k."*

46. The day before this Mr Garg emailed the claimant to say *"… you can rightfully take pride in making JLP deal happened … as a token of our appreciation we are rewarding you with a bonus of USD41,000.*" This appears to follow on from Mr Khosa's idea that a "Large Deal Bonus" could be awarded to go someway towards what the claimant lost through the imposition of the cap on the kitty bonus.

47. The claimant says "*I didn't complain there and then. I thought it prudent to wait.*" He explains why he thought it prudent to wait. There are a number of reasons for this, including that the kitty payment was not yet due for full payment, that he (on his case) had not accepted the H2 scheme and that he had an outstanding grievance. The claimant says "*I saw no reason to keep raising the issue again until the events of July/August 2021 … which triggered my follow up.*" In retrospect this appears at least to be very naïve and at worst to be the what Mr Khosa later described as attempting to be "smart", making no issue of it at the time but coming back in July/August 2021 in an attempt to reargue the point. We will refer later to what occurred in July and August 2021.

48. To his surprise, the claimant was paid his kitty bonus in February 2021, which is earlier than would have been expected. He says that he expected it to be paid on the basis of 1.25USD to GBP, which was the exchange rate set at the start of the plan year, but in fact was paid 1.276USD to GBP.

**The SIP**

49. The second element of the unpaid wages claim relates to the SIP for 2020/21 and in particular its division part way through the year into two halves.

50. The original SIP for 2020/21 was accepted without comment or hesitation from the claimant. It is his position that this is the SIP that should apply throughout the year. The SIP that applied to him was the SIP for "*Service Line Hunter Managers and Practitioner Managers*".

51. We do not need to go into the detail of that SIP for now, but note that it starts by saying "*overall payout would be capped at 2x of base or 300K USD per annum, whichever is higher*", and clause 2.4 says:

> *"The Company reserves the right to review the operation of the Plan during the Plan year and to make changes as it deems necessary."*

52. The concept that there may be changes during the plan year is reinforced by the third recital at the start of the SIP describing who has responsibility for approval of the document "*and any subsequent changes during the year*".

53. While being broadly speaking a traditional target-based incentive plan, there were a number of complications including when payment fell due (typically the second month after the end of the quarter it was accounted for, but including a provision for overall reconciliation of the amounts paid at the end of the year).

54. The first mention of changes in the VPP for FY 2020/21 was in an email dated 8 June 2020, said to be to "*reflect the unprecedented times and the challenging business situation due to the Covid-19 crises*", albeit this said that hunting roles "*will continue to get paid as per commission policy*". An email sent on 28 September 2020 talked of a "*target setting process for H2 FY21*". This says "*To enable revision (if any) of target, your current role end date will be set to 30th September. You will be mapped to the same role for H2 FY21.*" This suggests a novel split between the two halves of the financial year – something that had not happened before and was not anticipated in the original SIP.

55. On 12 October 2020 the claimant was sent an email asking him to "*accept the H2 Sales Incentive Letter*".

56. The letter was available on the respondent's internal systems but could not be accessed by the claimant at the time. He notified HR that he could not access this, and later that same day he got an email saying "*Below are the numbers reflecting for H2. If you wish to provide email acceptance, I can get this closed backed and share your letter copy for reference.*" The email included a basic statement of targets for the remaining two quarters of the year, which would be the second half of the year. These were both lower than the relevant quarterly targets the claimant had been given in the original SIP. In the absence of any other changes to the scheme, lower targets could only be of benefit to an employee, so it is not surprising that the claimant immediately replied saying "*I am okay with these numbers*".

57. By 23 October 2023 the claimant had gained access to the full letter. He describes this as being "version A" of the new plan, being the new plan covering the whole of FY2020/21. There was also version B and version C, dealing individually with the first half and second half of the year respectively.

58. The claimant has described in detail how these new arrangements disadvantaged him. We do not need to go into that at this stage, beyond noting

that the cap on commission had changed from USD300k for the whole year to USD150k for each half year.

59. The respondent says that these changes were made in response to difficult and uncertain market conditions during the Covid pandemic. It is clear that many employees could do better under the new plan (with reduced targets) but also that the new plan disadvantaged the claimant, in particular because his John Lewis deal (accounted for in the first half) would now be subject to the half-year cap of USD150k rather than the full year cap of USD300k. By the time of closing submissions it was common ground between the parties that the question for the tribunal was whether the respondent had the power to make these changes, not whether they had a good reason for them.

60. The claimant describes the introduction of the new plan as being "moving the goalposts". We can see why he calls it that. The respondent was retrospectively introducing a new SIP half way through the financial year.

61. As we have previously noted, the new plan also contained for the first time a cap on the kitty bonus.

62. On seeing the full plan, the claimant immediately sought to revoke his previous acceptance of the revised targets and protested about the change. Some steps were taken by the respondent in what appears to be an attempt to revoke the previous acceptance, but things went no further. In particular, although he had been promised by HR that he would have a meeting with Mr Khosa and Mr Garg about this, there was no such meeting. Beyond that, again the claimant "*thought it prudent to wait*". He revisited the point on not receiving any payment in May, June or July 2021, which is when he would have expected the full-year reconciliation to have taken place under the original plan.

63. The claimant points out that his comparator's SIP was not changed in the way that his was changed. The respondent accepts this, but says (and it does not appear to be disputed by the claimant) that the comparator was subject to a different SIP – the Large Deal Team SIP, on the basis that the comparator was a "Large Deal Pursuit Lead". The Large Deal Team SIP was not changed.

**July 2021**

64. The claimant picked up his complaints about the limited kitty bonus and the 2020/21 incentive generally in a call with Manish Garg at the end of July 2021. He enquired about his comparator, and was told that that comparator was getting "*his full bonus for the John Lewis deal*". From the information he was given he was able to determine that his comparator's bonus had been paid at an exchange rate of 1.25USD to GBP. Having had no response on this point he wrote pointing out the problems with payment of kitty bonus and variable pay generally, including the conversion rate that had been used for his kitty bonus payment.

**August 2021**

65. Both Mr Garg and Mr Khosa replied to the effect that they considered the question of the kitty bonus to be closed. Mr Garg pointed out that the claimant had had a discretionary large deal bonus and said "*Wipro has been fair to ensure that you have been rewarded.*" With regard to the SIP Mr Khosa said "*with regards to reconciliation H1 & H2 will be treated differently based on the respectively policy for H1 & H2.*"

66. It appears that the claimant attempted to make his case directly to Mr Desai, seeking a meeting with him. In discussions about this Mr Garg said "*I also told him that he would like to have audience with Kiran/Nag, by all means he can do. He is a key employee for us and I don't him to have a feeling that we have been unfair and have him motivated ...*". Mr Desai disagreed, saying "*this is not right approach*". Mr Garg pushed again for this, saying "*... if an employee wants to still highlight his concerns then in my mind its unfair to say no you can't speak. This too with one of our top sales person in CIS.*" Mr Desai was not persuaded, and said "*pls communicate with him that this is closed. Going to hierarchy does not open up.*" During these exchanges, Mr Khosa wrote to Mr Garg saying "*will you agree that* [the claimant] *is acting smart. Very clearly we had agreed that 150k USD will be total discretionary payout which will be paid to him.*" So far as Mr Khosa was concerned the claimant was "acting smart" in now trying to reopen matters that had been dealt with some time ago.

67. All of these discussions and the later communication to the claimant happened on 18 August 2021 by which time, so far as the respondent was concerned, the matter was closed. Perhaps there was correspondence between solicitors that we have not seen, but the claimant seems to have bided his time before taking any further action. He explains that the one year anniversary of the John Lewis invoices having started was November 2021, so under normal circumstances December 2021 would be the date for payment of the kitty bonus.

68. The matters that follow are then largely relevant to the victimisation and constructive dismissal cases.

**The presentation to Jo Debecker**

69. Around the end of 2021 Jo Debecker had taken over as Manish Garg's manager, and took an interest in what appeared to be the success of the UK & Ireland region (of which the claimant was a part) in hunting sales, compared with the rest of Europe. Jo Debecker's apparent enthusiasm for the model adopted in the UK & Ireland does not seem to be matched by more senior managers, who by May 2022 were proposing a change to the way in which hunting had been carried out in the UK & Ireland.

70. On 22 December 2021 Jo Debecker wrote to Manish Garg saying "*Manish, you have split farming and hunting in two different roles for UKI. I forgot to ask: do you see an uptake in funnel for NN* [new new] *because of this. In other words: is this working?*" Manish Garg replied "*Yes it's working, as people are aligned ...*". By 23 December 2021 Manish Garg wrote saying "*Hi Jo, I am attaching*

*some of the slides on the hunting topic. Pancham has prepared this. Pl have a look and we can have a call to discuss in the new year.*" Jo Debecker replied saying "*Thanks - very interesting – let us talk next 121.*" The claimant says that between Christmas and new year 2021 he gave his slide presentation on the UK & Ireland hunting model to Jo Debecker via a Teams meeting. He said "*Jo was impressed and at the end of the Teams meeting he told Manish to set up a further meeting to discuss the details of how we might replicated the dedicated hunting model in wider EU territories. We had agreed too do it after first week of January ...*". The claimant says, "*My involvement in this project would undoubtedly have assisted my career. I had come to the attention of the new senior executive early in his tenure. My 'stock' would rise. I was very pleased.*" In principle we accept this. The claimant was closely associated with a way of working that had apparently attracted favourable attention from a more senior manager, and seemed to be taking a lead in explaining that way of working to he manager. This was likely to be beneficial to him.

**The first claim**

71. With the full kitty bonus not having been paid to him in December 2021, the claimant submitted his first tribunal claim on 4 January 2022. This is accepted by the respondent to be a protected act for the purposes of the victimisation claims.

72. The claimant points out that his claim was acknowledged by the tribunal on 1 February 2022 so would have been served on the respondent in early February 2022.

**No meeting with Jo Debecker**

73. We have seen that in late December 2021 Jo Debecker was interested in the UK & Ireland hunting model and it was expected that further discussions would follow with the claimant about that. The claimant expected Mr Garg to arrange the next meeting with Mr Debecker. No such meeting was arranged.

**The subject access request – February 2022**

74. On 23 February 2022 the claimant's solicitors made a detailed subject access request on his behalf. The respondent took over three months to reply, eventually replying on 25 May 2022. The reply appears somewhat limited and contains substantial redactions.

**The offsite meeting in Coimbatore – March/April 2022**

75. On 7 March 2022 Mr Garg was sent an email by an assistant to Mr Desai and Mr Debecker asking him to "*Kindly nominate 3 participants from your sales team (D2 and above) who will be part of the CIS offsite meeting in April 22.*"

76. The CIS offsite meeting was to take place in Coimbatore, southern India, in April 2022. The claimant describes it as being "*effectively our team's annual strategy meeting. It was an opportunity to network with other leaders ...*".

77. D2 was an employee grade. The claimant was D1 grade, which is less senior than D2. In principle, therefore, he would not be eligible for an invitation to "*D2 and above*". However, in response to the invitation to nominate three D2 and above employees, Mr Garg, who had seven people reporting to him in total, nominated two employees at grade D1 and two at grade D2. The two nominated at grade D2 were the heads of hunting and farming for Germany and France. The claimant does not complain at their nomination. The two nominated at grade D1 (the claimant's grade) were the head of hunting and farming for Benelux and the head of farming for the UK, who occupied the same position as the claimant but focussed on farming in contrast to the claimant's focus on hunting. In replying with his nominations Mr Garg said *"I am proposing 4 and I don't have D2 and above hence two nominations are D1*". Mr Debecker replied to these nominations saying "ok". The claimant only learned of this offsite meeting on 10 April 2022 when Mr Garg sent a circular email saying he was going to be away and would be at the offsite from 18-22 April 2022.

**Long service – March 2022**

78. It was usual within the respondent for long-service milestones to be commemorated by the circulation of an email containing tributes and testimonials to the employee provided by their colleagues.

79. By the end of March 2022 the claimant had ten years' service with the respondent. An appropriate long-service email was sent including testimonials from colleagues.

80. Relevant for the purposes of the claimant's claim were that a testimonial from Mr Garg was included in this email. Mr Garg said:

> *"Congratulations Pancham on your very well deserved 10 years with Wipro. A big thank you for all the contributions you have made over the years to grow the CIS business in the UK. You are one of the key pillar of the CIS business in the Europe. I really admire your commitments towards business. You have great sense of ownership and very good understanding of the CIS business and great ability to connect with Customers. You are able to build some very strong and trusted relationships with key stake holders. I wish you successful career ahead."*

81. On the email being sent, Mr Garg forwarded it to various internal email groups, the scope of which is not clear. In forwarding it Mr Garg said: "*Congratulations Pancham. Very well deserved 10 years. Thank you for all the contributions you have made to grow CIS BUSINESS in the Europe.*"

82. The claimant's specific objection to this is that unlike other examples of long-service emails forwarded by Mr Garg that we have seen, there is no specific reference in the forwarded email to the claimant's future with the business.

**April 2022**

83. Setting aside the question of constructive dismissal and whether the claimant was entitled to any further incentive payments, it is hardly surprising that he was disenchanted with the respondent and may have felt that his future lay elsewhere. Apparently at the instigation of someone he knew at Infosys, on 8 April 2022 he submitted an online application for the position of Business Development Manager at Infosys.

84. In April 2022 the claimant was also paid a further £2,409 kitty bonus, which seems to have been paid by the respondent by way of a final reckoning up in accordance with the USD150k cap, rather than any additional payment arising from the claimant's representations.

85. On 19 April 2022 the claimant submitted a grievance "*on account of not having been invited to the CIS meet*", but also encompassing the question of his long service email and the failure to arrange the meeting with Jo Debecker. He said "*I have to ask whether my suspicion is correct that this is because I have brought a claim against Wipro in the tribunal, and am therefore being sidelined.*" The claimant said, "*I would like this complaint dealt with formally, but I don't need to attend a meeting as I'm happy if there can be a written outcome following an investigation if required.*" The claimant's grievance was taken on by Sheekha Shah, as CIS UKI HR representative.

**May 2022**

86. On 6 May 2022 Sheekha Shah reported to the claimant that "*I wanted to set up time to share findings from the investigation which followed post your grievance. I know that your email mentions that you would not like a meeting but I want to check if that is still the case or you would like a … meeting. Let me know, I will set it up accordingly.*"

87. The claimant replied saying he wanted the outcome by way of an email and then "*if necessary,* [I] *will request for a meeting after reviewing the report.*"

88. Sheekha Shah sent the outcome letter to the claimant by email on 12 May 2022. As the claimant says in his witness statement, the outcome was:

> *"I have now investigated your grievance. I have found no evidence to support your contention that you have been side-lined as you suggest, or that the fact that you have brought tribunal proceedings … has had any bearing on your day to day management … Accordingly, I have not upheld your grievance."*

89. On 23 May 2022 the claimant accepted a job offer that had been made to him by Infosys.

90. Events on 25 May 2022 will be discussed when considering the claimant's constructive dismissal claim.

**June 2022**

91. On 3 June 2022 the claimant wrote saying:

> *"I am resigning with immediate effect, because of events that have made the working relationship no longer tenable.*
>
> *I feel that Wipro has acted so poorly towards me and so out of character that I have no option but to conclude that there is some retaliation going on because I have stood up for my rights by bringing the tribunal claim."*

92. The claimant goes on to cite the matters relied upon by him in his constructive dismissal claim.

93. Although the claimant talks of resigning with immediate effect it is agreed between the parties that he stayed on for a handover period, and that the effective date of termination of his employment is 17 June 2022.

**Subsequent events**

94. On 4 July 2022 the claimant started work with Infosys. A grievance appeal hearing was arranged for 1 August 2022 but the claimant did not attend. A further grievance appeal meeting (at which a verbal outcome was given) took place on 20 September 2022, with a written outcome following on 15 December 2022. The claimant lodged his second tribunal claim on 27 September 2022.

THE LAW

**Kitty bonus and incentive payment**

95. Section 13 of the Employment Rights Act 1996 provides:

> *"(1) An employer shall not make a deduction from wages of a worker employed by him unless:*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *…*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion …"*

96. Section 23:

*"(1) A worker may present a complaint to an employment tribunal:*

*(a) that his employer has made a deduction from his wages in contravention of section 13 …*

*(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with:*

*(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made …*

*(3) Where a complaint is brought under this section in respect of:*

*(a) a series of deductions …*

*the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series …*

*(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).*

*(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

97. Section 27:

*"(1) … "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including:*

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

> *(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall be for the purposes of this Part:*
>
> *(a) be treated as wages of the worker, and*
>
> *(b) be treated as payable to him as such on the day on which the payment is made."*

98. Section 13(3) makes it clear that any payment of wages that is less than what is "properly payable" will amount to an unlawful deduction from wages. For something to be "properly payable" the employee must have a legal entitlement to it, but that entitlement need not necessarily be a contractual entitlement (New Century Cleaning v Church [2000] IRLR 27). Tribunals are entitled to construe a contract to see what is "properly payable" – Agarwal v Cardiff University [2018] EWCA Civ 2084.

99. In general terms, a quantified loss is required for a claim of unlawful deductions from wages (Coors Brewers v Adcock [2007] EWCA Civ 19), but this does not preclude "discretionary" bonuses being considered under this jurisdiction (Tradition v Mouoradian [2009] EWCA Civ 60).

**Direct race discrimination**

100. Under s13(1) of the Equality Act 2010:

> *"A person (A) discriminates against another (B) if, because of* [race]*, A treats B less favourably than A treats or would treat others."*

101. Section 23(1) provides that "*On a comparison of cases for the purposes of s13 … there must be no material difference between the circumstances relating to each case.*"

102. For both the claims of direct race discrimination and victimisation the claimant has the benefit of the burden of proof provisions in s136 of the Equality Act 2010:

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

103. The Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37 at para 32 said:

> *"it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for*

*doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

**Victimisation**

104. Section 27(1)(a) of the Equality Act 2010 addresses victimisation:

"*A person (A) victimises another person (B) if A subjects B to a detriment because … B does a protected act.*"

**Constructive dismissal**

105. The claimant's claim of constructive dismissal covers both unfair and wrongful dismissal. For both, the question is whether the claimant's resignation amounted to a constructive dismissal. The primary questions to be addressed for that are whether the respondent actions as alleged at para 4.1 of the list of issues amount to (either individually or collectively) a breach of the duty of trust and confidence, and whether the claimant resigned as a result of any such breach.

106. Any breach of the duty of trust and confidence is inherently a repudiatory breach of contract (Morrow v Safeway Stores plc [2002] IRLR 9).

107. The employer, must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Malik v BCCI [1997] ICR 606).

108. The question of whether there has been a breach of the duty of trust and confidence is to be assessed on an objective basis

DISCUSSION AND CONCLUSIONS

**Kitty bonus**

109. The claimant claims a kitty bonus paid at 1%. He was paid a kitty bonus of 1%, but it was capped at USD150k. His claim is that the kitty bonus should have been paid without the application of any cap. It is brought as a claim of unlawful deductions from wages, not a claim of breach of contract. It therefore has to be considered within the framework of an unlawful deduction from wages claim. As set out in the list of issues that requires consideration of whether it amounts to "wages" that were "properly payable". The list of issues goes beyond that, but unnecessarily so given the arguments made by the parties. If the uncapped kitty bonus was wages that were properly payable to the claimant, it is not suggested by the respondent that paying a capped kitty bonus does not amount to making a deduction from those wages, nor that there was some statutory provision or written agreement from the claimant that authorised the deduction.

110. The position is similar in relation to the incentive payment, where the issue is the half-yearly capping of payments, as opposed to the original yearly cap. There is also a question of time limits in relation to the incentive payment.

111. In his closing submissions, Mr McCombie talks of the outstanding amount of the kitty bonus as being "properly payable" in or around December 2021 "*after the first year of revenue on the JL account*". He says, and we accept, that "*the entitlement need not be contractual in nature … the amount in question must be capable of quantification, but that quantification need not be straightforward*".

112. Mr McCombie says that the footnote on the presentation: "*A kitty of up to 1% of new logo invoicing against first 12 months can be paid to Practitioner Sales Hunter/Hunter manager contributing to deal win based on SL* [sector lead] *head approval.*" creates a contractual or other legal entitlement to the kitty bonus, and that this entitlement crystalised on Mr Desai approving a payment of 1%. He says "*That exhausted R's discretion as announced / as it was committed to as a matter of contract. No witness now argues that the decision did not meet the requirements understood on all sides when the presentation was given. The 1% became a quantifiable sum at the point of the exercise of discretion. A precise figure could later be put on it when the time came – i.e. after a year of JL revenue.*"

113. Mr McCombie continues:

> *"… the amount of the kitty bonus became "certain" when discretion was properly exercised by Mr Desai to make a 1% award. A wider discretion existed prior to that moment, but after that moment an actual amount was always quantifiable. It does not matter that the actual amount of 1% was not known for a year.*
>
> *It was not open to R to impose subsequent conditions such as approval by Mr Bandaru and a $150k cap. That was to exercise the discretion otherwise than in accordance with its terms and/or in bad faith and improperly, so that in December 2021 there was an unlawful deduction from C's wages."*

114. Mr Beaver agrees that there needs to be a legal entitlement to the payment. He says that the claimant has never put forward any legal basis on which the payment was payable. It was simply a discretionary bonus, outside s13.

115. Mr Beaver accepts, however, that even if there is no legal entitlement to payment, once payment is made it is caught by s27(3), and so potentially falls within the ambit of an unlawful deduction from wages. Mr Beaver says that this does not help the claimant, since he would still have to demonstrate a legal entitlement to any shortfall and would still need to be able to quantify the amount of the deduction.

116. Given Mr Beaver's correct acceptance that s27(3) applies to the payment we are less concerned with whether the kitty bonus can count in principle as

wages, and more concerned with the fundamental question of whether the claimant had any legal entitlement to a payment of kitty bonus that was greater than he received.

117. We have previously identified the disclaimer that applied to the presentation, and the terms of the relevant footnote. It is clear to us that a reference to "*a kitty of up to 1% of new logo invoicing … based on SL head approval*" does not give any legal entitlement to a quantified amount. In particular, the idea that it is "*up to 1%*" renders it incapable of quantification. We accept Mr McCombie's point that there is not such a difficulty with "*invoicing against first 12 months*". That element was capable of quantification, albeit only after the actual invoicing had happened.

118. The point becomes whether, as Mr McCombie says, the kitty bonus had crystalised into a quantifiable legal entitlement, subject only to calculating the amount of the invoicing, on Mr Desai approving a 1% payment on 1 July 2020.

119. Our finding is that it did not. If this was all that was required to crystalise the entitlement it does not make sense that Mr Desai is later talking about "the Gods" giving approval. Although Mr Desai seems to have been willing to give his own approval, he did not think he had the last word or that it was within his authority to authorise the payment. He may at that point have had no reason to think that the payment would be refused, and as we have seen, other managers were surprised that full approval was not forthcoming and that the cap was identified, but he considered that approval of higher managers was necessary for the payment.

120. Mr Beaver's reliance on Farrell Matthews & Weir v Hanson [2005] IRLR 160 in these circumstances is correct, with the legal obligation to pay in this case only arising on the formal declaration on 15 December 2020 of the amount of the kitty bonus.

121. There was no legal entitlement to be paid a quantified or quantifiable amount until it was formally communicated to the claimant that the decision had been made and that he had such an entitlement. This was done on 15 December 2020 and the payment that was communicated at that time was one that was subject to the cap. There was nothing more that was "properly payable" and the failure to pay an uncapped kitty bonus to the claimant did not amount to an unlawful deduction from wages.

**Incentive payment**

122. The first point to be considered in relation to the incentive payment is whether the claim is brought within time. The respondent says that it is not, and that time should not be extended.

123. Mr Beaver says that the unlawful deduction in question, if made at all, was made on 28 May 2021 but early conciliation (let alone a claim) did not commence until 26 October 2021 so it is clearly out of time, with there being no basis on which

the tribunal could find that it was not reasonably practicable for the claim to be brought within time.

124. Mr McCombie accepts that the incentive payment should have been made in May 2021. He does not suggest that it was reasonably practicable for the claim to be brought in time. Instead, he relies on there being a series of deductions, the series being the underpayment of kitty bonus and the underpayment of incentive payment. He says that the kitty bonus is the last of the two deductions that make up the series, and since it is within time the incentive payment is also within time.

125. The answer to that is that as we have found above that the alleged underpayment of kitty bonus is not an unlawful deduction from wages, it cannot be the last in a series of deductions and the incentive payment claim is out of time. The tribunal has no jurisdiction to consider it and it must be dismissed.

126. For the sake of completeness we will briefly address two alternative scenarios:

a. If the kitty bonus was an unlawful deduction from wages, and the incentive payment is an unlawful deduction from wages, are they both part of a series of deductions?

Mr McCombie makes his argument on this point by reference to two common factors: both deductions derive from the John Lewis deal and "*they both derive from the imposition of conditions on remuneration that had not been imposed at the beginning of the year.*"

Mr Beaver relies on Chief Constable of Northern Ireland v Agnew [2023] UKSC 33 as authority for the idea that *""series" has its normal meaning. It does suggest looking for a "common fault" or "unifying vice"".*

In Agnew at para 127 onwards the Supreme Court held:

*"… the word "series" is an ordinary English word and that, broadly speaking, it means a number of things of a kind, and in this context, a number of things of a kind which follow each other in time. Hence, whether a claim in respect of two or more deductions constitutes a claim in respect of a series of deductions is essentially a question of fact, and in answering that question all relevant circumstances must be taken into account, including, in relation to the deductions in issue: their similarities and differences; their frequency, size and impact; how they came to be made and applied; what links them together, and all other relevant circumstances …*

*… it is helpful and important to identify the alleged series of unlawful deductions upon which reliance is placed and the fault which is said to underpin it. In these appeals, the series is a series of deductions in relation to holiday pay. Each unlawful deduction is said to be factually linked to its predecessor by the common fault or unifying vice that holiday*

*pay was calculated by reference to basic pay rather than normal pay, as so regardless of any overtime or allowances during the reference period."*

So if there was an unlawful deduction from wages in respect of both the kitty bonus and incentive payment, did they amount to a "series" when taken together?

Mr McCombie is correct to say that both deductions occurred to payments said to arise from the John Lewis deal. It may at least be arguable that they arise from mid-year changes to the commission plan (that was not quite our finding in respect of the kitty bonus, but we are addressing a hypothetical situation in which underpayment of kitty bonus was an unlawful deduction from wages). However, those are the only similarities. Both payments are calculated differently under different elements of the commission plan. The respondent's explanation for not paying the full kitty bonus is different from its explanation for splitting the incentive payment target into half-years. It has not been suggested by the claimant that both derive from a single decision or policy from the respondent of reducing payments to individuals or the claimant. There is no "common fault" or "unifying vice". "*What links them together?*" Essentially it is that they arise out of the John Lewis deal and that the claimant did not receive the full amount he considered due to him. In the absence of any other common factors, that is not enough to constitute a series of deductions, and we find that if both had been unlawful deductions from wages they would not have constituted a series and the tribunal would not have had jurisdiction to consider the deduction from the incentive payment.

b. Was there an unlawful deduction from wages in respect of the incentive payment?

As we have pointed out above, the SIP was far more fully documented than the kitty bonus and contains provision that "*the Company reserves the right to review the operation of the Plan during the Plan year and to make changes at it deems necessary*".

That is what the respondent did in this case, and while it operated to disadvantage the claimant, others may have benefitted. The respondent was entitled to vary the SIP during the year and it did so. The failure to pay according to the original version of the SIP was not an unlawful deduction from wages.

**Direct race discrimination**

127. It is accepted by the respondent that the claimant is Indian and that his comparator is white British.

128. The claimant's position is that the respondent was embarrassed by its lack of diversity being, on his case, predominantly staffed by men who were either Indian nationals or of Indian origin. The claimant says that this embarrassment led the respondent to favour "local" staff in the countries it operated in. In the case of his direct race discrimination claim, he says that this was favouring a white British employee, both in applying a more favourable exchange rate to his incentive payments and in not imposing a half-year cap on his incentive payment.

129. The answer to this question lies in whether his comparator is a proper comparator for his claim: as it is put in the list of issues, were "[the comparator's] *circumstances the same or materially the same as C's*"?

130. The answer that clearly emerged from the evidence was that the comparator's circumstances were not the same as the claimants. He was employed to do a different job (Large Deals Pursuit Lead) and was subject to a different incentive scheme (the Sales Incentive Policy for Large Deal Team (Dedicated)). That scheme was not changed in the same way as the claimant's was, and it is the, not any difference in race, that accounts for the fact that the comparator was not subject to half-yearly caps on his incentive payments.

131. Mr McCombie argues that even if they are not direct comparators, a hypothetical comparator can be constructed by reference to this comparator, but we do not see that this can be done on our findings. Having found that the differences in treatment arise from their different circumstances and the different positions they held within the business there is no room for going on to find that this was nevertheless direct race discrimination. It is not disputed that everyone, regardless of race, who was on the same plan as the claimant had their plan changed in the same way that the claimant's was. It is also not disputed that everyone, regardless of race, who was on the same plan as the comparator kept the same plan. In some circumstances that situation may give rise to indirect discrimination arguments (which were not part of the claimant's case) but it cannot be direct race discrimination, since a hypothetical white British employee occupying the same role as the claimant would have his incentive plan changed in the same way the claimant's was.

132. The second element of the direct race discrimination claim is in a different currency exchange rate being applied to the claimant and the comparator's bonus payments.

133. Since the respondent accounted for sales in US dollars, there needed to be a mechanism for converting that into local currency for payment.

134. The claimant in his witness statement:

> *"Whenever they do business in a non-US currency, they use a conversion rate that is set at the start of the year. In all years that are relevant to my claims the rate in use was 1.25 dollars to the pound. But*

*that would mean a payment of £120k, so I don't know why they used a worse rate to arrive at £117,591 (i.e. the rate of 1.276). It's an odd figure and not one I've seen before."*

135. The parties' submissions on this point were somewhat limited. As far as we can tell the basic proposition from the claimant that the £117,591 was paid by reference to a different (and worse) exchange rate than that applied to the commission payment to his comparator is not disputed by the respondent. Both parties referred to the evidence of Rajesh Ramachandran, who said:

> *"Wipro is a global company. It reports its progress in $USD and incentive payments are also based on targets and figures in $USD. At the start of the Financial Year (FY), which runs from 1 April to 31 March, the currency conversion exchange rates that will be used during the course of that Financial Year, both for reporting purposes and for plan-based incentive payment purposes, are frozen as per the corporate plan. For the FY 2020/2021 (i.e. 1 April 2020 to 31 March 2021) the corporate plan exchange rate to convert £GBP to $USD was 1.25 ... This rate did not change during the course of the FY.*
>
> *Extraordinary or discretionary payments made to employees not under an incentive plan would not be calculated using the agreed plan rate. Instead, the prevailing exchange rate at the time the payment is made would be used."*

136. Both parties acknowledge that Mr Ramachandran was not responsible for the payments that were made to the claimant and his comparator, but he appears equipped to give proper evidence as to the respondent's usual practice on such matters. He is correct to say that the SIP document specified a 1.25 exchange rate for the relevant financial year.

137. The claimant's submission makes reference to a small so-called "rounding error", but the issue for us is the application of a "less favourable currency conversion rate" not any rounding error.

138. The first question is whether there is anything in this from which we could conclude that there has been race discrimination. On the face of it, someone who is Indian has been paid according to a different (and worse) exchange rate than someone who is white British. However, their circumstances are not identical and the bonuses in question are not the same nor do they derive from the same scheme as each other. There may be difference of race and difference of treatment, but that is not enough. There is no "something more" suggesting race discrimination, and we are not in the situation described by HHJ Tayler in Virgin Active v Hughes [2023] EAT 130 where there is an comparator in such a similar situation that an explanation is called for.

139. Perhaps recognising this, Mr McCombie suggests that what he considers to be inadequacies of Mr Ramachandran's witness statement are sufficient to

reverse the burden of proof. The position he adopts is that putting forward Mr Ramachandran as a witness when he had no direct involvement in the currency conversion, not explaining Mr Ramachandran's lack of involvement in his witness statement and Mr Ramachandran's slow acceptance of his lack of involvement are sufficient to reverse the burden of proof.

140. We do not accept that. There are many reasons why a respondent may not be able to call the individual with direct responsibility for such a decision and may have to make arguments by reference to general policies. It is true that Mr Ramachandran's witness statement does not set out that he was not personally involved in the decision of what exchange rate to adopt, but neither does it say that he was. In the passage immediately following his explanation of the currency conversion, Mr Ramachandran says "*I did not personally know the Claimant and had never met him in person. I have come to know of the Claimant and about some aspects of his case when I have been copied into emails when queries have arisen on the calculations of incentives and bonuses paid to the Claimant in FY 20/21 and FY 21/22.*" Mr Ramachandran has not been "caught out" claiming a greater involvement in the calculation than he had. The burden of proof has not shifted.

141. For the avoidance of doubt, if the burden of proof had shifted, it seems to us to be likely that we would have found that the respondent's explanation of different exchange rates applying to different elements of incentive payments would be correct, and thus not a matter of race discrimination.

**Victimisation**

142. There are four alleged acts of victimisation. The submission of the claimant's first tribunal claim is accepted by the respondent to be a protected act.

143. The first point is that our factual findings show that each of the alleged detriments relied on by the claimant actually occurred (although see below for more detailed discussion of the long-service email). We have to consider whether they occurred because the claimant had carried out a protected act.

144. Mr McCombie addresses the "delayed incentive payment" in the following terms:

> *"the relevant motivation is to be inferred from* [Mr Khosa's] *reaction to C's legitimate attempt to resolve his kitty bonus concern in late 2020 through into 2021. Having failed to offer C the meeting promised in November 2020, Mr Khosa then expressed his displeasure with C on 2 occasions (to Ms Kataria and to Mr Garg) for having sought a resolution of the issue as "acting smart"."*

145. We accept that Mr Khosa was not impressed by what he (Mr Khosa) saw as the claimant's tactics in revisiting the question of the incentive payments that Mr Khosa considered to be closed, but this question of "acting smart" predates the protected act.

146. Mr McCombie continues:

> *"It rings true, especially taken with Ms Shah's evidence of his part in the grievance outcome, that he would wish to punish C for taking the further step of a tribunal claim. The time taken to deal with the 2021/22 incentive payment is indicative of interference from Mr Khosa, in a period (May 2022 to August 2022) during which C resigned (3 June), in order to delay the resolution of a fresh difficulty C experienced in getting properly paid."*

147. Mr Beever replies in this way:

> *"The circumstances are infused with the language of "error" and "tagging of accounts". NewNew considerations arising. Ordinary workplace events. Not the first time that C has encountered end of year "tagging" errors which needed challenging: in 2020, issues are raised in May and are still apparent in July, which plainly undermines the victimisation claim.*
>
> *The errors were the subject of detailed correspondence between 13 May and 16 June, which explains why no payment in May payroll. There is nothing untoward in the correspondence nor any sense of C being treated dismissively or detrimentally. There was partial reconciliation in June payroll and full satisfaction in August payroll. C accepted that "it sometimes happened" that payroll run late. There was plainly reasonable cause: and a suggestion that someone might have deliberately entered wrong tagging details is unmeritorious."*

148. We accept that every year end would involve resolution of "tagging" problems – that is, deals that had not been correctly allocated to the relevant salespeople. As Mr Beever says, there is no sense in the correspondence that the claimant was "*being treated dismissively or detrimentally*".

149. We do not see in this material from which we could conclude that the incentive payments were delayed in whole or in part because of the claimant having brought a tribunal claim. It appears to be normal that calculation of final incentive payments could be delayed and we see nothing untoward here that would suggest unlawful victimisation.

150. The remaining three detriments arise from decisions made by Mr Garg. Mr Garg was not called as a witness by the respondent. Despite the tribunal raising this during the course of the hearing we were never given an explanation why he was not called as a witness. It would normally be expected that he would be the person best placed to explain why he had done particular things.

151. We do not think the failure to call Mr Garg as a witness is something that of itself that amounts to facts from which we could decide that there had been unlawful discrimination (s136(2)) but we will bear it in mind when considering whether it is appropriate to draw any inferences of discrimination.

152. Despite there being no first hand evidence from Mr Garg, the respondent's other witnesses, some of whom were involved in the claimant's grievances, have offered explanations on his behalf.

153. As regards the intended meeting with Mr Debecker, we accept Mr Beaver's submission that the claimant was originally expecting this to be set up in January 2022, but that this did not occur. This was before any protected act. Mr Garg did not set up the meeting the claimant was expecting either before or after the protected act. There is no indication that something changed after the protected act in circumstances where, on the claimant's case, the meeting should have been but was not set up before the protected act. Mr Garg's failure (if that is what it is) was the same before and after the protected act.

154. As regards the long-service email, the claimant's complaint about that was that "*Mr Garg failed to send a long-service email to the customary colleagues when C attained 10 years' service.*" This fell away during his evidence. Mr Garg had sent the email to others but because he had used mailing list addresses it was not possible for the claimant to say that this has not been sent to the "customary colleagues", by which he meant more senior managers.

155. Instead this became that Mr Garg had not made any reference to the claimant's future within the respondent in forwarding the email. We saw other examples where Mr Garg had done that for colleagues.

156. The respondent can be forgiven for not addressing this point when it was not something that had previously been raised by the claimant, but it was noted during evidence that in the body of the email, in his own tribute to the claimant, Mr Garg included "*I wish you successful career ahead*". It does not seem reasonable to interpret this as Mr Garg wishing him a successful career outside the respondent.

157. At this point the alleged detriment becomes that the reference to future career by Mr Garg was in the wrong place – in the tribute in the body of the email rather than in the lines forwarding it to others. We do not see that this can properly be considered to be a detriment, although if it were it seems highly improbable that because of the claimant's protected act Mr Garg decided that he would include reference to the claimant's future career in one part of the email but not another. We reject that suggestion.

158. It is correct to say that Mr Garg did not invite the claimant on the work trip to India. Was this because the claimant had done a protected act?

159. The first point on this is that we know from the original email that D2 grade employees were the ones that were expected to be invited. D1s were invited only by special exception, so why did Mr Garg invite another D1 rather than the claimant?

160. In the absence of an explanation from Mr Garg, we have one from Sheekha Shah, who investigated the claimant's grievance. She says:

> *"In the main, Manish Garg chose country heads to attend the event. However, as the UK did not have a country head at that time, and as* [another D1 employee] *had been in a sales leader role for a longer time at that point than the claimant he selected* [that other employee] *rather than the claimant to attend the meeting. Manish Garg also felt that it was more appropriate to invite* [that other employee] *over the claimant because* [that other employee] *managed a considerably larger farming portfolio and had a sizeable team that reported to him."*

161. We do not think the basic facts there are disputed. It was mainly country heads who attended. There was no UK & Ireland country head at that time. The claimant's colleague had longer service, a larger portfolio and more people reporting to him.

162. On the face of it this is a sensible explanation why the claimant was not invited to the meeting, but is it the true explanation?

163. The point relied upon by Mr McCombie in his submissions as suggesting victimisation or this not being the true explanation is the absence of any first-hand evidence from Mr Garg. We have explained before that we are troubled by the absence of Mr Garg and the lack of evidence from him, but having taken that into account we do not see that it is something from which we should draw an inference that there could have been victimisation nor that the apparently rational explanation given was not the true explanation.

164. We have considered the absence of Mr Garg more broadly across the other allegations of victimisation, but do not consider that in the circumstances of this case we should draft an inference from that that there is material from which we could conclude that there has been victimisation, nor that the explanations given by the respondent are incorrect. The claimant's claims of victimisation are dismissed.

**Constructive dismissal**

165. The acts of victimisation are said also to be (or to contribute to) breaches of the duty of trust and confidence. This does not depend on them being acts of victimisation. It may well be that something that is not an act of victimisation is nevertheless a repudiatory breach of contract or contributes to a repudiatory breach of contract. However, given our findings on these points above we do not see how it can be said that they amounted to or contributed to a repudiatory breach of contract.

166. The remaining matters that are said to amount to or contribute to a repudiatory breach of contract occurred or continued after the claimant had applied for a job with Infosys. He was appointed to this job and took it up shortly after his resignation from the respondent. That is not necessarily inconsistent with his position that his resignation was caused by a repudiatory breach of contract, but it is a matter we will bear in mind, and clearly gives the respondent the

opportunity to argue that the real reason for his resignation was that he had found a job he preferred to his job with the respondent, not that there had been any repudiatory breach of contract.

167. The claimant's position that the grievance outcome had "*unsatisfactory logic*" leads to the question what there was about it that amounted to unsatisfactory logic. This is a difficult point to the claimant particularly as he declined the meeting he had been offered prior to receiving the grievance outcome.

168. While it is clear that the claimant does not agree with the outcome of the grievance, exactly what is said to be "unsatisfactory logic" is unclear. It is not mentioned in either the claimant's witness statement nor Mr McCombie's closing submissions. Since we are not at all clear what this is, we will take it no further. We do not find that there was "unsatisfactory logic" nor that this amounted to or contributed to any repudiatory breach of contract.

169. It was clear from what emerged during the hearing that the response to the claimant's SAR was incomplete. Mr Beever's response to this was that the SAR was being taken seriously and that nothing was done that was untoward. He said:

> *"The search was done by IT, (Manish Garg … and Ateet Khosa … among others provided IT with full access). Thus undertaken by those who would be expected to understand and facilitate the request more efficiently than individuals. SAR requests are data and process driven and do not require relevant actors' personal involvement. Secondly, and more crucially, the process was overseen by reputable third party external advisor (lawyer). Hence, not objectively damaging and further it is perhaps strongly suggestive that the SAR process and outcome met a "reasonable and proper cause" threshold."*

170. Thus while we have found that the SAR response was incomplete Mr Beever says that this does not point towards a breach of the duty of trust and confidence as there was nothing deliberate about any incomplete response. It was outside the hands of those the claimant has criticised elsewhere in the claimant's claim and done under the supervision of the respondent's lawyers, suggesting it was not "objectively damaging". We will consider this in our conclusions on the question of whether there has been a constructive dismissal. Mr Beever's argument that there was "reasonable and proper cause" for any incomplete SAR response is difficult as no particular reason for the SAR response being incomplete has been provided to us. In general, the respondent's position seems to have been they did the best they could, rather than explaining why the response was incomplete.

171. It is correct to say that the respondent intended to make changes that would affect the claimant and his team's role. As Mr McCombie points out, the potential scope of these changes was acknowledged by Mr Debecker himself. They seemed to catch Mr Debecker unawares. There is no suggestion that

these changes were particularly directed at the claimant, but there were changes that the respondent intended to make. It is not entirely clear what those changes were, since the most we heard on that was by way of a kind of introductory presentation. It seems the idea was that there would no longer be hunters alighted to different sectors such as CIS (the claimant's present role) but instead hunting would be done by reference to "strategic market units" – that is, by reference to particular industries such as retail or banking. This would be expected to change the incentive arrangements applicable to the claimant, although details on that were unclear.

172. There are two things that could amount to or contribute to a breach of the duty of trust and confidence: the incomplete SAR response and the intended reorganisation.

173. A point that the respondent was keen to note was that the claimant had accepted his new job at Infosys on 23 May 2023. Both the incomplete SAR response and the presentation about the reorganisation occurred on 25 May 2023, so after he had accepted his new role although, as Mr McCombie pointed out, before he had actually resigned from the respondent, which occurred around a week later. Mr McCombie referred back to the claimant's evidence on this point, saying that the period between accepting his new job and resigning amounted to a "*final making up his mind*".

174. It is true to say that there is a distinction between accepting another job and resigning from your current job, and that for constructive dismissal purposes it is the latter rather than the former that is the essential point. However, in the circumstances of this case the distinction is not obvious. The claimant was a serious-minded professional with ten years' service at a senior level with the respondent. He would not have committed to a new employer without careful thought. There may be some cases in which an individual accepts a new job but gives their current employer one last opportunity to keep them by correcting previous grievances, but that was not what happened in this case. Before anything that we have found could constitute a breach of contract the claimant had accepted a job with a rival employer. What subsequently happened was not a failure to correct earlier errors, but, on the claimant's case, two further breaches of contract.

175. Another way of looking at this is what would have happened if the respondent had given a full response to his SAR and not held a presentation concerning a reorganisation two days after he had accepted his new role. Would the claimant then have decided to stay with the respondent? That seems inconceivable. We cannot imagine circumstances in which the claimant would have seen a full response for his SAR and no reorganisation as a reason for reneging on his agreement with his new employer and staying with the respondent. He was unhappy with them for understandable reasons which did not amount to a breach of contract. He found work elsewhere as a result. That was the reason why he resigned and it was not to do with the response to his SAR or the proposed reorganisation.

176. That is sufficient to dispose of the unfair dismissal and breach of contract claims – there was no constructive dismissal because the claimant did not resign in response to anything that could be considered to be a repudiatory breach of contract.

177. For the sake of completeness we will address the question of whether the incomplete response to the SAR and the proposed reorganisation did in fact amount to a breach of the duty of trust and confidence. We do not consider that they did – either taken separately or together. An incomplete response to a SAR seems to be simply that – an incomplete response to a SAR. There are remedies for that via the ICO, and we do not see that it is necessary or appropriate to view this as being or contributing to a breach of the duty of trust and confidence in these circumstances. On the question of the proposed reorganisation, it does appear that sale structures within the respondent were somewhat fluid. There is no suggestion that the reorganisation targeted the claimant or was anything other than a good-faith attempt by senior manager to achieve the best possible sales structure. We do not see that this amounts to or contributes to a breach of the duty of trust and confidence. There was no repudiatory breach of contract by the claimant.

## Conclusion

178. The claimant's claims are dismissed.

Employment Judge Anstis
Date: 24 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
1 July 2024
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FOR EMPLOYMENT TRIBUNALS

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# APPENDIX – LIST OF ISSUES

1. **Unlawful deductions from wages (1st and 2nd claims)**

   1.1. C asserts that he is entitled to:

      1.1.1. Bonus of 1% (1st claim)

      1.1.2. Incentive under the 20-21 Sales Incentive Plan (1st claim)

      1.1.3. […]

   1.2. Was each of the items listed in the statement of loss (and as stated above) within the statutory definition of 'wages', as defined in s27 Employment Rights Act 1996?

   1.3. If so, were those wages 'properly payable'?

   1.4. Has R made any deductions from those wages?

   1.5. Was the total amount of wages paid on any occasion by R to C less than the total amount of the wages properly payable on that occasion?

   1.6. In respect of 1.1.2 only, has C brought such claims within the timeframe set out in s.23 Employment Rights Act 1996.

   1.7. If so, was the deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of C's contract?

   1.8. If not, had he previously signified in writing his agreement or consent to the deduction?

   1.9. Was any deficiency of wages attributable to an error of any description on the part of the employer affecting the computation?

   1.10. If not, what is the amount of the unlawful deduction(s)?

2. **Direct discrimination because of race (1st claim)**

   2.1. Was C treated less favourably than the named comparator (Mr Patrick), alternatively a hypothetical comparator? C contends that the less favourable treatment was that R:

      2.1.1. Paid C bonus entitlement on a less favourable basis than the comparator

      2.1.2. Applied to C's bonus payment a less favourable currency conversion rate than that applied to the comparator.

   2.2. (In the case of the named comparator) were Mr Patrick's circumstances the same or materially the same as C's (section 23, EqA 2010)?

   2.3. Was any less favourable treatment because of race?

3. **Victimisation (2nd claim)**

   3.1. C relies on the first claim in February 2022 as the protected act pursuant to s.27(2) EqA.

   3.2. C relies on the following alleged detriments:

      3.2.1. That between 30 May 2022 and 31 August 2022 R delayed an incentive payment (due for the 2021/2022 financial year);

3.2.2. That between 1 March 2022 and the end of his employment Mr Garg failed to set up a growth development meeting with Mr Debecker;

3.2.3. That on 29 March 2022 Mr Garg failed to send a long-service email to the customary colleagues when C attained 10 years' service; and

3.2.4. That during a period ending on 22 April 2022 Mr Garg failed to invite him on a work trip to India.

3.3. Did any of these acts complained of constitute a detriment to the Claimant?

4. **Constructive unfair dismissal**

4.1. C relies on the alleged conduct below as repudiatory breaches by R:

4.1.1. failure to set up growth development meeting (para 3.2.2 above).

4.1.2. inadequacy of the long-service email (para 3.2.3 above)

4.1.3. failure to invite C on the work trip to India (para 3.2.4 above)

4.1.4. the unsatisfactory logic of the grievance outcome of 12 May 2022.

4.1.5. the incompleteness of the SAR response (due to heavy redactions) on 26 May 2022.

4.1.6. reorganising the business in a way that affected C's role, from 25 May 2022 (expressed to take effect from 1 April 2022).

4.1.7. the delayed incentive payment (still outstanding at date of resignation)

4.2. Did each or any alleged event above take place?

4.3. Did it amount to a repudiatory breach of any implied term?

4.4. That is, viewed objectively, was any of the alleged conduct above, on its own or, taken cumulatively ('the last straw doctrine') likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in their employer?

4.5. Did C resign as a result of any repudiatory breach?

4.6. At the time of his resignation, had he accepted any breach and affirmed the contract?

4.7. If there was a constructive dismissal under s.95(1)(c) ERA, was such a dismissal unfair (s98(4) ERA)?

5. **…**

6. **Wrongful dismissal**

6.1. Did R commit a repudiatory breach of C's contract?

…