



EMPLOYMENT TRIBUNALS

Claimant: B Mitchell

Respondent: Novaplex Business Solutions Limited

Held at: London South Employment Tribunal

On: 3 September 2025

Before: Employment Judge Burge

Representation

Claimant: Mr S Maini-Thompson, Counsel

Respondent: Mr O Jackson, Counsel

JUDGMENT

The Judgment of the Tribunal is:

1. The complaints in relation to commission payments and share options are dismissed upon withdrawal.
2. The complaint of wrongful dismissal is not well founded and is dismissed; and
3. The complaint of breach of contract (employer's pension contributions) is not well founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 16 October 2023 as Chief Operating Officer until he was dismissed for gross misconduct on 10 December 2024. He claims that he did not commit gross misconduct and

so was entitled to notice pay and that the Respondent should have been paying employer's pension contributions at a rate of 8% throughout his employment but had not been.

The evidence

2. The Claimant, Ben Mitchell, gave evidence on his own behalf. Michelle Langton, Chief Executive Officer, founder and Director of the Respondent gave evidence on behalf of the Respondent.
3. The Tribunal was referred during the hearing to documents in a hearing bundle of 618 pages. During the evidence of Ms Langton, a further email was disclosed and accepted into evidence.
4. Mr Jackson provided written submissions and both Mr Maini-Thompson and Mr Jackson provided the Tribunal with oral closing submissions.

Issues for the Tribunal to decide

5. At the start of the hearing the Claimant withdrew his complaints for commission and share options.
6. The remaining issues were for breach of contract:
 - a. Notice pay
 - i. was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?
 - b. Was the Respondent in breach of contract in not paying 8% employer's pension contributions?
7. While the Claimant had raised breach of ACAS Code of Practice on disciplinary and grievance procedures, it was stated at the start of the hearing to be about the failure to follow a fair dismissal procedure. This did not follow from the Claimant's complaints (he does not have enough service to bring an unfair dismissal complaint). It was not pursued in closing submissions.

Findings of Fact

8. On 16 June 2023 the Claimant wrote an email to Ms Langton setting out his expectations for the role. He set out his remuneration packages with his previous and current employer. Of his current employer he said

*"...the overall theme here was to initially take a lower salary in exchange for higher commission earning potential and equity award. Base salary: £165k (with agreement that this would increase £20k each year until it reached £225k- these increases were not performance related)
Commission plan & bonuses: £185k*

*Company pension contributions: 8%
Private medical insurance
30 days annual leave
Equity award at target valuation: £5m”*

9. The Claimant then said

*“In terms of what a remuneration package might look like at Novaplex, here is a suggestion.
Base salary: £165k (with agreement that this would increase in increments over time - I am happy for this to be performance related)
Commission plan & bonuses: £185k
Company pension contributions: 8%
Private medical insurance
30 days annual leave
Equity award at target valuation: £5m (based on a target valuation of £100m)”*

10. The Tribunal finds that the Claimant was communicating the expectation that the employer's pension contributions would be 8%.

11. In an email dated 23 June 2023 the Claimant provided comments on the draft contract of employment. In relation to pension he said “12 – Pension. The company pension contribution % needs to be stated.”

12. In relation to pension the offer letter dated 11 July 2023 stated

“You are entitled to join the Company Pension Scheme and Health Scheme, this would usually be after successful completion of probationary period, but as a known entity to the owner of the business, an exception will be made and the administration of this will be dealt with upon acceptance of the offer and will commence at the earliest date possible after completing the necessary paperwork between the parties.”

13. The Claimant was employed by the Respondent, Novaplex Business Solutions Ltd, as Chief Operating Officer from 16 October 2023.

14. The Claimant's contract of employment provided:

*“12. Pension
If you are eligible, the Company will auto-enrol you into a pension scheme, in accordance with the Company's pension auto-enrolment obligations.
Full details of the scheme will be provided when you are enrolled, including the minimum contribution level that you will be required to make and your right to opt out if you do not want to join the scheme.
While participating in the scheme, you agree to worker pension contributions being deducted from your salary.*

The Company Pension Scheme is NEST and we will transfer your existing NEST Pension to the Novaplex Company Scheme. We will confirm the terms of the transfer once acceptance to the Scheme has been confirmed by the Pension Administrator. The Company has offered to match your current % contribution of base salary, which is believed to be 8% but will be confirmed once we receive all the administrative documents from NEST.

The scheme is subject to its rules as may be amended from time to time, and the Company may replace the scheme with another pension scheme at any time."

15. The Claimant's contract of employment further provided:

3.2 You are required to comply with the Company's rules, regulations and policies for its employees from time to time in force."

*...
"23.3 Nothing in this Contract prevents us from terminating your employment summarily or otherwise in the event of any serious breach by you of the terms of your employment or in the event of any act or acts of gross misconduct by you."*

16. There was no evidence to the Tribunal that the Claimant had ever been provided with the Respondent's IT Security Policy or the Computer and Telephone Use Policy. The Claimant said they were never provided to him, this is accepted by the Tribunal.

17. In evidence to the Tribunal the Claimant said that every month he had to chase to get his pay slips. He said that the pension contributions were £1100 at his previous employer, he did not notice that in his pay slips with the Respondent the contributions were £110 and he did not notice that there was an additional 0 missing. Ms Langton recalled an informal conversation she had with the Claimant where he raised the pension contribution amount and she told him it was a qualified pension scheme which was different. This is rejected as unlikely. The Claimant had no recollection of the conversation and the Tribunal finds that if it had happened it is unlikely that the Claimant would have accepted that explanation.

18. On Friday 6 December 2024 there was a firmwide issue with the Novaplex customer relationship management platform (Zoho) which led to some employees being unable to access certain parts of the platform. Ms Langton messaged some staff to say there seemed to be an issue, she was out of the office but would look into it when she was back. At 10.01 the Claimant wrote "my permissions have been removed in Zoho so there is nothing I can do about this".

19. The Claimant sent a message to two colleagues at 10:03am saying "I have just discovered that my permissions in Zoho have been removed, so it looks like I am on my way out the door." A colleague replied that he had also had a similar message but had logged back in. The Claimant wrote "No, I had

admin rights which have been removed”. The colleague replied that this “could have been changed after the updates”. The Claimant responded at 10:04am “Unfortunately that is wishful thinking”.

20. Ms Langton replied to the Claimant at 10:08am: “No permissions have been removed – just licences have been updated as part of renewal – let me know what you can’t do and I’ll look into it when I’m back...”.

21. At 10:42am, the Claimant started a download of files from the Respondent’s server onto his personal drive. Screenshots were provided to the Tribunal of the Claimant’s screen showing the download. The evidence of Ms Langton is accepted that she got alerted of the large file transfer by monitoring software. She contacted the Claimant at 10:59am to say that the Claimant had been transferring data and company information to a personal drive, that this downloading was unacceptable and to “leave your laptop untouched – this situation is extremely serious”. The Claimant replied “I have done nothing of the sort. I back up my emails but have not transferred any company confidential data”.

22. Ms Langton wrote “it’s been flagged by automatic systems – the logs and all activity will be reviewed. I am arranging for immediate collection of the laptop”. The Claimant replied that the laptop was not to be collected until all of his personal data was removed. Ms Langton then messaged again saying that the laptop is company property and must be returned immediately. To address his concern regarding his personal data she confirmed that arrangements would be made to provide him with access to retrieve any personal files that did not contain company related or confidential information. Further messages were exchanged with Ms Langton stating “I must remind you that the situation is extremely serious, and the copying of 1000s of files needs to be investigated properly and thoroughly.” The evidence of Ms Langton is accepted that she

“later learned that he had initially downloaded over 1,395 of the Respondent’s files onto his personal OneDrive, which included client folders, finance data, contracts and pricing information (page 411). These files were confidential and contained the Respondent’s confidential information, including commercially sensitive information.”

23. The Claimant continued to transfer files. The Respondent says it was 221,718 company files onto his personal laptop, his personal one drive and his own external USB stick. The Claimant says he was transferring the contents of his personal Onedrive. The Respondent tried multiple times to remotely shut down the Claimant’s laptop to stop the transfers. The Claimant put the laptop into flight mode to stop the remote shut downs. He then downloaded a ‘Secure Eraser’ software program on the laptop. This was uncovered through a computer forensics report, produced later.

24. On 6 December at 12.53 the Claimant raised a grievance in relation to unpaid commission, Employee Share Option Plan and pension contributions.

25. Ms Langton suspended him that day at 16:59pm. In the suspension letter she asked him to explain where he had copied all of the files, and to confirm that he would not use the downloaded information for his benefit or for the benefit of any third parties.
26. The Claimant replied at 17:25pm saying that he had not knowingly transferred any company files outside of the Respondent's network and that the only action he could think of involving a large number of files being transferred was when he tried to copy the contents of a particular file that he wanted to access while on holiday.
27. On Monday 9 December 2024 the laptop was collected from the Claimant by courier.
28. On Tuesday 10 December at 9:45am, the Claimant raised a whistleblowing complaint, alleging various wrongful acts by the Respondent. In the email he said "I have evidence to support these assertions" and "depending on your response to this whistle blow, I will then consider whether to share the information contained within it with my legal advisors in considering disclosure of the information to Litera". Litera is one of the Respondent's competitors. The whistleblowing allegation was not taken further by the Claimant.
29. The Claimant was summarily dismissed for gross misconduct on Tuesday 10 December at 18:22. The reasons for dismissal were:
1. Downloading private company data onto a personal drive and / or any external devices without authorisation or permission from the Company
 2. Downloading software on his Company computer to conceal evidence
 3. Breach of the Data Protection Act 2018
30. A forensic report was carried out post termination by an external company. The Executive Summary stated:
- "3.1 Ben Mitchell has used a device to siphon many files to his personal device, in addition to this he used the Anti-forensic tools to cover his tracks. Despite the use of the tool there was still data that remained that was able to illustrate what had happened on the 6th of December 2024."*
31. The grievance process continued post dismissal. In relation to the pension contributions the Respondent stated that the Claimant had never provided the proof of 8% contribution as envisaged by the contract and requested proof that the Claimant's previous employer had paid 8% contribution rate. The Claimant provided that proof, initially with 3 months' worth of proof and then later with 6 months proof. The Respondent did not pay the 8% contribution.

Legal principles relevant to the claims

- 32.1. Employment tribunals in England and Wales were given power to deal with breach of contract claims by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order").
33. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.
34. Lord Evershed in *Laws v London Chronicle (Indicator Newspapers Ltd)* [1959] 2 All ER 285, set the question as "whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service". "...the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions".
35. Mr Jackson referred me to *Adesokan v Sainsbury's Supermarkets Ltd* (CA) [2017] ICR EWCA Civ 22 wherein Elias LJ said:

"Was the misconduct gross?"

21 Under the contract, the employer is entitled to dismiss summarily for gross misconduct. So when can misconduct properly be described as "gross"? In my view a useful starting point in answering that question in the context of this case is the judgment of Lord Jauncey of Tullichettle, acting as the Visitor to Westminster Abbey, in *Neary v Dean of Westminster* [1999] IRLR 288, para 22:

"Whether misconduct justifies summary dismissal of a servant is a question of fact. In Clouston & Co Ltd v Corry [1906] AC 122, which concerned summary dismissal for drunkenness, Lord James of Hereford delivering the judgment of the Board said at p 129: 'Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.' His Lordship went on to observe that 'the question of whether the misconduct proved establishes the right to dismiss the servant must depend upon facts - and is a question of fact.'"

...

23. *The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence."*

36. An objective test is used for ascertaining the intention of the parties to the contract. From the standpoint of a reasonable person. Where there is ambiguity in a contract, a court or tribunal must consider the language used and ascertain what a reasonable person, who has the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. If there were two possible constructions, the court was entitled to prefer the construction which was consistent with business common sense and to reject the other. (*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50).

37. Mr Jackson brought my attention to the case of *Ms N Colomar Mari v Reuters Ltd* (UKEAT/0539/13) wherein Browne-Wilkinson P in *WE Cox Toner (International) Limited v Crook* was quoted:

“Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: Allen v Robles [1969] 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.”

38. The purpose of an award of damages for breach of contract is to compensate the injured party for loss, rather than to punish the wrongdoer. The general rule is that damages should (so far as a monetary award can do it) place the claimant in the same position as if the contract had been performed (*Robinson v Harman* (1848) 1 Ex 850).

Conclusions

Wrongful dismissal

39. On behalf of the Claimant Mr Maini-Thompson submitted that there was no gross misconduct, it was a series of misunderstandings whereby Ms Langton acted too hastily. He said that the Claimant had downloaded some files because he was going to go on holiday and retain some access to his work materials. Further, the Claimant is an IT expert and knows that if the Respondent took hold of the laptop they would have access to his personal OneDrive.

40. On behalf of the Respondent Mr Jackson submitted that the Claimant's accounts were inconsistent, the Claimant dishonestly claiming not to have downloaded any files at all, disobeyed his CEO (Ms Langton's) instructions to leave his laptop untouched and installed eraser software onto his computer and put it into aeroplane mode to cover his tracks. He then wrote

a whistleblowing email saying that he would disclose confidential files to his legal team and then the competitor.

41. "The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category..." (*Adesokan v Sainsbury's Supermarkets Ltd* (CA) [2017] quoting *Neary v Dean of Westminster* [1999] IRLR 288). The laptop was a work laptop, although it had a copy of the Claimant's Personal OneDrive on it. The Claimant mistakenly thought he was going to be pushed out of the Respondent as he was not able to access an online platform. He then started downloading the Respondent's files including confidential and commercially sensitive information to his Personal OneDrive. On the balance of probabilities, it was a deliberate act. Had it not been a deliberate act his response was likely to have been very different. He would have stopped the transfer, explained the mistake and allowed the Respondent to take the laptop to assess what had happened.
42. Instead, the Claimant disobeyed Ms Langton's reasonable instruction to leave his laptop untouched. He put his laptop into flight mode and downloaded 'Secure Eraser' software so that the Respondent would not be able to see what he had erased when the laptop was returned. The Claimant then said he had retained evidence and, depending upon their response, was going to disclose this evidence to his lawyers for consideration of onward disclosure to their competitor. This undermined his evidence to the Tribunal that he was only concerned about deleting his Personal OneDrive account and that is why he had refused to hand over his laptop without securely erasing his personal OneDrive. The Claimant's email demonstrated that he had retained sensitive information belonging to the Respondent. The Claimant's actions were willful which poisoned the relationship: they amounted to gross misconduct. I conclude that, on the balance of probabilities, the Claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract. The Claimant was therefore not entitled to be paid notice pay, this complaint therefore fails and is dismissed.

Pension Contributions

43. On behalf of the Claimant Mr Maini-Thompson submitted that the pensions clause was not ideally drafted but it was possible to discern what the intention of the parties was. The Claimant was expecting the Respondent to match the contributions that his previous employer had made and that he had not waived the breach when the employer did not pay that contribution. He submitted that during the grievance procedure the Claimant had supplied the requested documentation to the Respondent and so the condition was fulfilled late, albeit after the employment had ended.
44. On behalf of the Respondent Mr Jackson submitted that the contractual condition was never satisfied and so the obligation was not triggered. The provision of the documents post employment did not affect matters as the

contract had come to an end. Even if that was wrong, the Claimant affirmed the contract.

45. The Claimant clearly wanted to have 8% employer pension contributions included in his remuneration package, the pre contract negotiations reveal that. However, the clause that was included in the contract was

“The Company has offered to match your current % contribution of base salary, which is believed to be 8% but will be confirmed once we receive all the administrative documents from NEST.”

46. An objective test is used for ascertaining the intention of the parties to the contract from the standpoint of a reasonable person. Where there is ambiguity in a contract, a court or tribunal must consider the language used and ascertain what a reasonable person, who has the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. Here, however, there is no ambiguity, the clause says that the Respondent will match the current % contribution of base salary (believed to be 8%) but *“will be confirmed once [they] receive all the administrative documents from NEST”*. The obligation to pay 8% arose once they received the documentation from Nest. They never received it and so the condition was not fulfilled and the obligation to pay 8% did not arise. The contract came to an end when the Claimant’s employment was summarily terminated on 10 December 2024. Provision of the Nest documents after this date therefore did not give rise to a contractual entitlement as the obligation under the contract ended. The Claimant’s complaint for breach of contract for failure to pay 8% pension contributions therefore fails and is dismissed.

Employment Judge Burge

Date ~~15 September 2025~~
Corrected 9 December 2025

MS

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>