EMPLOYMENT TRIBUNALS

Claimant: **Mr B George**

Respondent: **Simtom Food Products Limited**

Heard at: **Leicester**

On: **4, 5 and 6 January 2017**
10 February 2017 (in chambers)

Before: **Employment Judge Ahmed**

Members: **Mr M Robbins**
Ms J Dean

Representation
Claimant: Mr Alford of Counsel
Respondent: Mr Jenkins of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The complaints of indirect discrimination because of religion or belief, harassment, detriment by reason of health and safety and an unlawful deduction of wages are all dismissed upon withdrawal.

2. The complaint of constructive unfair dismissal is dismissed.

3. The complaint of breach of contract in respect of unpaid bonus payments succeeds. The Respondent is ordered to pay to the Claimant damages for breach of contract which if not agreed shall be listed for a remedy hearing.

REASONS

1. By a Claim Form presented to the Tribunal on 29 May 2016, Mr Bincemon George (born 9 May 1977) brings various complaints against his former employer, Simtom Food Products Limited. The complaints of indirect discrimination based upon the protected characteristic of religion or belief, harassment and detriment for health and safety were withdrawn at the hearing. They are dismissed upon withdrawal. There was also a lengthy application at the commencement of the hearing to amend the claim to plead the existing bonus

claim which had been brought as a complaint for an unlawful deduction of wages to be pursued in the alternative as a complaint of breach of contract no doubt to avoid any out of time issues. Despite the fact that this appeared on the face of it to be nothing more than a re-labelling exercise, the application was opposed by the Respondent. There was also an application to amend the relevant provision, criterion or practice for the indirect religious discrimination complaint. After hearing submissions, but before announcing our decision on the applications to amend, agreement was reached between the parties whereby the Respondent no longer opposed the amendment application on the breach of contract issue but at the same time (we do not know whether the two were connected) the Claimant withdrew the complaints mentioned above. Accordingly, by consent, we amend the claim to allow Mr George to bring a complaint of breach of contract in respect of the bonus. In relation to any claim for overtime payments as set out in the Claim Form, the bonus issue incorporates the same claim as the overtime.

2. In coming to our decision we have taken into consideration the oral evidence of the witnesses, the documents in the agreed bundle and the submissions by Counsel on both sides, to whom we are grateful. Giving oral evidence were the Claimant himself and some former colleagues whom he called namely Mr Jordan Gutang and Mr Pawel Lokietek. Their evidence was largely in relation to how they perceived working conditions to be unpleasant and how they believed there was very little mechanical equipment to assist or if it existed it was faulty or of no value. Their evidence was, it has to be said, largely irrelevant to the issues we have to determine. There was also a witness statement from Mr Krzysztof Jurczak which was admitted into evidence though Mr Jurczak was not called. His statement follows the same themes as the other witnesses called by the Claimant. From the Respondent we heard from Mr Jai Chandarana, Managing Director and Co-Founder of the Respondent, Mrs Jyoti Chandarana, Operations Director and Mr Chandarana's daughter-in-law, Mrs Jane Critchley, HR Manager and Mr Carl Woolrich, Engineering Manager. This decision represents the views of all three members of the Tribunal following a reserved decision meeting.

3. Mr George began working for the Respondent as a Production Operative and then later as a Production Supervisor. The Respondent is a relatively small business started in 1977. It manufactures condiments and ready-made meals of Asian food. Mr Chandarana has been and to a large extent remains the one who makes key decisions affecting the business although as it is a family concern his son and his daughter-in-law are also involved as Directors. The business has factory premises in Desford, Leicestershire. The factory has two main production lines, A and B. It employs approximately 77 people including an HR Manager and a Finance Director.

4. Mr George came to the UK in 2004 on a work permit. In March 2006 he applied for and joined the Respondent. Mr George had previous experience in the food industry. Over the years, Mr George and Mr Chandarana developed a close personal working relationship which can be gauged from the fact that Mr Chandarana gave the Claimant a loan through the business of £6,000 which was repaid from salary on a monthly basis. Mr Chandarana believes that there is still some £900 outstanding from the loan.

5. Mr George was usually willing to do overtime but by 2010 as the business continued to grow, and it was now producing items in much larger quantities for at least one household supplier, the demands of overtime increased significantly. As an incentive to undertake regular overtime, Mr Chandarana offered the Claimant a quarterly bonus of £400 if he worked 45 hours or more per week in

any given quarter. There is disagreement as to how bonus entitlement was to be calculated. We will deal with that in more detail below. The existence of a bonus scheme is however not in dispute. From 2011 onwards bonus payments were actually made but in due course they became less frequent and then practically stopped. It is the Claimant's case that the bonuses fell due but Mr Chandarana repeatedly reneged on promises to pay despite numerous reminders and chasers.

6. It is the Claimant's case that as time went on Mr Chandarana's attitude to him became increasingly hostile with unrealistic work demands and expectations. Not only was Mr Chandarana's behaviour less friendly but he was also constantly pushing for greater production for the same rate of pay. Mr George also accuses Mr Chandarana of unethical business practices. He says that when the company was in the process of setting up a new production line there serious concerns as to health and safety were raised by the then Quality Assurance Manager who ultimately chose to resign over the issue. We should say that whilst Mr George asserts this he has produced no evidence in support and we do not find the allegation substantiated.

7. In 2015, Mr George says that health and safety inspectors visited the premises and Mr Chandarana asked his staff to disconnect all the machines, keep them in a corner and cover them in a plastic sheet so that their true condition would not be detected. The inspectors were also told not to enter one of the production rooms where health and safety breaches would have been identified. Mr George relies on alleged breaches of health and safety as part of his reason for his resignation. We have to say that we regard it as rather fanciful that trained health and safety inspectors would be so easily put off from their inspections as Mr George suggests. We find no evidence to support Mr George's allegations of breaches of health and safety.

8. In the summer of 2015, representatives from Lidl, one of the Respondent's main customers, visited the premises for health and safety checks. Once again it is alleged by the Claimant that Mr Chandarana was able to avoid a proper and detailed inspection by hiding things in one room telling them that it was being used purely for storage when in truth it was a production area.

9. In December 2015 Mr George went to India to see his parents. Prior to his departure there were 5 people working on production Line A. When Mr George returned he noticed the line had been reduced to only 3 staff yet Mr Chandarana wanted the same level of output. The Claimant alleges that following his return from India Mr Chandarana called him to the office and told him that he would need to work 3 weekends every month because they were now behind due to the time he had taken off. Mr George, a strict Catholic, was concerned that this would prevent him from going to Church on Sundays. Mr George accepts that he did occasionally work on Sundays but only very reluctantly and he was certainly not happy to do it on a regular basis.

10. In relation to the outstanding bonus payments Mr George says that before he went to India he had asked for the bonus payment which was due to him and Mr Chandarana said that he would pay him on his return but did not. He continued to press for payment after he returned until sometime in February 2016 when Mr Chandarana said told him that he would no longer be paying bonuses at all.

11. On15 January 2016, there was an important meeting although both of the Claimant's witness statements are silent on it. The meeting was between the

Claimant, Mr Jai Chandarana, Mrs Jyoti Chandarana and Mrs Critchley. The Respondents say that Mr George told them that his father was very ill and he needed to return to India but he did not have the money. He did not know how long he would be away for. He said that he had worked very hard for the company and wanted to be made redundant. The Claimant was told that he could go but they would need to know when he would return. They said they could not make him redundant as his job was not in fact redundant. Mr George then asked Mr Chandarana for a loan for the flight. Mr Chandarana said that although a loan had been given in the past the business could no longer do so. Mr George said that he would speak with his family and let them know of his decision. On 18 January, Mrs Critchley asked what his plans were and Mr George said that he no longer needed to go to India as his brother was going instead.

12. On 24 February 2016 Mr Chandarana sent the Claimant to another warehouse unit belonging to the business, which is 17 miles away from the main factory and where the Claimant was usually based. It was not unusual for Mr George to be asked to go there but the distance meant that allowance needed to be made as to when the Claimant could get back to base or go home. On this day Mr George was asked to work at the other site until 2.00 pm and then return to cook two batches back at base. Mr George told Mr Chandarana that it was impossible to do two batches if he was to return at 2.00pm as this would take 5 - 6 hours and his shift finished at 6.00 pm. Essentially, he did not mind going to the other location as long as he could return to base in time to leave at his usual time of 6.00pm. According to the Claimant, in the course of the discussion Mr Chandarana began to shout at him and said that he must finish the two batches of cooking before he could go home. Mr George said he had needed to be home by 7.00pm as he had childcare responsibilities because his wife went to work shortly after he got home. He told Mr Chandarana of his difficulties at which Mr Chandarana allegedly responded with: “I don’t care about your children”. In his witness statement Mr George says that he was “very scared” and felt that his “life was in danger”. Mr George went off sick the following day with a headache and sent in his resignation on 26 February. The letter refers to the reasons for resignation being harassment, intimidation and bullying, victimisation, unauthorised wage deduction and an attempt to unilaterally change his contract.

THE LAW

13. Section 95 (1) ERA 1996 (“ERA 1996”) states:

“For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) and Section 96, only if)-

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a contract for a fixed term and term expires without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

14. Section 95(1)(c) ERA 1996 describes a form of dismissal which is commonly referred to as ‘constructive dismissal’.

15. In accordance with the principles established in **Western Excavating v Sharp** [1978] IRLR 27, for an employee to succeed in demonstrating that he has

been constructively dismissed, the Tribunal must be satisfied that the employer has either broken a principal term or terms of the contract or has evinced an intention to be no longer bound by one or more of those terms. The breach must be of such seriousness as to strike at the very root of the contract and the employee must leave in response to a breach. The case of **Meikle v Nottingham County Council** [1995] ICR 1 makes it clear that there may be more than one reason for resignation.

16. Mr George relies on a breach of the implied term of trust and confidence as one such reason. In **Malik v BCCI** [1997] ICR 606, the House of Lords (at page 621) set out the definition of what is meant by a breach of that implied term, namely that the employer must not:-

"without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust between employer and employee"

17. Mr George also relies on the 'last straw' principle. In **Lewis v Motorworld Garages Ltd**, [1986] ICR 157, the principle was explained in the following terms:

"… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

18. In **Omilaju v Waltham Forest London Borough Council** 2005] IRLR 35, the Court of Appeal explained that in last straw cases whilst the final act in a series of other acts may not in itself be blameworthy or unreasonable, it had to contribute something to the breach even if relatively insignificant so long as it was not utterly trivial. An entirely innocuous act could not be a final straw, even if the employee genuinely, but mistakenly, interpreted the act as hurtful and destructive of his or her trust and confidence in the employer.

19. Mr George also relies on a breach of an implied term to maintain an safe working environment, a breach of an express term as to the payment of a bonus and an attempted variation of his terms and conditions of employment.

CONCLUSIONS

20. We will deal firstly with what appeared to be the main reason for resignation set out in the ET1 at paragraph 3 (I) and (II) which is that the Claimant left because of the non-payment or unilateral withdrawal of the bonus. Whilst it is agreed that there was in place a bonus agreement we do not find that the Claimant resigned as a result of a breach in relation to any issue concerning it. The Respondent's failure to pay the bonus had been a historical breach spanning a considerable period. At the time of resignation no bonus had been paid for some months. The Claimant does not appear to have pressed his claim for bonus vigorously and whilst he never accepted the failure to pay was because the bonus was no longer payable, Mr George appears not to have pressed the matter very hard because we infer that on past experience he felt that he was unlikely to be paid. In particular, when he returned from India on 13 January 2016 and when he was asking for a specific promise to be honoured he still did not receive it. He chose not to resign at that stage. We are satisfied that he affirmed the breach.

21. There is a distinct lack of evidence as to the allegation that Mr Chandarana decided to unilaterally cease the bonus in February. There is no reference to that allegation in the primary or supplemental witness statement of the Claimant. Given that this was an important point and that the claimant has

been legally represented throughout the omission is striking. We conclude the alleged discussion as to ending bonus payments did not happen and any previous breaches were affirmed by the Claimant's conduct.

22. We do not find that there is evidence to substantiate the Claimant's allegations of bullying and harassment. There is a distinct lack of detail as to what the bullying behaviour was. What Mr George describes in reality is a deterioration of the working relationship over the years between him and Mr Chandarana. The demand for staff to work harder, without more, is not a breach of the implied term of trust and confidence.

23. The Claimant's reasons for resignation are alleged to be:-

23.1 Health and safety breaches;

23.2 The conduct of Mr Jai Chandarana, in particular the alleged bullying, intimidation and harassment;

23.3 Non-payment of the bonus;

23.4 An attempt to vary the contract of employment unilaterally;

23.5 Insistence on working 3 weekends every months which in turn meant he was not able to go to Church on the majority of Sundays;

23.6 An unlawful deduction from wages;

23.7 Victimisation.

24. In relation to the health and safety breaches, the detriment complaint has of course been withdrawn. There is no reference to health and safety issues in the resignation letter. It is not referred to as a reason for resignation in the claim form. We find no substance in the allegation that health and safety matters were a reason for resignation.

25. In relation to the alleged conduct of Mr Chandarana, whilst we find that Mr Chandarana was someone who pressed his workforce to work hard and for long hours, there is nothing to suggest that his behaviour amounted to harassment, intimidation or bullying. In particular the alleged comment as to Mr George's children is a serious allegation yet it does not appear in the ET1 or the resignation letter. The Claimant has not identified what the 'last straw' was even though he makes a somewhat incomprehensible reference to it in his letter. We conclude that there was no last straw and the conduct of Mr Chandarana on 24 February could accurately be described as 'innocuous' shorn of the allegations which we do not find proved. We do not find that the comment as to the Claimant's children was made and the Claimant did not in fact beyond his usual leaving time of 6.00pm that day or on any other day that he is able to establish as a fact. In summary, we do not find that Mr Chandarana's behaviour passes the test in **Malik**.

26. We have already dealt with the bonus issue. We have found it was not a reason for the Claimant's resignation. Payments of the bonus had not been made for some considerable time before resignation and the Claimant's evidence on when he pressed for payment and the responses received are at times vague and contradictory. The failure to pay the bonus is not even cited as a reason for leaving in the resignation letter even though four other reasons are mentioned.

27. There is no evidence as to what the attempted unilateral change in contract was other than the allegation that the bonus was to be withdrawn, which has already been dealt with. The Claimant's resignation letter on this issue is in any event extremely vague and neither the ET1 nor the two witness statements shed any light on what the attempted unilateral variation was.

28. Similarly, there are no details as to what the unlawful deductions of wages were or what the victimisation was. There is no victimisation claim in these proceedings.

29. The complaint as to discrimination on grounds of religion was withdrawn which appears inconsistent with a continuing allegation of having to work 3 Sundays every month.

30. In all of the circumstances we are satisfied that there was no breach of any express or implied term. The complaint of constructive dismissal is therefore dismissed.

31. We now turn to the complaint of breach of contract, namely the claim for outstanding bonus payments. The issue is the method by which any bonus was to be calculated and thus whether any bonus did indeed become payable.

32. The only relevant contractual provision in relation to the bonus is in a document headed 'Contracted Hours Schedule' and states:

"If you have worked 3 consecutive months at your contracted 45 hours, you will receive a £400 bonus."

33. The document containing this provision appears to have been updated in 2012 but it is agreed that it merely codified the previous position. It is also agreed, and if it is not we would find, that the three quarterly periods in question were January - March, April - June, July - September and October - December. There is no specific due date for the bonus payment but customarily the bonus payment was contained in the pay for the month after the end of the relevant quarter as is clear from the payslips of October 2011, January 2012 and May 2012.

34. The interpretation of the relevant contractual provision set out above is in dispute. Mr Jenkins on behalf of the Respondent argues that in order to give the provision its natural meaning one must look at the hours worked each week in each individual month and that a bonus is only payable if every month in the quarter produces an average of 45 hours or more. Mr Alford on behalf of the Claimant argues that one must undertake an averaging exercise so that the bonus is due if the Claimant works an average of 45 hours a week during any given calendar quarter.

35. We prefer the interpretation of the Claimant. We do so because the interpretation that the Claimant advances was the one that was in fact adopted in practice. The Respondent has paid bonuses when, if Mr Jenkins' construction was correct, the Claimant would not have been entitled to them. Mr Chandarana can provide no explanation as to why a bonus was paid (for example) in the October 2011 payslip relating to the third quarter of July - September despite the Claimant not having met the number of hours on his interpretation of the agreement. There are other similar examples. We conclude that the bonus was payable when the Claimant worked an average of 45 hours a week over the relevant three month period.

36. We conclude that on the facts the Claimant was entitled to a bonus which was due from time to time but has not been paid. In relation to quantum it appears that there are 4 - 6 and possibly even 7 such instances where a bonus was payable but not paid. However, as the evidence and submissions concentrated principally on the question of liability as opposed to quantum the position is not certain by any means. Having decided the issue of liability we hope that the parties will be able to undertake the necessary calculations themselves and to agree a figure. A global agreement may be in the best interests of the parties. If it cannot be agreed, we will list the matter for a remedy hearing. We should make it clear though that if a party acts unreasonably in terms of not agreeing quantum, an order for costs may be considered against them if a remedy hearing could properly have been avoided. The parties should within 21 days of receipt of this judgment indicate whether a remedy hearing will be required.

37. The parties should also indicate whether the question of any fees paid to HMCTS are agreed bearing in mind that only part of his claim has been successful. If not, any further hearing shall deal with that issue too.

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Employment Judge Ahmed

Date: 22 March 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS