THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE NASH (sitting alone)**

BETWEEN:

Claimant **ALEXANDER HAWKES**

and

Respondent **OXFORD ECONOMICS LIMITED**

ON: **12, 13 & 14 October 2020**

APPEARANCES:

For the Claimant: **Ms G Churchouse, Counsel**

For the Respondent: **Ms L Gould, Counsel**

JUDGMENT

The Judgment of the Employment Tribunal is as follows:-

1. The Tribunal does not have jurisdiction to consider the case of unfair dismissal.

2. The claim is dismissed.

REASONS

1. Following dismissal on 14 January 2019, the Claimant undertook ACAS Early Conciliation from 14 March 2019 to 23 March 2019. He presented his application to the Tribunal on 26 April 2019.

2. There were two case management hearings prior to this final hearing.

3. At this hearing, the Tribunal heard witness evidence from the Claimant on his own behalf. For the Respondent it heard from Mr George Armitage, the Claimant's line-manager and Mr Charles Burton, Mr Armitage's line-manager.

4. The Tribunal had sight of a bundle to 464 pages. However, there were three issues in respect of documents.

5. Firstly, there was an outstanding dispute concerning specific disclosure. The Claimant had, on 22 September 2020, made a request for specific disclosure. The Respondent's position before the Tribunal was that it had disclosed all of the documents requested by the Claimant in his 22 September 2020 request at paragraphs A-D. It explained that it no longer relied on the reasons it had previous stated for not providing disclosure, save where those documents were duplicates or were legally privileged. The Tribunal proceeded on this basis.

6. The second issue was one late and disputed additional document. This was a letter before action in respect of a potential private criminal prosecution brought by the Claimant against the Respondent. The Respondent had previously had sight of this document. The Tribunal agreed to accept this document which was only five pages long on the basis that it was proportionate.

7. After submissions, it transpired that the hard copy of this document provided to the Tribunal (and in the bundle on the witness table) was different to the version the Claimant had disclosed to the Respondent. There was a handwritten short comment on the disclosed document. The version with the handwritten comment was put before the Tribunal but no party sought to question any witness any further based on this new version.

8. The third issue was that the Claimant sought to rely on a new document after the close of evidence and submissions. This document had been created by the Claimant overnight after close of evidence. The Tribunal refused the Claimant's request to rely on this document due to its extremely late disclosure.

The Claims

9. There was only one claim - unfair dismissal under Section 98 of the Employment Rights Act.

The Issues

10. At the beginning of the hearing the Tribunal agreed the issues with the parties as follows:-

    (i) It was not in dispute that the Claimant was a member of a reserved force during his employment for the purposes of section 48 Defence Reform Act 2014.

    (ii) Was the reason for the dismissal the Claimant's membership of a reserved force, or connected with his membership, pursuant to Section 48 of the Defence Reform Act 2014? This section disapplies Section 108 of the Employment Rights Act 1996, which normally requires a Claimant to have two years' continuous service in order for the Employment Tribunal to consider a claim of unfair dismissal under Section 98

    (iii) If the reason for dismissal was or was connected with the Claimant's membership of a reserved force as per Section 48 Defence Reform Act, was this determinative of the reason for dismissal under Section 98 Employment Rights Act in that the Respondent could not rely on the potentially fair reasons of misconduct or capability under section 98(1)(b) Employment Rights Act?

    (iv) If not, did the Respondent follow a fair procedure in dismissing the Claimant? In respect of misconduct, this included whether the Respondent had a genuine and reasonable belief in the Claimant's culpability following a reasonable investigation (often referred to as the "Burchell" test)?

    (v) If not, should there be any so called Polkey deduction if the Respondent did not follow a fair procedure, that is, would and could the Respondent have dismissed the Claimant fairly had it followed a fair procedure?

    (vi) If the reason for dismissal was potentially fair, did the decision to dismiss come within the range of reasonable decisions available to the Respondent in the circumstances?

    (vii) To what, if any, extent had the Claimant contributed to his dismissal?

11. It was agreed that other remedy issues would be held over to any remedy hearing.

The Facts

12. The Tribunal found the following facts.

13. The Respondent employer employs about 90 staff, including those at its UK headquarters. Its business is providing analysis of economic sectors including real estate to professional investors and other interested parties.

14. The Claimant started work on the 5 June 2017. At the time he was a Royal Marine Reservist, and the Respondent was aware of this. He was based in the UK head office and he sat next to Mr Armitage, his line-manager. His job was head of real estate for UK, Nordics and the Netherlands. Essentially, he sold the Respondent's products and services to customers in these territories.

15. The Respondent's case was that the Claimant was given a target for sales and customer meetings. This was intended to ensure a balance between bringing in money now, and ensuring a pipeline of future income. He received, in addition to his basic salary, a commission of 25% of basic and then an accelerator once he had achieved target.

16. The Claimant agreed he had a sales target. However, he said that he was never given a meetings target until later in November 2018. The Tribunal noted that there was no reference to any meetings target in the Claimant's commission structure at page 90. The Claimant had a thorough appraisal on the 7 July 2018 and there were many references to sales targets, but there was nothing about meetings targets. There was evidence that data on meetings was collated from early in the employment. Accordingly, the Tribunal found that at least until November 2018, whilst there was pressure on the Claimant to have meetings, there was no specific target.

17. The Claimant's first annual review occurred in July 2018. It was recorded that he had exceeded his target in respect of his first year of employment by 143%. This coincided with the Respondent's financial year that ended at the end of every July. It was agreed that this was highly impressive.

18. The Claimant was invited to apply for a vacant post as director in the Respondent's Hong Kong office. He applied and was successful. However, he refused the offer on 28 August 2018, due to his concerns about the geopolitical situation in China.

19. In the UK, he was given a 13% pay rise and Mr Armitage wanted to promote him to assistant director, although this was not possible at that time.

20. For the new financial year, the Claimant was given a new sales target of £400,000. Mr Armitage as his line-manager had a target which was dependent on his reports, including the Claimant, making their targets.

21. Mr Armitage carried out an annual review on 1 August 2018 saying that the Claimant had performed very well.

22. The Respondent's case was that it had concerns in respect of timekeeping, absences and credit card use in the Claimant's first year. The Tribunal had sight of a warning given to the Claimant on 16 May 2018 for failing to follow the absence notification procedure. However, the Tribunal did not accept Mr Armitage's evidence that there were any material concerns about the Claimant's use of the company credit card at the end of the first year. If such concerns were material, the Tribunal found that it would be unlikely that the Respondent would offer the Claimant a promotion to another region, would wish to promote him in his own region and would give him a significant pay rise. The Tribunal found that any frustration on the Respondent's part was overshadowed by the Claimant's excellent performance. He was a salesman who was selling, and that was what mattered to the Respondent.

23. In the second year of the Claimant's employment (which coincided with a new financial year for the Respondent) the Claimant's performance against target was notably poorer. The Claimant, in effect, said that he did not follow the common tactic in sales of deliberately holding over business from one sales year to the next, in order to ensure that he did not overperform on target on his first year and miss his target in his next year. His view was that he should ensure that all business was billed as soon as possible even if this meant his sales performance was uneven in different years.

24. The Respondent's evidence was during his second year, it grew increasingly concerned not only about the Claimant's poor performance but other issues such as misuse of the company credit card and attendance issues. At the beginning of October, the Claimant failed to turn up to work. It transpired that he had been on a personal trip to Prague, lost his phone and missed his flight. The Respondent was not aware of where he was until the end of the day (as recorded in emails at page 191). The Tribunal accepted the Respondent's evidence that this incident was very frustrating.

25. However, the Tribunal did not accept that the Respondent was equally concerned when it alleged that the Claimant had missed a meeting at a conference in Sweden at the end of September. It was unclear from the Respondent's evidence that there was a significant meeting at all.

26. Mr Armitage's evidence was that he wished to discipline the Claimant because of concerns over the credit card and the Prague incident. However, this did not come to pass because the Claimant resigned on the 9 October 2018. The Claimant wrote a letter of resignation stating that an opportunity had come up to join the Armed Forces full-time. He wrote, however, that there was a very real chance that he would not pass

selection and hoped that if this did happen that he and the Respondent could work together in future if possible.

27. This led to discussions about how the Claimant's departure might be managed and in particular how this might fit around the military commitments required during his notice period. For instance, the Respondent agreed to let the Claimant have a day off to do a preparatory course during his notice period.

28. However, on 15 October the Claimant emailed Mr Armitage saying that 'things had changed a lot'. The Claimant explained to the Respondent that the Forces opportunity was no longer available, and he wanted to continue his employment with the Respondent. In the event, he formally rescinded his resignation on the 29 October 2018, and this was accepted by the Respondent.

29. The Tribunal had sight of internal email discussions within the Respondent which led to Mr Armitage and Mr Burton, in effect, agreeing to let the Claimant rescind his resignation but on conditions. Mr Armitage informed the CEO that because there were issues with the Claimant's performance and timekeeping, they were setting conditions. The Claimant was put on a new three-month probationary period, his sales target was reduced by 20% for that three months and he was given an additional target for monthly meetings. The practical effect of this was that the Claimant had to meet his sales target over the next three-month period, or he could be dismissed. There was, in effect, no leeway for a few bad months to be made up later in the year. He essentially had to hit his target in November, December and January, albeit with the 20% reduction.

30. The Claimant was informed of these new conditions at a meeting on 6 November 2018 a week after the rescinding of the resignation. The Claimant said that he was entirely taken by surprise by these new terms. The Respondent accepted that they did in effect spring this on the Claimant in the meeting without giving the Claimant time to consider. The Claimant did sign the contract and in effect agreed to the new terms and conditions.

31. There was a dispute between the parties about what the Claimant told the Respondent about his ongoing commitments to his reservist duties, once the opportunity to join the Forces full time failed to materialise. The Tribunal did not find either party's evidence on this point particularly clear or reliable. The Tribunal concluded that the parties were finding it difficult to disentangle what they had discussed after the Claimant re-committed to the Respondent, from what they had discussed earlier when they were organising his notice period.

32. The Claimant said that he rang Mr Armitage to inform him and warn him that, although he was now going to remain in the Respondent's

employment, he would need to attend another military course at the end of January 2019. Mr Armitage denied that this conversation had occurred. The Claimant's evidence was that on 16 October 2018 he told Mr Armitage that the military course would start in January 2019. Mr Armitage said that he did not recall being told this.

33. The Claimant said that he had a number of conversations with Mr Armitage about needing to attend the course in January 2019. He recalled a particular conversation in a taxi on either 5 or 6 November 2018.

34. The only independent evidence going to what the Claimant could have known about the date of military course (and hence what might have been discussed with the Respondent) was a letter from the Armed Forces. This stated that the Claimant had telephoned them on 5 December to try to firm up course dates.

35. During this new probationary period, there were disruptions. The Respondent employed an assistant for the Claimant who role was to assist in setting up meetings. However, after a poor start, the Respondent decided to dismiss the assistant due to performance issues. The Claimant took leave of absence to attend a wedding (with the Respondent's permission) at short notice, and he also suffered some illness. The Claimant contended, that there was a down-turn in the market due to the Brexit negotiations, although the Respondent disagreed.

36. Mr Armitage's evidence was that the Claimant's attendance deteriorated during his new probationary period, although he did not consider it sensible to proceed to a formal discipline. He relied on an email he said that he sent to himself on 28 November 2018 as a reminder that the Claimant was late again and there was no apology. It was agreed that the Claimant was eight minutes late.

37. On 4 December 2018 Mr Armitage emailed HR asking if there might be, hypothetically, grounds to dismiss the Claimant. There was no mention of any reason in this email. This email was drafted less than one month into the probation period. Mr Armitage's explanation was that he was, in effect, fed up with the Claimant's poor performance, attendance and the like.

38. On 24 December, the Respondent held its Christmas party. The Claimant said that again he told Mr Armitage that the January course was looking more likely. Mr Armitage again said that he did not recall being told about the course.

39. Mr Armitage and the Claimant also discussed figures showing the Claimant's performance against target. This showed that he was not hitting the targets for new meetings. In respect of how the Claimant was performing against his sales target, the Tribunal had sight of figures (at page 234) which showed that the Claimant was well under-target from

August 2018. This meant he had been notably under target for all of his second year, although he had had an excellent last month of his first year.

40. The Tribunal accepted the Respondent's evidence that it kept a close eye on the Claimant's performance against target. It accepted that Mr Armitage would need to know how salespeople were performing. Mr Armitage's job, as line-manager, was to manage salespeople. His target was dependent in part on how his salespeople were performing. He was likely to keep a particularly close eye on the Claimant who was on a probationary period.

41. On 2 January Mr Burton wrote to say that the Claimant had accidentally misused the company credit card again. The Tribunal found that the Claimant had on several occasions accidentally used the company credit card when he should have used his own. This meant that he had to repay the company and at times the accounts department had had to chase him about this.

42. According to the Respondent, it reached the decision to dismiss the Claimant on 3 January 2019. This was confirmed in the witness statements of Mr Armitage and Mr Burton. Their evidence was that the procedure was that Mr Armitage made the recommendation to dismiss, which he took to Mr Burton who agreed, and then it went to the CEO to be signed off.

43. In Mr Armitage's statement, he then went on to discuss the performance and pipeline figures that the Claimant produced on 7 January 2019. This document was the Claimant's estimate of the value of his pipeline, that is the sales that he believed that he would achieve within the following three months. The document included both the value of an account and the chance of its being achieved. For instance, an account that might yield £20,000 but with only a 25% probability, would be recorded with a value of £5,000. The total of the pipeline was valued at £59,000 which was well under his sales target, even including the 20% discount.

44. The Respondent relied on a document (at page 323) that it said provided more detail for the Claimant's accounts after he was dismissed. This, it was said, showed that if everything in the Claimant's pipeline came to pass, he would bring in £500,000. However, once subject the reduction for the value was about £77,000 which was still under the sales target.

45. The Claimant, who was unaware of any decision to dismiss him, said that on 7 January 2019 he told Mr Armitage more information about the military course. He said that Mr Armitage expressed alarm about the amount of time needed off work and asked questions about this. Mr Armitage said that he did not recall this conversation

46. On 7 January Mr Armitage emailed Mr Burton stating that the decision to dismiss had been made.

47. The Claimant, in effect, alleged that the Respondent at this stage went on what amounted to a 'fishing expedition' to collect evidence against the Claimant to justify the decision to dismiss. For instance, the Respondent suggested that his CV was inaccurate and there were significant issues over his credit card. Essentially, the Tribunal accepted that once the Respondent had reached the decision to dismiss, it to some extent went looking for things to discredit the Claimant.

48. In an email (at page 230) the Respondent's accountant suggested taking the credit card off the Claimant which indicates that they were very unhappy with the Claimant's conduct with the card. The Respondent took the card from the Claimant on 7 January. Mr Burton said that he googled the Claimant and Royal Marines, and there was an email showing that this was forwarded to Mr Armitage on 6 January; there seemed no clear reason for Mr Burton to do this unless he was, to some extent, on a fishing expedition.

49. When the decision to dismiss was run past the CEO on 14 December, Mr Armitage stated that the Claimant was under-performing on sales and meetings. The CEO asked why the Claimant's performance had declined so markedly. Mr Armitage sent an email in reply stating that he thought that the Claimant's decline came under four categories. Firstly, his ambition centred around the Marines and not the Respondent; secondly, he had become isolated within the team; thirdly, he was not interested in looking for clients; and fourthly, he had become lazy and distracted and it was unclear if this was the Marines or something else.

50. The Claimant was called to an unscheduled meeting on 14 January 2019. He was dismissed with immediate effect at this meeting. Nothing resembling a dismissal procedure was followed. The Respondent said that the Claimant was told that there were issues with his performance and targets. The Claimant said that he asked for a performance matrix which was not provided. According to the Claimant, he asked if it was to do with his military commitments. However, Mr Armitage told the Tribunal that he did not remember this. There were no notes of this disciplinary meeting although Mr Armitage and the Claimant thought notes were taken by an HR person.

51. Mr Armitage provided the Claimant with a letter of dismissal on 14 January. The letter of dismissal did not mention the credit card save for a seemingly proforma instruction to leave the credit card behind on departure. The letter relied on the Claimant's shortfall against targets as a reason for dismissal.

52. The Claimant was not informed of any right to appeal. The effective date of termination was recorded as 14 January 2019.

53. On 12 February, the Claimant requested an appeal. The Respondent refused this by way of a letter on 4 March 2019 on the basis that he had not applied within the seven days of the dismissal.

54. Mr Armitage said that none of the prospects in the Claimant's pipeline document came to fulfilment after the Claimant was dismissed. Mr Armitage's evidence was that he in effect achieved about £89,000 in sales in the Claimant's department. He said that he had spent about 20% of his time on the Claimant's work and had some assistance from Mr Burton, the Claimant's assistant and the account manager.

Applicable Law

55. The applicable law is found at s48 of the Defence Reform Act 2014 as follows

> **48 Unfair dismissal of reserve forces: no qualifying period of employment**
>
> (1)The Employment Rights Act 1996 is amended as follows.
>
> (2)In section 108 (unfair dismissal: qualifying period of employment), at the end insert—
>
> "(5)Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or is connected with, the employee's membership of a reserve force (as defined in section 374 of the Armed Forces Act 2006)."

56. The applicable law is found at Section 108 of the Employment Rights Act as follows

> ***108 Qualifying period of employment.***
>
> (1)Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

Submissions

57. Both parties' Counsel provided very thorough written submissions and then spoke briefly to these submissions.

58. There was a discussion between the Tribunal and the parties as to the nature of the Claimant's case. On the Claimant's behalf it was confirmed that his case was that the reason for his dismissal was not connected to his resignation in October. His case was that the reason for his dismissal

was the increasing amount of time that he would be spending in future on reserved forces activity and, in the alternative, the fact that he was a member of a reserved force.

59. The Tribunal discussed with the parties the meaning of the words "connected with" in s108, and the inter-relationship with Section 98. In order to clarify the parties' cases, the Tribunal proposed an example of a bus driver whose sight was permanently damaged whilst serving as a Reservist; as a result, he was unable to drive, and was dismissed when there was no suitable alternative work. Would such a dismissal be connected with his membership of a reserved force for the purposes of section 108? The Claimant's position was that such a dismissal would not be "connected with" membership of a reserved force for the purposes of section 108.

Applying the Law to the Facts

60. The first issue was whether the Tribunal had jurisdiction to consider the unfair dismissal claim. Because the Claimant did not have two years continuous employment, this depended on whether the principal reason for his dismissal was or was connected to his membership of a reserved force.

61. The parties did not direct the Tribunal to any authority on the meaning of 'connected with' under the Defence Reform Act. The parties during submissions, with the agreement of the Tribunal, proceeded on the basis that it would be of assistance to consider other employment law statutes where the words 'connected with' was used. However, the Tribunal explained that it was hesitant to take into account any statute where the meaning of these words may have been affected by European Union law.

62. The Tribunal drew the parties' attention to the case of **London Ambulance Service v Charlton & Others 1992 IRLR 510 EAT.** The case concerned Section 168(1)(a) and (b) Trade Union and Labour Relations (Consolidation) Act 1992 as follows (emphasis added):-

> (1) An employer shall permit an employee of his who is an official of an independent trade union recognised by the employer to take time off during his working hours for the purpose of carrying out any duties of his, as such an official, concerned with—
> (a) negotiations with the employer related to or connected with matters falling within section 178(2) (collective bargaining) in relation to which the trade union is recognised by the employer, or
> (b) the performance on behalf of employees of the employer of functions related to or connected with matters falling within that provision which the employer has agreed may be so performed by the trade union

63. According to the Employment Appeal Tribunal, in order for matters to be "related to or connected with", one important consideration would be whether there is sufficient nexus between the negotiations and functions and the collective bargaining.

64. The test in TULRA is not identical to the Defence Reform Act, it is "related to or connected with" rather than, 'connected with'. Nevertheless, the Tribunal viewed **Charlton** of being of assistance.

65. The other case that the Tribunal found of some assistance was **Atkin v Coil Personnel plc 2008 IRLR 420 EAT**. This considered the meaning of the phrase 'connected with' in regulation 29 in the Parental and Adoption Leave Regulations 2002, which at the material time were not impacted by European Law. Regulation 29 is concerned with dismissals "connected with" paternity or adoption leave.

66. The EAT made obiter comments on the meaning of the words, 'connected with' in Regulation 29 at paragraphs 40 and 41

> 40. The fact that the words 'connected with' might on the dictionary definition be taken to mean 'associated with' does not mean that a causal connection is not necessary between the dismissal and the paternity leave. 'Associated with', without more, is a very vague concept, so wide and vague that it could on its face include a simple time connection, in other words it would be enough merely because the employee was on paternity leave at the time he was dismissed. Such an interpretation cannot have been intended and for the same reasons nor can a 'but for' test or a *causa sine qua* non test.
> 41. We are satisfied that 'connected with' in Regulation 29 means causally connected with rather than some vaguer, less stringent connection… The legislation must, in our view, be given a wide purposive interpretation and the application of the test must, as on any causation issue, be approached in a pragmatic commonsense fashion on the facts of the individual case.

67. Although these comments were obiter, the Tribunal found **Atkin** to be of some assistance.

68. The Tribunal also considered what does 'connected with' mean in English? In the view of the Tribunal, it appears wider than other phrases dealing with causation that are found in Employment Law statutes, such as 'because of' or 'on the grounds that'. There must be a connection between the membership of the reserved force and the dismissal. The question for the Tribunal was what, if any, impact did the Claimant's membership of a reserved force have on the decision to dismiss?

69. The Claimant's case was put on the basis that the principal reason for dismissal was connected with his membership of a reserved force - being the Respondent's concern at the amount of time the Claimant would

spend in future on reserved forces activities (such as the January 2019 course) and a slightly increased risk in being called up. This meant that the chances of his making target and Mr Armitage making target, were reduced. In the alternative, the Claimant's case was that the Respondent simply did not want to employ reserved forces personnel.

70. The Tribunal discussed the Claimant's case during submissions with his representative. The case was expressly not put on the basis that his resignation to pursue an opportunity to join the Armed Forces, and then asking for the resignation to be rescinded led to the Respondent doubting his commitment moving forward.

71. The Tribunal firstly considered whether the decision to dismiss was his being a reservist. The Tribunal found that it was not for the following reasons.

72. In the view of the Tribunal, the most important factor is that the Respondent appointed the Claimant knowing he was a reservist.

73. Further, the Claimant resigned to pursue the chance of joining the Armed Forces full-time. When this did not come to pass, he asked to rescind his resignation and continue in the Respondent's employment as a reservist. He did not rescind his resignation because he changed his mind and preferred to work for the Respondent, rather than pursue a Forces career.

74. The Respondent could have said "no" at this point, and refused to rescind the resignation, but it did not. It agreed to, in effect, take the Claimant back, albeit with conditions. These conditions were not linked to the Claimant's membership of the reserved forces – the Respondent did not, for instance, ask the Claimant to resign from the reserves in order to continue in employment.

75. This conduct of the Respondent is not consistent with not wanting to employ reservists.

76. Further, according to the Claimant's evidence, the reason the Respondent's attitude to his Forces connection changed, was that he expected to spend more time on reservist duties in future. He had spent relatively little, if any time, on reservist duties during his first year of his employment. It was, on the Claimant's evidence, not the fact that he was a reservist that led to his dismissal, but the effect of his reservist duties.

77. The Tribunal accordingly, went on to consider the second strand of the Claimants' case - the Respondent's attitude to the amount of time he would spend in future on his reservist duties.

78. The Tribunal found that the principal reason for dismissal was, in large part, accurately reflected in Mr Armitage's email to the CEO explaining

why he thought performance had deteriorated. This email in effect stated that the reason for dismissal was the decline in the Claimant's performance, in the context of doubts as to his commitment to the company including the Royal Marines.

79. This was an internal email between senior management. There was no indication that this email should be viewed with caution because it was drafted with any future litigation in mind. The Tribunal inferred from the Respondent's lack of procedure around the dismissal, the lack of meeting minutes and the refusal of an appeal, that it was not thinking of any litigation risk. Accordingly, on the balance of probabilities, the email reflected Mr Armitage's true views, albeit expressed in a way which would be acceptable to his superior.

80. The Tribunal considered why the Respondent doubted the Claimant's commitment. The Tribunal concluded that the crucial factor was that the Claimant had demonstrated that he preferred a full-time role in the Armed Forces to working for the Respondent. He had resigned from the Respondent to try to obtain that role, even when he was aware that he might not be successful in obtaining the role. When the role did not work out, he in effect went back to the Respondent.

81. In the view of the Tribunal, the ultimate cause of the dismissal was the conditions the Respondent decided upon on 6 November – the targets which the Claimant did not make. In early November, it is likely that the Respondent knew to some extent that the Claimant would be spending some more time on reservist duties. However, it is far from clear that the Respondent had any good idea of detail at this stage, as it was not until the beginning of December that the course dates started to be firmed up.

82. The Respondent's subjecting the Claimant to a probation period and new targets indicates, in the Tribunal's view that it had material concerns about taking the Claimant back after his resignation. Whilst there was a 20% reduction in sales target, in effect he had to make this target in the next three months. He was also given a target for meetings, which was not previously subject to a specific target.

83. It was a challenging target, but the Tribunal did not accept the Claimant's view that he was set up to fail. If the Respondent had wanted this, it would have accepted his resignation, rather than permitting him to rescind it. This shows that the Respondent was still willing to try make the relationship work, albeit it had doubts. In the view of the Tribunal, the Respondent's actions in November are consistent with its thinking that there was a chance that the Claimant would go back to succeeding and performing as he had done before, as recently as July.

84. Nevertheless, within a month on 4 December the evidence shows that Mr Armitage was thinking of letting the Claimant go. At this point the

Claimant's performance continued to be not good. In addition, there had been further problems with the credit card and there were on-going issues with attendance dating back to October. It cannot be said that things had been going smoothly or as the Respondent had wanted.

85. The Tribunal did not accept the Respondent's case that the 7 January document setting out the Claimant's pipeline played a material part in the decision to dismiss. This is because it was created after the decision to dismiss was made. In the view of the Tribunal, this document's role can have been no more than to reinforce the decision to dismiss. The document showed that there was no reason to believe that the Claimant was going to make his annual target. The document would not have changed the Respondent's mind.

86. The Tribunal's findings are that the Respondent dismissed the Claimant because of poor performance which it viewed as connected to his lack of commitment to the company. The Tribunal found that the Respondent saw a lack of commitment and poor performance as two sides of the same coin. Poor performance is explained in part by lack of commitment; lack of commitment leads to poor performance.

87. Accordingly, the Tribunal considered why the respondent concluded that the Claimant had a lack of commitment and to what, if any, extent this was linked to his membership of a reservist force. The Tribunal noted that Mr Armitage had referred to the Claimant's relationship with the Marines in his explanation for the Claimant's poor performance.

88. The Tribunal concluded that the Respondent was a sales-driven organisation. It operated a target and bonus scheme expressly designed to motivate selling. Managers' targets included elements dependent on their reports making their own targets. When the CEO raised questions as to the decision to dismiss, he focused on the Claimant's lack of sales, rather than anything else. The Tribunal found that the Respondent concluded the Claimant lacked commitment primarily because his performance declined.

89. The Tribunal agreed with the Claimant's case that there were a number of references to his connection to the Forces, for instance Mr Armitage's email to the CEO and Mr Burton's googling the Royal Marines. However, in the view of the Tribunal, the crucial factor which led the Respondent to conclude that he lacked commitment because he had resigned to try to get another position and after he was, in effect, forced to return, his performance was poor. The Respondent had evidence that the Claimant wanted a full-time position in the Armed Forces, and it had no reason to believe that he had changed that ambition and might not leave them to seek a full-time position as soon as it became available. Perhaps the Respondent would have put up with this situation if the Claimant, as a salesperson was selling, but he was not.

90. To a much lesser extent, the fact that the Claimant had applied for and then refused the position in Hong Kong likely did not encourage the Respondent to view him as fully committed to his future in the company. Again, there is no evidence that this played a material part in the decision to dismiss, but it cannot have encouraged the Respondent to see the Claimant as being committed to an ambitious future with the Respondent.

91. The Tribunal accepted that the issues with the credit card and attendance issues had influenced the Respondent in concluding the Claimant lacked commitment. The Respondent did not appear to suggest that it viewed the Claimant as dishonest over the credit card; rather he was – repeatedly - not taking enough care which was consistent to a lack of commitment.

92. However, the Tribunal had little doubt that if he had been selling, the Respondent would have put up with this; but he was not selling. When he was not selling, these misdemeanours loomed larger and became very frustrating. However, the issues with the credit card did not pay a principal role in the decision to dismiss, as indicated by the only reference to the credit card in the dismissal letter being a pro forma reference to logistics.

93. The Tribunal considered to what extent the Respondent was aware that the Claimant was going to devote more time to his reservist duties and hence this might impact on his commitment to the company.

94. In respect of the course in January 2019, the only independent contemporary document was the letter from the Armed Forces of 5 December. This states that the Claimant was seeking to confirm dates of his course. Thus, the Claimant cannot have not known the dates before 5 December. In the event, the date was not confirmed until 7 January, which gave the Claimant less than three weeks' notice of the course. Mr Armitage's email to the CEO refers to the Claimant's commitment to the Royal Marines, which is consistent with the Respondent knowing that he might be taking time off to go on a course in or around January 2019.

95. The Claimant told the Tribunal that the time commitment was going to increase in 2019. These duties would require some travel at weekends, plus he would probably need to devote two periods of two weeks to his duties. In the view of the Tribunal, this was not an unduly onerous burden. If his reservist duties were likely to have an adverse impact on his work for the Respondent, the Claimant would likely not have sought to do both at once. The Claimant himself believed that he could continue to carry out his job and fulfil his reservist commitments; he was an experienced salesman and might be expected to have a good idea of what was practicable. Of course, this does not in itself prove that the Respondent did not view this commitment as a real problem. However, it does make it somewhat less likely that the Respondent was concerned, given that the burden was not so onerous.

96. By the time the Respondent made the decision to dismiss, the Tribunal found it likely that it had a clearer idea of the amount of time the Claimant would devote to reservist issues going forward, even if this was still uncertain. However, by early January 2019 the Claimant's performance had already been well below his target since August and well below his (reduced) target since early November.

97. In the view of the Tribunal, when it made the decision to dismiss, the Respondent likely believed that the Claimant's future time commitment to his reservist duties was unlikely to make it easier for him to achieve target. However, much more importantly, the Claimant's performance had already deteriorated markedly, during a period when he was not devoting more time to his reservist duties. The evidence before the Respondent when it made the decision to dismiss was that the Claimant had markedly failed to make target for some time and had specifically failed to make the new November target.

98. The Tribunal found that the Respondent's attitude to the Claimant's future going time commitments to his reservist role and the effect that this might have on his performance was one of a number of factors in the reason for dismissal. However, it was not the principal reason.

99. Essentially, following the resignation, as indicated by the new targets and a second probationary period, the Claimant's card was marked. The Respondent knew he had resigned for the chance of a full-time Armed Forces post. He did not subsequently seek to re-commit to the Respondent because he changed his mind as to his future career; he sought to re-commit to the Respondent only when his preferred option did not come to pass. From that point on, the Respondent knew that it was, in effect, his second choice. The doubts were evidenced by the new targets. When he failed to fulfil the new targets, in the context of minor irritants such as attendance and the credit card, the Respondent decided not to invest any further in the relationship. This was the principal reason for dismissal.

100. Accordingly, the principal reason was not connected with the Claimant's membership of a reserved force. The Claimant's case was that the connection his membership of a reserved force had to be more than the context to the decision to dismiss. For instance, the bus driver who suffered a disability on reservist duty which led to his being dismissed. The Tribunal found that had the Claimant resigned to undertake another career in any field, in the same circumstances, the Respondent would most likely have reacted in the same way. Bearing in mind that the Tribunal should give a purposive construction to the statute, the Tribunal cannot conclude that the dismissal was connected with membership of a reserved force.

101. Further, there was no evidence that the Respondent reacted to a career in the Armed Forces in a worse way than to any other career, or that there was any particular animus to the Forces. The evidence shows, in fact, the opposite. When the Respondent referred to the Claimant's leaving to seek a position in the Forces, this was described as a fantastic opportunity. Although allowance must be made for usual hyperbole found in emails dealing with staff departures, this is not consistent with any animus towards the Forces in general.

102. Accordingly, as the principal reason for dismissal was not connected on the Claimant's case with his membership of a reserved force, the Tribunal does not have jurisdiction to consider his case of unfair dismissal. The complaint must therefore be dismissed.

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Employment Judge Nash
Date: 12 December 2020