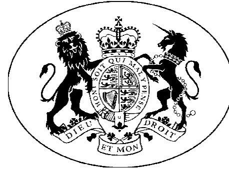

EMPLOYMENT TRIBUNALS

Claimant: Mr S Sweeney

Respondent: Synenergy Logistics Limited

Heard at: By CVP at Midlands West Employment Tribunal

On: 28 and 29 July 2022

Before: Employment Judge Platt

Representation
Claimant: in person
Respondent: Mr Williams of Peninsula

JUDGMENT

The Claimant's claim of constructive unfair dismissal is well-founded and succeeds. The Respondent made unlawful deductions from the Claimant's wages in respect of bonus payments for each of the months of June – November 2020.

REASONS

Introduction

1. The Claimant was employed as National Operations Manager of Synenergy Logistics Limited. He resigned with immediate effect on 16 March 2021. The Claimant claimed constructive unfair dismissal because of what he says were several breaches to the implied term of trust and confidence causing him to resign.

2. The Claimant also claimed unlawful deductions from wages in relation to a bonus scheme he asserts was part of his contract of employment and was based on 25% of profits relating to works done for Amazon. He claims unlawful deductions were made in respect of the months of June – November 2020.

3. The Respondent's position was that both claims were unfounded.

Claims and issues

4. The Claimant's claim for constructive dismissal was brought pursuant to section 95(1)(c) of the Employment Rights Act 1996. The Claimant claimed that there had been a series of events which cumulatively amounted to a fundamental breach of the implied term of trust and confidence causing him to resign.

5. The Claimant submitted a detailed ET1 Form and confirmed at the outset of the hearing that his claim for constructive unfair dismissal was based on seven grounds (the “Grounds”) referred to in his ET1 Form as follows:
    a. Being suspended in front of 10 colleagues which he felt was humiliating, intimidating and embarrassing;
    b. His staff having been informed that he had been suspended and there having been no consultation as to why he would be out of the business during the suspension;
    c. He wasn’t provided with any evidence as to why he was suspended;
    d. His grievance was not heard by impartial personnel;
    e. His suspension lasted from 12 January to 16 March 2021 and he was not given evidence for the suspension during that time;
    f. He was interviewed at a second meeting with 18 hours’ notice and was not provided with information before the meeting;
    g. From 12 January 2021 – 24 February 2021 no-one from the Respondent contacted him to assist from a welfare perspective.

6. The Respondent’s position is that its treatment of the Claimant did not amount to a fundamental breach of the implied term of trust and confidence or, in the alternative, that any breach was waived by the Claimant. It was also contended that the Respondent’s conduct was not the reason for the Claimant’s resignation. The Respondent also asserted that the Claimant failed to follow the ACAS Code on Disciplinary and Grievance Procedures and that any compensation should be reduced to reflect contributory conduct and that the Claimant would have been dismissed in any event following *Polkey v AE Dayton Services Limited* had he not resigned.

7. The Claimant’s claim for unlawful deductions was set out as follows: the Claimant’s contract of employment contained a clause relating to bonus which stated that a bonus of 25% would be payable by reference to profitability shown on job cards from the preceding month’s profits in relation to work for Amazon. The Claimant claims he was owed monies for June 2020 – November 2020, that he was never consulted about and never agreed to any changes to his contractual entitlement. The Respondent’s position is that any bonus entitlement was discretionary and was withdrawn on 3 August 2020. It argues that, in any event, the claim for unlawful deductions is out of time because time should run from the date of the alleged breach on 3 August 2020 or when payment was made at the end of August 2020.

8. The issues for the Tribunal to decide were as follows:

    Constructive unfair dismissal:

    a) Whether there was a fundamental breach of contract, namely the implied duty of trust and confidence, by the Respondent based on the Grounds identified by the Claimant,;
    b) Whether there was reasonable/proper cause for the Respondent’s conduct in respect of the Grounds;
    c) If not, when viewed objectively were the Grounds calculated or likely to seriously damage trust and confidence;
    d) Whether the Claimant terminated the contract because of the Grounds; and
    e) Whether the Claimant lost the right to resign because he affirmed the contract of employment.

Unlawful deduction from wages

a) Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted, i.e. were the wages paid to the Claimant for the period June – November 2020 less than the wages properly payable based on any contractual entitlement to bonus?
b) Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996?
    i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
    ii. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
    iii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
    iv. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period.

In this claim the fundamental issues in dispute were: 1) whether there was a contractual entitlement to bonus for June – November 2020 or whether it was entirely discretionary; and 2) whether if the Respondent unilaterally changed the Claimant's contractual entitlement to bonus on 3 August 2020 the Claimant acquiesced by his conduct (or otherwise agreed) and was therefore out of time to bring a claim for unlawful deductions from wages.

Procedure

9. At the outset of the Hearing the Tribunal spent some time clarifying the basis of the Claimant's claim and the Respondent's position in response.

10. The ET1 Form named three Respondents. It was agreed between the parties that the correct employer was Synenergy Logistics Limited as referred to in the Claimant's contract of employment dated 27 May 2020 and that corporate entity was the correct Respondent. The parties consented to the claims against the other Respondents, Synenergy Global Limited and DMG Eco Waste Management, being dismissed.

11. The Tribunal was provided with a Bundle of documents comprising 384 pages. The Tribunal asked the parties to confirm the key documents that it needed to consider (in addition to the Pleadings) and the following were identified: pages 160, 166-167, 217,109, 229, 188, 246, 204, 265, 274, 168 - 170, 276, 352, 58 – 80, 152, 186-195,217-227, 256 – 261.

12. The Tribunal heard witness evidence from the Claimant and two witnesses for the Respondent, Mr Meseck and Mr Motisi. Both parties had exchanged evidence of additional witnesses who did not attend. It was explained that their written statements would be considered by the Tribunal but would not be accorded significant weight because the individuals were not present. Both parties delivered oral submissions for the Tribunal to consider.

Findings of fact

13. The Claimant was employed under a contract of employment dated 27 May 2020 as National Operations Manager for the Respondent. He had continuous service from a period with another company in the group, DMG Eco Resources Limited, from 20 September 2016.

14. The parties negotiated the terms around bonus and the clause set out in the Claimant's contract stated the following which was also set out in the Employee Handbook:

    "**Bonus Scheme**

    We operate a profit related bonus scheme to which you will be entitled. The bonus is based on any ad hoc work billed through DMG Eco Waste Management. The bonus is based on the profitability shown on the job cards. The bonus is 25% and is payable from the preceding month's profits. The bonus is subject to tax, national insurance and pension contributions. The bonus scheme may be amended or withdrawn at any time"

15. Discussions took place between the parties prior to the contract being agreed. The Claimant was unhappy with the wording in the last sentence and this was raised by the Claimant in an email to Tracey Hargreaves, the Respondent's Financial Controller, on 26 May 2020. She responded on 27 May 2020 to reassure the Claimant that on the advice of Peninsula (the Respondent's advisors) the wording needed to be retained but any amendments would need to be the subject of consultation between the parties. The Tribunal finds that the Claimant accepted this assurance and entered into the contract in good faith having relied on it.

16. By email of 8 June 2020 Dave Meseck (the Managing Director of the Respondent) set out that the bonus would need to be paid on the last day of the second month because of lag issues with compiling the relevant information. The Claimant accepted this in light of the practicality of operating the agreed bonus arrangements.

17. On 3 August 2020 a meeting took place (which the Claimant did not attend) between Dave Meseck and Ryan March (the Claimant's Line Manager). A note was produced which was sent to the Claimant and Rob Brough as an email. It stated that at this meeting a decision was made to "draw a line under the bonus confusion". It was stated that the Claimant and his colleague Rob Brough would receive a bonus of £1,000 for June and a "final bonus of £6,000 for August" making a total of £7,000 which would be paid at the end of August. It also stated that any discussion/decision regarding wages or any bonus paid will be controlled by Ryan March and signed off by Dave Meseck. The sums referred to were paid on the last working day of the month as shown by the Claimant's payslip for the month of August 2020. No further bonus payments were ever made to the Claimant during the remainder of his employment. There is no evidence that any consultation took place with the Claimant and the Respondent's position is that it was entitled to unilaterally vary the contract without consultation.

18. The Claimant's position is that he verbally objected to Ryan March after receiving the email and did not accept the unilateral variation of his contract. In his evidence he stated that he and Mr Brough strenuously voiced their concerns. Mr March did not attend to give evidence but did provide a written statement which

corroborates that a conference call took place where the Claimant objected to the purported withdrawal of the bonus. The Claimant's position is that during August – December 2020 he verbally raised concerns and that a number of meetings were arranged but then cancelled or pushed back by Dave Meseck. There is no relevant documentation in the Bundle that pertains to this period. The Claimant's evidence is that his objections were oral until he raised a grievance on 19 January 2021. There is no evidence that the Claimant ever signified his agreement to the change. The Tribunal finds that the statement in Ryan March's email that "any discussion/decision regarding wages or any bonus paid will be controlled by Ryan March and signed off by Dave Meseck" indicates that the matter was not concluded on 3 August 2020.

19. On 12 August 2020 an email was sent from Tracey Hargreaves to the Claimant attaching figures regarding the DMG Eco Waste Management profit and loss and commenting that it was a good result. It is unclear why this email was sent to the Claimant but it tends to suggest that the matter of the Claimant's bonus was not concluded.

20. It is a matter of public record that the Claimant set up a company called Veritas Services UK Limited on 27 April 2020. He was appointed a statutory director on 24 December 2020. His colleague Rob Brough sent an email to the Claimant on 20 February 2020 attaching a list of contacts. The Claimant's evidence is that this email was sent because there was significant uncertainty in the business at the time. The Respondent believes it was to facilitate competition with the Respondent's business. The Claimant's position is that Veritas Services UK Limited was not trading during his employment with the Respondent. The Tribunal accepts the Claimant's evidence in this regard.

21. On 12 January 2021 the Claimant attended a meeting about an Amazon Tender. This meeting was minuted and included in the Bundle. A total of 11 people attended that meeting (some in person, some virtually). The Claimant participated in that meeting. At the end of the meeting Mr Meseck stated that he had been talking to his brother and that he had told him that a company called Veritas had been set up. Mr Meseck asked the Claimant and Rob Brough whether there was anything that he needed to be told about. The Claimant and Mr Brough responded that it was their company. Mr Meseck asked if it was doing any work that the Respondent should be getting. The Claimant and Mr Brough responded that it was not and that they were prepared to be held to that statement. Mr Meseck then stated that he was suspending them until he found out definitively and stated that he would have a chat with Mr March "when he had finished with these two". This conversation took place in front of all those present at the meeting.

22. Shortly after the meeting had concluded the Claimant was handed a letter of suspension which stated that he would be suspended on full pay and confirmed that the suspension was not a form of disciplinary action. He was told not to attend work or contact anyone. Access to his phone, computer and company credit card was frozen. The letter was incorrectly dated 19 November 2020. The Tribunal accepts that this was an error. The Claimant was not contacted by HR during 12 January 2021 – 24 February 2021 or offered any support by the Respondent.

23. The Claimant was invited to and attended an investigation meeting on 19 January 2021 at 9.20am. This required him to make more than a three-hour journey from his home. His evidence was that his company credit card has been

frozen and he could not get overnight accommodation the night before. He did not ask because he was told not to contact anyone. Knowing the Claimant's home address, it was not reasonable to ask him to attend a meeting which required him to leave home so early in the morning. Mr Meseck conducted this investigation meeting.

24. The Claimant raised grievances about two matters on 19 January 2021: the manner of his suspension and the unpaid bonus. A grievance meeting was held on 25 January 2021. The Claimant's grievances were not upheld and he appealed against the outcome which was given to him on 3 February 2021.

25. The Claimant appealed the grievance outcome to Richard White on 9 February 2021 in relation to his suspension and the bonus payments he believed he was owed for June – November 2020.

26. A grievance appeal meeting was held on 12 February 2021 and an outcome provided to the Claimant on 5 March 2021. The Claimant's appeal was not upheld.

27. The Respondent chose not to progress the investigation whilst the Claimant's grievances were being dealt with. There was no evidence that it kept the Claimant's suspension under review during this time.

28. The Claimant was required to attend an investigation meeting on 9 March 2021 conducted by Mr Motisi which lasted some 2.5 hours. The Claimant maintained the position he had previously taken. No disciplinary action followed this meeting.

29. The Claimant resigned with immediate effect on 16 March 2021 citing that his grievances has not been dealt with properly, that his position was untenable, that he had worked under protest since August 2020 as a result of the Respondent's breach of contract and that his suspension had been protracted. The Respondent responded on 17 March 2021 acknowledging the Claimant's resignation.

30. No disciplinary charges were ever put to the Claimant prior to his resignation. His suspension lasted for eight weeks.

31. Mr Brough was suspended at the same time as the Claimant and brought a claim against the Respondent. He has since returned to the Respondent's employment.

32. In relation to the Grounds, the Tribunal makes the following findings of fact. The Claimant was suspended in front of 10 colleagues and it is accepted that he found that humiliating, intimidating and embarrassing. Staff were informed that he had been suspended and nothing was agreed with the Claimant as to what would be communicated. The Claimant was provided with a letter of suspension and attended two investigation meetings during his suspension. However, he was not provided with detailed information about why he was suspended or why his suspension continued for eight weeks. The Claimant's grievance and appeal were heard by individuals who had been present at the suspension meeting. The Claimant addressed his grievances to Stuart Read, General Manager, but they were heard by Charlie Tomlinson, who was at the time employed by Kuits Solicitors and later became In-House Counsel and Richard White (Chairman) on appeal. The Claimant did not object to either the grievance or appeal officer. The Claimant was suspended 12 January 2021 until his resignation. He raised two

grievances during this period. It is not evident what further investigations were done between the two investigation meetings on 19 January 2021 and 9 March 2021. The Claimant was given 18 hours' notice of the second investigation meeting and not provided with information before it. The Claimant did not object to attending the meeting. The Claimant was not contacted from a welfare perspective until Rebecca Ball, a recently appointed HR Advisory lead, emailed him on 24 February 2021.

Law

Constructive dismissal

33. Section 95(1) (c) of the Employment Rights Act 1996 sets out that an employee will be dismissed by an employer if 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.

34. The law in relation to constructive dismissal and the fundamental questions which must be considered have been settled since the case of *Western Excavating Ltd v Sharp [1978] 1 All ER 713*. They are as follows:

    a. Did the Respondent breach a fundamental term of the contract?
    b. Did the Claimant resign in response to the breach?
    c. Did the Claimant delay too long before resigning, thereby affirming the contract?

35. The trust and confidence term was set out in *Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462* as follows: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

36. More recent case law has clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement need only be satisfied – see *Baldwin v Brighton & Hove City Council [2007] IRLR 232*.

37. Where there is a series of acts, the question for the Tribunal will be "does the cumulative series of acts taken together amount to a breach of the implied term?" (*Lewis v Motorworld Garages Ltd [1985] IRLR 465*, per Glidewell LJ).

38. In cases where a series of acts is relied upon the Tribunal must consider the "last straw" which caused the Claimant to resign. The last straw must not be an innocuous act – it must be something which goes towards the breach of the implied term (see *London Borough of Waltham Forest v Omilaju [2005] ICR 481*).

39. Tying together the case law identified above the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* clarified the approach to be taken by the Tribunal as follows:

    In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

    (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2)Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation….)

(5) Did the employee resign in response (or partly in response) to that breach?

40. A fundamental part of the Claimant's constructive unfair dismissal claim is his suspension. The position was considered in the case of *London Borough of Lambeth v Agoreyo* where it was held that consideration should be given to the question whether there was reasonable and proper cause for the suspension. This is a highly fact-specific question and whether suspension is properly described as a 'neutral act' was unlikely to assist in resolving that question.

41. The EAT *in Milne v Link Asset and Security Co Ltd EAT 0867/04* observed that it is always necessary to consider the surrounding circumstances in which suspension from work has been imposed. These include (a) what was said to the employee about the circumstances justifying the suspension, (b) the length of the suspension, (c) whether the employee has lost any income because of the suspension, (d) whether the employee has been replaced during the suspension, and (e) whether the terms of the contract of employment require the employer to provide work for the employee.

42. The Court of Appeal in *Crawford and anor v Suffolk Mental Health Partnership NHS Trust 2012 IRLR 402, CA*, stated that even where there is evidence supporting the employer's investigation, suspension 'should not be a knee-jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is'.

43. The ACAS Code on Suspension (which was referred to by the Claimant but is not legally binding) states that, if a suspension with pay is considered necessary, it should be as brief as possible and kept under review, and that it should be made clear to the employee that the suspension does not amount to disciplinary action.

Unlawful deductions from wages

44. The key legal issues engaged in this claim relate to whether the bonus payments were properly payable. This involves an analysis of the status of the contractual clause relating to bonus and whether entitlement to bonus was entirely discretionary. If not, whether the Claimant can be said to have accepted the unilateral breach of his contract.

Status of the contractual clause

45. Whether a payment is properly payable under section 13(3) of the Employment Rights Act 1996 is critical to determining whether an unlawful deduction has been made. The meaning of properly payable was considered by the Court of Appeal in *New Century Cleaning Co Ltd v Church 2000 IRLR 27,CA* who held that in order for a payment to fall within the definition of wages 'properly payable' there

must be some legal entitlement to the sum in question. In this case this involves distinguishing between contractual and discretionary payments.

46. *Agarwal v Cardiff University and anor 2-18 EWCA Civ 2084 CA* makes it clear that Tribunals are able to properly construe contractual terms. In this claim the disputed term is expressly referred to in the contract of employment and Employee Handbook, was agreed by the parties as the result of a negotiation, refers to a specific percentage of profits / method of calculation and includes details of payment terms. The entitlement turns on the construction of the words "the bonus scheme may be amended or withdrawn at any time".

47. In *Horkulak v Cantor Fitzgerald International* 2005 ICR 402 the Court of Appeal held that although the clause stated that an employer "may in its discretion" pay a bonus it was a contractual benefit. In *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA 2010 IRLR 715, CA* it was stated that the employer had a "right to review or remove this formula-linked bonus arrangement at any time" and that this meant the bonus was discretionary. The Court of Appeal rejected this argument and stated that the argument that an entitlement was removed by the words "at any time" was <u>not</u> the most rationale way to read the clause.

48. If a bonus is discretionary, following *Clark v Nomura International plc 2000 IRLR 766, QBD*, the test is whether the employer had acted irrationally or perversely in exercising its discretion.

Acceptance of the unilateral breach

49. If the bonus is contractual rather than discretionary, the Respondent relies on there having been a unilateral breach of contract on 3 August 2020. It argues that the Claimant acquiesced and is therefore out of time.

50. An employee can respond to a unilateral change to contractual terms in one of a number of ways: acquiesce by carrying on working under the revised terms; if it is a fundamental breach resign and claim constructive dismissal; refuse to work under the new terms; work under protest; or work under the new contract and claim to have been unfairly dismissed from the old contract. The Respondent argues that the Claimant acquiesced and is therefore out of time. The Claimant asserts that he did not accept the breach and he worked under protest.

51. In *Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT*, and *Solectron Scotland Ltd v Roper and ors 2004 IRLR 4, EAT,* the EAT indicated that continuing to work in the face of a variation which has immediate effect may be taken as an implied acceptance of the variation. However, this is not an inference that will be drawn easily. Terms like redundancy terms will not impinge on an employee until they are in fact made redundant. In *Abrahall and ors v Nottingham City Council and anor 2018 ICR 1425, CA*, the Court of Appeal held that a group of employees who continued to work following their employer's imposition of a pay freeze did not thereby agree to a variation of contract, even though they did not bring tribunal claims until two years later. A number of relevant principles were identified: the inference must arise unequivocally — if the employee's conduct in continuing to work is reasonably capable of a different explanation, it cannot be treated as constituting acceptance of the new terms; protest or objection at the collective level may be sufficient to negate any inference of acceptance; the suggestion in *Solectron* that, after a 'period of time', the employee may be taken to have accepted raises the difficulty of identifying

precisely when that point has been reached on anything other than a fairly arbitrary basis.

52. The *Abrahall* case was applied in *Cox and ors v Secretary of State for the Home Department 2022 EWHC 680, QBD*. The continuation of work did not unequivocally give rise to the inference that the employees had accepted the withdrawal of check-off arrangements.

53. In *Wess v Science Museum Group UKEAT/0120/14/DM* it was held that where an employer purported to unilaterally change terms of a contract which did not immediately impinge on the employee, the fact that the employee continued to work knowing what the employer was asserting did not mean that the employee had accepted that variation in the contract.

54. In reaching its decision, the Tribunal identified and considered a number of relevant cases in relation to claims for unlawful deductions regarding changes to contractual terms. In *MacRuary v Washington Irvine Ltd EAT 857/93* the EAT held that a tribunal had erred in ruling that the Claimant, who was faced with a unilateral pay cut, was in a 'take it or leave it' situation and, since he had not resigned, must be deemed to have accepted the breach. The claim for unpaid wages was upheld by the EAT because the Claimant had expressly refused to accept the pay cut and had stated that he was working on under protest. In *Bruce and ors v Wiggins Teape (Stationery) Ltd 1994 IRLR 536, EAT* the employer, having paid double the previous overtime payment on a night shift for nearly four years in order to boost productivity, cut the overtime payment back to the previous level without the agreement of the employees or their union. The employees continued to work but did so under protest. The EAT noted that any shortfall in the amount which was properly payable to an employee was a 'deduction' under the wages legislation and decided that, as the employees had not agreed to the reduction in overtime rates, the amount that was properly payable under the employees' contracts was the higher rate. In G*ower and anor v Post Office Ltd ET Case No.3200588/17:* contracts of employment with the Post Office stated that 'the interval at which your remuneration will be paid shall be weekly'. The Post Office wrote to both Claimants seeking their agreement to change to monthly payment which they rejected. An employment tribunal rejected the argument that because the Claimants continued to attend work, and received their pay, then they should be deemed to have accepted the change. The rejection of the Post Office's proposal to change the relevant term was prompt and emphatic. It was held to be manifestly incorrect to construe an absence of any explicit statement by the Claimants that 'we are working under protest' as their implied agreement to or acceptance of the new terms.

Conclusions

Constructive dismissal

55. In this case the Claimant asserts that the Respondent breached the implied term of trust and confidence by the cumulative effect of its conduct as referred to in the Grounds culminating in his resignation on 16 March 2021.

56. Following the approach in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* the Tribunal has asked itself the questions referred to in that decision. The Claimant's grievance appeal was rejected on 5 March 2021. He attended a second investigation meeting on 9 March 2021. He resigned on 16 March 2021. The last act relied upon is the second investigation meeting on 9

March 2021 and subsequent omission to deal with the Claimant's suspension before his resignation.

57. This was part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term. The Claimant resigned in response on 16 March 2021. The delay of one week from the second investigation meeting does not constitute affirmation of the cumulative breach. It was reasonable to have expected the Respondent to do something in relation to the suspension within a week of the second investigation meeting.

58. The Claimant was suspended in front of ten colleagues at the end of a meeting. His suspension was not treated as confidential. The Tribunal finds despite the Claimant's explanation when questioned, suspension was imposed and was a knee-jerk reaction to information Mr Meseck had received from his brother. It seems a letter had been prepared in advance and that no alternatives to suspension were properly considered by the Respondent in light of the Claimant's response. It was an understandable response for the Claimant to have found the experience humiliating, intimidating and embarrassing. Nothing was agreed with the Claimant as to what staff would be told about why he was out of the business and the manner of suspension meant that the Claimant's reputation would inevitably have been damaged. He was not provided with evidence as to why he was suspended and the letter of suspension refers to "breach of confidentiality clause within your employment contract and other rules governing gross misconduct". Despite the length of suspension no further evidence was given to the Claimant during the period.

59. The Claimant raised grievances about his concerns. He was not satisfied with the outcome. The Respondent did not keep the Claimant's suspension under review and did not take a decision about whether matters should progress to a disciplinary. The Claimant was interviewed in a second investigation meeting on 9 March 2021 with 18 hours' notice and was not provided with any further information regarding his suspension. The Claimant was not contacted by anyone from the Respondent from a welfare perspective for six weeks during his suspension. His grievances were dealt with by people who had been present at the meeting on 12 January 2021 when he was suspended and who he did not consider to be impartial. These matters amount to a course of conduct which when viewed cumulatively breached the *Malik* implied term.

60. The Claimant gave clear reasons for his resignation in his letter of 16 March 2021. His grievance appeal had been dismissed and he remained suspended for a further week after the investigation meeting on 9 March 2021. He was still no clearer what if any disciplinary action the Respondent intended to take against him. He maintained his position regarding his dissatisfaction with his suspension and his dissatisfaction with how his concerns about failure to pay his bonus has been dealt with.

61. The Claimant followed the Respondent's grievance procedure and sought to comply with the provisions set out in the ACAS Code of Practice on Disciplinaries and Grievances. He pointed out the failures of the Respondent in relation to how it dealt with his suspension and that it did not accord with the relevant ACAS Code of Practice.

62. The Tribunal cannot conclude that the Claimant would have been dismissed in any event had he not resigned or that the Claimant's conduct contributed to his dismissal. The Respondent's investigations did not result in any disciplinary charges being put to the Claimant. The Claimant took some preparatory steps in relation to registering a company but did not do anything further which would

have put him in breach of any implied terms of his contract of employment. There were no relevant express terms in his contract of employment. The Respondent continues to employ Mr Brough which is inconsistent with the *Polkey* argument that was advanced.

63. For the reasons set out, the Tribunal finds that the Claimant's claim for constructive unfair dismissal succeeds.

Unlawful deductions from wages

64. The Respondent submitted that the bonus payments set out in the Claimant's contract of employment were entirely discretionary and could be withdrawn at any time. The Tribunal rejects the Respondent's interpretation of the contract of employment having considered relevant case law (set out above).

65. The Respondent was in breach of the express term of the Claimant's contract of employment when it unilaterally decided not to pay the Claimant any further monies in relation to the bonus of 25% of profits relating to the Amazon contract. It did not have an unfettered discretion to withdraw the entitlement to bonus at any time without consultation (see *Horulak* and similar cases referred to above).

66. The Respondent submitted that if it was in breach of contract, such breach arose on 3 August 2020 and the cut-off was the last working day of August 2020 when payments were made to the Claimant. It argued the Claimant had acquiesced and was out of time given that he first notified ACAS on 17 March 2021. The Respondent argued that there was nothing to suggest it was not reasonably practicable for the Claimant to get his claim for unlawful deductions filed in time. The Tribunal rejects this submission.

67. Following *Abrahall* (and the other cases cited above) the Tribunal concludes that the Claimant did not acquiesce to the unilateral breach of contract by the Respondent. The Claimant's conduct in continuing to work is reasonably capable of a different explanation and therefore it cannot be treated as constituting acceptance of the withdrawal of the bonus. The Tribunal finds that the Claimant made it clear orally that he objected and did not accept the position put forward by the Respondent concerning the bonus. The email of 3 August 2020 implies that discussions were ongoing and the matter had not concluded. The Claimant was not present at the meeting where his bonus entitlement was discussed. The Claimant did not accept the change verbally or in writing. He was led to believe by Ryan March that the matter would be resolved. The Tribunal accepts that the Claimant continued to seek to arrange meetings to discuss the matter until he came to raise a grievance about it on 19 January 2021 after he had been suspended. The Claimant was entitled to be paid a bonus under his contract of employment as per the terms set out.

68. There was a series of deductions and the Claimant contacted ACAS within three months of the last of the series, i.e. the last working day of January 2021 which was 29 January 2021 (the last day of the second month as per the Respondent's email of 8 June 2020).

69. Unlawful deductions in respect of the Claimant's bonus were made from the Claimant's wages for each month from June – November 2020. The precise figures will need to be determined at a remedy hearing.

Employment Judge Platt

Date 11 August 2022