EMPLOYMENT TRIBUNALS

Claimant: **Mr. D Thomas**

Respondent: **Rolls Royce Plc**

Heard at: **Nottingham**

On: **23rd January 2023**
7th February 2023 (In Chambers)

Before: **Employment Judge Heap (Sitting alone)**

Representation
For the Claimant: **In person**
For the Respondent: **Ms. A Niaz-Dickinson - Counsel**

JUDGMENT

The claim fails and is dismissed.

REASONS

BACKGROUND &THE ISSUES

1. This is a claim brought by Mr. Daniel Thomas ("The Claimant") against his now former employer, Rolls-Royce Plc ("The Respondent").

2. The only complaint is of constructive unfair dismissal. The Claimant relies upon a breach of the implied term of mutual trust and confidence and relies on the following acts as being destructive of that implied term:

    i. The level of his salary which he says was below that of one of his direct reports and was not reflective of the work that he was doing; and

    ii. That the early termination of an international assignment in the United States made him incur a tax liability which the Respondent did not agree to meet on his behalf.

3. The Respondent denies that there was any breach as alleged but argues, in the alternative, that the Claimant waived his right to rely on them due to the delay in his resignation. Alternatively, it is said that the Claimant did not resign in relation to any alleged breach but because he had obtained a preferred role elsewhere on at a significantly higher rate of remuneration.

THE HEARING

4. The claim was allocated one day of hearing time. Fortunately, the evidence and submissions of the parties were able to be completed within that time but given that they did not conclude until late in the afternoon it was not possible to give Judgment on the same day and accordingly Judgment was reserved. A further date for deliberations was listed, which took place on 7th February 2023 in chambers.

WITNESSES

5. During the course of the hearing I heard evidence from the Claimant on his own account. He also provided witness statements from Mr. Lewis Prebble, the Claimant's line manager whilst he was seconded to the United States and also from Ms. Jacqueline Sutton MBE, the former Chief Customer Officer of the Respondent. Neither Mr. Prebble nor Ms. Sutton MBE attended to give evidence and I heard submissions on the weight that should be attached to their statements. Ultimately, I determined that I should not place weight on that evidence because it was not able to be tested in cross examination and, in all events, it could not materially assist me in respect of the issues in the claim.

6. On behalf of the Respondent, I heard from the following witnesses:

    a. Mr. Andrew Geer, the Claimant's former line manager; and

    b. Mr. Steven McNabola, the Respondent's Tax Compliance Manager.

7. In addition to the witnesses from whom I have heard I have paid careful attention to the documentation within the hearing bundle before me and to the helpful submissions received both from the Claimant and from Ms. Niaz-Dickinson on behalf of the Respondent. I should observe that if I fail to make specific mention in this Judgment of something that I have seen or heard that does not mean that I have not considered it as the parties can be assured that i have taken into account everything that I have been told when reaching my decision.

THE LAW

8. Before turning to my findings of fact, I remind ourselves of the law which I am required to apply to those facts as I have found them to be.

9. Section 95 provides for a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

10. Tribunals take guidance in relation to complaints of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA**:-

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

11. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always inevitably be repudiatory by its very nature.

12. The question of whether or not there has been a repudiatory breach of the term of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

13. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

14. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions, including continuing to accept pay or a lengthy delay before resigning. In those circumstances, an employee may affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

15. Tribunals are also assisted by the guidance in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] I.R.L.R. 833** which requires consideration of the following matters when determining a complaint of constructive dismissal:

    (i) 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?

(ii) Has he or she affirmed the contract since that act?
(iii) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? and
(iv) Did the employee resign in response (or partly in response) to that breach?

FINDINGS OF FACT

16. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have therefore invariably not made findings in respect of each and every area where the parties are in dispute with each other on the evidence if it is not necessary to do so.

The Respondent and the commencement of the Claimant's employment

17. The Respondent is a multi-national aerospace and defence company. It has bases not just in the United Kingdom but from a number of counties throughout the world, including the United States of America.

18. The Claimant applied for and was offered employment with the Respondent in 2012. He commenced employment at a staff level role but was promoted relatively swiftly. The Claimant was seen as something of a rising star within the Respondent. He was seen as having high potential and it is clear that he made a significant contribution to the parts of the business in which he was working at various times. He is clearly very ambitious and is rightly proud of the achievements that he has made and how successful he has been in his career. Those successes have been recognised by the Respondent at various times including not only promotion and salary increases but also internal awards being presented to the Claimant. The Respondent clearly saw great things for the Claimant and that is recognised by issues such as their funding of an MBA qualification at a cost of approximately £40,000.00 and his entry into the leadership high potential pool.

19. At the date of his resignation the Claimant was earning just over £76,000.00 per annum in addition to a monthly car allowance and 15% discretionary bonus scheme.

International assignment to the United States

20. At times employees of the Respondent are asked to undertake international assignments. For long term assignments of this nature there is a specific assignment policy ("The Policy") which appears at pages 42 to 76 of the hearing bundle. Part of the Policy is in respect of what is referred to as "tax equalisation" (see page 60 of the hearing bundle). That is designed to ensure that the assigned employee pays no more tax and social security payments in their host country than they did within the country in which they were normally employed to work.

21. The Policy clearly sets out that sources of income that are subject to tax equalisation and equally clearly sets out what is excluded. It makes clear that the Respondent is not responsible for paying home or host country tax on a number of income sources which includes "income from renting out or selling your property" (see page 60 of the hearing bundle).

22. The Respondent engages tax advisers to assist employees on international assignments in preparing their tax returns in respect of their home country. That assistance was afforded to the Claimant.

23. In early 2019 the Claimant was offered an international assignment as a Lead Customer Manager. The assignment was due to last between 1st May 2019 and 30th April 2021. However, it did not in fact commence until July 2019 and the expected end date was later extended to July 2021. However, the assignment did in fact end early, in circumstances which I shall come to below, in January 2021.

24. The Claimant freely accepted that assignment and in doing so expressly accepted that he had understood and accepted the terms and conditions set out in the Policy (see page 113 of the hearing bundle). The Claimant did not dispute in his evidence that that was the case nor did he suggest that he did not understand what the Policy said.

25. The Claimant's line manager for the duration of his international assignment was to be Lewis Prebble. It is clear that the Claimant continued to perform as well as he had in the United Kingdom whilst on assignment and that his work was highly regarded and appreciated (see page 150 of the hearing bundle).

26. It should be noted that Mr. Prebble was based in the United States and had no authority over the business in the United Kingdom and, particularly, not over budgets or the implementation of the Policy.

Termination of the assignment

27. As a result of the impact of the Covid-19 pandemic the Respondent's civil aerospace division in the United Kingdom was subject to a restructuring process which left the Claimant's substantive post at risk of redundancy. The Claimant takes no issue that there was a genuine restructure and that as a result his role was at risk. As a result, his international assignment was also at risk and he was informed by Mr. Prebble that it would need to be terminated before it would otherwise have come to an end at the end of June 2021. It is not in dispute that the Claimant's international assignment would no longer exist with effect from 1st February 2021. It is also not in dispute that the Respondent was entitled to terminate an international assignment on thirty days notice for business reasons (see page 66 of the hearing bundle) and the Claimant would have been aware of that before he accepted the assignment. That is what the Respondent later did due to business need. The Claimant does not dispute that the Respondent was entitled to terminate the assignment nor does he dispute that it was necessary for business reasons to do so.

28. Mr. Prebble encouraged the Claimant to seek alternative employment within the United Kingdom operations of the Respondent given that his substantive post was at risk of redundancy and the Claimant was job matched and accepted the role of Programme Executive working within their UltraFan engine programme (see page 135 of the hearing bundle). The Claimant would be reporting into Andy Geer, the Chief Engineer and Head of Programme with UltraFan.

29. The Claimant was paid the same in his new role as he had received in his previous substantive post although I accept that the Programme Executive position did come with some additional responsibility.

30. Prior to formally being told when his assignment would be ending and securing an alternative role the Claimant raised with the Respondent's Global Mobility Support Team ("Global Mobility") who were tasked with supporting employees who needed to be repatriated at the end of an international assignment, what assistance was available in respect of early termination. Particularly, the Claimant was understandably concerned that he had obligations to continue to pay his lease on a property in the United States until June 2021 and whilst he was out of the United Kingdom he had been renting out his house and the tenant was not due to leave that property until at least March 2021 (see pages 139 and 140 of the hearing bundle).

31. Global Mobility replied to the Claimant to indicate that nothing could be resolved until a final decision had been taken as to the Claimant's substantive role, his assignment and any alternative employment that he may secure. The Claimant sent a further message to Global Mobility asking if the Respondent would be responsible for the early termination charges on his lease. The Claimant was told in reply that consideration would be given to any "assignment related costs" that he had already committed to such as the lease on his property in the United States (see page 136 of the hearing bundle). That did not amount to a guarantee that any associated costs would definitely be met and certainly not any tax liability which was not in all events known about at that time.

32. After confirmation that the assignment would be terminating early and having secured the UltraFan role the Claimant sought to agree the logistics for leaving the United States and commencing his new position. He emailed Mr. Prebble on 17th December 2021 proposing that his last working day in the United States would be 28th January 2021 with him then travelling back to the United Kingdom the following day and commencing the UltraFan role on 1st February 2021.

33. He also asked for Mr. Prebble's assistance in obtaining clarity from the Respondent about buying out his lease on his accommodation in the United States and providing short term accommodation until his tenant had vacated his own property in the United Kingdom. Mr. Prebble responded to indicate that he was sure that things could be arranged to make what the Claimant had proposed work and that the onus would be on Global Mobility to "do the legwork". Again, that did not amount to any guarantee that any associated costs would be met and again not any tax liability which was still not known about at that time nor, indeed, was it known before April 2021 when Mr. Prebble left the business. Even if the tax liability

had been known to Mr. Prebble, he had no authority to bind Global Mobility or the Respondent's business in the United Kingdom to meet those costs.

34. It was subsequently confirmed that the Claimant's international assignment would cease slightly earlier than the date referred to above and that he would repatriate to the United Kingdom with effect from 21st January 2021.

35. Around the time of that confirmation the Claimant was in contact with Global Mobility concerning the arrangements for his repatriation and the associated costs. He was asked to find out details of those costs and he emailed Global Mobility with the details on 6th January 2021 (see page 174 of the hearing bundle). He indicated that the costs of early termination of the lease on his rented accommodation in the United States would be $6,200.00 and that he and his wife (who had joined him in the United States during his assignment) would need six weeks of serviced accommodation before they were able to move back into their own property at the end of their tenant's lease. The Claimant proposed mitigation of the latter costs by indicating that they would arrange to stay with family if the Respondent agreed that they could both fly back to the United Kingdom on 21st January and meet the costs of two additional checked bags for each of them on that flight.

36. The Claimant sent a further message regarding the costs of early termination of the lease on the United States rental property. In addition to the early termination costs previously given the Claimant indicated that a period of 60 days notice needed to be given, albeit he had negotiated that down to 30 days if the Respondent was able to provide written confirmation of the date on which he was required to return to the United Kingdom. Those total early termination charges equated to $7,865.00 (see page 173 of the hearing bundle).

37. Mr. Geer agreed, which was communicated via Global Mobility to the Claimant, that the Respondent would meet the costs of the early termination of the United States lease and the additional checked baggage which equated to a further $540.00 and that the Claimant would not have to travel to Derby between 1st February 2021 when he commenced his new Ultrafans role and March 2021 when he would be able to move back into his own house once his tenants vacated it.

<u>Return to the United Kingdom</u>

38. The Claimant formally accepted the offer within UltraFans and was sent an offer letter by the Respondent on 6th January 2021 whilst he was still in the United States (see page 159 of the hearing bundle). The offer set out that the Claimant would be remunerated at a rate of £70,000.00 per annum subject to an annual review which was dependant on affordability. The Claimant accepted the position at that rate of remuneration and made no reference to any dissatisfaction with the package that he received until some months later.

39. The Claimant commenced his new position on 1st February 2021 and continued to perform impressively in that role. That was reflected in the grading which he was

given by Mr. Geer at the end of 2021 when he was rated as a high performer (see page 151 of the hearing bundle).

Personal tax liability

40. The Claimant was given assistance from the Respondent's external tax advisers in respect of completion of his self-assessment tax return for the tax year 2020/2021 following his repatriation. Around that time and in respect of a need to file an amended tax return with regard to the previous year, it came to light that there was going to be a tax liability arising in the United Kingdom with respect to the property that the Claimant had rented out during his time in the United States. The Claimant had not anticipated that because previous advice that he had been given by the same advisers was that he would be treated as resident in the United States for tax purposes in respect of the period in question. That would have been the case had the international assignment run its course and the Claimant had not been repatriated early. In those circumstances, he would not have incurred any tax liability in respect of his rented property. The amount due in respect of the year 2019/2020 was £1,082.00 and for the following year £304.60.

41. Alongside that an additional issue as to tax had arisen because the Claimant had received a refund from HMRC in March 2021 which meant that he had not paid enough tax in that tax year. That had caused the Claimant to be due to repay the sum of £2,700.39 to the Respondent.

42. Upon becoming aware of the situation, the Claimant emailed Steven McNabola, the Respondent's Tax Compliance Manager, on 12th November 2021 asking for his assistance in setting up a way to structure repayments to the Respondent in respect of the sum of £2,700.39 over a six month period. However, the Claimants e-mail also said this in respect of the sums that he owed directly to HMRC:

"However, I understand from Tom that if the company had honoured its obligations for my assignment through to June 2022 , then my 2019/20 tax return would not have required amendment, and no further payment will be required on my part. I also similarly understand, that if my assignment hadn't been cut short, then there would have been no tax due on my rental income in 2020/21, as this would been covered with the personal allowance available as a UK non-resident.

Given the company took the decision to end my assignment early out with my control, and based on the information from Deloitte, my position is that the company should cover the incremental cost due in 2019/20, and the tax relating to rental income in 2020/21, both of which I would not otherwise have been payable (sic)".

43. The Claimant's email asked for Mr McNabola's assistance to bring matters to a conclusion. Mr. McNabola had been involved in respect of the tax issue at an earlier stage when the Claimant had asked him to check the tax position based on the advice that he had been given that there was an additional tax liability.

44. Mr. McNabola replied on 16th November 2021 to agree a repayment plan over 6 months but to indicate that the Respondent could not be responsible for the

Claimant's tax liability on income from his rental property because that was specifically excluded under the terms of the Policy. He made clear that a number of other individuals had been repatriated early and all had had the Policy consistently applied to them without exception (see page 239 of the hearing bundle).

45. He also set out that if the Claimant was having difficulty settling his own outstanding tax to HMRC then it may be possible for the Respondent to pay that and for a repayment plan to be devised. He indicated that in respect of the repayment plan the Respondent would look to set that up after the New Year and most probably in February 2022.

46. The Claimant replied to say that he was not agreeable that he needed to repay the additional tax liability on his rental income. He referred to the fact that the Respondent had met other early termination costs such as his lease termination in the United States and his belief that the tax liability should also be done in the same way because early termination had been a decision by the Respondent that he had no control over. He asked for Mr. McNabola's assistance to enable him to escalate the matter.

47. The matter was referred to Ian Dawe, the Respondent's Tax & Reward Manager in Global Mobility who emailed the Claimant on 29th November 2021. He said that he had reached the same conclusion as Mr. McNabola in that the Respondent could not agree to meet the Claimant's personal tax liability on his rental property. He set put the following points as to why he had reached that conclusion:

    a. That the Policy was clear that the Respondent does not settle personal tax liabilities and that that was applied consistently to all employees;

    b. That there had been no commitment that his tax would be calculated at a certain rate;

    c. That other employees who had been repatriated early and had similar circumstances had been treated consistently;

    d. That a tax consultation had been offered on repatriation; and

    e. That the Claimant had received the rental income and as such he should pay the tax due on it.

48. Mr. Dawe chased the matter up with the Claimant on 14th December 2021 as to whether he was in agreement with the repayment plan proposed by Mr. McNabola or whether he had found someone within the Respondent who would be willing to absorb the cost and responsibility of acting outside the terms of the Policy.

49. The Claimant replied to say that he would not be making the repayments of the sum due to the Respondent because the decision to end the assignment early was their decision and outside his control. He said that he would seek to find a "voice of reason" within the business to support him and he later confirmed to Mr. Dawe that

Mr. Geer was aware of the situation and asked that he follow matters up with him directly to resolve the matter.

50. Mr. Dawe emailed Mr. Geer providing him with a copy of the earlier email chain and asking if he wanted to authorise it as an exception to the Policy and providing the rationale for why the Claimant's position had not been accepted to date. He indicated that if the Respondent was to meet the costs directly it would be taxable income and so would amount to a 60 percent higher cost to the Respondent than the Claimant's own personal tax liability.

51. On the same day the Claimant sent an email to Mr. Geer asking for his assistance to resolve the tax issue and setting out why he felt that the Respondent should meet the additional tax that he had incurred on his rental income (see page 184 and 185 of the hearing bundle). At the same time he also raised issue as to his salary and I come to the details of that further below.

52. Mr. Geer replied the following day to both the tax and salary points and the relevant part of his email relating to the latter said this:

> *"I would think that the company should protect you against the change of circumstance that was their choice not yours and make good the increased tax liability…. assuming that there were no contract conditions expressed at the time of signing which directly exempt that (in other works that you didn't directly agree to that risk in the first place – seems unlikely!!). I'll take advice on how best to tackle this if you can please confirm there's no contract involvement/complexity and give me a contact in Global Mobility".*

53. I accept the evidence of Mr. Geer that at the time that he wrote this email to the Claimant he was not fully aware of the relevant part of the Policy relating to personal tax liability and the Claimant having agreed when accepting the international assignment to be bound by that. I also accept that he was just expressing his opinion that the Respondent should meet the additional tax liability but that he needed to check that position and was not making any promises that the cost would definitely be met. There is support for that position in the fact that Mr. Geer's email made reference to seeking advice.

54. The Claimant replied on 17th December thanking Mr. Geer for his assistance and attaching his offer letter for the international assignment. He made it plain that he agreed that Global Mobility had correctly applied the tax equalisation policy – referring to it as not really being up for debate – but referring to his belief that the additional tax liability should be seen as a further liability that the Respondent should be accountable for in the same way as had been the case for the early termination of his lease in the United States.

55. Mr. Geer subsequently spoke with Global Mobility about this issue and was made aware of the fact that the Policy exempted any payment by the Respondent from paying tax on income from renting out a personal property and that there had been others who had incurred such costs who had had assignments terminated early and that a consistent approach had been taken with all of them to the one that was being

taken with the Claimant (see page 201 of the hearing bundle). Mr. Geer accepted that it was a difficult position and that he had some sympathy on both sides but also recognised that Global Mobility had taken a consistent approach and that the Claimant was not considered to be a special case.

56. Mr. Geer accordingly communicated to the Claimant that he would need to meet the additional tax on his rental property personally. He advised the Claimant of how he could escalate matters to Human Resources if he remained dissatisfied and the Claimant did so on 28th February 2022 (see page 206 of the hearing bundle). The Respondent's position on the matter did not alter.

57. The matter still not having been resolved Mr. McNabola emailed the Claimant on 25th February 2022 indicating an agreement to six monthly deductions to repay the outstanding sum and providing bank details if the Claimant wanted to make a payment in one go.

58. Mr. McNabola wrote again more formally to the Claimant on 25th February 2022 proposing a repayment schedule to be deducted from his wages of £450.00 per month in accordance with the request made by the Claimant on 12th November 2021. The Claimant was asked to sign an agreement to that effect. He did not do so. He did, however, email Mr. McNabola asking to discuss matters further because he did not agree the position and felt that there was still a dispute. He asked for assistance in understanding the £2,700.39 figure and referred to his own tax liability as being unresolved. He reiterated that had his international assignment not ended before the anticipated conclusion then he would not have incurred tax liability in respect of his rental income in either 2019/2020 or the following year.

59. Mr. McNabola replied agreeing to discuss matter further but reminding the Claimant that the sum of £2,700.39 was due as a result of a previous refund to him from HMRC and it had been understood that he agreed following discussions with Deloitte that the sum was due and that repayment in instalments had been agreed by the Respondent.

60. The Respondent also paid the tax liability on the Claimant's behalf of £1,082.00 so that by the time the Claimant left employment with the Respondent he owed the sum of £3,782.39 which the Respondent had paid in respect of the Claimant's tax liabilities.

61. It is not in dispute that the Claimant did not make repayment to the Respondent in respect of the tax liability of £3,782.39 either before or after his employment terminated. The Claimant's evidence was that he was awaiting the outcome of this case before dealing with that issue.

Salary levels

62. As indicated above, the Claimant commenced the new role working under Mr. Geer on 1st February 2021 at a salary of £70,000.00 which was equivalent to that which he had received in his previous role before he was sent on international assignment.

63. He was also entitled to participate in a bonus scheme to receive a 15% discretionary bonus.

64. On 19th April 2021 the Claimant had sent an email to a work colleague which largely related to the resignations of two other members of staff which he commented were due to reward and recognition issues. He referred to his own position in relation to this email and the relevant part said this:

> *"If I'm being brutally honest, whilst I understand and accept the broader business challenges at present, I'm in a similarly frustrating position. I have been in a Level B role since January 2019, with 2 full year PDR's at High performance and remain more than 20% down on the Level B mid-point. This is also despite moving into a bigger role on 1st Feb with more accountability and business significance, whilst keeping the same T&C's from 2019. I also find it difficult to reconcile how one of my direct reports with a fraction of my accountability is compensated better than I am. These are some of the thoughts on my mind, and so it's not surprising that we have people looking at external opportunities.*
>
> *I think we have to either find some flexibility/means to protect our key talent or accept people leaving as a gravity issue that will com with impact that we will have to try and navigate".*

65. As indicated above, the Claimant also raised the issue of his salary with Mr. Geer on 14th December 2021 at the same time that he was requesting his assistance with regard to the matter of his tax liability on his rental property. The relevant part of the Claimant's email said this:

> *"This* [that being the tax issue] *has also led to me reflecting on the fact that I have come back to the UK in a bigger role (top end of Level B), with a basic salary that is 20% down on the mid-point of Level B. Furthermore, I have recently learned that I am paid £2.5k less than one of my direct reports, who by definition have a fraction of my accountability.*
>
> *I trust that I have demonstrated my capability in delivering this role and going above and beyond to the point where my salary (and this frustrating tax issue) are making me feel extremely undervalued".*

66. The Claimant asked to discuss matters with Mr. Geer when they next caught up.

67. Mr. Geer replied the following day and sought to reassure the Claimant that he would talk the issue of his salary through but in the meantime set out steps that he had taken which may be able to improve matters.

68. In fact, Mr. Geer arranged for the Claimant to receive a pay increase in December 2021 to £72,800.00. That was outside the usual cycles of pay reviews which would normally take place annually in March of each year. Mr. Geer did not arrange an out of cycle increase in pay for anyone else in his team other than the Claimant.

69. By that stage, the Claimant was no longer earning less than the direct report to whom he had referred in his email to Mr. Geer as that individual was earning £72,013.00 and did not receive any pay increase as the Claimant did. I accept the evidence of the Respondent that pay levels were not dictated only by the role that was being undertaken but also by things such as qualifications, experience and length of service and it was for those reasons and the fact that the individual report had moved from a role at a higher grade than the Claimant that there was an initial disparity in pay. The Claimant's evidence was that this report was the only one who received a salary close to that which he received.

70. The employee in question did receive a pay increase in March 2022 but that was as a result of a decision taken by the Claimant as his line manager. His pay at that time increased to £72,875.00 and the Claimant also received a pay increase of 4.5% agreed by Mr. Geer which increased his salary to £76,076.00. That was the annual pay review and was received by the Claimant as well as the out of cycle increase the previous December. At no time after December 2021 when the matter was raised with Mr. Geer did the Claimant receive a salary less than one of his reports.

71. The Claimant also received a 15% discretionary bonus which was a greater rate than his direct reports received. Although the Claimant may have received less salary than some other members of Mr. Geer's team I do not accept that he was treated inequitably in respect of matters of pay and that salary was not based solely on the role that was being undertaken so that it would not have been reasonable to have expected him to receive a salary increase to match other higher earning members of the team.

72. The Claimant accepted in his evidence that Mr. Geer had gone out of his way to ensure that he received pay increases once the matter had been raised with him. Prior to December 2021 I accept that Mr. Geer had not been aware that the Claimant was dissatisfied about his pay levels and immediately that he was, he took steps to try to resolve matters.

73. Whilst the Claimant suggested in his evidence that Mr. Geer could have backdated his increased pay to 1st February 2021 when he started the UltraFan role, he did not in fact ever ask Mr. Geer to do that nor was there any suggestion that that was something that happened in practice when pay increases were given.

<u>The Claimant's resignation</u>

74. On 4th March 2022 the Claimant wrote to Mr. Geer tendering his resignation with effect from 4th June 2022. The resignation letter is at page 209 of the hearing bundle and it is worth setting out the pertinent sections which are below:

> *"I received an offer for a significant leadership role as Senior Director - Service Delivery and Programme Management for the Europe, Middle East, and Africa region for Rapiscan Systems. Following very careful consideration over the past few weeks, I feel that this opportunity is the right step in my career.*

It has been a pleasure working with you and the UltraFan team over the past 14 months. Keeping the demonstrator programme on track and our team fully engaged whilst also dealing with the unprecedented levels of ambiguity has been a great learning experience that will stick with me forever. I'm also particularly grateful for leadership and coaching through one of the most challenging times for Rolls-Royce civil aerospace. I know that Rolls-Royce will find a way to navigate through this difficult external environment and I'm confident that you position the UltraFan technology to help win future positions for Civil Aerospace.

I will continue to offer my full support to you in the programme to help ensure that the programme continues to run smoothly after my departure I'm keen to help recruit and bring my replacement up to speed and I will make certain that a robust handover is completed before my last day of work.

Thank you again for the opportunity to undertake a significant leadership role in UltraFan and make a contribution towards the future technology for sustainable aviation in Civil. I wish you in the team all the very best and hope to stay in touch with you in the team who will help who will bring UltraFan to life".

75. The Claimant provided his personal email address and mobile telephone number and invited Mr. Geer to contact him at any time.

76. The Claimant made no complaint in the resignation letter about his salary or the tax position or suggested that either of those things had caused him to terminate his employment. It is clear from the letter that his reason for leaving was because he had obtained a much better opportunity elsewhere. Whilst the Claimant did reference the tax and salary issues within his leavers interview (see page 254 of the hearing bundle) I am not satisfied that those matters had anything to do with his resignation. Indeed, the same exit interview also covered his frustration as to the lack of opportunity in his present role and a lack of career development opportunities. I am satisfied that those latter two issues were the reason that he began to look for employment elsewhere where he could better advance his career.

77. The Claimant commenced the new employment that he had referenced in his resignation letter on 6th June 2022. Although he says that this is on a reduced package of benefits to those which he received from the Respondent there is no evidence of that before me upon which I can make any finding. What is plain, however, is that the Claimant's remuneration in his new employment is significantly more than that which he was receiving from the Respondent. At almost £126,500.00 per annum, it represented around £50,000.00 more than he was paid by the Respondent. The role is also one with significant leadership responsibility and as such is also a step up in terms of career development. I accept the evidence of the Respondent that although it is clear that the Claimant had long term career goals the sort of remuneration that he is now receiving would not be a possibility with the Respondent for some considerable period of time.

78. The Claimant is clearly ambitious and I am entirely satisfied that the reason that he sought new employment was because of his desire to obtain an increased rate of remuneration and a more senior position. Indeed, he accepted in cross examination that the reason that he had started looking for alternative employment elsewhere was for career progression and to obtain a higher salary.

79. Although he had received promotions with the Respondent things were not progressing as swiftly as he wished and were unlikely to do so in the short to medium term. I am satisfied that that is why he sought alternative employment and upon receiving what would clearly be a very satisfactory offer he decided to terminate his employment with the Respondent.

80. My finding in that regard is reinforced by the fact that in February 2022, shortly before his resignation, the Claimant applied for an internal promotion within the Respondent in a Customer VP role (see page 257 of the hearing bundle). By that stage the Claimant had received a pay increase in his existing role and his direct report was no longer earning more than he was and he was also aware of the Respondent's position with regard to the tax payment. His application for another role to advance his career progression within the Respondent is inconsistent with the position that the Respondent had fundamentally breached his contract of employment such that he had no alternative to resign but it is entirely consistent with him seeking opportunities to develop his career. Indeed, his evidence under cross examination was that if he had obtained that position it would have been a "win win".

CONCLUSIONS

81. Insofar as I have not already done so I now turn to my conclusions in respect of this claim.

82. I deal in turn with both of the instances upon which the Claimant relies as being destructive of mutual trust and confidence before dealing with, whether singularly or cumulatively, they were destructive of that term.

83. I begin with the tax issue. The Claimant accepted that the Policy applied to his international assignment. He was given a copy of the Policy prior to the commencement of the assignment in the United States and signed to say that he agreed to be bound by them. The Policy could not have been clearer that that the Respondent is not responsible for paying tax on income from renting out a property during the course of the assignment. The Claimant was aware of that before accepting the assignment.

84. The Claimant accepted – both in his evidence and in email communications with the Respondent at the time – that the Respondent had applied the tax equalisation policy correctly in respect of the rental income in question. That was income which the Claimant had received and none of it had benefited the Respondent. The Respondent had applied the terms of the tax equalisation policy consistently to all employees who had incurred tax liabilities arising from the early termination of an international assignment. There could be no justification for treating the Claimant

more favourably than everybody else and, indeed, no doubt it would have caused considerable dissatisfaction with others had that occurred.

85. Whilst the Claimant points to the fact that had the assignment run its course then he would not have incurred a tax liability, that overlooks the fact that the Respondent was contractually entitled to terminate on 30 days notice and the circumstances were unusual because the Claimant was at risk of redundancy in his substantive role. Whilst the Respondent did meet the costs of the early termination of the Claimant's lease on his property in the United States and additional baggage costs for him and his wife to repatriate, that does not somehow obligate them to meet costs expressly excluded under the Policy.

86. Whilst the Claimant also relies on the initial email from Mr. Geer that suggested that his view was that the Respondent should make good the additional tax liability, that was sent with a clear caveat that nothing to the contrary had been agreed and before he had seen the Policy and received advice on the tax equalisation exclusion which clearly applied to what the Claimant was asking for. I find it entirely unsurprising that the Respondent took the position that they did in respect of refusing the Claimant's request that payment be made. The Respondent took considerable time to explain that position to the Claimant and to allow him to escalate it and challenge it from Mr. McNabola to Mr. Dawe then on to Mr. Geer and to HR.

87. The fact that the Claimant was dissatisfied with the position does not mean that following the Policy that he had agreed applied to him in the same way as was done with others could reasonably be said to amount to a breach of the implied term of mutual trust and confidence.

88. I turn then to the issue of the Claimant's salary. The Claimant commenced the UltraFan role at the same level of remuneration as that which he had received in his previous substantive role. He accepted that and did not challenge it with Mr. Geer or anyone else at the time. The salary that the Claimant was receiving was within the relevant banding for the position that he was undertaking. Where someone fitted within the banding was not only dependant on their responsibilities but also qualifications, experience and length of service. The latter explained the disparity in pay between the Claimant and his direct report and as soon as Mr. Geer became aware that the Claimant was dissatisfied with his remuneration package he was supportive and took steps to try to rectify the situation. Indeed, he arranged an out of cycle pay increase for the Claimant which he did not do for anyone else in his team. By the time that the Claimant resigned there was no longer any disparity of pay between him and a direct report and the Respondent was under no obligation to increase his pay to match that of other members of Mr. Geer's team who had different circumstances and arrangements. Matters of the Claimant's pay could not reasonably amount to a breach of the implied term of mutual trust and confidence.

89. For those reasons neither of those things either singularly or cumulatively are so serious as to breach the implied term of mutual trust and confidence. They did not go to the root of the contract for the reasons that I have already set out in my

findings of fact above and were minor matters for which there was reasonable explanation.

90. For completeness I have considered whether the Claimant waived his right to rely on any breach. If I had found the issue of salary to have amounted to a fundamental breach of contract, then I would certainly have found that the Claimant had affirmed that breach. He had worked in the UltraFan role for almost a year without any complaint to Mr. Geer and for 13 months before his resignation. At the time of his resignation there was no longer any disparity in his pay with the direct report which he had complained of in December 2021 and alongside continuing to work and accept his salary he had also applied for another role within the Respondent.

91. I would not have concluded the same with regard to the tax issue, however, as the Claimant was continuing to escalate that matter until shortly before his resignation and so although there had been a passage of time since he discovered about the liability and since Mr. McNabola's decision, there was continued dialogue which may have led to resolution. However, the fact remains that requiring the Claimant to meet his own personal tax liability was, in the circumstances, not a breach of the implied term of mutual trust and confidence.

92. Equally for the sake of completeness, even had I found there to be a fundamental breach of contract I was not satisfied from the Claimant's evidence that he resigned in response to it. It is plain for the reasons that I have found and set up above that the reason that the Claimant resigned was because he had found a more senior position at a much higher rate of remuneration. That was what the Claimant had been seeking for some time – including when he applied for a more senior internal position with the Respondent shortly before his resignation. The issues relied on were not therefore part of the reasons for the Claimant's resignation and so the claim would have failed on that front also.

93. For all of those reasons the complaint of constructive dismissal fails and is dismissed.

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Employment Judge Heap

Date: 17th March 2023

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