EMPLOYMENT TRIBUNALS

Claimant

Mr P Kujawa

Respondent

Essex Transport Services Limited

Heard at: **Southampton (by CVP)** **On: 25 26 27 January 2021**

Before: **Employment Judge Dawson, Mr N Cross, Mr R Spry-Shute**

Appearances
For the claimant: In person,
For the respondents: Ms Reece, employment adviser

.

RESERVED JUDGMENT

1. The claimant's application to strike out the response is refused.
2. The respondent was in breach of contract in respect of:
    a. non-payment of bonus due to the claimant in 2017
    b. non-payment bonus due to the claimant in 2018
    c. preventing the claimant from taking holiday in 2017.
3. The respondent made an unauthorised deduction from the claimant's wages in December 2018 by deducting the sum of £15.
4. The remedy hearing in respect of the claims set out in paragraphs 1 and 2 is adjourned, if either party wishes to apply for the remedy hearing to be listed,

they must apply to the tribunal within 21 days of this judgment being sent to the parties.

5. If neither party applies to the tribunal within 21 days of this judgment being sent to the parties then the claim in respect of remedy may be dismissed without further order.

6. The other claims of the claimant are dismissed.

REASONS

Introduction, Procedural Matters and Issues

1. By a claim form presented to the Tribunal on 19 March 2019, the claimant presented claims of unfair constructive dismissal, discrimination on the grounds of race and for holiday pay and arrears of pay (by reference to the boxes ticked on the Claim Form).

2. The case came before Employment Judge Midgley on 22nd October 2019 when the issues were identified and the case was listed for a two-day hearing. The timetable agreed at that hearing allowed 2 hours for cross examination of the claimant's witnesses and the same for the respondent's witnesses. Following that hearing the claimant sought amendment of the issues as listed which resulted in an Amended Case Management Summary. At the outset of the hearing before us, the claimant confirmed that the issues set out in that document accurately represented his case and the respondent agreed that those were the issues that we must determine.

3. At a subsequent case management hearing, Employment Judge Roper extended the hearing to 3 days and it was confirmed that the issues remained as set out by Judge Midgley. He set a new timetable which allowed 3 hours for the presentation of each party's case because it was anticipated that the claimant would give evidence himself and the respondent would now call 4 witnesses. It is clear that, regrettably, even at that stage the parties were unable to agree a bundle of documents. The respondent asserted that it had prepared a bundle of the relevant documents which the claimant would not agree to and that it was ready to exchange witness statements. It said the claimant was seeking to add documents which were not relevant. The claimant stated that the respondent had failed to include documents that he wanted and therefore he had been unable to complete his witness statement. Both parties were reminded of the need to cooperate. The judge gave directions for finalisation of the bundle.

4. At this hearing the claimant represented himself and the respondent was represented by an employment adviser. We heard from the claimant and, for the respondent, from Mr Collins, the respondent's financial director and Mr

Pickering, the Southampton depot manager (although that was not his role at the relevant time- when he was a supervisor).

5. At the outset of this hearing we were provided with a bundle of 212 pages but the parties remained in dispute about the bundle. After some time was spent clarifying the position, we concluded that the initial bundle sent by the respondent to the claimant was around 151 pages long and indexed. It contained the pages that made up the first 151 pages of our bundle. That was sent in July 2020. The claimant then asked for additional documents to be added to the bundle. He sent those documents to the respondent and the respondent added some or all of them to make the current bundle. The additional documents had been sent by the claimant in August 2020. The claimant was, therefore, aware of all of the documents in the current bundle a long time ago, although for reasons which were not entirely clear, he was only provided with a hard copy of the bundle on the Wednesday before this hearing started. The claimant continued his resistance to exchanging witness statements and, therefore, the respondent unilaterally sent its witness statement (for its, then, only witness) on the Saturday before this hearing started on the Monday. The claimant then sent his statement on the day before this hearing started.

6. The claimant made an application to strike out the respondent's case because he said the respondent had still not included all of the documents that he wanted in the bundle. He referred to a number of other documents which he said he had sent to the respondent but were not in the bundle and he wanted us to see. He said the respondent was at fault for the delays in finalising the bundle and, therefore, in the exchange of witness statements. The respondent denied that additional documents had been sent to it but said that it had no objection to us considering any documents that the claimant wanted to rely upon.

7. Although the claimant wanted the respondent's response to be struck out, if we were not minded to do that he did not want an adjournment on the grounds that he needed more time to deal with the documents or witness evidence, he was able to go ahead with the hearing.

8. Neither party was in a position to furnish us with a clear chronology of how the above procedural matters had arisen and given that the hearing was taking place by Cloud Video Platform it was more difficult to share emails than it would have been if the hearing had taken place in person. It was not possible for us to resolve definitively where fault lay without effectively turning the trial into one on that issue. We therefore considered whether we would strike out the response even if we were of the view that the respondent was at fault.

9. Having regard to the overriding objective, we concluded that a fair hearing was possible. The claimant had seen the respondent's documents in July 2020 and although he had wanted additional documents to be added, they were documents in his possession and so he would have been aware of them and their content for a long time. Whilst we accepted that he may struggle to find documents within the bundle, we considered that we could assist him in doing that (and did so during the hearing).

10. We took the view that we could allow the claimant to send the additional documents to us and the respondent that he wanted us to consider. As indicated, the respondent had no objection to that. Although the claimant had only received the respondent's statement on Saturday, the statement was relatively short and was received by him when he had not sent his statement to the respondent. The claimant was able to set out his evidence in a detailed witness statement and was fully aware of his case and the case he had to meet. The claimant did not suggest that he was not in a position to deal with the evidence of the respondent and said that he wanted the case to go ahead rather than be adjourned.

11. In reaching our decision, we also took into account the fact that the claimant would have another hour after we had communicated our decision whilst the tribunal carried on reading the documents.

12. In those circumstances. we considered that a fair hearing was possible and having regard to the overriding objective we refused the application to strike out the response.

13. The claimant then sent a large number of additional documents to the tribunal and the respondent, many of which were embedded in a cloud-based file sharing arrangement. On the morning of the 2nd day of the hearing, the respondent's representative told us that she had not been able to access the documents which were cloud-based. The tribunal had done so and had downloaded them and compiled them into one PDF. The tribunal, therefore, shared that PDF with both the claimant and the respondent (albeit that due to its size it had to be broken down into 5 parts). We stood the matter down for 30 minutes to allow the respondent to consider the documents. Many of the documents were ones which must have originated with the respondent. We also invited the claimant to check that we had included all of the cloud-based documents and had not omitted any of them. After 30 minutes the respondent confirmed that it had considered the document and was content to continue with the case and the claimant stated that he was happy with the single document created by the tribunal. Everyone agreed that the PDF document did not contain all of the documents which the claimant had shared - simply the cloud-based ones. The respondent had been able to access the other documents.

14. After the claimant had cross-examined the respondent's witness, Mr Jeff Collins, the respondent made an application to call a further witness, Mr Pickering. It had understood issues 9.1.5 and 9.1.8 as set out in the Amended Case Management Summary to refer to an isolated occasion when the claimant was given an additional collection. It had become aware, following cross examination of Mr Collins, that the claimant was making a different case, namely that after the 30 January 2019 the additional collection was a permanent adjustment to his duties.

15. It seemed to us that the claimant's case was clear from his particulars which were sent with the Claim Form and, also, his witness statement which the respondent had had since the previous Sunday. Nevertheless, the tribunal could understand why the respondent had understood the claimant's case to

be referring to an isolated occasion if the list of issues was considered in isolation.

16. We heard submissions and having considered the matter and the overriding objective decided that it was appropriate to allow limited further evidence from an additional witness for the respondent, to go purely to the question of the additional collection. We considered the prejudice to the claimant if we allowed the additional witness evidence and noted that although the claimant would not have had advance notice of what the witness would say, he was well aware of the issue having dealt with it extensively in his witness statement and would be able to formulate questions for the witness if we allowed appropriate time. On the other hand if the respondent was not permitted to call the witness, the issue was sufficiently important (being alleged to be a last straw) that the respondent could be significantly prejudiced.

17. In those circumstances we allowed limited further evidence and allowed the claimant time to prepare cross examination afterwards. The claimant confirmed that he had had sufficient time and cross-examined the witness. The claimant wanted to refer to a certain document which the witness did not have in front of him and we dealt with that by sharing the relevant document over screens. Everyone confirmed that they could see the document in question.

18. The parties were both able to complete their cross examination of the witnesses within the timescale anticipated by Judge Roper (leaving aside the additional witness for the respondent); the claimant finished over 30 minutes before the time which we had agreed as being the end time for his cross examination, Ms Reece also was able to complete her cross examination without needing to ask for further time. The claimant asked for a further 5 minutes to complete his closing submissions and we granted him that time.

Relevant Law

Constructive Dismissal

19. A termination of the contract by the employee will constitute a dismissal within the Employment Rights Act 1996 if he or she is entitled to so terminate it because of the employer's conduct. The Court of Appeal made clear in *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27,* that it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.

20. In *Omilaju v Waltham [2005] ICR 481 Dyson LJ said:*

> 14 The following basic propositions of law can be derived from the authorities.
>
> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, 610 e– 611a (Lord Nicholls of Birkenhead), 620 h– 622c (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666, 672 a. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Mahmud* , at p 610 h, the conduct relied on as constituting the breach must

"impinge on the relationship in the sense that, looked at *objectively* , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in *Harvey on Industrial Relations and Employment Law* , para DI [480]:

"Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

…

19 The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the Woods case at p 671 f– g where Browne-Wilkinson J referred to the employer who,

> stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> 20 I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.
>
> 21 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.
>
> 22 Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above).

21. In *Kaur v Leeds Teaching Hospitals* [2019] ICR 1, Underhill LJ gave the following guidance at paragraph 55:

> 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* [2005] ICR 481) 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, for the reason given at the end of para 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

22. It was held in *W A Goold (Pearmak) Ltd v. McConnell* [1995] IRLR 516 that it is an implied term in a contract of employment that the employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have.

Direct Discrimination

23. Section 13 Equality Act 2010 provides:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

24. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

25. In *Madarassy v Nomura International Plc* [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

"The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment. In Hewage v Grampian Health Board [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Deductions from Wages

26. The Employment Rights Act 1996 contains the following relevant sections

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

23.— Complaints to employment tribunals.

(1) A worker may present a complaint to an [employment tribunal] —

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

…

(2) Subject to subsection (4), an employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments,

…

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

…

27. Where a claim is made in respect of a 'series of deductions', the three-month time limit starts to run from the date the last deduction in the series was made — S.23(3). In *Bear Scotland Ltd and ors v Fulton and ors and other cases 2015 ICR 221, EAT*, Mr Justice Langstaff, held that whether there is a 'series' of deductions is a question of fact, requiring a sufficient factual and temporal link between the underpayments. This, he said, meant that there must be a sufficient similarity of subject matter, so that each event is factually linked, and a sufficient frequency of repetition.

28. He also held that a gap of more than three months between any two deductions will break the 'series' of deductions. At paragraph 81 of the Judgment he stated "Since the statute provides that a tribunal loses jurisdiction to consider a

complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made (s.23(2) and (3) ERA 1996 taken together) (unless it was not reasonably practicable for the complaint to be presented within that three month period, in which case there may be an extension for no more than a reasonable time thereafter) I consider that Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid."

Breach of Contract

29. Where a breach of contract claim requires the Tribunal to consider the exercise of discretion in the payment of a bonus, Harvey gives the following summary of the law

> Firstly, the bar is still set very high for potential claimants. Merely contesting that the exercise of the employer's discretion is unreasonable from the employee's standpoint will be insufficient to show a breach of the trust and confidence term. Equally, although the employee's reasonable expectations may be a relevant factor, they will not be determinative. As the court put it in *IBM v Dalgleish* at [229]: '…to elevate [reasonable expectations] to a status in which they [have] overriding significance over and above other relevant factors [is] erroneous in law'. As a result, the statement of Moses LJ in *Commerzbank AG v Keen*, that the mere fact that the employee had received higher bonus awards in previous years did not assist 'in any way' with the assessment whether a later award was irrational, should now be treated with caution. The failure to honour reasonable expectations may well need to be taken into account but only as one factor in the decision.
>
> Secondly, whilst the bar remains high, the decisions in *Braganza* and *IBM v Dalgleish* do throw something of a lifeline to would-be claimants. This is because, as noted above, they appear to import *both* limbs of *Wednesbury* into the relevant test. So although the employee may be unable to show that the bonus decision was one that no reasonable employer could have reached, he may be able to demonstrate, for example, that relevant factors have been disregarded.
>
> (Division B1 [34.05])

30. In respect of breach of contract claims, the Employment Tribunals Extension of Jurisdiction (England And Wales) Order 1994, Article 3, provides that "Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum … if -

(a) the claim is one to which s 3(2) of the Employment Tribunals Act 1996 applies …

(b) the claim is not one to which art 5 applies; …

31. Section 3(2) Employment Tribunals Act 1996 provides

(2) Subject to subsection (3), this section applies to—

(a) a claim for damages for breach of a contract of employment or other contract connected with employment,

(b) a claim for a sum due under such a contract, and

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,

if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

32. Article 7 of the 1994 Order provides

Subject to article 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim…

Annual Leave

33. The following regulations are in the Working Time Regulations 1998

13 Entitlement to annual leave

…

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) [subject to the exception in paragraphs (10) and (11),] it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated

30 Remedies

(1) A worker may present a complaint to an employment tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—

…

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) Subject to regulations 30A and regulation 30B, an employment tribunal] shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

Rest Breaks

34. Regulation 12 of Working Time Regulations 1998 provides as follows:

(1) A worker's daily working time is more than six hours, he is entitled to a rest break.

(2) The details of the rest break to which [a worker] is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.

(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

35. It was held in *Grange v Abellio* [2017] ICR 287 that "regulation 12 of the Working Time Regulations 1998, was intended to be actively respected by employers by proactively ensuring that working arrangements allowed for workers to take those breaks; that, while regulation 30(1) provided that the only permissible ground for a complaint to an employment tribunal of a breach of regulation 12(1) was that the employer had "refused to permit" the exercise of the entitlement, the employer's "refusal" did not have to amount to an active response to some

positive request but could be simply the denial of the right through the arrangement of the working day" (taken from the head note).

Effect of TUPE

36. Reg 4 Transfer of Undertakings (Protection of Employment) Regulations 2006 provides

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources

Findings of Fact and Conclusions

37. Given the nature of the issues in this case, and to avoid a large amount of repetition, it is most convenient to set out our conclusions in respect of a particular issue at the same time we set out our findings of fact.

38. We set out findings on various general matters and then refer to the list of issues.

39. Except where stated below, references to page numbers are to the bundle of documents.

General Findings of Fact

40. The claimant had initially worked for a business called Contact Transport and then for Manpower before his employment was transferred to the respondent from 3rd July 2017. There was no dispute that both the transfer from Contact Transport and from Manpower were transfers to which the Transfer of Undertakings (Protection of Employment) Regulations 1996 applied.

41. The claimant was employed as a van driver and the respondent provides a parcel delivery service, generally as a sub-contractor for companies such as UPS. The claimant worked on delivery and collection of parcels from the Southampton depot.

42. The claimant's contract of employment allowed the company to make deductions from wages in respect of any outstanding monies owed to it including in respect of damage to vehicles and loss caused by failure to follow the rules. It also permitted fines to be deducted such as missing a delivery (£15 per package), failing to meet a timed delivery (£15 per package).

43. The claimant's hours of work were Monday to Friday from 7:30 am to 5:30 pm. The claimant's contract provided that he must not return to the depot before 4 pm but we accept that the respondent operated so that if the claimant returned after then but before 5:30 pm he was generally allowed to leave early. At some point, that position was modified so that drivers should not return to the depot before 5 pm; if they were finishing early they should assist other drivers.

44. The contract stated that the claimant was entitled to a 60 minute unpaid break. Thus although there was a 10 hour working day (7:30 am to 5:30 pm) the claimant was only paid for 9 hours of work. If the claimant finished work before 5:30 pm he was still paid for 9 hours, if he had to work after 5:30 pm he was entitled to be paid overtime and the respondent paid that overtime.

45. It was a term of the claimant's contract that "the company may require you to perform a reasonable amount of work in addition to your normal hours of work, depending on the needs of the business."

46. We find that for most of the year the claimant did leave work before 5:30 pm because he had finished for the day but was still paid until 5:30 pm. The claimant did not wish to work overtime because he had other commitments outside work, including family.

47. In addition to those contractual terms there was a separate document headed "Deductions from Pay Agreement" which partially repeated those matters set out above and which the claimant signed on 26 September 2017 (page 56).

48. At some point the claimant had opted out of the 48 hour working week requirement.

49. We turn to the allegations in the List of Issues.

    9.1.1. In the period November 2018 to January 2019 the claimant was denied the right to take an unpaid 1 hour lunch break; specifically on 23, 26, 27, 28 and 30 November, each of the claimant's working days in December 2018 and on 2, 3, 4, 8 and 15 of January 2019;

50. We find that there was a contractual right to take an unpaid one-hour break during each day. However, we accept the respondent's evidence that it was left to the claimant whether he took that break in one go or at periods throughout the day. The claimant was not monitored to ensure that he did take a break or that his breaks did not exceed the permitted time.

51. The period between the middle of November and December is an exceptionally busy times of year for the respondent- not only because the number parcels

increases because of Christmas, but also because the number of parcels increases due to Black Friday and Cyber Monday.

52. The claimant agreed with the summary of his hours of work in that period set out in paragraphs 20 to 26 of the witness statement of Mr Collins. Thus, we find that generally during the period to which this issue relates, the claimant was able to return to his depot at around 5:30 pm.

53. We accept the claimant's evidence that the number of parcels he was required to deal with in that period increased compared to his normal working time and, in order to return to the depot by 5:30 pm, he did not take a break. However it is not in dispute that the claimant could have taken an hour long break and returned to the depot later than 5:30 pm. The claimant told us and we would be minded to accept, that it is not a simple question of returning an hour later because he may then get stuck in traffic, but whatever time he got back he would have been paid overtime.

54. Although the claimant did not want to work overtime, he was contractually obliged to work a reasonable amount of extra hours depending upon the needs of the business.

55. In our judgement the appropriate analysis is as follows. In order to deal with an increase in parcels from around 23rd November to early January, the claimant had to do more work. He was contractually entitled to take an unpaid 60 minute break. At no point did the respondent seek to stop him doing that. If he had taken a 60 minute break then he may well have ended up working later than 5:30 pm. The respondent was entitled to require him to do that as long as the extra hours were reasonable. The respondent would have paid the claimant for the extra hours.

56. Taken in the context of the slightly seasonal nature of the respondent's business and the fact that when work was quieter the claimant was allowed to leave work before 5:30 pm but still paid until 5:30 pm, we find the additional work which the claimant had to do in this period in order to take a 60 minute unpaid break during the day was reasonable and did not amount to a breach of contract by the respondent.

57. Thus the respondent's working practices did not prevent the claimant taking the 60 minute break to which he was entitled during the day.

58. We also find that there was no breach of the implied term of trust and confidence in this respect. The requests made of the claimant- in terms of the number of deliveries/collections which were given to him -were reasonable and appropriate and did not undermine the trust and confidence with claimant was entitled to have in his employer.

    9.1.2. The respondent ignored the claimant's written and verbal grievances and complaints about the respondent's failure to allow the claimant to take such breaks in the period December 2018 to January 2019,

59. The claimant's contract of employment states, in respect of grievances, "the Company encourages employees to settle grievances informally with their manager. If, however, you have a grievance relating to any aspect of your employment which you would like to be resolved formally, you must set out the nature of the grievance in writing and submit it to Depot Manager."

60. We find that as the claimant's workload increased in November/December 2018 it is likely that the claimant was complaining to his supervisor. However we do not find that the complaint would have been of a formal nature at that stage. We think it was more in the nature of the claimant grumbling about the fact that he could not take an hour long break and also return to the depot by 5:30 pm.

61. We accept that the claimant's supervisor did nothing about such grumbling. We find that the respondent operated in such a way as to try and fairly distribute parcels amongst van drivers, taking parcels away from van drivers if they had too many and asking other van drivers to take on extra loads where necessary. We find that it is likely that many van drivers would have had an extra workload in that period and the fact that the claimant was complaining about such matters was not something which would cause the respondent to alter its practice. We do not find that the respondent was behaving unreasonably in this respect. As we have already set out, we consider that what the claimant was being asked to do for this period was reasonable.

62. The claimant made a first written grievance on 5 January 2019. The respondent did not ignore that grievance, Mr Collins replied to it by interpolating his answers into the claimant's email (pages 201 – 202.) It is fair to say that he was, at best, brusque in his answers, especially towards the end of the email. According to the claimant's chronology the reply was sent on 10 January 2019.

63. The claimant then emailed on 15 January 2019 stating that he was not happy with the outcome of the grievance procedure and asked for another proper grievance investigation which followed the rules of the ACAS code of practice. He also stated "I also wish to cancel my opt out agreement to work more than an average of 48 hours in any week." (Page 203).

64. On the next day, Mr Collins emailed the claimant stating "hi Tomas, can you send me specific details of what part of my replies you think are incorrect and your reasons for this so I can look into them." He also agreed to the opt out point to which we will return below.

65. The claimant particularised his grievance further on 17 January 2019 (p205) in the course of which he stated that his request to cancel the opt out was the least important point in his email and that he was shocked by the speed of Mr Collins' reaction. He stated that that point should be suspended or solved later. Again we will refer to this later in the context of another issue, but it is relevant context in which to consider how the respondent responded to the claimant's grievance. The claimant, in that email, made a series of complaints and allegations including breach of the Working Time Regulations, discrimination, unauthorised and unfair deductions from pay slips and unreasonable withdrawal of the bonus in 2018.

66. On 18 January 2019 Mr Collins wrote stating that the decision about the opt out was to try and help the claimant as he felt it was a big point and stated "I'm inclined to think that your recent emails and the one below are unlikely to be simple grievances but to me seem to have an ulterior motive. I will respond to your email within the next 14 days after taking advice from our HR advisers."

67. On 3 February 2019, in circumstances where the respondent had not reverted to him about the grievance, the claimant resigned.

68. Having read the correspondence and heard from Mr Collins we formed the view that although Mr Collins' original response to the grievance was brusque, he was taking the claimant's grievance seriously. He immediately responded to the claimant's request to cancel his opt out from the 48 hour working week. We also find that that Mr Collins was not very familiar with how to run a grievance procedure. We accept that he did start to take advice and although he did not revert within the 14 days that he said he would, we find that he would have gone back to the claimant as soon as he had taken advice and was acting in good faith.

69. This is not a case where the respondent refused to provide a right of redress for an aggrieved employee. This is a case where the employer was seeking to provide the claimant with a formal grievance process but wanted to take advice in order to do so correctly. Whilst the claimant may not have appreciated the answers which the respondent had given to the claimant during the period leading up to 18 January 2019, the claimant cannot say that his grievance was being ignored.

70. We do not find that there was a breach of the implied term of trust and confidence in this case or of any implied term to reasonably and promptly afford a reasonable opportunity to the respondent's employees to obtain redress of any grievance they may have.

    9.1.3. Further or alternatively, the respondent failed to respond to a written grievance sent by the claimant in January 2019 and/or to hold a hearing to determine it; The grievance related to his inability to take breaks and the lack of support with his role.

    9.1.4. On 17 January 2019 during the hearing of the claimant's grievance appeal the respondent informed the claimant that it would obtain independent HR advice and would provide an outcome within 14 days, however, it failed to inform the claimant of any outcome;

71. It is convenient to deal with these issues together.

72. For the reasons we have given, we do not accept the respondent failed to respond to the written grievance sent in January 2019. Whilst we accept that at the time of the claimant's resignation it had not held a hearing to determine the grievance, that was because it was still seeking to take advice. The claimant was not being deprived of the right to a hearing. We do not find any breach of contract in this respect.

73. In fact, there was no hearing of the claimant's grievance appeal on 17 January 2019 (as is implicit in the previous issue). The claimant's own Chronology prepared for this hearing states that on 17 January he submitted his 2nd grievance (page 205).

74. Whilst the respondent did inform the claimant that it would obtain independent HR advice, it did not say that it would inform the claimant of the grievance outcome within 14 days. The respondent said, on 18 January 2019, that it would respond to the claimant's email within the next 14 days after taking advice from HR advisers.

75. 14 days from 18 January 2019 was Friday 1 February 2019; the claimant resigned on Sunday 3 February 2019. He did not chase the respondent in respect of the grievance.

76. Whilst the claimant resigned before any outcome had been reached in respect of the grievance, we do not find that the respondent behaved unreasonably or in breach of the implied term of trust and confidence in failing to revert within the precise 14 day period. Time limits are sometimes missed, the fact they are missed does not automatically give a person the right to resign and claim that they have been constructively dismissed. There was no repudiatory breach in this respect.

    9.1.5. Following the failure in 7.1.4 above the respondent allocated an additional collection to the claimant which again would have prevented him from taking a lunch break;

77. The reference to paragraph 7.1.4 is a typographical error and should refer to 9.1.4. As was discussed with the parties and agreed at the hearing, this allegation is the same allegation as is referred to in issue 9.1.8 and we will deal with them together.

78. The claimant says that on 30 January 2019 he was told by his supervisor, Pav, and his manager Richard Collins, that from 4th of February 2019 he would have an additional daily collection assigned to him.

79. We find that by this stage in the employment relationship the claimant was very deeply dissatisfied with his employer and was interpreting the employer's actions through a negative filter. Although we accept that the claimant genuinely believed that he was being told that from 4 February 2019 onwards he would have this additional daily collection assigned to him, we accept the evidence of the respondent that, in fact, it was only a temporary assignment. Whilst we doubt that Mr Pickering, who gave evidence on behalf of the respondent in this respect, has any clear recollection of the day in question, he was able to tell us that the driver who was doing the collection assigned to the claimant at the time was Tony Lampard and Tony Lampard remains a driver for the respondent and still does the collection from Mondays to Thursdays. He does not do the collection on Fridays because the place where the collection is made closes early and so if Mr Lampard is out of the area another driver makes the collection.

80. We find that the claimant was only asked to do this collection on a one-off basis to help out. In those circumstances, even if the claimant would have been forced to choose between not taking a break or returning to the depot after 5:30 pm, given what we have said above we do not find that that would have been a breach of contract by the respondent.

81. However, even if it were to be a permanent addition to the claimant's round, we also accept the evidence of Mr Pickering that the collection point was close to where the claimant's round ended in any event. Although the claimant tells us that it would have added an extra 30 minutes journey time each way (and has produced various JPEG images in support of that), given that he never worked on the route with the extra collection (because he resigned) we are not satisfied that the extra collection would have required the claimant to finish work after 5:30 pm, even if he took a 1 hour break. We remind ourselves that a claimant can resign in respect of anticipatory breach of contract, but we are not satisfied that adding the extra collection would have been such a breach.

82. The claimant's evidence was that this additional collection was added to his round in order to punish him for raising a grievance. There is no evidential basis for that assertion beyond the timing and a bald assertion by the claimant that other drivers were near to that collection. We accepted the evidence of Mr Collins that if the job was allocated to the claimant, it was because he would be the ideal resource to do it on that day. We are not persuaded that the collection was given to the claimant as a punishment. As we have indicated, we find that the respondent was properly trying to resolve the claimant's grievance.

83. Thus we do not find any breach of the implied term of trust and confidence in this respect.

9.1.6. Discriminating against the claimant on the grounds of his race by failing to instruct other employees to assist the claimant with his deliveries;

84. We will deal with our findings on this allegation more fully below (in the context of issue 10). However, we do not find that the respondent discriminated against the claimant on the grounds of his race either as alleged in this allegation or at all. There are no facts from which we could conclude that the respondent had discriminated against him.

9.1.7. On or about the 16 January 2019, the respondent unilaterally changed the claimant's role to that of 'cover driver' which necessarily changed the delivery and collection route, requiring the claimant to learn an entirely new route and which came into effect from 21 January 2019;

85. The background to this allegation is that, on 15 January 2019, the claimant emailed Jeff Collins stating "… I also wish to cancel my opt out agreement to work more than an average 48 hours in any week." (Page 203). He ended his email with the statement "I appreciate your quick response"

86. On 16 January 2019 Mr Collins replied to the claimant stating "as we are unsure of the hours on your regular route we will have to allocate you a route each day for the time being until we calculate your average over a 17 or 26 week period

(whichever is the appropriate timescale to use). Once we have reviewed and calculated your average we will review your position as cover driver and see if we can reallocate a permanent route to you. Therefore from Monday 21st January you will be allocated as a cover driver while we complete our investigation of your hours, with a route set each day so we can ensure you are not in a position where you exceed the 48 hour per week limit" (page 204). The same email was also sent to Richard Chapman, the claimant's supervisor, and Lee Collins. Within the same email Richard Chapman was instructed to allocate the claimant's current route to the next driver waiting from Monday 21st and make sure a suitable cover route was found. He also instructed Lee Collins to ensure the payroll department was aware that the claimant should not be allocated work that exceeds 48 hours per week and to notify him if that happened.

87. We find that was an entirely appropriate response to the claimant's request.

88. On 17 January 2019 the claimant replied stating "I am a bit shocked by the speed of your reaction to cancel the opt out agreement, he then quoted from his contract of employment that he must give 3 months written notice if he wished to withdraw from the opt out agreement. He states "calculating my average hours doesn't seem to be a good and fair reason for the change. Given the fact, that excluding 2.5 hours of overtime in Christmas peak I haven't got any extra hours since March 2018. Besides, this was the least important point in my email and it can be suspended or solved later." (Page 205).

89. The respondent's action in this case was not unilateral. It was a speedy and efficient response to the claimant's express request to withdraw his consent to the opt out agreement. It was a response which was given in the context of the claimant raising a grievance and demonstrates that the respondent was taking the claimant's concerns seriously.

90. The fact that the claimant now complains of the respondent doing exactly what the claimant had requested, suggests that matters had reached a stage where there was nothing that the respondent could do which would satisfy the claimant. It is a further illustration of the fact that the claimant was viewing all of the respondent's actions in a sinister light. In fact the respondent did nothing in this respect which would either undermine the trust and confidence which the claimant was entitled to have in his employer or was otherwise a breach of contract.

    9.1.8. On 30 January 2019, the respondent allocated the claimant an extra collection at 3pm (which was the driver, Tony's) in circumstances where it was no reasonable possible for the claimant to make the collection and complete the collections/deliveries which had been allocated to him; (The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

91. We have dealt with this allegation above in respect of issue 9.1.5.

    Conclusions on Unfair Dismissal

92. Applying the test laid down in *Kaur v Leeds Teaching Hospitals* [2019] ICR 1, we find that the most recent act which the employee says triggered his resignation was being allocated an extra collection as set out in issues 9.1.5 and 9.1.8. We have set out our findings as to that above. We accept that the claimant had not affirmed the contract since that act. However the respondent's act was not a repudiatory breach of contract. That act was not part of a course of conduct comprising several acts or omissions which viewed cumulatively amounted to a breach of the *Malik* term. Even if we were to take all of the allegations which are said to amount to a breach of the implied term of trust and confidence and look at them cumulatively we find there is no breach of the implied term of trust and confidence for the reasons which we have given.

93. The claim of constructive dismissal must fail.

10. Section 13: Direct discrimination on grounds of Polish Nationality

10.1. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely:

10.1.1. Between the 23 November and 20 December 2018 did the respondent require the claimant to help other drivers load their parcels for deliveries, (in circumstances where, despite the claimant's requests for support from the respondent, no employee was instructed to assist the claimant load his parcels)?

94. The claimant clarified that he had not been, at any point, asserting that he was required to help other drivers load their parcels but his complaint was that he had not been given assistance with his parcels. We accept that. The claimant also clarified, and his witness statement makes clear, that his point is not so much about loading his parcels at the point of dispatch, but that parcels were not taken off him and given to others to reduce the number of deliveries which he had to make.

95. We have already set out various relevant findings of fact above.

96. We accept that the claimant was verbally complaining about his workload and we accept that the respondent did nothing in response to such complaints.

97. The claimant seeks to compare himself with van drivers to the side of him when he was loading his parcels who were English -Tony and Ian. His argument was that parcels were taken off them to assist them but not off him.

98. However, the claimant accepted in cross examination that he had no knowledge of how many parcels Tony and Ian had left in their van, when the parcels had been taken off them. They could have been left with exactly the same number of parcels as the claimant, or if they had a different number of parcels, the amount of time it took them to deliver those parcels could have been more or less than it would have taken the claimant to deliver his. Although at one point in his cross examination (in answer to the above points) the claimant suggested that Tony and Ian returned earlier than him, he gave no details of the dates

when they returned earlier, or by how much they were earlier or how often they were earlier than him or even why they were earlier than him.

99. When the claimant was asked if he saw how many parcels Tony and Ian had to deliver he said "I didn't have time to analyse that sort of thing, it's not my task to judge the amount they had, I just knew I was being treated unfairly." It was then put to him that he did an average number of parcels and asked if he would accept that was a possibility to which he replied "it is hard to decide if distribution is even because every work is different, it's not just the number of parcels but also the area you are driving in."

100. Anticipating issue 10.3 below, we do not find that there are facts from which we could decide that if Tony and Ian had parcels taken off them, when the claimant did not, that was because they were English whereas the claimant was Polish. It is just as likely to have been because they had more parcels than him in the first place.

10.1.2. On 3 December 2018, did the claimant's Supervisor, Richard Chapman, tell the claimant that he would be required to undertake more delivery duties in 2019?

101. We find that the claimant did complain to Richard Chapman on 3 December 2018 about his workload. The claimant's statement says that he refused to leave the depot until he was allowed to leave some stops, by which we understand he meant parcels. Richard Chapman agreed to that but then started shouting at him and warned that "for the help my workload will be increased in 2019. He said also that I would have to pay the help back and he would make sure I will have a lot of work all the time."

102. The respondent has not called any evidence to challenge that statement and there is no basis for us to disbelieve the claimant. Indeed we think it is likely that if the claimant was refusing to leave the depot, in the context of a busy delivery service, Richard Chapman may very well have been cross. He may very well have said what is alleged. However, there is no basis on which we could conclude that those comments were made because of the claimant race. It is just as likely, if not more so, that the comments were made because Richard Chapman was annoyed by the claimant's attitude.

103. Again anticipating issues 10.3, in the circumstances there are no facts from which we could decide, in the absence of any other explanation, that the comments were made because of race.

10.2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators; The drivers 'Tony' and 'Ian' whose designated loading bays were either side of the claimant's, and/or hypothetical comparators.

104. We are not satisfied that the respondent treated the claimant less favourably than it treated Tony and Ian. As we have said, we do not know what parcels were in their van after they had been allowed to leave some parcels behind. There is no evidence that a person in the position of the claimant, that

is to say somebody who was being given the same number of parcels that he was and who was complaining in the same way that he was, but who was English, would have been treated more favourably by having parcels taken off his van.

105. In respect of allegation 10.1.2 we do not think that a comparator who complained in the same way that the claimant did but who was English would have been treated differently to the claimant. Given the working circumstances at the time and the pressure which Mr Chapman was under, it is likely that such a person who was complaining in the way that the claimant was would have been treated in exactly the same way.

10.3. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

106. Section 136 Equality Act 2010 does not expressly provide that it is for the claimant to prove the relevant facts. We must consider whether we are satisfied that there are such facts.

107. As we have set out above, we have not found facts which would allow us to conclude that any difference in treatment between the claimant and Tony or Ian or a hypothetical comparators was because of the claimant's race.

108. We have also considered whether there was evidence, more generally, of discriminatory practices within the respondent. There was no evidence of any such practices. We noted that the claimant's supervisor was Polish and, also, that the respondent had translated the first page of its "Bump Report" into the languages of the drivers employed by it to enable them to understand it. Mr Collins told us that approximately 1/3rd of his drivers had English as a 2nd language. Whilst none of those matters prove that the claimant could not have been the victim of discrimination on the grounds of race, equally they do not suggest a working environment which was hostile to non-English drivers.

11. Unlawful deduction of wages

11.1. What wages were 'properly payable' to the claimant?

109. The claimant was paid for a nine-hour working day at the rate of £8.97 per hour.

11.2. Were the following sums deducted from the claimant's wages?

11.2.1. In November 2017 £65 in respect of damage to a driveway and a lamp at a customer's property?

11.2.2. In March 2018 £17.87 in respect of one days statutory sick pay?

11.2.3. In May 2018 £5 for the cost of replacing a broken lens in the side mirror of the claimant's van?

110. Because of our decision on time, set out below, and in particular that between May 2018 and November 2018 there was a break of more than 3 months which means that these 3 claims were presented out of time, we have not decided whether these sums were deducted from the claimant's wages or, if they were, whether that deduction was unauthorised.

11.2.4. In November 2018 £15 due to an alleged time failure by the claimant?

111. This sum was deducted from the claimant's December 2018 wages, although it related to an incident in November 2018 (p199).

112. There is no doubt that the sum was deducted.

11.3. If so, was the deduction required or authorised be made by virtue of a relevant provision of the claimant's contract, or had the claimant previously signified his agreement in writing to the making of the deduction?

113. The claimant's contract of employment provided for deductions to be made, as did a separate agreement signed by the claimant on 26 September 2017. The separate agreement does not refer to the ability of the respondent to levy fines of the type in question here.

114. The contract of employment does give the respondent the power to make deductions in respect of any fines, penalties or losses sustained during the course of the claimant's employment and which were caused through the claimant's conduct, carelessness, negligence, recklessness or through breach of the company rules or dishonesty. It states that after one month's employment the claimant will be fined £15 per package for failure to meet a timed delivery.

115. The claimant's evidence in respect of this issue, as set out in his witness statement, is that the package in respect of which he was fined was not marked with a time allocation on the label and was not on the list that appeared every morning on the diad. He states that he did not receive any confirmation and, as a result, had no idea that the delivery was timed.

116. That evidence was unchallenged by the respondent and, in those circumstances, we find that the respondent was not entitled to make the deduction which it made. We find that the fine was not caused through the claimant's conduct, carelessness, negligence, recklessness or through breach of the company rules or dishonesty. It was caused by the failure of the respondent told claimant that the package was timed.

117. This claim succeeds.

12. Breach of contract

12.1. Was it a term of the claimant's contract that he would be paid a performance related bonus in December each year?

118. The claimant was entitled to participate in a bonus scheme in both 2017 and 2018. The terms of the scheme are at pages 79 and 191 of the bundle. The Amended Grounds of Resistance appeared to admit that the scheme was

contractual at paragraph 29a to 29c, but that is denied Mr Collins witness statement.

119. We find that it was a contractual bonus scheme in that once the terms of the scheme had been issued, the parties would expect employees to rely upon those terms and seek to earn their bonus accordingly. Both parties would expect the agreement to create legal relations between them once the scheme had been issued.

12.2. If so, did the respondent exercise its discretion to pay or to decline to pay the claimant a bonus in a bone fide and rational manner (see Clark v Nomura International plc [2000] IRLR 766) in respect of the following periods:

12.2.1. December 2017?

120. The 2017 bonus scheme provided that the amount which would be paid was £400. The period over which the bonus could be earned ran from 20th November to 23rd December 2017.

121. There were various matters listed in the scheme which would cause a person to lose a bonus. The scheme stated "unpaid holiday that has been agreed with management will lose bonus for that week only."

122. The refusal to pay the claimant's 2017 bonus arose out of the fact that on 30th October 2017 he asked to take holiday to attend to his flat in Poland. He wanted to visit Poland "on the turn of the next month to make sure everything is done" (page 162).

123. Mr Collins replied warning the claimant that his December bonus would be at risk but stating "however, if you are able to reduce the unauthorised days from your original request to the dates above we would consider stopping just one week from the four-week bonus."

124. The claimant replied to state that he did not think he would be able to complete what he needed to do in 3 working days but suggested he could cut the time down to 5 to 7 working days. To that Mr Collins replied "I appreciate your effort to compromise, can you give me the dates if we aim at 5 days please" (page 163). The claimant then offered to take 27 November to 1 December, being 5 days and stated "if I understand it correctly the £400 bonus would be paid for weekly pro rata basis in my case. Assuming of course that other criteria are met as well."

125. Mr Collins then replied stating "I've had a word with Lee and your dates … seen fine but please just speak to Lee on Monday to make sure it is fully okay" (page 163).

126. On 1 December 2017 Mr Collins wrote the claimant stating "good to have you back – hope it all went well for you" (page 163).

127. On 16 January 2018 Lee Collins then wrote to the claimant stating "in regards to your December bonus we didn't authorise the time off, you had explained that regardless of our decision you are going to go to Poland anyway.

We just negotiated a shorter period with you. At no point did we agree the busiest week of the year was okay to still have of unpaid and still receive the performance bonus." (Page 171)

128. We consider that Mr Collins was wrong. The email chain which we have quoted does show that the respondent authorised the claimant's time off. The respondent may or may not have been happy to do so but the absence was not unauthorised.

129. Our primary conclusion is, therefore, that this is not an issue of the exercise of a discretion. The claimant satisfied the requirements to earn the bonus and it was a breach of contract to fail to pay him the bonus, save to the extent that the respondent was entitled to deduct a pro rata portion in respect of the period when the claimant was on leave.

130. If we were wrong in that respect and the payment of the bonus was discretionary, applying the test *in IBM United Kingdom Holdings Ltd v Dalgleish and others* [2018] IRLR 4 we find that in so far as Lee Collins refused to give the claimant the December bonus because he understood that the time off had not been authorised, he failed to take into account a relevant matter, which was that the time off had been authorised.

12.2.2. December 2018?

131. The 2018 bonus scheme was similar to the 2017 one but stated that "there are some criteria for this period that will lose your Christmas bonus without question:… Taking sick days or days off (excluding holidays) without a genuine reason." (Page 191).

132. In his evidence Mr Collins accepted that the respondent had wrongly refused to pay the claimant a bonus for this period. He stated that the company had marked the claimant's absence in December 2018 as standard sick whereas it should have been marked as "special sick". If it had been marked as "special sick" the claimant would have been paid his bonus.

133. In those circumstances, again, we find that the claimant was contractually entitled to be paid his bonus or December 2018 and the respondent was in breach of contract in failing to do so. Again, if it was necessary for us to do so, we would have found that the decision to not pay the claimant a bonus had failed to take into account a relevant matter, namely that the claimant's absence was such that it fell within "special sick" and, therefore, amounted to a genuine reason.

12.3. If not, what level of bonus would reasonably have been paid to the claimant?

134. The part of the hearing to which this judgment relates has dealt with liability only. In those circumstances the tribunal has not yet heard sufficient evidence to determine what level of bonus would reasonably have been paid to the claimant. If necessary a separate remedy hearing will be held though it is to be hoped that the parties can agree the figure.

135. In relation to the 2017 bonus the claimant should have been paid the full bonus less an amount to reflect the fact that he was off work for one week and in relation to the 2018 bonus the claimant should have been paid the full bonus. to which he was otherwise entitled.

Constructive dismissal

136. The failure to pay bonus was not listed in the Amended Case Management Order as being a breach of contract which led to the claimant's resignation and we have not treated it as such above.

137. Whilst reaching our decision, we have revisited the claim form to consider whether this is one of those cases where the claim form cries out for us to consider the question of whether the failure to pay bonus would also give rise to a claim of constructive dismissal. We do not consider that it is. Box 8.2 of the claim form most naturally reads that the question of non-payment of bonus is only being raised in connection with unlawful deduction of wages. The non-payment of a bonus does not fall within the early part of that paragraph where the claimant set out the matters that led to his resignation.

138. The list of issues, in this respect, faithfully reflects the claim form and we note that this was not a respect in which the claimant sought to amend the list of issues when he wrote to the tribunal. He also confirmed the list of issues before Employment Judge Roper and at the start of the hearing before us. Thus we have not gone on to consider whether the breaches were repudiatory, whether they were causative of the decision to resign, whether the contract of employment was affirmed or whether the fact that the respondent was willing to hear a grievance from the claimant in respect of the December bonus has any impact on the decision.

13. Unpaid annual leave – Working Time Regulations

13.1. Was there an oral agreement between the claimant and Jon Rolland that the claimant would be entitled to 2 extra days of annual leave on the third and fourth of July 2017?

139. The claimant's evidence was not substantially challenged in cross examination.

140. This agreement, if it was made, was made with the respondent's predecessor. The respondent sought to deny that any agreement would have been made by relying on assurances that it had been given by the transferor. However, the respondent showed us no documentation in support of its position and we accept that there was such an agreement.

141. The claimant's witness statement states that he took 2 days paid leave on 3rd and 4 July 2017 but then states that he did not get permission to use them in 2017 due to heavy workload and staff shortage. It appears there must be a typographical error in the claim form and the claimant is saying that he did not get the ability to use the 2 days leave in 2016 and therefore he was allowed to carry them forward to 2017.

142. The email dated 16 September 2017 at page 152 of the bundle states that the claimant had carried forward two extra days from the previous year and that it was agreed those 2 days would be taken on 3 July and 4 July 2017 without counting them towards "this year's allowance". The claimant stated that he should still have 2.97 days available to take. The claimant's position was not accepted by the respondent.

143. If the leave to which the claimant is referring is to be classed as annual leave under regulation 13 of the Working Time Regulations 1998 then there is no ability under the Regulations for the leave to be carried forward. However if the leave was additional annual leave under regulation 13A then the leave could be carried forward.

144. However even if the leave was carried forward into 2017, under the Regulations the claimant must then take the leave and payment in lieu cannot be made. If the claimant's claim is that he was not permitted to take the leave in 2017, then under regulation 30 any claim must be presented within 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted. The claimant has not sought to persuade us that it was not reasonably practicable for the complaints to be presented in that time and therefore a claim under the Working Time Regulations 1998 would be out of time.

145. Although that disposes of the question under the Working Time Regulations 1998, it does not answer the position in contract. The claimant's contract gave him a right to holiday of 5.6 weeks per year inclusive of bank holidays. The claimant's contract is silent as to the ability to carry holiday forward.

146. However, on the basis of the claimant's evidence, for the year 2017 the respondent's predecessor had agreed to allow the claimant an extra 2 days holiday (on the basis that the claimant had taken less holiday in 2016). That was a contractual agreement which would transfer to the respondent under TUPE. In breach of that agreement the respondent did not allow the claimant to take that holiday. In that respect the respondent is in breach of contract.

147. Although the list of issues has only listed the issue as being under the Working Time Regulations 1998, the claim form does not limit the holiday claim in that respect, and in our judgment, it should be considered both under the Working Time Regulations and under contract.

148. The claim in contract succeeds.

13.2. If so, the respondent accepts the claimant was not paid for the two days of annual leave. What sum is due to the claimant in respect of the two days?

149. The precise amount due to the claimant is a matter for the remedy hearing but, again, it is hoped that the parties can agree the figures and do away with the need for a remedy hearing.

14. Working Time Regulations 1998 (regulation 12)

14.1. What was the claimant's contractual entitlement to rest breaks?

150. The claimant's contractual entitlement was to a one-hour unpaid break. There was no collective or workforce agreement as far as we are aware.

14.2. Did the respondent permit the claimant to take rest breaks in accordance with his contractual right?

151. For the reasons we have given in paragraphs 50 to 57 above the respondent did permit the claimant to take rest breaks in accordance with his contractual right.

14.3. If there was no contractual right to rest breaks, did the respondent permit the claimant to take an uninterrupted period of rest of not less than 20 minutes in respect of each six-hour period of work as required by regulation 12 WTR 1998?

152. The respondent did permit the claimant to take an uninterrupted period of not less than 20 minutes in respect of each six-hour work period as required by regulation 12 of the Working Time Regulations 1998. We find that there would have been sufficient time during each working day for the claimant to find a 20 minute uninterrupted period if he had been willing to take it.

15. Time/limitation issues

15.1. The claim form was presented on 19 March 2019. As a result, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction to hear it.

15.2. Can the Claimant prove that there was a series of deductions? If so, is claim for unlawful deductions and/or breach of contract in time?

15.3. If not, was it not reasonably practicable to have presented the claim in time, and, if so 15.4. Was the claim presented within a reasonable further period?

153. This issue is only drafted as if it applies to the claim of unauthorised deduction from wages.

154. Taking the claimant's case at its highest, whilst there was a series of deductions from wages between November 2017 and November 2018, the claimant has not suggested that there were any deductions between May 2018 and November 2018.

155. Thus there was a period of more than 3 months with no deductions.

156. Applying the judgment in *Bear Scotland*, when the period of 3 months from May 2018 had passed, the tribunal lost jurisdiction to consider those matters.

157. The claimant has not sought to persuade us that it was not reasonably practicable to present the claimant in time therefore we do not consider that point further.

158. It has not been suggested to us that the claim in respect of the bonus for 2017 would be out of time but, in any event, that would be subject to different considerations. The limitation requirement in respect of that claim (and indeed the contractual claim for 2 day's holiday pay) is that the claim was outstanding upon termination of employment and brought within 3 months of the effective date of termination. If those conditions are both satisfied then there is no further time limit as to how old the contractual claim may be (leaving aside the possible six-year time limit under the Limitation Act 1980).

Overall Conclusions

159. The claim of constructive unfair dismissal fails on the basis that the alleged breaches of contract referred to in paragraph 9 of the list of issues were not repudiatory breaches of contract, or indeed breaches of contract at all.

160. The claim of direct discrimination on the grounds of race fails in respect of the assistance issue because there are no facts from which the tribunal could decide, in the absence of an explanation, that the respondent subjected the claimant to a detriment or otherwise treated him less favourably than it would treat others. Even if there was less favourable treatment there are no facts from which the tribunal could decide, in the absence of an explanation, that the reason for the less favourable treatment was because of race. That is also the case in respect of the incident on 3rd December 2018.

161. The claim of unlawful deduction of wages fails in respect of those deductions made between November 2017 and May 2018 on the basis that the tribunal lacks jurisdiction to consider them as the claim was presented out of time.

162. The claim of unlawful deduction of wages in respect of the deduction in November 2018 succeeds because the tribunal is satisfied that the deduction was made and it was not authorised by the claimant's contract or other documents.

163. The claims of breach of contract succeeds in respect of the non-payment of the bonus in December 2017 and December 2018 because the claimant was entitled to be paid a bonus and was not paid.

164. The claim in respect of 2 day's unpaid annual leave succeeds as a claim of breach of contract but not as a claim under the Working Time Regulations because it was presented outside of the time limit for a claim under those Regulations.

165. In respect of rest break, the claim fails because the respondent permitted the claimant to take rest breaks.

166. In the hope that the parties can resolve the remedy part of this hearing by consent the claim is not, this stage, listed for a remedy hearing. If either party wishes to apply for the matter to be listed for a remedy hearing they must do so within 21 days of the date that this judgment is sent to the parties.

Employment Judge Dawson

Date: 2 February 2021

Judgment & Reasons sent to the parties: 11 February 2021

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP

The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so.