EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Melvin Berango	SGS Limited

Heard at: **Leeds by CVP** **On: 23 October, 19 – 20 December 2024**
Before: **Employment Judge Jaleel**

Appearances
For the Claimant: **In person**
For the Respondent: **Ms Souter (counsel)**

RESERVED JUDGMENT

1. The complaint of constructive unfair dismissal is not well-founded and is dismissed.

2. The complaint of unauthorised deduction from wages is not well-founded and is dismissed.

REASONS

Introduction

1. These were complaints of unfair dismissal and unauthorised deduction from wages, brought by the claimant.

2. I had before me a bundle of papers to page 273 as prepared by the respondent.

3. I took some time to privately read into the witness statements exchanged between the parties and relevant documentation.

4. I heard evidence from the claimant.

5. I then heard evidence from respondent's witnesses, Matthew Doyle (Commercial Director), Kate Grice (Office Manager) and Mark Duffy (Managing Director).

6. We agreed that the timescale of one day to hear all evidence and determine the case was ambitious. As it transpired the case was part-heard and thereafter re-

listed to resume on 19-20 December 2024. I also determined that remedy would be dealt with, if required, at a separate hearing.

7. The Respondent's representative provided written submissions at the commencement of the Hearing as well both party's making oral submissions. I have not set these out in but took them fully into account.

List of issues

8. The issues to be determined were:

Claim 1: Unfair dismissal (ss.94-98 Employment Rights Act 1996)

8.1 Did the claimant's employment contract contain the following contractual terms:

(a) express and/or implied term (whether or not based on parties' custom and practice) entitling the claimant to be paid a bonus payment in full in December of each year

(b) implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

8.2 Did the Respondent breach one or both of those terms by:

(a) Failing to pay the claimant his bonus in full in December 2023

(b) Placing constant pressure on the claimant every week

(c) Showing lack of trust and communication with the claimant

(d) Strained relationships with co-workers

(e) Issuing a verbal written warning to the claimant without adequate investigation and not resolving his appeal

8.3 If there was one (or more) breach of the above terms of the claimant's employment contract, was that a repudiatory breach of contract by the Respondent?

8.4 If it was, did the claimant by his conduct after the breach affirm the continued existence of his employment contract, losing the right to resign and claim constructive dismissal?

8.5 If not, did the claimant timely resign in response (in whole or in part) to the breach, not for some other unconnected reason?

8.6 If yes, was the claimant constructively dismissed by the Respondent?

8.7 If the claimant was constructively dismissed, what was the respondent's reason (or principal reason if more than one) for dismissing the Claimant? The respondent will say it was to ensure/obtain a fit for purpose commission scheme for the claimant.

8.8 Was that reason a potentially fair reason for dismissal? The respondent relies on "some other substantial reason" as potentially justifying the claimant's dismissal.

8.9 If it was, was the claimant's dismissal for that reason within or outwith the band of reasonable responses open to the respondent at the time, given its size and administrative resources, equity and the substantial merits of the case?

8.10 If the claimant was unfairly dismissed, is there a chance – and if so how great a chance –that the claimant would have been fairly dismissed had a fair dismissal/termination of employment procedure been applied by the respondent?

8.11 Did the Claimant engage in culpable conduct which caused or contributed to his dismissal? If yes, what conduct and by how much?

Claim 2: Unauthorised deductions from wages (s.13 Employment Rights Act 1996)

8.12 The claimant alleges that the Respondent made unauthorised deductions from his wages by not paying him enhanced sick pay

8.13 Did the claimant's employment contract contain an express and/or implied term (whether or not based on parties' custom and practice) entitling the claimant to be paid full pay when off sick?

8.14 If yes, did the Respondent make the alleged deductions from the claimant's wages?

8.15 If and to the extent it did, was the relevant deduction required or authorised to be made by virtue of

(a) a statutory provision; and/or
(b) a relevant provision of the claimant's employment contract?

8.16 If not, did the claimant previously signify in writing his agreement/consent to the making of the deduction?

Findings of fact

9. The respondent provides specialist scaffolding services across the North of England and is part of the Wescott Group.

10. A copy of the claimant's signed contract of employment dated 1 August 2007 is found at pages 253-254. A further contract of employment (unsigned) is found at pages 44-50. However, the claimant does not recall receiving this document and the respondent's witnesses accept that it may not have been issued. For the purposes of this claim both contracts were consistent with regards to bonus payment and sick pay.

11. The claimant commenced employment in 2007 as an Accounts administrator. The claimant and Mr Gainey (the owner at the time) formed a close relationship in a short period of time and this is described aptly at paragraph 2 of claimant's witness statement '*we've already developed mutual trust and confidence, and we understood that both of us have an expectation about having respect, trust and a good working relationship'*.

12. In 2009 the claimant took up the role of Office Manager. This role brought with it additional responsibilities such as control of the cash/banking management, submission of monthly sales applications and invoices, management of sales and purchase ledger, producing the monthly management accounts for year-end financial reports.

13. In 2010 the claimant worked flexible working hours as suggested by Mr Gainey so that he could manage his childcare responsibilities and to prevent him from leaving the company.

14. At the time of the takeover of the business by the Wescott Group in February 2021 the claimant was earning £26,250.00. He met with Mark Duffy (Managing Director), Matthew Doyle (Finance Director) and Christian Farquhar (Operations Director). It was agreed that there would be a reduction in respect of the claimant's duties in order to alleviate pressure upon him. Christian Farquhar assumed the role of Office Manager and Matthew Doyle was responsible for finance.

15. The claimant did not have full control and input into the contracts, the day-to-day banking management or decisions relating to payment of suppliers. This was assumed by Matthew Doyle and Ailsa Standring (Finance manager). The claimant remained involved in Invoice Finance and continued to submit the invoice arrangements for funding. The claimant did not raise a formal grievance to suggest that he was unhappy or aggrieved with regards to the reduction of his role. Despite the decrease in his workload and responsibilities the claimant enjoyed a significant pay increase at the respondent's behest.

16. It became obvious early on that working practices were to be adapted under the new ownership; they had their own experience of the industry and were keen to implement their own practices and processes. This is supported by the fact that Matthew Doyle had further conversations regarding cashflow with the claimant and asked him for an update. However, it transpired that the claimant was using his own version and refused to complete the respondent's version. The respondent accepts that on acquiring the company it implemented new processes and the claimant struggled to adopt these. A prime example relates to the invoice finance facility whereby the claimant was insistent that certification was necessary but Matthew Doyle disagreed with this. By way of evidence during the Hearing it was evident that both parties had differing views as to the implementation and working practices re invoicing; the claimant accepted that the respondent was not involved in wrongdoing, he felt his method was more efficient and prevented further enquiries being raised. This emphasises that the claimant was resistant to change and wanted to work in the manner he was accustomed to.

17. The claimant resigned from his role on 28 December 2023 with his final day of employment being 25 January 2024. His grounds for resignation as stated in his resignation are:

    a) *Chasing for bonus payments that had been agreed and promised*
    b) *The constant pressure that I have experienced and has placed on me every week and leaving me with no choice so we can have available funding by processing invoices to upload to the facility despite the fact that such invoices are no certified, approved or with no purchase orders yet from clients.*
    c) *The lack of trust and communication.*
    d) *Strained relationships with co-workers.*
    e) *Issuing a warning to me that was placed on my employee file without any disciplinary process having been carried out and without an adequate investigation prior to this and to this date still without resolution regarding my appeal.*

<u>Placing constant pressure on the claimant every week</u>

18. In his witness statement and evidence at the Hearing the claimant referred to the pressures and frustration that he faced at work every week from the end of 2021. He specifically referred to email communications which he states supports his position in this regard (and paraphrased for the purposes of this Judgment):

    <u>February 21st, April 20th and April 21st 2022, the pressure to process invoices was constant. The claimant referred to pages 105- 106 in support.</u>

19. The messages were sent by Christian Farquhar to the claimant on three different occasions enquiring about invoicing and in February he specifically states that 'cash is a bit tight'. I accept that the respondent required the claimant to issue invoices as a priority but did not find that the communications constituted constant pressure on a weekly basis as described by the claimant.

The respondent would be keen to ensure that it had sufficient funds, especially towards month end and it would be reasonable to request that the person responsible for invoicing (the claimant) can assist in identifying and processing invoices, this was his job role. The communications, whilst implying that there was a cash shortage did not in any way suggest that if additional funds were not realised it would somehow reflect badly on the claimant or that he would be held accountable.

June 2022, the claimant has repeated conversations with Christian Farquhar regarding the issues he was having with cash and finally they managed to speak a week after 29th June 2022 (page 108)

20. The messages between the claimant and Christian Farquhar relate to an update regarding invoicing. Again, those messages do not support the claimant's contention that he was facing constant pressure and frustration.

20th December 2022, a day before breaking off for Christmas, pressure trying to process invoices which have already been submitted but waiting on documentation. Lack of any information regarding Newcastle jobs as claimant did not have requisite information to process invoice (pages 109-111)

21. In the initial email of 20 December Christian Farquhar enquires of an update with regards to invoicing. The claimant provides an update and Christian Farquhar follows up by asking when will they hear back from Gasco. Christian Farquhar does not make any demands of the claimant and it would be reasonable to make enquiries relevant to invoicing including when payment is likely to be received and the value of the same.

4th January 2023, request from Lloyds to transfer funds as direct debits returned over Christmas (pages 114-115)

22. The claimant forwarded the relevant email from the Bank which highlighted that the direct debits had been returned unpaid. It is apparent from Matthew Doyle's email that he is relying upon Christian Farquhar and the claimant to realise funds via invoicing so necessary transfer of funds to the Bank can be made. On the same afternoon, funds are then transferred to the Bank.

5th January 2023, Matthew and Christian Farquhar were aware that the company will struggle to pay workers by midnight on the same day (page 117)

23. The email communication confirms that the funds transfer to the new modular payroll system missed its deadline. As a result, the workers would not receive their wages just after midnight but more likely over the course of the morning. Christian Farquhar asked that this be communicated to the workers so that they are assured of their wages. He also offered to speak to anyone who is particularly unhappy. I do not find that the situation would cause any pressure upon the claimant as alleged; it was not his responsibility to pay workers, Christian Farquhar had explained that the slight delay related to the transfer, described this as a one off and also confirmed that workers would receive their wages.

7th February 2023, referring all suppliers chasing payment to Accounts at the Newcastle office (page 118-119)

24. In his email dated 7 February the claimant makes it clear that it would be wise to discuss the approach in the first instance. He also suggests that Accounts be provided with more information such as who the company is chasing, affordability and how this can be utilised alongside cash flow projections. Matthew Doyle, in his response email of the same date is open to the claimant's suggestion and confirms that they can discuss the matter later in the week to work on a solution. Again, I do not find how the communication supports constant pressure being placed on the claimant; the original request by Matthew was short on detail but on being questioned he is amenable to discuss strategies that the claimant proposes would assist. Whilst, I find that the claimant may have been frustrated by the initial request, the subsequent communications would have alleviated his concerns.

23rd February 2023, the claimant was upset again due to repeated issues from external payroll persons. Incorrect pay and with no communication received from Payroll Pages 121-122)

25. The claimant raised a legitimate concern that his wage slip did not reflect his new salary. His concerns were directed towards payroll whom he described as being incompetent and disorganised. Christian Farquhar liaised with Mandy Sandler and payroll to rectify the error and explained how this had come about. Christian Farquhar apologised and agreed that the department was very disorganised but assured the claimant that the shortfall in respect of his wage would be in his account on 24 February 2023. Whilst I sympathise with the claimant who rightfully expected to receive his correct wage in the first instance I do not agree communication was required by Payroll; Christian Farquhar, who the claimant reported to had made relevant enquiries and resolved the situation in a timely manner.

17 March 2023, the company was again struggling to pay wages. The claimant returned after his medical appointment to process an invoice to ensure funding was available to make payment of wages (page 128)

26. It is apparent that the respondent was struggling to make payment of wages at the time. The claimant responded that he was not in the office as he had a medical appointment; there are no messages to suggest that he was pressurised come into the office or to cut short his appointment. I accept that the claimant returned to the office to process an invoice and this was done to alleviate the financial concerns, but this is part of his job role. The responsibility to make payment of wages remained with the respondent.

22 March and 12 March 2023, Christian Farquhar was asking if there is anything to invoice so that they could process funding for wages

27. The message on 22 March is an enquiry to ascertain if everything submitted is sufficient for the wages/salaries for the week. It does not suggest any further action for the claimant to take or to find additional monies to cover wages. I do not find that the enquiry could cause constant pressure on the claimant, raising invoices was part of his job role.

25 May 2023, the claimant emailed Matthew regarding his concerns and worries (pages 131-132). Salaries were again not paid on time and the claimant is required to sort something out to secure funding. He also mentioned that Christian Farquhar was having issues with the Contracts Manager Tony Johnson which required addressing.

26 May 2023, issue again relating to payment of wages. The claimant uploaded invoices for funding to cover wages but the company is left to the mercy of the banks. Prior to the takeover of the company, funds for salaries were covered by the Wednesday and salary payments were made to all by early morning Friday. The claimant accepted that a salary payment was not missed by the respondent but he was aggrieved that salary payments were not being made early in the morning and instead left to later in the day

28. This initial email was sent when the claimant was on annual leave. I find the claimant's evidence as per his witness statement to be slightly inaccurate; in the email he does not explicitly state that he has to secure funding by way of additional workload being placed upon him, furthermore I found that wages were paid on time (as accepted by the claimant in his own evidence), his issue being that the wages should be in workers account at midnight. There is no contractual term stipulating the time the wage would be in individual accounts, rather the date on which wages will be paid, which has always been met by the respondent. It is a fact that invoicing is directly related to payment of wages and other expenses; it is therefore natural for the respondent to enquire about invoicing (especially towards the end of the month) so that they are confident that wages can be paid and no shortfall exists. In his email, the claimant also communicates that morale is low and the fact that he has been unable to speak to Christian Farquhar for more than 8 weeks. He also reiterates that Christian Farquhar has got 'huge issues' with Tony which need to be addressed. Matthew Doyle sent the claimant a response on the same day, agreed that things needed to change and he would discuss matters with the claimant when he was back next week. I found that Matthew Doyle reassured the claimant of the company's financial status and reminded him of his duties which would assist with cash flow.

In June 2023 Mark and Matthew visited the premises and discussed areas of concern with the claimant and a colleague Tony. They required assurances regarding the financial standing of the company and also raised concerns about Christian Farquhar as they did not think they were being supported by him. The claimant was assured by Matthew and Mark who stated that they would deal with Christian Farquhar. However, it transpired that Christian Farquhar was leaving the company and the respondent had failed to inform them of this.

29. The claimant provided further explanation during the hearing as the respondent struggled to understand his complaint in respect of the above. The claimant clarified that in his opinion he should have been informed that Christian Farquhar was leaving. I do not find that the claimant was entitled to know of Christian Farquhar's decision to leave the company. It may have been helpful to advise that Christian Farquhar was leaving as the claimant had concerns that he was not being supported by him. However, the claimant does not enjoy a contractual right to do so, and in any event it is a matter for senior management to communicate of such a development when they felt the need to do so. Further, whilst Christian Farquhar had communicated he was leaving, it remained that he would be expected to fulfil his contractual obligations as normal and in any event the claimant's roles and responsibilities remained constant during this time period.

10 October 2023, the claimant was instructed by Matthew to invoice Trad invoice that had no agreement. The claimant reminded Matthew that they had just issued a Credit note to Trad with material value and the Invoice Facility would enquire about some information re. Credit value (pages 141-143).

30. Again, in similar vein to earlier emails the communication relates to invoicing for which the claimant is responsible. The claimant has made a suggestion in respect of the Trad invoice and again I do not find that the communication supports constant pressure or frustration as alleged by the claimant.

19 October 2023, the claimant was submitting invoices to Invoice Finance; he suggested to Matthew what the value to invoice first on the Final account with a client that had yet to agree account (page 144)

31. Again, in similar vein to earlier emails the communication relates to invoicing for which the claimant is responsible. The claimant has made a suggestion in respect of the invoice and again I do not find that the communication supports constant pressure or frustration as alleged by the claimant.

19 – 20 October 2023, the claimant emailed Matthew in respect of his concerns regarding the respondent's financial and cash flow. The claimant states nothing was clear about his position within the company. He also raised issue of how much was owed to HMRC.

32. By way of email dated 20 October 2023 the claimant queried his role within the company and felt that he did not have the respondent's trust. He referred to previous conversations regarding an 'Autonomous plan' as well as conversations with Mark which do not appear to have progressed further. He also expressed concerns about the financial health of the respondent and Westcott. The concern had not been raised in his previous communications, and I found it was partly triggered by Christian Farquhar's decision to leave the company and the void that this had created. It is apparent from this email that the claimant was concerned by the company finances as a whole (whilst accepting that he could be wrong) and of work practices that were to be implemented across the company.

I did note that on 30 October 2023 sent a detailed email setting out his dissatisfaction with regards to a verbal warning he received. Within this email the claimant very briefly refereed to overwhelming pressure being placed on him for the last 2.5 years such that it was affecting his mental health. However, he did not expand upon this or provide further details how this was the case and neither did he chase this up in the intervening period. In his own evidence the claimant accepts that he did not raise concerns about his workload with Christian Farquhar. He specifically stated in this email 'you may now place on record that I am filing a grievance' but did not elaborate further on this. I found that the claimant's grievance at this point related to his dissatisfaction in receiving a warning without an investigation meeting being carried and not being made aware of any accusations against him. The claimant was off work with stress at the beginning of November but did not suggest on his return, that he was unable to return and/or faced difficulties returning due to the pressure he was under.

33. In his email of 19 October, the claimant states that he thinks the respondent owes HMRC £500,000 and that it was struggling to pay wages and suppliers. There is no doubt that the claimant in his role, is likely to become aware of sensitive financial information which may cause him concern as an employee given the direct impact it could have on his position; whilst it was reasonable for him to raise his concerns it is also evident that Matthew Doyle engaged with the claimant to alleviate the same, in this instance he suggested that the figures may be incorrect. It is also apparent that there is a certain amount of speculation on part of the claimant as he is not privy to all information. Whilst the claimant had raised his concerns debt management remained an issue for senior management to deal with and outside of claimant's role and remit within the company.

24 October 2024, the claimant raised issue of cashflow again (pages 148-149)

34. Again, in similar vein to earlier emails the communication relates to invoicing and cashflow. The claimant has made a suggestion in respect of the R&D claim which would assist with cashflow. However, Matthew Doyle has provided some clarification around the amounts that he was expecting from claims and transfer of monies.

15 November 2023, raised issues with funding again and the fact that there wasn't much he could invoice (pages 176 – 178)

35. Again, in similar vein to earlier emails the communication relates to invoicing for which the claimant is responsible. It had been identified that funds were required to pay wages and the claimant was copied into the response email to confirm what monies were expected. Again, I do not find that the communication supports constant pressure or frustration as alleged by the claimant.

21 and 23 November, the claimant was instructed by Matthew to estimate and bring forward an invoice in order to obtain funding. The claimant processed the

invoice despite the fact that strict orders were not being followed (pages 179 – 184).

36. In the email dated 21 November 2023 Matthew Doyle enquires about invoices and asks if an estimate can be made or an invoice can be brought forward. The claimant has responded to Matthew's email and clarified how he envisages the invoice process to prevent issues from developing. The email correspondence from the claimant did not state he was conflicted to the degree suggested or that he was unwilling to process the invoice. The final decision to process the invoice in the manner stipulated remained with Matthew Doyle.

24 November 2023, wages were due and workers contacting the office repeatedly to enquire when they were getting paid.

37. As set out above, I found that wages were paid on time (as admitted by the claimant), his issue being that the wages should be in workers account at midnight. There is no contractual term stipulating the time the wage would be in individual accounts, rather the date on which wages will be paid which has always been met by the respondent.

38. I found that workers were contacting the respondent to enquire about their wages but payment was not the responsibility of the claimant. Senior management were aware of the situation and had assured persons that wages would be processed.

Wescott still owed the respondent £337,081.02, HMRC were owed approximately £500,000 and around £207,736.97 was owed to Gasco. The claimant was very concerned by the figures.

39. I found that the claimant's concerns in this regard lay outside of his role and responsibility. Internal fund transfers are not his concern or responsibility. There is no doubt that the claimant in his role, is likely to become aware of sensitive financial information; whilst he may have concluded that the respondent was struggling financially, the internal funding and debt owed remained an issue for senior management to deal with.

Bonus

40. The claimant's contract of employment signed 16 August 2007 does not contain any clauses referring to the entitlement of a bonus payment. The unsigned contract of employment also does not contain such a clause.

41. Matthew Doyle in his evidence accepts that the claimant received a bonus payment of £2,000 in 2018, 2019 and 2020. He did not hold records for payments made beyond this period. He maintains that the payment of bonus was discretionary, and it was to paid in two parts in accordance with the financial year and also dependant on the performance of the company. In his evidence, the claimant clarified that prior to Wescott taking over, his bonus was not fixed, he was not aware of any method to calculate his bonus and payment of it was very much dependant on Mr Gainey. He had enjoyed receiving bonus

payments prior to the takeover of the company but this was not guaranteed and were not for a fixed amount.

42. Matthew Doyle also explained in his evidence that the payment of a full bonus in December would not make commercial sense; this was only part way through the financial year and the respondent was required to review its profitability and performance at the end of the financial year before being in a position to make further bonus payments in March/April. Mark Duffy and Matthew Doyle's evidence was consistent in this regard; they had a discussion in December 2022 that payment of bonus would be made in two parts, this would assist with cash flow and also make financial sense. Both witnesses also confirmed that all other employees were entitled to a discretionary bonus on this basis. This was not challenged by the claimant.

43. Following a pay review in April 2021 the claimant's salary was increased to £30,000, £400 per month car allowance and a 10% bonus of his basic salary (page 102). The pay review was initiated by the respondent who felt the claimant was underpaid. By 2023 his basic salary had been increased to £40,000. In doing so, I found the respondent demonstrated that it was a very reasonable and generous employer.

44. In his December 2021 pay, the claimant received a bonus of £2,000 and the covering email with attached letter explained how the respondent was hoping to secure a profitable future growth of the business (page 103-104). The wording of the correspondence is evidence of the bonus being paid based on the profitability of the company as well as being discretionary. The claimant did not dispute this at the time.

45. The claimant then came to learn that Christian Farquhar received a £20,000 bonus payment despite the respondent stating that it had faced difficult financial circumstances in 2021. I found that this triggered the claimant's concern that he should have been paid an extra £1,000 inn December 2021. On the balance of probabilities I find that the claimant would not have taken issue with the payment of his bonus payment if it was not for him learning that Christian Farquhar received a substantial bonus payment. The claimant states that he discussed his dissatisfaction about his bonus payment with Christian Farquhar who assured him that he would speak with Matthew but no further response was received. There is no written evidence of any conversations that took place between the claimant and Christian Farquhar but on the balance of probabilities I find that the claimant did suggest to Christian Farquhar that he was disgruntled with the bonus payment he received. However, it is telling that the claimant did not raise a formal grievance or make efforts himself to raise the issue with Matthew Doyle directly especially when he did not receive a response from Christian Farquhar as stated.

46. In December 2022 the claimant asked Christian Farquhar that he be paid his outstanding £1,000 bonus payment along with his annual bonus payment of £3,000 in December 2022. The claimant was paid £2,000 in December and was again aggrieved by this as he expected to be paid £3,000; the claimant again states that he discussed this with Christian Farquhar who informed him that

Matthew and Mark had made the decision to make a bonus payment. He did not receive any further information in this regard. Again, tellingly he does not raise the issue of non-payment of bonus directly with either Matthew or Mark and/or by way of a formal grievance. There are no documents whereby the claimant has asserted a contractual right to a bonus payment or chasing up the matter. This is despite the claimant being in regular contact with the Matthew Doyle. Further, I found it to be inconsistent that the claimant did not enquire of any outstanding bonus for almost 12 months despite his contention that he was contractually entitled to the payment. I therefore find that the claimant accepted that the decision to make payment of his bonus rested with Matthew Doyle and Mark.

47. In April 2023 the claimant received a payment of £2,000 which he states reflects the outstanding bonus payments from December 2021 and 2022. This was done without prompting the respondent and I found that it supports the position that (1) bonus payments were based on profitability of the company in accordance with the financial year and (2) the payment of bonus was not restricted to one payment.

48. On 26 and 27 October 2023 (page 160) the claimant emailed Matthew Doyle to remind him that he was expecting full payment of bonus in December 2023. The claimant did not receive a substantive response to these emails. Matthew Doyle states that this was due to the fact that bonus payments had not been looked into or calculated at that point.

49. In December 2023, the claimant again received payment of £2,000 when he was expecting to receive £4,000. The claimant contacted Matthew Doyle on 22 December 2023 by telephone and I found that the claimant was able to discuss a number of concerns such as bonus payment, deduction of pay, allocation of duties and appeal against his written warning. This is supported by the email of 22 December 2023 (page 202) as discussed below. As part of this discussion I found that Matthew Doyle advised the claimant that the payment of bonus was up to 10% of his basic salary, discretionary, based upon performance of the company and made over two payments to coincide with the financial year. In his own evidence the claimant states that this was the first time the position had been explained to him and if it had been done in 2022, he would have accepted this. This contradicts his assertion that the bonus payment was contractual and had to be paid in full in December of each year. In his own evidence, the claimant accepted that it would make financial sense to make payment of a bonus in accordance with the financial year.

50. On 22 December 2023 Matthew sent the claimant a follow up email whereby he stated that in respect of his bonus, both himself and Mark would come and see him in early January to discuss his concerns. The email also confirmed that a number of issues had been discussed during the telephone call. I therefore found on the balance of probabilities that that Matthew did advise the claimant that he may be paid a further bonus payment in March 2024.

51. The respondent was keen to discuss the issues of concern bearing in mind that it was keen to schedule a meeting in early January to address the concerns

raised by the claimant. The office was closed between 22 December 2023 to 2 January 2024.

52. The respondent was unable to discuss the claimant's concerns in respect of his bonus as he resigned from his role on 28 December 2023 (and thereafter remained off sick).

Verbal Written Warning

53. On 4 October Richard Leng (Yard Manager) raised a grievance. It was alleged that staff at the Hull office were causing him difficulties by way of obstructive and unprofessional behaviour (pages 238-240). The claimant was not named in Richard Leng's original grievance.

54. The grievance was investigated by Katie Grice (Office manager).

55. On 9 October 2023 the claimant attended an investigation meeting as part of a grievance raised by Richard Leng. Katie Grice also interviewed other colleagues including Tony Johnson and Helen Glen.

56. During the course of the meetings the claimant stated that he had been involved in an altercation with Richard Leng. As part of Katie Grice's findings (pages 248-250) she found that there was an uncomfortable atmosphere in the office. In particular she highlighted that there is a sense of 'us and them' attitude between Richard Leng and his colleagues, which included the claimant. The instance between the claimant and Richard Leng related to difficulties experienced by him when requesting information from his colleagues and which is what led to the altercation.

57. Mark Duffy decided to issue what he describes as a verbal written warning to all workers at the Hull office including the claimant on 26 October 2023 (page 159). He felt that a further meeting was not required and he contends that the disciplinary procedure allowed him to depart from the precise requirements of the procedure 'where it is expedient to do so and where the resultant treatment of the employees is no less fair'.

58. The claimant submitted an appeal against this decision on 30 October 2023 on the basis that the correct procedure had not been carried out by the respondent and in particular he was never advised that the situation related to a potential disciplinary action against himself. The claimant had not been made aware of the accusation(s) against him and was not provided with an opportunity to defend himself.

59. Katie Grice provided a response by email dated 27 October 2023 (page 162) and referred to the Employee Handbook which related to informal warnings and how they could be issued without the need for a formal complaint or disciplinary hearing. She emphasised that she recommended that it would be inappropriate to conduct formal disciplinary hearings or take formal action but it was essential to issue informal verbal warnings to highlight to staff that the current conduct is not appropriate. She concluded by stating that these warnings do not come with

a right of Appeal but if the claimant wished to pursue this he should do so in writing by 3 November 2023. Katie Grice confirmed by email that Matthew Doyle would be handling his Appeal.

60. I find that it was the intention of the respondent to issue informal verbal warnings. However, the wording of the correspondence sent to the claimant dated 26 October 2023 suggested he had been issued with a written warning and any further behaviour related to this grievance would be 'met with further disciplinary action, including an investigation into gross misconduct'. He had not been given a verbal warning by either Katie Grice or Matthew prior to receiving the correspondence. In the circumstances the respondent should have arranged an investigation meeting to allow the claimant an opportunity to defend himself prior to issuing the warning.

61. The respondent failed to arrange an Appeal Hearing in good time; this was an oversight on their part due to the claimant being off sick in November and also due to the volume of work that they experienced at the time. However, the claimant also did not chase up the matter or seek to resign from his position on receiving the warning. I found that relevant individuals, Matthew Doyle and Mark Duffy were genuinely apologetic in respect of the delay that had occurred in arranging the Appeal Hearing. Mark also conceded in is evidence that in hindsight the claimant should have received further correspondence regarding this matter. The claimant having raised this as a concern to Matthew Doyle in his conversation on 22 December 2023 was advised that the Appeal Hearing would be arranged to take place in early January when the office reopened. A letter dated 22 December 2023 confirmed that an Appeal Hearing was scheduled to take place on 4 January 2024 and then rescheduled to take place on 8 January 2024.

62. The claimant elected not attend the Hearing and he was off sick following for the entire duration of his notice period following his resignation on 28 December 2023.

63. On 3rd January 2024 the claimant received correspondence from Matthew Doyle accepting his resignation. The respondent also highlighted that in response to his concerns:

a) His bonus entitlement was discretionary and up to 10% based on personal and overall company performance
b) They always had utmost respect and trust for the claimant and the work he carried out
c) Issues surrounding the scheduling of the appeal hearing which could now be heard on 8 January 2023 at the Hull office or a suitable date of the claimant's choosing.

Sick pay

64. The claimant's contract of employment states that the claimant will be entitled to statutory sick pay only.

65. In his evidence, which is not challenged, the claimant states that he was paid full pay whilst on sick leave in October 2007. This was authorised by the owner at the time Steve Gainey. The claimant also states that he was afforded full pay when on sick leave in April 2008. It was Mr Gainey who again authorised this and visited him in hospital almost every week.

66. In November 2023, the claimant who was off work with stress queried his pay as he had been paid his normal wage when off sick previously. Matthew Doyle, advised the claimant's contract of employment as provided by Mr Gainey entitled him to statutory sick pay only (which payroll had worked off), but the respondent had topped this up to normal pay. Mr Gainey had not advised the respondent of any enhanced contractual rights applicable to the claimant during due diligence. The claimant who accepted that he not aware of his contractual rights relating to sick pay stated "…..so it means you still paid the full amount even though I was off due to sickness? Thank you Honestly I've not really looked at my Contract of Employment as its never been an issue ever since I started and never got paid SSP…." The claimant was not even aware of his entitlement and recognised the contractual right to pay him SSP. The decision to 'top up' his sick pay was made at the discretion of Matthew Doyle.

67. However, when the claimant was off work from 22 December 2023, he was only paid statutory sick pay.

The Law

Interpretation of contractual terms

68. The proper approach to the construction of a contract was confirmed by the Supreme Court in *Arnold v Britton* [2015] UKSC 36. The Tribunal should interpret the intention of the parties as to the meaning of the terms by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"*.

69. The Supreme Court identified six relevant factors [para 15]:

    1. the natural and ordinary meaning of the clause;
    2. any other relevant provision of the contract);
    3. the overall purpose of the clause and the contract;
    4. the facts and circumstances known or assumed by the parties at the time that the document was executed; and
    5. commercial common sense; but
    6. disregarding subjective evidence of any party's intentions.

70. This is an objective exercise. The ordinary language of the provision should not be undervalued by any reliance on what is said to be commercial common sense within the surrounding circumstances [para 17]. The clearer the natural meaning of a clause, the more difficult it is to justify departing from that meaning [para 18].

71. The grounds on which a term may be implied into a contract are very limited. the general principle is that terms can only be implied into a particular contract if the Tribunal can presume that it would have been the intention of the parties to include them in the agreement It is not sufficient for the proposed term to be a reasonable one in all the circumstances.

72. There are a number of bases on which such a presumption can be made:

a) Business efficacy
b) The officious bystander
c) Custom and practice

73. The Tribunal should first determine what the express terms of the contract are and what they mean, before considering whether any terms ought to be implied. Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2016] AC 472.

74. The Marks and Spencer case contains a detailed discussion of recent authorities and the applicable principles relating to the business efficacy and officious bystander tests. In short:

a) The question is whether the parties can be presumed to have intended to include the term at issue. That is to be judged at the time the contract was made.

b) The parties may well have chosen deliberately not to make provision for a particular situation. It is not enough to show that if the parties had foreseen the situation they would have wanted to made provision for it.

c) A term cannot be implied if it contradicts an express term of the contract.

d) An implied must be reasonable and equitable.

e) An implied term must be capable of clear expression.

f) A term can be implied if it is necessary to do so to give business efficacy to the contract - no term will be implied if the contract is effective without it.

g) The test is one of necessity not reasonableness, although it is not a test of “absolute necessity”. One approach would be to ask whether, without the term, the contract would “lack commercial or practical coherence.”

h) A term can be implied if it is left not expressed because it is so obvious that that “it goes without saying” The approach is sometimes described as ‘the officious bystander test’. (if suggested by an officious bystander the parties would “testily suppress him with a common, “Oh, of course!”). However, such a term should not be implied unless it is necessary to give effect to the agreement.

75. In respect of custom and practice the proper approach was set out by the Court of Appeal in Park Cakes Ltd v Shumba [2013] IRLR 800. Lord Justice Underhill, giving the judgment of the Court, analysed various authorities including Albion Automotive Ltd v Walker [2002] EWCA Civ 946 (which is relied on by the claimant) and Solectron Scotland Ltd v Roper [2004] IRLR 4 EAT (which is relied on by the respondent), before holding in paragraphs 34 to 36:

> "34: …the essential object is to ascertain what the parties must have, or must be taken to have, understood from each other's conduct and words, applying ordinary contractual principles: the terminology of 'custom and practice' should not be allowed to obscure that enquiry.
>
> 35: Taking that approach, the essential question in a case of present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered the employee for his work (or, perhaps more accurately in most cases, his willingness to work), and the employee works on that basis. … It follows that the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are or should be reasonably have been aware of it."

76. Lord Justice Underhill stressed that he was not setting out a comprehensive list of relevant circumstances, but stated that the following would typically be relevant:

a) on how many occasions and over how long a period, the benefits in questions have been paid;
b) whether the benefits are always the same;
c) the extent to which the enhanced benefits are publicised generally;
d) how the terms are described;
e) what is said in the express contract;

> "As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood."

f) Equivocalness, by which is meant whether the practice, viewed objectively, is equally explicable as an exercise of discretion rather than as compliance with a legal obligation.

77. The burden of establishing that the practice has become contractual is on the employee.

Constructive unfair dismissal

78. Section 95 of the Employment Rights Act 1996 defines a dismissal for the purposes of a claim for unfair dismissal. By virtue of s 95(1)(c) this includes constructive dismissal, defined as follows:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if) –
> (c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

79. In the leading case of Western Excavating (ECC) Limited v Sharp [1978] ICR 221, the proper approach was set out. The Tribunal must ask:

79.1 Was there a repudiatory breach of contract?

79.2 If so, did the Claimant resign in response to that breach and not for another reason?

79.3 If so, did the Claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that they chose to keep the contract alive?

80. If a relevant contractual term exists and a breach (actual or anticipatory) has occurred, it must then be considered whether the breach is fundamental — i.e. whether it repudiated the whole contract. A key factor to take into account is the effect that the breach has on the employee concerned.

81. The employer's motive for the conduct causing the employee to resign is irrelevant. It makes no difference to the issue of whether or not there has been a fundamental breach that the employer did not intend to end the contract — Bliss v South East Thames Regional Health Authority [1987] ICR 700. Similarly, the circumstances that induced the employer to act in breach of contract have no bearing on the issue of whether a fundamental breach has occurred — Wadham Stringer Commercials (London) Ltd v Brown [1983] IRLR 46, where the EAT stressed that the test of fundamental breach is a purely contractual one and that the surrounding circumstances are not relevant.

82. The Claimant also asserted that there had been a breach of the implied term of mutual trust and confidence. That was explained by the House of Lords in Malik v BCCI SA (in compulsory liquidation) [1997] ICR 606, where Lord

Steyn held that it imposed an obligation that the employer shall not, "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

83. It has been clear, since Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, that any breach of the implied term of mutual trust and confidence will be a repudiatory breach. However, as noted in Malik, the conduct has to be such that it is likely to "destroy or seriously damage" the relationship of trust and confidence.

84. The proper approach to constructive dismissal in a trust and confidence case has been more recently summarised by the Court of Appeal in Omilaju v Waltham Forest London Borough Council [2005] ICR 481, to which I have also had regard.

85. I have also taken into account the case law and principles referred to in the respondent's written submissions.

86. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

Conclusions

87. Applying the above principles to the facts as found, I reach the following conclusions.

88. I therefore deal with the following issues together given the relevance of them to the issues at hand:

Claim 1: Unfair Dismissal

Did the Claimant's employment contract contain the following contractual terms:

(a) express and/or implied term (whether or not based on parties' custom and practice) entitling the Claimant to be paid a bonus payment in full in December of each year

(b) implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or serious damage the relationship of trust and confidence between employer and employee.

Issue 8.1(a)

89. I find that the claimant's contract of employment did not contain an express term (written or verbal) giving him a contractual right to be paid commission:

a) Both parties agree that the claimant's employment contract did not contain an express term giving the claimant a contractual right to be paid bonus. It is silent on this matter. In his own evidence the claimant confirmed that the contractual basis of the bonus payment had never been discussed.

b) By way of pay review, the claimant was informed that his pay had been increased and he would be entitled to a 10% bonus of his basic salary. However, I found that this correspondence did not form part of his contractual entitlement. While the communication refers to a 10% bonus, it does not expressly state that the bonus is guaranteed or irrevocable. An enforceable contractual term must be clear, certain, and intended to create legal obligations. The wording must be examined in the context of the entire employment relationship. The respondent as well as the previous owner has historically exercised discretion in awarding bonuses, this reinforces the argument that bonuses are not contractual entitlements but discretionary. I found that the communication outlined what the employer "intended" or "expected" to pay, on the basis of the company's performance, this does not create a binding contractual duty. This is also supported by the wording of the correspondence sent to the claimant on payment of a bonus in 2021; it was evident that the bonus was being paid based on condition of the performance and profitability of the company. The fact that a further bonus payment was made in April also strengthens the position that it was payable in direct correlation with the company's end of year performance.

c) The claimant did not at any point contend that he was contractually entitled to be paid a bonus, it could not be changed and/or the actions of the respondent would breach his contract until his resignation. Whilst he raised an enquiry with Christian Farquhar, this being as a result of his frustration on learning about the bonus he had received, he did not seek to escalate the matter to Mark and/or Matthew with whom he had open channels of communication. It was only at the end of October 2023 that the claimant states that he is expecting his bonus payment to made in full in December and not part paid as per 2021 and 2022.

d) There are no documents within the hearing bundle which suggest that the claimant was contractually entitled to be paid commission.

e) There are no documents within the hearing bundle whereby the claimant challenged the respondent on his contractual entitlement to commission in a timely manner. I would have expected the claimant to raise this by way of a formal grievance following any discussions with Christian Farquhar in respect of his bonus payment received in December 2021.

f) During the due diligence process the respondent was not informed of any enhanced contractual rights enjoyed by the claimant.

g) There is no evidence to suggest that the claimant's non-contractual entitlement to bonus payments was changed during his employment. The contract of employment retains all benefits that the claimant is contractually entitled to. The omission of a bonus scheme enforces the view that it treated

as a separate non-contractual benefit. If the respondent had intended for it be a contractual element they could have easily advised of this by way of correspondence which it then attached to the contract of employment as an appendix. This wasn't the case.

I find that there was not an implied term *entitling Claimant to be paid a full bonus payment in December of each year because:*

h) I considered the business efficacy and officious bystander tests that I have referred to above. I did not find that the parties intended to create a contractual non-discretionary bonus scheme. The initial contract of employment does not contain any reference to a bonus scheme. Whilst the claimant enjoyed bonus payments over a number of years, he was aware that it did not form part of his contract of employment.

i) The payment of bonus was linked to the growth and profitability of the respondent. Matthew whose evidence I found credible stated that all bonus payments to workers within the organisation were non-contractual and it wasn't in the interest of the business to depart from this. It made financial sense to structure any bonus payments around the company's financial year and the claimant also agreed with this.

j) As set out above, I found that in December 2023 Matthew Doyle explained to the claimant how the bonus scheme operated, payment of bonus being based on performance and that he may be entitled to a further payment in April 2023. The claimant accepted that if this had been explained to him in 2022 the issues would not have arisen in respect of his bonus.

k) I then went on to consider if the custom and practice of paying commission resulted in a contractual entitlement. I did not find this to be the case. Whilst the claimant enjoyed bonus payments throughout his employment it was never guaranteed. In his own evidence the claimant confirmed that prior to Wescott taking over, his bonus was not fixed, he was not aware of any method to calculate his bonus and payment of it was very much dependant on Mr Gainey. He had enjoyed receiving bonus payments prior to the takeover of the company but this was not guaranteed and were not for a fixed amount. Again, it was not in the interest of the business to depart from this.

Issue 8.1(b)

90. The claimant relies on a breach of the implied term of trust and confidence.

91. It is uncontroversial that the following fundamental term is implied into every contract of employment. It is a fundamental breach of contract for either party, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer 30 and employee' (Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT, Malik v BCCI [1997] ICR 606)

Did the Respondent breach one or both of those terms by:

Failing to pay the claimant his bonus in full in December 2023:

92. As I have found, the claimant did not have a contractual entitlement to a bonus payment and as the respondent was under no express or implied contractual obligation to pay bonus the respondent cannot be held to have been in breach of the implied term of trust and confidence in this regard.

93. Against this background I cannot find that there was any conduct in this respect which, without reasonable and proper cause, was conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

94. I therefore do not find that the respondent breached the implied term of trust and confidence in the circumstances.

95. It therefore follows that there was no repudiatory breach of contract not to make additional bonus payments to the claimant. The respondent legitimately, reasonably, and in good faith, exercised its discretion not to make those payments.

Placing constant pressure on the claimant every week

96. The claimant's duties were reduced shortly after the takeover of the company. He did not object to this and/or raise a grievance. He appeared content with the situation and discussions that he had in 2021. The respondent, despite reducing his tasks rewarded the claimant with a substantial salary increase. The respondent was therefore genuine in its approach and were keen to assist the claimant from the outset and avoid pressure being placed upon him.

97. There is no doubt that the respondent had to meet financial targets every month to satisfy any debts and/or disbursements. The claimant's role was directly related to the funding of the aforementioned and it was reasonable for the respondent to enquire of invoices and payments. There were occasions whereby the respondent was struggling to reach its monthly monetary target and it required the claimant to carry out additional invoicing to raise funds; this was the claimant's job role as emphasised by Ms Souter and it is a requisite that he may feel pressurised towards the end of the month. I did not find sufficient evidence to suggest that he was being placed under constant pressure every week as alleged.

98. I also agree with the respondent's submission that it is also evident that certain issues that the claimant complains about and which he says caused him constant pressure lay beyond his remit. The claimant enjoyed a close relationship with Mr Gainey previously and as office manager there is no doubt that he was accustomed to having greater involvement in the running of the company, financial concerns and processes adopted. This was not the case when the respondent acquired the business and I find his frustration lay in the

fact that whilst his role had been reduced voluntarily he wished for the business to run in the same fashion that it had done since 2007. He also held the belief that it was his right to involve himself in all aspects of the running of the business, whilst good natured and in the best interests of the business, it was not part of his job role or remit.

99. The claimant alluded to payment of wages not being made on time; he agreed at the Hearing that he expected payment to be made at midnight as per the previous practice but accepted that wages were paid later on the same day. This is a prime example of the claimant's desire that the previous practice(s) remain in place despite the fact that the respondent was not late in payment of wages. Furthermore, it was not his responsibility to ensure that payment of wages was made on time. In the same vein, it was not for the claimant to be involved in the internal funding of the respondent and group company and nor was it his responsibility to deal with any liability to HMRC or other organisations. Whilst, this may have caused him some pressure, as he was genuinely concerned about the financial standing of the company, I find it would be unreasonable to place any blame upon the respondent.

100. The claimant did not raise a formal grievance suggesting that he was he was facing constant pressure every week and/or felt frustrated despite alleging this was the case for over two years. Whilst he alluded to querying his role as per the email dated 20 October 2023 he did not specifically raise issue in respect of pressures that he faced and/or how this was affecting him. He did not follow up the email. I have already addressed in my findings of fact that whilst the claimant sent an email on 30 October highlighting pressure he had faced for 2.5 years, he did not follow this up with a formal grievance and I found that his dissatisfaction and stress at this time related to the manner in which he received a warning. The claimant also accepted that he did not raise concerns about his workload with Christian Farquhar, his concerns were related to the financial standing of the business and how it was being operated. The claimant held a genuine affinity with the business and wanted more involvement in its day to day running.

101. On discussing matters of concern with Matthew on 22 December 2023, it was apparent that the respondent was keen to schedule a meeting to discuss the claimant's concerns when the office reopened in January. It was for the claimant to set out his concerns to the respondent to allow them the opportunity to address these in the first instance.

102. Against this background I cannot find that there was any conduct in this respect which, without reasonable and proper cause, was conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

103. I therefore do not find that the respondent breached the implied term of trust and confidence in the circumstances.

Showing lack of trust and communication with the claimant

104. As per the respondent, I also had difficulty in understanding the allegation being pursued by the claimant in this regard. The claimant's workload was reduced, whilst at the time same time receiving a substantial increase in his wage.

105. The structure of the business was such that key financial documents, decisions including processes and procedures were under the remit of Matthew Doyle and Mark Duffy. The claimant had enjoyed greater transparency in respect of financials under Mr Gainey but this was not his job role following the takeover.

106. The communications that have been highlighted by the claimant demonstrate that the respondent and in particular Matthew (with whom he had a lot of dealings) took into account the views expressed by the claimant in respect of invoicing, funding etc but the ultimate decision relating to key decisions remained with Matthew and Mark.

107. By way of email dated 20 October 2023 the claimant queried his role within the company and felt that he did not have the respondent's trust but he did not expand upon his concern nor did he chase this up. During his evidence the claimant was aggrieved that he was not informed about Christian Farquhar's intention to leave the company but this has been addressed above. The respondent was keen to discuss the claimant's concerns in early January but the claimant resigned and elected not attend the meeting.

108. I therefore conclude and agree with the respondent, that it cannot be said that the respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.

Strained relationships with co-workers

109. I again agree with the respondent in that the claimant has not pleaded any particulars of the co-workers concerned. There are no details within claimant's witness statement dealing with this aspect of his claim. Whilst the claimant described a physical altercation with his colleague Richard Leng he did not wish to escalate this further and his dissatisfaction stemming from this episode related to the warning that was issued by the respondent (and discussed below). Against this background I cannot find that there was any conduct in this respect which, without reasonable and proper cause, was conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I therefore do not find that the Respondent breached the implied term of trust and confidence in the circumstances.

Issuing a verbal written warning to the claimant without adequate investigation and not resolving his appeal

110. The respondent intended to issue the claimant a verbal written warning in line with company policy. However, the letter sent to the claimant suggested that it was a written warning. I sympathise with the claimant was rightfully concerned that disciplinary action had been taken for which he was not afforded an opportunity to defend himself. The claimant was however provided with the right to appeal the warning.

111. A warning, whether verbal or written, does not constitute a fundamental change to the employee's contractual terms or employment status. The appeal process was available as a mechanism to rectify any miscommunication, reinforcing that no substantive detriment was caused to the claimant.

112. While the respondent may have acted unfairly by issuing a warning without a proper investigation, I find that it does not amount to a repudiatory breach due to the following:

112.1 The respondent's conduct did not destroy the employment relationship.
112.2 The procedural deficiency can be corrected through an appeal.
112.3 The warning does not immediately or significantly impact the claimant's position.
112.4 There is no evidence of bad faith or a deliberate attempt to undermine trust and confidence. The respondent sought to issue all named in the grievance with a verbal warning and the claimant was not singled out.

113. There has been a delay in holding an appeal hearing but prior to his resignation an appeal hearing was scheduled and the claimant was also provided with an alternative date post his resignation.

114. The claimant elected not to attend the hearing whereby he could challenge the warning that had been issued.

115. As such, whilst I find defects within the procedure adopted by the respondent it cannot be said that this amounted to a repudiatory breach in that the respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.

116. As a consequence of my findings above, I am not required to consider the outstanding issues under the heading of constructive unfair dismissal.

117. I then went on to consider the allegations pertaining to the unlawful deduction from wages claim in respect of sick pay, namely:

The claimant alleges that the Respondent made unauthorised deductions from his wages by not paying him enhanced sick pay

Did the claimant's employment contract contain an express and/or implied term (whether or not based on parties' custom and practice) entitling the

claimant to be paid full pay when off sick post resignation?

If yes, did the Respondent make the alleged deductions from the claimant's wages?

118. The employee's contract of employment expressly states entitlement to Statutory Sick Pay (SSP). There is no contractual provision entitling the employee to full pay during periods of sickness absence. The employee was off sick on two occasions approximately 15 years ago, during which time the previous owner of the business exercised discretion to pay full salary instead of SSP. More recently, during a period of sickness absence under new ownership, SSP was initially paid but later adjusted to full salary, after the claimant raised the matter with Matthew.

119. The employee's contract explicitly states entitlement to SSP. In the absence of an express term providing for full sick pay, the default position is that the employer is only legally required to pay SSP, unless an implied contractual right to full pay has arisen.

I find that there was not an implied term *entitling Claimant to be paid above SSP:*

120. The claimant argues that previous discretionary payments created a contractual right to full sick pay based on custom and practice. However, the following factors indicate that no such right has arisen:

    120.1 Full pay was provided on only two occasions 15 years ago, which is insufficient to establish a binding practice.

    120.2 The payments were at the discretion of the previous owner and not a uniform policy applied to all employees.

    120.3 The respondent does not pay enhanced sick pay to its employees

    120.4 The language used by Matthew in November 2023 confirms that payroll had been working off the contractual entitlement of SSP but had 'topped' this up at the respondent's discretion. His communications did not form the basis of a contractual right to enhanced sick pay. The claimant was referred to his contract of employment in respect of his entitlement. The claimant also accepted in evidence that he had not looked at his contract of employment. The claimant recognised that the respondent was well within its rights to pay him SSP but elected to pay his normal wage at its own discretion. He was most thankful for this.

    120.5 There is no evidence of a policy, handbook, or communication suggesting otherwise.

121. I therefore find that SSP was correctly paid during the employee's notice period, and there is no contractual or implied entitlement to full sick pay. The previous discretionary payments do not override the explicit contractual provision for SSP.

Employment Judge Jaleel
06 February 2025