



EMPLOYMENT TRIBUNALS

Claimant: Mr Phillip Femminile

Respondent: Croner Group Ltd

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
By cloud video platform

On: 8, 9, 10, 11, 12 March 2021
27 April 2021 (deliberations, parties did not attend)

Before: Employment Judge R Adkinson sitting with
Mrs K Srivastava
Mr A Wood

Appearances

For the claimant: Mr L Varnam of Counsel

For the respondent: Mr S Sansom of Counsel

JUDGMENT

After hearing the evidence from the claimant and from the respondent, and after taking into account each party's submissions, and after the claimant withdrew his claim for breach of contract on the grounds that the respondent had failed to pay his commission (for which a separate order has been issued), it is the unanimous conclusion of the Tribunal that:

1. The claimant's claim for breach of contract for payment in lieu of notice succeeds. The respondent shall pay the claimant the sum of £6,666.66;
2. The claimant's claim for constructive automatically unfair dismissal pursuant to Employment Rights Act 1996 section 100(c)(ii) is dismissed;
3. The claimant's claim for constructive automatically unfair dismissal for making a protected disclosure is dismissed; and
4. The claimant's claim for detriments as a consequence of making a protected disclosure is dismissed.

REASONS

Introduction

5. The claimant (“Mr Femminile”) presented his claim to the Tribunal on 16 November 2018 following early conciliation between 31 October 2018 and 7 November 2018. He alleges that he has been subjected to a constructive and automatic unfair dismissal for health and safety matters that fall within the **Employment Rights Act 1996 section 100(c)(ii)** (“health and safety dismissal”); for automatic constructive unfair dismissal for making protected disclosures and that he has been subjected to detriments for making those protected disclosures. In addition, he brings a claim for breach of contract in which he alleges that the respondent (“Croner”) failed to pay to him the right amount of payment in lieu of notice (“PILON”). He also alleged that Croner did not pay to him all the commission he was owed. He withdrew that at the hearing. It was not dismissed because he wanted to reserve his right to pursue that claim in another jurisdiction. Mr Femminile lacks two years of continuous service and therefore there is no ordinary unfair dismissal claim for the Tribunal to consider. Having contested the amount of the PILON due, Mr Femminile conceded in cross examination the value would be £6,666 as Croner had always said.
6. Croner deny that they dismissed Mr Femminile. Instead, they say the claimant resigned of his own freewill. They say that in any case even if he were dismissed, it is neither a health and safety dismissal nor a dismissal for a protected disclosure. Croner also denies that it subjected Mr Femminile to any detriments.
7. As to the PILON Croner say they do not owe him any money because he was overpaid at the end of his employment, and they are entitled to set off whatever money is owed to him against that excess payment. Alternatively, they are entitled to recoup it under the terms of the employment contract.

Hearing

8. Mr Femminile was represented by Mr L Varnam, Counsel, and Croner by Mr S Sansom, Counsel.
9. We heard live oral evidence from Mr Femminile himself and on his behalf from Mr R Fenn and Ms D Heatley. On Croner’s behalf we have heard from Mr P Holcroft, who is the Associate Director of Operations, and Mr A Price, who is Group Operations Director. We have taken into account their evidence to the Tribunal in reaching our conclusions.
10. At the beginning of the case, Croner presented an opening note and at the close of the case, both Croner and Mr Femminile presented written submissions, which we have taken into account. We have also taken into account the oral arguments that each party made at the end of the hearing.
11. The hearing itself proceeded by way of HMCTS’s Cloud Video Platform. During the course of the hearing, there were a number of technical problems, in particular connecting Mr Sansom into the hearing. This was not Mr Sansom’s fault; it is just an unfortunate consequence of these sorts

of hearings. Nevertheless, it did cause a few delays to the hearing but did not in our view have any significant impact. When there was a technical problem, we paused to allow that to be resolved and the Tribunal's administrative staff provided as much support as they were able to do so. During the course of the video hearings, in line with Health and Safety Executive guidance, we took a short break every hour. The hearing started at about 10 am and finished at about 4 pm, sometimes a little bit later if it meant that we could complete the evidence of a witness. At lunchtime, we took a break of one hour at about 1 pm.

12. The biggest delay in these proceedings, however, was the parties' inability to agree the list of issues until the start of the third day. Where the blame lies is not something the Tribunal has the material to consider and in any case is not relevant to the issues before it. The Tribunal can however note that despite the difficulties, each party's Counsel took the matter in hand and worked hard to finalise the agreed list, neither party asked for permission to amend their claim or response (as may be) and neither party asked for an adjournment.
13. The Tribunal was able to use some of this time to read into the papers so that we had a full understanding of the case. Nonetheless, it meant that the hearing, which could ordinarily have been completed within the 5 days, only had 3 days available, and they were required to hear the evidence from all the witnesses.
14. Another consequence of the delay agreeing the list of issues was that both parties, but particularly Croner, complained that as a result of the late clarification and agreement of the list of issues, it has not been possible to investigate all the necessary documents and therefore to detect if there are extra relevant documents for the bundle. However,
 - 14.1. we note that neither party has alleged that the other has failed to comply with their disclosure obligations and therefore we proceed on the assumption that everyone has acted reasonably in disclosing that which was appropriate for them to disclose and that neither party has withheld relevant documents;
 - 14.2. notwithstanding that, there was an agreed supplementary bundle prepared during the course of the hearing and late disclosure even after that to deal with some issues that had arisen on clarification of the list of issues; and
 - 14.3. neither party at any time asked for an adjournment to seek new evidence or to consider the issues in more detail. Croner did ask permission to rely on a supplementary statement from Mr Holcroft. We granted permission to Croner. Mr Holcroft produced a supplementary statement and we took it into account.
15. We proceed on the basis that all relevant material has been put before us and there is no extra material that might have proven a particular party's case one way or the other. We are after all not in a position to carry out speculation as to what might exist: we can only deal with what we have.
16. Therefore, by the end of the hearing there was before us a bundle of approximately 222 pages, a supplementary bundle of approximately 135

pages and a final document of about another 15 pages. We have taken into account those documents to which we have been referred during the course of evidence and submissions.

17. We want to thank Mr Sansom in particular for the very detailed chronology which was cross-referenced not only to the witness statements but also to the documents in the bundle. This document enabled the Tribunal to gain a detailed and thorough understanding of the case and of the sequence of events. Mr Varnam received this document it seems quite late. However, notwithstanding that, he too clearly worked hard to go through it thoroughly and helpfully agreed that it was an accurate chronology of what had gone on in this case.
18. Because of the lack of time left at the end of the hearing, the Tribunal was not able to reconvene until 27 April 2021 when it reached its unanimous decision. This is that decision.

Issues

19. The Tribunal is satisfied at the end of the case that the agreed list of issues represents the issues that the Tribunal has to determine. The issues therefore are as follows:

Breach of contract

20. It is agreed between the parties that the claim for payment in lieu of notice ("PILON") is valued at £6,666.66.
21. The issues that arise are:
 - 21.1. Did the respondent make the payment either expressly or by way of set off?
 - 21.2. If it was by way of set off, was the respondent entitled to set off or deduct any overpayments that had been made?
 - 21.3. If so, to what extent does the recovery of the overpayments reduce any sum due in respect of PILON?

Automatic constructive unfair dismissal (health and safety) – Employment Rights Act 1996 section 100(1)(c)(ii)

22. The issues that arise are:
 - 22.1. Was the claimant constructively dismissed from his employment with the respondent because:
 - 22.1.1. The claimant brought to the respondent's attention by reasonable means complaints about the damaging behaviour of Mr J Martin and Mr J Bagram being unsubstantiated rumour and gossip about the claimant getting more leads than them because he was "buying them for cash" and "buying leads for cocaine and money" on
 - 22.1.1.1. in July 2018 orally to Mr D McManus;
 - 22.1.1.2. on 19 July 2018 by email to Mr D McManus;

- 22.1.1.3. on 30 July orally to Mr D McManus;
- 22.1.1.4. on 30 July 2018 orally to Mr A Price; and/or
- 22.1.1.5. on 30 July 2018 orally to Mr P Holcroft
- 22.1.2. If so, did the claimant reasonably believe they were harmful or potentially harmful to health and safety.
- 22.1.3. If so, was it not reasonably practicable for the claimant to raise the matter with the representatives of the respondent's Safety Committee or the person responsible for health and safety?
- 22.1.4. If so, did the following acts amount to a breach of the implied term of trust and confidence by the respondent,
 - 22.1.4.1. failing to take appropriate action against Mr Martin and Mr Bagram; and/or
 - 22.1.4.2. telling the claimant that he could leave if he did not like the action taken.
- 22.1.5. If so, were the breaches repudiatory and thus entitling the claimant to resign without notice?
- 22.1.6. If so, did the claimant then actually resign in response to the alleged breach?
- 22.1.7. Has the claimant affirmed the contract?
- 22.1.8. If not, was the reason or principal reason for the fundamental breach of contract the matters identified in the above paragraph?

Protected disclosures and automatic unfair dismissal – Employment Rights Act 1996 section 103A

23. The issues that arise are:
- 23.1. In relation to unsubstantiated rumour and gossip about the claimant getting more leads than Mr Martin and Mr Bagram because he was buying them for cash and/or buying leads for cocaine and money, did the claimant make the following disclosures?

[These disclosures are identical to the matters relied on in relation to the constructive unfair dismissal for health and safety matters under **Employment Rights Act 1996 section 100(1)(c)(ii)**, as set out above.]
 - 23.2. In those disclosures, did the claimant complain about, the bullying behaviour of Mr Martin and Mr Bagram?
 - 23.3. If so, were any of those disclosures qualifying disclosures within the meaning of the **Employment Rights Act 1996, section 43B** specifically:

- 23.3.1. Was the claimant's complaint about the bullying behaviour of Mr Martin and Mr Bagram a disclosure of information?
- 23.3.2. Did he reasonably believe that such information tended to show that the health and safety of an individual had been, was being or was likely to be endangered?
- 23.3.3. Did the claimant reasonably believe the disclosure was made in the public interest?
- 23.3.4. Was the disclosure made in accordance with the **Employment Rights Act 1996 sections 43C to 43H** so that it was protected?
- 23.4. If so, was the way in which the respondent dealt with the allegations in terms of the action that they took against Mr Martin and Mr Bagram and/or telling the claimant he could leave if he did not like the action
- 23.5. If so, were those breaches repudiatory entitling the claimant to resign without notice?
- 23.6. If so, did the claimant resign in response to the alleged breach?
- 23.7. If so, has the claimant affirmed the contract and, if so, was the reason for the fundamental breach of contract that the claimant had made protected disclosures?

Alleged detriments because the claimant made a protected disclosure – Employment Rights Act 1996 section 47B

- 24. These repeated the questions of whether or not there had been whistleblowing above but the alleged detriments are as follows. The following issues then arose:
 - 24.1. If there has been a protected disclosure, did the respondent subject the claimant to the following detriments:
 - 24.1.1. The non-payment of his 2 months' contractual notice in lieu?
 - 24.1.2. The non-payment of commission?
 - 24.2. If so, was that because of the protected disclosures?

Findings of fact

- 25. There was a lot of detailed evidence adduced in this case and detailed cross examination. However we make only those findings of fact that we believe are necessary to resolve the issues before us.
- 26. We first deal with what we make of the witnesses because this affects our overall assessment of credibility.
- 27. First, we consider Mr Femminile. We found it difficult to accept much of his evidence.

- 27.1. We were struck by how he appeared to find it difficult to clarify and identify his own case. It was striking that from the moment he presented his case (if not before) he insisted the amount of the PILON was a different amount to that which Croner advanced only to suddenly accept Croner's calculation partway through the hearing as correct. The documents used to establish this had been in his possession through disclosure for some time and were in the agreed bundle. He had been represented throughout and so had the benefit of advice on the issue. We were also struck that he pursued the issue of allegedly unpaid commission payments to the trial and then dropped the claim. We acknowledge he wanted to preserve his position to claim elsewhere but again we note he had been represented throughout and find it odd he did not make the decision beforehand. Moreover, though he provided a bottom-line figure for this claim, he never set out a calculation of how he arrived at it. Giving the benefit of the doubt to Mr Femminile, the Tribunal believes these suggest he is vague about the claim he has brought and that he has not really thought about the claim as such, merely that he wants to bring one.
- 27.2. We found other parts of his evidence puzzling. For example, as we explain later in the findings of fact, Mr Femminile was away because of stress, confirmed by a doctor's fit note, and there was no pressure on him to return. Notwithstanding that, he did then return to work. He was not able to give us a satisfactory explanation as to why he would choose to go back to work if he were signed off with stress. This undermines the general credibility of his case that Croner's conduct was so bad it breached his contract of employment.
- 27.3. We also found it puzzling that having gone back to work, he then appeared to wait until resigning. He could provide no satisfactory explanation as to why that particular day proved to be the point at which he chose to resign particularly, on his own case, nothing appears to have happened of any interest, so far as the facts of this case are concerned, after 31 July. We could detect no other rational explanation other than the coincidence between the date when he tendered his resignation and pay day when he would be paid his salary and commission. We think it implausible that he would come back to work when he does not have to come back to work, stay in employment for a period in which nothing of note happens, and then only resign on the pay day if the circumstances of his employment and their effect on him were as he alleged. In our mind this is a significant inconsistency and undermines his credibility.
28. We do take into account that the hearing took place over video and it is difficult sometimes to have the same fluid communication by video in the same way as one can when in the court room. We have also reflected on the fact that Mr Femminile is of Italian heritage and that there may therefore have been some issues in cultural communication. However, no such

difficulties were suggested to us and we did not observe any such difficulties ourselves. More significantly, those potential factors do not really explain the significant discrepancy in his apparent behaviour and the allegations he makes about his employment at Croner.

29. In relation to Mr Fenn's evidence, we found him not be particularly credible. Whilst he was able to give his evidence of the rumours taking place behind the scenes, Mr Fenn shied away from and failed to acknowledge his own involvement in those rumours. He was aware of the rumours and that they were being spread; it seems he was aware of how they were affecting Mr Femminile; yet he himself did nothing to report them. We observed that he was not able to give us an answer to obvious questions like he did not report them? Why he involved himself in the spread of the rumours? And why he did not take other steps to stop them? He appeared to play down his own clear role in the alleged bullying. We have concluded that, overall, his story was a predetermined one; that he was here simply to tell us what he had already determined he was going to tell us and thus simply shut down on any of the difficult issues about his own actual involvement.
30. Evidence from Ms Heatley was limited but we accept that she was a straightforward witness. She made concessions where appropriate. For example, she accepted that the investigation that Mr Holcroft carried out was a decent investigation and that there was no need to have interviewed other people like Mr Femminile alleges.
31. In terms of the respondent's witnesses, we make the observation that we thought that Mr Holcroft was, generally speaking, a credible witness. We would go so far as to say that of all the witnesses, he was the most straightforward.
32. We have concerns about the credibility of Mr Price. We noted during cross-examination that he seemed particularly keen at every opportunity to emphasise his background as being a trade union representative and how he had worked for some time with employees in that role. It came across like a presentation or sales pitch rather than an attempt to give straightforward evidence. This "spin" undermined his credibility in our view. In addition, he was not able to give us a particularly satisfactory answer about why Croner Group did not deal with the allegations by way of disciplinary action. His explanation, as we will come to, was that the Business Development Managers involved were taken off the road and, as a result of being summoned to the office, they were therefore unable to earn commission and unable to earn bonuses, plus of course they had a long journey from wherever they were based in the UK to go to head office in Hinckley. He described this as serious. Personally, we do not find that serious. We think being asked to go into the office of the employer you actually work for is not particularly serious, it is surely part of the job. We think that Mr Price was exaggerating the effect of the steps actually taken to compensate for the obvious difficulty of not taking formal disciplinary action. This too undermined his credibility in our view. However we nevertheless felt able to accept much of his evidence: Mr Price made notes of telephone conversations that he had had with various people and these are either contemporaneous or near contemporaneous in most cases.

Furthermore, these notes and Mr Price's evidence tended to match the other documentary evidence available. Therefore, we tended to accept what he said.

33. With those observations in mind, we go on to make the following findings of fact on the balance of probabilities.

34. From 3 April 2017 until 24 August 2018, Croner employed Mr Femminile as a Business Development Manager ("BDM"). A BDM's job is go out and sell Croner's services to companies across the UK. Each BDM has their own designated geographic area. They secure a commission from each sale. The commission is discretionary and is paid in any case only provided the customer has made a certain number of payments and the BDM is still an employee at the time that the commission payment would ordinarily be paid. Therefore, it follows that if an employee were to leave employment before the date that the commission payment was to fall due for payment, they would not receive the commission.

35. The letter offering employment to Mr Femminile was sent on 24 March 2017 and, so far as is relevant, says as follows:

" ...

"Further to your recent interview, I am pleased to offer you the above position, reporting to Dale McManus, on the terms detailed below starting on 3 April 2017. The details set out in this offer letter are the outline terms of the position offered and you will also be subject to our standard contractual terms that you will be issued with, and required to sign, prior to you commencing work. This offer is conditional upon you entering into the standard contractual terms as discussed at interview and set out in the enclosed documentation.

" ... "

36. Mr Femminile signed this on 27 March 2017 confirming his understanding and accepting this offer of employment.

His terms are set out in the document headed "Statement of Main Terms of Employment" ("Statement of Terms") So far as relevant, this provides as follows:

"STATEMENT OF MAIN TERMS OF EMPLOYMENT

"This Statement, together with the Employee Handbook, forms part of your Contract of Employment (except where the contrary is expressly stated) and sets out particulars of the main terms on which Croner Group Ltd ...

"Employs

"Phillip Femminile

" ...

"Your employment will begin on the 3rd April 2017 and no previous employment counts as your continuous period of employment.

"JOB TITLE

"Business Development Manager

...”

37. Under commission, it confirms that commissions will be paid at the end of the month, and they are subject to the Sales, Commission and Bonus Scheme Rules.

38. The contract continues:

“NOTICE OF TERMINATION TO BE GIVEN BY EMPLOYEE

“Under 1 month’s service – nil

“During Probationary Period – 1 week

“From end of Probationary Period but less than 1 year’s service – 1 month

“1 years’ service or more – 2 months

“Conditions relating to termination of employment and return of company property are shown in the Employee Handbook to which you should refer.

“PAY IN LIEU OF NOTICE

“We reserve the contractual right to give pay in lieu of all or any part of the above notice by either party.

...”

39. The contract also had with it a number of restrictive covenants dealing with non-solicitation and non-dealing, confidentiality clauses, non-poaching clauses, prevention of employment by clients and clauses relating to intellectual property and social networking.

40. This Statement of Terms says just above the parties’ signatures that

“Any amendments to this statement will be agreed with you and confirmed in writing within one month.”

41. Mr Femminile signed the statement to indicate his agreement to those terms on 27 March 2017, as did Croner’s representative on 24 March 2017.

42. The BDM’s “Sales and Commission and Bonus Scheme Rules” provides, so far as relevant:

“ ...

“(B) BONUS AND INCENTIVE SCHEMES

“In addition to the above commission structure Business Managers may be entitled from time to time to enter into various bonus or incentive schemes with details in relation to qualification and payment being issued separately. These bonus and incentive schemes are discretionary and operate from time to time as determined by the company’s Directors and are subject to regular review.

“(C) EMPLOYEES LEAVING THE COMPANY

“i) If the contract of employment is terminated either by the company through dismissal or by the Business Manager through resignation, then

special rules apply in relation to commission and any bonus or incentive payments that might otherwise have been payable.

“ii) Commission payments on new business are only paid if the Business Manager is in the employment of the company at the end of the calendar month when the commission payment would normally become payable. “This does not apply in circumstances where the termination is by the company and by reason of redundancy only.

“iii) It is therefore an express contractual condition that an employee has no claim whatsoever on any commission payments that would otherwise have been generated and paid, if they are not in employment on the date when they would normally have been paid, being at the end of the month following 12.5% (or 7.5% with five-year contracts) of the fee being received.”

43. Mr Femminile signed this document to indicate his agreement to it also on 27 March 2017.

44. The employee handbook that was in place when Mr Femminile’s employment began was that version from the February 2017 (“the 2017 handbook”). The introduction to the 2017 handbook reads so far as relevant as follows:

“ ...

“Your Principal Statement of your Main Terms and Conditions of Employment forms your contract of employment with Croner Group Limited. Except where specifically stated, this handbook and the policies and procedures referred to are for guidance only and do not form part of your contract of employment.

“Where guidance in the handbook varies from terms set out in the Principal Statement of Terms and Conditions of Employment (hereinafter referred to as the “contract”), the terms in the statement will apply.”

45. The words “Your Principal Statement of your Main Terms and Conditions of Employment” is not defined but it can only sensibly refer to the Statement of Terms above given the context in which it is used, the purpose of the Statement of Terms and the lack of any other document to which the words could refer.

46. The 2017 handbook continues:

“The Company reserves the right to vary conditions of employment by giving four weeks’ notice in writing of any variation. Where statutory notice entitlement exceeds four weeks the statutory notice will apply.

“The Croner Employee handbook is subject to amendment to reflect changes in legislation, regulations and best practice and the latest version will always be published on the Intranet.”

47. It is common ground that neither the Statement of Terms, the bonus scheme nor the 2017 handbook contain any provision for the recoupment of overpayments of wages, salary or commission that were made by an employer to an employee.

48. At the commencement of his employment on 3 April 2017, Mr Femminile received the February 2017 handbook. He accepted he was aware of the location of health and safety information. Given he specifically relies on **section 100(1)(c)(ii)**, we infer that either Mr Femminile knew whom to contact or where to find that information and, more specifically, how to contact them to raise a health and safety concern.
49. During 2017, Mr Femminile's employment can be described as good. He was a clearly good at his job and a high performer: Croner regularly congratulated him on his performance.
50. Though Croner wanted Mr Femminile to speak at conferences or to give public presentations, Mr Femminile was a private individual who preferred to shun the limelight. Croner respected this and it did not impact on the employment relationship at all.
51. In the later part of 2017 Mr Femminile and Croner spoke to each other about his salary and commission. They agreed that his salary would decrease but his commission would increase in compensation thereby allowing him to benefit from his success more directly in his role as BDM. The change took effect at the start of November 2017.
52. In November 2017 there was an error in the commission payments. He was paid commission at his old rate. Mr M Gardner, head of finance at Croner, and Mr D Chadwick agreed there was an error and had it corrected.
53. The respondent released an updated handbook in March 2018 ("the 2018 handbook") to include express provision to recoup overpayments.
54. The handbook 0So far as relevant, under the heading "Terms & Conditions of Employment" it says as follows:
"2. Overpayments
"Should you be overpaid for any reason then you must immediately inform the appointed person in your department who will then escalate the matter to the Payroll Department. The total amount of the overpayment will normally be deducted from your next payment but if this would cause hardship, arrangements may be made for the overpayment to be recovered over a longer period."
55. It is common ground the 2018 handbook was available on the respondent's intranet to Mr Femminile. There is no evidence that anyone at Croner wrote to Mr Femminile in particular or to a group of employees of which he was a member, or to employees generally to draw attention to the new 2018 handbook or in particular to draw attention to this new overpayment clause. We conclude that this is the first time that the potential power to recoup overpayments.
56. In April to May 2018, it became apparent that Croner had overpaid salary to Mr Femminile, using his old rate not his new rate.
57. Mr Gardner and Mr Femminile spoke about the overpayments. It is not clear when or what was discussed. Later, Mr Gardner emailed Mr Femminile on 17 May 2018 as follows (so far as relevant):

“As discussed earlier, there has been an administrative error between sales admin and payroll which has resulted in your basic salary not changing in line with your commission structure in November [2017]. This has resulted in 5 overpayments of £833.33 gross, totalling £4,166.67

“In order to correct this my proposal would be to adjust the commission you are due for Comex in June. This essentially means that your commission payment in June for this deal, would be reduced from £8,233.50 to £4,066.83. Your total commission payable in July would reduce to £9,554.13...

“It is important to note, this is not a reduction in your net commission [...], only an adjustment as the commission payable has effectively been paid to you in earlier salaries due to this admin error.

“Please let me know if you agree to the timing of this adjustment and accept my apologies for any confusion caused. Let me know if you have any queries.”

58. Mr Femminile replied on 18 May 2018 saying, “That’s fine...”.
59. The Tribunal finds as a fact the adjustments were made on an entirely consensual basis and not by Croner pursuant to any contractual power. The reasons are as follows:
 - 59.1. To us, the wording of the email is entirely aimed at consensus. In particular the fact that Mr Gardner makes a proposal and seeks agreement emphasises in our mind the consensual nature of what happens;
 - 59.2. There is no mention of the purported contractual right in the 2018 handbook entitling Croner to recover overpayments, nor any suggestion it arose in the conversation beforehand;
 - 59.3. The 2018 handbook suggests that the deduction will happen from the next payroll by default. That is not what is proposed here. The discretion to depart from that is based on hardship to the employee. There is no suggestion that Mr Femminile suggested he would suffer hardship or Croner had reason to think he would. Therefore, the recoupment and proposals are at odds with the alleged contractual right in the 2018 handbook and suggest Croner is not relying on it; and
 - 59.4. Mr Femminile’s reply does not shed any light on whether he believed that the deductions were made pursuant to contract or his belief that he should simply morally pay back salary paid in error.
60. During this time there were other issues developing relating to rumours about the reasons for Mr Femminile’s success. As Mr Holcroft found during his investigation, 2 of Mr Femminile’s colleagues (Mr J Bagram and Mr J Martin) had started to make allegations about Mr Femminile to Mr D McManus in April or May 2018 and again late in May 2018. They were also spreading rumours amongst Mr Femminile’s colleagues, albeit at the beginning without Mr Femminile’s knowledge. The gist of the rumours and allegations were that Mr Femminile could not have been performing as well

as he was without impropriety. They alleged he was obtaining sales leads through bribery and by providing drugs such as cocaine. Croner has not suggested the rumours or allegations were true.

61. Mr McManus tried to contain the rumours by telling his staff to stop spreading the rumours and stop making up allegations. However, Mr McManus never reported these rumours to more senior management, to Mr Femminile nor took any formal action like threatening or starting disciplinary proceedings against those involved.

62. Mr McManus considered these allegations were unfounded, describing them later in the investigation interview (to which we shall come) as “ridiculous” and “ludicrous”.

63. Eventually, the allegations came to Mr Femminile’s attention and, understandably, caused him upset and then stress and anxiety. As to how he felt at the time, Mr Femminile said this to Mr Holcroft in a subsequent investigation:

“[I] Told [Mr McManus] about this in June time 2018. Then [Mr Fenn] called, then [Mr Femminile] called [a colleague] said that it was getting on nerves, pissing me off, how can I deal with it. Would speak at conference, we didn’t speak. [Mr McManus] pulled me aside and I was going to ask for a way forward and nothing happened.

“Then at a party that night, Friday of the conference, Donna Heatley there, rumours about paying off BSCs for leads. From people who were there.

“[Mr Bagram] blanked at every conference.

“In team meetings [a colleague] is negative about business. ...

“Don’t like bullying in deals or territory and feels [Mr Martin] and [Mr Bagram] do this.

“On holiday, it was eating me up that nothing had been done and they are carrying on in a completely immoral way. They are getting away with what no one else is getting away with. Personally being accused of ridiculous staff. Hurting me and management doing nothing about it. Getting more annoyed on holiday.

“Annoyed yesterday, not in a position to work. Morally there are bad things happening management are not dealing with. Can’t sleep as annoying so much. Have had eyesight problems before due to stress, can’t have before.

“Doesn’t think [Mr McManus] ignored email, just thinks he didn’t see it.

“...”

64. Despite raising it with Mr McManus in June 2018, the rumours continued to be made. Mr McManus has confirmed in his interview as part of the investigation that he again told the perpetrators to stop it but again did not take any formal action.

65. On 17 July 2018, Mr Femminile secured a new deal with a new customer. As a result of that, an email was generated by the computer system confirming Mr Femminile’s success. On 18 July 2018, Mr McManus sent an email to Mr Femminile congratulating him on the sale and (amongst other

things) asking if there was a possibility for including health and safety package as well. Mr Femminile replied that that was something that was in hand.

66. On 19 July 2018 at 07:46 at page 62, Mr McManus wrote:

“Brill, thanks Phillip,

“If there’s still stuff on your mind then remember you’re always free to talk to me openly.

“Kind regards

“Dale”

67. Mr Femminile replied that morning as follows:

“I’m not sure that’s going to fix it I’m afraid Dale. This is really concerning and causing me much unrest and sleepless nights. I hate bullies, especially those that go unopposed.

“ ... ”

68. In the context of the rumours being spread, his previous complaints to Mr McManus about them and that Mr McManus had attempted informally to deal with the matters that Mr Femminile is clearly talking about the rumours being spread by Mr Martin and Mr Bagram.

69. The Tribunal finds as a fact that when Mr Femminile found out about the rumours he suffered stress and anxiety which was amplified by Mr McManus’s failure to take formal action to bring things to a halt. Our reasons are as follows:

69.1. The Tribunal notes that these are nasty things going on behind his back and it seems logical and inherently plausible that when they came to his attention, he would have felt he was the victim of what, in essence, was workplace bullying by Mr Martin and Mr Bagram;

69.2. Mr McManus’s failure to take formal action is clearly capable of conveying the impression to Mr Femminile he is not taking it seriously, even if Mr McManus felt he was dealing with it appropriately;

69.3. We can detect no reason that Mr Femminile would make up how it affected him;

69.4. We also note that his reaction tallies with the thrust of other contemporaneous documents such as fit notes that show he ill with stress and what he said in interview, and what others said in those interviews; and

69.5. Rumours that your success is down to supplying drugs and effective bribery are inherently likely to undermine one’s wellbeing.

70. We are satisfied that, if not before his first complaints, by 19 July 2018, Mr Femminile was in a low mood and feeling stressed by the rumours that Mr

Martin and Mr Bagram were spreading behind the scenes given what was said in his email.

71. We add that the emails and correspondence that we have seen clearly taken in context show that Mr McManus was aware at this point of the impact that these rumours were having on Mr Femminile. The fact that on 19 July 2018, he felt the need to offer the support to Mr Femminile and tell him that he was always free to talk to him openly shows that he was fully aware that Mr Femminile was suffering stress, anxiety and/or low mood and was generally in a negative situation. We can no other reason as to why in the context of what had happened until this point and the spread of the rumours why he would have simply said that. The only way that the information about Mr Femminile's low mood and how it was affecting him could have come from his interactions with Mr Femminile.
72. On 20 July 2018, Mr McManus went overseas on a project in Barcelona and was then on leave until 25 July 2018.
73. On 27 July 2018 in the evening, Mr Femminile wrote to Mr McManus saying:
“ ...
“Really disappointed not to receive a response from you on my previous email [i.e. 19 July 2018].
“Are you in the office on Monday? I'd appreciate sometime to go through some urgent matters.
“Regards
“Phillips”
74. On 29 July 2018 Mr McManus replied enquiring about which email Mr Femminile was referring to and it was clarified that it was the email of 19 July 2018, sent when Mr McManus was away. We accept this is why Mr McManus did not reply.
75. On 28 July 2018 Mr Femminile took leave.
76. On 29 July 2018 Mr McManus replied (aware Mr Femminile was away):
“Yes am in [the office] and we'll find time to speak when you're in.
“Forward me the email [of 19 July 2018] please”
77. Mr McManus and Mr Femminile spoke by phone on 30 July 2018. There were three discussions that day, but we are quite satisfied that they were summarised accurately in a letter that Mr McManus sent to Mr Femminile on 30 July 2018 because there was no suggestion it was wrong in any material way. So far as relevant, the letter reads as follows:
“I write further to our general conversations over the last few weeks and in particular today in which you have raised some serious concerns regarding your colleagues, [Mr] Martin and [Mr] Bagram.
“I was very worried by how you sounded on the phone today and after we met, also by your explanation as to how this issue has affected you, even whilst away on holiday last week.

"I want to reassure you that what you had outlined recently is absolutely not the environment that I or the company expect for any member of the team. I had already begun to take steps to investigate and address the matters that you raised before our conversations today and will be following the Companies formal procedures in this regard.

"Due to my ongoing concern and to provide further reassurance I called you again this afternoon to offer to come and meet with you in person later this week. In the meantime however please stay in contact with me and keep me updated as to how you are. [Mr Manus then refers to the Employee Assistance Programme and how to contact it].

"Please to let me know when is convenient and we can make the arrangements to meet up. Aside from giving us the opportunity to discuss the situation in person it will also give you the opportunity to provide me with any further information that you have.

"I would also remind you that the company has both an informal and formal grievance procedure in place. Should you wish for me to address your concerns through the formal process then please let me know. However, regardless of how you wish to move forwards I will be thoroughly following up on the points that you raised.

"My primary concern is your wellbeing and I want to ensure that you are happy and comfortable in your working environment. We are a growing business with ever changing requirements and you are a significant part of that success.

" ... "

78. On 30 July 2018, that evening, Mr McManus sent that letter to Mr Femminile by email and he wrote (so far as relevant):

"As mentioned on the phone had this to send prior to our conversation after your visit to the doctor. Have a restful night and speak to you tomorrow as your health and wellbeing is my primary concern."

79. Mr McManus raised the matter with Mr Holcroft. Mr Holcroft then raised the matter with Mr Price.

80. By 17:47 on 30 July, Mr Price had appointed Mr Holcroft to launch a formal investigation. Later that evening, Mr Price wrote to Mr Femminile himself after speaking to him. In that email he says as follows:

"Thank you for taking my call earlier.

"As discussed I was made aware of your absence today and the reasons surrounding it.

"My understanding from our conversation was that you were unhappy with the informal handling of your informal concerns to Dale McManus and Darren Chadwick.

"You had been made aware by a number of BDMs that two senior BDMs had made inappropriate and personal comments about you in relation to lead allocations and claims of you providing inducements to the BSC team.

“You were unhappy that [Mr] Chadwick had agreed to speak to you at the recent sales conference but didn’t and that when raising the concerns with [Mr] McManus on a number of occasions, the comments continued to be made which resulted in you continuing to receive calls from BDMs.

“You also noted that the two senior BDMs has hosted sales conferences or been used to present the best image of the company at sales events. This was inappropriate in your view given the comments that they had made about you generally about their colleagues in sales.

“You as a result felt you had no choice but to visit your GP today and get signed off.

“I apologised that you felt you had no other option and you had mentioned that you had prepared emails to both myself and the group CEO regarding the two senior BDMs. I was concerned that you didn’t feel well to continue work.

“I assured you I was taking this matter very seriously and would arrange for all those who were involved namely [Mr] Martin, [Mr] Bagram to be interviewed formally by Paul Holcroft, non-practising solicitor and associate operations director and the BDMs who had called you would also be interviewed namely [Mr] Fenn, Parvin, Neal and Ben. Both [Mr] McManus and [Mr] Chadwick would also be interviewed and [Mr Holcroft] has my full authority to deal with this matter.

“I promise to seek to ensure the investigation will be concluded swiftly, however ensuring a full and thorough process was followed. a copy of the outcome to the process would be forwarded to you and I would call you on Friday with an update.

“Please be assured the company takes this matter seriously.

“Should you have questions or concerns in the interim please so not hesitate to contact me directly at any time.”

81. We observe as an aside that nothing turns on the hosting of the conference by Mr Martin and Mr Bagram because of Mr Femminile’s admitted reluctance to hold the limelight. However we also believe that is a side-issue to the main allegations they had spread untrue rumours in the workplace and Mr McManus had not acted with sufficient seriousness.
82. Given that this email was sent on the same day and that there is no suggestion contemporaneously to suggest that the email is inaccurate in any material way, we are quite satisfied that this is the tenor of Mr Femminile’s and Mr Price’s discussion. We are quite satisfied that Mr Price therefore would have been aware that what Mr Femminile was complaining about was how it affected him and in particular the consequent stress, anxiety and low mood.
83. On the same day, 30 July 2018, Mr Femminile was signed off work for a period of one month by his doctor. The reason was stress at work.
84. On the same day at 21:24 and to make sure Mr Femminile was aware of that letter, Mr Price texted him with a message to alert him to it.

85. The earlier attempts to deal with the rumours and bullying had been, in our view less than ideal. The Tribunal believes it is fair to say that Mr Holcroft stepped up to the mark. He acted quickly and launched a formal investigation. We have seen the totality of that investigation.
86. We have already quoted some of the investigation and in particular Mr Femminile's own interview. We also draw attention to the other particular parts that we felt were significant to show its thoroughness, independence and how well-reasoned it is:
- 86.1. Mr Holcroft began by correctly identifying the allegations that he was dealing with, namely that Mr Femminile was receiving a disproportionate amount of leads in exchange for cash and that he was receiving a disproportionate amount of leads in exchange for cocaine. He notes these allegations were raised with Mr McManus and Mr Chadwick who failed to handle them in a formal manner and that, despite Mr McManus's efforts, no action was taken and the comments continued.
- 86.2. Mr Holcroft interviewed a number of people, including Mr Femminile himself, Mr McManus, Mr Chadwick, Mr Martin (but he was on leave), Mr Bagram, Mr Fenn and Ms P Begum, Mr N Skelton and Mr Ben Burmo to see if they could shed light on what happened. Mr Holcroft also went through the emails to see what the exchanges had been between the parties.
- 86.3. Though we have quoted Mr Femminile's response, it is worth recording the responses from the other people. The responses are not verbatim, but we are satisfied accurately capture the gist, given they support Mr Femminile's position.
- 86.4. Mr McManus said as follows:
- "Beginning of April 2018 a lot of BDMs had negative vibes about lead allocation, to close this off on 16th April 2018 there is a call with all x 4 FSMs. Problems with conversions. Not directed at [Mr Femminile] but did say him and other BDMs got more leads than others.
- "In early-May 2018 [Mr Bagram and Mr Martin], raised allegations to [Mr McManus] that [Mr Femminile] and [another person] were getting more leads as they was buying them for cash. [Mr McManus] said don't be ridiculous and denied it was happening, no evidence of this.
- "At the end of May 2018, [Mr Martin] and [Mr Bagram] said that [Mr Femminile and one other] were buying their leads for cocaine and money. Also that [a third party] was part of the 'drugs ring' [Mr McManus] said no evidence of this and was not the case.
- "In June [Mr Femminile] told [Mr McManus] that he was aware of the allegations about buying leads for cocaine and cash. [Mr McManus] said that it is ludicrous and not the case. At the time, [Mr Femminile found ridiculous and was laughing this off, quite

light-hearted. [Mr McManus] thought that what had been said to [Mr Bagram and Mr Martin] had closed it already.

“[Mr Martin and Mr Bagram] brought it up again in June 2018 to [Mr McManus] and were linking to why he was getting more leads than them, they were casting aspersions about leads before cocaine and money allegations (sic). [Mr McManus] says to stop it, that this is not happening.

“The week before the conference [Mr Femminile] speaks to [Mr McManus] about wanting to speak to [him] and [Mr Chadwick] about him saying the comments are still happening. Sounded more serious at this point. You said would speak to [Mr Chadwick] and ensure we speak at conference.

“He has confirmed that that conversation does not take place.

Later on:

“[Mr McManus] calls [Mr Bagram and Mr Martin] again tells them to stop mentioning this. Just stop it, concentrate on your own performance.

- 86.5. In interview, Mr Chadwick said that he was sorry that he delegated to Mr McManus to deal with things and felt disappointed that Mr Femminile felt let down by Mr Chadwick.
- 86.6. Mr Bagram in interview said that he never did it to hurt Mr Femminile and was only reporting what he had heard from others and that he like to send a letter apologising that he never wanted to upset anyone.
- 86.7. Mr Fenn said that he was aware of the rumours and that Mr Femminile had told him that he knew the rumours were being spread and that he did not speak to anyone about it because he thought other people were dealing with it. He said it had been festering for a long time and was still happening by Mr Martin.
- 86.8. Mr Holcroft expressed the following findings.

“FINDINGS

“Based on my investigation, I have made the following findings based on the issues raised earlier in this report.

“1. Were the alleged comments made?

“I find that they were made by both [Mr Martin and Mr Bagram] on several occasions to numerous members of the BDM team. I find that [Mr Martin and Mr Bagram] repeatedly raised these allegations despite being asked to stop doing so by [Mr McManus].

“...

“I find that these issues were raised to both [Mr McManus] (Circa 3 months ago) and [Mr Chadwick] (circa 4 weeks ago).

“...

"I find that these issues were not addressed with the appropriate formality and that formal processes should have been commenced against both [Mr Martin and Mr Bagram]. This is with the benefit of hindsight. [Mr McManus] did address this with [Mr Bagram and Mr Martin] every time he was made aware of these allegations and refuted their authenticity from the start. This was all dealt with informally with handwritten notes taken. However, a more formal approach could likely have stopped their behaviour. However, it wasn't clear from the complainant that they wanted a formal process followed and [Mr McManus] had wrongly assumed all parties were happy until he received further emails from [Mr Femminile]. Written confirmation of [Mr McManus] position on the informal complaints would have either resolved the matter or allowed [Mr Femminile] to confirm he wanted a more formal process followed.

"RECOMMENDATIONS

"Based on the above findings, I make the following recommendations:

"1. That formal processes are commenced against both [Mr Martin and Mr Bagram].

"2. That [Mr McManus] is issued with a letter setting out his responsibilities as an Associate Director in relation to these types of allegations and that he should involve HR in all circumstances of such serious allegations as those raised here.

"3. The individuals interviewed who continued to pass on the rumours be reminded of their unprofessional behaviour.

"4. That the entire BDM team is re-issued with a copy of the harassment and grievance policies and the obligations under those policies are clarified.

"5. That BDMs involved are issued a formal letter stating that if they are made aware of any serious issues in the team, that these are escalated to HR and ultimately me given my Company HR responsibilities.

"..."

87. In response to the draft report, Mr Femminile asked three questions, only one of which is relevant for our findings of fact, which was:

"Why wasn't this escalated in May when the allegations were first made to senior management?"

88. Mr Holcroft replied:

"The escalation to the CEO only occurred due to him being informed of your absence due to ill health. As stated in my draft report the matter was deemed by the Associate Sales Director to have been resolved informally. A position he now accepts was wrong. However, no formal grievance was raised and therefore the matter would not normally be escalated."

89. We note in particular that the investigation found as a whole in favour of Mr Femminile on pretty much every issue. In the circumstances we think that the investigation is a perfectly reasonable investigation.
90. Mr Femminile has suggested that there were other people to whom Mr Holcroft should have spoken. We reject that:
- 90.1. The fact is he did speak to everyone to whom it was reasonable to speak. No doubt one could always find more people but that is not the test but it would not have been reasonable to do so. He spoke to the main actors in the events under investigation.
- 90.2. Most significantly, Mr Holcroft on the whole upheld his complaints. We find it somewhat strange and telling of Mr Femminile's credibility and approach that he thinks an investigation that comes out in his favour and recommends formal action to deal with his complaints is nonetheless flawed.
91. On 6 August 2018, Mr Femminile attended an occupational health assessment that had been arranged by Croner. The occupational health report said as follows so far as is relevant:
- “ ...
- “Is the employee fit for normal hours and duties required by his post? If not, please comment on their likely future fitness for their normal or alternative work.
- “In my view, Mr Femminile is fit for work with adjustments on the expiration of his current fit note if the work-related issues can be addressed to reduce his stressors.
- “ ...
92. The report confirmed that Mr Femminile:
- “... was experiencing palpitations and therefore his GP arranged an electrocardiogram (ECG) and the test result was normal.
- “He is treated with night sedation at the present time which does not completely mask his symptoms at the time of his assessment.
- “ ...”
93. And later on, it says:
- “It may be worthwhile for the company to consider undertaking a stress risk assessment in line with HSE management standards to explore the issues within the workplace. This will provide more clarity and guidance on the areas where some adjustments may be helpful and further information can be sought at [web address provided]”
94. That risk assessment did not occur before resignation.
95. The occupational health report suggested a phased return to work over two weeks, with a possible further extension by another two weeks if any issues arose.
96. Whilst away from work ill, Mr Femminile drove himself to his house in Italy. Croner suggested that the fact that he had driven to Italy implies his

stress/anxiety and difficulty sleeping were not anything like as bad as he alleged. While we are concerned about his credibility, on this we disagree. We can see why a person in Mr Femminile's position might consider it reasonable to take a break, if possible, going to a different location. We see nothing particularly objectionable to that. There was no rule he had to remain in the UK while away from work ill. That he drove rather than flew is irrelevant, contrary to what Croner suggested. There is no evidence that, in him driving, he broke any laws or it was dangerous in his position.

97. Whilst Mr Femminile was in Italy, he and Mr Price had discussions on the telephone on 7 August 2018. There was some difficulty making contact; we do not think anything particularly turns on that. Mr Price followed up one of his conversations with an email to himself on 9 August 2018 at 12:29 which, in essence, is a file note of his discussions with Mr Femminile on 7 August 2018. While we accept that it is two days later, there is nothing to suggest that it is in any significant way an inaccurate recollection of the discussion. So far relevant, it reads as follows:

"I asked if he was fit and able to talk to me about the current process and the steps we had taken to remove any potential triggers for his absence in the workplace. He confirmed he was.

"I explained that the internal investigation has concluded and a separate process would follow with [Mr Bagram and Mr Martin] but also others who had continued to discuss the rumours. Also the BDM would all be written to reiterating our standards and also how to properly escalate any complaints of grievances.

"I confirmed the formal investigation report had been provided to Philip. He stated that he needed to process matters. I asked what was outstanding and he said he hadn't had an apology from [Mr Martin]. I said I would raise this with the investigating officer but it was clear action would be taken with the two individuals concerned and all recommendations from the investigation report would be put in place by the company.

"[Mr Femminile] said he didn't give a shit about the company of what [Mr Bagram] had said.

"He wants to see what [Mr Martin] would say."

98. The conversation then got quite heated and Mr Femminile got quite angry. Mr Price said that Mr Femminile should seek professional help on how he is feeling. That was not suggested in a pejorative manner but out of genuine concern. The note continued later:

"I explained I would have tackled this matter head on spoke to the individuals concerned informally and then raised a formal grievance if matters were not resolved in line with the company handbook. He said he raised the matter with Dale and Darren, I said this is all covered in the formal investigation report and we need to move on. He said he cannot and was signed off for a month. He said what I do?

"I added that if I was in his station (sic) the trigger for his absence appears to be he remains unhappy with the informal resolution of his concerns to Dale. When this resulted in him seeking a GP referral his absence was then

notified to me which I intervened. He stated the company hadn't taken his concerns seriously to which I replied they had and as soon as I was made aware a formal investigation took place, a report was issued to him which he had now received.

"I asked how he was feeling and he said he needed time to process matters, I suggested calling him back Friday with a view to a meeting on the following Monday to attempt to move matters forward with the business and discussing his absence and the OH report.

"He asked was he being forced to come back and he could come in tomorrow if needed, I stated no he wasn't being forced back but we needed to address what appeared to be reactive issues that we believed had been resolved. If further professional medical support should be sought he should seek it but not withstanding that we should talk Friday and look to see his view on a formal meeting Monday.

"The call ended"

99. Shortly after that conversation, there was a call back. Mr Price did not make a note of this conversation until 3 September 2018. He explains that his business affairs meant that he was not able to make a contemporaneous note. However, we are quite satisfied that the note that he did make is a reasonably accurate description of the conversation that took place. Firstly, the phraseology used in it, as we quote, seems to be consistent with something that was said rather than someone inventing a note. Secondly, it appears to accord with the surrounding evidence and Mr Femminile's own recollection in cross-examination. The note reads as followings:

"[Mr Femminile] rang me back to say he had time to think and completely understood our position and to be frank needed a kick up the arse, he hadn't realised that when approaching the situation that he needed to move on and that the company had done everything it would to resolve the issue. He was happy with my intervention and wanted to get back to work."

100. There are no other documents, emails or contemporaneous complaints that suggest that Mr Femminile was being forced or coerced or otherwise persuaded to come back to work. Insofar as Mr Femminile suggested that he was forced to return in oral evidence, taking into account the contemporaneous documents and the credibility of the witnesses, we reject that assertion. We are satisfied Mr Femminile's decision to return before his sick leave expired at the end of August 2018 was his own free decision.
101. On 9 August 2018 (though it may have been a few days earlier and the date is wrong but that does not matter) Mr Bagram wrote to Mr Holcroft and Mr McManus apologising for what he had caused and offering to step down as a team leader. Mr Femminile was copied into this letter.
102. Despite Mr Holcroft's recommendations that formal action be taken against Mr Bagram and Mr Martin, that did not happen. Instead, Croner sent letters of concern to Mr Bagram and Mr Martin saying that they were not going to initiate any further formal disciplinary action but warning them that, if it continued, then the disciplinary procedures would be invoked. A similar letter was sent to Mr Fenn. A reminder email was sent to everyone reminding

them of the formal procedure for raising concerns and including a copy of the grievance procedure.

103. As we said at the beginning, Mr Price sought to justify this by saying that the people affected had to come into the office to be spoken to. This caused them to lose the chance to complete sales and earn commission. In addition, they had to undertake a long journey from where they were based to the office. Mr Price felt this was a serious sanction. We do not accept this reasoning. The report recommended formal action. Mr Holcroft would have known about the consequences of coming into the office for informal action but felt it was not appropriate. We do not see how going to the office and so having a day away from pursuing sales could be said to be a serious sanction. It is an inconvenience at best. We also bear in mind the context: here are 2 BDMs who have for a long time been undermining a fellow BDM by spreading false rumours.
104. We can therefore understand why Mr Fenninile might feel upset to learn that no formal action has been taken. However against that we note that some action was taken, the perpetrators were warned as to their conduct. It is clear that they have been given what in essence is a final warning that if they continued in this vein, they would find themselves on the end of disciplinary proceedings. Croner's actions did have the effect of drawing a line under the misconduct because it did not occur again.
105. On 13 August, Mr Femminile returned to work. Mr Holcroft conducted a return-to-work interview. As part of the return-to-work process, the employee has to complete a self-certification return to work form, which is then signed off by the line manager. The form records that Mr Femminile's absence finished on 13 August 2018, the reason for his absence was stress, he had seen a doctor and he provided a fit note. He was then asked a series of questions:
- "Are you able to carry out your role? Yes.
- "Is there likely to be further absences in the future? No.
- "Were proper notification procedures taken? Yes.
- "Are there any patterns or reoccurring [sic.]? No.
- "Are there any concerns about work? If yes, please give details below. No. [our emphasis]**
- "If appropriate, does this sickness absence require further attention/cause for concern? A. No.
- "Is an Occupational Health Referral necessary? Yes."
106. There is then a note that there was a contact made with occupational health for the report. Under the details of return-to-work interview conversation it says:
- "Full details of absence are contained in [Mr Holcroft's] report. Sickness due to stress, ... being rumours spread by 2 x colleagues. Resolved internally via report and Phillip returned to work on 13/08/2018.

- “[Return to work] completed via telephone.” [This was because Mr Femminile was working from home].
107. This was then signed off by Mr Holcroft.
108. Mr Femminile was sent a copy for review. The only addition that he wanted was a note that he was prescribed sleeping pills.
109. We conclude that the evidence shows that Mr Femminile was perfectly willing and happy to come back to work:
- 109.1. There was after all no reason for him to have returned to work. He was signed off sick until 31 August;
- 109.2. There was no pressure applied to him to come back; and
- 109.3. He freely of his own will declared in the return-to-work interview that he was fit to come back to work;
110. Nothing of any note happened between 13 August 2018 and 21 August 2018.
111. 21 August 2018 was payroll day, for which Mr Femminile was paid his basic salary plus commission of £12,262.26 gross of tax.
112. On 21 August 2018 at 8:00, Mr Femminile emailed Mr McManus, Mr Holcroft, Mr Fenn and a M Brewer. This email’s subject was “Notice of Resignation”. It read:
- “Dear Paul/Darren,
- “Please accept this email as formal notification that I am resigning as Business Development Manager with Croner. As per my contract my last working day will be two months from today, the 21st October 2018.
- “Regards
- “Phillip”
113. Mr Holcroft gave evidence about what happened afterwards. Taking into account credibility of the witnesses, we accept what Mr Holcroft said. He said:
- “Upon receipt of the claimant’s resignation, Mr McManus and I held a meeting with him on 22 August 2018 to discuss the possibility of him retracting his resignation. During this meeting, [Mr Femminile] did not raise any issue relating to health and safety or any breach of contract and nor did he say that there were any other matters of concern. He did state that the only way he would remain in employment was if Mr Bagram and Mr Martin were dismissed that day and he be given Mr Price’s position as Chief Executive Officer. As we were unable to agree to such demands, we were unable to convince [Mr Femminile] to retract his resignation.”
114. We do not believe that Mr Femminile seriously proposed that he would take Mr Price’s job. We think it was one of those throw away comments that was made, since we do not believe Mr Femminile could have for a moment seriously have contemplated that he would be promoted to Chief Executive Officer. However we do believe he was serious about wanting the dismissal of Mr Martin and Mr Bagram.

115. Mr Femminile did not withdraw his resignation.
116. Mr McManus sent a letter following that conversation on 22 August 2018 confirming acceptance of the resignation:
“As agreed your last working day will be Friday 24th August 2018, your termination date with the company will also be this date and we will pay you in lieu of notice for the remainder of your notice period.
117. The letter then goes on to deal with holiday pay and later:
“As discussed, per the Sales, Commission and Bonus Scheme Rules you signed on 27th March 2017, commission payments on new business are only paid if the Business Manager is in the employment of the company at the end of the calendar month when the commission payment would normally become payable.”
118. The letter then contains a reminder of his obligations to deal with expenses, return belongings and abide the restrictive covenants of his contract of employment.
119. The effect is his employment ended on 24 August 2018.
120. It is apparent Croner obviously undertake a risk. Although commission is only due if the employee remains employed at the end of the calendar month, they process the payment seven days beforehand. It is therefore the case that an employee receives his commission for a given month at a point 7 days before the month itself ends. Therefore, if the commission would not have been due it is up to Croner to try to seek repayment.
121. After Mr Femminile’s employment came to an end, there were various allegations and counter allegations about whether Mr Femminile was seeking to breach the restrictive covenants or non-solicitation clauses or whether Croner were trying to apply pressure to him by writing strong letters warning him of breaches. Frankly, we cannot resolve that one way or the other and we do not think that it matters so far as this case is concerned. It certainly had no effect on the resignation since Mr Femminile had already made the decision to resign and had left the employment.
122. There is one event afterwards that we do believe is of relevance and that is a conversation that took place on about 24 September 2018 and in particular after Mr Femminile received his September payslip. The conversation was by telephone and recorded. So far as relevant, the following exchanges took place:
“Mr Femminile: Just that I didn’t get paid, Matt. I wanted to know why, what was going on. Whether I should ...
“Matt [from payroll]: Okay. Well, in short, the reason you weren’t paid is you left the business on the 24th August. So, the pay in September relates to existing employees in the business in September. That’s the reason why you didn’t receive anything in terms of pay.
“Mr Femminile: So, when do I get my two months?
“Matt: You’ve already had your two-month PILON. Let me explain to you how that works. We paid on 21st of every month. The 21st of every month

relates to the three weeks prior, and the one week in advance. Ok from the 21st or 22nd on to the 30th, 31st of the month, however long it takes, however long the month is. As you left the business on the 24th, essentially you were overpaid in terms of basic.

“Mr Femminile: But I left on the 24th.

“Matt: Yeah.

“Mr Femminile: And I should have ... I could have worked two months, yeah?

“Matt: That’s right.

“Mr Femminile: Because I had to give two months’ notice yeah.

“Matt: Yeah.

“Mr Femminile: So ... how does that even work that from the 24th, I’, supposed to give two months’ notice?

“Matt: That’s right.

“Mr Femminile: But why haven’t ... but you’re saying I’ve been paid for like two months’ notice?

“Matt: Yes. Any I’ll ... if you allow me, I’ll explain how that works. Okay? So, you’re paid the 21st of every month. You left on the 24th. Therefore, you’re overpaid from the period of the 24th or 25th till the end of the month. So, your basic is overpaid. In addition to that, you’re paid your commission in a month. Your commission is £12,262.26. Now, in your contract and employment ... your commission is only payable if you’re within ... in the business on the last calendar day of the month. Therefore., you were overpaid your commission ... because you should have not been have been paid commission you left the business in the calendar month. As such, it has been considered that your PILON has been offset with your overpayment of commission. So, therefore, you have already received your PILON in August. And the net position ...

“... ”

“...that leaves you in is there’s an overpayment still to recover of £7,820.34.

Mr Femminile: You know what? Go fuck yourself, Matt. This is a joke. I’ve had enough with you. I really have. I’m done.

“Matt: Yeah. I appreciate a professional approach, but it is actually with Group In House Legal now Philip.

“Mr Femminile: All right Matt, okay. You know, Matt, obviously you know what? You’re an absolute disgrace. Look, you really are. I’m done. I’m fucking ... I’ll go anyway. I’ve got to go now.

“Matt: Okay.

“Mr Femminile: I’ve been nice. I’ve been kind. I’ve done everything I’m going to do. But you know what? You are despicable individuals, all of you. Okay.

“... ”

123. It is quite apparent from looking at that conversation that Mr Femminile was expecting to be paid PILON in addition to the commission he had received in August, notwithstanding that under the terms of the bonus scheme, he should not have been paid commission in August nor in September because he was not employed at the end of the September.
124. Taking the above into account and the coincidence of the resignation with pay day, we conclude Mr Femminile was seeking to maximise his financial gain.
125. Noting in particular his free decision to return to work, the return-to-work interview and that nothing of note happened after he returned to work, that between his return to work and his resignation Croner did not do anything to prompt him to consider resigning, to cause him to decide to resign or to justify a resignation. Resignation was entirely his own free choice.
126. As an aside the claim alleges that Croner told Mr Femminile he could leave if he did not like the action taken. The Tribunal rejects that this was ever said. It is in complete contrast to the action that Croner did take (as set out above) which on the whole was positive. Secondly Mr Femminile's evidence on this was vague to non-existent. We believe it is simply untrue.

Law

Automatic unfair dismissal relating to health and safety

127. The **Employment Rights Act 1996 section 100** provides:
- “(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
- “ ...
- “(c) being an employee at a place where—
- “(i) there was no such representative or safety committee, or
- “(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
- “he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
- “ ...”
128. In **Balfour Kilpatrick Ltd v Acheson aors [2003] IRLR 683 EAT**, the EAT said must be established that:
- 128.1. it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee
- 128.2. the employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believes are harmful or potentially harmful to health or safety, and

- 128.3. the reason, or principal reason, for the dismissal must be the fact that the employee was exercising his or her rights.

Automatic unfair dismissal and detriments arising from protected disclosures

129. The **Employment Rights Act 1996 section 43B** provides so far as relevant:

“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

130. The **Employment Rights Act 1996 section 47B** says that an employer may not subject an employee to a detriment on the ground they made a protected disclosure.

131. If the sole or principal reason for dismissal is because the employee made a protected disclosure, then the dismissal is automatically unfair: **Employment Rights Act 1996 section 103A**.

Disclosure of information

132. The disclosure must be information rather than allegation: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT** with the qualification in **Kilraine v Wandsworth LBC [2016] IRLR 422 CA** that we

“should not be easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined’.

133. **Kilraine** confirms that a disclosure must contain sufficient factual content that tends to show one of the elements in **section 43B(1)(a)-(f)**.

134. That is a question of evaluation in light of all the facts in the case and in particular any context surrounding the alleged disclosure when it is made.

135. It is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures.

Belief

136. The employee must believe the information that they disclosed, even if it is wrong. However, we must by reference to the character and circumstances of the employee, decide if

136.1. their belief in the truth of what they say is reasonable,

136.2. and their belief it shows tends to show one of the relevant elements is reasonable: see **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 EAT, Phoenix House Ltd v Stockman [2017] ICR 84 EAT,**

137. In **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731 CA**, Underhill LJ said that if the information disclosed does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

Public interest

138. Likewise, the discloser must believe it is in the public interest and likewise we must assess their belief as reasonable in the same way. In **Chesterton Global** the Court of Appeal said
- 138.1. That there are no absolute rules about what is in the public interest.
- 138.2. It does not mean that the interest serves only those outside the workplace or that large numbers of employees are affected.
- 138.3. The following may help to decide the issue:
- 138.3.1. The numbers in the group whose interests the disclosure served, and
- 138.3.2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed the nature of the wrongdoing disclosed, and the identity of the alleged wrongdoer, and finally
- 138.4. Motive forms no part of the assessment of public interest.

Constructive automatic unfair constructive dismissal

139. In **Western Excavating (ECC) Ltd v Sharp [1978] QB 761 CA** Lord Denning MR said that
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

Implied term of trust and confidence

140. In every employment contract there is a term implied that the employer shall not without reasonable and proper cause conduct itself in manner calculated to or likely to destroy or seriously damage relation of confidence

and trust between the employer and employee: **Omilaju v Waltham Forest LBC No2 [2005] ICR 481 EWCA.**

141. A breach of the implied term is by very nature repudiatory: **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 EWCA** and **Morrow v Safeway Stores [2002] IRLR 9 EAT.**
142. While bad practice by an employer is a factor to consider, it is not enough by itself to amount to a fundamental breach.

Role in resignation

143. A fundamental breach must play a part in resignation but need not be only or effective cause: **Wright v N Ayrshire Council [2014] ICR 77 EAT.**

Affirmation

144. A person must make up his mind soon after the conduct of which he complains about occurred: **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 EWCA.** although given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there has really been an affirmation.
145. It is only affirmation after last act that matters because previous breaches can be taken into account even if after those previous breaches the employee affirmed the contract affirmed: **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 CA.**

Key questions

146. In **Kaur**, the Court set out five questions the Tribunal should ask in a case for constructive unfair dismissal
- 146.1. What was most recent act (or omission) that triggered or caused the employee to resign?
- 146.2. Has the employee affirmed the contract since that act?
- 146.3. If no, was the act or omission itself a repudiatory breach?
- 146.4. If no, was it part of a course of conduct which taken together amount to breach of implied term of trust and confidence?
- 146.5. If yes to either of the preceding questions, did the employee resign in response to that breach?
147. Where an employee alleges they were constructively dismissed and that it was for an automatically unfair reason, then we understand that we must determine firstly there was a constructive dismissal. If there was then the focus is on why the employer fundamentally breached the contract in the way that led to the dismissal. It is for the employer to demonstrate it is for a potentially fair reason. If the employer's sole or principle reason was a proscribed one, then the dismissal is automatically unfair.
148. Whether there have been a constructive dismissal and the reason for it are distinct and it does not follow that because there has been a constructive dismissal that the reason is proscribed: **Price v Surrey County Council UKEAT/0450/10 EAT.**

Objective assessment

149. The Tribunal must assess the matter objectively. The motives of the parties or their subjective intentions are irrelevant: **Leeds Dental Team v Rose [2014] ICR 94 EAT.**

Breach of contract

Right to interpret the contract

150. A Tribunal is entitled to interpret a contract of employment to determine what sums are properly and lawfully due from the employer to the employee: **Agarwal v Cardiff University [2019] ICR 433 CA.**

Finding terms when not clearly expressed

151. **Mears v Safecar Security Ltd. [1983] QB 54 CA** states that where a Tribunal has to consider an incomplete written statement of terms of employment, the tests to be applied as to the implication of terms are not limited to those used in construing commercial contracts, but may include all the circumstances of the case, including the actions of employer and employee under the contract.

Approach to interpretation

152. The approach to interpretation of an employment contract is the same as that used in the civil courts: **CF & C Greg May Ltd v Dring [1990] ICR 188 EAT.**

153. The approach set out in **Arnold v Britton [2015] AC 1619 UKSC** applies to the interpretation of pay terms in contracts of employment: **Campbell v British Airways plc UKEAT/0015/17 EAT.**

154. In **Arnold v Britton aors [2015] AC 1619 UKSC** (a case that concerned leases but whose principles are of general application to interpretation of contracts) Lord Neuberger summarised the cases on interpretation of contracts and said that the general principles that apply to the interpretation of express contractual terms are as follows:

‘When interpreting a written contract, the court is concerned to identify the intention of the parties 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”

“And it does so by focussing on the meaning of the relevant words... in their documentary, factual and commercial context. That meaning has to be assessed in the light of

- (i) the natural and ordinary meaning of the clause,
- (ii) any other relevant provisions of the [contractual agreement],
- (iii) the overall purpose of the clause and the [agreement],
- (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
- (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.’

155. Lord Neuberger cited 7 factors at paragraph [17] onwards that a court should consider, 6 of which are potentially relevant to employment cases:
- 155.1. Identifying the what the parties meant through the eyes of a reasonable reader “and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision”.
 - 155.2. the worse the drafting, the more ready the court can properly be to depart from their natural meaning. That does not empower a Tribunal to find excuses to depart from the natural meaning of the words used.
 - 155.3. One cannot invoke “commercial common sense” retrospectively. That it has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language”
 - 155.4. A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed.
 - 155.5. One can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties.
 - 155.6. If an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract, then the Tribunal can give effect to the intention if it is clear what the parties would have intended.”

Equitable set-off

156. An employer may raise an equitable set-off as a defence even if it has not brought a counterclaim for breach of contract: **Ridge v HM Land Registry UKEAT/0485/12 EAT.**
157. For an equitable set-off to succeed it is necessary for the party claiming the set-off (here Croner) to show some legal (or equitable) entitlement to the money it seeks to set off against the debt claimed by the other (here Mr Femminile). The crossclaim must also be closely linked to the subject matter of the claim: see **Halsbury’s Laws of England vol 47(2014) para 245; Francis v Dodsworth (1847) 4 CB 202 QB.** It is a
158. It follows that Croner must prove an entitlement to set-off the alleged overpayment against Mr Femminile’s claim either by reliance on contractual terms or on some other right: the only real contender in this case is unjust enrichment (no other basis was suggested).
159. The Tribunal notes that Tribunals should be slow to imply terms to set-off cross claims against unpaid wages in absence of express terms. The employer is in the stronger bargaining position and is better placed to include such a term if it sees fit: see e.g. **Clayton Newbury Ltd v Findlay [1953] 2 All ER 826 QB.**
160. The parties did not address the issue of what amounted to an unjust enrichment. The Tribunal understands that unjust enrichment has the following key elements (see **Banque Financière de la Cité v Parc**

(Battersea) Ltd [1999] 1 AC 221; Investment Trust Companies v HMRC [2012] EWHC 458 (Ch); Benedeti v Sawiris [2013] UKSC 50):

- 160.1. Has the defendant been enriched?
 - 160.2. Was the enrichment at the claimant's expense?
 - 160.3. Was the enrichment unjust?
 - 160.4. Are there any defences available to the defendant?
161. The cases make it clear that “unjust” is not a free-standing term: it is unjust only if it falls in one of the recognised bases for deciding a payment is unjust. In relation to this the only real basis advanced in argument was the money was paid by mistake. It does not matter if the mistake was one of fact or law: **Kleinwort Benson Ltd v Lincoln City Council 1999 2 AC 349 UKHL**. There is a distinction between doubt and mistake. A person who pays when in doubt takes the risk that he may be wrong.

Conclusions

Automatic constructive unfair dismissal for health and safety reasons

Did the claimant bring to the respondents attention by reasonable means complaints about the damaging behaviour of Mr J Martin and Mr J Bagram being unsubstantiated rumour and gossip about the claimant getting more leads than them because he was “buying them for cash” and “buying leads for cocaine and money” in July 2018 orally to Mr D McManus?; on 19 July 2018 by email to Mr D McManus; on 30 July orally to Mr D McManus; on 30 July 2018 orally to Mr A Price; and/or on 30 July 2018 orally to Mr P Holcroft?

- 162. We have considered each date separately however our conclusions on each are the same and so for brevity we express them en bloc.
- 163. The facts show that Mr Martin and Mr Bagram were spreading the untrue rumours from April or May 2018. The evidence shows that when the rumours came to Mr Femminile's attention he was adversely affected.
- 164. We also know that there was an email on 19 July 2018 between Mr McManus and Mr Femminile that strongly implies there had been discussion about the rumours and their effect on Mr Femminile, hence the invitation to talk.
- 165. We also know from the investigation that Mr McManus as early as June 2018 about the rumours. We know they continued. The idea he further raised it orally to him is inherently plausible and fits with the emails.
- 166. We are also satisfied from the documents and the investigation that Mr Femminile raised the matter with Mr Price and Mr Holcroft.
- 167. We are also satisfied that in the context of this case it would be clear to every recipient of the complaints that they related to.
- 168. On the evidence we are satisfied that the manner in which he raised it was reasonable.

If so, did the claimant reasonably believe they were harmful or potentially harmful to health and safety.

169. We are satisfied both that Mr Femminile believed that the rumours were harmful to health and safety and that such a belief was reasonable.
170. It is a fact that the Mr Femminile's knowledge of the rumours caused him stress and anxiety and low mood. That is supported by his own evidence and medical notes saying he is not fit for work.
171. We are satisfied the belief was reasonable. It is clear that stress and anxiety/low mood can be adverse to health and safety. His own experience evidences they are harmful. In those circumstances the belief is reasonable.

If so, was it not reasonably practicable for the claimant to raise the matter with the representatives of the respondent's safety committee or the person responsible for health and safety?

172. No. Mr Femminile has adduced no evidence and given no explanation why it was not reasonably practicable for him to raise the matter with the employee responsible for safety or the Safety Committee.
173. In addition, he is clearly a competent and sophisticated individual. He had access to the intranet and could at any time looked at it for guidance. He accepted he knew where the health and safety information was.
174. In the absence of any evidence about why it was not reasonably possible to report it to the relevant parties, we conclude that the claim must fail at this point.
175. We are conscious he suggested that there was no such representative or committee. However he clearly put his claim on the basis such a person of committee existed. He did not rely on **sub-sections (1)(d) or (e)**. He did not apply to amend his claim. We therefore can only judge it by the claim as put.

If so, did the following acts amount to a breach of the implied term of trust and confidence by the respondent by failing to take appropriate action against Mr Martin and Mr Bagram; and/or telling the claimant that he could leave if he did not like the action taken.

176. Insofar as Mr Femminile suggests the only "appropriate action" is dismissal of Mr Martin and Mr Bagram (see the meeting of 22 August 2018), we reject that the failure to dismiss them could amount to a breach of the implied term. Mr Martin and Mr Bagram would be entitled to the benefit of the process that is the hallmark of a fair dismissal which could elucidate matters that mean Croner could conclude that dismissal was not a fair or appropriate response.
177. If Mr Femminile means formal disciplinary proceedings more widely, we still believe that it cannot be said that the failure to instigate them amounted to a fundamental breach of contract, objectively judged. It is clear Mr McManus did not act with the alacrity or seriousness that could be expected. However he did not ignore the problem. He was clearly trying to maintain an effective team and keep the peace. We do not believe his

failures in context can objectively said to be a fundamental breach of of the implied term of trust and confidence.

178. It is correct that the Tribunal has concerns about the failure to implement a formal procedure in light of Mr Holcroft's clear recommendation. However the Tribunal has to recognise that Croner did act, in effect gave a final warning and in effect their actions appear to have stopped the spread of untrue rumours. Objectively judged it is clear that Croner did take the matter seriously, at least once Mr Price took control and sought to stop the problem, and it seems the actions did.
179. We also believe it must be looked at in context. Croner did not abandon Mr Femminile. They did not pressurise him to return to work. They organised occupational health. They kept in contact and were supportive.
180. Therefore, either taking the history as individual failures to take appropriate action or as an overall failure, we conclude that objectively judged it did not amount to a breach of the implied term of trust and confidence.
181. The Tribunal concludes that the failure to take appropriate action against Mr Martin and Mr Bagram is not a breach of the implied term of trust and confidence and so not a repudiatory breach of contract.
182. As set out above, words to the effect of Mr Femminile could leave if he did not like the action taken were never said.

If so, were the breaches repudiatory and thus entitling the claimant to resign without notice? If so, did the claimant then actually resign in response to the alleged breach?

183. There were no repudiatory breaches. Therefore, the claimant did not resign in response to them.
184. It follows his resignation was not in fact a dismissal.

Has the claimant affirmed the contract?

185. Even if we were wrong about the above, we conclude the claimant affirmed the contract. He was away ill because of the stress and anxiety caused by the rumours. He could have resigned then but did not do so even though he was aware of the situation. Instead, he returned to work early from sick leave of his own volition and had no concerns about work. He did not have to return. After he returned nothing of note happened. His letter of resignation gives no explanation what prompted him to resign on pay day.

If not, was the reason or principal reason for the fundamental breach of contract the matters identified in the above paragraph?

186. He was not dismissed. This therefore falls away. Even if we are wrong, Croner did not react in a way that suggested they wanted to get rid of him. Indeed, his good performance, Mr McManus's attempts to stop the rumours, Mr Price's actions on finding out about what was happening, Mr Holcroft's investigation, the actions afterwards and the support all suggest that rather than dismiss him for raising health and safety matters, they wanted him to remain an employee.

Protected disclosures

*In relation to unsubstantiated rumour and gossip about the claimant getting more leads that Mr Martin and Mr Bagram because he was buying them for cash and/or buying leads for cocaine and money, did the claimant make the disclosures (which are the same as those relating to **Employment Rights Act 1996 section 100(1)(c)(ii)**, as set out above)?*

In those disclosures, did the claimant complain about, the bullying behaviour of Mr Martin and Mr Bagram?

*If so, were any of those disclosures qualifying disclosures within the meaning of the **Employment Rights Act 1996, section 43B** specifically: was the claimant's complaint about the bullying behaviour of Mr Martin and Mr Bagram a disclosure of information?*

187. Given our conclusions about the disclosures under the **Employment Rights Act section 100(1)(c)(ii)** above, we are satisfied that the answers to all these questions is "yes" for the reasons set out previously. We emphasise the context in which the disclosures were made. Croner were aware of the rumours being made and the perpetrators. They would have been aware of the effect of Mr Femminile once he became aware of them. In that context and with their knowledge, we are satisfied that the disclosures were information rather than opinion.

Did he reasonably believe that such information tended to show that the health and safety of an individual had been, was being or was likely to be endangered?

188. We conclude the answer is yes for the substantially the same reasons we concluded that the claimant reasonably believed the rumours were harmful to health and safety, above. We cannot see how in reality he could believe their acts were harmful to health and safety, yet not believe the information disclosed was that his health and safety was being or likely to be endangered. We think that being caused stress and anxiety and low mood can reasonably be described as health and safety being endangered.

Did the claimant reasonably believe the disclosure was made in the public interest?

189. No. The only person adversely affected was Mr Femminile. It did not endanger the health and safety of any other employee nor was it likely their health and safety would be endangered. The wrongdoing was indirectly aimed at Mr Femminile. No-one outside the workplace was affected and there is no evidence that they were likely to be affected.

190. Taking into account his credibility, we do not believe that he thought these disclosures were in the public interest. We think it is far-fetched to believe they are. Besides, it was only his health and safety affect and there is no suggestion that anyone else was affected or going to be affected. This is not the situation for example where procedures are not being followed and which could have wider public impact; there are no other employees who were being affected by this; it is purely private to Mr Femminile and he would have known this. In the circumstances any belief that it was in the public interest was unreasonable.

191. It follows therefore there were no protected disclosures.

*Was the disclosure made in accordance with the **Employment Rights Act 1996 sections 43C to 43H** so that it was protected?*

192. If relevant, yes it was because it was disclosed to his employer.

If so, was the way in which the respondent dealt with the allegations in terms of the action that they took against Mr Martin and Mr Bagram and/or telling the claimant he could leave if he did not like the action?

If so, were those breaches repudiatory entitling the claimant to resign without notice?

If so, did the claimant resign in response to the alleged breach?

If so, has the claimant affirmed the contract and, if so, was the reason for the fundamental breach of contract that the claimant had made protected disclosures?

193. We answer these for completeness in case we are wrong about there being no protected disclosures.

194. For the reasons we gave above in relation to the claim under the **Employment Rights Act 1996 section 100(1)(c)(ii)** our answers to these questions are the same. We cannot see how we could come to a different conclusion under this part of the claim.

195. We emphasise we cannot see any evidence that his making of these disclosures had any adverse impact on how Croner treated him. Indeed, we emphasise once Mr Price was aware of the issue, Croner stepped up to provide support until he resigned. Croner also provided support that is in stark contrast to the idea that the disclosures caused Croner to want to dismiss him.

196. Therefore, there was no automatic unfair dismissal for making a protected disclosure.

Detriments from making protected disclosures

197. This claim must fail because there were no protected disclosures. However for completeness we will express our views.

Did the respondent subject the claimant to the following detriments: The non-payment of his 2 months' contractual notice in lieu?...

198. Yes, because it was set off against commission that allegedly was overpaid. Not being paid is clearly a detriment.

... and the non-payment of outstanding commission?

199. No. Such commission depended on him being employed and besides the commission was discretionary. While unfavourable we do not accept it could reasonably be considered unfavourable. He had resigned and left the business. He knew the terms on which commission was paid. He was simply subjected to the terms of the policy like anyone else leaving.

If so, was that because of the protected disclosures?

200. In any case these did not happen because of any disclosures – protected or otherwise. They happened because he voluntarily resigned and was paid PILON (subject to set off). At risk of repeating ourselves, we emphasise Croner's treatment of Mr Femminile, especially after Mr Price became

involved stands in stark contrast to the idea any detriments were because he made the disclosure (even if not protected).

201. Therefore this claim fails.

Breach of contract

Did Mr Femminile's contract of employment contain a clause that entitled Croner to deduct overpayments from future salary?

202. It did not.

203. We conclude that the primary document must be the Statement of Terms. Our reasons are as follows:

203.1. The Statement of Terms is particular to Mr Femminile and Croner whereas the 2017 handbook (that was in force at the time) was of general application. We believe that if parties chose to create a specific document to their relationship that sets out the terms and conditions, then the reasonable person would understand that to mean it must take precedence to the generality of the handbook;

203.2. The opening paragraph "This Statement, together with the Employee Handbook, forms part of your Contract of Employment (except where the contrary is expressly stated)..." in our view can be read only as reflecting the primacy of the Statement of Term;

203.3. The paragraph in the opening of the 2017 handbook emphasises its subservient nature to the Statement of Terms when in its use of the words:

"Except where specifically stated, this handbook and the policies and procedures referred to are for guidance only and do not form part of your contract of employment."

and

"Where guidance in the handbook varies from terms set out in the Principal Statement of Terms and Conditions of Employment (hereinafter referred to as the "contract"), the terms in the statement will apply."

204. Therefore, in our opinion where there is conflict then primacy must be given to what is in (or not in) the Statement of Terms.

There was no agreement between Croner and Mr Femminile to vary the Statement of Terms to include a recoupment clause nor notice in writing within one month. Therefore the condition precedent to variation in the Statement of Terms ("Any amendments to this statement will be agreed with you and confirmed in writing within one month.") was not satisfied so there was no variation.

205. However if we are wrong about the effect of those words, we still conclude that the publication of the 2018 handbook did not introduce such a clause to the contract of employment. Our reasons are as follows:

- 205.1. We firstly accept that the 2017 handbook would have contained some contractual terms. What they may have been is not relevant. It is only relevant to remember neither it nor the statement of terms provided for a right to recover overpayments.
- 205.2. Croner drafted the handbooks. They had total control over their terms. In the 2017 handbook they wrote:
“The Company reserves the right to vary conditions of employment by giving four weeks’ notice in writing of any variation. Where statutory notice entitlement exceeds four weeks the statutory notice will apply.”
- 205.3. The Statement of Terms confirms some of the 2017 handbook can be contractual. We conclude a reasonable person would see this term on variation as a contractual term. The reasonable person would recognise that employees are in a weaker bargaining position and want certainty and familiarity. They would recognise that business and employee needs change and therefore Croner would want to reserve its position to vary terms and conditions. They would also recognise that the employer wrote this clause to provide it and the employee with certainty with how variations would take effect to eliminate arguments about custom and practice, acquiescence etc. They would also appreciate it was the employer that imposed restrictions on its right to vary by imposing conditions precedent as to notice requirements.
- 205.4. Thus they would conclude that the fact Croner wrote this term shows it intended to be bound by the restrictions in it to gain the benefits its otherwise provides.
- 205.5. We also believe that the reasonable person would understand that compliance was to be strict so as to provide maximum protection to employees while providing certainty and flexibility going forward to the employer.
- 205.6. The reasonable person would also have taken into account that compliance with the clause by the employer is very simple.
206. Applying that to the facts, Croner did not comply with this variation clause in the 2017 handbook either. There is no good reason for non-compliance. What is required is notice in writing. Publishing it on the intranet is plainly not enough because it is not 4 weeks’ written notice to Mr Femminile as the clause that they drafted required.
207. As an aside it was suggested Mr Femminile had shown by his own conduct he agreed to the term when Croner recovered an overpayment in May 2018. We reject that. That was entirely consensual arrangement on each party’s part and Croner did not rely on any contractual right to recover the money. We do not accept it showed Mr Femminile was aware of the new term in the 2018 handbook or that he was agreeing to a variation by conduct. It was no more than a one off and is entirely consistent with a moral obligation.

208. It follows that Croner had no contractual right to deduct any overpayment from sums otherwise due.

Does Croner have some other claim in unjust enrichment which it could equitably set-off against the claim?

209. This was not properly or fully developed by Croner. We therefore analyse as best as we are able. We apply the law as we understand it.

Has Mr Femminile been enriched? Was the enrichment at Croner's expense?

210. The answer to both is obviously yes.

Was the enrichment unjust?

211. We conclude that the answer must be no. No party cited any authorities to us on this issue so we do the best we can. The most striking feature for us is that Croner implemented a scheme that pays money that will be due at the end of the month in advance of that end, on the assumption that nothing will happen between pay day and the end of the month that means in fact it would not owe the money (or part of it) after all. This is not a mistake that Croner is making but is a calculated risk on their part that they may pay more than due if the employment terminates between pay day and the end of the month. The payments thus are not being made pursuant to any mistake.

212. The overpayment did not result from Mr Femminile's fault. It derived from the system Croner implemented. There is nothing that suggests Mr Femminile should have been aware that he was not entitled to treat the payment as his own money.

213. The risk can be easily militated against for example with a clause for recoupment or set-off of overpayments from e.g. notice pay. It is clear that Croner tried this with the 2018 handbook. However, it did not make it into Mr Femminile's contract.

214. In short, they took a risk and the risk materialised. That is not unjust.

215. Therefore, we conclude there cannot be any argument that there is unjust enrichment.

Would there be any defences available to Mr Femminile?

216. The parties did not address this legally or factually. Therefore, we make no findings.

Conclusions on equitable set-off

217. Croner has not established any contractual or other basis on which it could crossclaim the overpayment. Therefore, equitable set-off does not arise.

218. It follows that Croner owes Mr Femminile the agreed sum of £6,666.66.

Employment Judge Adkinson

Date: 15 June 2021

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.