



EMPLOYMENT TRIBUNALS

Claimant: David Burrows

Respondent: Sizer Engineering Limited

Heard at: Leeds by Cloud Video Platform ("CVP") **On:** 31 January 2023

Before: Employment Judge Evans (sitting alone)

Representation

Claimant: in person

Respondent: Mr Healy of Counsel

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by CVP.

JUDGMENT

- 1) The claimant was not constructively or expressly dismissed. His claims for unfair dismissal and wrongful dismissal (notice pay) therefore fail and are dismissed.
- 2) The claimant was not entitled to an amount in respect of the year-end bonus (as defined in paragraph [7.2] below). His claim for breach of contract fails and is dismissed.
- 3) The claimant was not entitled to any payment in respect of accrued but untaken holiday pay on the termination of his employment. His claim for holiday pay fails and is dismissed.
- 4) The claimant withdrew his breach of contract claim in respect of the commission bonus (as defined in paragraph [7.2] below) at the hearing of his claim and his claim for that bonus is dismissed.

REASONS

Preamble

1. I heard the claimant's claim presented on 28 June 2022 on 31 January 2023. The claimant is unrepresented and there was no agreed bundle at the beginning of the hearing. After discussion, papers missing from the bundle prepared by the respondent were included in a supplementary bundle. Consequently, it was agreed that all the documents that I needed in order to determine the claim were as follows:

- 1.1. The bundle containing 505 pages prepared by the respondent (“the main bundle”);
 - 1.2. The supplementary bundle containing 255 pages prepared on the day of the hearing (“the supplementary bundle”);
 - 1.3. The witness statement and supplemental witness statement of Mr Jordan Simpson, a director of the respondent;
 - 1.4. The claimant’s witness statement;
 - 1.5. The claimant’s schedule of loss;
 - 1.6. The case management orders of Employment Judge Parkin made on 23 November 2022 which contained a list of issues.
2. Page references are to the page numbers of the main bundle unless otherwise stated.
 3. The claimant and Mr Simpson gave oral evidence at the hearing. After they had given evidence the parties made brief submissions. I then reserved my decision: sorting out the papers had eaten into the time available on the day and I was unable to reach a decision and give an extempore judgment.

The issues

4. The parties agreed at the beginning of the hearing that the issues were as set out by Employment Judge Parkin in his case management orders:

*1. **(Constructive) Unfair dismissal:** sections 94-95 and 98, Employment Rights Act 1996.*

1.1 Was the Claimant actually dismissed by the Respondent (on 31 May 2022) or was he constructively dismissed or did he simply resign? The burden of proving a dismissal, actual or constructive, rests on the claimant; otherwise he has no unfair dismissal claim. If he does prove this, the respondent no longer contends in the alternative that it dismissed fairly and for a fair reason.

1.2 If he resigned, has he established a fundamental breach of contract? He relies upon a cumulative breach of the implied term of trust and confidence i.e. that the respondent so undermined him as its Managing Director over a period of time and failed to repose trust and confidence in him such that he lost all trust and confidence in the respondent.

1.3 If he establishes this fundamental breach, did he resign in response to that breach?

1.4 Did the Claimant waive any such breach and affirm the contract by remaining in employment?

1.5 Remedy: Should any compensation awarded be reduced on the grounds of Polkey (on the basis that the Claimant’s employment may have shortly ended in any event) or a failure by the Claimant to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

1.6 Should any compensation awarded be increased on the grounds of a failure by the respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

2. Notice Pay: Article 3, Employment Tribunals Extension of Jurisdiction (England and Wales) order 1994, section 86 ERA 1996

If the claimant proves he was dismissed, he was entitled to notice of termination. He claims entitlement to 6 months' notice on the basis of a verbal agreement that his previous package of contractual terms with Sizer Ltd would be replicated by the respondent, including being entitled to 6 months' notice of termination. Otherwise, again if he proves dismissal, statutory minimum notice would have been 3 weeks based on 3 years' service.

3. Bonus: sections 13 and 23-24 Employment Rights Act 1996.

Can the Claimant establish that he is owed any sums by way of bonus, as a matter of contractual or other legal entitlement? If so, how much? He claims an 8% bonus on net profit of the respondent to year end March 2022 of £13,662.59 with an additional £7,183 for under-valuation of stock and 2.5% bonus on the machine sales to year end March 2022 of £8911.62.

4. Holiday pay: sections 13 and 23-24 Employment Rights Act 1996, with Regulations 13-14 and 28, Working Time Regulations 1998

Is the Claimant owed anything by reason of accrued but untaken annual leave, entitling him to compensation pursuant to regulation 14 of the Working Time Regulations 1998? If so, how much?

4. Given that the issue of remedy was not complicated, it was agreed that I would deal with liability and remedy together and that consequently both would be considered in the oral evidence.
5. There was a short discussion of the matters relied upon in support of the claimant's contention that he had been constructively dismissed. He confirmed that the matters he relied on were as set out in his witness statement.
6. I asked the parties what their respective positions were in relation to several matters in respect of which the parties' positions were unclear to me:
 - 6.1. **Position of claimant:** it was not clear to me whether it was agreed that he had been the respondent's managing director. The claimant said he had only been its general manager. The respondent said the claimant had been employed as managing director from September 2021 but that this had not been documented in any way.
 - 6.2. **How employment terminated:** the respondent's position was that the claimant's employment had ended by resignation as a result of his letter of 2 May 2022 but that the date on which the resignation had taken effect had been agreed as 31 May 2022 after "toing and froing". The claimant said that he had given notice of his resignation but that before that resignation had taken effect he had been dismissed by the respondent at a meeting on 31 May 2022. The claimant said that by that date he had decided that he was leaving but not when. If he had not been dismissed his employment might have continued for another two or three months.

7. I also clarified certain other matters with the parties:

7.1. **Length of notice period:** the claimant contended that he was entitled to 6 months' notice as a result of a verbal agreement. The respondent contended that the claimant's entitlement had been to statutory notice only.

7.2. **Bonus:** the claimant had said in his claim form that he was entitled to two bonuses. One was based on the profit of the respondent in the year to the end of March 2022 ("the year-end bonus"). The other was in respect of pellet machines sales ("the commission bonus").

7.3. The claimant clarified that the year-end bonus was to be calculated as set out in an email from Mr Simpson at page 63 of the bundle and the amount claimed as set out in his schedule of loss was £13,662.59. The commission bonus was a proposed term of the draft contract provided to the claimant, the terms of which he in fact rejected (page 27). I asked the claimant on what basis he contended that he was entitled to this bonus, given he had rejected the contract. The claimant said that he took the point and withdrew this part of his claim, which I therefore dismissed.

7.4. **Holiday pay:** it was agreed that the holiday year of the respondent ran from 1 April to 31 March. The claimant's case was that he had carried over 22.6 hours from the 2021-2022 holiday year. He had then taken slightly more holiday than he had accrued in the 2022-2023 holiday year with the result that he was owed 20.4 hours of holiday pay. The respondent agreed that the claimant had been permitted to carry over 16 hours of holiday pay but he had then taken that holiday and more than the holiday he had accrued in the 2022-2023 holiday year with the result that he was owed nothing.

The Law

Unfair dismissal

8. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

9. In order to bring a claim of unfair dismissal, the employee must show that they have been dismissed. The circumstances in which an employee is dismissed are set out in section 95 of the 1996 Act. The burden of proof to show a dismissal has taken place is on the employee.

10. Section 95(1)(c) of the 1996 Act provides that an employee is dismissed when they terminate the contract with or without notice in circumstances such that they are entitled to terminate it without notice by reason of the employer's conduct. When the employee does this there is a constructive dismissal.

11. In order for there to be a constructive dismissal there must be a fundamental breach of contract by the employer. That is to say a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more essential terms of the contract (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221).

12. For an employee to show that they have been constructively dismissed, they must show that:

12.1. There was a fundamental breach of contract by the employer;

- 12.2. The employer's breach of contract caused them to resign;
- 12.3. The employee did not waive any breach.
13. If as in this case the employee relies on a breach of the implied term of trust and confidence, this is a term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is an objective one.
14. The implied term of trust and confidence is a broad one and many different acts (or failures to act) by an employer may cause it to be breached.
15. A single act or omission by the employer may of course comprise a fundamental breach of contract. However, a course of conduct can also cumulatively amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal after a "last straw" incident, even though the last straw alone does not amount to a breach of contract and may not in itself be blameworthy or unreasonable. However, the last straw must contribute something to the breach and be more than utterly trivial.
16. Because the implied term of trust and confidence is fundamental, any breach of it is likely to be repudiatory (Morrow v Safeway Stores plc [2002] IRLR 35).
17. Whether a repudiatory breach has occurred is a question of fact for the Tribunal and the objectively assessed intention of the employer towards the employee is of paramount importance (Tullet Prebon Plc and others v BGC Broker LP [2011] EWCA Civ 131).
18. So far as the link between the repudiatory breach of contract and the employee's resignation is concerned, it is not necessary for the employee to show that the breach of contract was the only cause of the resignation. However, the resignation must be at least in part in response to the breach (Nottingham County Council v Meikle [2004] EWCA Civ 859).
19. Turning to the issue of the employee affirming their contract or waiving the breach, there is no fixed period of time within which an employee must make up their mind and a reasonable period is generally allowed.

Wrongful dismissal (notice pay)

20. An employee is entitled to be given notice as set out in their contract of employment if the employer decides to terminate it. Section 86 of the 1996 Act sets out the minimum period of notice that must be given. The notice required for an employee who has been continuously employed for one month or more is not less than one week if the period of continuous employment is less than two years and one week for each year of continuous employment if the period of continuous employment is two years or more but less than twelve years. If the period of continuous employment is twelve years or more, twelve weeks' notice is required. Alternatively, an employee may be entitled to longer notice under their contract of employment.
21. If an employer fails to give the period of notice required, it will act in breach of contract unless the employee has committed a repudiatory breach of contract and so the employer is entitled to accept that repudiatory breach and terminate the contract without notice.

Breach of contract

22. A breach of contract occurs when a party to a contract fails to fulfil an obligation imposed by the terms of a contract.
23. A breach of contract gives the innocent party the right to sue for damages, i.e. for financial compensation for losses flowing from the breach. The general principle which applies to all types of claim for breach of contract is that damages should return the innocent party to the position they would have been in if there had been no breach.

Holiday pay due under the Working Time Regulations 1998 ("WTR")

24. Regulation 14: Regulation 14 of the WTR gives a worker whose employment is terminated during the course of a leave year a right to a payment in lieu of accrued but untaken leave calculated in accordance with regulation 14(3). A claim for a failure to pay the amount due under regulation 14 may be brought under regulation 30.

Findings of fact

25. In making these findings of fact I do not of necessity refer to all the evidence that was before me. I have, however, taken all of it into account.
26. The claimant had previously been employed as the managing director of Sizer Ltd, a subsidiary of Newburgh Engineering Ltd which had gone into liquidation. It is unnecessary to consider the details of that process but the respondent emerged out of it and the employee was employed by it as its general manager from May 2019. There was as noted above a dispute about whether the claimant had or had not been promoted to the post of managing director in September 2021. I find that he had not: it was accepted that no written document confirming this could be provided and I note that the draft contract of employment provided to him on 22 May 2022 describes him as "General Manager", as does the email of 29 May 2022 from Mr Simpson at page 458.
27. In terms of the matters relied upon by the claimant in his argument that the respondent breached the implied term of trust and confidence, at [34] of his witness statement the claimant refers to a conversation which he had with Mr Simpson towards the end of April 2022 as being "the first serious demise in our relationship". The claimant's evidence is that Mr Simpson unfairly blamed him in this conversation for delays in certain jobs being completed and that he had demanded that future quotes be approved by him. The claimant's evidence is that the criticisms were unfair because jobs had been delayed as a result of delays with suppliers resulting from them being paid late as a result of cash-flow difficulties of the respondent. Mr Simpson accepts that he queried when certain jobs would be completed and his concerns in this respect are at [2] to [3] of his supplementary witness statement.
28. In questions asked in cross-examination in relation to this meeting the claimant was asked whether in fact what had happened in the meeting had not in reality been a difference of opinion about the profit margins that the respondent should be operating on. The claimant said he did not think that there was a disagreement but rather his point was that certain key suppliers were not being paid promptly and that was causing problems. When asked if the reality was not that there had been a difference of opinion rather than a falling out at this meeting, he said

“there wasn’t. In 85% of cases we agreed and we had a decent relationship at the time”.

29. Taking the evidence in the round, I find that what happened at the meeting at the end of April 2022 was that Mr Simpson expressed frustration that certain jobs had not been completed and the claimant was at least a little irritated by what he took to be an unfair criticism of himself in light of his analysis of the cause of the delays. However, the claimant as the general manager was a senior employee and I find that Mr Simpson did not on this occasion speak inappropriately to him either in the form or in the substance of what he said.
30. At [36] of his witness statement the claimant complains about not being provided with details of indemnity insurance. He does not say when he asked for this but in his oral evidence thought that it was “some time in May”. I note that he requested it in writing in his email of 29 May 2022 (at page 208), which does not refer to any earlier request. The claimant was provided with the information requested on 31 May 2022 (page 467). The claimant has not suggested in his evidence that his query in this respect was particularly urgent. I find that the respondent did not delay unreasonably in providing the information.
31. At [38] to [40] of his witness statement the claimant raises various issues in relation to the transparency of the respondent’s accounts and financial records. Even taking full account of the fact that the claimant has been unrepresented throughout, and so has not had the benefit of professional assistance when drafting his witness statement, the details of his concerns are not entirely clear. I accept that he found the accounting system used by the respondent to be a downgrade on the one he had been used to and that on occasion he was frustrated by the quality or quantity of financial information available to him. However, in the absence of a more detailed account, I find that the claimant was provided with the information that he asked for when he asked for it in light of [6] of Mr Simpson’s witness statement which is cross referenced to a number of accounting documents contained in the bundle which were sent to the claimant on various dates. Further, the respondent’s efforts to address his requests for further information are clear. For example, I find in light of page 212 of the bundle that by 17 May 2022 the claimant had been given access to the Sage accounts system.
32. At [41] of his witness statement the claimant refers to difficulties with a customer in France. This does little more than identify the claimant’s frustration with the accounting system referred to at [31] above.
33. At [42] of his witness statement the claimant said that “at this stage my position became untenable due to the lack of transparency of the financial aspects of the business”. The claimant goes on to state that he then handed in his notice on 3 May 2022 (letter at page 201). However, in [43] of his witness statement he refers to his resignation as being “the only way of achieving some form of action to meet the business needs”. In answer to questions asked in cross-examination, the claimant elaborated on this saying that things needed to be brought to a head. He explained that his particular concern was the late payment of suppliers and the knock-on effects of that on the business. I therefore find that when the claimant resigned on 3 May 2022 he did so not because he thought his position was untenable as a result of a lack of financial transparency or because he intended to leave the respondent but as a means of putting pressure on the respondent to improve its relations with suppliers by paying them on time, which would in turn assist with production.

34. The claimant and Mr Simpson had a meeting following his resignation of 3 May 2022. The claimant does not deal with this meeting in any significant way in his witness statement but Mr Simpson touched on it in his at [8] and [9]. I find that it was in fact at that meeting that the claimant asked for access to the Sage accounts system which was quickly given to him and that there was further discussion about profit margins and suppliers. I find that Mr Simpson's concern was that profit margins were insufficient for a cash reserve to be built up to pay suppliers out of cash reserves and on time. I find that the claimant's concern was more focused on the inability to pay suppliers on time. I accept Mr Simpson's explanation at [9] of his witness statement that the reason that the claimant sought access to Sage at this point was that he did not understand why the respondent was not making more profit than it was. I find that whilst there may have been a robust exchange of views at this meeting the concerns of Mr Simpson were understandable and he acted reasonably in voicing them as he did.
35. In his letter of 3 May the claimant had said "I am willing to stay until Friday 1st July of this year to give you time to find a suitable replacement or any other avenue you wish to take." Following that meeting, the claimant wrote to the respondent again on 9 May 2022 (page 202) stating "I still believe I am not receiving transparency on both Sizer and Dynamic financial information required for me to carry out my position". He expressed an intention to terminate his employment with effect from 20 May 2022. However, he went on to say that he would reconsider his position if a bonus of £13,652.59 was paid to him by Friday 13 May.
36. Mr Simpson formed the view that what the claimant was really seeking was an increased salary and bonus and that he wanted this in writing. A draft proposed contract was put to the claimant (page 27) and the claimant responded positively (page 204) suggesting changes to the contract and indicating a willingness to withdraw his resignation on 22 May 2022. Mr Simpson agreed to make the changes sought by the claimant.
37. I find that what had happened between the claimant's first letter of resignation and 22 May 2022 was in effect a process of negotiation in which the claimant had sought better access to accounting information (via Sage) which he had been granted and had then tried to negotiate improved terms and conditions of employment (in which he had also been successful). I find that negotiations were heading towards the employment of the claimant continuing and indeed the parties agreed to extend his notice period to beyond the date of 20 May given in his letter of 9 May. I find that at this point the claimant intended to continue in the employment of the respondent and that was what the respondent wanted also.
38. However, at that point the claimant became aware of "the full extent of wages" being paid to Ashley Clough (paragraph [60] of his witness statement). In summary, the claimant's concern was that although junior to him Mr Clough had higher take home pay as a result of being paid overtime. The claimant says that Mr Clough told him that Mr Simpson had guaranteed him 15 hours of overtime a week, whether or not it was worked. The evidence of Mr Simpson was that in order to ensure Mr Clough's continued employment he had been offered a "reasonable number of hours overtime". He also pointed out that the job offer to Mr Clough (page 463) signed by the claimant stated:

You will be expected to work overtime to meet the business need which we anticipate [sic] natural growth and development based on the sustained growth to date.

The present basis on overtime is not limited and all staff can work 6am to 6pm Monday to Friday, however they presently choose to limit this to approximately 15 hours per week, which is their preference.
[emphasis in bold added.]

39. Mr Simpson denied guaranteeing a particular number of hours overtime to Mr Clough. I did not hear evidence from Mr Clough and I accept Mr Simpson's account of what had been said to Mr Clough because this is consistent with the offer letter sent to him.
40. There was then a meeting between Mr Simpson and the claimant on 31 May 2022. From his account of this at [63] of his witness statement it is clear that the claimant regarded this meeting as a negotiation following his discovery of the amount of Mr Clough's take home pay: he comments at [62] in respect of Mr Clough that "I stated he generated this problem he needs to come up with the solution, and that's how I left it over the weekend" before beginning [63] as follows:

Jordan Simpson came down to see me the following Monday 31st May and his answer was to offer me another £4,000 to my wages but I had to justify this by working additional hours. I told him that was not the answer I was looking for.

41. Mr Simpson's recollection of this part of this meeting is similar ([16] of his witness statement). I therefore find that at this point the contract negotiations between the respondent and the claimant failed, derailed in effect by the claimant's dissatisfaction with the fact that Mr Clough's take home pay had been higher than his own. At this point the claimant had decided that his employment would not continue. I find that the reason for this was his dissatisfaction with his pay compared to that of Mr Clough.
42. Mr Simpson's recollection of what happened next is as follows ([16] of his witness statement):

I asked if that meant he was going and he said 'yes I'm going I'll either leave now or I'll work notice if you want me to' and I said you may as well leave now'. So that he did not have to work any further notice.

43. The claimant's recollection of what happened next is that Mr Simpson said that he could get someone "shit hot" for the wages sought by the claimant (which Mr Simpson denied) and that:

I then stated, 'Do you wish me to stay whilst you get someone shit hot' and his answer was you may as well leave now.

44. It is unlikely that either the claimant or Mr Simpson will have an entirely accurate recollection of what was said at this point. Feelings were running high. However, putting together their respective recollections I find that (1) the claimant indicated that he was after all leaving the employment of the respondent (2) he said he was prepared either to leave immediately or to work a further notice period (3) Mr Simpson chose the latter option and said that he should leave immediately. This was not Mr Simpson dismissing the claimant but rather Mr Simpson and the claimant agreeing an immediate end to the notice period of the claimant which he had set running by his resignation on 3 May 2022.

Findings relevant to the breach of contract claim

45. It was agreed between the parties that the terms of the bonus were set out at page 63 of the bundle in an email dated 22 February 2022 from Mr Simpson to the claimant. The email stated:

*My proposal is to pay you 8% of combined net profit for Sizer and Dynamic.
This will be based on the published year end accounts.
I am happy for it to start with this year ending March 2022.
So if Sizer make 150k net profit and Dynamic make a 60k loss the 8% will be passed on 90k.*

46. The relevant year end accounts were included in the bundle. They show that the respondent made a net profit of £66,061 (page 100) and Dynamic Die and Steel (Sheffield) made a loss of £85,976 (page 123). The net "profit" was therefore -£19,915.

47. The claimant implicitly invited me to go behind the year end accounts by implying that they might be inaccurate (for example paragraphs [39] to [40] of his witness statement). So far as [39] is concerned, this involves speculation by the claimant in relation to what a particular item is. So far as [40] is concerned, Mr Simpson provided a satisfactory explanation for the number of scrap invoices. I find that the claimant has failed to produce evidence of the kind necessary to persuade me on the balance of probabilities that the accounts of the respondent or of Dynamic Die and Steel (Sheffield) included in the bundles are materially inaccurate.

Findings relevant to the holiday pay claim

48. The claimant relied on a spreadsheet that he said was "collated by both Technical Cranes accounts and Sizer Administration" in relation to his holiday pay claim (supplementary bundle page 237). This shows shows 57.5 hours as having been taken up to and including 31 May 2022 and a further 69.5 as having been booked for the rest of the 2022-2023 holiday year (or as being accounted for by bank holidays and the Christmas break).

49. In his schedule of loss the claimant says that he carried over 22.6 hours and accrued 7.8 hours a week working on the basis that he worked 39 hours a week.

50. The respondent's position in relation to holiday pay is set out in an email at page 469 from Jane Wall. She says that his annual entitlement is 259.5 hours including bank holidays and that in light of that his accrued entitlement from 1 April to 31 May 2022 was 40.2 hours. She says that he carried over 16.3 days from the 2021 to 2022 holiday year and that his entitlement for the 2022-2023 holiday year was therefore 56.5 hours. She says that he took a total of 66 hours and so owed 9.5 hours back to the respondent. Her email is followed by a spreadsheet (page 460) which shows 66 hours as having been taken in the period 1 April to 31 May 2022.

51. The difference between the two spreadsheets is 11 May: the spreadsheet in the supplementary bundle shows him as having worked that day but that in the main bundle shows it as having been taken as holiday. I find that he took a day's holiday on that day because he gave notice of that in his second letter of resignation (page 202).

52. The claimant did not take express issue with the accuracy of either spreadsheet referred to above. They are clearly contemporaneous records to which it is appropriate to give weight. I therefore find that he took holiday as set out in the one at page 470 (because this appears to be the most up to date) and that

accordingly he took 66 hours' holiday (including bank holidays) in the 2022-2023 holiday year. I prefer the written record to his rather unclear recollection as set out in his schedule of loss.

53. The respondent says that the claimant accrued 40.2 hours' holiday in the 2022-2023 holiday year because his annual entitlement was 259.5 hours. No explanation is given for this calculation and it seems to me that the correct pro-rating calculation would have in fact been $61 \text{ [days elapsed in holiday year]} / 365 \text{ [days in year]} \times 259.5 \text{ hours [annual entitlement]} = 43.4 \text{ hours}$. The claimant's schedule of loss is unclear but I cannot see any suggestion that he thinks the hours accrued in the 2022-2023 holiday year should be higher.
54. I accept the claimant's account that he it was agreed that he could carry over 22.6 and so he was entitled to a payment on the termination of his employment of $43.4 \text{ hours [accrued]} + 22.6 \text{ [carried over]} \text{ hours} = 66 \text{ hours less holiday taken, which I have found above to be 66 hours}$. Consequently, he had no accrued but untaken holiday as of 31 May 2022.

Conclusions

Constructive unfair dismissal

55. In light of my findings of fact above I conclude that the claimant resigned on 2 May 2022 and that the resignation took effect on 31 May 2022. He was not expressly dismissed by the respondent on 31 May 2022.
56. I conclude that the claimant has failed to establish that there was a breach of the implied term of trust and confidence by the respondent. I have made findings of fact above between [27] and [44] about the dealings between the claimant and Mr Simpson over the relevant period and I conclude that there was simply nothing in the way that the respondent treated the claimant which amounted to a breach of the implied term of trust and confidence, whether the events are taken in isolation or viewed cumulatively. Rather a director (Mr Simpson) and a very senior employee (the claimant) were exchanging views forthrightly about various matters affecting the profitability of the respondent and relating to the terms under which the claimant was employed. I accept entirely that the claimant had concerns about the information being provided to him but I have found above that when he raised those concerns the respondent dealt with them. Equally, although it is unsurprising that the claimant was dissatisfied that Mr Clough's take home pay was higher than his, this was not a breach of the implied term of trust and confidence given in particular that Mr Clough was being paid in accordance with a contract signed by the claimant which made it clear that the overtime provisions were generous.
57. Taking the evidence in are round, therefore, the respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the claimant. The claimant was not therefore constructively dismissed and his unfair dismissal claim fails and is dismissed.

Wrongful dismissal (notice pay)

58. In light of my findings that the claimant resigned and was not constructively dismissed, his claim for wrongful dismissal (notice pay) fails. His claim for wrongful dismissal therefore fails and is dismissed.

Breach of contract (bonus)

59. In light of my findings set out above, the claimant was not entitled to a bonus because the combined profit figures of the respondent and Dynamic Die and Steel (Sheffield) are a negative figure. His claim for breach of contract therefore fails and is dismissed.

Holiday pay

60. In light of my findings above about the claimant's holiday entitlement, how much holiday he took in the 2022-2023 holiday year, the amount of holiday he accrued in that holiday year and the amount he carried over by agreement from the previous holiday year, the claimant had no accrued but untaken holiday on the termination of his employment. Consequently, his claim for holiday pay fails and is dismissed.

Employment Judge Evans

Date: 8 February 2023

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