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EMPLOYMENT TRIBUNALS

Claimant: Mr R Ciesielski

Respondent: KBC Logistics Ltd

Heard at: East London Hearing Centre

On: 7-8 June 2017

Before: Employment Judge Russell

Members: Mrs G A Everett
Mrs M Fuller-Smyth

Representation

Claimant: Mr D Ludwiczak (Friend – assisted by an interpreter
Mr T Gierasimiuk)

Respondent: Mr M Howson (Consultant)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) The claim for unauthorised deduction from wages was presented out of time. It was reasonably practical to have presented it within time.
- (2) The Claimant was not entitled to treat himself as dismissed by reason of the Respondent's conduct.
- (3) All claims fail and are dismissed.

- (4) The Claimant was not treated less favourably because of his race.**

- (5) The Claimant was not indirectly discriminated against because of his race.**

REASONS

1 By claim form presented on 25 July 2016, the Claimant brought complaints alleging that his bonus a component of his wages had been deducted without his authority and/or that the Respondent's conduct in connection with a grievance had amounted to a constructive dismissal and acts of race discrimination. The Respondent denied all claims. The issues were identified by Employment Judge Ferris on 19 December 2016. The Claimant not having two years continuous employment confirmed that his unfair dismissal claim was based upon the assertion of a statutory right either not to have unauthorised deduction from wages or not to be discriminated against on grounds of race. The matters relied upon as breach and implied term of trust and confidence were not having a translator present at the original grievance meeting on 12 January 2016 delaying the grievance meeting to arrange for a translator to be able to attend and withdrawing the offer to arrange for a Polish interpreter and asking the Claimant to attend the meeting with work colleagues as an interpreter.

2 On the wages claim other than the jurisdictional issues, the Tribunal were asked to consider whether or not the bonus scheme was a contractual entitlement and whether there was lawful reason to withhold it, whether the Claimant was entitled to

notice of dismissal.

3 In terms of the race case the Claimant's comparators were other foreign speaking employees who required an interpreter. The Respondent conceded that it applied a PCP in respect of not providing an independent translator at the company's expense. It denied however that there had been any PCP on the three specific PCPs or points raised by the Claimant as in the issues.

Jurisdictional issues

- 3.1 Has the claim/s been presented within the statutory timeframe?
- 3.2 If not, was it reasonably practicable to do so (in relation to the wages claim)?
- 3.3 If not, did the Claimant submit it as soon as it became reasonably practicable to do so (in relation to wages claim)?
- 3.4 With regards to the discrimination claim, is it just and equitable to extend time?

Unlawful deduction of wages/breach of contract

- 3.5 Was the bonus scheme operated by the Respondent a contractual bonus scheme?
- 3.6 If so, did the Respondent have lawful reason to withhold it?
- 3.7 Was the Claimant entitled to notice of dismissal and if so, has the Respondent breached that obligation and if so, what notice pay is due to the Claimant?

Automatic constructive dismissal for assertion of a statutory right

- 3.8 Did the Claimant assert a statutory right, namely not to have his wages unlawfully deducted and/or not to be discriminated against on the grounds or race?
- 3.9 If so, did the Claimant believe this to be the case?
- 3.10 Did the Respondent act in a way calculated or likely to destroy the mutual duty of trust and confidence without reasonable excuse – namely:

- 3.10.1 Not having a translator present at the original grievance meeting on 12 January 2016;
 - 3.10.2 Delaying the grievance meeting to arrange for a translator to be able to attend a rearranged grievance meeting;
 - 3.10.3 Withdrawing their previous offer to arrange for a Polish interpreter for a grievance meeting and asking the Claimant to attend the meeting with work colleagues as an interpreter.
- 3.11 If so, was this because the Claimant had asserted a statutory right not to have his wage unlawfully deducted and/or to be discriminated against and/or not to be discriminated against?
- 3.12 If so, did the Claimant resign in consequence of the Respondent's breach of trust and confidence?

Direct race discrimination

- 3.13 Did the Respondent treat the Claimant less favourably than they would have treated others who are not of the same race as the Claimant by:
- 3.13.1 Not having a translator present at the original grievance meeting on 12 January;
 - 3.13.2 Delaying the grievance meeting to arrange for a translator to be able to attend a rearranged grievance meeting';
 - 3.13.3 Withdrawing their previous offer to arrange for a Polish interpreter for a grievance meeting and asking the Claimant to attend the meeting with work a colleague as an interpreter.
- 3.14 If so, was this treatment on the grounds of the Claimant's race?

Indirect race discrimination

- 3.15 Did the Respondent apply a provision, criterion or practice ("PCP"), namely:
- 3.15.1 Not having a translator available at the original grievance meeting on 12 January;
 - 3.15.2 Delaying the grievance meeting to arrange for a translator to be able to attend a rearranged grievance meeting;
 - 3.15.3 Withdrawing their previous offer to arrange for a Polish interpreter for a grievance meeting and asking the claimant to attend the meeting with a work colleague as an interpreter.

- 3.16 If so, did said PCP apply to both the Claimant and other employees who are not of the same race as the Claimant?
- 3.17 If so, would said PCP be more likely to put those of the Claimant's race at a particular disadvantage?
- 3.18 If so, was the Claimant put at a particular disadvantage compared to someone who is not of the same race?
- 3.19 If so, was said PCP proportionate and necessary to achieving a legitimate aim?

4 I heard evidence from the Claimant on his own behalf. Initially his statement was provided in Polish but we were given an English translation which the Claimant confirmed he had had interpreted to him or at least he understood its contents which were true. We read a statement provided by Anna Zamroczynska which was signed although Ms Zamroczynska did not attend to give evidence. We admitted it but attach such weight as was appropriate in the circumstances.

5 For the Respondent we heard from Mr David Ashford, Director of Transport and Compliance Manager and we heard from Mr Radzyminski, Director.

Findings of fact

6 The Respondent is a logistics and trucking company operating from Purfleet in Essex. It employs a number of drivers of whom the Claimant was one as well as many other employees who are fluent in both English and Polish.

7 The Claimant's employment commenced on 14 October 2014. He was entitled to a daily rate of pay of £86. The contract also stated:

“There will be a discretionary bonus paid of £30 per week (£6 per day) after 4 weeks of employment, this will increase to £50 per week (£10 per day) after a further satisfactory 3 months. The management reserve the right to withdraw these bonus payments at their discretion for any infringements, non compliance or performance related issues.”

Under the heading “Non-contractual bonus” the contract stated:

“The Employer operates a non-contractual discretionary bonus scheme in which you are currently entitled to participate. Any payments made are at the total discretion of the Employer.”

8 The term dealing with deduction from wages records that by signing the agreement the employee expressly consents to deduction from wages in respect of money owed to the employer examples of which are given as any insurance excess payable by the employer as a result of damage caused by your negligence or lack of care. The Claimant acknowledged by his signature receipt of the statement of terms and conditions and a copy of the employee handbook which where specified were incorporated into the contract. We were provided with a copy of the handbook which provided that rules in Part 1 formed part of the contract of employment; those in Part 2 the statements of intention and were non-contractual. The Claimant also signed for receipt of this document.

9 The clauses relating to personal liability for damage to vehicles at Rule 10.7 is within Part 2 of the handbook and therefore is non-contractual. It states that if a

company vehicle is damaged through negligence fault or lack of care there may be a deduction for the cost of damage from wages but before any decision is made to deduct the matter will be fully investigated with the employee given an opportunity to state their case and appeal any decision. Clause 12 is also in Part 2 and therefore non-contractual. Again it provides authority for a deduction in respect of damage to property but again after a full investigation and an opportunity to state your case and appeal.

10 In or around March 2015 the Claimant had been involved in a road traffic accident whilst driving the Respondent's vehicle. It is a large cab to draw a ????? lorry. The accident had occurred as the Claimant was exiting a roundabout. The Respondent deemed the Claimant to have been at fault and in the weeks following the accident deducted from the Claimant's bonus in weekly daily instalments the total sum of £900. The Claimant did not object at the time although he raises it in his witness statement it does not form an express part of the issues.

11 On 11 December 2015 a member of staff informed Mr Radzynski that his car which is parked in the company car park had been damaged. The employee had taken photographs and shown them to Mr Radzynski. The other vehicle involved was the truck driven by the Claimant the previous evening. Mr Radzynski logged on to the Tom-Tom system and saw that after the Claimant had parked the truck nobody else had taken possession of it or moved it. The damage to the colleague's vehicle was in the off-side middle suggesting that the Claimant's lorry had reversed sideways into it. The photo show the chase of the Claimant's truck the shape of the chase imprinted into the damaged the middle part of the car, the two vehicles were touching. As a

result Mr Radzynski concluded that the Claimant was responsible for the damage caused.

12 When the Claimant attended work on 11 December 2015, Mr Radzynski approached the Claimant and spoke to him about the damage. Initially the Claimant denied responsibility and Mr Radzynski showed him the photographs before informing him and he believed that the only possible way the damage could have been caused was the Claimant attempting to park too close to the other car as such the discretionary bonus would be stopped to pay for the damage.

13 The Claimant's evidence is that Mr Radzynski approached him at a close distance invading his personal space, spoke to him a very loud and imperative tone practically shouting and suggesting that if the Claimant did not admit fault and accept the penalty it would mean that "we say goodbye" which the Claimant says he perceived to be a threat of instant dismissal. Mr Radzynski denies any inappropriate conduct, he did not shout, use abusive language, invade personal space or threatened the Claimant with dismissal. On balance we prefer the evidence of Mr Radzynski who appeared to us a calm, collected and mild mannered witness; the Claimant by contrast we found to be an unreliable witness. For example in connection with the extent of information available to him in connection with the accident. Therefore we find that there was no inappropriate conduct by Mr Radzynski and the Claimant was informed of the outcome of the investigation into the accident. The Claimant was not advised of a right of appeal.

14 The Claimant noticed that in his pay on 18 December 2015 the bonus had been

deducted and he queried the same receiving by way of response an email confirming that he would not receive bonus up to the sum of £900 as these had been taken by way of damages. The Claimant was not paid for three days worked the previous week. We find that this was because he had submitted his information late and he was in due course paid on the 22 January 2016.

15 On 24 December 2015, the Claimant sent via email a seven page letter raising a written formal grievance in essence for the deductions from salary and the suggestion that he was at fault for the accident in the yard in the conduct of Mr Radzyminski.

16 That is the essence of the grievance although the manner in which the grievance is expressed is long winded, extravagant in its use of language and unduly legalistic. For example it refers from the very first paragraphs to trust and confidence, equality of arms, the statutory code of practice and in the ACAS Code before purporting to set out a number of questions relying upon the handbook and then going on to state a belief that he had been subjected to unfair treatment. By way of example he suggested that the colleague's allegations against him was libellous information pursuant to section 35 of the Defamation Act. He cited a range of employment cases including unreported cases such as the ET in *Farnaud v Dr Hadwen Trust Ltd* [2011], *Spink v Express Foods Ltd* [1990] IRLR 320 and a whole range of other cases that appear to be directly relevant to conduct dismissals and the fairness of a disciplinary procedure, for example *Spink*, *British Home Stores v Burchell*, *Sainsbury's v Hitt*, *Babapulle v Ealing*. The Claimant however did not suggest in this letter that he was treating himself as having been summarily dismissed. Rather in sought to invoke the grievance procedure as a continuing employee hoping that his career with the

Respondent would continue. The standard of the English used within this letter did not suggest any comprehension problems. In fact the Claimant has very little, if any, spoken or written English and we find that this letter was not written by him, it was clearly written on his behalf. It is an unusual letter for an employer to receive from their employee at such an early stage taking as it does such a confrontational and overly legalistic approach and in many regards missing the point legally.

17 The Respondent by way of Mr Ashford replied on 4 January 2016 indicating that he had been appointed independent adjudicator and would be investigating the complaint. He stated that he would like to invite the Claimant to a formal grievance interview and proposed 10am on 12 January 2016. He advised the Claimant of the right to be accompanied by a colleague or accredited trade union representative.

18 The Claimant replied again by email on 6 January 2016 posing a series of questions for which he required the information 24 hours in advance of the hearing. These included requests for the training undertaken by Mr Radzynski in to bullying and harassment, health and safety at work steps, details of previous complaints against Mr Radzynski, training received by the investigating officer and enquiries as to how the Respondent would ensure that he received a fair and equitable grievance process not prejudiced with bias citing *Dattani v Chief Constable of West Mercia* [2004] as the inferences which may be drawn from an evasive or equivocal reply to questionnaires under the original discrimination legislation and providing links to CIPD bulletins in connection with the same. Mr Ashford was somewhat confused by the questions and their relevance and we agree that this was a reasonable response.

19 At this stage Mr Ashford had sought to invite the Claimant to attend a grievance hearing. The Claimant's response in letters written on his behalf was again unduly legalistic and overly confrontational. It is of note however that on 6 January 2016 the Claimant did not indicate that he would require a translator at the meeting.

20 In the meantime on 6 January the Claimant indicated that he was prepared to attend work. It appears however that no work was provided to him after this date. Whether or not this was because of the outstanding grievance as the Claimant says or whether it was because there was a general downturn in the amount of work available as the Respondent says is not a matter to be determined as part of the issues before us.

21 On 8 January 2016, the Claimant emailed again stating amongst other things the Respondent was acting in its own best self-serving interests and that the Claimant was asserting his statutory rights.

22 On 12 January 2016, that is the day of the hearing, the Claimant raised for the first time the fact that he required a Polish English interpreter suggesting that failure to provide the same may amount to race discrimination and/or a failure to make reasonable adjustments. He also suggested that the grievance be undertaken in writing by way of reasonable adjustment. The Claimant's case is that this was provided to Mr Ashford on the day of the grievance hearing. This is consistent with an email from Mr Ashford on 12 January at 12:04 expressing surprise at the Claimant's response that morning when he had refused to attend the hearing. Mr Ashford had believed the Claimant to be or have a very articulate command of English based upon

the earlier correspondence. Nevertheless he had agreed to reschedule the meeting which the Claimant could be accompanied by a work colleague or trade union representative. He suggested that the Claimant choose from any of the numerous staff of the Respondent who were bilingual. He reminded the Claimant of the need for him to carry out a full investigation and to have this meeting in order to make a decision on the grievance. It is also worth noting that present at the proposed grievance hearing was a newly appointed manager who had no prior involvement in the facts of this case who also spoke Polish. The Claimant objected to assistance from this new manager on the grounds it appeared to us the very fact that he was employed by the Respondent would render him biased and not a fair interpreter. It seems to us to be a sweeping assumption based upon little, if any, evidence. Nevertheless Mr Ashford proposed a rescheduled hearing on 20 January 2016.

23 The Claimant's response on 15 January was to raise a further grievance this time asserting race discrimination and failure to make reasonable adjustments in summary due to the failure to provide an interpreter. We say in summary because again the letter is lengthy and remarkably legalistic citing at length parts of the Equality Act 2010. The ACAS statutory code and asserting that section 110 of the Equality Act applied to render Mr Ashford personally liable for discrimination.

24 In response on 15 January Mr Ashford wrote to the Claimant in an attempt to move matters forward indicated that he was prepared to allow an independent Polish language interpreter to attend the grievance hearing in addition to the write to be accompanied by a work colleague or a trade union representative. This would, he indicated, delay matters and a further date would be provided in due course. The

Claimant was asked to confirm that this was acceptable. The Claimant did not respond until 27 January 2016 querying the fact that he had not yet been provided with a date for the grievance hearing. Again the Claimant complained that he had been punished subject to a detriment, namely the failure to provide him with work as punishment for asserting his statutory right. Again this is not a claim before us.

25 Mr Ashford responded on 27 January 2016 explaining that they had been waiting for the Claimant to confirm that the proposed course of action was acceptable but indicating that he would now arrange for an interpreter and send a date in due course. In fact this did not happen as Mr Ashford subsequently decided that it would not be appropriate for the Respondent to provide at its own expense an independent interpreter as there were sufficient number of Polish speakers internally as the Claimant had been advised that he could choose a person of his own liking whether that be a colleague or somebody from outside of the organisation and also of the fear that it would set a precedent for other employees in the future incurring a considerable expense which was not justified given the presence of Polish speakers internally already.

26 As the matter rumbled on the Claimant received his final payslip on 22 January for the three days worked earlier in December. Again there was no discretionary bonus paid in respect of those three days. The total sum deducted from the Claimant through stopping his bonus was therefore £110 by the date on which the Claimant resigned which was 1 March 2016. Reasons given were firstly the threat of dismissal if he did not accept liability for the accident, failure to investigate the accident in accordance with the employee handbook, the deduction from pay, the failure to provide

him work subsequently and the failure to properly comply with the grievance procedure both by way of race discrimination and delay. The Claimant asserted that these were fundamental breaches of contract on the part of the Respondent and therefore he resigned.

Law

27 **TO BE INSERTED BY AER**

Conclusions

Wages Act

28 We are satisfied that the complaint was presented out of time. The last date of any deduction was 22 January 2016, the day of the final payslip and therefore the final deduction. It follows therefore that time ran from the 22nd. Primary time limit would expire on 21 April subject to ACAS conciliation. In this case the claim was not referred to ACAS until 24 May 2016 and was out of time at that stage. It did not benefit therefore from an extension of time in the ordinary manner. The test is reasonably practicable and we have heard no evidence upon which we could find that it was not reasonably practicable to have presented the claim within time. The legalistic content of the claims and the reference to an authorised deduction from wages make it clear that the Claimant was well aware of his legal rights. We therefore find the claim is out of time. In the alternative we would have found that the bonus was discretionary and was not a payment to which the Claimant was contractually or otherwise entitled at the

relevant dates. The exercise of the discretion is limited by the conditions of the contract but in this case we are satisfied that the preconditions required or set out at clause 6 of the contract, namely that there be infringements non-compliance or performance related issues was satisfied.

29 Insofar as the Claimant relies upon the terms of the handbook these are not contractual terms therefore they will subsequently be relevant albeit only to the implied term of trust and confidence. There was no contractual term requiring there to be a full investigation and right of appeal prior to deduction of these sums. Indeed we are satisfied when read with clause 8 the Respondent enjoyed a very broad discretion as long as it was not exercised in a way which was frivolous or nonsensical capricious or otherwise and we are satisfied on the evidence available to Mr Radzynski that is not the case.

30 As for the constructive dismissal, for the reasons set out in our findings of fact we are satisfied that the Respondent's conduct was with reasonable and proper cause. We remind ourselves that constructive dismissal imports a contractual test not one of reasonableness, a concept to which Mr Ludwiczak **off** returned in the course of questions and indeed submissions. In such circumstances the matters relied upon within the issues were specifically limited to three particular points. Dealing with each in turn not having a translator present at the original grievance meeting on 12 January 2016, we are satisfied it was with reasonable and proper cause.

31 In the run up to the grievance hearing the Claimant had communicated in writing in a manner which indicated no practical difficulty with the English language. Nor had

he requested the presence of a translator. Further or in the alternative there was indeed a bilingual manager who could have provided his interpretation skills or translating skills on that occasion. The Claimant's objections on the basis that he was an employee of the company seemed to us to be scant in the extreme.

32 The second is delaying the grievance meeting to arrange for a translator to be able to attend. It is difficult to see how the Claimant can rely upon this as unreasonable conduct to the extent that he had requested the delay in order that such arrangements could be and should be made. We think that the meat of the Claimant's complaint is really that the delay was unduly lengthy. We accept that there was an initial period until the end of January 2016 where the Respondent was expecting the Claimant to confirm his agreement to their proposals. We find that there was reasonable and proper cause to await such confirmation in light of the confrontational or adversarial nature of the Claimant's correspondence to that date. We note that although the date is not clear the Claimant was subsequently made aware that the Respondent would not pay for an independent translator although as the Claimant accepted in cross-examination he was permitted to bring a friend, relative or colleague.

33 We have had regard to the reasons for the Respondent withdrawing their previous offer to arrange for a Polish interpreter and we accept that that was borne out of a genuine belief that it was not necessary given the alternative proposals and that it was not cost effective and that it may set a dangerous precedent. We bear in mind that we must only be satisfied that there is reasonable and proper cause not reasonableness overall and we are satisfied that there was in this case. We bear in mind that the obligation implied term of trust and confidence is a mutual obligation. It

requires both employer and employee to work together in a constructive manner. We take into account the efforts of the Respondent to assist the Claimant, the clearly express desire of Mr Ashford to meet with the Claimant to resolve or investigate at least what was very clearly his own grievance and the unusual content of the letters sent in the name of the Claimant.

34 As we noted in our findings of fact that the Claimant has referred to in evidence a number of additional matters. For example, whether or not Mr Radzyninski had behaved inappropriately on 11 December 2016 and/or whether or not he be withholding of the bonus and the way in which the employment handbook procedure were followed also amounted to breach of the implied term of trust and confidence and we are not satisfied that they did. Even though the Respondent had not offered the appeal we take into account that the extent to which there have been investigation and evidence produced and the Claimant's ability essentially to appeal by way of grievance was not so unreasonable as to amount to a breach of the implied term and we have not accepted the Claimant's evidence as to what happened on 11 December in any event.

35 In any event furthermore the Claimant has not put before us strictly speaking the question of whether or not there was work withheld from him and we have indicated above that we did not find it necessary to resolve that dispute. We simply note that the Claimant was engaged under a zero hours contract and therefore there is no breach of any express term with regard to his hours.

36 The Claimant asserts that he was entitled to payment of notice; the Respondent disputes the fact and we accept that the Claimant's letter of resignation is to some

extent ambiguous. It does not, for example, say that he is resigning with immediate effect. Nor however does he indicate that he is giving any period of notice or that he expects to be provided with work and/or payment in respect of the same. The letter is entirely silent on the point. On balance we find that the Claimant did resign without notice and is not entitled to any notice payment.

37 Turning next to the race discrimination case, we are not satisfied that the Claimant was treated less favourably on grounds of race. There was a real issue here with the comparator in determining the Claimant's case at one point Mr Ludwiczak whom we accept was not a lawyer although from the content of both of his submissions and the letters from the Claimant to the Respondent during the employment suggest that he has spent some considerable time at the very least researching a number of matters in employment law.

38 Coming back to where we were, the issue with regard to the comparator, Mr Ludwiczak suggested that the appropriate comparator would be an English speaking employee. We do not accept that that would be an appropriate comparator as circumstances would be materially different. To put it at its starkest an English speaking employee would not require a translator or interpreter for the grievance hearing. We considered that the appropriate comparator is an employee of another nationality who does not also speak English. The Claimant has failed to prove primary facts from which we could conclude that such an interpreter would be treated in a more favourable way.

39 Finally with regard to the claim of indirect discrimination we were not persuaded

that the provision, criterion or practice relied upon at 1 was established as a matter of fact, namely not having translator available at the original grievance meeting. At that stage no translator was available because in the particular circumstances of the Claimant's case none was thought to be required. Alternatively although not appointed as a translator the presence of the other manager who was bilingual means that there was no PCP. As for the second, that is the delay, it is hard to see how this could be extended into a PCP of general application rather than a point specific to the Claimant's case and we note indeed that it is relied upon both as an act of direct discrimination and PCP for indirect discrimination. The nature of the two types of claim is different in the one, direct discrimination, the Claimant is saying that he as an individual was treated less favourably than other would have been in different circumstances or who did not share his circumstances.

40 By contrast, in an indirect race discrimination claim it seems to us that a claimant is asserting that the same treatment applied to all employees irrespective of their circumstances merely that the effect of the treatment was to put the Claimant and somebody of his race at a particular disadvantage yet in this case the Claimant relies upon the same detriments in the direct claim as then PCPs in the indirect claim.

41 In any event we are not satisfied that there was any disadvantage to the Claimant even if a PCP and even if applied. It made eminent sense to delay the initial grievance meeting to arrange for a translator given the Claimant's facetious objection to proceeding on 12 January 2016. Insofar as the subsequent delay is concerned we are not satisfied that there was any particular disadvantage to the Claimant or those of his race in circumstances where the Respondent was waiting for his response.

42 Further and finally, insofar as the justification defence is engaged, we are satisfied that it was necessary a legitimate aim was to ensure that the employee could participate in the grievance meeting it was therefore necessary to delay to arrange translator attendance and it was proportionate for that delay to await initially the Claimant's confirmation that he agreed in the circumstances and/or latterly awaiting his confirmation as to the individual he would attend with.

43 The final point or PCP is the withdrawal of an independent pay for Polish interpreter and the Respondent concedes that it did apply a policy of not providing independent translators paid for by the company.

44 We find however that there was no disadvantage to the Claimant or others of the same race in a workplace with a very large number of Polish English speaking employees. We take into account that the Claimant was able to rely upon not only a colleague if he felt uncomfortable doing so but a friend or family member. In the circumstances therefore we think that there was no particular disadvantage and we were not persuaded by the Claimant's evidence that the Respondent may not have relied upon such or view such a translator as reliable. It seems to us rather fanciful given that it was the Respondent who suggested it.

45 Further in the alternative we would have found that it was objectively justified. It was clearly proportionate in the circumstances. For those reasons the claims fail and are dismissed. We would simply make the following comment. It is unusual in our experience to see such a relatively ordinary concern such as the deduction of the

bonus escalate so quickly into grievance letters and correspondence of the confrontational adversarial and overly legalistic nature that the Claimant sent in this case. It is in our view apparent that the Respondent wish to hear his grievance and get to the bottom of the accident and that it was the Claimant essentially who **threw out** the barriers to that process being successful. It is unfortunately in our view a sad case where the Claimant has not been well served by the letters which were sent. We do not mean this to be taken in any way as a finding that the Respondent behaved badly to the Claimant because he had asserted his statutory rights. We think that it did not. Rather we think that the Claimant for whatever reason in becoming overly confrontational or adversarial himself put in place barriers to the resolution of a relatively straightforward internal employment dispute. Ultimately it was the Claimant's conduct and not that of the Respondent which led to the employment relationship breaking down. [Notes on evidence Claimant appeared to us and presented to us as a witness who appeared not to be familiar with what his case was and gave the impression in evidence that he was relying on what he had been told by someone else. Nor did we find convincing his explanations in connection with the car crash. The Claimant appeared to us to take a great deal of care with significant pauses before answering these particular questions and in particular whether he had in fact damaged the other employee's vehicle.

46 By contrast we found the Respondent's witnesses to be reliable and credible and in particular we were impressed by the evidence of Mr Radzynski. As for Mr Ludwiczak's submissions once we make allowance for the fact that he is not legally qualified, his written submissions displayed many of the characteristics which we have described in the letters sent by the Claimant during the grievance process. In

particular we were not assisted by Mr Ludwiczak's reliance upon cases such as *Farnaud Spink* or any of the other cases specifically relating to dismissal for conduct reasons. This is not a case in which the Claimant was expressly dismissed. Nor have we found was there any conduct by Mr Radzynski on 11 December which was consistent with a dismissal. Quite simply the cases relied upon by Mr Ludwiczak are not relevant to the issue which we have to decide. Firstly was there in fact a dismissal not whether such dismissal is fair in all of the circumstances of the case. The test of reasonableness within section 98 are not applicable to the test of dismissal to be considered as section 95. Whilst we accept that in principle failure to follow an internal grievance procedure and/or failure to deal promptly and reasonable with grievances may amount to a breach of the implied term of the Claimant's employment contract sufficient to warrant or amount to dismissal. We remind ourselves again that the failure must be of such magnitude as to amount to a repudiatory breach when taken either individually or cumulatively that is not the case here.

47 We note the Claimant relies on the fact that his recruitment was conducted entirely in Polish and that therefore the Respondent must have known that he did not speak English. As set out above we find that Mr Ashford was not familiar with the Claimant on a day-to-day basis and that the content of the Claimant's letters gave rise to no such concern. The reason is not entirely clear to us. Mr Ludwiczak addressed us on the Claimant's contractual arrangements and whether or not he had the employment status of employee. This is not one of the issues to decide and we decline to do so.

48 We also declined Mr Ludwiczak's invitation to imply into the contract a term to

override the express term reserving discretion to the Respondent. It was our view that an implied term cannot override an express term in such circumstances although we accept and have found that an express term is nevertheless subject to the implied term of trust and confidence and must be exercised in a manner which is not capricious.

49 We note finally Mr Ludwiczak sought to add a further PCP of not permitting a grievance to be dealt with in writing we are not satisfied that there was evidence that was a PCP in fact applied. It also sits ill with the Claimant's primary case that he wish to have a hearing and that no translator was appointed. For all of these reasons therefore we reject the Claimant's case in its entirety. It fails and is dismissed.

Employment Judge Russell

6 September 2017