EMPLOYMENT TRIBUNALS

Claimant: **Mr M Choudhury**

Respondent: **Castleplus Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On **19th & 20th November 2020 and (in chambers) 15th December 2020**

Before: **Employment Judge McLaren**
Members: **Mrs P Alford**
Mrs G McLaughlin

Representation
Claimant: In Person
Respondent: Mr T Gillie, Counsel

JUDGMENT

The unanimous decision of the tribunal is that:

1. **The claim for harassment on the grounds of race and/or religion fails.**

2. **The reason for dismissal was redundancy.**

3. **The claimant was unfairly dismissed. The claimant is awarded £500 for loss of statutory rights. No other compensation is awarded.**

4. **The employer's counterclaim succeeds, and the claimant is ordered to pay the respondent £144.**

5. **The claim for breach of contract by the claimant succeeds in relation to life insurance and accident insurance. No loss arises from this failure, so no award is made.**

6. **The claim for breach of contract in relation to unpaid pension contributions succeeds, but the sum has been paid in full by the respondent.**

7. The claim for breach of contract in relation to failure to provide private health insurance with Aviva succeeds. No loss arises from this failure, so no award is made.

8. The claim for breach of contract in relation to a 3% pay rise and bonus do not succeed.

9. The claim for holiday pay does not succeed.

REASONS

Background

1. We heard evidence today from the claimant on his own account and from Mr N Weisberger and Mr K Bruzas on behalf of the respondent. We were provided with an electronic bundle of 561pages.

2. In reaching our decision we have considered all the evidence we heard and those parts of the documents in the bundle to which we were directed. We were assisted by detailed written submissions from both parties. The claimant's written submissions identified the relevant parts of the evidence for us and directed us to particular parts of the bundle and the recording. The respondent's submissions similarly detailed the evidence for us and we carefully considered all the points made.

3. We have also listened to those parts of the audio recording of the redundancy consultation meeting to which we were directed by both the respondent and the claimant.

Issues

4. The issues in this matter had originally been set out at the preliminary hearing of 17 December 2019. Subsequently, the claimant had failed to pay an ordered deposit in relation to his claim for discrimination relating to race/religion but continued to bring a claim for harassment on these grounds.

5. The issues list is therefore as follows:

Unfair dismissal

7. What was the principal reason for dismissal and was it a potentially fair one (see sections 98(1) and (2) of the Employment Rights Act 1996 ('ERA')?

- 7.1. The Respondent asserts that the reason was redundancy or in the alternative some other substantial reason namely a business reorganisation.

- 7.2. The Claimant argues there was no genuine redundancy situation but contends it stems from his earlier rejection of a new contract and/or race and/or his religion.

8. If the reason was redundancy, was the dismissal fair or unfair, see section 98(4) ERA in particular did the Respondent:

- 8.1. reasonably consult with the Claimant;

- 8.2. reasonably respond to the Claimant's queries during the process;

- 8.3. create a reasonable pool for selection;

- 8.4. reasonably consider alternative positions. The Respondent contends that it suggested the Claimant apply for the new Estates Manager role but he refused to do so.

Remedy for Unfair Dismissal

9. If the dismissal was unfair ought the Claimant to be reinstated?

10. If the dismissal was procedurally unfair, should any adjustment be made to any compensatory award to reflect the possibility that the Claimant would have been dismissed had a fair and reasonable procedure been followed? The respondent contends that the Claimant would have been dismissed because role of Building Manager no longer existed and he did not wish to apply for the Estates Manager role.

11. Would it be fair Gust and equitable) to reduce the amount of the basic award because of any blameworthy conduct before the dismissal? And, if so, by how much? (see section 122(2) ERA). The Respondent contends that the Claimant had committed gross misconduct or misconduct by retaining or concealing money that belonged to the Respondent and/or by using it to buy presents for tenants, which were unauthorised.

12. Did the Claimant, by blameworthy actions, cause or contribute to the dismissal? If so, by how much, if at all, would it be fair to reduce the amount of any compensatory award? (see section 123(6) ERA)? The Respondent repeats its contentions above.

EQA, section 26: harassment related to race/religion.

16. Did the Respondent engage in conduct as follows:

16.1. Dismissal

16.2.Not being provided with information about the claimant's contract upon him requesting it by email in about January 2019

16.3 Offering a contract that did not preserve his contractual rights upon the TUPE transfer. The respondent argues that the offered contract did so and was, in fact, more beneficial

17. If so was that conduct unwanted?

18. If so, did it relate to the protected characteristic of race or religion?

19. Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Breach of Contract

Notice

20. The Claimant's notice period was 6 weeks and that he was paid basic pay in lieu of that notice. The Claimant claims that during this notice period he was also entitled to:

20.1. a 3% pay rise and a bonus payment of £1695.00. The Respondent disputes this on the basis that those payments were discretionary;

20.2. employer pension contributions. The Respondent contends it has paid the relevant pension contributions to Aviva. (*)

Other Breach of Contract

21. Was the claimant entitled to a 3% pay rise from 1 April 2019 to 15 April 2019?

22. If so did the Respondent fail to pay this?

23. If so, what is the Claimant's loss?

24. Was the Claimant contractually entitled to the benefit of private health insurance; life assurance; 4 x death in service benefit from 1 September 2019?

25. Did the Respondent fail to provide the Claimant with these benefits? And if so, for what period?

26. If so, what financial loss did the Claimant suffer, if any?

Employer's Counterclaim

27. Was the Claimant subjected to the following contractual terms:

- 27.1. at 7(3)(iv) of his contract not to use any information coming to his knowledge during his employment with the Respondent for his own advantage;

- 27.2. the implied term of fidelity.

28. If so did the Claimant breach those terms by:

28.1. refusing to return the Respondent's information so that it could access its email server; the Claimant denies this. He submits that he provided the information to Claire Baker and to Modern Networks in about January 2019;

28.2. in April 2019 deleting the Respondent's email facility and/or the server before a transfer of information to Modern Networks could take place. The Claimant denies he did so.

29. If so, did the Respondent suffered the following losses: 29.1. £144 for a new domain name; 29.2. £480 for IT services.

Unpaid annual leave - Working Time Regulations

30. What was the Claimant's leave year?

31. How much of the leave year had elapsed at the effective date of termination?

32. In consequence, how much leave had accrued for the year under regulations 13 and 13A of the Working Time Regulations 1998?

33. How much paid leave had the Claimant taken in the year?

34. How many days remain unpaid?

35. What is the relevant net daily rate of pay?

36. How much pay is outstanding to be paid to the Claimant?

Remedy

37. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

37.1. Did the Clamant mitigate his loss.

37.2. Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

37.3. Did the Claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

6. The claimant's witness statement was some 48 pages (his total statement was 52 pages at this included his schedule of loss). This contained his evidence on a number of matters that were not within the issues list, for example a complaint of paragraph 2.8 about JD Wood's legal status and complaints about disclosure of information to individuals engaged by the respondent. While we read all of the claimant's witness statement, we make no findings of fact on these points. We have been guided by the issues list together with those parts of the narrative on the claimant's ET1 which can form the basis of a legal claim that can be brought before this tribunal.

Finding of facts

Background

7. The claimant was originally employed by Cushman and Wakefield and his employment transferred by virtue of the Transfer of Undertakings (Protection of Employment) Regulations so that he became employed by the respondent on 1 September 2018. Throughout the period of his employment with the respondent he was the building manager for a property known as the Relay Building.

8. We were told by the respondent's witnesses that the respondent's business trades as John D Wood and are commercial property consultants. The respondent actively manages approximately 80 different properties. The Relay Building was purchased by the respondent in 2018 and they began managing the building since 1 September 2018. It has a ground floor consisting of three units

occupied by retail tenants, six floors of commercial office space and 15 residential floors above.

9. The management of the building includes its maintenance, security, and reception. We were told that the respondent is a small company with 14 employees. There are five directors. Mr Bruzas is the finance director and his responsibilities included looking after the service charge for this building. Mr Weisberger's statement said that he was the head of facilities management and was the claimant's day-to-day manager.

10. During the hearing, Mr Weisberger confirmed that he is not a direct employee of the respondent. He is engaged via his own limited company and he told us that he provides a number of services to the respondent. It would not be correct to describe his title as head of facilities management, although it would be correct that his role for the respondent included this.

11. Mr Weisberger explained that his position was more senior to that of building manager, the role the claimant undertook, as he was involved across the respondent's property portfolio at a more strategic level.

12. Clare Baker, who was also a self-employed consultant and not a direct employee of the respondent, reported to Mr Weisberger and also oversaw the claimant's work in relation to the building performance. As she was also in the line of management, the respondent tells us that she was provided with employment contract information for the claimant.

13. As noted above, the claimant has made a number of complaints about the sharing of his information with individuals who are not employed by the respondent but who are carrying out tasks for it via contracts with their limited companies. This complaint is not one of the legal issues before the employment tribunal. In any event, we note that there is nothing incorrect or improper with the respondent engaging individuals to provide services to it other than through a direct employment model. If the respondent's data use policy identified that personal data might be shared with such individuals, and this was necessary for the performance of the claimant's contract, it would be an appropriate thing to do.

Breach of contract

14. The claimant considered that the respondent did not honour the terms of his transferred employment contract. The agreed issues list identified a failure to pay a pay rise, failure to provide a bonus payment, failure to provide private health insurance with Aviva and a failure to provide life insurance. The issues list also included a failure to pay relevant pension contributions. The ET 1 also referred to a failure to provide accident insurance.

15. The claimant took us to his offer letter in which a number of terms were stated. This included the provision of life insurance at four times salary on death, accident insurance, a discretionary bonus and single private medical cover specified to be with Aviva, together with membership of the company pension scheme with an employer contribution of 7 ½% The offer letter did not refer to annual pay reviews.

16. The Cushman Wakefield contract was also included in the bundle. That provided for an annual salary review, although not a guaranteed salary increase.

It also referred to a discretionary bonus scheme which would be payable based on a number of factors which included personal performance, company performance and the general performance of the property. The contract, under the heading pensions and insurance, specified that the claimant would immediately join the company's non-contributory pension scheme, it's life assurance and accident insurance. It did not specify in the contract that he was entitled to medical insurance.

17. The contract of employment did not contain any clause which displaced the offer letter. The offer letter referred to full details of the terms and conditions being provided in the contract. We find that the offer letter forms part of the contractual terms.

Death in service

18. The respondent accepted that it had not organised a death in service benefit. Mr Bruzas incorrectly thought that employer's liability insurance covered everything. This insurance was not therefore put in place during the claimant's employment. It is self-evident, as the claimant accepted that he has no loss under this policy. He suggested, however, that the policy may have had additional terms from which he could have benefited during his employment. We find that this is most unlikely. We find that while there was a breach of contract there was no loss arising from it.

Company Pension Plan.

19. It was accepted by both parties that the company pension plan was underpaid as the respondent did not set up regular monthly payments. It was also agreed that the underpayment was settled by the respondent prior to this hearing. There is therefore no pension loss arising.

20. The claimant in his schedule of loss sought compensation for the loss of value to his pension fund because there was a delay in investing monies because they were received late. This claim did not form part of the agreed issues. The ET1 stated that the claimant was claiming for unpaid pension contributions. It does go on to refer to the respondent needing to "pick up the costs related to the share price which he would benefit from", however, it is not clear from the pleadings what the claimant means by this. A previous Employment Judge had agreed the issues list with the parties and had not included loss of investment growth. The claimant had not raised any point on this but agreed the issues list and confirmed the list was accurate at the start of this hearing. We conclude that it was not set out in the pleadings and we therefore make no finding on this point.

Private medical insurance

21. It is a clear term of the claimant's contract (very unusually) that the provider of the medical insurance is specified as Aviva.

22. We heard from Mr Bruzas that only two employees of the respondent have private medical insurance and those are himself and the other senior director. He told us that he put the claimant on the existing Axa policy that the

company had for the two directors to ensure that the claimant was covered. He told us he did this from about October. This was confirmed at page 129, being a letter from Axa showing that the claimant has been added to the policy and this is with effect from September 2018.

23. Mr Bruzas also told us that had been advised by the insurance provider that they had written to the claimant at his home address to tell him this. The claimant said that he was not aware he had this cover and became aware of it only after he left employment. The bundle contained. handwritten notes at page 131 which appear to reflect a conversation with the claimant in which he is advised the cover has been arranged. Whether the claimant was, or was not, aware, we find that medical insurance was in place. It was arranged in October and back dated to September 2018.

24. The claimant was extremely keen that he retain cover with Aviva rather than be provided with it from a different insurance company. This was because he had pre-existing medical conditions relating to his knee and his back for which he hoped cover would be extended. The claimant investigated the options and is it clear from the bundle that some effort was made to see if continuation of cover from one scheme to another could be provided. This proved not to be possible and on 29 January 2019 the claimant confirmed that he wants to proceed with the Axa cover. He would use the NHS for the problems of his knee and his back and knee.

25. He did agree to varied cover in January, and we note there is a contractual right to vary the contract on one month's notice, but this did not assist with issues that arose before that variation. Prior to the start of February, the company had not honoured his contractual right to cover with Aviva and this led to a reduction in benefit and certain conditions not being covered. Nonetheless, the claimant did not incur any cost arising from this because he did not pay for any treatment that arose from the difference in cover between Aviva and Axa, choosing to use the NHS.

Accident insurance

26. The claimant's witness statement and his schedule of loss also referred to failure to provide accident insurance. We note the claimant did not have an accident at work. Mr Bruzas accepted, however, that he had only put in place employer's liability insurance.

Pay rise and bonus

27. We find that the terms of the contract are clear on the subject of a pay rise. There is a review obligation, but no obligation to award a rise. In the circumstances in which the company was seeking to save money by making redundancies, not providing pay rises is a reasonable step. As this is not a discretion, the question of reasonable exercise of a discretion does not arise.

28. The claimant confirmed that he had not received a bonus in 2018. He accepted that the bonus was discretionary, and it was subject to a number of factors. He confirmed that it was reasonable that a company that was looking to save costs would not pay a bonus. He considered his performance would have merited a bonus as there had been no concerns with his performance.

29. The respondent's position was that there had been issues with the claimant's performance and that these had been discussed with the claimant. It was an agreed fact that the claimant had been suspended for conduct and was likely to be subject to a disciplinary procedure had he not been made redundant both for a letter he wrote to tenants and in relation to missing money. We find that this is, as the claimant accepts, a discretionary bonus and therefore not paying it in circumstances in which the company was seeking to save costs and there were conduct concerns was a reasonable exercise of discretion. It was not a breach of contract.

Other matters

30. As part of this litigation the claimant says he was provided with a certificate of the employer's liability insurance and policy document from which he could see that he would have been entitled to unlimited access to legal advice. This would have been extremely beneficial both during the contract dispute and the redundancy process. He was not made aware of this and was not able to make use of it. The claimant's evidence is that because of his medical condition the free support would been beneficial to him and could have avoided the redundancy situation.

31. The respondent submitted that the policy is to provide business related advice and not personal advice. It allows designated employees to take this advice, but it does not apply to personal advice. We agree with the respondent, but this was not part of the pleading for breach of contract and we therefore make no formal finding on this point.

Claim of harassment related to race/religion

32. Mr Bruzas explained that the respondent is a small organisation and likes to promote a team feeling. His statement said that religion or ethnicity was not a relevant consideration of the respondent's business. The bundle contained at page 435 details of the race and religion of the respondent's current direct employees. This shows that there are a number of staff from a variety of different ethnic or religious backgrounds.

Offer of a new contract of employment which did not preserve his continuity of employment

33. In early January 2019 the claimant was offered a new contract with JD Wood as the employer. The document was at bundle pages 71 to 87. It showed continuous service starting from 1 September 2018 and did not, as it should have done, acknowledge the claimant's continuity of employment.

34. Mr Bruzas told us that it was the respondent's standard practice to ask all staff who transferred from other organisations to sign new contracts in these terms. The claimant was not treated any differently from anyone else. The terms were an improvement on the claimant's previous contractual conditions in that it offered one additional day's holiday.

35. He was asked why the contract only referred to the start date with the respondent. He told us that the company's standard contract had been sent out and therefore their standard drafting. He thought that the contract should reflect the date on which the claimant started to do the new role with the respondent. He

understood that continuous employment transferred under the Transfer of Undertakings Regulations and so the claimant had continuous service. This was acknowledged by the company when the claimant was made redundant as his redundancy pay was calculated based on his service with his previous employer as well.

36. We accept the respondent's evidence that the form of contract provided to the claimant was the standard form and the opportunity for him to sign it was regarded by the respondent as a positive thing. There is no evidence that the draft of the contract was intended to remove the claimant's continuity, and, even if it had been, that this was based on the claimant's race or religion.

37. By an email of 25th January, the claimant indicated he would not sign the new contract as he was happy with this current terms.

Not being provided with information about the contract he requested by email in January 2019

38. The claimant also raised a number of questions and asked for information about his employment. The issues list referred to an email request in January 2019. The claimant made a request for information on 29 January and a further one on 30 January. An answer to his request for information was provided by Mr Bruzas on 8 February 2019. As was explained in correspondence at the time, Mr Bloom, who was needed in order to answer some of the questions, was suffering a family bereavement and was absent for a few days.

39. We conclude that all of the legal information the claimant asked for was provided by the company. This was all the information about the contract that the claimant requested. While he did raise some other questions, for example about the genuineness of his payslips, whether pension contributions had been paid et cetera which do not appear to be answered, there is no evidence that any failure in providing this information was because of the claimant's race or religion.

Unfair dismissal/dismissal as harassment

Invitation to consultation meeting

40. The respondent's redundancy policy was included in the bundle. It provided that the respondent would seek to avoid compulsory redundancies were ever it could and set out some steps it might consider, although it concluded that not all the steps might be appropriate in every redundancy situation. Where compulsory redundancies could not be avoided then the policy made the following commitments.

> "Where more than one person is at risk of redundancy, if this is applicable the criteria used to select those employees who will potentially be made redundant will be objective, transparent and fair and based on the skills required to meet our existing and anticipated business needs.
>
> We will continue to look for alternative employment for redundant employees where employees where it is reasonable to do so and inform them of any vacancies that we have until their termination dates. The manner in which redundant employees will be invited to apply for and be interviewed for vacancies will be organised depending on the

> circumstances existing at the time. Alternative employment may be offered subject to a trial period where appropriate.
>
> Employees are entitled to be accompanied at any meeting in connection with this redundancy policy by a work colleague or a trade union representative."

41. On 6 March 2019 the claimant was sent a letter (together with a copy of this redundancy policy) warning him of possible redundancy. The letter was signed by Mr Bruzas who confirmed in his witness evidence that he was the decision-maker.

42. The letter explained that the role of building manager had been created in March 2015 in order to give dedicated building management and support to one building, the Relay Building. The respondent had carried out a review of its planning and budgeting activities which included reviewing the need for this position.

43. The letter went on to explain that following acquisitions of other properties the respondent considered that property management services could be provided more effectively, both in terms of cost and delivery, by one head office-based manager role. The respondent proposed creating a new role of Estate Manager to be based at head office travelling to multiple sites and responsible for management of four buildings.

44. The letter explained that considering the overall financial situation of the organisation and what it described as the substantial inefficiency of maintaining the position of a Building Manager at one specific building, it was proposed that the position of building manager at the Relay Building was at risk of redundancy. The claimant was warned that the role could be made redundant. The letter referred to exploring ways of avoiding compulsory redundancy including offering alternative employed elsewhere with the company or applying for the estate manager role.

45. The claimant was, at the time, on annual leave and he replied on 15 March asking for 31 days to consider the position. Mr Bruzas replied on the same day, scheduling the meeting for 25 March. His reply stated he considered this was sufficient time period to allow the claimant to consider the position. The claimant was advised that he could bring a trade union representative or colleague to the meeting. The claimant again replied by return accepting the offered date of the meeting. We find that the claimant accepted the timing of the redundancy meeting and raised no issues at that point that this was not the requested 31 days delay. We also find the timing of the meetings was reasonable. He indicated he wanted to bring a colleague but was unable to identify who was employed by the respondent organisation and therefore asked for details.

46. Mr Bruzas sent a further letter to the claimant dated 21 March. It confirmed that the respondent might not be able to answer all of the claimant's questions in the meeting as this will depend upon the level of detail, but in any event, they would then be followed up. He advised the claimant that it was not appropriate to send him a list of all the respondent's employees but that he was free to ask any of the staff that he knew to accompany him. We find that the claimant was able to

bring a work place colleague if he chose to do so. The claimant sent a detailed list of written questions the following day.

47. While it was the original plan that Mr Bloom would be attending the meeting with Mr Bruzas, he was not available, and Mr Weisberger attended as notetaker. He was not a decision maker. While the claimant has objected in his witness statement to Mr Weisberger's presence, there is nothing inappropriate with the respondent having a notetaker there. The respondent is not limited to having only employees present.

48. While there was some confusion about this because the respondent's ET 3 had referred to there being other building managers, it was clarified by the respondent's witnesses that this was not the case. The claimant was the sole building manager dedicated to one building. While there were other staff concierge/receptionists who were assigned particular buildings, they had a different and more junior role. This redundancy proposal, therefore, affected only the claimant as he held a unique role in the respondent organisation. We accept the respondent's evidence on this.

Letter to tenants

49. Having received the invitation to the redundancy consultation meeting, on 15 March the claimant sent a letter to all the tenants in the Relay Building. This letter advised the tenants that the respondent was considering making the claimant's position redundant, suggests that he would ask the respondent to reduce its management fee in order to save costs, sent a staff structure with the email, advised the tenants that redundancy costs could be passed to them and asked for their views on the removal of a dedicated Building Manager.

50. Mr Bruzas was copied into this email and was immediately concerned that the claimant had written it without any authority and had sent out confidential information about the respondent which was potentially damaging. Once this email was sent the information was in the public domain which had a negative effect on other staff who became concerned about whether that would mean their role could be selected for redundancy.

51. The claimant was suspended on 18 March and invited to an investigation meeting by letter dated 21 March from Mr Weisberger. The suspension letter set out a number of allegations.

52. The claimant was then invited to attend an investigation meeting and was sent a further letter. This contained additional allegations. The investigation meeting took place on 25 March, just prior to the redundancy consultation meeting. Very brief notes were taken at this meeting.

53. The disciplinary matter went no further as the redundancy process then took over. Mr Bruzas witness statement states that he is unable to say for sure what would have happened had the claimant not been made redundant and the disciplinary proceedings had reached their conclusion. It was his evidence that it was likely the allegations would have been upheld and, in those circumstances, it is likely the claimant would have been dismissed.

54. For the reasons set out in our conclusion we do not need to consider the issue of contributory fault based on conduct and have not done so.

The redundancy consultation meeting

55. The notes of the redundancy consultation meeting are also extremely brief. The claimant, however, made an unauthorised recording of the meeting and we were directed to various parts of that recording.

56. It is clear from the recording that the claimant attended the meeting with a list of questions which he asked. These appear to be identical to the written questions that he told us he had sent in advance of the meeting on 22nd March and sent again on 11 April in a word format in answer to a request for the document to be provided in this format by the respondent. We find that the claimant had every opportunity to ask questions and to challenge the respondent's rationale for identifying the role of building manager as potentially redundant. We find that the claimant's questions were answered prior to his redundancy being confirmed. The alternatives suggested by the claimant included asking ACAS to help find a solution, the respondent paying for the claimant to take legal advice to challenge the redundancy and reviewing the use of self-employed individuals.

57. We find that there was no obligation on the employer to ask ACAS to test its redundancy rationale and certainly no obligation to fund an employee's legal fees to challenge the scenario. We find that any failure by the respondent to act on these suggestions cannot make the process unfair.

58. The rationale given at the meeting and later confirmed in writing to the claimant was consistent with the explanation given in the letter inviting the claimant to this meeting and with the evidence given by Mr Bruzas to us.

59. He explained that removing the post of building manager, even though an Estates Manager was employed, would save costs because the tenants of the Relay Building would then be charged only one quarter of the salary of the Estates Manager instead of 100% of the Building Manager salary. There will also potential economies of scale across the portfolio of properties. We accept the respondent's evidence that the cost saving rationale that the respondent was seeking to achieve could not have been achieved by reducing consultancy staff. Failure to consider the removal of self-employed staff does not in these circumstances make the process unfair.

60. We find that the claimant was given sufficient details of the rationale behind the proposed removal of his role and that the respondent's actions were reasonable in all the circumstances.

61. One point of contention was whether the respondent had offered suitable alternative employment. Mr Bruzas told us that the claimant was asked to apply for the role of Estate Manager. He confirmed that this was not offered to the claimant as of right because there was another internal individual who was interested in the position and they also wanted to test the outside market to ensure that the best person was appointed to the role. He confirmed that the new role was at the same salary as the claimant was paid as Building Manager, the largest property that would be managed in the new portfolio was the property the claimant managed and he accepted that the claimant had extensive experience from previous roles from other organisations of managing multiple properties.

62. The extremely brief notes of the redundancy meeting have the claimant state that Mr Bruzas is aware of two aspects of the claimant's health and he won't be able to do the job. The recording has the claimant saying that he would be unable to do the role for these reasons. It also records the claimant saying that if he was forced to take the job, he feared that he would be dismissed. The respondent considered that the claimant had refused to consider this position, and this was recorded as an agreed fact in the summary of the case management held on 17 December 2019. The claimant when it was put to him that he had agreed he had refused to consider the position in front of Employment Judge Moore said that he could not recall.

63. The claimant included in the bundle his own notes of the redundancy hearing in which he says this about the position:

"MC stated that he suffers from ADHD, knee and back pain which will not allow him to effectively manage multiple properties. MC stated that even if he takes this on or is forced to take this on then he will not be successful, and it will end up with his dismissal."

64. The claimant in his witness statement made the point that he had not been provided with the job description in advance of the meeting was only shown it during the consultation meeting. He was adamant that no formal offer was made to him and he would have been willing to consider the position.

65. Having listened to the recording and considered the claimant's own notes of the meeting, we find that it was reasonable for the respondent to take the claimant's words in this meeting as an indication that he was not willing to apply for the role. On the recording he tells the respondent they are already aware of his position and explains that a medical condition makes it impossible for him to manage multiple buildings. This was the critical point of the new role.

66. Mr Bruzas confirmed that the Estate Manager role was advertised. They appointed an individual to that role at around the same time as the claimant's redundancy was confirmed.

67. On 3 April the claimant was sent a letter identifying that he was provisionally selected for redundancy:

"I attached the minutes from the consultation meeting including replies to your list of questions.

As you know from the consultation meeting held on 25 March the Company has taken steps to try and avoid a compulsory redundancy where possible, including exploring alternative employment for you. You stated at that meeting that you did not want to apply for the new Estates Manager Role and we have confirmed at today's date there are no other vacancies elsewhere within the Company but we will keep that situation under review. I also note that you did not have any other proposals to avoid this redundancy. These steps are set out in the attached minutes.

Unfortunately, there are no other steps to avoid the need to make your role of Building Manager role at The Relay Building redundant and your role has been provisionally selected for redundancy."

68. The letter concluded that if the claimant wanted another meeting then it would be arranged. The claimant responded on 11 April. Again, he mentioned the Estate Manager role and his medical conditions but does not dispute the respondent's statement that he does not want to apply for the role. We find that this again makes it reasonable for the respondent to conclude the claimant was not interested in this role. The claimant also says that he is unable to provide any alternative proposals to redundancy because the respondent has not answered his questions. He concludes his letter, not by taking up the respondent's offer of another meeting, but by saying that if the respondent wishes to arrange another meeting to discuss anything, they should let him know.

69. On the same day, the claimant was sent a notice that his employment would be terminated for reason of redundancy. The claimant's employment came to an end on 12 April. He was advised that he could appeal against this decision up to 26 April.

70. On 26 April, that is the last day on which the appeal could be lodged, the respondent sent a formal written answers to the questions the claimant had raised during redundancy process. We have already found that the respondent had answered these during the meeting itself. The claimant complains that he was unable to make a counter proposal because the respondent did not disclose information.

71. We conclude that the respondent provided reasonable responses to these questions and where it did not provide the information requested this was not relevant to the proposal and the provision of the information would not have assisted the claimant in coming up with an alternative. This is a situation where a unique role was proposed to be removed in order to save costs incurred by the tenants of one building and the organisation overall. Information as to how other roles were structured and how the operation would be running in future would not assist the claimant in challenging this proposal.

72. The claimant appealed against his redundancy dismissal by letter 25 April. In this letter he states that he has not pursued a further meeting because the information that he requires from the respondent is outstanding. He also says that the position of Estate Manager had not been offered to him and he had merely said that it was not suitable given his circumstances. His letter concludes by saying that he wishes to be considered for the role. By this time, the respondent had already filled this role. This suggestion by the claimant that he is willing to consider the role is made after his employment has ended. Even in that letter the claimant states that the role is not suitable for him given his circumstances

73. The claimant was invited to an appeal hearing on 16 May. On 29 May 2019 the claimant submitted a grievance and the appeal hearing and grievance hearing were heard together on 6 June 2019 with the outcome letter on the redundancy appeal being sent on 28th of June and on the grievance on 2 July. Both were heard by an independent consultant and both were dismissed.

Employer's Counterclaim

74. The claimant accepted that his contract of employment contained a confidentiality clause which prevented him from using information had come to

his knowledge as part of his employment with the company for his own benefit. It was to be used for the company benefit only.

75. The claimant accepted that on 31 August after he left employment, he had deleted the respondent's email facility as the password access had not been changes as it should have been. It was agreed that this meant the accounts could not be reinstated and all prior email history was deleted and could not be recovered. The claimant confirmed that this was not his proudest moment but that he had done this because he was feeling angry and frustrated at the way in which he had been treated.

76. The respondent had incurred costs and the claimant agreed that this included £144 for a new domain name. The respondent also said that it incurred £480 for IT services. This invoice was at page 381 of the bundle and referred to cabin hire. The claimant in submissions suggested that this was for security to be on site. Mr Bruzas was uncertain what this invoice related to and was not clear that it did relate to the domain name. We find therefore that on the balance of probabilities it was not related to the domain name and the cost to the respondent of the claimant's actions was £144.

77. The respondent also brings a counterclaim that the claimant breached the terms of his contract by refusing to return the respondent's information. The bundle contained at page 386 an email from the claimant to Clare Barker sent in January 2019. This does show that Clare Barker has been provided with his password information.

Unpaid annual leave

78. In his schedule of loss, the claimant has specified that he was entitled 25 days annual leave in any holiday year which is the calendar year He had worked for 20 weeks in 2019 and had been paid eight days untaken holiday.

79. The claimant's employment ended on 12th April 2019 by which time he had worked 17 weeks of the year and so accrued 7 days leave.

Relevant Law

TUPE

What transfers?

1. Regulation 4(2) of the TUPE Regulations states that on the completion of a relevant transfer:

> all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred to the transferee — Reg 4(2)(a), and
>
> any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee — Reg 4(2)(b).

2. Certain rights and liabilities are expressly excluded from the principle of automatic transfer in the TUPE Regulations. These are:

> criminal liabilities

terms relating to occupational pensions

insolvency, and

continuation orders.

3. Regulation 4 allows a change to contractual terms that arise because of, or are related to the transfer in limited circumstances or where there is a contractual right to vary

5) Paragraph (4) does not prevent a variation of the contract of employment if—

(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or

(b) the terms of that contract permit the employer to make such a variation

Dismissal

80. A dismissal carried out solely or principally by reason of the relevant transfer will be rendered automatically unfair by Reg 7(1) of the TUPE Regulations. However, Reg 7(2) and (3) provides that Reg 7(1) does not apply 'where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer' ('an ETO reason'). Instead, the dismissal is, without prejudice to the reasonableness test in S.98 of the Employment Rights Act 1996 (ERA), deemed to be have been for redundancy (where it meets the definition of redundancy).

81. So, where an employer successfully shows that the sole or principal reason for dismissal was an ETO reason, the dismissal will not be automatically unfair under Reg 7(1). However, it might nevertheless be unfair under the general unfair dismissal provisions of the

82. The onus is on the dismissing employer to establish that a reason that appears to be connected to the relevant transfer is in fact an ETO reason

Fairness of a dismissal

83. Redundancy is defined in S.139(1) ERA The statutory words are:

'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —

(a)the fact that his employer has ceased or intends to cease —

(i)to carry on the business for the purposes of which the employee was employed by him, or

(ii)to carry on that business in the place where the employee was so employed, or

(b)the fact that the requirements of that business —

(i)for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'

84. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

85. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

> *"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

86. In Williams and Ors v Compair Maxam Ltd 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

87. The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:

a) whether the selection criteria were objectively chosen and fairly applied

b) whether employees were warned and consulted about the redundancy

c) whether, if there was a union, the union's view was sought, and

d) whether any alternative work was available.

88. We were referred by counsel for the respondent to a number of authorities on the question of the selection pool and suitable alternative employment including Banks City Print Limited v Fairbrother and others UKEAT/0691 /04/TM, Wrexham Golf Co Ltd v Mr G R Ingham UKEAT/0190/12/RN, Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA and Modern Injection Moulds Ltd. v Price [1976] I.C.R. We considered these and agreed with counsel's submissions on the effect of these authorities.

Compensation

89. Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) established the following principles: Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to

reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

90. The compensatory award may be reduced where the claimant's conduct has contributed to the dismissal, commonly referred to as "contributory conduct" or "contributory fault". The reduction can be anything up to and including 100%.

91. The basic award may be reduced where the claimant's conduct before the dismissal is such that it would be just and equitable to reduce the award. There is no need for the conduct to have contributed to dismissal or for the employer even to have known about it at the time of dismissal

92. Where the tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding" (section 123(6), ERA 1996).

93. Three factors must be present for a reduction of the compensatory award for contributory fault: The claimant's conduct must be culpable or blameworthy. It must have caused or contributed to the dismissal. The reduction must be just and equitable (Nelson v BBC (No.2) [1979] IRLR 346 (CA).

Contract issues

94. Where a pay award or a bonus is identified as discretionary in a contract of employment that is not the end of the matter. The employer must exercise its discretion in accordance with the implied term that it will not without reasonable cause in a way that is likely to or does destroy the relationship of trust and confidence.

95. In Clark v Nomura International [2000] IRLR 766 QB the High Court preferred a test of irrationality or perversity for determining whether the exercise by the employer of a contractual discretion breached the trust and confidence term. This was elucidated further in Braganza v BP Shipping Ltd [2015] ICR 449 SC, in which a two stage test is established: first to ask whether the employer had taken correct matters into account in exercising its discretion and then whether the decision was so unreasonable as to be a decision no reasonable decision maker could have reached.

96. Counsel for the respondent addressed the issue of the calculation of compensation in this way. “The compensatory principle which applies to the assessment of damages for breach of contract involves putting the innocent party in the position it would have been in if the contract had been performed ...There is no case, or at any rate none which was cited to us, in which the reason why a party is in breach of contract has been held to justify, let alone require, a different approach to the compensatory principle.” See Classic Maritime Inc v Limbungan Makmur Sdn Bhd [2019] EWCA Civ 1102 at [66] and [84]”

Harassment

97. Harassment Is defined at s 26 Equality Act 2010

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

98. It has 3 essential elements, unwanted conduct which has the prescribed effect and which relates to a protected characteristic.

Burden of proof

99. In Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to

prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

100. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

101. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for anexplanation is insufficient to get to the second stage: there still has to bereason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground(see B v A [201 O] IRLR 400, per Underhill Pat [22]).Therefore 'something more' than a difference of treatment is required.

Holiday pay

102. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1)

103. The calculation of annual leave for a part-time worker with regular working hours is relatively straightforward. Compensation related to entitlement to leave is set out in regulation 14

> 14.—(1) This regulation applies where—
> (a)a worker's employment is terminated during the course of his leave year, and
> (b)on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.
> (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
> (3) The payment due under paragraph (2) shall be—
> (a)such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
> (b)where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—
> where—
> A is the period of leave to which the worker is entitled under regulation 13(1);
> B is the proportion of the worker's leave year which expired before the termination date, and
> C is the period of leave taken by the worker between the start of the leave year and the termination date.
> (4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Conclusion

104. Applying the relevant law as we have set it out to our findings of fact we conclude as follows.

Harrassment

105. The claimant has identified three incidents which he says amount to harassment on the basis of his race or religion.We have found that he was provided with the information he requested in January 2019 about his contract.That is how the issue is put and on that basis there is no failure by the respondent. If the claimant intended the complaint to be wider and encompass other questions that are not related to his contract, we find that there is no evidence that any such failure was connected to his race or religion.The claimant has not provided anything more than his suspicion that this is the case.We conclude that it was not the case.

106. We have found that the new contract did not properly reflect the date of continous employment as it should have done, but we have also accepted the respondent's account that they make the same error for all.This was not because of the claimant's characteristics.

107. We have concluded that there was a genuine redundancy and the claimant was the holder of a unique role.His dismissal arose because he was not prepared to consider the only alternative role available.All the claims for harrasment are therefore dismissed.

Unfair dismissal .

108. We have found that there was a genuine redundancy and that the respondent followed a fair procedure. The claimant was given time to consider his response and we have found that his questions were answered and taken into account when the respondent made its final decision. We find that the redundancy was fair in these aspects. The respondent did reasonably consult with the claimant,reasonably respond the his queries during the process and create a reasonable pool of selection.

109. While we agree that there was only 1 vacant role that could have been suitable for the claimant, we conclude that the respondent did not reasonably consider alternative positions.It did not offer the claimant the role of Estate Manager which, on its evidence, we find would have been suitable alternative employment.The claimant was clearly well qualified to do this role and we also conclude it was more likely than not that he would have been the succesful candidate had he contended for it. We conclude that a reasonable employer would have offered the role, not merely invited an application and expected the claimant to compete for it against internal and external candidates.

110. We also find, however, that despite his statement in the appeal letter, the claimant had determined that this role was not one he wished to accept and on the balance of probabilities, we find that even if it had been offered to him he would have refused it. That is consistent with the position he took at the preliminary hearing in front of Employment Judge Moore. On that basis, we conclude that the claimant would have been made redundant, even if the

respondent had followed an appropriate procedure in the way in which it offered the alternative role.

111. As the case was part heard, having concluded this was an unfair dismissal we would generally list this case for a remedies hearing. In this case, however, we are able to make findings of fact based on the evidence we have heard in full which will avoid any further hearing and the time and cost incurred.Any compensatory award would be adjusted to reflect the chance that had a fair procedure been followed the claimant would still have been dismissed.

112. As we have concluded the claimant would not have accepted the suitable employment,it follows that a 100% reduction would be made from any such award. As the claimant has been paid statutory redundancy pay no basic award is due. We therefore award the claiamant £500 for loss of statutory rights .

Breach of contract

113. The claimant brings a claim for breach of contract. We have found that the respondent was in breach of contract and that it failed to provide health insurance with Aviva, did not put in place accident insurance or death in service insurance. No loss arises from these failures.

Counterclaim

114. The claimant has accepted the validity of the respondent's counterclaim and we agree that he did delete the email facility.We have found that there was a cost of £144 incurred.We have alos found that the £480 cost incurred does not relate to the domain name issue.We therefore order the claiamnt to pay the respondent £144 as it suffered that loss in having to obtain a new domain name.

115. The respondent's other counterclaims do not suceed, we have found the claimant did provide the information required

Holiday pay

116. The claimant complains that he was not paid sufficient annual leave. We have calculated that he has been paid all monies due and this claim therefore fails.

Employment Judge McLaren
Date: 16 December 2020