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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr M Budd

and

Respondent

Extra Digital Ltd

Held at Ashford on 10 and 11 January 2017

Representation

Claimant:

In person supported by

Mr K Budd (Father)

Respondent:

Mr T Fuller, Consultant

Employment Judge Morton (sitting alone)

WRITTEN REASONS FOR THE JUDGMENT PURSUANT TO AN ORAL REQUEST BY THE CLAIMANT

The claims and evidence

1. By a claim form presented on 12 April 2016 the Claimant, Mr Budd, brought to the Tribunal a claim of constructive unfair dismissal against the Respondent under section 95 (1) (c) Employment Rights Act 1996 ("ERA"). He also brought a claim that he was entitled to a 12 month notice period and was accordingly entitled to compensation for breach of contract. My oral judgment, delivered with reasons at the hearing, was that Mr Budd's claims failed and should be dismissed. Mr Budd made an oral request for reasons.
2. At the hearing Mr Budd gave evidence on his own behalf. The Respondent's evidence was given by Dr Cornish, the Respondent's owner and managing director. I also heard evidence on one discrete matter (the statement at page 211) from James Sarjeant, another of the Respondent's employees at the material time.
3. Each of the witnesses had produced written statements which I read before the hearing commenced and there was a bundle of documents consisting of

343 pages sections of which I also read before the hearing. References to page numbers in this judgment are to pages in that bundle. A small number of additional documents was handed up during the course of the hearing.

The law

4. S 95 (1)(c) ERA provides as follows:

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

5. I also had regard to the leading authorities on constructive unfair dismissal. In ***Western Excavating (ECC) Limited-v- Sharpe [1978] ICR 221*** the Court of Appeal said that to give rise to a constructive dismissal claim the employer's conduct must involve a repudiatory breach of contract: "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or would show that the employer intends to be bound by one or more of the essential terms of the contract, an employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed." The essential terms of the contract might include express terms, such as the agreement to pay a particular salary, or implied terms, principally the implied term of trust and confidence that exist in every employment relationship. Ordinarily a breach of the implied term of trust and confidence will amount to a fundamental breach that will entitle the employee to resign from employment. In ***Malik v Bank of Credit and Commerce International SA [1997] ICR 606***, the House of Lords considered what is meant by the implied term of trust and confidence. It decided that the term is breached when an employer "without reasonable and proper cause, conducts itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".
6. I was also required to consider Mr Budd's claim of breach of contract arising from his claim that he was entitled to 12 months' notice. The tribunal has jurisdiction to consider a claim of a breach of contract arising or outstanding on the termination of an employee's employment (Employment Tribunals Extension of Jurisdiction Order 1994 Article 3). It may award damages of up to £25,000.

The issues

Constructive dismissal

7. The Respondent had produced a draft list of issues that Mr Budd was given the chance to consider before the hearing commenced. The parties then agreed that the issues for the Tribunal to determine were as follows:
- (a) Can the Claimant demonstrate that he terminated the contract under which he was employed either with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the Respondent's conduct? The Claimant relies on the following as alleged breaches of the implied term of mutual trust and confidence:
 - i. The accumulation of projects with impossible deadlines from January 2015 to November 2015, specifically:
 - 1. The Embroidered and Printed Clothing Company project (started in January 2015);
 - 2. The Garment Printed Clothing project (started in April 2015);
 - 3. The Screen Print Essentials project (started in August 2015).
 - ii. Dr Cornish allegedly telling staff members that the Claimant was 'mentally ill'.
 - iii. The Claimant being told others might be made redundant if his performance did not improve.
 - iv. Being invited to a disciplinary hearing for working on other projects in working time and being invited to a disciplinary hearing with only two days' notice when others have not been disciplined for similar practices.
 - v. Failure to meet the terms of the Claimant's proposed resolution to his complaint.
 - vi. Breakdown in the relationship between the Claimant and Dr Cornish.
 - (b) If the answer to (a) is yes did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant having regard to the size and administrative resources of the Respondent and in accordance with equity and the substantial merits of the case? (s 98(4) ERA 1996).

Wrongful dismissal/breach of contract

- (c) What was the Claimant's notice period? (The Claimant asserts that it was 12 months, the Respondent asserts that it was one month).
- (d) If the Claimant was unfairly constructively dismissed was the Claimant dismissed without being paid for the requisite period of notice?

(e) If not is the Claimant entitled to be paid for either period of notice?

Findings of fact

8. Based on my assessment of the oral and written witness evidence and the documents made available to me at the hearing, I made the following findings of fact.
9. The Respondent is a web design, web development and marketing services business that was established by Dr Cornish in 2002. The Claimant, Mr Budd was employed as a senior web developer by the Respondent from 11 March 2013. He entered into a contract of employment (page 58) which provided for one month's notice of termination of employment (clause 10). He alleged, but was unable to prove by reference to any documents, that the notice period had been increased to 12 months by an exchange of emails, a matter denied by Dr Cornish. Dr Cornish agreed in September 2013 that the Respondent would pay the course fees for Mr Budd to undertake an MSc, through a salary sacrifice arrangement and would allow him eight hours off per week to undertake lectures and coursework. The agreement was confirmed in a letter at page 79 which provided that Mr Budd would work for the Respondent for a minimum of 12 months following the end of the course.
10. Mr Budd resigned from his employment on 2 December 2015. Following his resignation he started work relatively quickly as a freelance developer. He then brought claims to the Employment Tribunal on 12 April 2016 of constructive unfair dismissal and breach of contract.
11. In May of the year of his resignation, in his appraisal form (page 87-89) Mr Budd expressed general satisfaction with the work he was doing and in particular the work he had done on the project for the Embroidered and Printed Clothing Company. He also expressed satisfaction with the amount of autonomy he was being given. He said that he would like the company to start using more modern web design tools such as Laravel and that he found the compromise between quality and speed and between refactoring and testing a difficult aspect of his job. He accepted in that appraisal form that he did not always handle things in the right way, but he expressed clear aims and ambitions and evidently had a clear vision of how he would like his work to develop. He made no reference in that appraisal form to being overworked or to being set any unrealistic deadlines.
12. By June Mr Budd was beginning to complain about needing help (page 92) but he also accepted that he was "not a great multitasker". Dr Cornish responded to this particular request by asking other staff to give the Claimant and the other developers more time to themselves and more time to work uninterruptedly and to focus on their jobs.
13. I find that tensions as regards the work began to emerge in August 2015 (pages 98-99). I would characterise the exchange on these pages as a

difference of professional opinion between Dr Cornish and Mr Budd about how a task should be undertaken. The work being undertaken by the Respondent was complex and involved high levels of skill and expertise. It is not surprising that there might be differences of opinion and debate about how work should be undertaken. Then on 25 August Dr Cornish wrote to all staff raising concerns about certain pieces of work running late and setting out her reasons for her concerns (page 103). In her evidence to the Tribunal she explained that the Claimant in particular had a tendency to make tasks more complex than they needed to be and to do things in his own way rather than in the way that she had budgeted and planned for. Mr Budd maintained that Dr Cornish's skills were out of date and that she was no longer on top of the latest trends in coding practice. I was not in a position to say which of their respective views was correct from a technical perspective. I find however that Dr Cornish is an experienced professional in the field in which her business operates and has been running her own business since around 2002. I accepted her evidence of her credentials, including her ongoing role as an associate tutor in information management systems on the MBA programme at Warwick Business School. I did not accept Mr Budd's assertion that Dr Cornish's skills are out of date. I find that Mr Budd and Dr Cornish did not see eye to eye on how work should be done and as Mr Budd's confidence and knowledge increased he increasingly took issue with the way that Dr Cornish was running her projects. Even if I am wrong about this and Dr Cornish's skills were out of date, she nevertheless had the right to expect as the owner of the business that if there was a difference of view as to how work should be approached, Mr Budd would defer to her and her experience, her expertise and her methods. There were elements of the dispute between Dr Cornish and Mr Budd that had the characteristics of a power struggle, but as the employer Dr Cornish could reasonably expect to have the last word on how work should be conducted. I found from the documentation and her oral evidence that she had a generally collaborative approach and was not high handed or dictatorial.

14. I also accepted Dr Cornish's evidence that when giving fee estimates to clients she sometimes did so on the basis that the client would not have a product developed from scratch, but would sometimes, for a lower fee, commission a product that had been developed for another client which would then be customised to a degree to the client's specification. Although some of the evidence in the case involved technical details of web development work that it would be difficult for an uninitiated person to fully grasp, I find that as Mr Budd progressed within his employment and his studies was that he increasingly questioned Dr Cornish's methods and began to do things his own way, which was not always consistent with the method contemplated by the fee estimate. This caused projects to run behind schedule and over budget. This began to particularly manifest itself on the Garment Printed Clothing project, in respect of which Dr Cornish and Mr Budd were in dispute as to whether the timescales were unrealistic. Again I find that Dr Cornish was entitled to expect that Mr Budd would work in accordance with her instructions and guidelines and defer to her experience. To some extent because he did

not do so and wanted to work in his own way Mr Budd contributed to his own problems with pressure and deadlines, particularly as these evolved in the Garment project. A letter to Dr Cornish at page 108 from Jason Smith, another senior web developer employed by the Respondent, acknowledges problems with time estimates and suggests that some of the pressures might have arisen from the growth in the company and the need for better communication within teams. I find that what Mr Smith describes are issues that could beset any business providing services to clients against difficult client demands. Time estimates are an inexact science and can be a source of friction between businesses and their clients. Mr Budd accepted that he had contributed to the problems on the Garment project in his letter at page 157 (to which I return below).

15. Matters seem to have run smoothly for some weeks and there was then an email from Mr Budd to Dr Cornish at page 125 (28 October) that showed that the tensions resumed two months later. The email raises an issue about morale amongst the developers who were doing similar work to the Claimant. In particular Mr Budd raises concerns about his colleague James Sergeant and indeed about Dr Cornish herself who was working unusual hours at that time. He makes however no specific complaint about his own personal work situation or his own working hours although he does wonder if more back end development resources are going to be provided. Dr Cornish's response at page 126, sent the same day, described her concerns that developers are spending too much time on "the wrong stuff or fixing issues, or extra development work that we cannot sell and make money from. Again partly a management issue. I realise much of this has happened when I diverted my attention across to the marketing side". I find that her response was an open and collaborative one and there was no sign of relations between the two individuals at that point having deteriorated despite the differences of opinion about working methods. The email begins with thanks to Mr Budd for drawing the situation to her attention and ends with an invitation from Dr Cornish: "If you want to talk to me about this then give me a ring when convenient". In fact the Claimant only two days after that (30 October) went on to invite all staff, including Dr Cornish, to a bonfire and fireworks party at his house.
16. On 6 November Mr Budd wrote to Dr Cornish asking for a bonus for himself and for James Sergeant on the basis of the hard work they had been doing. Hence notwithstanding the issues alluded to in the correspondence on 28 October I find that the relationship was functioning normally at the beginning of November and that by asking for a bonus, Mr Budd was acting consistently with the employment relationship not having been fundamentally damaged at that point.
17. As November progressed further difficulties began to arise with the Garment project. There were various emails with the client explaining difficulties meeting the client's expectations (pages 138 and 141 are examples). Plainly the project was beginning to become very stressful for all concerned and I note that there was a Christmas deadline looming.

18. On 25 November Dr Cornish sent Mr Budd a set of instructions to be executed in time for the project to go live on Monday 30 November (page 148). I find that Mr Budd should have realised having read those instructions that they meant that the first two actions were the most important and that they should have been done well before the deadline given so that all other matters could be done on time. I also find that Dr Cornish unfortunately changed the deadline to early Sunday and did not show clearly that the Claimant had received notification of the changed deadline. Nevertheless I find that Mr Budd did not start the work until Saturday 28 November and was at fault for not having started it earlier, thereby compounding the problems that he encountered in trying to comply with it. I also note that on 23 November a company called Smuddle was incorporated by Mr Budd and Mr Alexander both of whom were its initial directors as shown at page 144. I find that Smuddle was involved in work running up to Black Friday on 27 November (pages 150-156), constituting evidence that the Claimant was not devoting all his time and attention to the Respondent's business in that week despite the pressure arising from the Garment project. When Dr Cornish discovered on Saturday 28 November, shortly before the deadline, that Mr Budd was late with the work and was "refactoring" rather than performing the task in the way that she had outlined on 25 November, she was justifiably concerned and she expressed that concern at page 163.
19. Mr Budd makes much in his claim of being asked at page 167 to call Dr Cornish at 22.58 on 28 November (a Saturday night) but I find on the facts that the Claimant was choosing to do the work that he had been assigned at this time and should not therefore have been surprised that Dr Cornish was contacting him about it. The Respondent operated a flexible working policy and although employees were required to work certain core hours they were at liberty to do the remainder of their working hours at times of their choosing. I find that on this occasion he had chosen to work out of hours over the weekend, at least in part because he had been occupied with his work on Smuddle in the days leading up to Black Friday. Mr Budd also knew or ought to have known that he was running up against the deadline and he could not therefore have been surprised, given the importance of the budget and the importance of the deadline to the client, at being asked to call Dr Cornish to explain what was happening, albeit in abrupt terms.
20. Two days earlier, on 26 November, around the time of the formation of Smuddle, Mr Budd had written to Dr Cornish (page 157) asking for an amicable agreement for a parting of the ways. In that letter he says "I fully appreciate the stress and pressure that Garment has placed upon us as a business and I know you are only ever looking out for everyone's best interests, and as I have alluded to already I do accept some criticisms for the outcome of the project". As noted, Dr Cornish had funded the Claimant's Masters Course in Computer Science against an agreement (as I understand the terms) that having completed the course he would work for at least 12 months to avoid having to repay any of the costs. I find that the Claimant was

looking a way of ensuring that he could move on from the Respondent's employment without having to repay the course fees or be held to the 12 month period and indeed in his evidence to the Tribunal he was explicit about that.

21. The setting up of Smuddle also suggests that Mr Budd was becoming interested in setting up his own projects and going his own way. A few days earlier on 12 November, Dr Cornish had twice found the Claimant during working hours apparently working on work for CampusLets, an organisation that shares the same premises as the Respondent but is an entirely separate organisation. She took no action at the time and accepted Mr Budd's explanation that he had been doing the work out of working time and that it was in any event unpaid work. However on 27 November Dr Cornish had begun to become concerned about the apparent lack of progress on work for the Respondent and in particular work on the Garment project. She was particularly concerned about the lack of progress whilst the Claimant was working at home on 26 November which was a Thursday and a day that Mr Budd would ordinarily have been in the office. She then discovered various retweets of tweets by Smuddle and found that some 20 of them that had been sent during working hours and after investigating she learned that that these related to a company that had been set up by Mr Budd. She also discovered a podcast posted on 25 November concerning Smuddle (although I accept that it is possible that the podcast was not created during working hours).
22. In response to Mr Budd's overture about leaving his employment Dr Cornish wrote to him on 27 November taking issue with some of his concerns (page 158). She did not want to lose his skills and I find that she regarded him as a very good developer and wanted to retain him in her employment. However by 29 November when the issue of the work for Garment had become critical, Dr Cornish had become sufficiently frustrated with the events of the previous week and particular the events concerning the time critical work over the weekend of 28 and 29 November, that she wrote a letter to Mr Budd inviting him to a disciplinary meeting on 1 December to explain himself (page 171).
23. The letter stated as follows:

"The areas I wish to address at the meeting with regards to your performance are:

- **Your poor performance with regards to producing agreed simple tasks to time. An example would be copying a database of data.**
- **Your continual refusal to undertake the work requested , instead of working on what you wish to.**
- **Your continual refusal to follow an agreed approach to the work.**

I have previously raised these issues with you on an informal basis.

The possible consequences of this might be a formal oral warning or a first written warning.

I also wish to address your use of company time for external projects, and work for other companies and businesses.

The possible consequences arising from this meeting might be a warning or it might be dismissal”.

24. Shortly after sending that letter Dr Cornish sent a second letter referring to Mr Budd’s non-work activities that had been done at least partially in work time and disclosing the fact that she was aware of the existence of Smuddle and of the possibility that he had been doing work for Smuddle in work time. She alluded to the impact on work deadlines and her desire for an explanation as well as her concern that there was another member of staff (Michael Alexander) involved. It seemed that Dr Cornish was trying to encourage Mr Budd to delete incriminating evidence about his activities to avoid putting her in a position in which she had no option but to terminate his employment (as she understood it).
25. The following day, 30 November, there was a meeting between Mr Budd and Dr Cornish of which there were no minutes. Mr Budd followed the meeting with the letter at page 176 setting out various matters on the basis of which he was contemplating bringing a constructive dismissal claim against the Respondent. Those concerns consisted of: unfair criticism, unfair pressure, unreasonable demands, unfair and unequal treatment and unfairness over the manner in which it was alleged that he was undertaking his own work out of office time. He also complained about the short time scale for the disciplinary hearing. He did not refer to Dr Cornish having mentioned his mental health to colleagues and nor did he make any mention of Dr Cornish having suggested that individuals employed by the company might be at risk of redundancy if adherence to deadlines did not improve.
26. He sought a “resolution” of this complaint and referred to the content of the previous day’s meeting which, as I have noted, was not minuted. I accepted Dr Cornish’s evidence that what he had asked for at that meeting was a written apology, although Mr Budd did not at any stage specify what that apology was to cover, and that he also wanted a pay rise. Dr Cornish gave a detailed response to the letter of 30 November at page 178 and agreed to both of those demands. Despite these concessions Mr Budd resigned from his employment on 2 December.
27. On 4 December he wrote the email at page 190 informing Dr Cornish that the previous day (3 December) two employees of the Respondent had emailed him to inform him that she had told them that Mr Budd was mentally ill. There was no prior reference to mental ill health in any of the correspondence or documentation.

Conclusions

28. In light of my findings of fact I reached the following conclusions on the issues that were agreed at the start of the hearing.
29. Turning first to the constructive dismissal and the various matters that it was

agreed that Mr Budd was relying on in alleging that the Respondent was in fundamental breach of contract entitling him to terminate his employment, the first issue is that of “impossible deadlines” in relation to the three projects referred to in the list of issues. I was not however shown any evidence of deadline difficulties with either the Embroidered project or the Screen Print Essentials project. I note that in his initial statement of his claim, in his ET1, Mr Budd made no reference to either of these projects and in his witness statement he made only passing reference to the Embroidered project, in the context of explaining that it was the project on which the Garment project was to be based. Screen Print Essentials was briefly referred to in his witness statement at paragraph 7 where he explains that the project began before the Garment project was complete and that the deadline set was in his view not a realistic one. There is no reference to either Embroidered or Screen Print Essentials in his letter of 30 November setting out his intention to bring a constructive dismissal claim and his grounds for doing so. I was taken to no evidence that showed that there were problems with the deadlines on either project that were causing particular difficulties for Mr Budd. I therefore conclude that Mr Budd has not shown that there were “impossible” deadlines with regard to either the Embroidered or the Screen Print Essentials project that would entitle him to complain that the Respondent had fundamentally breached his contract of employment, or indeed at all.

30. As discussed in my findings of fact there was a dispute of fact between Dr Cornish and Mr Budd about the timescales set on the Garment project. Although I did not uncritically accept all of the testimony of either witness - at times Dr Cornish had difficulty recollecting events, she occasionally exaggerated matters and occasionally contradicted herself - looking at the evidence as a whole as regards project planning, deadlines and timescales I preferred her evidence as to the sustainability of the timescales on the Garment project. I was persuaded by her evidence that many of the problems that the Claimant ran into arose not from the deadlines themselves being unreasonable but from the way in which he decided to go about undertaking his work, his inclination to do things his own way at the expense of timescales and, latterly, his allowing himself to become distracted by his own projects.
31. I also find that pressure and having to meet deadlines are a natural part of working life in a service industry such as that in which the Respondent operates and Mr Budd has not shown any conduct by the Respondent that would amount to a breach of the implied term in respect of the expectations placed upon him. I remind myself that the question posed by this aspect of Mr Budd’s complaint was whether the Respondent, in agreeing the work deadlines to which it agreed, was in fundamental breach of the express or implied terms of Mr Budd’s contract of employment. I accept that in principle an employer that consistently agrees unrealistic deadlines with clients and then coerces its employees into meeting them, might, through such acts of coercion, be in breach of the implied term. But I find no evidence that Mr Budd was being treated in that manner by Dr Cornish. The only remotely coercive email in the bundle in my view was the email sent on Saturday 28 November

demanding that Mr Budd call Dr Cornish immediately to explain what he was doing with the data and that email was in my view justified on that occasion. I do not accept that it was an express or implied term of Mr Budd's contract of employment that the Respondent would only agree to deadlines with clients that Mr Budd regarded as realistic. I conclude that to a large extent the pressure Mr Budd was experiencing was self-generated and attributable to his decision to undertake the work in a different way from that specified by Dr Cornish, as well as, towards the end of his employment, his becoming distracted by his own personal projects. He himself admitted that he had contributed to the difficulties with Garment. I therefore reject Mr Budd's assertion that the Respondent was in fundamental breach of his contract of employment by subjecting him to impossible deadlines in relation to the Garment project, or at all.

32. Mr Budd next relies on Dr Cornish allegedly telling staff members that he was 'mentally ill'. However he has not shown that at the time of his resignation that he was aware of Dr Cornish having made any comment about his mental health to any of his colleagues (and I make no finding as to whether or not she did make such comments as it is not necessary for me to do so). The email at page 190 in fact suggests the contrary, the clear implication of that email being that he discovered that comments had been made (if indeed they were made) only the day before the email was written, on 3 December. This was the day after he actually resigned and such remarks, if made, could therefore have had no influence of Mr Budd's decision to resign.
33. Mr Budd next relies on being told that others might be made redundant if his performance did not improve. In connection with this part of the claim Mr Sarjeant had written a short statement in April 2016 (page 211) that mentioned the redundancy issue and he gave oral evidence to the same effect during the hearing. On the question of redundancies his evidence was that on two occasions (of which there were no written records and he was unable to confirm the dates) Dr Cornish had implied that redundancies might result if deadlines were not met. I therefore accept that the Respondent said more than once that the failure of projects could lead to redundancies within the company. That would not be a wholly surprising thing to say as a downturn in business often does preface a loss of jobs. However I did not find any evidence that Mr Budd was specifically targeted with the responsibility for the success of the company in the way which he suggests. Mr Sarjeant's statement at page 211 and his oral evidence do not show any conduct by the Respondent that could amount to a breach of the implied term. An employer is entitled to communicate to employees the fact that the business itself and potentially jobs within the business may be at risk if certain contractual commitments cannot be met, as this would have an obvious impact on the ability of the organisation to earn fees and pay its staff. Mr Budd did not show that he was subjected to the threat that others would lose their jobs if he did not meet deadlines and he did not show any conduct by the Respondent in relation to this issue that would amount to a breach of his contract.

34. Mr Budd's next complaint contains three elements: being invited to a disciplinary hearing for working on other projects in working time; being invited to a disciplinary hearing with only two days' notice; and being invited to a disciplinary hearing when others had not been disciplined for similar practices.
35. Dr Cornish's decision to invite Mr Budd to a disciplinary hearing was not undertaken without reasonable and proper cause. Dr Cornish had concerns about Mr Budd not complying with her instructions, not working effectively to the deadline she had set and being distracted by his own projects. I find that she had reasonable grounds for all her concerns and at the time of the invitation to a disciplinary hearing I see no evidence that she had made up her mind about any of the matters referred to in the invitation letter. She simply wanted Mr Budd to explain himself and she was entitled to such an explanation. I am satisfied that there was no breach of the implied term in the way that Dr Cornish dealt with this issue. This is not to say that her handling of it was beyond criticism - it could be said that two days is short notice of a disciplinary hearing and a longer period would normally represent good practice, but on the particular facts of this case in which Dr Cornish considered that Mr Budd was acting in a way that represented a potential immediate threat to her business, she was justified in expediting the meeting. It was not an express term of Mr Budd's contract that he would be given a particular period of notice before a disciplinary hearing and the short period of notice did not amount to a breach of the implied term on the facts of this case.
36. As regards to the question of inconsistent treatment Dr Cornish did also ask to speak to Mr Alexander, Mr Budd's colleague about his involvement in Smuddle but she had concerns about more than one issue as regards Mr Budd and I am satisfied that that explains the different in treatment between the two employees. She gave both Mr Budd and Mr Alexander the opportunity to "cover their tracks" about formation of Smuddle having formed the view that her hands would be tied if she were to find them guilty of having set up a competing business. Whether or not she was right about that she proceeded on that basis and endeavoured to give them both the opportunity to escape from the consequences so there was no inequality treatment between them in that respect. The decision to call Mr Budd to a disciplinary meeting was however taken on a number of additional grounds that were not applicable to Mr Alexander. There was therefore no difference of treatment without reasonable and proper cause that was capable of amounting to a breach of the implied term.
37. I find no breach of the implied term in relation to the proposal for resolution of the matter put forward by Mr Budd. I was puzzled by this aspect of Mr Budd's case, which implied that he had a contractual right to have matters resolved in the manner he had suggested, including the payment to him of 12 months' notice. I return to the question of notice below, but more significantly for the way in which Mr Budd has put his case, I find that he had no express or implied contractual right to have matters resolved in a particular way at the

end of his employment relationship. Even if I am wrong about that, Mr Budd did not explain to my satisfaction how Dr Cornish fell short of what he wanted her to do and nor did he explain clearly what sort of apology he was seeking (and I have already found as a fact that Dr Cornish did offer an apology and to give him a pay rise). He did not therefore demonstrate that Dr Cornish was breach of the implied term in relation this element of his complaint.

38. I do not accept that the relationship with Dr Cornish had broken down as Mr Budd suggests. My findings of fact suggest a working relationship that had many ups and downs, but had not broken down. Even Mr Budd's attempt to seek an amicable separation, whilst indicative of the fact that he had decided to move on, was written in terms that strongly suggested that the and Dr Cornish still had a functioning working relationship. The evidence in fact points the other way - to Dr Cornish wanting to mend fences and to keep the Claimant in her employment. That is the clear impression given by her response to Mr Budd's overture about leaving on agreed terms (page 158) in which she addresses his points (without agreeing with them) but then adds:

"This reads as if you are a mixture of frustrated, annoyed, feeling guilty and overwhelmed at what needs doing. You need to stop being so negative and looking backwards at whose fault etc. The reason I try and run a no blame culture is that those people who contribute most will also cause the most mistakes. You don't get one without the other."

I consider that passage to be conciliatory in tone and clearly not consistent with an employment relationship that has broken down. The evidence is far more consistent with Mr Budd having decided to move on and pursue his own projects for reasons that are not attributable to repudiatory conduct on the part of the Respondent. I find that there was no such repudiatory conduct in the matters relied upon by Mr Budd and that is claim of constructive unfair dismissal must therefore fail.

39. Mr Budd's wrongful dismissal claim stands or falls with the constructive dismissal claim. As he resigned in what I have found to be circumstances in which he was not forced to do so by his employer's conduct, then he is not entitled to a payment for breach of contract. But as I explained to the parties during the course of the hearing, even if I had found in favour of Mr Budd on his constructive dismissal claim I would have rejected his claim for one year's notice pay by way of damages for breach of contract for two reasons. Firstly his claim was not established on the documentary evidence. His contract of employment clearly entitled him to one month's notice and he was unable to produce, or convince me of the existence of, any document that conferred a longer entitlement. Secondly, his claim for wrongful dismissal is a claim for damages, and he is therefore obliged to mitigate his losses, which he has done by finding within a short period of leaving the Respondent's employment remunerative work, which on his own evidence is at least as well if not better paid than his work for the Respondent, . That means that his losses, even if he could recover them, would be very small, and far lower than the one year's salary that he sought. His claim for damages for breach of contract and

Case Number:2300672/2016

wrongful dismissal therefore fails of the facts of the case.

Employment Judge Morton
Date: 6 March 2017