



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Almeida

**Respondent:** Curzon Street Partners Limited

**Heard at:** London Central      **On:** 11-13 April 2017

**Before:** Employment Judge K Welch

## **Representation**

**Claimant:** Mr J Taylor (Counsel)

**Respondent:** Mr E Williams (Counsel)

# JUDGMENT

1. The Claimant's complaint of constructive unfair dismissal is well founded and shall succeed.
2. The Claimant's conduct contributed to his dismissal and it would be just and equitable to reduce the amount of any basic and/or compensatory award that may be awarded by 35 per cent.

Employment Judge Welch  
11 May 2017

## Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

# REASONS

1. This is a complaint for constructive unfair dismissal brought by the Claimant against his former employer.
2. The claim form was submitted on 6 December 2016 and the response was received following an extension of time granted by the Tribunal.
3. The issues were agreed as follows:

## **Unfair/ Constructive Dismissal**

- 3.1. Is there a breach of contract?
- 3.2. If so, what is it?
- 3.3. Over what period do the alleged breach/breaches relate to?
- 3.4. Did the breach/ breaches amount to a repudiatory breach of the Claimant's contract of employment by the Respondent?
- 3.5. Did the Claimant resign in response to the breach/breaches? If so;
- 3.6. What was the reason for the Claimant's dismissal?
- 3.7. Did the Respondent act reasonably in all the circumstances in treating the reason for dismissal as sufficient?

## **Compensation**

- 3.8. What compensation is the Claimant entitled to?
- 3.9. In particular, would the Claimant have been dismissed in any event for gross misconduct?
  - 3.9.1. If so, when?
  - 3.9.2. And what is the percentage chance that the Claimant would have been fairly dismissed for gross misconduct in any event had he not resigned?

- 3.10. Do the ACAS Code of Disciplinary and Grievance Procedures apply to a constructive dismissal?
- 3.11. If so, was there an unreasonable failure to follow the ACAS code of Disciplinary and Grievance Procedures and if so by which party and to what extent does that affect the damages payable?
- 3.12. Did the Claimant contribute towards his own dismissal? If so, to what degree?
- 3.13. Has the Claimant mitigated his loss?
4. I had before me an agreed bundle of documents and references to page numbers within this Judgment are to page numbers within that bundle. I heard evidence from witnesses, whose written witness statements formed their evidence in chief, and who were subjected to cross examination and questions from me. I heard evidence from:
  - 4.1. The Claimant himself;
  - 4.2. Mr Cyrus Rehman, head of finance/ HR Manager for the Respondent.
5. There was a preliminary application by the Respondent, which was agreed by the Claimant, asking for a preliminary hearing case management to consider their application. The press were given the opportunity to make representations concerning this before the parties were sent out whilst I considered the application. Having called the parties back into a public hearing, I then converted the hearing to a preliminary hearing case management, which was held in private to consider the application.
6. The parties had agreed that there would be a very small redaction to the Claimant's witness statement, which I agreed. The hearing then returned to being a public full merits hearing.
7. On the second day of the hearing, a member of the press requested she be given access to the photographs contained within the surveillance report provided within the agreed bundle of documents [pages 90-105 and 107-110]. Having considered the application, I refused it on the grounds that the public had full access to the bundle (including said photographs) and the witness statements during the course of the public

hearing. To have provided copies of the photographs for use within any article produced by the member of the press, would not have furthered the public's right to know what happened in the hearing. The member of the press was in a position to report fully on what she saw and heard by way of evidence, without risking breaches of copyright, data protection and/or convention rights issues especially since some of the photographs were of individuals not party to the proceedings.

**FINDINGS OF FACT RELEVANT TO THE ISSUES**

8. The Claimant was employed as a chef de cuisine by the Respondent from 9 May 2011 until his resignation, effective immediately, on 14 August 2016. Initially, he worked as a private chef for Mr Magdi Jameel's family. My Jameel was sole director of the Respondent company. Once the family was residing in separate households, he became the private chef for Mr Jameel, preparing his lunches and dinners and responding to requests from Mr Jameel. His role included shopping, preparing and cooking food for Mr Jameel, his family and guests and latterly on approximately 8 occasions, his office staff.
9. His hours of work were long and demanding and he gave evidence, which was not disputed, that he was required to be on his feet throughout his hours of work. His day was stated to be on average from 11am until after midnight.

10. The Claimant's contract provided:

**"3 DUTIES OF EMPLOYEE**

3.1 The Employee's principal duties are set out in the Job Description set out in the Schedule.

During the continuation of the Appointment the Employee shall unless prevented by ill health devote the whole of his time and attention during normal working hours (being between 11:00 a.m. and 8:00 p.m. Wednesday to Sunday, days off are therefore Monday and Tuesday) or such greater amount of time as is necessary for the proper and diligent performance of the Employee's duties hereunder to the business of this

Employer.....Employee will be paid one and halve times the equivalent hourly rate for any time worked over forty hours per week.”

“7. ILLNESS

7.1 In the case of Incapacity the Employee shall continue to be paid his basic salary during such absence (such payment to be inclusive of any Statutory Sick Pay or social security benefits to which the Employee may be entitled and for Statutory Sick Pay purposes the Employee’s qualifying days shall be Monday to Friday) at the Employer’s absolute discretion but such payment shall continue only for a maximum of twelve working days in any consecutive period of fifty-two weeks.”

“7.5 The Employee shall submit himself to a medical examination at the reasonable request and expense of the Employer at any time during the continuation of the Appointment and whether or not the Employee is or has been absent by reason of Incapacity.”

“SCHEDULE

JOB DESCRIPTION

The job title and the following job description are not intended to restrict the scope of the Employee’s duties in any way.

The Employee may be required to perform other duties from time to time and/or to work in a different capacity. It is a condition of employment that the Employee co-operates in this regard and adopts a flexible and helpful attitude.

The Employee’s main duties will include the following:

Those duties normally carried out by a Chef De Cuisine.”

[pages 170,171, 173, 174, 182].

11. The Claimant was one of 2 chefs employed by the Respondent to cook for Mr Jameel and his family. The other chef was Mr Satya Samanta, (referred to as Sam) who was a former colleague and friend of the Claimant and who recommended him for the role with the Jameel family. They would provide cover for one another when the other was

on holiday or off work.

12. In February 2016, Mr Samanta's wife (Shweta) and the Claimant's wife bought an Indian restaurant called Little Mumbai in Twickenham. Whilst Mr Samanta and the Claimant were working full time for the Respondent, they also spent some of their time off helping out in their wives' restaurant.
13. The restaurant had a full compliment of its own staff and the Claimant confirmed that he was not a trained Indian chef, even though originating from India and having some knowledge of Indian food (as evidenced by some of the menus within the bundle which he had agreed with the Respondent). He could not, for example, use a tandoori oven, which is apparently very different from a conventional oven used in a commercial kitchen. I accepted the Claimant's evidence that he did not work as a chef in Little Mumbai but that he did often carry out shopping, and helped out in emergencies, although not as a chef.
14. The Respondent accepted that prior to July 2016, the Claimant had not worked for Little Mumbai during working hours whilst working for the Respondent.
15. There were occasions when the Claimant was asked to clean up the kitchen, although I accept that housekeepers/ maids usually carried this out. The Claimant suggested that this and the requirement to cook for the office staff was a punishment meted out by Mr Jameel for taking holiday to which he was entitled.
16. Mr Rahmed gave evidence that he had discussed with Mr Jameel the possibility of the chefs cooking for the office staff on an occasional basis in November 2015. This was not implemented until January 2016, after the Claimant's extended holiday which he refused to cut short or delay. However, I do not find the request to occasionally cook for the office staff (which was stated to be less than 8 times between January 2016 and the Claimant's resignation in August 2016) to have been given as a punishment. The evidence was clear that the other chefs employed by the Respondent to cook for Mr

Jameel and his family also, on occasions, cook for the office staff and have done so since it was introduced in January 2016, and there was no suggestion that this was a punishment for them.

17. The Claimant had travelled with Mr Jameel to provide chef de cuisine services either on his yacht or in his family home in Saudi Arabia. In visiting Saudi Arabia, a visa was required for the Claimant. One of the Respondent's former employees, Mr Haroun, completed the form for the visa for the Claimant. The Claimant was not aware at the time of signing his form (due to it being in Arabic) that the form had wrongly indicated that he was an engineer rather than a chef, as it was unlikely that a visa would have been granted for a chef to enter the country.
18. The Claimant had initially refused to travel on behalf of Mr Jameel once he found out about the actions of Mr Haroun, but gave evidence that Mr Haroun told him to destroy his passport with the visa in it and that he would face dire consequences if he refused to accompany Mr Jameel on his visits to Saudi Arabia.
19. It was clear that the Claimant made no complaints to Mr Rehman about this during his time with the Respondent. It was not clear, however, whether the Claimant continued to travel to Saudi Arabia, although it was noted that the Claimant's last visa was dated 28 November 2012, which the Claimant confirmed to be the case.
20. The Claimant gave evidence that it was difficult to take time off, due to the demanding nature of Mr Jameel. There was documentary evidence before the tribunal that he had, in fact, taken paid holiday over an extended period in December 2015/early January 2016.
21. There were text messages between Mr Jameel and the Claimant [pages 111-113] which were interpreted by the Claimant as exerting pressure on him to return to work. Mr Jameel was trying to find out when the Claimant was due to return to work, as he needed to plan his arrangements. He did ask more than once whether it was possible for the Claimant to return on 4 January 2016, but the Claimant confirmed that he would

return on 5 January. There were no other examples cited by the Claimant concerning disapproval for taking holiday.

22. On 29 March 2016, the Claimant was told to work on his day off in lieu of a bank holiday by text message from Mr Jameel [pages 115-116]. This told him to “take it another time clean the kitchen tomorrow.” To which the Claimant replied, “ok sir”. It was clear that Mr Jameel expected the Claimant to move his time off at short notice, and often dealt with him by text or whatsapp messages as evidenced in the bundle.
23. The Claimant considered that the Respondent had imposed significant additional duties upon him unilaterally. These included cooking for the office staff (as dealt with above) and cleaning. Having considered the Claimant’s contract and his duties which included cleaning when the housekeepers/ maids were not there, I do not find this to be the case.
24. The Claimant was involved in a car accident on 19 June 2016, whilst out shopping for the Respondent during his working hours. The vehicle in which he was driving was hit in the back through the fault of the other driver. The Claimant returned to work the same day and continued to carry out his cooking duties, despite having some pain in his neck and back caused by the collision.
25. He reported the incident to Mr Rehman the following day. The Claimant’s evidence was that neither Mr Jameel nor Mr Rehman asked about his health.
26. The Claimant booked an appointment on 20 June 2016 to see his doctor on 24 June. His GP advised him to take pain relief. The Claimant continued to work on 26 June but felt unwell. He emailed Mr Rehman at 9.51am on 29 June 2016 [page 48] to inform him that he would not be able to come to work that day as he had a doctor’s appointment for his back pain and was out of painkillers, to which Mr Rehman replied “ok”. He therefore went to his GP again on 29 June. At this appointment, his evidence was that he told his doctor about his role as a private chef and that this involved “standing for long hours and cooking”. His GP therefore signed him off work from 27

June 2016 until 4 July 2016 as “not fit to work” [his fit note appears at page 88].

27. The Claimant sent a copy of his fit note by email to Mr Rehman on 29 June at 2.46pm. The reply from Mr Rehman was “until [w]hen will you be off?”, although Mr Rehman gave evidence that he was unable to open the fit note or had missed it, despite it being attached to Mr Almeida’s email. Within further emails between the Claimant and Mr Rehman, the Claimant confirmed that he would be back on Tuesday should he feel better.
28. On 4 July, the Claimant confirmed by email [page 89] that his back was stiff and that he needed physiotherapy. He confirmed that he was sending his sick note which again confirmed him to be “not fit for work” and asked for his private medical insurance details to book some physiotherapy.
29. On 5 July 2016, Mr Rehman emailed the Claimant saying “are you back to work today???” The Claimant replied the same day confirming that he was not returning at that point due to the sick note he had sent in for another week the day before. Mr Rehman gave evidence that, once again, he either could not open it or had missed it.
30. On or around 7 July 2016, Mr Jameel spoke to Mr Rehman saying that he had suspicions that the Claimant might have been working in his wife’s restaurant and as to the extent of his injuries preventing him from working. The Claimant, by this time, had been off work due to sickness for just over a week, never having had sickness absence before during this 5 years’ of employment with the Respondent.
31. On 8 July 2016, the Claimant sent an email to one of his colleagues, page 55 saying it had been a “terrible few days”.
32. Due to Mr Jameel’s suspicions, the Respondent instructed a private investigator to follow the Claimant to verify whether the Claimant’s injuries genuinely prevented him from carrying out his role.
33. On 9 July 2016, the Respondent was covertly monitored by the Respondent’s private investigator from 8am throughout the day until 12.30am on 10 July 2016, and from

5.30pm until 7pm on 11 July. The covert surveillance logs appear at pages 90-105 (for 9 July) and 107-110 (for 11 July). No evidence was provided concerning the basis of the Respondent's instruction to the private investigator.

34. The report for 9 July 2016 showed photographs taken of the Claimant at his home, driving, shopping with a friend, attending church, food shopping, carrying a number of grocery bags, placing them in car boots and being driven to Little Mumbai.
35. The Claimant gave evidence that he did some food shopping for his family and also the restaurant Little Mumbai due to there being an emergency – in that the manager of Little Mumbai had to attend hospital with his son.
36. From 6.47pm, the surveillance log states, “subject is not working in the eating area of the restaurant and be occasionally seen through the frosted windows of restaurant in the kitchen of restaurant....Throughout the evening the subject remains in the kitchen clearly preparing food and speaking with the waitresses before they carried food orders from the kitchen to the tables. However, due to the location of the kitchen at the rear of the restaurant it was difficult to see exactly what he was doing.” He could be seen wearing a striped apron. There were approximately 5 photographs taken throughout the evening of 9 July 2016, showing the Claimant through the glass window in the door. However, there was no evidence as to what he was doing in between these times.
37. The Claimant's evidence was that he was helping out – checking plates for service (ie 'passing' them) and garnishing food. The Claimant gave evidence that he was able to move around and sit down as and when required. Whilst he could do this, he could not have carried out his work for the Respondent, which required him to be standing throughout and, which was demanding work for long hours.
38. The log also provided notes of a conversation with Sam, who was working front of house on that evening. Sam stated that he ran the restaurant with his business partner, the Claimant. It was clear from the log that there was another chef working in Little Mumbai that evening.

39. The log of the 11 July showed the Claimant taking a couple of shopping bags into Little Mumbai.
40. Mr Rehman sent an email to the Claimant on 11 July 2016 at 10.30am [page 57] asking whether he was recovering and as his sick note was expiring whether he was coming back to work the next day. The Claimant replied the same day, saying his physio started that day and that his neck was mostly recovered but that his back was “badly [a]ffected” but that he would confirm later that day. Mr Rehman emailed back to ask, “does it mean you can’t move from your bed then?” The Claimant replied that he did not understand the purpose of the question but confirmed that he could move around and “work out” but that he was doing as advised by his doctor and did not want to take chances with his back. He confirmed that the problem was “mostly with sleeping and b[e]nding.”
41. Later that day the Claimant confirmed he would send another sick note and that he would need a few sessions of acupuncture. He was told by Mr Rehman that the sick note would have to be sent the next day else it would be treated as an unauthorised day off.
42. Mr Rehman also sent an email to the Claimant on 11 July at 6.48pm [page 58] saying “if your sick note you want to provide on Wednesday states that you require bed rest from Tuesday 12th then it should be fine.,.,Take care and I hope you get well soon.”
43. The Claimant sent a further sick note by email [page 59] covering the period 11 July 2016 to 14 August 2016 [page 106] which again stated that he was “not fit to work”.
44. The Claimant was informed by email on 20 July at 10.27am [page 60] that he would only be paid Statutory Sick Pay for his sickness absence throughout July. This, however, was not subsequently paid to the Claimant and he received no pay at all for the month of July.
45. On the same day, at 6.30pm, the Claimant was invited to attend a disciplinary hearing by letter emailed on 20 July 2016 [page 62]. The letter stated:

“..The purpose of the hearing will be to discuss your ongoing absence from work having been signed off sick since 4 July 2016. You have informed the Company that your ongoing absence from work is due to the injuries you sustained as a result of your involvement in a recent road traffic accident; however, the Company has reason to believe that you have acted dishonestly in overstating the extent of your injuries and/or inability to carry out your contractual duties. Accordingly, I would now like to discuss your absence from work and, specifically, your attendance and the duties you undertook whilst at the restaurant “Little Mumbai” in Twickenham on Saturday 9<sup>th</sup> July and Monday 11<sup>th</sup> July when you were purportedly unable to fulfill your contractual duties as a chef to the Company due to being signed off from work.

In support of this allegation, I enclose a copy of a surveillance report undertaken by an independent investigator on behalf of the Company together with an exchange of emails between us on Monday 9<sup>th</sup> July. If you have any documents that you wish to refer to I would ask that you let me have a copy of these in advance of the hearing.”

It also confirmed that the Claimant could be accompanied to the hearing.

46. The Claimant replied to the email attaching the letter on 21 July at 11.32am saying that he was unable to attend. “Based on the evidence you have taken any decision you would like to. and let me know by email.”
47. The Claimant received a further email from Mr Rehman [page 64] 12.35pm on 21 July asking for the reason for non-attendance and confirming that no decision had yet been made on the Claimant’s disciplinary.
48. Between this email and the Claimant’s reply of 1.19pm, Mr Rehman called the Claimant. The Claimant’s evidence was that he was told that he should resign to avoid problems or hassles for him and his family. He also stated that Mr Rehman stated that Mr Jameel was a powerful man and that he should return the keys to Mr Jameel’s residence, his uniform and shoes. Mr Rehman’s evidence was that he called the Claimant to find out when he could attend a hearing. During the call, Mr Rehman said

that the Claimant told him he was “fed up, that he was stressed, that he didn’t have enough money to fight with the Respondent’s owner and that he was contemplating resigning.” He also said that the Claimant said Mr Jameel was a very powerful man in that he would not want to fight with him and he agreed that the Claimant was correct.

49. I accept the evidence of the Claimant that Mr Rehman did suggest that he resign during this conversation. Since emails were being sent and received during this time, I can only surmise that the purpose of the phone call was for him to speak frankly with the Claimant concerning his position.
50. The Claimant replied to Mr Rehman’s email at 1.19pm on 21 July and referred in that email to Mr Rehman “asking [him] to resign on the phone and given the present circumstances I can only deduc[e] that this is premeditated and I will need to seek advice before any hearing. Thank you!” He also said that the reason he could not attend was that he had been given short notice of the hearing and could not leave his children.
51. Mr Rehman replied by email at 2.21pm refuting the Claimant’s assertion that he asked him to resign. The email did, however, go on to say that the reason for the call was “only to arrange for the property possessions to be collected and see how I can help you to organise hearing..... If you have any company property in your possession please confirm and hand them to Aly when he meets with you today.”
52. Following further emails, the disciplinary hearing took place on 26 July 2016 at 11am. Whilst there were typed minutes of the meeting at pages 187 – 190, these were not provided to the Claimant until recently and, even from Mr Rehman’s evidence, were not a true summary of what had been said in the meeting, since the order was disputed and some of the sentences within the minutes were agreed not to have been said.
53. The Claimant admitted to helping out in the Little Mumbai but that he had not stood throughout the evening and was not cooking. The minutes say that he said he was cooking for his friend, but, this was disputed by the Claimant. The chef would cook a

meal at the end of the evening for all staff and his friend was not in the restaurant.

54. Mr Rehman gave evidence that he had to carry out further investigations following the disciplinary hearing to address questions that the Claimant had raised.
55. The further investigations appeared to relate only to whether the Claimant was entitled to receive Statutory Sick Pay from the Respondent.
56. In any event, the Claimant was not paid any monies for the month of July and was not informed by the Respondent that this would be the case. Mr Rehman rightly acknowledged that he should have told the Claimant, but explained that during this period he was continuing to carry out his other duties in addition to handling Mr Almeida's disciplinary hearing and carrying out further investigations.
57. Mr Rehman emailed the Claimant on 11 August [page 66] asking whether he was returning to work on the 15 August.
58. The Claimant sent an email on 15 Aug 2016 attaching a letter of resignation dated 14 August [pages 68-70]. An extract from this resignation letter appears below:
- "...Being removed from the payroll and not paid any salary for the month of July 2016, not even the statutory pay. You even reduced the company sick pay to 2 days only without formal notice just to penali[s]e me.
- Threatening me on the phone saying that your advice to me is to resign which will not create any problem and hassle for me and my family as the owner of the company Mr Jameel is very rich and powerful man and they can do anything....
- You have changed my job role and responsibilities and made me do things outside my responsibilities mainly in order to punish me.....
- Taking drastic measures as doing surveillance on me even when I was off sick (for the first time in more than 5 years of active service) ....you wanted to prove that I was actively working in my wife's restaurant (which you have been informed about) which shows your biased intent.
- taking away all the company possession off me (21<sup>st</sup> of July) and taking me off the

payroll before the disciplinary hearing on the 26<sup>th</sup> of July 2016 which proves your intent beforehand.....

In the past I and my fellow colleague have been forced to travel to Jeddah, Saudi Arabia by Mr Magdi Jameel on falsified visa documents without our knowledge initially and then asked to destroy our passports...putting us in imminent trouble and risk without any wrongdoing on my part.”

59. Mr Rehman responded by letter of the same day [p72] which confirmed that the Claimant had not been removed from the payroll but had been paid no Statutory Sick Pay ('SSP') due to an administrative delay.
60. Whilst Mr Rehman gave evidence that he had attempted to call HMRC for advice, he had still not been able to speak with them. In answer to one of my questions, he gave evidence that he had not viewed the employers guide [page 197-202 of the bundle] which on considering his statement further, and his letter of 24 August 2016, he confirmed that the guide or website have given no assistance on this issue.
61. The Claimant sent a letter to Mr Rehman on 19 August 2016 which again referred to the threats he alleged to have received over the telephone.
62. Mr Rehman sent a further response to the Claimant dated 24 August [page 83] confirming that the Respondent could not pay Statutory Sick Pay to the Claimant as it genuinely believed that he was not incapacitated. It informed the Claimant that he could ask HMRC for a final decision on this. It also refuted the allegation that he had threatened the Claimant and asserted that the Claimant had raised the possibility of resignation.
63. Mr Rehman gave evidence that if the Claimant had not resigned, he would have been dismissed for gross misconduct based on dishonesty in connection with his sickness absence. He confirmed that the ultimate decision was for Mr Jameel but that he would, in the absence of any exceptional new evidence, have been recommending dismissal to him.

### Submissions

64. The Respondent handed in a closing speaking note and added to this orally. It was said that the Claimant had 'jumped before he was pushed' and that there was no repudiatory breach of contract. Particularly as reliance was upon the implied term of trust and confidence, which is that the "employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."
65. The Claimant would need to show a sufficiently serious breach and that he resigned in response. The Claimant's evidence was said to be confused, exaggerated, inconsistent and sometimes incredible. I was provided with a note of the evidence which the Respondent considered fell within one of these categories. The Respondent helpfully went through the 11 alleged breaches in the order in which the Claimant relied upon them and considered that there was no repudiatory breach in these circumstances.
66. It was contended that the Claimant had not resigned in response to any such breach(es), but because he knew he was going to be dismissed.
67. If there was a deemed dismissal, the Respondent argued that this was for some other substantial reason or conduct and that the Respondent had acted reasonably and fairly in accordance with s.98 (4) ERA. Further, that the decision would have been within the range of reasonable responses.
68. The Respondent finally relied upon Polkey and confirmed that there should be a 100 percent reduction relying upon *Atkinson v Community Gateway Association* [2015] ICR 1. Also, that as the Claimant was 100 percent to blame for his dismissal, there should be a reduction of 100 percent for contributory fault.
69. The Claimant agreed with the Respondent's consideration of the law and the necessary tests to apply in this case. However, it was contended that the Claimant had

been constructively dismissed. The surveillance of his client at home, with his family and at church was unreasonable and went much further than a reasonable employer would have done.

70. The Respondent had failed to undertake any medical consideration of what the Claimant could do. The case of *Merseyrail Electrics 2002 Ltd v Taylor* [2007] was stated to be good law to say in the absence of medical evidence an employer should not go behind a sick note.
71. The Claimant's representative considered that there had been fundamental breaches of contract as outlined in the Claimant's note and went through each of the 11 allegations and specified why they were still relevant breaches, despite the Respondent's contentions.
72. The Claimant was not dishonest in his dealings with the Respondent. He had not himself ticked the box saying unfit to work but relied upon his GP's advice and followed this. He informed the Respondent that he was not bedbound and could move around. He could not, however, carry out his duties.
73. The Claimant contended that a key witness was missing, namely Mr Jameel, who it was conceded was the person who would ultimately make any decisions concerning dismissal.
74. Therefore, any dismissal of the Claimant on this basis would be unfair. There should be no deductions for Polkey or contribution.

## **LAW**

75. The Claimant complains that he has been constructively unfairly dismissed.

**Section 95 ERA Circumstances in which an employee is dismissed** provides:

“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.”

76. It does not matter whether the Employee terminates the contract with or without notice providing that he was entitled to terminate it without notice.

77. An employee must show that the employer was in repudiatory breach of contract. If there is a repudiatory breach, then the employee must resign in response to that breach, not for some unconnected reason. Also, the employee must not have accepted the breach by delaying resignation, continuing to work and thereby waiving the breach.

78. The Tribunal reminded itself that the breach does not have to be the only cause of the employee's resignation. It had regard to Abbeycars (West Hornford) Limited v Ford UKEAT/0472/07 which at paragraph 35 states:

“It follows that once a repudiatory breach is established, if the employee leaves then even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon. We respectfully agree with this reasoning. We think it would be invidious for tribunals to have to speculate what would have occurred had the employee been faced with the more limited grounds of legitimate complaint than he had perceived to be the case.

Moreover, if there is a repudiatory breach which entitles the employee to leave and claim constructive dismissal, we see no justification for allowing the employer to avoid that consequence merely because the employee also relies on other, perhaps unjustified or unsubstantiated, reasons. The employee ought not to be in a worse position as a result of relying on additional, albeit misconceived, grounds.”

79. The repudiatory breach may be of an express or implied term (including the implied term of trust and confidence, which is relied upon by the Claimant in this case) and can consist of a one-off act or a continuing course of conduct extending over a period, culminating in a "last straw" for the employee. The final straw does not have to be a

fundamental breach in its own right but must not be innocuous.

80. Should there be a fundamental breach, the tribunal is then required to consider what the reason was for the Claimant's deemed dismissal and whether the employer acted reasonably in all of the circumstances in accordance with Section 98(4) ERA.

### **APPLICATION OF FACTS AND LAW**

81. I am satisfied that the Claimant was subjected to a repudiatory breach of contract in this case.
82. The conversation between Mr Rehman and the Claimant on 21 July 2016 in which it was suggested by Mr Rehman that he should resign, together with his actions following that phone call, namely sending an email requesting return of all company property (not just the keys to Mr Jameel's private residence) prior to the disciplinary hearing taking place, showed that the Respondent did not wish to remain bound by the contract of employment. Additionally, the failure to pay the Claimant his Statutory Sick Pay for the whole of July without informing him of this, despite only having what the Respondent considered sufficient evidence of the Claimant's ability to work from 9 July 2017, was unjustified.
83. In relation to the 11 alleged breaches the Claimant puts forward, I find as follows:

#### **83.1. Visa issue**

I find that this has been proved by the Claimant. Whilst the last visa was obtained over 3 years ago, it assists in showing the manner in which the Claimant was treated and forms part of a series of actions together forming a repudiatory breach, which can be revived by later breaches.

#### **83.2. Disapproving of taking holiday**

I find that this has been proved by the Claimant. Mr Jameel did not attend Tribunal to provide evidence himself as to his actions surrounding the Claimant's requests for holiday. The Claimant was able to show evidence that he was placed under pressure to delay or return early from holiday and to move one of his lieu days at

short notice. This is not sufficient in itself to be a repudiatory breach, but forms a series of breaches, together entitling the Claimant to resign in response.

**83.3. Contacting him during annual leave and questioning him about his return to work.**

Whilst there was an example of this in the bundle, I do not find that this amounted to a repudiatory breach or even part of a series of breaches together amounting to a repudiatory breach.

**83.4. Imposing significant duties on the Claimant unilaterally.**

I do not find this proved. The Claimant's job description was sufficiently wide for the respondent to reasonably expect him to undertake cleaning duties and to provide meals for the office. Therefore, this did not form part of a repudiatory breach by the Respondent.

**83.5. Approach to Claimant's injury – believe treating his actions as dishonest despite having 5 years' good service without time off and**

**83.6. Carrying out covert surveillance – I have dealt with this above. In brief, I find that these are proved by the Claimant.**

**83.7. Telling the Claimant he should resign during the disciplinary process.**

Whilst the Respondent denies this, I find that this took place and did form part of the repudiatory breach of the implied term of trust and confidence.

**83.8. Threatening the Claimant in the phone call concerning his resignation.**

There was a discussion about Mr Jameel, although I cannot say whether this was threatening in addition to telling the Claimant to resign.

**83.9. Being told to return company property prior to the disciplinary hearing, suggests to me a forgone conclusion based on the surveillance report alone.**

Again, I find this to be a repudiatory breach of the implied term of trust and confidence.

**83.10. Refusing Statutory Sick Pay with no notice of the same such that the**

**Claimant was not paid at all in July without any notification.**

This again is a repudiatory breach. The Claimant was not paid at all for the month of July. Even if we accept the Respondent's case that there was some doubt over the Claimant's absence from 9 July, he was not paid at all, either his discretionary company sick pay, or SSP. Nor was he told that this was to be the case.

84. The breaches I have found to have taken place as set out above, breached the implied term of trust and confidence. I do not accept the Respondent's assertion that the employer was acting with reasonable and proper cause in relation to this, since even though there was a surveillance log provided to the Respondent, there was not for example, in my view, proper cause to suggest resignation and/ or to insist upon return of all property at the stage it occurred, prior to a disciplinary hearing taking place.
85. The fact that the Respondent carried out surveillance on the Claimant was not, in my view, a repudiatory breach in itself. I do, however, question the reasonableness of ordering covert surveillance on an employee with 5 years' exemplary service who had never had time off previously and who, at the time the surveillance was ordered, had only been off for just over a week. I also consider that the extent of that surveillance may have been wider than was necessary in the circumstances. Whilst I appreciate that there is no right to privacy (as set out in City and County of Swansea v Gayle [2013] IRLR 768), this was not just surveillance of the Claimant at Little Mumbai, but rather of him at home, with his family, out with friends, at church etc.
86. I am therefore satisfied, that there was a repudiatory breach of contract by the Respondent. I am further satisfied that the Claimant resigned from his employment in response to that breach and that there was no waiver on his part, as the earlier breaches had been revived by the later breaches, which led to his prompt resignation.
87. I am satisfied that the Claimant knew he would be dismissed in light of the Respondent's actions in telling him to resign and by asking for all company property back, but I believe that he resigned in response to the breaches of contract and not

simply to avoid being sacked.

88. Having found that the Claimant was constructively dismissed, I have to turn to the reason for the dismissal. Whilst I accept that the Respondent may well have dismissed the Claimant in any event at some point after the Claimant's resignation, it is not entirely clear when this might have been. There was some delay between the disciplinary hearing on 26 July 2016 and his resignation on 15 August 2016, without any further action being undertaken by the Respondent during this period, other than to ask if the Claimant was to return to work.
89. It was also not clear when Mr Jameel would have been in a position to review the recommendation of Mr Rahmed.
90. In any event, however, whilst I consider that the dismissal would have been for a potentially fair reason, namely either conduct or some other substantial reason, I do not consider that the dismissal would necessarily have been fair.
91. In considering Section 98 (4) and the reasonableness of the decision, together with the test in BHS v Burchell, I consider that there is no certainty that the dismissal would have been fair. Whilst the Respondent would have genuinely believed in the Claimant's guilt, I do not consider that this would have been based on reasonable grounds following a proper investigation. This is because there was no medical evaluation, or apparent consideration of what the Claimant could do whilst signed off by his GP, despite being certified as unable to carry out his duties. Also, the decision to dismiss appeared to have been a forgone conclusion before any disciplinary hearing took place. Further, I heard no evidence from Mr Jameel, who it was acknowledged by the Respondent, would have made the decision to dismiss.
92. It is entirely possible that the Claimant's bad back/neck could have allowed him to shop, carry some bags, stand for periods of time, but that he still would have been unable to carry out his demanding role for the Respondent.
93. The GP certified the Claimant as being unfit to work based on the Claimant's

presentation of symptoms and information concerning his role with the Respondent. It was not clear to me that, whilst he was carrying out some of the aspects of his role on 9 July 2016, he could have been certified as fit to work or alternatively fit to return with adjustments. That is for the GP to decide based on his assessment of the patient.

94. The Claimant appeared entirely honest in his dealings with the Respondent – consistently stating what he was able to do and not do. I am not satisfied that he would have been dismissed fairly and that the dismissal would have been within the range of reasonable responses in these circumstances.
95. I will not make a reduction in accordance with Polkey.
96. However, I do consider that in “helping out” in Little Mumbai as he did on 9 July, he contributed to his dismissal such that there should be a reduction in compensation ordered in the sum of 35 percent. Whilst I accept that there was an emergency on that day, and that he did not carry out the role of a chef, I consider that in “helping out” in Little Mumbai he contributed to his own dismissal and a reduction should be made in accordance with Section 123(6) ERA.