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Case Number: 2300416/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE NASH**
MEMBERS: **Ms C Bonner**
Dr R P Fernando

BETWEEN:

Mr H Godfrey **Claimant**

AND

Eclipse Presentations Ltd **Respondent**

ON: **1 to 3 March 2017**

Appearances:

For the Claimant: **Ms S Cowan of Counsel**

For the Respondent: **Mr M Howson of Counsel**

JUDGMENT

The Judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed.

2. The Respondent did not unlawfully subject the Claimant to a detriment on the grounds that he made a protected disclosure.

3. By consent, the Respondent shall pay to the Claimant as compensation for unfair dismissal the sum of £42,276.39; this is made up of a Basic Award of £2850.00 and a Compensatory Award of £39,426.39.

4. The recoupment provisions do not apply.

REASONS

1. The claim was presented on 2 March 2016. There was a preliminary hearing on 3 May 2016.

2. At this full merits hearing, in respect of witnesses the Tribunal heard from the Claimant on his own behalf. On behalf of the Respondent it heard from Mr John Gibbons, its Managing Director at the material time, and from Mr Robin Purslow its current Managing Director who was a director at the material time. All witness statements were taken as read.

3. The Tribunal had sight of a bundle to 222 pages and all references are to this bundle unless otherwise stated.

The Claims

4. It was clarified that there were two claims:-

    a. Unfair dismissal under s.98 Employment Rights Act 1996; and
    b. Detriment by reason of a protective disclosure under s.48 Employment Rights Act 1996.

The Issues for Unfair Dismissal

5. The Claimant relied on a constructive dismissal, accordingly, the Tribunal had firstly to determine whether there was a dismissal.

6. The first issue was whether there had been a fundamental breach. The breaches relied on by the Claimant were:-

    a. a breach of the duty of mutual trust and confidence; and in the alternative
    b. it was a fundamental term of his contract that he had responsibility for the Respondent's Sets and Staging Department. Removal of this responsibility amounted to a fundamental breach of contract in and of itself.

7. The second issue was whether over any such fundamental breach had been affirmed.

8. If the Tribunal found for the Claimant on these two issues, then the Respondent accepted that the Claimant was dismissed and that there had been an unfair dismissal.

9. A further point arose during the hearing related to the nature of the fundamental breach. The Claimant's case was that the so-called "last straw" was a meeting on 22 September 2015. However, the Claimant sought to change his case during submissions and sought to rely on his grievance (which occurred in November to December 2015) as the last straw. The Respondent objected to this change on

the basis that it was made so late and that the Respondent had had no chance to cross-examine and to lead evidence.

10. The Tribunal applied the overriding objective, reminding itself that it must deal justly. The Tribunal noted that this was not an attempt to add a new cause of action, but an amendment to an element of an existing claim.

11. The Tribunal's starting point was that it should seek to consider all the Claimant's complaint as long as this was just. The Claimant had only recently obtained legal representation; however, this did not explain why the claim was changed only during submissions and after three days of evidence.

12. The Tribunal accepted that there was prejudice to the Respondent in this amendment. However, the Tribunal found that this could be very substantially mitigated by permitting the Respondent to cross-examine the Claimant and lead evidence. Accordingly the Claimant was put on the stand for a second time and cross-examined. The Tribunal reminded that parties that it would regard the Claimant's second evidence in the light of the fact that it came after the Claimant had been released from his oath and after submissions. After the second evidence of the Claimant, both parties made submissions.

The Issues for the Protected Disclosure Claim

13. The Tribunal decided the issues as follows.

14. The Claimant relied on a Public Interest Disclosure in respect of a health and safety issue at Sion Park on 5 November 2014.

15. It was agreed that this was a protected disclosure. The issue for the Tribunal was whether the Claimant was subjected to a detriment by reason of this disclosure. The detriment relied on was that the Claimant was threatened with disciplinary action and, further and in the alternative, all subsequent mistreatment pleaded.

16. The Claimant relied on a second disclosure in February 2015, being his assertion (made orally in a meeting on 15 February and confirmed by email on 13 February 2015) that the Respondent needed to carry out site inductions. This was also a health and safety matter. During the Tribunal hearing the Respondent accepted this too was a protected disclosure.

17. The issue for the Tribunal was whether the Claimant was subjected to a detriment by reason of this disclosure. The detriment relied upon was the bringing of Mr Gill into a meeting on 22 September.

18. This final list of issues was arrived at only after the Claimant applied at the start of the hearing to widen his case. At the preliminary hearing he had said that the only detriment resulting from the Sion Park incident were the threats by Mr Gibbons. At the hearing he sought to widen this to Mr Gibbons's general conduct after the incident. In addition, he sought to rely on the second disclosure - the site inductions; the detriments on which he sought to rely were (i) the calling of Mr Gill

into the meeting and (ii) the failure of the Respondent to ensure that its employee Mr Harlow was engaged with an IT project.

19. The Respondent objected to these amendments on the grounds of prejudice. In particular it objected to the Mr Harlow issue, which would require Mr Harlow to attend to give evidence.

20. The Tribunal applied the overriding objective and agreed to widen the scope of the claim in as much there was little prejudice to the Respondent. The Tribunal permitted the Claimant to rely on the further detriment to the Sion Park disclosure; this was proportionate because the Tribunal would have to consider these facts in any event in the unfair dismissal claim. The Tribunal also permitted the Claimant to rely on the second disclosure for the same reason. The Tribunal noted that the second disclosure had not been pleaded, nevertheless, the Claimant did not obtain legal advice until very near to the hearing and had prepared his witness statement and his pleadings himself.

21. However, the Tribunal did not permit the Claimant to rely on the Mr Harlow detriment because this would require further evidence; this was not proportionate and would cause material prejudice to the Respondent and would endanger the hearing timetable that had been agreed to by the parties.

The Facts

22. The Respondent is a large events production company, concentrating on corporate events. It employs about 99 people including 66 at the Claimant's place of work.

23. The Claimant started work on 1 June 2009 as Head of Operations. He received a three page job description including "responsibility for staging department', and health and safety within his department.

24. The Respondent told the Claimant that it was looking to develop him into a director and there were good prospects for advancement. The plan was for the MD Mr Gibbons to retire and the other director Mr Purslow to take over. Therefore, the Respondent needed to grow a new management / directorial team.

25. In respect of the management structure, Mr Gibbons gave evidence that, although he was the managing director, Mr Purslow was his equal. The Tribunal having considered their evidence found that whilst they worked closely together it was Mr Gibbons who had the final word; he was the highest authority in the company. Mr Purslow had influence, but not control, over Mr Gibbons.

26. The Claimant's case was based on the cumulative effect of a lengthy course of conduct. He relied on events that occurred in the two years prior to termination. Accordingly, it is necessary to set out the facts in some detail over this period.

27. Based on the evidence of all witnesses, the Tribunal found that the Respondent operated in a very high-pressure environment. It had to deliver very complex

events (often including difficult special effects, technical matters and lighting) with short lead in times on site and then de-rig quickly. The business was inherently very stressful. Health and Safety was also very important because of the nature of the business; large amounts of often heavy electrical equipment needed to be transported, installed, operated and de-rigged in short timeframes - in many different locations.

28. Mr Purslow accepted that Mr Gibbons was passionate about his business but said that he did not fly off handle at everyone. The Tribunal found that Mr Purslow was being tactful; we noted a considerable number of references to Mr Gibbons shouting and failing to listen in the contemporaneous documents. We accepted the Claimant's evidence that Mr Gibbons was prone to losing his temper and shouting. The Claimant gave consistent and detailed evidence that Mr Gibbons shouted and the Tribunal accepted the Claimant's evidence as to Mr Gibbons's general behaviour.

29. In general terms, the Tribunal found the Claimant a reliable and honest witness; he was willing to admit points against himself and sought to see the other side's point of view even when dealing with events he found upsetting. Unfortunately the Tribunal was unable to come the same conclusions about the Respondent's witnesses at all times.

30. The first relevant incident in the history of the employment was in 2013; Mr Gibbons brought back Mr Harlow (the Claimant's predecessor in his role) as a consultant to review the future of the Claimant's department. Mr Gibbons said that Mr Harlow's feedback was highly critical of the way the Claimant's department functioned.

31. The Claimant came across new procedures being trialled in his department without his knowledge. For instance on 6.12.13 there were emails from his staff about new procedures. When the Claimant asked management what was going on, Mr Gibbons simply denied that there was any new system and dismissed the Claimant's concerns.

32. At around the same time Mr Purslow told the Claimant that the Respondent was content with the Claimant's work. The Claimant asked for promotion to the director role and for a significant pay rise – from £50000 to £80000 per annum. In January 2014 he put together a full proposal for the promotion and pay rise. He said, in effect, that he was willing to continue to act up as Health and Safety manager if his proposals were agreed to. (The Claimant had ended up having responsibility for most of the Respondent's health and safety. However, outside of his department he did not have the authority for health and safety putting him in a difficult position.)

33. The Directors discussed the Claimants proposal and told him that it was not financially viable.

34. The next incident was when some overloaded lorries nearly went out on a job on 24.6.14, which the Claimant had to resolve. Mr Gibbons sent an email criticising the Claimant (not by name) although Mr Harlow was not communicating

effectively with the Claimant, (as admitted by Mr Purslow) leading to mistakes. Mr Gibbons's failure to manage effectively meant that the Claimant's position was undermined.

35. The Tribunal found – based on the evidence form the Respondent's systems - that Mr Harlow was in effect partly controlling the Claimant's Sets and Staging Department, which undermined the Claimant.

36. The Claimant was responsible for the Respondent's capital expenditure ("capex"). The Respondent has a high level of capex because an important part of its business is the leasing of equipment with a high level of depreciation. Mr Gibbons was angry at way the Claimant had managed the capex and took this from the Claimant to run himself. The Tribunal found this showed that Mr Gibbons was losing faith in the Claimant, "to get things done."

37. On 3.9.14 there was a significant error in the capex ordering process. Mr Gibbons very angrily denied he had taken over responsibility for capex from the Claimant. He said the Claimant had misunderstood that he was no longer responsible for capex, which was incorrect; he then said that he would need less people in Operations. The Claimant saw this as a threat. Mr Gibbons admitted what was said but denied that it was a threat because he needed to keep the Claimant on. The Tribunal accepted that this was a threat; an employer may make threats (particularly implied threats) even if there is no wish to carry them out.

38. We now turn to the first protected disclosure. The Respondent was working on an event at Sion Park in November 2014. A senior employee Mr Andy Lepine broke health and safety rules by using incorrect equipment to work at height. The Claimant reported this to Mr Purslow, his line manager. Mr Levine went to Mr Gibbons, *his* line manager.

39. Thereupon, Mr Gibbons called the Claimant. The Claimant's evidence was that Mr Gibbons was very angry during this call; Mr Gibbons shouted at the Claimant and said that the Claimant was being ridiculous, was trying to lose a client over a minor matter. Mr Gibbons denied that he had acted in this way. The Tribunal accepted the Claimant's version of events for the following reasons. The Claimant provided a clear description of the call in his witness statement, whereas Mr Gibbons did not mention it in his witness statements and only accepted that the call happened during cross-examination. Further, the Claimant sent an email to Mr Purslow on 7 November referencing this phone call.

40. Mr Gibbons quickly calmed down and sent an email on 7.11.14 referring to the Claimant as the health and safety officer. The Claimant emailed on 10 November saying he was not employed as this. Mr Gibbons emailed back that day that he was, "truly staggered and horrified" to hear this (P109). However, before the Tribunal Mr Gibbons conceded that the Claimant was not formally the health and safety officer, it was only his opinion.

41. The Tribunal found that as a result of this incident Mr Gibbons was again frustrated by the Claimant – he was not getting things done, and was creating difficulties.

42. At a meeting on 10 November the Claimant accused Mr Gibbons of saying that he would commence disciplinary action against the Claimant. The directors both denied this. The Tribunal preferred the Claimants' version of events. His evidence was clear and consistent and was corroborated by contemporaneous evidence – an email of 16 November to Mr Purslow which referring to this in terms (and which was not challenged at the time). This exchange occurred in the presence of a colleague who excused himself. The Claimant then said that there were regular breaches of health and safety and that he only managed health and safety for his department and not the Respondent as a whole. Mr Gibbons yet again found the Claimant's attitude frustrating.

43. The Claimant was then signed off sick, in effect with stress. While he was away on 12.11.14 Mr Gibbons sent a company–wide email saying that Mr Harlow was now in charge of Sets and Staging, thus hence removing Sets and Staging from the Claimant.

44. The Claimant's evidence was that he was not told in advance of this removal of his responsibilities. Mr Purslow's evidence was that he had told the Claimant in advance; Mr Gibbons said that Mr Purslow had told him this at the time.

45. Upon his return from sickness, the Claimant sent an email (p116) asking why responsibility for Sets and Staging had been removed without him being formally notified.

46. The Tribunal considered the conflict of evidence as to whether the Claimant was informed in advance of the removal of his responsibilities and preferred the Claimant's evidence. The event was over two years ago and memories are likely to have faded; accordingly the Tribunal relied upon the contemporaneous documents. At the time the time the Claimant had said he was not told in advance and Mr Purslow did not challenge this.

47. The Claimant then complained to Mr Purslow that Mr Gibbons was bullying, victimising and undermining him; he wanted to raise a grievance. The Tribunal accepted the Claimant's evidence that Mr Purslow effectively discouraged him, by saying a grievance would be "interesting" against the MD. By way of an email of 25 November the Claimant sought a "clear the air" meeting with Mr Gibbons but this was not acknowledged. Finally, the Claimant sought flexible working - working one day a week at home. This was agreed upon the Claimant's agreeing to formally take over health and safety responsibility. The Claimant's contract was varied from January 2015 in that he worked from home one day a week.

48. We now turn to the issue of site inductions. In February 2015 the Claimant told a colleague that the Respondent needed to carry out site inductions on their installations. Mr Gibbons saw that site inductions would be very onerous because the Respondent has very short lead in times and de-rig times on site. Mr Gibbons set out his concerns in clear terms in an email (p212). Mr Gibbons was displeased with the Claimant's attitude to health and safety; he saw it as overly regulatory and insufficiently commercial.

49. Mr Gibbons's later statements about the site inductions (during the Claimant's grievance proceedings) were inconsistent. He denied that the Claimant had raised the induction issue at all and then contradicted himself. (There was a contemporaneous email thread in the bundle showing that the Claimant had indeed raised the site inductions.) In front of the Tribunal, Mr Gibbons denied that the two accounts were inconsistent. This was one reason that the Mr Gibbons's credibility was damaged in the eyes of the Tribunal.

50. At a meeting on 24.4.15 (followed up by a letter) Mr Purslow told the Claimant that the flexible working trial had not worked out. They agreed to extend it by a further 2 months until July to allow the Claimant to make alternative childcare arrangements. The Tribunal found nothing unreasonable in the Respondent's wanting a manager of 30 staff to work full time on site.

51. We now turn to the 2015 roll out of a major software update – including migrating the Respondent's data to the new version of the software. This was a long-standing project for the Respondent which had stalled and which the Claimant had volunteered to take over.

52. As part of preparing for the roll out, the Claimant chased Mr Harlow but received little response. Therefore, following the involvement of another senior employee, Mrs Horseman, the Set and Staging Department was excepted from the migration. Mr Harlow then sent a misleading email claiming that he was unaware of the roll out and complaining that his department was missed out; in reality, he had been fully informed and had ignored it. Mr Gibbons stated he was dumbfounded by this decision, which had been taken by someone who did not understand Sets and Staging (p135). This was a clear criticism of the Claimant who had recently been responsible for the department.

53. The new software went live (and the data migrated) in August, which is the Respondent's quiet period. One week after the software went live, the Claimant went on annual leave.

54. Mr Gibbons was highly critical of the migration. In an email on 8 August (not sent to the Claimant) he criticised the migration in very strong terms. During migration, Mr Gibbons relied on Mr Gavin Gill, a junior member of his team, to debug the software and generally make it work. A couple of months later, during the grievance, he said the roll out was "a dogs breakfast". However, in his statement to the Tribunal he merely said that there were problems but they were resolved. The Tribunal preferred the statements made nearer the time and found that Mr Gibbons was angry at what had happened.

55. About three weeks after the Claimant returned from leave, on 22 September, he attended a senior management meeting where the rollout was discussed. Mr Gibbons called in Mr Gill - very publicly in front of the office – saying, "he's the one who knows most about it". The Claimant had delivered the roll out and felt that Mr Gibbons had seriously undermined him by doing this.

56. On 24 September 2015 the Claimant was signed off sick with work related stress; in the event, he never returned to work.

57. On 21.10.15 the Claimant raised a grievance complaining of the following: -

    Changing job duties
    Threatening to dismiss
    Implementing new processes without consultation
    Making it difficult to carry out his role effectively
    Health and safety conditions and threats of disciplinary action
    Disruption, harassment and bullying
    Bonus issues
    Discrimination
    Undermining of his position

58. The Respondent retained Mr Justin Lingard a HR consultant to hear the grievance. The Respondent described him as independent. The Tribunal did not hear from Mr Lingard, but did not accept that he was truly independent because of was part of the Respondent's advisors, PBS.

59. The Claimant attended a grievance hearing with Mr Lingard on 12.11.15. Mr Lingard then asked specific questions of Mr Gibbons and Mr Purslow. However, as we have set out above, when Mr Gibbons gave inconsistent answers, Mr Lingard did not pick this up, did not ask any follow up questions, and was seemingly unaware that this might raise any issues. Accordingly, the Tribunal found that the Claimant's grievance was not adequately considered and the grievance process was not independent.

60. On 4.12.15 Mr Lingard rejected the grievance. The Claimant did not appeal.

61. The effective date of termination of the Claimant's employment was 27 December 2015 when he resigned with immediate effect. In his letter of resignation he asserted that the Respondent had fundamentally breached his contract in that (i) it had removed responsibility for Sets and Staging and only informed him by way of a company-wide email (ii) the MD had undermined trust and confidence in him and (iii) the last straw was the 22 September meeting where the software rollout was discussed.

The Law

62. The law in respect of constructive dismissal is found at section 95 Employment Rights Act 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 …

…

(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.

63. The law in respect of a detriment under protected disclosure is found at sections 47B Employment Rights Act as follows:-

47BProtected disclosures.

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

…

Submissions

64. Both parties made submissions. The course of events with respect to submissions has been set out above.

Applying the Facts to the Law

65. The Tribunal firstly considered the protected disclosure claim. The claims were made out of time so the first question was whether it was reasonable practicable for the Claimant to have presented the claims in time. There is a well-known and considerable body of case law on the reasonable practicability test. Essentially, a Tribunal has to decide if it was reasonably feasible for a claim to have been brought within time. The burden is on the Claimant to show that it was not reasonably practicable to bring the claim in time.

66. The Claimant contended that it was not reasonably practicable to bring the claim in time because he was off sick due to work related stress from 24 September 2015. However, the Tribunal noted that he brought a lengthy grievance and attended a detailed grievance meeting whilst off sick. Accordingly, the evidence shows that he was capable of taking steps - writing, thinking, and answering questions in detail - about his employment, after 24 September.

67. In these circumstances, the Tribunal could not find that it was not reasonably practicable for him to bring a Tribunal claim within the statutory time limit. Accordingly the Tribunal did not have jurisdiction to consider the s.48 claim.

Unfair Dismissal

68. The Tribunal had to determine if the Claimant was constructively dismissed. The test for constructive dismissal was established by Lord Denning in **Western Excavating ECC Limited-v-Sharpe [1978] ICR 221 Court of Appeal;** "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract then the 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."

69. The Tribunal firstly considered whether it was a fundamental breach of the Claimant's contract of employment to remove the responsibility of the sets and staging department.

70. The Tribunal found that responsibility for the department was not a contractual term. It was not included in the Claimant's contract. It was included in the job description that was not described – in contrast to the employee handbook - as being contractual.

71. Therefore, the Tribunal went on to consider the removal of the sets and staging department as part and parcel of the alleged breach of trust and confidence. In respect of a breach of the fundamental term of mutual trust and confidence, the Tribunal considered the long-established test in **Malik v BCCI [1998] AC20**; "the employer shall not without reasonable and proper course conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee." This had been clarified as, "calculated or likely". Whether or not there has been a breach is an objective question. The employer's subjective intentions are irrelevant. If - considered objectively - the conduct is likely to destroy or seriously damage mutual trust and confidence, the employer is deemed to have possessed such intention as per **Leeds Dental Team Limited v Rose UKEAT/0016/13/DM.**

72. The Tribunal reminded itself that, following **Morrow v Safeway Stores Limited [2002] IRLR EAT,** where an employer breaches the implied term of trust and confidence the breach is inevitably fundamental; the seriousness of the breach is immaterial.

73. According to **Garner v Grange Furnishing [1977] IRLR 206,** a repudiatory breach may consist of a series of small incidents over a period of time which taken individually may not amount to a breach of contract, but when taken together amount to a breach of contract. This relates to the so-called last straw doctrine. The Tribunal directed itself according to the Court of Appeal's judgment in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35,** including that, 'although the final straw may be relatively insignificant, it must not be utterly

trivial'. The correct test in relation to whether or not an act constitutes the 'last straw' is one of objectivity.

74. The Tribunal finally reminded itself that there is no implied duty of reasonableness in an employment contract. An employer may act unreasonably without every instance of unreasonableness amount to breach to go to the root of the contract thereby enabling the employee to treat themselves as having been dismissed.

75. The Tribunal had accepted the Claimant's case on the majority of the facts. The Tribunal considered the lengthy history of which the Claimant complained. We considered the most serious incidents to be as follows. Firstly in November 2014, the removal of the Claimant's responsibility for set and staging without any warning or consultation, and the Claimant only being informed by a company-wide email. This put the Claimant at a serious disadvantage with respect to those reporting to him. Secondly, the Claimant was threatened with disciplinary action by Mr Gibbons in November 2014 following his refusal to formally take up full health and safety responsibilities and because he raised a health and safety breach. Thirdly in September 2015 Mr Gibbons publically undermined his performance on the software migration.

76. The Tribunal considered whether the Respondent's conduct – in particular the three events above – was a cumulative series of events amounted to something so serious that it was a fundamental breach. The Tribunal accepted the Claimant's case that Mr Gibbons had shouted at him.

77. The Tribunal found that, in effect, Mr Gibbons had lost confidence in the Claimant during the course of 2014 and had therefore frozen him out. Mr Gibbons simply did not rate the Claimant. He saw him as an obstruction who did not get things done and Mr Gibbons was a man who wanted to get things done. Mr Gibbons removed two elements of the Claimant's job – Sets and Staging and capex. The first was removed in humiliating circumstances and Mr Gibbons denied having removed the capex when it later went wrong under his stewardship.

78. However, the Tribunal did not find that the Respondent wanted to lose the Claimant. Mr Purslow evidently continued to have confidence in the Claimant. Mr Purslow, who all the evidence suggested, was a far calmer person than Mr Gibbons, had little if any criticism of the Claimant's performance and relied on him. The Tribunal found that Respondent concluded reasonably soon that the Claimant was not - contrary to one of their original plans - likely to be a future director; this was shown by their reaction to his request for a promotion – they simply rejected his proposal outright although they knew that they would soon need a new directorial team. The Claimant did not rely on this as a potential fundamental breach; an employer is entirely entitled to decide whom it wishes to grow as senior staff.

79. The Tribunal found that Mr Gibbons's lack of confidence in and respect for the Claimant was illustrated during the software roll out. Mr Gibbons sent an email stating that he was dumbfounded that the set and staging department were no

longer being involved in the migration. He did this because of a misleading email from Mr Harlow and not having checked with anyone else, for instance Mrs Horseman or the Claimant. The Tribunal found that this showed that Mr Gibbons instinctively favoured Mr Harlow and jumped to conclusions against the Claimant. Once he discovered that the Claimant was in the right about the Set and Staging Department being excluded from the roll out, there was no acknowledgement of this.

80. In the opinion of the Tribunal, the meeting on 22 September was less significant than the earlier events. Mr Gibbons was openly reliant on Mr Gill in place of the Claimant, after the Claimant had been back at work three weeks. There was nothing remarkable in Mr Gibbons relying on Mr Gill during the Claimant's annual leave; however, the Claimant, how was responsible for the roll out, had been on site for the three weeks immediately before 22 September and Mr Gibbons still saw a junior employee as knowing more about the rollout than the Claimant.

81. To sum up, the Tribunal carefully considered whether this was a case of unreasonable conduct by the employer and a justified sense of grievance by the Claimant or whether it was something more - a fundamental breach of the term of mutual trust and confidence. The Tribunal asked itself whether the Respondent's conduct determined objectively was so serious as to entitle the Claimant to regard himself as freed from the obligations of his contract. The Tribunal reminded itself the burden is on the Claimant; he who asserts a breach must prove a breach.

82. The Tribunal found that this was a systematic and long term undermining of a senior employee often in public and very visible to junior employees including those who reported to him. Two significant parts of his job description were removed in highly inappropriate ways. He was threatened with disciplinary action for raising health and safety issues. He was shouted at. Mr Gibbons saw him as an obstruction; there was a pattern of Mr Gibbons assuming that the Claimant was at fault and, when events proved otherwise, not acknowledging this and not learning from this. The Tribunal found that the Respondent in this case had, taking its conduct as a whole in the two years leading up to the Claimant's termination, conducted itself in such a way as to breach the fundamental term of trust and confidence. It behaved in such a way as permitted the employee to treat himself as discharged from his contractual duties.

83. The Claimant set out his case on the basis that this was a "last straw" case. However, until submissions before this tribunal, he relied on the 22 September meeting; he made reference to this in his resignation letter, in his ET1 and in his witness statement, all of which he drafted himself. As we have said, his case was changed at the last moment, during submissions.

84. The Tribunal considered what was the actual last straw. The Tribunal found that the Claimant had used the term "last straw" not as a term of art, i.e. as a term defined according to case law, but in the commonly understood meaning of the phrase - the last straw that broke the camel's back; a less important matter which nevertheless brought matters to a head. The Tribunal accordingly considered

what was in the Claimant's mind when he resigned. The Tribunal considered the Claimant's statement before us that the grievance had sent him into a state of depression, and it was when his grievance was refused that he realised that he was going lose his job. Relying on this, and the fact we had assessed the Claimant's credibility favourably in other matters, the Tribunal accepted that catalyst to the Claimant's resigning - the last straw - was the rejection of his grievance.

85. The Tribunal considered whether the rejection of the Claimant's grievance was consistent with a last straw following **Omilaju.** The investigation and rejection of the grievance was not innocuous or trivial. The Tribunal found that the grievance was not impartial and was too cursory.

86. For the avoidance of doubt if the Tribunal has fallen into error here, we would have come to the same conclusion had the last straw been the 22 September meeting. This, in the opinion of the Tribunal, was less serious than the grievance because it was a single comment by Mr Gibbons. However, it was not innocuous or trivial - which is the correct test. It contributed something to the breach in that it showed Mr Gibbons's lack of faith in the Claimant and his willingness to display this publically.

87. Having found that the Respondent had breached the fundamental term of mutual trust and confidence, the Tribunal considered if the Claimant had waived the breach. The Tribunal noted that an employee must not delay too long; otherwise he will be taken to have waived the breach. The Tribunal applied **W E Cox Turner International Limited v Hocks [1981] ICR 823.** There is no specific time limit or guidance as to what passage of time amounts to affirmation. Whether affirmation has occurred depends on all the circumstances including the employee's length of service, the nature of the breach and whether the employee protested at the change.

88. The Claimant's grievance was rejected on 4 December and he resigned on 27 December. Taking into account the holiday period, the Tribunal did not find that the Claimant had waited too long following the rejection of his grievance. An employee may take less than three weeks to decide whether to resign his employment.

89. The Tribunal also carried out this analysis on the basis that the last straw was the September meeting. After 22 September the Claimant was signed off sick and absent from work; he went through the grievance process. The Tribunal found that he did not affirm the fundamental breach. The Tribunal was particularly concerned that an employee should not be held to have affirmed a breach by participating in the employer's grievance procedure. Grievance procedures can be valuable ways of resolving workplace disputes and are, all things being equal, in the interests of good industrial relations.

90. The Tribunal finally considered if the Claimant affirmed the earlier breaches concerning the removal of the Sets and Staging Department and the threat of disciplinary action. We found that he had not. The Claimant protested at the time. He reserved his position. The Tribunal had sight of a large number of emails from

the Claimant protesting the things that he objected to. He came very close to raising a grievance but withdrew for understandable reasons - under what the Tribunal found to be more advice than pressure from Mr Purslow.

91. As the Tribunal found that the Respondent breached a fundamental term of the Claimant's contract and that he did not waive the breach, the Claimant was constructively dismissed. As the Respondent did not defend the claim on any other grounds, the Tribunal therefore found that the Claimant was unfairly dismissed.

Remedy

92. The Tribunal invited the parties to explore whether, pursuant to its judgment on liability, they could agree quantum. The parties advised the Tribunal that they had reached an agreement as to remedy, based on the Tribunal's findings on liability. The parties informed the Tribunal that it was agreed that the Respondent pay to the Claimant as compensation for unfair dismissal the sum of £42,276.39, made up of a Basic Award of £2850.00 and a Compensatory Award of £39,426.39. With the consent of the parties, this was included in the judgment. For the avoidance of doubt, the Respondent consented only to the quantum element of the judgment; it reserved its position as to the Tribunal's finding on liability.

Employment Judge Nash
Date: 28 May 2017