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# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Hazel Simmons

**Respondent:** Wax Art Limited T/a Stoneglow Candles

**Heard at:** East London Hearing Centre

**On:** 11 & 12 May 2017 and 29 June 2017  
(In Chambers 30 June 2017)

**Before:** Employment Judge M Hallen

**Representation:**

Claimant: Mr I Wright (Counsel)

Respondent: Mr A Sendall (Counsel)

## RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimants claim for constructive dismissal is without foundation and is dismissed. It is the Tribunal's conclusion that the Claimant resigned from her employment and was not constructively dismissed as a consequence of a repudiatory breach of contract.

## REASONS

### Background and Issues

1 In her Claim Form received by the Tribunal on 4 November 2016 the Claimant claimed unlawful deduction of wages/breach of contract and unfair constructive dismissal. She subsequently withdrew the unlawful deduction of wages/breach of contract claim so the only remaining claim for the Tribunal to consider was constructive unfair dismissal. In

its Response Form dated 7 December 2016, the Respondent denied that the Claimant was constructively dismissed asserting that she resigned from her employment.

2 At the commencement of the hearing, the parties accepted that the list of issues contained at pages 49M and 49N of the bundle of documents were the relevant issues for the Employment Tribunal to consider. These issues were:-

1. Did the Respondent commit a repudiatory breach of the Claimant's contract of employment?
  - (a) If so, by what act or acts does the Claimant identify from her complaints as the repudiatory breaches?
  - (b) If there was a breach, was it an express or implied contractual term?
  - (c) If so, what was/were the terms?
  - (d) Was there a single fundamental breach going to the root of the contract, or a final straw after a series of acts or incidents that amount to a fundamental breach of contract?
  - (e) If the former, what was the breach that was relied upon?
  - (f) Was the breach sufficiently serious to warrant resignation?
  - (g) If the latter, was the series of acts or incidents sufficiently serious to cumulatively amount to a repudiation of contract?
  - (h) If there was a final straw, was it sufficiently serious to cumulatively amount to a repudiation of contact?
  - (i) If there was a final straw, was it sufficiently serious to amount to a breach or was it utterly trivial and/or an entirely innocuous act?
2. Did the Claimant accept the breaches unequivocally?
3. Did the Claimant resign in response to that/those breaches or had she decided at an earlier date that she wished to resign, and if so, when?
4. Did the Claimant delay too long before resigning?
5. Did the Claimant affirm the contract and/or waive the breaches, if any?
6. In all the circumstances, to what extent was the Claimant's conduct relevant to whether the Respondent breached the Claimant's contract.

3 At the start of the Tribunal hearing, the Claimant further clarified that her claim for constructive dismissal was based on the Respondent's course of conduct as a whole to establish she was constructively dismissed when she resigned by letter dated 21 June 2016. The course of conduct covered the following issues:-

1. The new contract of employment left for the Claimant to sign in November 2015;
2. The Claimant's basic pay;
3. The failure to invite the Claimant to the staff Christmas party at the same time others were invited and the subsequent criticism of her for not attending the party;
4. The failure to inform the Claimant that her son was due to join the business in advance of the general announcement to managers on 5 January 2016.
5. From about January 2016 onwards Louise Dooley behaved "aggressively, arrogantly and rudely" towards the Claimant and the Respondent failed to manage Louise Dooley in that regard;
6. The withdrawal of payments for allowing time off in lieu for overtime hours;
7. The refusal to pay the Claimant for the three days sickness absence in June 2016 despite the practice or policy of the Respondent having previously paid in full for short term sickness absences.

4 At the hearing, the Claimant gave evidence herself and called one additional witness, her former assistant, Laura Melhuish-Sprague. These witnesses produced written witness statements. The Respondent called three witnesses namely Mr Perry Simmons, the company's Managing Director and owner, Mr David Robinson, the company's HR Manager and Ms. Louise Dooley the Account Development Manager. These witnesses also produced witness statements. In addition, the Tribunal had the benefit of an agreed bundle of documents.

5 All the witnesses were subjected to cross-examination and questions from the Tribunal. At the conclusion of the hearing the parties' representatives produced written closing submissions as well as making oral submissions to the Tribunal.

### **The Facts**

6 The Respondent is a company in the business of designing and manufacturing luxury scented candles at its UK based factory in Romford, Essex. The Respondent primarily markets its products to the retail trade. The Respondent employs approximately 106 employees and is a family business. The Claimant is the ex wife of the Respondent's Managing Director and Owner, Mr Perry Simmons (together since 1990 and divorced in or around 2009). She was employed as Head of Design from 25 July 2005 until 21 July 2016. On 21 June 2016, the Claimant resigned from her employment giving one month's contractual notice.

7 The Claimant started off as a shareholder of the Respondent and resigned as a director and company secretary in December 2008 when the company was in financial difficulty in order to protect her position. She separated from Mr Simmons on or around 2004/2005 and embarked upon divorce proceedings in December 2008. The parties had by the time of the divorce already sold their matrimonial home and each bought separate properties to live in and the Respondent's debt was secured against these properties. At that time, the Claimant was a personal guarantor for 25 percent of the business debt to the bank. The Claimant wanted to free herself from financial liabilities relating to the business, so she resigned as the director leaving Mr Simmons to bear those liabilities alone which included the company bank debts, credit card debts and supplier debts. Mr and Mrs Simmons agreed that she would transfer her shareholding to Mr Simmons in return for him taking on the debts as he had personal liability for them. Due to the break up of the marriage and divorce proceedings the company suffered and was not worth anything but had significant liabilities. After the divorce, Mr Simmons was left with business debts including £70,000 bank overdraft, £50,000 credit card bills and the company was in dire trouble. After the divorce, he began to concentrate more on the business and eventually managed to turn it around and it is currently fairly successful. Although the Claimant had resigned as a director, she remained as an employee working in her role as Head of Design subsequent to the divorce.

8 The Claimant's contract of employment was signed on 16 May 2011 and confirmed her continuous employment from 25 July 2005 onwards. The Claimant drafted the Respondent's contracts of employment for all staff and as at 2011 she was responsible for human resources matters. The original basic contract of employment was at page 217 of the bundle of documents.

9 On 7 July 2015, the company failed a Sedex Members Ethical Trade Audit. This international accreditation was required for the company to continue supplying large retailers such as John Lewis. The non compliance related to pay being deducted for late clocking on, and overtime premiums and required corrective measures that included changes to contracts of employment for staff of the Respondent. Accordingly, Mr Simmons instructed solicitors to liaise with the auditing company, Intertek and prepare new contracts of employment for all staff and he took the solicitor's advice to update the contract generally to comply with the law and protect the company. The pre audit was carried out on 3 December 2015 and the corrective measures had to be in place by that time.

10 Mr Simmons presented all staff with a new contract of employment in November 2015. A standard contract template was used for junior level staff (pages 225 – 231) and a different more detailed one for managers/supervisors at a higher level (page 232 – 240) and this included the Claimant as well as Ms. Louise Dooley, (Account Development Manager). The new manager level contract included post termination restrictions and confidentiality and intellectual property clauses which the old standard contract did not contain. These were included to protect the business if any key staff were to leave as the Respondent was concerned that they would take important information about the company's business dealings, customers and candle making processes with them to a competitor. These restrictions were limited to six months preventing ex employees from dealing with or poaching customers and suppliers with whom they had had contact with over the previous three months of their employment. The manager's contracts were given to the Claimant, Louise Dooley, Jade Webb, Jennifer Taschner, David Robinson, Jason

Collier and Barry Hughes.

11 The Claimant's new contract was left on her desk with a note to "please sign and return". The Claimant came to see Mr Simmons on 24 November 2015 to talk to him about the changes. She was not happy to sign the contract and both parties went through it clause by clause with a marked copy at pages 241 – 248 of the bundle. There was some discussion about the new terms at this meeting but it became clear to Mr Simmons that the Claimant was not prepared to sign the agreement so he confirmed that that was fine and that she would remain on her existing terms and conditions of employment including her bonus entitlement. At the Tribunal hearing, the Claimant gave evidence that this new contract would leave her "no leg to stand on" if Mr Simmons was to sell the business. However, the Tribunal noted that the Claimant did not sign the contract, took legal advice on the matter from her own solicitor who also confirmed that she was not obliged to sign the contract and indeed she did not agree to the new terms. In addition, Mr Simmons agreed that she could remain on her old terms and conditions of employment including her bonus entitlement. In such circumstances, the Tribunal could not see that she was unduly prejudiced by the Respondent giving her a new contract which she did not agree to in event.

12 At the Tribunal hearing, the Claimant gave evidence that Mr. Simmons issued these new contracts of employment to all employees because at the time that he did so, he was considering selling the business and was in the process of doing so. The Tribunal did not accept this evidence. It preferred the evidence of Mr Simmons that the new contracts were issued to all staff on the basis that the company on 7 July 2015 had failed a Sedex Members Ethical Trade Audit and required corrective measures that needed to be implemented including contractual changes (pages 221 – 223 of the bundle). This was the reason for Mr Simmons instructing solicitors to liaise with the auditing company, Intertek, to prepare new employment contract for all staff.

13 On 5 January 2016, Mr Simmons had a management meeting with the Claimant, Louise Dooley, Jade Webb, (Office Manager), Jennifer Taschner and Barry Hughes (General Manager). At this meeting, he announced to everyone that his son, Curtis Simmons, would be bought into the business. He discussed the idea of Curtis coming into the business previously with the Claimant, but as parents they had decided that he was not at that time ready. Curtis Simmons had left school after his A levels and worked for an estate agent for two years. Having spoken to Curtis, subsequent to this post school experience working in an estate agency, Curtis seemed keen to learn the business from the bottom up and Mr Perry Simmons decided that his son was now ready to enter into the business. He did not discuss the matter with the Claimant before the management meeting as he felt it was up to his son to discuss the matter with his mother if he felt it was appropriate. At this time, Curtis was a 21 year old adult. At the Tribunal hearing, the Claimant asserted that Mr Simmons announcement to senior staff at the meeting on 5 January 2016 was part of the course of conduct that amounted to a repudiatory breach of contract. However, the Tribunal could not see how this could amount to either a breach in itself or part of a course of conduct amounting to a repudiatory breach. Curtis Simmons was a 21 year old adult who had discussed the matter with his father and if Mr Curtis Simmons felt it was appropriate could easily have discussed the matter with his mother. In any event, Mr Curtis Simmons commenced employment with the Respondent in January 2016 and after three months or so working for the Respondent, the Claimant agreed with Mr Perry Simmons that the decision for him to come on board was a good

decision.

14 On 2 December 2015, Mr Perry Simmons emailed the Claimant to ask her why she was not intending to go to the staff Christmas party on 3 December 2015 the Claimant replied to say that she had not been told about the Christmas party. As it transpired, the failure to invite the Claimant to the Christmas party was that of the Human Resources Manager, David Robinson. He had a misunderstanding based quite naturally on the fact that he thought Mr Simmons had already invited the Claimant to the party. This was a genuine oversight on Mr Robinson's part and in any event was rectified prior to the party by Mr Perry Simmons inviting the Claimant on 2 December to the party. In any event, the Claimant chose not to attend the Christmas party. Her excuse was that she had to pick up her daughter from the train station. At the Tribunal, the Claimant asserted that this was part of a course of conduct by the Respondent leading to a breach of the implied duty of trust and confidence. The Tribunal as a matter of fact came to the view that failure to invite her was a misunderstanding on Mr Robinson's part and was not part of such conduct.

15 The Claimant gave evidence that she complained to the Respondent about not being paid enough and that her basic salary was too low. She suggested that this was part of the course of conduct leading to a breach of the implied duty of trust and confidence. However, as a matter of fact, the Tribunal accepted the Respondent's evidence that the Claimant was paid generously both in respect of her basic salary and, moreover, she received a very good bonus for an employee in her position. There was no provision in her contract of employment for a pay review or pay rise and as a matter of exercising a positive discretion in her favour, Mr Simmons in July 2011 agreed that she would receive an annual pay rise of 3% as well as a profit share arrangement whereby she would receive 3% of the company's pre tax profits each year (page 219). In October 2015, he added to this and agreed that if the company made more than £1 million pre tax profit in any one year, then the profit share bonus would increase to 4% (page 220). He saw this as a staff motivation tool as well as by way of sharing the success of the business with key staff and he agreed to the same arrangement with Louise Dooley. By 2016, the Claimant's basic salary had risen to £38,000 per annum and she received considerably more than this with a profit share. From her P60 at page 78 of the bundle of documents her gross earnings for employment for 2016 was £64,531.37. The Respondent's evidence which was accepted by the Tribunal was that the Claimant was well paid above the market rate for a designer and received a generous profit share. Since the Claimant left her employment, the Respondent has employed a new designer at a salary of £32,000 with no profit share.

16 The Claimant gave evidence to the Tribunal that her colleague and co manager, Louise Dooley (Account Development Manager) was rude and aggressive towards her and the behaviour of Ms. Dooley and the Respondent's failure to manage such a behaviour was also a breach of the implied term of trust and confidence. The Tribunal did not accept the Claimant's evidence. Ms Dooley started as an Office Junior working for the Respondent commencing in 1995 moving into the role of Office Manager and subsequently to Head of Own Brand Sales with the title Account Development Manager. The Claimant and Ms Dooley worked together for 21 years. Mr Perry Simmons gave evidence which the Tribunal accepted that there was always a bit of conflict between Own Brand and Stoneglow Brand on the Claimant's and Ms. Dooley's part. They had the odd disagreements over the years over business matters but otherwise there were no major

issues for most of the time that Ms Dooley and the Claimant worked together. Indeed they got on very well together until recently. When the Claimant was thinking of leaving the company during Mr and Mrs Simmons divorce in 2008/2009, Mr Simmons became aware that she had asked Ms Dooley if she would like to leave with her and start up her own business.

17 The conflict of personality issues between Ms Dooley and the Claimant began in January 2016 after Mr Simmons had announced he would be stepping back from the business and handing over some of his duties to Ms Dooley. At the time it did not occur to Mr Simmons that this announcement would split the two of them as it was a business decision not a personal one. From January 2016 onwards, the Claimant became more and more prickly and difficult with Ms. Dooley and other managers. It created an atmosphere of hostility and was starting to affect business. Some of examples of this were as follows: -

- (a) On 26 February 2016, there was a difficult exchange of emails between Ms Dooley and the Claimant, which was at pages 125 – 127 of the bundle of documents.
- (b) At one point on 15 January 2016, Mr Simmons emailed both of them saying “can you please pick up the phone and communicate with each other” (page 104)
- (c) From 18 – 28 April 2016, when the Claimant refused to do CLP sheets for Own Brand Goods and argued about whose responsibility it was (page 138 & 144 – 149 & 152 – 153 of the bundle).

18 On 29 February 2016, the Claimant came to see Mr Simmons with issues that related to the above exchange. The Claimant was complaining about Ms Dooley and Mr Simmons advised her not to make a formal complaint until he had sent Ms Dooley on a course. This course was highly recommended to Mr Simmons with good reviews for business management skills (page 118 – 121 of the bundle). He asked the Claimant to see how it went after Ms Dooley had completed the course and subsequently spoke to Ms Dooley about improving the situation between herself and the Claimant. Despite Ms Dooley’s attendance on the course, matters between the two remained difficult. On 14 April, Mr Simmons emailed the Claimant to attend a meeting at which Mr Barry Hughes was nominated to mediate between the parties. At this time, Mr Hughes had recently joined as a General Manager for the company so the task of mediating was left to him as he had no history with either party and was neutral.

19 The Claimant, Ms Dooley and Mr Hughes were present at the subsequent mediation meeting on 25 April 2016. At this meeting, the Claimant asked Mr. Hughes to leave the meeting and noted that she had personal issues with Ms. Dooley and it would be unfair to discuss them in front of Mr Hughes. There were some conflict of evidence as to what happened at this meeting between the Claimant and Ms Dooley. The Tribunal preferred the evidence of Ms Dooley in this regard. Right from the start, the Claimant talked at Ms Dooley in a very negative and derogatory way. She was very angry and told Ms Dooley that she found her to be rude and obnoxious. The Claimant told Ms Dooley that her issues were personal and not work related. Ms Dooley told the Claimant at the meeting that if she wanted to speak to her she should speak to her like an adult. Ms

Dooley then told the Claimant that it was not Ms Dooley that she had a problem with but that it was Mr Simmons and she walked out of the meeting room into her own office and the Claimant went back to hers. Ms Dooley was very upset by this altercation and needed to gather her breath and clear her head and concentrate on her work. Subsequently the Claimant sent an email to Mr Simmons about the altercation which was at page 142 of the bundle of documents. Ms Dooley did not receive this email until after business hours. In the email, the Claimant reiterated that staff found Ms. Dooley to be “arrogant, rude and frequently aggressive”. Ms Dooley did not respond to the email. At the Tribunal hearing, Ms Dooley was criticised for not responding to this email. However, the Tribunal accepted Ms Dooley’s evidence that she did not wish to stoop to the Claimant’s level of personal attack and chose not to respond to it. Ms Dooley felt a better way of dealing with the matter was that a further meeting with Mr Hughes as the mediator would be more appropriate and she agreed to a further meeting on 26 April to resolve the issues immediately so that they would not linger. The meeting took place on 26 April and the Tribunal accepted Ms Dooley’s evidence that the meeting was conducted fairly by Mr Hughes and it was very constructive. The meeting focused on where the departments were aiming to go and discussed the business structure and both parties agreed to work positively together in the future ensuring that they would not impede each other’s work.

20 Following the meeting, Mr Hughes tried to implement an end of month strategy meeting to ensure that both parties could raise any ongoing difficulties between themselves if and when they arose. The first one was held on 10 May 2016 to discuss issues with staff (page 154 – 156 of the bundle) and the next one was on 15 June 2016 and was a management update meeting where all managers were in attendance (page 147). The next one was on 5 July 2016 and the Claimant did not attend this meeting. The meetings were primarily for business matters but staffing issues could be brought up including those that Mr Hughes had identified at the mediation meetings.

21 During the Tribunal hearing, the Claimant sought to persuade the Tribunal by referring to email exchanges between herself and Ms Dooley that Ms Dooley was acting aggressively and rudely towards her. Various email exchanges were referred to in the bundle of documents being at pages 138, 144 – 149, 152 – 153, 178-179, 180-187. These related to disagreement between Ms Dooley and the Claimant as to whose responsibility it was for undertaking CLP sheets for Own Brand goods and Stoneglow goods. The Tribunal did not see any evidence of Ms Dooley acting aggressively or rudely towards the Claimant in these email exchanges and did not accept the evidence of the Claimant in this regard. The Tribunal was satisfied that the dealings between Ms Dooley and the Claimant at this time were personal issues between the two and probably related to the Claimant being dissatisfied Ms Dooley once she discovered that Mr Simmons was planning to ask Ms Dooley to take on more responsibility in the business. The Claimant was not happy with this outcome and this caused personal issues between the parties. The Respondent attempted to deal with the matter informally by way of mediation with Mr Hughes and this appeared to the Tribunal to be a sensible way forward.

22 At the Tribunal hearing, the Claimant sought to persuade the Tribunal that the withholding of overtime for her by the Respondent in May 2016 amounted to a repudiatory breach of contract and/or a breach of the implied term of trust and confidence. The Tribunal did not accept the Claimant’s evidence in this regard. On 26 November 2015, Mr Simmons sent an email to all his managers including the Claimant saying that there would be “no overtime for any staff until things pick up”, (page 96 of the bundle of documents).



On 16 and 30 May 2016 (both Fridays) the Claimant took a day off without requesting holiday. She said afterwards when Mr Simmons queried it that she was taking time off in lieu because Mr Simmons had put a ban on overtime (page 157). On 25 May 2016 the Claimant told Mr Simmons that she had 8 hours in lieu to her and said that she could put it down as overtime as it related to jobs that needed to get done would not be done otherwise. Mr Simmons reminded the Claimant that she should be able to get her work done in normal working hours now that she had an assistant and that if she could not do so she needed to consider if working more hours would improve her bonus and benefit her that way. Mr Simmons felt that the Claimant's strict observance of hours worked was not really compatible with somebody in her senior position and that if she wanted to do better and earn more profit share bonus for herself then she needed to work towards this (page 196). In any event, on this one occasion despite the overtime ban, Mr Simmons approved the 8 hours in lieu as overtime. Given this fact and the fact that there was a general overtime ban in place at the time, the Tribunal did not view Mr Simmons conduct as being anything more than generous to the Claimant and did not possibly amount to a breach of contract.

23 The Claimant's contract of employment stated that there were three waiting days before statutory sick pay would be payable (page 217). Mr Simmons knew that the Claimant was aware of this fact because both he and the Claimant discussed it when the new contracts were issued and she wanted it changed at that time which Mr Simmons did not agree to. In June 2016, he was aware that the Claimant was sick for three days which she had previously booked as holiday. On 20 June 2016 the Claimant emailed Mr Simmons to complain about Mr Simmons refusing to pay her for her three days sickness absence and to demand payment for three days or she would resign. Mr Simmons replied to her to explain that this was company policy and that the statutory sick pay rules applied to everyone including the Claimant (pages 188 – 189 of the bundle). Mr Simmons felt that the Claimant was holding him to ransom and threatening to leave unless he submitted to her demands. He did not believe that the Claimant would follow through with her request with her threat to resign. In the event, the Claimant did resign due to Mr Simmons not agreeing to pay the three days wages whilst the Claimant was off on sick leave. The Claimant's letter of resignation was at pages 191 – 192 of the bundle which was dated 21 June 2016.

24 The Respondent accepted the Claimant's resignation in writing by email dated 6 July 2016 and offered to treat her complaint as a formal grievance. On 11 July 2016, the Claimant replied that she did not wish for the matter to be dealt with as a formal grievance. The Claimant worked out one month's notice period and left the Respondent's employment on 21 July 2016.

25 In September 2016, it came to the Respondent's attention that the Claimant had posted Stoneglow photos on her website advertising her design skills as a freelance contractor. Mr Simmons did not know that the Claimant had these images and did not give her permission to keep or use them after she had left her employment. He saw that she had published these photographs on the internet for all to see especially the Respondent's competitors using the designs for summer and spring range 2017 that had not yet been released by the Respondent. As a consequence, Mr Simmons instructed solicitors to write to the Claimant on 6 September requiring her to remove the images and sign undertakings not to use confidential information in the future. On 19 September 2016 she wrote to the Respondent to confirm that she had removed the images that belonged

to the Respondent from her website.

### The Law

26 The Claimant claimed unfair constructive dismissal under Section 95(1)(c) of the Employment Rights Act 1996 (ERA) which states:-

- (1) for the purposes of this part an employee is dismissed by his/her employer if  
....
  - (c) the employee terminates the contract under which s/he is employed (with or without notice) in the circumstances in which s/he is entitled to terminate it without notice by reason of the employer's conduct.
- (2) In order to establish constructive dismissal the Claimant must show the following:-
- (i) her employer has committed a repudiatory breach of contract meaning a significant breach going to the root of the contract;
  - (ii) she left because of the breach;
  - (iii) she did not delay her resignation too long and thereby affirm the contract.

27 In this case the Claimant contended that the Respondent was in breach of the implied term of mutual trust and confidence. The following cases illustrate some of the principles for the Tribunal to consider when deciding whether the Respondent has committed a repudiatory breach of contract:-

- (1) the orthodox contractual test of repudiatory breach is to be applied namely that the Tribunal should consider whether the Respondent has shown an intention, objectively judged, to abandon and altogether refuse to perform the contract (**Tullet Prebon Plc v BGC Brokers LP [2011] EWCA CIV 131;**
- (2) it is not necessary therefore for a tribunal to make actual findings as to the employer's actual (subjective) intention with regard to the contract, simply finding whether, objectively, the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence;
- (3) "reasonableness is one of the tools in the tribunal's factual analysis kit for deciding whether there has been a fundamental breach of contract" (**Buckland v Bournemouth University Higher Education Corporation [2010] EWCA CIV 121;**
- (4) Even if the Respondents final act was the proximate cause of the Claimant's resignation and was not in itself a fundamental breach of contract, the Claimant may rely on the Respondent's course of conduct as a whole in

establishing whether she was constructively dismissed. The “last straw” must contribute, however slightly to the breach of trust and confidence (**Omliaju v Waltham Forest LBC [2004] EWCA CIV 1493**)

- (5) The repudiatory breach must play a part in the Claimant’s resignation but it is an error of law for the Tribunal to focus on whether the repudiatory breach was the main, predominant or “effective cause of her resignation” (**Wright v North Ayrshire Council [2014] ICR 77**).

### **Tribunal’s Conclusions**

28 Although a number of separate issues were identified in the list of issues (page 49M – 49N) the key issues for determination were established at the outset of the hearing as follows:-

- 28.1 Did the Respondent’s conduct amount to a repudiatory breach of contract, whether resulting from a single act or a series of acts amounting to a “last straw”?
- 28.2 Did the Claimant resign in response to that repudiatory breach?

29 It was the Tribunal’s view that none of the facts cited by the Claimant in the issues section of the judgment amounted to a repudiatory breach of contract and that the “last straw” incident that she cited did not in fact amount in itself to any breach of contract as the Respondent was simply asserting its contractual right not to pay full pay to the Claimant during her three days sickness absence.

30 At the hearing, the Claimant adopted in the Tribunals view a “scattergun” approach to the issue of repudiatory breach and relied upon a wide range of different conduct over a lengthy period of time exceeding eight months. These ranged from the issue of a new contract of employment to her and to all employees by the Respondent in November 2015 to a mix up in respect of her invitation to the 2015 Christmas party, to the Respondent not telling the Claimant that her son would be joining the business by the Respondent at a management meeting on 5 January 2016, to a complaint about her basic pay, to a complaint about the behaviour of Louise Dooley and the Respondent’s failure to manage that behaviour, to the failure to pay overtime to the Claimant and finally the Respondent’s failure to pay the Claimant full salary for three days while she was off on sick leave between 10 and 14 June 2016.

31 The “final straw” incident was alleged by the Claimant to have been the strict application of the Respondent’s contractual provision as to sick pay. The Claimant had booked three days holiday on Friday 10 June and 13 and 14 June. In fact she was unwell and could not take her holiday. She was informed by the Respondent that she would not be paid for three days sickness absence. She complained about this refusal to Mr Simmons (pages 188 – 189 of the bundle) stating that the refusal to pay her for the sickness absence was “the last straw” and if she was not paid in full she would resign. Mr Simmons replied by email confirming that he had not refused to pay it but that there was a statutory three waiting days “without sick pay”. Mr Simmons confirmed that he was exercising his discretion to refuse to pay the Claimant for her days off work through

sickness. It was asserted by the Claimant that this refusal was arbitrary, capricious and unreasonable and, therefore, conduct amounting to a breach of the implied term of trust and confidence. The Tribunal did not accept this to be the case. The Claimant's contract of employment entitled her only to statutory sick pay for which there was a three day waiting period. The Claimant's attempt at the Tribunal to suggest that this term had been varied in some way, either by express agreement or by custom and practice was not accepted by the Tribunal and was unsupported by the evidence. The Claimant was hardly ever ill and the payment of full pay for one day sickness absence in November 2015 was not sufficient to give rise to a custom and practice to vary the express contractual term. Any payment of full pay for periods of previous illness (which were few) seemed to have been more in connection with the failure of the Respondent's processes to determine the reason for absence which resulted in days not being recorded as sickness absence leading to payment of full salary. There was certainly no evidence adduced that would entitle the Tribunal to conclude that the express term had been varied by custom and practice. It was the Tribunal's view that the term as to sick pay had not been amended as alleged by the Claimant. Therefore, the Respondent could not be criticised for relying upon it and that reliance could not possibly contribute anything in the Tribunal's mind to any "last straw" type argument.

32 With regard to the alleged behaviour of Louise Dooley towards the Claimant and the Respondent's failure to manage such behaviour, the Tribunal found no evidence to suggest that Ms Dooley behaved 'rudely arrogantly and aggressively' towards the Claimant as the Claimant alleged. The Tribunal was referred to complaints raised by the Claimant to Mr Simmons in February 2016 onwards. These complaints were of an informal nature and were not progressed by the Claimant in terms of a formal grievance. The Claimant was content for the Respondent via Mr Simmons to deal with the matter in an informal way which the Respondent attempted to do by putting into place a mediation process handled by Mr Barry Hughes. This involved an initial session on 25 April 2016 and then an action plan for both of these managers of equivalent status to work together and review progress during subsequent management meetings. The Claimant initially agreed to undertake such a mediation process albeit she did not fully engage in such process herself. The Tribunal was satisfied that this response by the Respondent in terms of getting both of these managers to work together in a sensible manner over what appeared to be a personality conflict was the best method of working to resolve the issues. The Claimant did not fully engage with this process herself and cannot, in the Tribunal's mind, rely upon this assertion to justify her claim for repudiatory breach of contract. The Claimant asserted that there was evidence of Ms Dooley transferring her workload to the Claimant's department and there was reference to examples in the emails at pages 138 – 141, 123 and 181 – 187. The Tribunal had the opportunity of reviewing these documents and found no evidence of any transfer of any work to the Claimant's department by Ms Dooley nor of any evidence suggesting 'rude, arrogant and aggressive' behaviour on the part of Ms Dooley. In addition, the Tribunal had the opportunity of assessing the evidence of the Claimant and Ms Dooley at the Tribunal hearing and noted that there was evidence strongly suggesting that there were issues between both these two managers which was not solely the fault of Ms Dooley. The assertion about Ms Dooley allegedly talking over the Claimant and not letting her get a word in was implausible to the Tribunal given the Claimant's performance in the witness box where she strongly and forcefully put her own views across and often talked over questions and jumped in with answers before the questions were completed. This was in direct contrast with Ms Dooley's evidence to the Tribunal which was consistent, calm and measured.

33 The Claimant asserted in evidence that the Respondent issued a new contract of employment both to herself and to all employees of the business in November 2015 and that this made her insecure and concerned about her position should the business be sold. She also gave evidence to the Tribunal that the contract that was issued to her did not include the bonus scheme and contained restrictive covenants which would prevent her from working in the same industry should her employment be terminated following the sale of the business. However, it was clear to the Tribunal that a new version of the contract of employment was issued to all employees of the business and not just the Claimant. Further, the Claimant took legal advice from a qualified solicitor as to her rights in relation to signing the new contract which was to the effect that she did not need to sign it and if she did not sign it she could not be compelled to do so and that she would remain on her existing terms and conditions of employment including her entitlement to bonus. The Claimant subsequently discussed the matter with Mr. Simmons on 24 November 2015. Following the meeting, the Claimant was not required to sign the contract of employment as she refused to do so and the evidence was that she continued on her existing contract of employment with no change. In addition, Ms Dooley was provided with a similar contract of employment and like the Claimant she refused to sign. The Respondent did not place any pressure on the Claimant to sign the revised contract and the Claimant remained upon her existing terms and conditions of employment without any detriment. The Tribunal was not satisfied that this matter amounted to a repudiatory breach noting that the Claimant quite properly took legal advice from a solicitor and was very well aware of her legal rights which she put quite readily to the Respondent's Manager Director refusing to sign the revised contract of employment. As a consequence there was no detriment of any kind to the Claimant. The Tribunal did not accept her evidence that this episode made her insecure and worry for her future with the Respondent.

34 With regard to the 2015 Christmas party, it was common ground that the Claimant was not officially invited to the Christmas staff party by the Respondent's Human Resources Manager, Mr Robinson but this was an oversight on Mr Robinson's part which was rectified by Mr Simmons prior to the party. The Claimant was subsequently invited to the party but refused to attend in any event even though she could have done so. Her excuse was that she had to pick up her daughter from the station. The Tribunal was not satisfied that this incident amounted to a repudiatory breach. The Claimant cited that Mr Simmons announcement to senior staff at a meeting on 5 January 2016 amounted to a breach of contract expecting Mr Simmons to have announced the matter to her prior to announcing it to senior staff at the meeting on 5 January 2016. The Tribunal could see no reason why Mr Simmons had any duty to have a discussion with the Claimant prior to this announcement even though the parties previously were married. There was no contractual obligation on Mr Simmons, the Respondent's Management Director to have such a discussion prior to making the announcement to senior staff on 5 January 2016 with the Claimant and there was no breach of contract in this regard.

35 The Claimant asserted that basic salary was relatively low and this was a complaint that was mentioned in her letter of resignation at pages 191 – 192 of the bundle of documents. However as cited in the facts section of this judgment, the Claimant received a good basic salary and indeed this was doubled in most years by the Respondent's payment of a generous bonus to the Claimant which took her pay to a very good standard for the job that she did. Indeed, the Claimant's replacement was taken on by the Respondent following the Claimant's resignation at a similar basic salary to that enjoyed by the Claimant without any bonus provision whatsoever. The Tribunal did not

accept her assertion that her basic salary was relatively low.

36 The Claimant also asserted that the Respondent's failure to pay overtime to her for hours that she worked in excess of 40 amounted to a breach of contract. However, the Respondent wrote to all employees on 26 November 2015 stating that due to the financial circumstances of the Respondent, it would no longer be paying overtime. As a consequence no payments of overtime were paid to any employees including the Claimant. On 25 May 2016 the Claimant said that she had eight hours owing to her and asked Mr Simmons whether she should "save the time" or charge it as "overtime" in the next pay run. On this occasion, Mr Simmons agreed that the Claimant should charge that particular eight hours to overtime but in future, any work she did over and above her contractual hours would account to her bonus payment. The Tribunal did not find that this was unusual for the Respondent to do given the fact that overtime was not being paid to employees of the business at the time and as cited earlier, the Claimant was on a generous bonus package in any event. Objectively considered, this did not amount to a breach of the implied term of trust and confidence.

37 It was the Tribunal's view that no single incident cited by the Claimant amounted to a repudiatory breach and nor was it possible to bundle all the matters together that the Claimant cited as being a breach of the implied term of trust and confidence to produce a repudiatory breach that could be properly characterised as sufficient to amount to a 'last straw' doctrine. It was the Tribunal's view that the letter of resignation (pages 191 – 192), when read objectively in the light of the evidence heard by the Tribunal, revealed a number of facets of the Claimant's character that had actually led to her decision to resign. These were:-

- 37.1 A misplaced sense of entitlement to be treated differently and more preferentially because she was a former director and shareholder of the Respondent and formally married to Mr Simmons, the owner of the business;
- 37.2 A misplaced sense of "ownership" of the Stoneglow brand and of the work she undertook in its development;
- 37.3 A resentment of her loss of ownership of the financial interest in the fortunes of the company following her divorce with Mr. Simmons;
- 37.4 A failure to appreciate her own role in the deterioration in her relationship with Ms Dooley.
- 37.5 In addition to these matters, it appeared clear to the Tribunal that the Claimant had been considering the possibility of leaving to set up her own business for some time. She had previously approached Ms Dooley to encourage her to set up in business together. It was also clear that when she did leave, she took confidential information and company property including intellectual property with her for the purpose of setting up in competition with the Respondent and used such information to do so. She only withdrew the offending materials from her own business website after she received a letter from the Respondent's solicitors to "cease and desist".

38 In conclusion, the Tribunal found that there was no repudiatory breach of contract amounting to a constructive unfair dismissal.

Employment Judge M Hallen

Dated: 10 July 2017