EMPLOYMENT TRIBUNALS

Claimant Mr. J. Crocker

Respondent Goodyer Limited

v

Heard at: Watford **On**: 15 – 17 May 2017
Before: Employment Judge Heal

Appearances
For the Claimant:in person, then representation by Miss R. Crocker from 16 May.
For the Respondent: Ms K. Gardiner, counsel

JUDGMENT

The complaints of unfair dismissal and breach of contract are dismissed.

REASONS

1. Written reasons are given at the request of the claimant.

2. By a claim form presented on 2 April 2016 claimant made complaints of unfair dismissal, disability discrimination and breach of contract (failure to give notice of dismissal). The complaint of disability discrimination has been withdrawn and the other two complaints remain before me at this hearing. The claimant has confirmed that there was no complaint about unauthorised deductions from wages.

3. I have had the benefit of an agreed bundle running to 371 pages to which page 372 was added at the outset of the hearing by the respondent and with the claimant's consent.

4. The respondent produced a document headed 'medical reports' which Ms Gardiner said was simply a better copy than one in the bundle. The claimant made no objection to it being admitted but we left it to one side to see whether it would be needed. It was not referred to in evidence.

5. I have heard evidence from the following witnesses in this order:

Mr John Crocker, the claimant;
Mr Richard Lumm, managing director of Roof Masters Watford Limited;
Mr Terry McFall, roofer;
Mr Philip Calnan, managing director of the respondent;
Mr Kevin McEnteggart, contract director;
Ms Natasha Kearslake, independent human resources consultant.

6. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which I read before the witness was called to give evidence and the witness was cross examined and re-examined in the usual way.

The issues

7. The claimant qualifies to claim unfair dismissal and his claim is in time. Otherwise, the issues were identified by Employment Judge Henry at a preliminary hearing on 10 June 2016. These are:

7.1 It is not in dispute that the claimant terminated the employment relationship.

Unfair dismissal

7.2 Did the claimant do so in circumstances in which he was entitled so to do by reason of the respondent's conduct, which the claimant claims breached the implied term of mutual trust and confidence? In that:

7.3 Did the respondent make it known or otherwise act in circumstances where it was reasonable to believe that the decision in respect of investigations into allegations of misconduct would result in the termination of the claimant's employment?

7.4 If there was such a breach of the implied term of mutual trust and confidence, was that breach of a fundamental nature going to the root of the employment relationship so as to entitle the claimant to treat the employment relationship is at an end?

7.5 Did the claimant accept that breach as bringing the employment relationship to an end?

7.6 Did the claimant resign in response to those breaches?

7.7 Did the claimant waive or otherwise acquiesce in the breaches?

7.8 Did respondent act reasonably in accepting the claimant's resignation when they did, so as to be reasonable in all the circumstances of the case sufficient for the purposes of section 98 (4) of the Employment Rights Act 1996?

7.9 If the claimant was unfairly dismissed, did the claimant contribute to the dismissal?

7.10 If the dismissal was procedurally unfair, but for the unfairness, would the dismissal have ensued in any event? If so, to what extent and when?

7.11 If there was a dismissal by the respondent, what was the reason for the dismissal? The respondent submits conduct and this is a reason that could found a fair dismissal.

Breach of contract

7.12 What is the contract term relating to notice of termination of employment?

7.13 In accordance therewith, was the claimant is entitled to notice of resignation?

7.14 Has the claimant failed to receive notice to which he was entitled on termination of employment?

7.15 If not, in breach of contract, has the respondent failed to give the claimant notice on termination of employment for which the claimant is to receive damages?

Practical matters

8. We agreed to deal first with the issue of whether the claimant was dismissed and if so was the dismissal unfair, and then if the claimant proves those matters, to deal separately with issues of Polkey and contributory fault.

9. During the course of the first day, I became concerned that the respondent had referred to matters in its witness statements and had put documents in the bundle which appeared to be privileged. The respondent accepted this after discussion and when the problem was explained to him, the claimant declined to waive privilege. Accordingly, and with the consent and assistance of both parties I returned my bundle and witness statements to the parties who redacted those documents as necessary. Bearing in mind the overriding objective, I continued on the basis that I would put those matters out of my mind and would determine the case on the evidence actually before me.

10. The claimant represented himself on the first day of the hearing. However, at the beginning of the second day of the hearing Miss Crocker, the claimant's daughter, asked if she could take over the representation. The respondent raised no objections to the change and Miss Crocker therefore cross-examined the respondent's witnesses and made the closing submissions for the claimant. I am grateful to her for her assistance.

Facts

11. I make the following findings of fact on the balance of probability. I do so because I do not possess a fool proof method of discovering absolute truth. I

listen to and read the evidence placed before me by the parties and based on that evidence only, I decide what is more likely to have happened than not.

12. The respondent is a limited company in business carrying out repairs to properties for insurance companies, loss adjusters and building repair networks. This includes insurance related repairs to properties caused by, for example, subsidence, fire and flood.

13. In early 2007 the claimant began employment for the respondent on a part-time 'consultancy' basis. The claimant's contract of employment gives the start date of his employment relationship as 3 September 2007. Confusingly, it then gives a date for continuous employment of 1 December 2009. I do not have to explore these ambiguities in this judgment.

14. In any event, at all material times the claimant was a full-time employee of the respondent and as from May 2013 he held the title Operations Manager. He has also been described before me colloquially as a contracts manager. It has been common ground in the evidence I have heard that the claimant was very good at his job. The respondent valued him and held him in high regard.

15. The claimant was provided with a company vehicle for use in his work. It was not provided for personal use, as he knew.

16. By an email dated 11 January 2013 Mr Calnan wrote to 'all users', which would have included the claimant, drawing attention to the respondent's policy that employees were not permitted to engage the services of any person or subcontractor employed by the respondent to undertake private works either directly or indirectly without the prior consent of the director. This was to ensure that conflicts of interest did not arise.

17. An email dated 24 January 2013 sent to subcontractors on Mr Calnan's behalf told them that subcontractors must not agree to undertake work privately for members of staff, their family or friends without seeking prior approval from a director.

18. By email dated 13 May 2014 Mr Calnan wrote to the subcontractors again telling them that the respondent's company policies clearly state that members of staff must not accept gifts, inducements or favours of any kind from subcontractors.

19. In or around June 2015 Mr Calnan began to hear rumours internally within the respondent that the claimant was being paid money by subcontractors in return for guaranteeing them work. His initial reaction was one of shock and a desire not to believe the rumours. Mr McEnterggart shared that response. At this stage they took no action.

20. At about the same time a Mr Sagoo a senior contracts manager spoke to Mr Calnan and, amongst other things, shared concern that the claimant was taking 'backhanders' from subcontractors.

21. Mr Calnan therefore called the claimant to an informal meeting on a date which he cannot now remember. He told the claimant of the rumours that he was taking 'backhanders' and the claimant said, 'have you got any proof?'

22. Mr Calnan and Mr McEnteggart discussed what they should do about these matters. They agreed to remind subcontractors that they should not agree to undertake work privately for members of staff.

23. Therefore, by email dated 10 August 2015 Mr Calnan wrote again to the subcontractors reminding them that they were prohibited from carrying out work for the respondent's employees without the prior permission of a director and also that employees were contractually prohibited from accepting gifts or having works carried out for free. He went on,

'*If any subcontractor has in the past carried out work without the prior permission of a director or has offered gifts or gratuities to an employee I would ask that they disclose this. On this occasion only there will be no further action taken against the subcontractor.*

Going forward, failure to comply with the above will result in the subcontractor being removed from the network and the employee being summarily dismissed. There will be no 2nd chances.'

24. A Mr Taylor, managing director of one of the subcontractors wrote back on the same day adding that from what he had heard, the problem was less of subcontractors offering gifts and more an issue of the respondent's staff demanding them. Mr Calnan followed this up with Mr Taylor by telephone. Mr Taylor did not give detail but said that he too had heard rumours about the claimant which were similar to those raised by Mr Sagoo. In a later telephone conversation Mr Taylor told Mr Calnan that he had delivered a 'WC suite' to the claimant's home that he had been paid for, 'on a job'.

25. Around 10 August Mr Calnan set in train an investigation into jobs in which the claimant and one other person had been involved. In particular, it emerged that a subcontractor in one job had charged for a scaffold that had not been provided and that some surplus flooring worth around £3000 had gone missing. Paul Ramage a contracts manager for the respondent told Mr Calnan that he had seen the missing flooring in the claimant's house.

26. By a further email dated 18 August 2015 Mr Calnan wrote back to the sub-contractors inviting any subcontractor who felt that he or it had not been treated equitably or fairly or who believed that others were being preferential treatment, to contact any of the directors. He gave a deadline for disclosures which was later extended to 27 August 2015.

27. Given the number of concerns that were being raised about the claimant, Mr Calnan sought advice from Natasha Kearslake an independent human resources consultant. She advised Mr Calnan that it was appropriate and necessary to carry out an investigation as provided for by the respondent's disciplinary policy. Mr Calnan felt too close to the situation to undertake this

exercise himself and so he instructed Bluestone Consulting, who specialised in corporate investigations, to carry out the investigation.

28. The investigation began on 20 August 2015. At this stage the claimant was away on holiday. The claimant returned from holiday on 1 September 2015.

29. The claimant underwent an operation on his shoulder on 11 September 2015. He was signed off work for three weeks. That was then extended for a further month. In early October, Luke Munt, who worked for an associated contractor, contacted the claimant to say that his vehicle was off the road and he had been given permission by one of the respondent's directors to use the claimant's work vehicle. The claimant was off work and not permitted to use the vehicle for personal use. Mr Munt therefore collected the vehicle from him.

30. Bluestone interviewed 13 different individuals and then provided Mr Calnan with a summary of the case investigation, orally on 29 September, and then in writing on 2 October 2015. Mr Calnan then sought advice from Ms Kearslake and as a result decided that further investigation was required. They agreed that it was now appropriate to suspend the claimant pending that investigation and that Mr Calnan and Ms Kearslake would undertake the investigation together.

31. There is a conflict of evidence about the events of 9 October 2015. It may well be that there is a confusion about the precise date of these events. The claimant's email to himself confirming the issue is dated 11 October 2015. I see no reason to disbelieve Mr McFall who has no interest in these proceedings whatsoever and whose evidence is unlikely to be fabricated, not least because it does not in fact back the claimant up in the precise details the claimant alleges. It is at least possible that the events did not happen on 9 October also because a signing in sheet does not prove Mr McFall as present on that day. It may equally be of course that he forgot or failed to sign in on that day. However that may be, I accept Mr McFall's evidence, subject to the possibility that the precise date of these events may not have been 9 October.

32. I find that on the relevant day Mr McEnteggart attended one of the claimant's sites at 'Broomfield'. An issue arose about which the claimant might have known the answer. Mr Lumm suggested that Mr McEnteggart telephone the claimant. Given what he knew, this placed Mr McEnteggart into a difficult situation. He said it would be difficult to telephone the claimant and eventually said that this was because the claimant was under investigation for fraud. Mr McEnteggart's awareness of the seriousness of the situation affected the manner with which he spoke. Mr Lumm formed the impression and drew the conclusion that the claimant was in such trouble but he was unlikely to return to work for the respondent. I find however that Mr McEnteggart did not expressly say that or any words like that. I find that he did not say anything about what the outcome of the investigation would be or about the likelihood of the claimant returning to work.

33. Mr Lumm however was a friend of the claimant's and telephoned him and told him about the conversation. This was the first claimant knew about the

investigation of the allegations against him apart from the informal meeting with Mr Calnan at which he said ‘have you got any proof?’.

34. On the balance of probability, I think it more likely than not that what Mr McEnteggart actually said became lost in the reporting of it to the claimant. In any event the claimant’s email to himself dated 11 October recalls his then concern that process had been breached and his name and credit damaged before he had received any notice of the allegations from the respondent and while he was off work, recovering from an operation, not that he concluded or believed that the respondent had pre-judged the issue.

35. By email dated 12 October 2015 Mr Calnan told Mr McEnteggart not to respond to any emails he received from the claimant. He copied this to the claimant by mistake.

36. By email dated 13 October 2015 Mr Calnan told the claimant that he was the subject of an investigation into allegations of gross misconduct. The email attached a letter suspending the claimant and setting out various allegations of fraud. It went on to tell the claimant that the respondent had a duty fully and properly to investigate the matters alleged so he was being suspended on full pay pending the results of the investigation. He was told that suspension was not a disciplinary sanction. The letter told him to refrain from contacting fellow employees, suppliers or customers without having made explicit prior arrangements with Mr McEnteggart. The respondent told the claimant that it would provide him with an update about the investigation when he was fit to return to work and that no arrangements would be made for a meeting with him to discuss the allegations before he was fit to return.

37. The claimant makes no complaint about the respondent’s process (in terms of pre-judgment) after this date.

38. On 29 October 2015, the claimant was signed off work for a further month.

39. On 4 November 2015 the claimant drafted, but did not send, a letter to Mr Calnan. He said that he was unwell and so unable to come into work for an investigation meeting. However, he said that he did not think it was possible for him to be given a fair and impartial investigation. He said he believed this because he had heard from various sources that Kevin (McEnteggart) had given the ‘impression’ to subcontractors that he would not be returning to the respondent as the respondent had enough proof for fraud and that the claimant had stolen some flooring. The claimant said that his company vehicle had been returned to the office and his personal effects removed in full view of other employees without any notification to him. He said he thought that Mr Calnan was effectively using him as a scapegoat in an attempt to prevent the ‘ongoing wider culture of fraud’ at the respondent. He said that the culture of the respondent was fundamentally fraudulent and he believed that the matter was personal. He thought that Mr Calnan was upset and so would not able to give the claimant a fair and neutral hearing. He said that he was happy to attend the investigative meeting when he was fit to return to work. He said however that he did not feel he would receive a fair hearing and the outcome

had already been determined so it was likely that he would be issuing a claim of victimisation and constructive dismissal regardless of the outcome.

40. On 5 November 2015 Mr McEnteggart had arranged to meet the claimant for a welfare meeting. However, the claimant sent an email to say that he was not well enough for the meeting. Nonetheless, Mr McEnteggart emailed the claimant after that asking him what time would be good for the meeting. The meeting was subsequently rearranged. Whatever the explanation for the odd order of the emails and the fact that Mr McEnteggart was able to email the claimant without seeing the claimant's earlier email, I do not consider that anything turns on this: on the balance of probability it is a minor failure of communication arising from mistake or technology, the explanation for which has been lost with time.

41. On the same day, an email was sent to 'all users' within the respondent to tell them that passwords would be reset on the following Monday. This is the most likely explanation for the claimant discovering that he was locked out of his email account with the respondent in his absence.

42. On 12 November 2015 the claimant emailed Mr McEnteggart to say that he would be more comfortable discussing matters of welfare with his doctor.

43. By letter dated 20 November 2015 Mr McEnteggart wrote to the claimant with an update of the investigation. He told the claimant that the respondent now needed to discuss his current health condition to find a way forward. He said he would be happy to visit the claimant at his home or an alternative location. About the investigation, he said that the company's investigation was complete and when the claimant was fit enough to attend a meeting they would arrange a time to discuss the parts of the investigation relevant to the claimant personally before determining any further action. Therefore, while the claimant remained on sick leave, the investigation relating to those allegations would be put on hold. Mr McEnteggart proposed meeting to discuss the claimant's health on 23 November.

44. On 23 November 2015 the claimant was signed off work sick until 8 December 2015.

45. By letter dated 26 November 2015 Mr McEnteggart brought to the claimant's attention that it had heard that he had been contacting subcontractors asking for information about the investigation. The letter asked the claimant not to discuss the investigation without first having approached Mr McEnteggart personally. The letter continued,

'… We would appreciate being able to discuss the matters with you, as normal business operations are disrupted, with a senior position absent from the business for such a long period of time. Also, please be reminded that at this stage, we have not made any decisions yet. Therefore, please note that following a discussion of the investigation findings with you, should there be no case to answer, we would look forward to welcoming you back to work. Therefore, we reiterate, should you feel well

enough to attend a meeting from this point forward, please let us know and we will arrange to discuss the investigation to date with you.'

46. The claimant was subsequently signed off work sick until 5 January 2016.

47. An occupational health assessment of the claimant took place on 10 December 2015.

48. The claimant wrote a letter on 18 December 2015. He left this letter in his daughter's possession while he went on holiday. He wanted to reflect on whether he wanted to send the letter, before he actually sent it.

49. On 21 December 2015 he gave instructions for this letter to be sent and it was sent to the respondent.

50. The covering email said this:

'*Phil,*
As you are aware I am on annual leave and as a matter of courtesy I have attached a copy of a letter that will be sent to you in tonight's post,

Regards
John'

51. In that letter the claimant told Mr Calnan about his health difficulties, including his recovery from his operation and the effect that the stress of the allegations against him had on his state of mind. He was taking antidepressants and had trouble sleeping. He said that he did not believe it possible for him to have a fair and impartial disciplinary investigation. He gave these as reasons: that he believed his future had already been decided in advance of any opportunity for him to answer the respondent's concerns. He said he had heard from various sources that Mr McEnteggart had informed subcontractors that he had stolen flooring from the respondent and he had enough proof of the claimant taking bribes from subcontractors; this had given them the impression that he would be summarily dismissed on his return to work. This disregard for process and confidentiality happened he said before he was told that he was being suspended.

52. Further, the claimant said that the respondent arranged for his company vehicle to be returned and his personal effects removed in view of other employees. This, he said, added to speculation and damaged his reputation before any investigation. He felt that the respondent was making an example of him to cover up the fact that the company had turned a blind eye to fraud generally. He said that the culture within the respondent was not conducive to a fair investigation in relation to fraud. He made specific allegations (without giving names) about fraudulent practices. He said he did not have confidence in management confidentiality. He believed that what was happening was personal in relation to Mr Calnan. Therefore, he said it was not possible to have a fair and neutral investigation into the allegations and the handling of the process to date had made his continued employment untenable.

53. Mr Calnan replied briefly on the same day saying,

'John,

Thank you for your letter dated 18th December advising me of your concerns. I am on annual leave myself so will be in touch following the Christmas and New Year break and following your return from holiday to discuss how we may move forward.

Phil'

54. The claimant has told me in evidence that this was the 'final straw'. He told me that this was because Mr Calnan was not interested at all in what he had put to him on 18 December and just gave him the standard 'human resources block'. The claimant said it made him think Mr Calnan was not the man he thought he was and that the whole relationship was just a lie to improve his profits. This he said was what made him decide to resign.

55. Mr Calnan replied substantively by letter dated 4 January 2016. He expressed concern about the claimant's slow recovery and noted that he was likely to be fit to return to work as of 5 January 2016. He said that the respondent had taken some time to consider the points raised in the claimant's letter and although they noted his comments they did not agree that the claimant's employment with the respondent was untenable. They wanted to explore the investigation outcomes with the claimant so as to make the fairest, equitable and impartial decision possible in relation to the matters at hand. The occupational health medical report had advised that the claimant was able to attend meetings and so Mr Calnan proposed that the claimant's concerns be discussed as part of an investigatory meeting. In line with the medical advice received, an investigatory meeting was scheduled for 6 January at 9.30 a.m. at the respondent's offices.

56. Mr Calnan said that the company van had been reallocated to keep it in productive use for the company during the claimant's sick leave. He therefore offered to make arrangements should the claimant have any difficulty travelling the meeting.

57. Mr Calnan emphasised that the investigatory meeting was not a disciplinary meeting and although strictly the claimant was not entitled to be accompanied he was invited to bring a colleague to act as his companion.

58. Mr Calnan concluded that because this was the third attempt to arrange an investigatory meeting, if the claimant failed to attend, that might lead to a decision about how to proceed being taken without the claimant's input. For example, the respondent might decide to review the evidence available, take matters forward to a disciplinary hearing, notifying the claimant of his rights and entitlements as appropriate or they might conclude that the investigation warranted no further action in which case they would advise the claimant accordingly and he would return to work as normal.

59. By letter sent by email dated 5 January 2016, the claimant said that further to his letter of 18 December and the response dated 4 January, he had reviewed his position and with immediate effect he was resigning from the respondent. This letter made no reference to Mr Calnan's holding response dated 21 December.

60. On 6 January 2016 the respondent blocked the claimant's access to his iPad and his mobile telephone.

61. By letter dated 6 January Mr Calnan expressed the respondent's regret that the claimant had chosen to resign. He invited him to review that course of action and said that they would not accept the resignation immediately. The current suspension would remain in effect meanwhile. If by 8 January, the claimant still wished to resign then the resignation would be accepted.

62. By letter dated 8 January 2016 the claimant confirmed his decision to resign, 'as I feel you have totally ignored my grievance'. By this the claimant meant his letter of 18 December, albeit the respondent had responded to it on 4 January and told him that the matters raised would be explored at the investigatory meeting. The claimant denied the allegations and said that he would be more than happy to come in and discuss them had Mr McEnteggart not publicly declared his fate. He said that his relationship and trust with the respondent had completely dissolved adding to his reason for resigning. He said that his position had become untenable.

63. Mr Calnan responded by letter dated 8 January accepting the resignation and treating 8 January as the last day of employment. There was then some correspondence about return of property.

Concise Statement of the Law

64. So far as is relevant section 95 of the 1996 Act provides:

95 Circumstances in which an employee is dismissed

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

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

65. To succeed in establishing a claim under section 95(1)(c) the claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.

66. Although unreasonableness on the part of the employer is not enough an employee may rely upon the "implied term of trust and confidence". Properly stated the term implied is "*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."*
67. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract.
68. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the tribunal to warrant treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?
69. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or *the* effective) cause of the resignation.
70. There is no legal requirement that the departing employee must tell the employer of the reason for leaving however.
71. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.
72. The fact that a dismissal is constructive (within sub-section (2)(*c*)) does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); in that event, I must still go on to consider fairness in the usual way.

Analysis

73. I find that the claimant has not proved the fundamental breach of contract upon which he relies. He has proved on the balance of probability, that Mr McEnteggart did talk to at least one subcontractor about the allegations made against the claimant and the investigation. He said enough to convey to Mr Lumm that the matter was serious. I have not found that he said to Mr Lumm that the claimant was not coming back or that the matter was proved against him. He did not say anything to the effect that the respondent had made up its mind. Insofar as that was the message that reached the claimant that is not something for which the respondent can be blamed, but was to do with the communication made by a 3rd party. There was nothing in what Mr McEnteggart actually said that would lead a fair minded and reasonable person to conclude that the respondent had or must have pre-judged the matter.

74. I do not consider that the respondent's action in taking back the claimant's company vehicle was something that caused or contributed to a fundamental breach of contract either as he alleges or at all. I do not find that it was

evidence that the respondent had made up its mind already about the allegations or that it reasonably or objectively conveyed that message to him. In any event, the respondent had reasonable and proper cause for taking back the vehicle because it was not something made available to the claimant for his personal use, the claimant was not working and so could not use it and the company had or might have a use for it.

75. I find that no active steps were made to block the claimant from company communication systems until his letter of 5 January. On the balance of probability, I find that his inability to access his emails was the result of password changes while he was away. This is not, objectively speaking, something that caused or contributed to a fundamental breach by the respondent, it is not evidence that they had made up their minds about the allegations in advance and in any event, there is reasonable and proper cause for changing passwords: that is to maintain security.

76. I do not accept that Mr Calnan's short holding response dated 21 December was the 'final straw' or had any part in the claimant's decision to resign as a matter of fact. His contemporaneous correspondence is not consistent with the explanation on this point that he gave to me in evidence. The correspondence does not mention the email of 21 December. Read in context, the claimant and Mr Calnan were, as they both knew, communicating about a complex matter with potentially serious legal implications while they were both on annual leave over the holiday season. That being the case Mr Calnan had reasonable and proper cause for responding as he did and in any event at the time the claimant's own correspondence shows that he viewed that short email as innocuous, as indeed it was.

77. That being the case, even if I were wrong about my finding that there has been no breach of contract in the sense alleged by the claimant (that the respondent had prejudged the allegations against him or had led him reasonably to believe that), I would find that he had waived any such breach because as he said in evidence, from 13 October the respondent 'was exemplary'. He thought that the decision had been made by 9-13 October. The letter dated 4 November which he did not send, shows that even at that point he was contemplating resignation and a claim of constructive dismissal. So insofar as there had been any breach, it had happened to his knowledge before that date and yet he took until 5 January to resign. During that time, he was on full pay, communicating with the respondent and attending an occupational health appointment. I consider therefore that he has affirmed his contract of employment and waived any breach.

78. Therefore, I find that the respondent did not breach the claimant's contract of employment by prejudging the allegations against him as the claimant claims. In any event, the evidence shows that the claimant had waived any such breach, had he proved it.

79. For those reasons, it is not necessary to proceed to make findings about whether the dismissal was fair, about contributory fault or about whether there was a percentage chance of a fair dismissal in any event.

80. It follows from the fact that the claimant was not dismissed, that his complaint of breach of contract by failure to give notice of dismissal also fails.

81. It remains for me to thank both parties for their care and goodwill in presenting their evidence and, in particular to thank Miss Crocker who has taken over her father's representation with unusual skill.

_____
Employment Judge Heal
17 May 2017
Date: ……..

Sent to the parties on: .....

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For the Tribunal Office