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EMPLOYMENT TRIBUNALS

Claimant: **Mr A Phillippo-Green**

Respondent: **Julie Stewart t/a Stewart Law Solicitors**

Heard at: **East London Hearing Centre** **On: 16-17 March, 18-19 May & 22 May 2017 (in chambers)**

Before: **Employment Judge Prichard (sitting alone)**

Representation

Claimant: Ms S Sleeman (Counsel, instructed by Minster Law, York)

Respondent: Mr G Burke (Counsel, instructed by Ms Stewart)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the claimant's claim of constructive wrongful dismissal fails and is dismissed.

REASONS

1 In this case both the claimant and the respondent are specialist employment lawyers. The claimant was admitted as a solicitor in 2002, Ms Stewart in 1998.

2 Ms Stewart's background is that she had a training contract with Freshfields in the City. Subsequently she worked on the employment team of Nabarro Nathanson in London. She set up in business as a sole practitioner in March 2004 as Stewart Law Solicitors. Her first son Christopher was born in December 2005. It had been her plan to work nearer to home as she was often at home. Her husband, Goran, who is the practice manager for the firm, spends the majority of his time looking after the, now, 2 boys. Their second son, James, was born in March 2010.

3 She brought in a second solicitor called John Wilson in 2007. His engagement sounds to have been very satisfactory but after 5 years he moved on. He was a senior solicitor. He clearly went down well with the clients and Ms Stewart found him hard to

replace. About a year later she recruited a young solicitor who was only 25 years old, Harriet Williams. Ms Stewart explained that she found it hard to recruit solicitors. She was struggling because she had a large workload of many clients but she was doing so much of the work herself.

4 It was Harriet Williams' first job after she qualified, so a lot of Ms Stewart's time was taken up with training her. She was a quick learner and has clearly performed exceptionally well. It was therefore most likely that she would move on (as she has now done). She has now joined a West End firm. The problem, Ms Stewart explained, was that people living in Chelmsford, if they have abilities and ambition, wish to work in London, a short train ride away. If they wish to work in Chelmsford, they would prefer some larger firm in which there is career progression, i.e. the prospect of a partnership - something Ms Stewart was never going to offer.

5 A local agent sent Ms Stewart the claimant's CV. Despite initial misgivings, Ms Stewart decided she would interview him. His background was that he had worked in-house for an insurer from 1996 to 2004 and then from 2004 to 2012 he worked for the Engineering Employers Federation (EEF) which will have given him a good deal of litigation experience. From EEF he worked in an employment law practice in Ipswich - Quantrills. He left there after 2 years. It sounds as if it did not end happily. At this point he was ready to join Stewart Law. Despite initial misgivings Ms Stewart took him on.

6 It will be seen from his experience that the claimant had relatively little experience of private practice – 2 years in Quantrills.

7 As a sole practitioner Ms Stewart is acutely aware of her regulatory duties both as a compliance officer for legal practice and as compliance officer for financial affairs. She is accountable to the Solicitor's Regulatory Authority.

8 This case has proved to be a ruinous litigation arising from the claimant's claim for constructive unfair dismissal. It is a claim for 3 months notice pay. The claimant's salary was £50,000 per annum, so that that will amount to a net sum of approximately £8,000. I was horrified to be told that the respondent's costs following this 5-day hearing amount to approximately £75,000. There were 3 full lever arch files of documents (single sided).

9 The claimant had less than 2 years' employment. He worked from 1 September 2014 to 12 July 2016 when he resigned alleging that Ms Stewart was in fundamental breach of contract, in circumstances where he was facing disciplinary proceedings.

10 In response to the claimant's claims Ms Stewart is citing a litany of complaints against the claimant. Ultimately she was accusing him of incompetence and lack of integrity to such a serious degree that it breached the term of trust and confidence in the contract entitling her to dismiss him summarily without notice.

11 The disciplinary process never concluded because, by a final letter of 12 July 2016, the claimant resigned making a counter-allegation of fundamental breach of contract entitling him to resign summarily.

12 With no disrespect to the parties' counsel who referred me to legal authorities on summary dismissal and summary resignation the matter is now relatively settled. Counsel and the tribunal agreed that the law applicable to constructive dismissal by an employee is reciprocal with the applicable law for summary dismissal by an employer. At the root of it is the term of trust and confidence. The phrase "gross misconduct" is not helpful because it promotes what I referred to as an "arid debate" about whether dismissal is because of conduct or capability. Lack of trust is the key.

13 The debate is arid because an employee can be summarily dismissed for carelessness / negligence if the degree of that negligence causes the employer to lose "trust" in the employee. That is why the phrase "gross misconduct" is misleading. That implies deliberate wrongdoing, and often dishonesty. It is not essential to prove such conduct as a defence to a wrongful dismissal or constructive dismissal claim. An analysis of the facts will usually involve looking forward. If the employer/employee cannot trust the other party then there is no future for that contractual relationship. Then it can be, and often is, summarily terminable.

14 I have to remember that this is a wrongful dismissal case. It involves the tribunal making a finding on whether the respondent had reasonable or proper cause to bring disciplinary proceedings against the claimant. I need to find whether the respondent herself was in fundamental breach of the claimant's contract.

15 In this long hearing I have been asked to listen to an overwhelming amount of technical legal evidence adduced by Ms Stewart to illustrate the claimant's many alleged shortcomings.

16 In summary the working relationship started reasonably well but the claimant had a steep learning curve to undergo. At that stage Harriet Williams spent a significant amount of time "upwards managing" the claimant who is many years her senior in terms of PQE (post qualification experience). Unlike her, he was employed (and paid) as a senior solicitor.

17 The claimant appeared at first to be progressing, albeit from a starting point behind both the others. His contract provided for a 3-month probationary period terminable upon 1 week's notice. In the event, that 3-month period was extended to a total of 6 months. At that point his employment was confirmed as permanent.

18 In the course of this judgment I cannot make findings on the many alleged shortcomings but have, in a way similar to the respondent's summing up, made a selection of what the respondent considered were the worst. I have been asked to keep all client names out of the body of this judgment. There was a redaction key provided to me so that I could understand who the initials used in statements referred to.

19 At this hearing I only heard from 2 witnesses. That was the claimant and the respondent Ms Stewart. There were some written observations from Harriet Williams by way of comment on the claimant's claim. Predictably these support the respondent's case. The format of those observations has been a matter for extreme criticism by the claimant's counsel but I can find nothing objectionable or even unreliable in them. There was what I consider to be a confirmation of truth statement,

a statement of truth which is valid notwithstanding it is phrased in the conventional legal format. The objection was hyper-formal and forensic/legalistic. It was not well suited to this employment tribunal.

20 Mr Burke pointed out the claimant's contract has a term requiring competence and integrity as follows:

> "Stewart Law will require you to perform your duties and discharge your responsibilities to the highest level of competence and integrity and to safeguard the reputation good name and high standing of Stewart Law at all times. The law will also require you to comply at all times with the rules and codes of conduct of any and all professional bodies of which you are a member including without limitation the Solicitor's Regulation Authority, the Law Society and the Institute of Legal Executives."

21 I shall adopt the structure of Mr Burke's closing submission which was a helpful way of dealing with what at times seemed to be overwhelming quantity of evidence. Like many stories it is sensible to start at the end and then work backwards. One of the features of the reciprocation of constructive dismissal law and summary express dismissal law is a concept of waiver can apply. An exception to that is what has been called the "last straw", a concept developed in constructive dismissal law.

22 Ms Stewart did not record or document her growing dissatisfaction with the claimant, preferring instead to tackle him orally. I can see why she might have done so. Early indications were that the claimant could react angrily to adverse criticism.

<u>"Last Chance Saloon"</u>

23 The respondent had serious concerns before matters came to a head on 29 June - 1 July. What the respondent referred to as "last chance saloon" was on 15 June 2016. This arose from advice given to a senior executive of a healthcare organisation over his termination. Notes of the meeting which the tribunal accept as broadly accurate, even though not immediately contemporaneous, stated: "I am at my wits end". The respondent said that the claimant was unable to provide a compliant client care letter for the purposes of the SRA, no fee estimate, and a fee cap / alternative. She stated he was unreliable, there was an issue over his honesty, he was professionally negligent, she did not understand how an advice he had done for this health care organisation, was so wrong. The advice was <u>not</u> just for legal expenses. It was for general insurance cover. He was told that trust and confidence were threatened, (whose meaning would be clear to any employment lawyer). The respondent also stated he was bringing the firm into disrepute and that Harriet Williams had to upwards supervise him. At that meeting the claimant agreed that it was not working out at Stewart Law.

24 The claimant sent a text to his wife shortly after that, saying how unhappy he was with the way things were going at Stewart Law, and how he was not trusted. Clearly, therefore, the respondent's message had got through to the claimant. That is the respondent's case against the claimant.

<u>The Client X Advice – 29-30 June 2016</u>

25 Client X was the respondent's largest client by far. Taking a long-term view it

accounted for an average of 20% of the respondent's time. Ms Stewart had an excellent working relationship with the senior HR individual there - JS (not Julie Stewart, but another JS). However JS had a number two - SE - whom the claimant and the respondent were asked to work with. SE was part of Client X's long-term succession plan in HR. The relationship with the respondent had to work.

26 The respondent was working on settling a potential claim against Client X. She advised SE to settle the claim for several thousand pounds which SE had considered was excessive. The respondent however clearly believed that the potential liability from losing in a claim of this sort could have been very large and therefore settlement in a 5-figure sum was justified. It is difficult because JS was trying hard to delegate her responsibilities to SE but the respondent had to appeal to JS when she reached this impasse over the settlement figure. JS proposed that the respondent did a written advice which she, JS, could proffer to the CEO of Client X (also female). The CEO had to approve all settlements. The advice would have to be with JS by 11am the following morning.

27 That meant that the respondent needed to finally approve the advice either that evening 29 June 216, or by 9.30 the following morning in order to meet the deadline. She was due to go to a client's birthday party in London at Sushi Samba in the City of London that night. In fact she was late leaving Chelmsford because she had to stay and brief the claimant on the advice. She gave a hurried briefing to the claimant before setting out late for the party in London. It was of real urgency, and maximum priority, given the importance of this client and the sensitivities surrounding the respondent's relationship with the incoming HR manager, SE.

28 Around this time the claimant had a number of pre-occupying life issues. He was in his second marriage. He had 2 children by his first marriage and would regularly see them at the weekends. Now he had 2 more children in his new marriage to Rachel Phillippo. His wife Rachel was particularly keen to move house and they had resolved to move to the village of Great Bentley. Great Bentley is east of Colchester (where they are still living) and therefore even further from Chelmsford.

29 The claimant made no secret of the fact that he was thinking of changing jobs and he might soon be gone. Ms Stewart appreciated that if he lost his employment now it would upset all his plans. She was also aware that funding for the house move was precarious because of the claimant's age, and as he had an amount of debt (following his divorce and remarriage). He was taking up work time with correspondence about the proposed house purchase. The claimant had previously worked in Ipswich which was a far easier commute than going to Chelmsford. (In the end they never did manage to move from Colchester).

30 The respondent stated that the claimant could well have been a good person to do this advice for the CEO of Client X as he was "a thinker". The urgency must have been obvious, however, the claimant's timesheets, which were available in the bundle, show that he did not get straight on with this advice. He worked on another client file and then prioritised his own work in progress.

31 He then worked on a second client's file from 7:30pm to just before 8:30. He was dealing with his personal affairs then until 9 o'clock. He then spent 12 minutes

back with work in progress, and from 9:12 to 9:24, he spent 12 minutes on the Client X advice

32 There then followed more work in progress and desk tidying for 22 minutes, and then the claimant stayed in the office until 11:05 pm. No time-recording entries were made for the last Ihr and 20 minutes.

33 There was known to be a faulty burglar alarm and the claimant could not set it. He called Goran Stewart at home to say that he was leaving the office unalarmed. He did not go into work early the next day in order to complete this advice and he did not do any work at home. When he saw the respondent at 08:50 am he said he just needed a "short" time to finish it off. However he did not provide the advice until 11:40. When he did provide it, it was completely unsendable.

34 It is worth quoting from it. I accept the respondent's evidence that it was essentially a verbatim repeat of her hurried briefing to him the evening before, using the same informal language she had used, which is not the sort of language that a professional solicitor should use when advising a client. As follows:

> "I totally understand how you feel about X. You are, naturally, hacked off with her for a whole range of reasons including the fact that (a) she has bled you dry for a year with her sick pay, (b) you have "helped" her out in a variety of ways such as allowing her to work from home before she went off sick c) see you have tolerated her "unreasonableness" at times, and d) you have not pulled her up on her wider poor sickness record. This I can understand, however, in many ways your kid glove approach has made your job harder now …
> …. Also given that your company sick pay is discretionary you could have (and maybe should have) looked to pull the plug on this earlier and / or investigated the cause(s) of her sickness absence more fully. I appreciate that you may not have wanted to poke your hornet's nest for fear of what might happen but it may have helped you now had you done so."

35 This was striking to the tribunal. I cannot conceive how somebody of the claimant's experience could have seriously offered that. It also seems to me from studying the timesheets the claimant gave this urgent advice extraordinarily low priority resulting in letting down the client on a matter of importance and very much jeopardising the working relationship that the respondent had with this important client, which the firm could not afford to do.

36 Ms Stewart had to offer abject apologies to the client for the failure to meet this deadline for the CEO; it was completely avoidable. I accept the respondent's evidence that the claimant was aware of the time of the deadline and the importance of it which is why the respondent was delegating this work in circumstances where another client commitment called and he had nothing urgent to attend to than perhaps his personal and domestic affairs that evening.

37 The point about legal advice, as any lawyer would know, is that it can end up in anybody's hands. It is a formal professional service, which is charged and paid for. It is not at all unreasonable to think that this could have ended up in insurers' hands. They might have had cause to query Client X's choice of lawyer. The timing of this advice also had the effect of derailing the respondent's relationship with SE, a relationship that has only slowly and more recently improved. This took place on 30 June 2016. As far as the respondent was concerned it was the last straw.

38 So far as the settlement was concerned, and the client Client X, Ms Stewart made a special arrangement that she would liaise with the other side and get this settlement achieved. She would provide her reasons (her advice on settlement) in writing after the event, but the moment could not be lost. In the event, Client X approved the final settlement and considered it a good deal, well carried out.

Pay Review – 01/07/2016

39 Subsequently that day, there was an annual pay bonus review for all staff. This is an exception to the respondent's lack of documented criticism of the claimant. She stated in this (pre-prepared) letter dated 30 June:

> "… I am seriously concerned about your figures.
>
> I am seriously concerned around your workload prioritisation time management skills such that even when you have chargeable and, indeed, billable work which you could be doing you don't do it and nor, therefore, do you generate fee income from it which you would otherwise would, for the benefit of the firm.
>
> In view of that I have decided that unfortunately I don't feel able to award you a pay rise or bonus this year. Furthermore to retain your salary at its current level I will need to see a substantial improvement in your ways of working and in your output, please, particularly on the chargeable and billable hours front. We have the work there to do. Please would you therefore do all you can do to do it and in doing so generate fee income."

40 The following day was Friday 1 July 2016 when the respondent told the claimant she would have to have a meeting with him and on the Friday afternoon she did.

41 She informed the tribunal that she did not take contemporaneous notes of meetings when she was talking to staff. She liked to engage with them and make eye contact. I can accept that her notes are accurate record of what was said at the time, as she made a point of recording them as soon as possible after the meeting was finished.

42 She stated that the position was untenable and could not continue like this referring to herself and Harriet having to drop everything to get him out of a pickle, saying he was not concentrating, that he was distracted, that his eye was off the ball that his personal domestic matters had become his priority. He was told that there had been a prior warning and that was "last chance saloon" (15 June 2016, see above). She said that it was informal now. She had said if there was a reoccurrence and/or no improvement then she would go formal. She said on this day that they were now at that point.

43 Ms Stewart said she was giving him the weekend to consider things and come back to a meeting with her first thing on Monday. She would be happy to hear all mitigating reasons he could think of. For instance, his home situation and buying and selling of property. She credibly says to the tribunal that she was actually grilling him to hear mitigation in his defence because he was apparently saying nothing during this meeting.

44 The claimant was letting this wash over him. He had a lot on his mind. He was still having trouble waiting for a response from what was now a second lender to make

him the necessary loan for the purchase. There were issues around his pension because the term of the loan was to extend beyond the claimant's normal retirement date at age 65. (I was told the impetus for the house move had come from his wife Rachel rather than the claimant himself).

45 Come the Monday, the claimant called in at 8:30 saying he had a migraine and was unable to attend that day. That was Monday 4 July. He was due to be off work from the next 3 days - 5 to 7 July. He was not due back in work until Friday 8 July.

46 In readiness for this, the respondent had left him some work to do. There were 5 pieces of work which she had numbered in order of priority. She did so because she herself had commitments outside that day in the morning. She had a school function she needed to attend then she urgently needed to visit her asthma clinic.

47 Apparently they told her there that her breathing and blood pressure was so bad that she should not go into work but should go home - advice she did not take. She also appeared to have a urinary tract infection she could only treat by drinking a lot of water because she is allergic to Amoxicillin.

First Resignation 8/07/2016

48 After she left the surgery Ms Stewart telephoned her husband Goran. He informed her that on the management email address (which is private to Ms Stewart and her husband only) he had seen an email from the claimant tendering his resignation. It was a short letter and it was sent at 7:21am. It stated as follows:

> "I write further to our meeting last Friday 1 July 2016. Over the last few weeks I have been considering my position as a Senior Associate at Stewart Law Solicitors and last week's meeting has brought things to a head. As a result of everything that's happened I've come to the conclusions that things cannot go on as they are and I am unable to continue in my position. Therefore please accept this letter as 3 months notice in accordance with my contract…"

49 Ms Stewart noted there was nothing in that email which suggested that this would be a constructive dismissal resignation. However that may well not have been surprising. The claimant knew that he still wanted 3 months notice from the respondent. I note that the 3 months' notice would have taken the claimant past the second anniversary of his start date. It is also possible that the claimant considered that any impending formal process that the respondent had referred to at the meeting on 1 July might lapse if it was known he was shortly leaving. That was not the respondent's intention however.

Disciplinary Proceedings

50 When she came into the office, against advice, Ms Stewart was told that the claimant had so far done very little of the work she had left him to do. Quite shortly she convened a meeting with the claimant. Harriet Williams also attended, at midday. The respondent asked the claimant if he had anything further to say since the meeting of last Friday. The claimant was silent. She said she was aware of his resignation now but she was not sure it changed anything. Issues still needed to be addressed. She said they had major concerns over the claimant's honesty, integrity, his terms and conditions, his performance, and his conduct.

51 (There was a side issue about a misunderstanding about what the claimant had said about his pension and whether he intended to misrepresent to his lender that he had a pension which he did not have, but the claimant explained that satisfactorily. That was therefore no longer an aspect of integrity that was of concern to the respondent).

52 The respondent's main point was not being able to trust the claimant's capability, having to supervise everything. She said that both Harriet and the respondent's figures were suffering as a direct result of having to supervise the claimant. She said that they could not trust him to have any direct dealings with clients anymore and that he was not fit to work in private practice.

53 Apparently Harriet Williams agreed with all this, particularly saying he was no good under pressure. Ms Stewart referred particularly to the late advice for Client X and that the claimant had lied saying he had some things to do on it when in fact he had not started on it. This came to light when the respondent asked for an interim draft to look at.

54 The claimant was silent in response to all this. He said he wanted to leave then and there, and get 3 months pay in lieu of notice. The respondent said that was not going to happen. She stated that pay in lieu of notice had never been paid by her firm.

55 The respondent tried to find some work for the claimant that he was fit to do and which was not client facing. At that point the respondent and Harriet Williams needed time to consider what their next step was. The meeting resumed at 12:25.

56 When they reconvened the respondent told the claimant that she would instigate disciplinary proceedings and that he was fully aware of their concerns. She said he was being placed on garden leave with immediate effect. She used a standard sheet prepared for clients for the steps that should be taken before suspending somebody, i.e. asking for personal contact numbers, email address, asking for the return of company property together, and asking for the pin codes and login details for the computers and telephones. Apparently the claimant's telephone was dead, completely flat.

57 That was another indication that the claimant did not use his work mobile.

58 The claimant was angry. He slammed his writing pad down, and then went to his office to collect his things. This is vividly recalled by Ms Stewart whose account I accept. It is not particularly relevant whether Harriet Williams accompanied the claimant to his office or not. Shortly afterwards the claimant was found sitting in his car in the car park outside the building.

59 Subsequently they sent a letter to the claimant, to his personal email address, confirming his suspension. He was told that he was already aware of the issues that they would be tackling and that there would be a disciplinary hearing on Tuesday 12 July at 10:30am. He was also told in that letter that the process could end in immediate dismissal without notice or pay in lieu. They also sent him a copy of the firm's dismissal and disciplinary procedure. As can be imagined, with employment

lawyers, they had all the documentation in order.

60 Later that evening the respondent and Harriet Williams interviewed Julie Ann Allan as the older experienced PA secretary to the claimant. She said that she had no confidence in the claimant and always went to Harriet instead. His timesheets were horrific, made no sense, and his writing was bad. He was disorganised. He worked a lot slower than everyone else. He was frustrating on deadlines. He spent a lot of time changing his mind so work had to be completely redone. She said he had improved a bit but then the improvement tailed off and deteriorated. Ms Allan confirmed at the end of her interview that she could think of nothing to help the claimant improve and that: "I think I've carried him for a while, at least a year, maybe more".

61 Following this, by email, of Monday 11 July the respondent and Ms Williams put together a pack for the disciplinary hearing. It was arranged under various headings:-

61.1 client complaints made about you and your work;

61.2 key dialogues with you since January 2016 listing concerns such as deadlines, to speed;

61.3 inability to deal with pressure;

61.4 lack of urgency or commitment;

61.5 not doing tasks in the order requested;

61.6 core time management;

61.7 prioritisation;

61.8 reactivity;

61.9 lack of email response;

61.10 the firm actually records higher chargeable hours when the claimant is out of the office;

61.11 losing work because of failure to save it correctly;

61.12 no market or business development;

61.13 not doing his share of the work compared to the respondent and Ms Williams;

61.14 client care;

61.15 risks to the business;

61.16 judgement;

61.17 failure to adjust and learn sufficiently to be in private practice;

61.18 stressing out staff team members in particular Ms Stewart who said she was ill (and she appeared to be so at this time)

Confronting the claimant plainly took a heavy toll on the respondent.

62 There was what was described as a non exhaustive list of key dialogues numbered 1 to 48. It was recorded in a 12 page document written in single line

spacing. Some are mentioned here:

63 There is a web-based application called GoToMyPC run by Citrix. The application enables you to access your work PC from anywhere in the world, from a phone or another computer, without being at work. The respondent was keen that employees should not spend excessive hours in the office and should spend more time with their families. That was Ms Stewart's original vision when she set up Stewart Law.

64 There was a mail from Citrix saying they did not intend to renew the claimant's GoToMyPC account because he had not accessed it. The claimant maintained to Goran Stewart that he had accessed it. So Goran Stewart made enquiries from Citrix customer care who confirmed that, for the last 60 days there was no activity whatsoever. The respondent concluded that the claimant had not been truthful, which itself was worrying. This is one aspect relied by the respondent to support her view that she could not wholly trust the claimant's integrity and honesty. The word "untruthful" was used in that written account.

65 There was another similar instance later in the month. The claimant said to the respondent that he used his work iPhone to access his work emails when they knew that to be untrue, and provably so. The claimant was forced to admit that was not right.

66 An early source of controversy between the respondent and the claimant was client care letters. The respondent regards these as fundamental to the whole of private practice. They are the key to charging proper fees, and not having to write off time. The respondent's complaint was that she had to write off so much of his time because of failures in his client care letters. His clients were not properly prepared for the level of fees to be expected. I was shown many, many examples of this. I will not go into great detail save to say I am quite satisfied that the respondent had a genuine concern about this. It was causing financial loss to the firm.

67 Client care letters were not something that the claimant was used to from his previous experience in EEF or with insurers. It is not known what experience the claimant had with Quantrills. Still, he failed to pick it up, despite coaching from the respondent.

68 On the main drive, there were precedents for client care letters; some of the paragraphs are mandatory. For some reason the claimant was deleting mandatory paragraphs and thus leaving large areas of uncertainty around fees as a case progressed.

69 Another question of honesty arose from the Client X advice incident on 29 June. On 30 June the claimant stated to the respondent that he nearly finished it at a time when he had not started it. It took him over 2 hours more to deliver it from then, quite apart from the fact it then proved unsendable.

70 Ms Stewart rightly, in my view, characterised the claimant's conduct in being late with the Client X advice as deliberate. It could not have been anything else, given the evidence of the time recording. The tribunal accepts she was clear in the terms in which she briefed him to do that urgent work, and the deadline.

71 As part of the pack prepared for the disciplinary hearing, the respondent sent a schedule of client complaints to the claimant. There were a total of 12, of which 7 were from 2016. So the rate seemed to be increasing. Again I have been shown these and the responses to them. Ms Stewart's version of these complaints has not been meaningfully challenged on behalf of the claimant at this tribunal hearing.

72 One of the allegations was that Harriet Williams and the respondent had had to take client files back from him and the net result of which was that he was no longer had a single active client file of which he was the lead fee earner. Everything was checked before it could go out from the claimant.

73 Furthermore, since an incident where the claimant had apparently double deleted a customer complaint from the office email, the respondent, as I find, had set the claimant's incoming emails to auto forward to both Ms Williams and the respondent to make sure they had oversight of what came in to the claimant's inbox, just in case he should neglect it, otherwise fail to act where necessary, or delete it. The double deletion of the complaint email also raised concerns about the claimant's integrity. It could not have been inadvertent. It cannot happen by accident that an item is deleted from an inbox and then deleted from deleted items. It only came to Ms Stewart's attention because the customer in question had referred her to an earlier email which appeared to be missing from the email threads.

<u>The Claimant's Counter-complaints</u>

74 On the same date as the claimant received all these concerns against him, he, in turn, raised a complaint against the respondent. It was at 9:55am, just before the respondent had emailed the catalogue of complaints and discussion points to the claimant.

75 The claimant's complaint against the respondent was that he was unable to prepare for a disciplinary hearing and had not received the papers in hard copy. He did not have the means to print off large amounts of documentation at home. He also wanted a copy of the employee handbook disciplinary procedure (which might not have been enclosed with the suspension letter after all).

76 In the course of this complaint, the claimant said that the work delegated to him on Friday 8 May indicated that he was still trusted, contrary to the respondent's main submission. As Ms Williams and Ms Stewart were checking everything that the claimant had done before it went out, that contention does not seem to be correct.

77 I find there was a misunderstanding about the conversation that had taken place on 8 July. The claimant considers that the respondent had told him that his "contract was ending" meaning his contract of employment. This was a subject of complaint now. It is clear from Ms Stewart's account that the "contract" came up in the context of her request for the return of the company's mobile phone. I accept the respondent's evidence on this that she said the contract was ending but that she referred to the contract on the mobile telephone. She was not pre-empting the outcome of a disciplinary hearing which had not yet happened. I consider she is too careful and experienced in employment law to have fallen into that well-known *"fait accompli"* trap.

78 The claimant stated that, so far from himself being in breach of contract, that the respondent was in breach of contract. Although he stated he was being prevented from effectively preparing for the meeting, he did not request a postponement. He just stated his belief that the outcome was a foregone conclusion and that the respondent was determined to summarily dismiss him.

The claimant's second Resignation – 12.07/16

79 Rather than spending time preparing for the hearing the claimant seems to have composed his second and final letter of resignation. It ran to 11 pages in close type. I am informed that his typing speeds are slow. Therefore the letter must have been in preparation for some time. He sent it by email on 12 July 2016 at 10:24am just before the disciplinary hearing was due to convene. The subject heading of the letter is: "Your repudiatory breach of contract". The summary at the end states:

> "As a result of everything that has gone on and your various fundamental breaches of contract I hold you in repudiatory breach of contract. Without limitation and in no particular order, amongst other things these include your unjustified treatment of me post me handing in my notice, your threatening to discipline me, you saying that you will not pay my contractual notice, you telling me that my contact is an end and asking me to clear my office, your bullying and harassment of me, and your casting aspersions on my character and honesty. As a result of your repudiatory breaches of contract I am treating my contract of employment as being immediately at an end."

So it was a summary resignation.

80 It has been a controversial theme that the claimant was prone to blame support staff for his own failings, which they found most upsetting. There was one incident involving Rosie Girling who was only 18 years old. On the morning of the disciplinary hearing Harriet Williams and Ms Stewart interviewed Lara Knighton and Katie Smith as well. Katie Smith stated that the claimant regularly lied about his work about the time at which he had given work to them in order to make them seem to blame for the delay when it was truly his fault.

Conclusions on Constructive Dismissal

81 The claimant's case against the respondent that the respondent was in breach of contract rests upon the following allegations in these proceedings.

82 First, the respondent gave him a public dressing down at a meeting on 12 May 2016. She did speak crossly to him that day. She accepts this. It is not clear how public this was, if at all. It was significant enough for Ms Stewart to have handwritten a fike note on the incident. She explained it arose out of work for a client KL where he had failed to meet a deadline, and lied about how much work he had done on it when he had done none. He also sought to blame support staff.

83 The evidence that it was in public is the claimant's text to his wife on the same day at 12.40. He says that the meeting started 1:1 but that Harriet Williams came in later. The claimant added a second text "I'm sorry I just don't know what to do. I am in bits xx".

84 In the circumstances, I accept the respondent's account. Given the claimant's

behaviour I cannot consider that this amounted to a breach of contract. He never mentioned this complaint until this second resignation letter.

85 The second alleged fundamental breach was the meeting of 30 June when the respondent informed the claimant he would not get a pay rise or bonus because of the respondent's concerns about his workload and prioritisation as quoted above. This was eminently justified. Compared to the others, his billable hours were low particularly compared to the respondent's. They were not that much lower than Harriet Williams'. The tribunal accepts the respondent's explanation which is two-fold (a) Harriet Williams was far junior to the claimant and (b) she had to spend far too much time upwards supervising him. I accept, as the respondent stated, that both of them were more productive when he was out of the office.

86 The third alleged breach of contract was the initiation of disciplinary process on 8 July. It should already be clear from the above reasoning that the respondent had amply justified reasons to initiate this process.

87 They were not prepared to pay the claimant in lieu of notice either. When I pressed her on this Ms Stewart explained that, apart from anything else, if they had paid the claimant 3 months notice it would have sent a bad message out to Harriet Williams for whose help and assistance throughout on this and generally on the firm's work was so appreciated by Ms Stewart. Ms Williams had had to shoulder a lot of responsibility in this disciplinary process. Ms Stewart was struggling with it mentally and needed support. Given her age, roughly 25, compared to the claimant of nearly twice that age (now 47), it was a large psychological burden for her too. She gave her notice shortly after this, as was always likely anyway as she was a very competent solicitor. She has now moved to a larger firm in the West End of London.

88 Ms Stewart owed it not only to Harriet Williams but also to members of the support staff, whom the claimant had blamed for his own failings, not to pay the claimant notice.

89 The reason Ms Stewart gave for not involving Harriet Williams in this hearing, (on which she was exhaustively cross-examined), was because she felt she had involved Ms Williams too much already. It was a major imposition. The least she could do was to spare her this litigation, which the respondent has clearly found emotionally exhausting and extremely stressful. I accept those reasons. I do not come near to considering that the respondent was lying, and then keeping Harriet Williams out of the tribunal so as not to force her to lie on the respondent's behalf. I accept Ms Williams' brief written statement as a statement of the truth, as also mentioned above.

90 The tribunal has no hesitation in finding that the level of the claimant's conduct and performance meant that the firm as a whole could no longer trust him as to his capability, his judgement, or his integrity. It became impossible to see how the relationship could continue in the future, and in retrospect it was hard to see how it had survived for so long in the past.

91 The events which happened showed that Ms Stewart was correct in being apprehensive about how the claimant would take it if confronted with his shortcomings. That was a significant factor in causing such a delay to these confrontations. In the

event, the claimant became wholly confrontational and angry. This was not unpredicted. The process was bruising for all concerned. It has continued into this litigation.

92 The fourth fundamental breach alleged by the claimant was the respondent allegedly telling him his contract was at an end on 8 July when the claimant was suspended. As made clear in the findings above, I consider the evidence is clear that Ms Stewart would not have said that, and that the "contract ending" referred specifically to the mobile telephone contract. The remark was made in the context of the claimant's suspension and handing in of the mobile phone.

93 The fifth breach was the failure to provide the claimant with the right documentation for him to prepare for the disciplinary hearing. The main point about this is that the claimant could have asked for an adjournment. He could have requested hard copy too. It is such a common feature in employment situations. It could not possibly have been unknown to the claimant who was particularly experienced with respondent work and litigation through his years at the EEF.

94 It is for an employee to request a postponement and it is quite rare for an employer to refuse at least one request for a postponement of a disciplinary hearing. It would have been an eminently fair request in this case. There was a lot of material for the claimant to deal with. The respondent had set a tight timetable on the disciplinary process. The claimant could have asked for more time. There is no way the respondent would have refused it.

95 It appeared the claimant probably preferred to nurse and exhibit a sense of grievance in these proceedings than to have engaged in challenging the detail of this huge litany of detailed criticisms, arising out of client complaints, Ms Stewart's own complaints, mishandling of client files, incidents which suggested a lack of integrity, and failures in client care letters resulting in copious write offs.

96 Given the claimant's stance that he did not want to have a summary dismissal on his record, he had little choice but to resign rather than undergo a disciplinary hearing. He was unlikely to receive 3 months notice, anyway. That much must have been clear at that stage. It was a good decision on the claimant's part.

97 I cannot accept on the facts that the respondent is exaggerating the degree of the claimant's incompetence and unsuitability to work at all in private practice. I appreciate he is now working for an Ipswich firm. It may be, as formerly with Quantrills, that his weaknesses are less exposed in a larger firm than a small firm like this where he had to take sole individual responsibility for all aspects of the cases of all clients allocated to him.

98 It is sad because when the claimant initially joined Stewart Law, the respondent had been enthusiastic about him. She thought at last she found someone to share the workload with her. She sold him strongly to clients who then, particularly in the case of Client X, the main client, soon became disappointed with him. The client would say that they wanted the respondent to act for them and not the claimant. For instance, they said they did not consider the claimant would be assertive enough in a mediation to get a good settlement, and that he was "wet".

99 The claimant overall has had remarkably little to say in response to the respondent's criticisms, either then or now. There was an overwhelming and detailed case against him. The claimant referred to generalities. He relied heavily on the fact that the respondent did not document her dissatisfaction (to him) prior to 30 June 2016 in his pay review.

100 For his part, he does not seem to have taken any notes or made records or memos for himself, unlike the respondent. He has orally given a version of events which I have found hard to accept, to the extent that it differs from the respondent's recollection. The respondent is good at recordkeeping, and describes events in vivid detail. It is most unlikely to be invention or exaggeration.

101 The respondent had justifiably lost trust in the claimant. The disciplinary proceedings were amply justified and the claimant's claim of constructive wrongful dismissal fails and is dismissed.

Employment Judge Prichard

11 September 2017