EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Blair	**v**	**Harvey Group Plc**

Heard at: Watford **On**: 24, 25 & 26 April 2018

Before: Employment Judge Andrew Clarke QC

Appearances

For the Claimant: Mr A Robson, Counsel
For the Respondent: Mr M Mason, Solicitor

JUDGMENT

1. The claim for constructive unfair dismissal fails and is dismissed.

REASONS

Background

1. The respondent is a company headquartered in Belfast which provides mechanical and electrical services in Ireland and in Great Britain. Mr Harvey is its Managing Director. The claimant had, since July 1997, been employed by his family M&E company, Blair Electrical Ltd ("Blair"), which operated in Great Britain. In February 2016 the four shareholders in Blair (which included the claimant) sold their shares to the respondent and the claimant became an employee of the respondent. The consideration for the purchase of the shares fell into three parts. First an initial payment of £1million, which could be reduced or increased depending on the net asset value of Blair at completion, secondly a guaranteed payment payable in instalments and, thirdly, an additional payment based on the performance of the respondent in Great Britain over the following eight years.

2. The claimant had been working on a contract for the respondent for many months prior to the acquisition of Blair, although remaining an employee of Blair. It had initially been anticipated that he would run the former Blair business post acquisition. However, that changed at the time of acquisition

and he became Operations Manager for the respondent in Great Britain, but with the former Blair business being put into a separate Non-Core Activities division (together with small works contracts and another acquired company, Solmatix Renewables Ltd). The claimant accepted the offer of employment on those terms and makes no complaint about the role he took. Mr Harvey himself took overall responsibility for those Non-Core Activities.

3. In the background to this claim (and to much of the evidence which I have heard) is a wider dispute between the respondent and the four former Blair shareholders. In summary, the respondent maintains that Blair turned out not to be the business it was represented to be and that instead of being a company with considerable net assets, it was (to all intents and purposes) insolvent. The respondent claims to have served relevant notices under the share purchase agreement in that regard. It says that information to justify the state of the company's finances as represented to it was sought, principally from the claimant, from October 2016 onwards and was not provided. The Blair shareholders maintain that the downturn in the company's fortunes is due to poor management, especially by Mr Harvey. They say that no appropriate notices were served and that they (and the claimant in particular) could not provide the information sought as the respondent had all the books and records under its control. The rival contentions will be familiar to those who have had to deal with disputes in the aftermath of a less than successful corporate acquisition. A detailed examination of corporate records and accounting documents will be necessary to resolve the issues between the parties. It is agreed that I cannot perform that task, not least because I do not have those materials before me. Each party's witness statement contains some material relevant to these issues, but I can do no more then find that the party's respective positions were (and remain) polarised and that each was aware of this in October and November 2016, when the key events with which I am concerned took place.

4. The claimant's immediate superior in the respondent's organisation was Mr Herbie Watterson, who was called as a witness by neither side. He was the Director responsible for the operations in Great Britain (other than those in the Non-Core Activities division) until his resignation, shortly before the claimant's own resignation. The claimant liked him and got on well with him. As the claimant knew, Mr Watterson's relationship with Mr Harvey deteriorated from the summer 2016 onwards. By the time of the events in October and November 2016 it was poor. This was, in large measure, due to the difficulties that the respondent was experiencing with Blair. Mr Watterson had been instrumental in the dealings leading to the acquisition of Blair and, with the claimant, in the establishment of a new headquarters in Great Britain for all of the respondent's GB based operations. That headquarters was at Dunstable. Mr Watterson and Mr Harvey were agreed on the fact that the Blair acquisition was unsuccessful, but disagreed radically as to why this was so. Mr Harvey considered that the respondent (principally acting by Mr Watterson) had been misled and that Mr Watterson should shoulder considerable responsibility for this. Mr Watterson considered that the problems lay in how Blair had been run post acquisition.

Mr Watterson was completely open with the claimant about these matters of dispute between himself and Mr Harvey.

5. Whilst there was no promise of future Directorship made to the claimant, Mr Watterson saw him as his successor and made the claimant aware of this. Mr Watterson anticipated that he would retire in the next few years and that the claimant would gradually take over from him. From March 2016 the claimant and Mr Watterson were engaged in setting up the new Dunstable office and recruiting staff for it. This was done against a background of the deterioration in the fortunes of Blair and Mr Watterson's relations with Mr Harvey. As they deteriorated, Mr Harvey began to criticise Mr Watterson for the expensive structure which had been put in place at Dunstable.

6. On behalf of the claimant I heard from Ms Dawn Styles, as well as from the claimant himself. On behalf of the respondent I heard from Mr Harvey and, briefly, from two employees working at Luton Airport (Mr Connor Crothers and Mr Barrie McKenna) and another Director, Mr Samuel Glass. I considered that each was doing their best to assist the tribunal in recalling salient events and their thought processes in respect of them.

October and November 2016

7. The claimant was described, on business cards and elsewhere, as the Operations Manager GB. His contract refers to him as an Operations Manager. The GB operation then had some £13,000,000 worth of contracts, of which the one at Luton Airport was worth £11,000,000. Mr Watterson spent roughly half his time in Great Britain and, although he did work relating to other matters whilst here, he was in overall charge of the GB operations of which the claimant was Operations Manager. By October 2016 the claimant was devoting the majority of his time to the Luton Airport contract.

8. Before me, the respondent sought to characterise the claimant as just a Contract Manager for that Luton Airport contract, rather than an Operations Manager, at least from mid-2016. There was no formal or informal change of title. The claimant's various duties were set out in a detailed job description sent to him shortly after he joined the respondent. I accept that it was not expected that he would carry them all out from day one. He was expected to need (and received) assistance from Mr Watterson in that regard for some time. I also accept that one reason for having him take on the Luton Airport role was to enable him to gain experience of managing a large contract and having set up the Dunstable office with Mr Watterson's assistance and guidance, the claimant was spending a great deal of this time doing the work of a Contract Manager at the Luton Airport site. He visited Dunstable from time to time, but regarded Luton as his base. Letters from his Solicitors (referred to later) demonstrate that to be the case. However, he was doing significant parts of the Operations Manager's job and was still expected to do the whole range of duties in due course.

9. On 16 August 2016, Mr Watterson told the claimant of plans to appoint Mr Ross (a previous employee of the respondent who had left) and Mr Glass (a current employee of great experience) as, respectively, the Operations Manager Electrical and the Operations Manager Mechanical. Mr Watterson suggested that he had argued that their appointment was not a good idea. He expressed concern that they would be placed above the claimant in the company. So far as Mr Glass is concerned, he was appointed a Director of the company in November 2016 and he was a mechanical engineer by trade. His being the Operations Director for that specialism would have had very little impact on the claimant. On the evidence before me, I cannot conclude why Mr Watterson might have suggested that it would. As to Mr Ross, he was to remain based in Northern Ireland (as was Mr Glass) with responsibility primarily for contracts there and it does not appear to me that this would be likely to have had any profound impact on the claimant's position. Of course, it might make it less likely that the claimant would be the preferred candidate to replace Mr Watterson in due course, not least because a replacement might be unnecessary if the claimant was, by then, fully functional as Operations Manager for Great Britain and Messrs Terry and Glass could undertake other of what had been Mr Watterson's responsibilities. Despite what he was told by Mr Watterson, I do not believe that the claimant was particularly concerned by that information at the time, but it undoubtedly added to his general concerns as matters progressed in October and November.

10. On 10 October, an accountant partner at UHY Hacker Young LLP (acting for the respondent in respect of the remaining issues in relation to the Blair acquisition) wrote asking the claimant for certain information. This was followed up by a voicemail and further email on 12 October. In the context of those queries, it emerged that the respondent was asserting that UHY Hacker Young had issued a dispute notice under the share purchase agreement on 22 June 2016. The former Blair shareholders denied that this had been received. At the time of the October correspondence, the claimant was about to go on holiday, but agreed with Hacker Young that his father would seek to help them in his absence. His father had been employed by the Blair business and had remained employed for a period of some three months after the acquisition.

11. In response to those enquiries the claimant emailed Mr Harvey on 13 October. In that letter he made a number of points:

    11.1 He noted that "unfortunately due to bad timing I have missed seeing you at Glengormley the last three times I have been in the office." Those failures to meet were not deliberate on Mr Harvey's part. Indeed, the letter did not suggest that they were, although that has (over time) become the claimant's belief.

    11.2 The claimant could not provide the information requested of him by Hacker Young as the respondent had all the relevant books and records.

11.3 The claimant wanted a face to face meeting in the week commencing 24 October, on his return from holidays "to amicably agree a resolution on this matter. My concern is that once emails have started to be exchanged between accountants and solicitors this will sour a relationship with you, a relationship that I have given my full commitment to. We do have different options on the table regarding my individual performance pay out that I would be willing to discuss in order to swiftly move on." He then commented on his enjoyment of his role at the respondent and concluded "it would be a very bitter blow to me if this time is cut short."

12. The claimant was concerned that if the issues on the Blair accounts were not resolved, this would lead to a dispute between him (as a vendor shareholder) and his new employers, which could impact on the future of his employment. Insofar as this was a call for reassurance by the claimant, Mr Harvey sought to provide it. Mr Harvey emailed immediately to say that he was travelling, but would call and then picked up the phone to the claimant and spoke reassuringly to the claimant. However, he suggested that the claimant was uniquely placed to answer the questions asked and that more time would be given due to his holidays. There was no discussion initiated by either of them as to when they would meet. Both left that until after the claimant's return.

13. An email written by the claimant to his solicitors on 14 October shows that he was concerned that the respondent was attempting to get out of paying what was due under the share sale agreement. From that it is clear that the claimant was now questioning the honesty of Mr Harvey and the others at the helm of the respondent. They do not dispute that they were increasingly of the view that they had been deliberately misled as to Blair's financial situation. The future conduct of both the claimant and Mr Harvey has to be seen against this background of some mutual suspicion.

14. Whilst the claimant was away an email was circulated by Mr Harvey on 19 October to announce the appointment of Mr Jim Ritchie as Director responsible for maintenance and small works, both in Northern Ireland and Great Britain. Those areas had not been within the claimant's responsibilities in Great Britain and this had negligible impact on him. The email was sent to four people and copied to nine others, including Mr Watterson, the claimant's immediate superior, but not to the claimant. The claimant saw that as having significance, in that he believed that he was being excluded from the senior management of the respondent. He told me that there had been a similar failure to send an earlier email, which had been sent to senior managers, to him. However, on investigation it emerged that he was one of those to whom that email was copied, just as Mr Watterson had been copied in on this one.

15. I consider that his omission from the distribution of the email reflected the limited impact of the appointment on him. Had there not been concern arising from the share sale issues, I do not believe that the claimant would have seen any significance whatsoever in his omission. As it was he contacted Mr Watterson by email on his return on 22 October noting that "I

don't think Brian now sees me as a senior manager any more". He concluded the email by asking Mr Watterson to call him saying "I have a feeling that I need to start thinking whether I'm part of Harvey Group's strategic future or if I'm now an uncomfortable reminder to Brian of his own failure with Blairs."

16. Mr Watterson did not inform Mr Harvey about what the claimant said as to his concerns about his future, but he did tell him that the claimant had contacted him. Mr Watterson and Mr Harvey discussed what to do in the light of their concerns regarding the outstanding issues with Blair (on which no progress had been made) and the claimant's email sent before his holiday. It was decided that Mr Watterson should meet the claimant and seek to agree with him a period of paid leave of absence, during which matters could, hopefully, be resolved. Mr Watterson and Mr Blair discussed that proposed leave of absence using the description "garden leave". They understood that to mean paid leave of absence during which the claimant would not have any involvement with the business or its customers.

17. Either during the discussion between them on the telephone when the meeting was arranged, or during a subsequent telephone conversation, Mr Watterson said to the claimant words to the effect of "it doesn't look good for you", or agreed with the claimant when he said words to that effect. The claimant gave both accounts at different points in his evidence. I do not consider that this shows any untruthfulness on his part or any attempt to deceive. The claimant's recollection is of the general tone and content of the conversation and of its impact upon him. Of course, he was aware that relations between Mr Harvey and Watterson were not good. I consider that whatever Mr Watterson was referring to when he said those words (or agreed with them when said by the claimant), the claimant took this to mean that the threat to his employment caused by ongoing issues with the Blair acquisition (which he had foreshadowed in his email) was a real one. That Mr Watterson, with whom he had developed a good relationship, was himself having difficulties with Mr Harvey added to his concerns for the future.

18. On 27 October the claimant and Mr Watterson met at Mr Watterson's apartment in Dunstable. At Mr Watterson's instigation, they agreed that the claimant would take a period of leave to commence at the end of the following day (Friday). The term garden leave was used by Mr Watterson, because that was the term they had ascribed to what they had in mind when he and Mr Harvey discussed the matter. There was little discussion on 27 October as to precisely what this meant, but both Mr Watterson and the claimant understood that the claimant would not work for the respondent for an undefined period whilst efforts were made to sort out the remaining issues with Blair. In particular, there was no agreement as to how the Blair issues might be resolved, no agreement as to how long this period of leave might last (although the claimant expressed the hope that it would be as short as possible) and no agreement as to what access the claimant was to have, after close of business that Friday, to emails and the respondent's IT systems generally and to colleagues. The first two points are common ground, but the claimant alleges that there was agreement as to the third, namely access to business systems and the like. I am satisfied that no

agreement was reached on any of those issues, because of the content of three subsequent written communications:

18.1 An email letter from Mr Harvey to the claimant confirming the terms of his garden leave.

18.2 The claimant's response by email of 31 October, in which confirmed the receipt of the earlier letter, noted the obligations of confidence expected of him, said that he was forwarding the respondent's letter to his solicitors prior to accepting its contents and correcting the author as to when it had been agreed that garden leave would start.

18.3 The letter from the claimant's solicitors of 2 November which responded to Mr Harvey's letter, which said that the claimant had agreed to absence, but not garden leave and said that the claimant remained entitled to "full access to the company, its infrastructure and staff" and complained that "his access to the company's email server has been removed."

19. Had there been some agreement as to email and server access, I consider that the claimant would have said so in his email to Mr Harvey and it would have been asserted in his solicitor's letter of 2 November 2016. The point made in that letter is that there was no contractual entitlement to put the claimant on garden leave and that, whilst an employee, he was entitled to email access and so forth. There was no assertion that this had been specifically discussed, let alone agreed, at the meeting. Taking those matters into account, together with the claimant's oral evidence on the meeting, where the picture he painted of it was very sketchy, I conclude that whilst what to do on that day and the next was discussed and agreed, what was then to happen with regard to access to the IT systems was not. The suggestion that there was an agreement came later, as the situation developed. Access to the respondent's email and server systems were withdrawn. This was because Mr Harvey considered this to be part of garden leave and because the claimant was not working he would not need access and for two other reasons. Firstly, Mr Harvey believed the claimant (via his solicitors) had agreed to this by agreeing the terms of garden leave as set out in his, Mr Harvey's, letter of 31 October and, secondly, he was concerned at giving the claimant unrestricted access in circumstances where there were concerns raised as to his conduct towards the respondent when negotiating the sale of the Blair shares and having regard to the amount of confidential information contained within the IT system.

20. Mr Harvey was, at this time, well aware that the claimant had requested a meeting on his return from holiday, but he believed that it was best to let Mr Watterson deal with these matters. He did not deliberately avoid meeting with the claimant at this time, and the claimant did not assert that he was doing so.

21. The letter of 31 October from Mr Harvey and that of 2 November were both, in effect, solicitor's letters. Mr Harvey had sought advice on what to write

when garden leave had been agreed, so his solicitors supplied a text which, in effect, summarised what one might expect to see in a standard garden leave clause. The claimant's solicitors disputed that garden leave had been agreed in these terms and asserted that there was no power to place the claimant on garden leave.

22. The letter from the claimant's solicitors contained the following statements material to this claim:

    22.1 "We are instructed that our client met with Herbie Watterson on Thursday 27 October 2016 to discuss our client's standing within the company. As a result of that discussion we are instructed that our client agreed to take some time away from the business with a view to his standing being resolved but that at no point did our client agree to being placed on garden leave."

    22.2 "Whilst our client remains in employment he is entitled to full access to the company, its infrastructure and staff. Despite this we understand that our client's company credit card has been cancelled and his access to the company's email server has been removed.

    Our client is concerned that the company will seek to terminate his employment and that the purported garden leave is a preparatory step towards this end.

    For the avoidance of doubt our client does not accept that there are any grounds upon which the company might be entitled to terminate his employment and he remains available and willing to work.

    However, our client recognises that it may be appropriate for the parties to have an opportunity to consider their respected positions."

    22.3 "To facilitate this and strictly without prejudice to our client's position that the company is not entitled to place him on garden leave, our client is willing to allow the company a period of 7 days from the date of this letter in which to clarify its position with regard to our client's continued employment with the company. During this period our client will agree to abide by the confidentiality provisions referred to in the letter dated 31 October and the stipulation set out in paragraphs 1 to 5 of that letter."

23. The author of that letter was clearly and understandably concerned at the use of the concept of garden leave in this context. It is a concept more usually associated with the termination of employment and the letter reflects the fear that the respondent intended that association. The phrase "standing within the company" is a reference to whether or not the claimant had a future with the company, but the intention of the parties was that this period would be used to resolve the remaining Blair issues, or to agree a way forward whilst they were resolved.

24. The letter did not seek to grapple with the issue which had given rise to the garden leave agreement, namely the interrelationship of the Blair issues and the claimant's employment and, in particular, how those issues might be resolved, or a mechanism for resolution put in place, so as to enable the claimant to resume work. The use of the term garden leave (and the

respondent's letter of 31 October) had deflected the claimant (and, in due course, was to deflect the respondent) away from that.

25. In the immediate aftermath of the claimant's absence, the respondent had two matters to deal with:

    25.1 What to say to customers and staff about the claimant's absence.

    25.2 What to do about the outstanding Blair issues.

26. As to the former, Mr Harvey spoke to the two principal customers, Luton Airport (via a Mr Bell) and Furness House (via a Mr Begley). Mr Harvey wished to say as a little as possible to them and believed that he had described the claimant's absence in such a way as not to indicate that he had left or was leaving his employment. However, rumours began to circulate, both at Luton and elsewhere, that the claimant had left. Mr Harvey accepted in cross-examination that Mr Bell must have misunderstood him. However, having heard all the evidence, I am of the view that the situation may be somewhat more nuanced.

27. The claimant met two members of the respondent's team at Luton Airport on the morning of 28 October. He told them that he was taking garden leave from the following Monday. I reject the suggestion that on hearing that he was to take leave, Mr McKenna asked if this was to be garden leave. I accept Mr McKenna's evidence that he had not heard the phrase before the claimant used it to him and had no understanding of what it meant, other than what the words suggested. It seems to me much more likely that having agreed to take garden leave (a term used in the discussions between himself and Mr Watterson) that is what the claimant said that he was doing. Whilst it is the case that, despite the use of the phrase garden leave to them, Mr McKenna and Mr Crothers understood that the claimant intended to return to work at some point, others who heard that phrase may well have thought differently. Mr Harvey was unable to recall exactly what he said to Mr Bell and Mr Begley, but it seems likely to me that he too would be likely to have used the phrase garden leave (because that is the phrase that he and Mr Watterson had used in their discussions) and even if he made clear to those two gentlemen that the claimant was to return in due course, they may well have used that phrase to others who understood a little more of its usual meaning. The same is, of course, true of Mr McKenna and Mr Crothers.

28. I am satisfied, having heard from those two members of the Luton staff, from Ms Styles and from Mr Glass that Mr Harvey was saying as little as possible about the claimant's absence to staff and was not trying to suggest that the claimant would not return. I am equally satisfied that, because of his absence, the lack of any apparent reason for it and the use of the phrase garden leave by various persons, the rumours began to circulate that the claimant's absence was permanent. When Mr Harvey learnt of rumours circulating amongst the staff of the client at Luton Airport to that effect, he acted swiftly to deal with the situation by calling Mr Bell.

29. During this time (and beyond) the respondents were looking into the Blair issues and, in particular, at emails from the claimant and his father to customers in the run up to the acquisition. Mr Harvey's evidence is that what was found added to their concerns. However, that is evidence in the most general terms. Given the scope of this case, that is understandable, but I can make no finding upon it beyond the following, which is sufficient for my purposes. Given that no "smoking gun" was pointed to, either contemporaneously or before me, and given Mr Harvey's subsequent conduct with regard to the claimant's employment, I conclude that what was found was not thought to have taken matters a great deal further. In other words, suspicions were neither allayed nor confirmed.

30. Just before the expiry of the seven-day period in their letter of 2 November, the claimant's solicitors wrote again. Their letter of 9 November crossed with one from the respondent's solicitors of the same date. Both were sent by email. The claimant's solicitors explained that they had received no response to their earlier letter and stated that "in the circumstances our client will be attending his normal place of work at London Luton Airport tomorrow morning."

31. Unaware of the claimant's solicitor's brief letter of the same day, on 9 November, just before the expiry of the seven-day deadline, Mr Harvey sought to contact the claimant by telephone and left him a voicemail. The transcript of that voicemail shows that Mr Harvey said that a letter to the claimant's solicitors had been sent in which the respondent was "suggesting that we agree a period of two or three weeks… call it whatever you like... a suspension or off work or break or whatever you call it, just by mutual agreement, that we get things... sorted out… so look we've confirmed that formally to your solicitors."

32. Mr Harvey had intended to speak to the claimant. He was making clear that he did not regard the claimant's employment as being over, but that how to deal with the Blair issues needed to be sorted out before the claimant could resume work. In his oral evidence Mr Harvey said both that he regarded the resolution of the Blair issues as a pre-condition to the claimant's resumption of duties and, later on, that some way of making progress on them so as to facilitate his return would have been necessary. Having heard all of his evidence, I am satisfied that whilst he hoped to find a solution to the issues (as the claimant himself had said in his letter of 13 October) he recognised that this might not be possible in the short term, but some mechanism for resolution or some way of ensuring that the issues and the claimant's employment could be kept separate (at least in the short term) would have to be devised.

33. The respondent confirmed its position by letter of 9 November written to the claimant's solicitors. In it:

    33.1 Mr Harvey asserted that garden leave was agreed and that both Mr Watterson and the claimant had used the term garden leave when agreeing to it. I have found that they did, but that this was because

it was the term that Mr Watterson used following his conversation with Mr Harvey.

33.2 "If your client is still in agreement to take some time out of the business over the next few weeks to allow discussions to develop, then I would be content to maintain the status quo and keep the matter under review over the next weeks. I appreciate that what is proposed is not a long-term solution, but creating some space over the next weeks to allow discussions to develop and investigations to be carried out regarding the valuation of the business will, I hope, be mutually beneficial." That again made clear that the claimant was not dismissed and garden leave was not to be seen as precursor to dismissal.

33.3 That this was so was confirmed by what was said about possible suspension. The letter stated "if your client is now saying that he wishes to return to work, consideration will have to be given to the appropriateness of this and perhaps a period of suspension with pay pending the development of investigations may be considered. However, my preference would be that the current leave of absence will be extended by mutual agreement and subject to review in two to three weeks' time." As his voicemail to the claimant had made clear, Mr Harvey wanted to agree an extension to the period of paid absence with a review of where things stood in some two to three weeks' time. Suspension was only to be considered if the claimant was insisting on returning to work forthwith.

34. Complaint is now made by the claimant that this letter did not address his concerns as to his status as a senior manager. It did not, but it did address the matter which the respondent had been asked to address, namely whether the claimant remained an employee and whether the respondent was in the process of removing him.

35. The claimant's response to that letter came from his solicitors later on that same day. That responsive letter made a number of relevant points:

35.1 It noted that the claimant had agreed to be absent, denied that the company was entitled to place him on garden leave and complained of the cancellation of his email access and company credit card.

35.2 It said that the company had advised staff and clients that he had left the business.

35.3 It disputed any entitlement to dismiss the claimant and suggested that any suspension would damage his reputation. Of course, the respondent was not suggesting that he was to be dismissed and suspension had only been floated as a possibility if extending the period of absence, which had lasted since 31 October, could not be agreed.

35.4 It complained that the claimant's status as an employee was "entirely separate" from the issues relating to the share sales. That the two were, in practicable terms, interrelated had been recognised by the

claimant in his 13 October email and it must have been obvious that if the respondent had been seriously misled by information produced by (among others) the claimant that could impact upon his employment.

35.5 It offered to extend the current absence arrangements until 4.00pm on 18 November (a Friday) to enable the respondent "to clarify its position with regard to our client's continued employment with the company."

36. It is unclear what "clarify its position" meant. That the claimant remained an employee and was not under immediate threat of dismissal must have been clear. I consider the phrase is a vague one because the situation was uncertain. As the author said earlier in the letter "the current situation cannot continue indefinitely." Hence, I consider that the phrase suggested the claimant would require some way forward to have been put in place by that following Friday, not just a continuation of the current period of absence.

37. Unfortunately, the respondent chose not to respond to that letter until the last minute. That may be partly explained by the intervening resignation of Mr Watterson and the need to deal with the consequences of that, but it is unfortunate that a more rapid response was not made. However, the respondent's position on 18 November and the claimant's later conduct can only be understood in the light of events in the period from 9 November and I deal with them next.

38. On 10 November 2016, the respondent updated its website. A page with photographs of eight senior staff, last updated in 2015 before the claimant was employed, was updated. The former Finance Director's details were replaced by those of the new Finance Director. Three of those previously included who had been promoted to Director had their titles changed and Mr Ross, the Electrical Operations Manager, was included. He had recently been re-employed in that role. Given that the claimant had not appeared on the page before, that there was no predecessor in his post (whose details might have appeared in the 2015 version) and that his immediate superior, Mr Watterson, did appear, it is difficult to know whether the claimant would have appeared, but for the fact that he was absent in the circumstances described above. Mr Harvey did not view him as amongst the most senior staff (who appeared on the page). That was, in part, because he saw the claimant as still being on a learning curve, significantly supported by Mr Watterson and largely engaged in a contract management role at Luton Airport. On balance, I do not consider that the claimant was omitted because he was in the process of being removed (as he later came to suggest), rather because Mr Harvey saw him as, at least currently, of a status below those who featured on the relevant page.

39. On or shortly prior to 15 November 2016 Mr Watterson resigned. The principal reason was that he and Mr Harvey had fallen out about responsibility for the situation regarding Blair. Had Mr Watterson bought a poor business, or had Mr Harvey turned a good business poor? Each held polarised views and Mr Watterson was not prepared to continue in those

circumstances. I accept that he told the claimant that another reason for this dismissal was the respondent's treatment of the claimant. I also accept that he did not advance this to Mr Harvey as one of his reasons for leaving. Why he told the claimant that, precisely what he meant by it and what his true views were, I cannot determine. The impact upon the claimant of that resignation is obvious: the person within the senior management team with whom he had the best relationship and with whom he worked closely and whom he had hoped to replace in due course had gone at a time when he was absent with (as he saw it) his job under some threat.

40. Consequent upon Mr Watterson's resignation, the respondent needed to regroup. Whilst Mr Watterson did not leave instantly, he ceased to work on current projects and left a few weeks later in December. Mr Harvey arranged meetings with the GB staff and customers on 16, 17 and 18 November. He worked with the Office Manager at Dunstable, Ms Styles, to write up on the office whiteboard a chart showing who was going to be responsible for what and who was to provide what support in the short-term. This exercise has to be seen against the background of the two most senior people in the GB operations no longer being at work. Mr Watterson had resigned and the claimant was on paid leave of absence. The diagrams on the whiteboard showed the maintenance and small works operations in green, the teams working on GB contracts (for which Mr Watterson and the claimant had been responsible) in red and the assistance to all of those operations which staff from Northern Ireland would provide in blue.

41. The claimant's name did not appear on the board. That was because he was currently absent and a regime for working without him (and Mr Watterson) was needed. Further, Mr Harvey did not mention him when telling Ms Styles what to put on the board because he took pains not to prejudge what was to happen when the claimant returned. One of the things that Mr Harvey was considering in this period, after Mr Watterson's resignation, was what duties the claimant could undertake if he was to return. He concluded that the Luton Airport contract was now working satisfactorily and the respondent did not require the claimant to be present to the extent that he had been in the recent past. Mr Harvey considered that he needed to work out with the claimant what the claimant could do and where he would need support.

42. One feature of the whiteboard diagrams needs particular mention. This is because of what the claimant says he understood from it when it was explained to him by Ms Styles. In the green section of the diagrams, under the name of Jim Ritchie (the Operations Manager for Maintenance and Small Works), appeared the words "Ops Manager?". The claimant's evidence was that after he had seen this whiteboard (on 21 November) he had been told by Ms Styles that Mr Harvey had told her to write the words "new Operations Manager" on the board, but then told her to erase this saying that it was too sensitive. That evidence suggested that the claimant thought that Mr Harvey had originally had a reference to his post (and possible replacement) put on the board, but then had it removed. In fact, when Ms Styles gave evidence she explained orally that the word "new" had

originally appeared in front of the "Ops Manager?" entry under Mr Ritchie's name and it was just that word "new" which Mr Harvey had told her to remove. He could not recall doing this and so could not assist as to why he had asked that this be done.

43. That change was, of course, irrelevant to the claimant who had no responsibility for maintenance or small works. I have no reason to doubt that what the claimant understood by what Ms Styles told him was that the whole phrase "new Operations Manager" had once appeared somewhere on the board and had been removed. That must have had some impact on his thinking about Mr Harvey's motive for acting as he had done and his intentions towards him. In particular, it tended (in his mind) to confirm that there were doubts as to whether the respondent wished to continue to employ him. Of course, his thinking was thereby influenced by inaccurate information. There had been no reference to his post on the board.

44. I now turn to the events of Friday 18 November and Monday 21 November, which are key to this claim. I have already noted that up to 18 November, no response had been sent to the claimant's solicitor's second letter of 9 November. Consequent upon that lack of response, the claimant's solicitors sent an email letter on 18 November at 11:42 in these terms:

> "If a satisfactory response is not forthcoming by [4.00pm today] then our client will, as stated in our earlier correspondence, attend his normal place of work at London Luton Airport on Monday 21 November. In order that he might carry out his employment duties, he expects to have full access to the business; the company's IT systems, staff and clients and his access to his company credit card restored."

45. In response, the respondent's solicitor (Mr Mason who appeared before me) telephoned his opposite number and suggested a meeting between the claimant and Mr Harvey. Mr Mason summarised this conversation and what followed in a letter of 24 November in the following terms. There was no challenge to this account, either contemptuously or before me, hence I accept it to be accurate (as supplemented by the contents of an email of 21 November from Mr Mason referred to below):

> "I contacted you on Friday 18 November and suggested that, rather than have your client simply arrive for work on Monday 21 November, it will be preferable for your client to meet with Brian Harvey. I indicated that the primary reason for this suggestion was that clarification was needed from both sides regarding what third parties had been told regarding your client's absence from work and what would be communicated about his return before he could simply resume his duties as normal. The requirement for this is highlighted in your most recent letter that says that on 1 November your client "received information" that Brian Harvey had met with his client and informed him that your client had left the company and that he "received information" that on 3 November senior managers in the Harvey Group had been told the same thing. Brian Harvey rejects that this was said and it is important that the clarity is given regarding where this information came from and precisely what was said so that the matter can be made right. It simply does not make sense for your client to return to his normal duties without first having a discussion with Brian Harvey to agree a way forward on this matter.

> I suggested that both parties take the weekend to consider what they would like to discuss when they meet and advise the other on Monday so that there would be clarity on both sides. You did not revert to me on Friday afternoon nor over the weekend and so Brian Harvey took the decision to travel to Luton Airport to meet with your client at the start of the working day on Monday 21 November as your correspondence indicated that this would be where he would go at that time. However, rather than doing what he said he would do, your client went to the Harvey Group office in Dunstable. It is disappointing that a decision was taken by your client that the proposal put on Friday was not appropriate and that this view on this was not communicated before he arrived at the Dunstable office on Monday morning."

46. Mr Harvey was anxious to meet with the claimant and intended to discuss with him his immediate return to work. He had prepared a handwritten note of items to be discussed between them. He intended that after discussions at Luton Airport they would go to Dunstable and discuss the claimant's role in the future in the light of the departure of Mr Watterson and by reference to the diagrams on the whiteboard. In particular, he wished to establish who from Ireland would support what aspects of the business in GB. Mr Harvey had asked the IT department to restore the claimant's access to the respondent's systems and to give him the claimant's new password for him to pass on.

47. The claimant went to Dunstable and not to Luton Airport, as his solicitor had said that he would. He found that his access to the systems had not been restored. He saw the whiteboard and noted that he did not appear on it. Hence, he assumed that he had been (or was intended to be) permanently removed as an employee. He spoke to Ms Styles, but their conversations regarding the deletion of information originally on the whiteboard took place later that day. Without contacting or attempting to contact Mr Harvey he went home. Ms Styles contacted Mr Harvey to tell him that the claimant had briefly attended at the Dunstable office and had then left. She found that Mr Harvey was in Luton. Mr Harvey then called the claimant and left a message asking that the claimant call him, but he did not return that call. It may be that the claimant did not get the message until after he learnt from his solicitor that Mr Harvey had been in Luton waiting for him. In any event, the claimant decided not to contact him, but to leave the issue of their meeting to be dealt with between solicitors.

48. At 9:33 on 21 November the respondent's solicitor (Mr Mason) sent the following email to the claimant's solicitor:

> "Further to our discussion on Friday, I understand that your client attended the Dunstable office this morning for a brief period and then left.
>
> When we spoke on Friday we agreed that you would speak with your client and revert to me regarding an agreed date and time to meet. I should be obliged if you would let me have an update from your prospective.
>
> Please note that, when we did not hear back from you on Friday, Brian Harvey made the decision to go to the Luton site this morning to meet your client as this was the place where you had said your client would report for work this morning."

49. The claimant's solicitor responded at 12:06 in these terms:

> "I apologise for not reverting to you on Friday evening. Given the failure to respond to our earlier correspondence, the proposal for a meeting put forward late on Friday afternoon, which no agenda had yet been provided to my client, was considered inappropriate… we are instructed to write to you in substantive terms regarding his employment position later today."

50. The position around noon on Monday 21 November was, therefore, as follows:

    50.1 The claimant had been on paid leave of absence for some three weeks.

    50.2 The claimant had agreed to this, but had wanted the position with regard to his employment clarified by the end of Friday 18 November.

    50.3 Both the claimant and the respondent recognised the difficulties as regards his employment that had arisen because of the issues relating to this Blair sale and purchase.

    50.4 The respondent had offered a meeting between the claimant and Mr Harvey and the claimant's solicitor had agreed to revert on that, but had failed to do so.

    50.5 The claimant had made clear that he intended to return to work at Luton Airport on Monday 21 November and Mr Harvey had gone there to meet him, intending to discuss his immediate return to work.

    50.6 The claimant's immediate superior, Mr Watterson, had resigned and Mr Harvey (and no doubt others) had had to carry out some reorganisation in relation to GB contracts in order to deal with this, which was reflected in the contents of the whiteboard notes at Dunstable which Mr Harvey had intended to review with the claimant.

    50.7 The claimant was aware that Mr Harvey had travelled to Luton to meet him, believing (from what his solicitor had said in correspondence) that he was intending to go there.

51. Later on 21 November the claimant's solicitors sent a detailed three page letter to the respondent's solicitors. In it they:

    51.1 Asserted that the respondent was in repudiatory breach of the claimant's contract of employment by:

        51.1.1 Subjecting him to disparate treatment, a reference to his not being told of senior appointments or being involved in them.

51.1.2 Conflating the issues of his continued employment and the resolution of the Blair issues.

51.1.3 Going beyond the terms agreed for so called garden leave by seeking to impose the terms of the 31 October letter.

51.1.4 Removing access to the respondent's IT systems.

51.1.5 Informing clients that the claimant had left due to problems with Blair.

51.1.6 Similarly informing senior managers.

51.1.7 Suggesting the possibility of a period of suspension if the garden leave arrangements were not extending by agreement.

51.1.8 Not adding the claimant into the website page dealing with senior staff when it was updated.

51.1.9 Removing his work and reporting roles as demonstrated by the contents of the whiteboard at Dunstable.

51.2 Asserted that this represented a concerted campaign to remove the claimant from the respondent's business and that his position had "become untenable." However, the claimant gave the respondents "a further opportunity to resolve matters" and required proposals in writing by 5.00pm the following Monday, 28 November.

52. In oral evidence the claimant stated that had he been given an agenda for the proposed meeting with Mr Harvey and allowed to be accompanied, he would have met with Mr Harvey. Although the lack of an agenda was mentioned in the 12:06 email on 21 November, neither this, nor the request to be accompanied was referred to in the later letter. Indeed, that letter stated that "given the circumstances above and the failure to provide any assurance to our client regarding his employment he did not consider [having the proposed meeting] appropriate."

53. The respondent's solicitors replied to that letter of 21 November by an email letter sent at 8:49 on 24 November. I have already set out much of what it said about the proposed meeting. The author:

53.1 Asserted that before the claimant returned to work he needed to discuss matters with Mr Harvey and that matters such as access to the IT systems were amongst those that were to have been discussed on the 21st. It went on to the state: "It remains the case that Brian Harvey is ready and willing to meet with your client and if your client is to resume his duties it is obvious that discussion between your client and Brian Harvey must be the first thing that is attended to upon his return. My client invites your client to reflect upon his position for the rest of this week. By the

deadline contained in your letter of 5.00pm 28 November my client expects your client to have agreed to meet with Brian Harvey."

53.2 Stated that in the circumstances he could not understand what "written proposals" the claimant expected to receive, leaving it open to the claimant's solicitor for example to say that a point by point response to her letter and/or an agenda for the proposed meeting were required.

53.3 Concluded by stating: "my client remains willing to resolve the issues that have arisen between the parties and trusts that upon reflection your client will agree to meet with Brian Harvey to move matters forward."

54. I am satisfied that Mr Harvey's stated desire to resolve matters was genuine and the only basis for the claimant's concerns that this might not be the case was (1) the matters in his solicitor's letter which were the very matters that he told me in evidence that he wanted the respondent to address and which would have been addressed at the meeting and (2) the removal of the statement "new Operations Manager" from the whiteboard, which was not mentioned in his solicitor's letter and upon which he was mistaken.

55. The response to that letter came on 28 November in a letter of resignation from the claimant's solicitors. The letter asserted:

55.1 It was "farcical" to state that the claimant could not report back to work and could not perform his duties without communicating with Mr Harvey.

55.2 That having heard what clients and colleagues had been told and having seen what was on the whiteboard "the damage had been done and was irreparable."

56. The claimant's oral evidence did not adopt this approach. In it:

56.1 He complained of the respondent's failure to address in writing the general issues of his employment and the impact of the Blair issues and the matters raised in his solicitor's letters, particularly that of 21 November. He was clear that the person he expected to address these matters was Mr Harvey and he wanted this done in order to facilitate his return to work.

56.2 He stated that he would have met Mr Harvey had there been an agenda and had he been allowed to be accompanied and that he hoped that this meeting would have led to Mr Harvey and himself reaching an agreement so that his employment could continue.

57. It may be telling that when explaining his failure himself (or by his solicitor) to suggest an agenda and agree to meet he said that "I'd been told it had gone too far." Whatever he may have been advised, having heard his evidence I am satisfied that immediately before 28 November letter was sent he held the belief that the differences between himself and the respondent could be

resolved at a meeting between himself and Mr Harvey which would have enabled him to return to work. That was, of course, precisely the belief held by Mr Harvey.

58. It is unnecessary for me to consider the subsequent exchanges between solicitors. They do not assist me in that each maintains a line consistent with their positions as adopted in earlier correspondence and in the submissions before me.

The Law

59. Both representatives provided lengthy written submissions, these dealt with the law in some detail. However, on investigation it became clear that the parties were in agreement as to the relevant legal principles, which I summarise as follows:

    The nature of constructive dismissal was made clear by the Court of Appeal in Western Excavating (ECC) Ltd v Sharpe [1978] ICR221 in the following terms:

    > "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

60. Whether a breach of contract is fundamental (so as to go to the root of the contract) is a matter of fact and degree for me to assess. However, a breach of the implied term of mutual trust and confidence will inevitably be fundamental: See Morrow v Safeway Stores Plc [2002] IRLR9.

61. Whether a party has breached the implied term as to trust and confidence is to be assessed objectively. As Lord Steyn said in the House of Lords in Malik v Bank of Credit and Commerce International SA [1998] AC20 at 47:
    "In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee, rather than what the employer intended. Moreover, the impact will be assessed objectively."

62. The employee's subjective reaction to the employer's conduct is, nevertheless, a factor which the tribunal is entitled to take into account in deciding whether the conduct (viewed objectively) was likely to destroy trust and confidence. See: Parsons v Bristol Street Fourth Investments Ltd UKEAT/0581/07/DM at paragraph 20.

63. The employer's subjective intention is not material. As his Honour Judge Jeffrey Burke QC noted in Leeds Dental Team Ltd v Rose [2014] IRLR8 at paragraph 25:

    > "The test does not require a tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the

> employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of; in pure contract cases in what we may call "the old days" expressions were used such as, "the conduct evinced and intention on the part of the defendant to bring the contract to an end", or "fundamentally break the contract", so that the other party could terminate it."

Nevertheless, a reasonableness of the employer's conduct may be of evidential value as the EAT made clear in Courtaulds Northern Spinning v Sibson [1987] ICR329, where it was noted that "reasonable behaviour on the part of the employer can point evidentially to an absence of a significant breach of a fundamental term of the contract."

64. Once an employer has committed a fundamental breach of contract, that breach cannot be remedied, as the Court of Appeal made clear in Bournemouth University Higher Education Corp. v Buckland [2010] EWCACIV121:

> "[There is] no space for repentance by a party which has not simply threatened a fundamental breach or forewarned the other party of it, but has crossed the Rubicon by committing it. From that point all the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat. What it can do is invite affirmation by making amends."

65. The EAT in Vairea v Reed Business Information UK Ltd (UKEAT/0177015) makes clears that once an employee has waived conduct amounting to a fundamental breach of contract, the employee cannot then go back and rely upon that conduct supplemented by a "last straw" (not itself amounting to a fundamental breach of contract) as a new breach which can be accepted. Subsequent to my hearing the submissions in this case, the reasoning in that case was disapproved by the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. Given my reasoning, this change in what was hitherto thought to be the law is irrelevant and, hence, I did not seek further submissions from the parties.

66. The Court of Appeal gave guidance in Omilaju v London Borough of Waltham Forest [2005] ICR 481 at paragraphs 19 to 22 with regard to the "last straw" doctrine. The court emphasised the following:

    66.1 The quality that a final straw must have is that it should be an act in a series of acts whose accumulative effect is to amount to a breach of the implied term as to trust and confidence.

    66.2 That final straw need not of itself be a breach of contract, nor need it be something which can be characterised as "unreasonable" or "blameworthy" conduct. However, it must contribute, however slightly, to the breach of the implied term as to trust and confidence.

    66.3 The concept of an act in a series is not to be understood in a legalistic sense. The final straw need not be of the same character as the earlier acts.

67. If the constructive dismissal is established, it is possible for the respondent to argue that this dismissal was contributed to by the claimant: see Garner v Grange Furnishings Ltd [1977] IRLR 206.

The application of the law to the facts

68. The claimant relies upon a series of matters which, either individually or taken together, are said to amount to a breach of the implied term as to trust and confidence. I have to ask myself whether, using the language of Rose, this is conduct which considered objectively was likely (without good cause) to destroy or seriously damage the relationship of trust and confidence, a term reflecting which is implied into all contracts of employment. In this instance the "last straw" is said to be the failure to allow the claimant access to the IT systems on 21 November and the reorganisation of the respondent's business without consulting him and in a manner that, in effect, removed his role. I will look at each of the claimant's contentions in turn:

    68.1 Appointing Messrs Ross and Glass as Operations Managers so as to sit above him in the corporate structure. At the time the appointments were first discussed (in about August 2016) and when they were made (November 2016) the claimant was Operations Manager for GB, working under Mr Watterson. Neither Mr Ross nor Mr Glass was interposed between the claimant and Mr Watterson in the reporting structure. Both had primary responsibility for operations in Northern Ireland and Mr Watterson and the claimant remained responsible for operations in Great Britain, albeit that both Mr Ross and Mr Glass might be expected to provide specialist assistance at times. Further, at all material times the claimant was heavily involved with the Luton contract. Mr Watterson may have argued against those appointments and seen them as a threat to his preferred course for the future, whereby the claimant should take over from him in due course. However, there was no promise that this was to happen. To act in this way did not place the respondent in breach of the trust and confidence implied term of the contract. It was not conduct which, viewed objectively, was likely to destroy or serious damaged trust and confidence. I also reject, for similar reasons, the suggestion that failing to consult with the claimant about these appointments amounted to a breach of contract (being likely to destroy or seriously damage trust and confidence). In any event, the claimant was informed by Mr Watterson about the debate at the Board on this subject.

    It is also said that Mr Watterson told the claimant that Mr Glass being made a Director was a way of forcing the claimant into a lower position. Whatever Mr Watterson may have said to that effect, it was inaccurate. The claimant had never been promised a Directorship and, in any event, Mr Glass' expertise was as a mechanical engineer and the claimant's as an electrical engineer. I

reject the suggestion that making Mr Glass (a senior and long-standing employee who had been a Director in the past) a Director amounted to conduct likely to destroy or seriously damage trust and confidence.

68.2 Ignoring the claimant's request for a meeting contained in his letter of 13 October 2016. That request was not ignored. Mr Harvey spoke to the claimant. The need for a meeting between them was overtaken by the meeting between the claimant and Mr Watterson and the ensuing agreement. Mr Harvey did not avoid a meeting with the claimant. Indeed, from 18 November onwards it was Mr Harvey who was seeking the meeting and the claimant who was avoiding it. The behaviour of Mr Harvey in response to that letter would not destroy or damage trust and confidence.

68.3 Not copying the claimant into emails relating to senior appointments. The only example investigated in any detail related to Mr Ritchie's appointment as Director for small works. This covered Northern Ireland and Great Britain, but the claimant had no responsibility for small works in Great Britain, so to include him in the senior employees informed of the appointment was, objectively speaking, entirely understandable. It would not damage trust and confidence to omit him from the addressees of that email.

68.4 Mr Watterson telling the claimant that it did not look good for him. This has to be seen in context. The remark was made (or agreed to) against the background of Mr Watterson's deteriorating relationship with Mr Harvey of which the claimant was aware and the claimant's concerns about the possible impact of the Blair issues on his employment. I accept that Mr Watterson making (or agreeing to) that statement did very minor damage to the trust and confidence of the claimant in his employer. I consider that, objectively speaking, such a minor impact was likely. I do not believe that, taken alone, it demonstrates that conduct on the part of the respondent had taken place, or was intended to take place, which would amount to a breach of contract by destroying or seriously damaging trust and confidence. I consider below whether it can be said to form part of a series of matters which, taken together and viewed objectively, had that effect.

68.5 The respondent went far beyond what was agreed as regards the terms of paid absence. Both Mr Watterson and the claimant contemporaneously described what they had agreed upon as garden leave. The letter confirming the arrangements spelt out terms consistent with those which would be expected in a true garden leave situation. I do not consider that sending the letter amounted to conduct calculated or likely to damage the relationship of trust and confidence, because what had happened must, looked at objectively, have been obvious. The lay persons involved having

used the label “garden leave”, one set of lawyers had fleshed it out and the other had made comments upon that. It was agreed that from the forthcoming Friday evening the claimant would cease to work, so he did not need client contact or the use of IT systems. In any event, that these would be the terms of his absence was agreed between the parties in correspondence. That the respondent had elevated the agreement into these formal terms and found it necessary to spell out what the claimant must not do whilst absent did concern the claimant and led him to question whether he had a long-term future at the respondent which, in turn, led to his desire to have the respondent confront this issue (and the impact of the Blair issues on his employment generally). Like Mr Watterson’s comment, I consider that spelling these matters out did minor damage to the trust and confidence of the claimant in his employer. Again, I consider that, objectively speaking, such a minor impact was likely. I do not believe that, taken alone, it demonstrates that conduct on the part of the respondent had taken place, or was intended to take place, which would amount to a breach of contract by destroying or seriously damaging trust and confidence. I consider below whether it can be said to form part of a series of matters which, taken together and viewed objectively, had that effect.

68.6 Associated with the previous matter is the allegation concerning the removing of the claimant’s access to the respondent’s IT systems after his having such access had been agreed. I have already dealt with the respective factual positions in relation to this matter in the context of setting out my findings of fact. It was the claimant’s case that specific agreement as regards his having access to the IT systems had been reached and was then reneged upon. I have rejected that factual assertion, so this separate contention fails because the factual substratum is not present.

68.7 Communicating to clients and staff that the claimant had left the business. The respondent did not so inform staff or clients. I refer to my findings of fact as to how some confusion most probably arose. That confusion and the rumours that spread were a result of both the claimant and the respondent talking of the claimant’s absence in terms of garden leave. Viewed objectively, this was not conduct calculated or likely to destroy or seriously damage trust and confidence. Both sides had what I consider to be the same loose understanding of what they meant by garden leave, some problems arose (see above) when this got into the hands of lawyers who understood what the phrase ordinarily meant and the context in which it was ordinarily used. Had the respondent taken no steps to address the resulting confusion when it became aware of it, that could have amounted to conduct which did some damage to trust and confidence, but the respondent did address the matter appropriately.

68.8 Failing to respond expeditiously to the claimant's solicitor's letter of 2 November. There was a response within the period prescribed, albeit towards the very end. Waiting until the end of the period, given that both sides accepted that they were dealing with difficult issues relating to the interrelationship of the Blair issues and the claimant's employment, does not amount to conduct calculated or likely to damage trust and confidence. The claimant clearly wanted to get matters resolved as soon as possible and the passing of time without response clearly concerned him but, objectively speaking, as the response was made within the time limit, I reject the suggestion that this damaged trust and confidence.

68.9 The claimant relies upon four aspects of the respondent's behaviour on 9 November in this regard. I deal with each individually:

68.9.1 Not giving an assurance as to the claimant's employment status. As I have found, the letter coupled with the earlier voicemail showed that the claimant's employment status was not currently in issue, but (as the claimant had recognised) various matters needed to be addressed before he returned to work.

68.9.2 Not addressing the claimant's concerns about denial of "access to the company, its infrastructure and staff." I consider this to be a false point. The letter does contain that assertion. It said that as an employee he was so entitled. However, this was said in the context of concern that the respondent had no right to place the claimant on garden leave and that in doing so this was a precursor to the termination of his employment. Of course, garden leave (in the terms the respondent had required) was agreed by the claimant's solicitor in this letter. The thrust of their position, which was addressed by the respondent, was concerning the claimant's future employment status.

68.9.3 Closing off the possibility of the claimant returning to work. That this was closed off by the respondent is said to have arisen from the suggestion of a possible suspension. However, that suggestion was made on the basis that a period of absence was necessary and with the hope that it could be agreed. The parties did agree that a period of absence was necessary and agreed to it. Hence, suggesting an alternative method of achieving that absence cannot, looked at objectively, be objectionable in the sense of being calculated or likely to damage trust and confidence.

68.9.4 Tying the Blair issues and the claimant's employment together. The claimant himself had done that as early as the letter of 13 October. To acknowledge some interrelationship of these matters cannot destroy or damage

trust and confidence. The true concern was not that they were being tied together, rather the concern on the claimant's part was that as a result of the existence of the Blair issues his employment was under threat.

Hence, I do not consider that these matters, or any other points in that letter, when examined objectively and taken cumulatively amount to conduct calculated or likely to damage trust and confidence.

68.10 Omitting the claimant when updating the website. Only very senior staff were included on the page in question and he did not currently fall into that category. The claimant had not been added to the page when he joined in February 2016, or subsequently. I do not consider that failing to add him amounted to any breach of contract or was, viewed objectively, conduct calculated or likely to damage or destroy trust and confidence.

68.11 Mr Watterson telling the claimant that he had resigned in part because of the treatment of the claimant. I do not believe that giving the information as to his opinion regarding the claimant's treatment can amount to a breach of contract by damaging or destroying trust and confidence. It is not the giving of that information which I need to look at, but the treatment of the claimant itself. Precisely what Mr Watterson had in mind is unclear, but I have to consider all of the treatment of the claimant relied upon by the respondent. I do not regard Mr Watterson's very general comment upon it to assist in that analysis.

68.12 Failing to consult the claimant as to the reorganisation following Mr Watterson's resignation. The claimant was not currently at work at this time and must have appreciated that Mr Harvey (and others) would need urgently to undertake some re-organisation in order to deal with the situation. I do not consider that it amounted to a breach of contract to fail to involve him in these matters: this was not a re-organisation to cope with the absence of someone reporting to the claimant. This was a reorganisation to deal with his immediate superior's absence whilst he himself was absent. Indeed, this failure to consult was not the complaint made contemporaneously. That complaint was that his role and reporting lines had been removed. It is also important to note that this reorganisation was done in the two days prior to the suggestion being made that the claimant and Mr Harvey needed to meet, a meeting obviously intended as a way of looking forward and at which the reorganisation was to be addressed. Hence, viewed objectively, I do not consider that this shows any intent or likelihood of trust and confidence being damaged.

68.13 Failing to respond substantially to the claimant's solicitor's letter of 9 November. In fact, the respondent did respond by suggesting a

meeting. The claimant's solicitor was to revert on that, but did not do so. However, by mid-morning on 21 November, the claimant was aware that Mr Harvey had come to Luton Airport (where the claimant had said he would be) especially to discuss matters with him and continued to wish to have a meeting with him. Whilst the claimant's solicitors maintained that the situation had become untenable by this point (after the abortive return to work on 21 November) the claimant's evidence ran contrary to this. Hence, the factual substratum underlying this complaint is not present. There was a substantive response, albeit one which assumed that the detail of how to take matters forward would be discussed at a meeting rather than being set out in correspondence. Had there been an agenda and a willingness to allow the claimant to be accompanied that meeting could have taken place. The respondent had indicated that both sides should reflect on what they wanted to have discussed. The claimant did not revert on that and never mentioned the requirement to be accompanied.

68.14 Removing or omitting the claimant from the diagrams on the whiteboard which he saw at Dunstable. Those diagrams were not hidden from the claimant, but it was intended that he would see them and discuss the content of them with Mr Harvey. He was omitted (but not removed) because his role going forward (both at Luton Airport and more generally) required discussion. The respondent intended to have such discussions and sought a meeting for that purpose. The claimant would have been prepared to meet (and had the hope that such a meeting would resolve matters) had he been given an agenda and allowed to be accompanied. He did not make that clear in correspondence, he did not respond to Mr Harvey's voicemail and, in short, he made no efforts towards having a meeting which he believed could resolve matters when the respondent was offering to meet. The writing of the diagrams without including the claimant does not, in that context, amount to conduct which, viewed objectively, was calculated or likely to damage trust and confidence. The diagrams were written when the claimant's future was uncertain, when Mr Harvey was trying to say as little as possible (internally, as well as externally) so as not to provoke further debate and speculation and discussions with the claimant were needed and would, it is clear to me, have been welcomed by both sides. The diagram showed the current position, post Mr Watterson's resignation and with the claimant on leave of absence.

68.15 Failing to provide a detailed response to the claimant's solicitor's letter of 21 November. A response was provided on 24 November, but the complaint is that it did not deal point by point with what the claimant's solicitors had said. However, this also needs to be seen in context. A meeting had been offered and the respondent was continuing to say that a meeting was necessary. Its solicitors were saying that the matters of concern would be addressed at the

meeting. In that context, failing to address them point by point in correspondence does not amount to any breach of contract or to conduct calculated or likely to damage trust and confidence. That this is so is reinforced by the claimant's evidence that had there been an agenda and had he been accompanied at a meeting, he hoped that matters could be resolved so that his employment could continue.

68.16 Failing to restore the claimant's access to the company IT systems prior to his return to work on Monday 21 November. Access to the systems had not been restored. Mr Harvey had arranged for access to be restored that morning and for the new password to be sent to him to give to the claimant. He assumed that the claimant would go to Luton Airport, where they would meet before going on to Dunstable to discuss (and, hopefully, agree) upon various matters before the claimant returned to work. In those circumstances, I do not consider that the failure to restore access in advance of the claimant starting work that morning so as to enable him to have access when he attended at the Dunstable office to amount to a breach of the implied term as to trust and confidence. In all the circumstances, I do not consider that, objectively speaking, it would be likely to have any impact on trust and confidence at all.

69. Could this course of behaviour on the part of the respondent amount, taken together, to be a breach of the implied term as to trust and confidence? I pose that question mindful that in respect of some of the allegations I have noted that, objectively speaking, some limited impact on trust and confidence could be expected. I also make clear that where I have not made such a finding, I consider that the conduct in question (viewed objectively) would not impact at all upon trust and confidence. I answer that question in the negative. Trust and confidence had not been destroyed or seriously damaged by that course of conduct. The claimant had concerns, most particularly from seeing the diagrams on the whiteboard and hearing that "new Operations Manager" had been put on and crossed out because Mr Harvey considered this matter too sensitive. However, he saw the diagrams without hearing from Mr Harvey because he went to Dunstable not to Luton Airport where his solicitors had said he was to go and left almost immediately, failing to respond to Mr Harvey's voicemail. Those matters relied upon as the final straw, cannot be so relied upon and, in any event, there was no sufficient straw (or straws) already in the balance so as to enable the so called final straws to tip it over.

70. I am satisfied that the claimant's position had not become "untenable" as his solicitors asserted. I say that looking at the matter both subjectively and objectively. I consider that the claimant's subjective position here to be a good guide to the appropriate objective analysis. He wanted a meeting, albeit with an agenda (which he made no effort to produce) and with someone accompanying him (which he never even mentioned) and he hoped that such a meeting would lead to the resolution of the various

matters which had been raised on his behalf, so as to allow his employment to continue. Having heard both from him and from Mr Harvey and having considered the contemporaneous correspondence, I consider that this was a reasonable expectation for him to have in the circumstances. The pity is that the meeting did not take place.

71. In the light of my findings I do not need to consider whether the claimant waived an existing breach by his solicitor's letter of 21 November, as I have found there to be no such breach established at that stage. I also do not need to consider the issue of contributory fault, although I note that had I found a breach which was accepted by the claimant, I consider that this may well have proved to be one of those rare cases where the doctrine could be found applicable in circumstances of constructive dismissal.

72. For all of those reasons this claim must fail and is dismissed.

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Employment Judge Andrew Clarke QC

Date: 10 May 2018

Sent to the parties on: .....

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For the Tribunal Office