EMPLOYMENT TRIBUNALS

Claimants: **Richard Smith**
Michelle Smith

Respondent: **The Shoe Healer Limited**

Heard at: **Leeds** **On: 13 and 14 August 2018**

Before: **Employment Judge Brain**

Representation

Claimants: Mr T Pochron, Solicitor
Respondent: Mr H Menon, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimants were constructively dismissed by the respondent. Their complaints of constructive unfair dismissal succeed.
2. The claimants did not act in fundamental breach of their contracts of employment. The respondent had no entitlement to summarily dismiss them. Accordingly, the claimants' complaints of wrongful dismissal succeed.
3. The respondent failed to comply with its obligation under section 1 of the Employment Rights Act 1996 to provide the claimants with a statement of employment particulars.

REMEDY

4. Upon the complaint of unfair dismissal

4.1. The claimants were employed between 1 November 2006 and 20 October 2017. The respondent therefore has a liability to pay:

4.1.1. To Mr Smith a basic award of £3,317.25.

4.1.2. To Mrs Smith a basic award of £1,879.76.

4.2. Compensatory award

It is just and equitable that the respondent shall pay a compensatory award to both claimants in the sum of £1,380 calculated as follows:

Loss of earnings 31 October 2017 to 30 November 2017-	£958.00
The employment relationship would have come to an end around 20 January 2018 in any event.	
Hence, three months partial loss of earnings -	£100.80
Total	£1,058.80
Add loss of the statutory rights not to be unfairly dismissed -	£250.00
Total compensatory award	£1,308.80

5. Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 the respondent shall pay to each claimant an uplift of 25% upon the compensatory award by reason of the failure to comply with the *ACAS Code of Practice: disciplinary and grievance procedures.*

Each claimant shall therefore be paid the sum of £327.20

6. Pursuant to section 38 of the Employment Act 2002, the respondent shall pay to each claimant two weeks' wages for the failure to comply with section 1 of the 1996 Act. Each claimant shall therefore be paid the sum of £442.30.

7. The respondent shall pay the sum of £1,024.54 as damages for wrongful dismissal.

Summary

The total sums payable by the respondent to the claimants are as follows:

Mr Smith - £5,395.55

Mrs Smith - £3,958.06

[These figures are inclusive of the amount awarded for wrongful dismissal to avoid double recovery]

REASONS

1. I heard evidence in this case on 13 and 14 August 2018. After hearing helpful submissions from the parties' representatives I reserved Judgment. I now give the reasons for the Judgment that I have reached.

2. The respondent was incorporated on 30 September 2005. From the time of its incorporation until 31 March 2009 the directors of the respondent were Antony Frith and his wife Ann Frith. Mr and Mrs Frith each held 50% of the respondent's shares.

3. On 31 March 2009 Mr Smith was appointed as a director. Mrs Smith followed suit on 4 November 2014. According to the annual return filed on 8 December 2012 Mr and Mrs Frith and Mr and Mrs Smith each held 25% of the issued shares in the respondent.

It appears therefore that Mr and Mrs Frith vested shares in the respondent with Mr and Mrs Smith at some point during 2012.

4. It was common ground accordingly that at the time of the events with which I am principally concerned Mr and Mrs Smith and Mr and Mrs Frith were each a director of the respondent and equal shareholders. It is also common ground that all four of them drew a salary and were employees of the respondent.

5. The respondent operated from premises in Doncaster and South Elmsall. The business carried on now by the respondent was started by Mr Frith's father. Mr Frith says in paragraph 3 of his witness statement that he has been involved in the business for around 33 years. I was not informed of the longevity of the business but plainly it is well established and longstanding.

6. The business has always undertaken shoe repairs, engraving and services of that kind. From around the time that Mr Smith became a director, the business branched into the retail of sale of shoes. Mr Frith gave evidence that the business had intermittently undertaken retail prior to Mr Smith becoming director. However, it is the case that the respondent was not involved in the retail sale of shoes immediately before Mr Smith becoming involved.

7. At paragraph 4 of Mr Frith's witness statement he says:

"Richard Smith was a long-time friend of mine. Richard went through a divorce around 2007, and following his divorce he frequented the shop premises. He often filled his time at the shop. At that time he had a new girlfriend, Michelle, who subsequently became his wife. As a result of our friendship, I invited Richard to come and work at the shop. At that time Richard had no knowledge or experience of the shoe industry. When I suggested that he could work for the business, Richard insisted that if he was to join our business then he would only do so as a partner rather than as an employee. It took some time before Richard joined the business as he was deciding whether he wanted to go back to long distance lorry driving and/or start up another business with a mobile food outlet unit. I also remember that he was off work receiving normal pay for about a year, and so he delayed joining The Shoe Healer for quite some time as he wanted to as he said "stay under the radar".

8. None of the parties produced any documentary evidence to assist upon the question of the commencement of employment of either Mr or Mrs Smith. The respondent accepts that Mrs Smith commenced employment in March 2007 and that Mr Smith did likewise in April 2009. In evidence given under cross-examination Mr Smith confirmed that the position was *"regularised"* (as Mr Menon put it) in April 2009. (By this was meant that Mr Smith became an employee after a period of being *'under the radar'* (as it was put by Mr Frith)). That would appear to fit with Mr Smith being appointed director on 31 March 2009.

9. Mr and Mrs Smith contended their employment with the respondent in fact commenced earlier than the dates accepted by the respondent. Mrs Smith says that she joined the respondent in 2006. Her schedule of loss and her claim form provide a commencement date of 1 November 2006. In evidence given under cross-examination, it was in fact suggested by Mr Menon that she started in 2006. She confirmed this to be the case. She said, *"yes* [I started] *towards the end of 2006".* Nothing was put to her to suggest a later start date.

10. Her uncertainty as to her commencement date is unsurprising given that the respondent failed to issue her with a written statement of particulars of employment pursuant to its obligations under section 1 of the Employment Rights Act 1996. Given

that failure and the lack of any meaningful challenge to Mrs Smith's evidence (and it seems acceptance from counsel's question to her that she started work in 2006) I am happy to accept her account of the date of commencement of her employment with the respondent.

11. The respondent's failure to comply with its obligations under the 1996 Act and issue Mr Smith with a statement of employment particulars was a somewhat unpromising background against which for the respondent to effectively challenge Mr Smith's account that he became an employee of the respondent at the same time as Mrs Smith.

12. Mr Smith accepted, in evidence under cross-examination, that when he first became involved with the respondent he had a job as a lorry driver. Of course, that in and of itself does not prevent him from being an employee of the respondent. It is not uncommon for individuals to hold down two jobs at the same time.

13. It was put to Mr Smith that he initially started working on an *ad hoc* basis for the respondent. This he fairly accepted. It was then suggested to him by the respondent's counsel that although he would turn up for work on a regular basis prior to 2009 there was no obligation upon him so to do. Mr Smith said that there was an obligation *"in my own mind".* He accepted that there were no set hours of work.

14. In evidence given under cross-examination, Mr Frith told the Tribunal that prior to April 2009 Mr Smith had performed a regular service for several years and that he would come in regularly *"3 or 4 times a week".* Mr Smith was paid for the days that he worked. Mr Frith said that Mr Smith *"stopped pursuing other interests and then came in regularly".* He accepted that when Mrs Smith came in so would Mr Smith *"if he was not doing other things".*

15. For there to exist a contract of employment there must be present the irreducible *minima* of control of the putative employer over the putative employee, mutuality of obligation and an obligation of personal performance.

16. In my judgment, Mr Smith has little difficulty in establishing the elements of control and personal performance. There was no suggestion other than that when he undertook work for the respondent his tasks were given to him by Mr Frith. Indeed, Mr Frith says that he trained Mr Smith *"extensively in all aspects of the business and the shoe industry".* There was also no suggestion that Mr Smith could perform his obligations by sending along a substitute in his stead. Plainly, the expectation was that Mr Smith personally would carry out the duties assigned to him by Mr Frith.

17. It was not disputed by Mr and Mrs Smith that their 25% shareholding was gifted by Mr and Mrs Frith. Mr and Mrs Smith did not pay anything for them. The only reasonable inference to draw therefore is that Mr and Mrs Frith saw Mr and Mrs Smith as an asset following Mr Frith having given extensive training to Mr Smith in particular. That purpose would have been defeated had it been open to Mr Smith to send along somebody else to work in his stead.

18. Therefore, this leaves the crucial issue of mutuality of obligation. This is usually expressed as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. The absence of this mutuality of obligation can defeat a claim for employment status even where the purported employer operates a significant degree of control over how the work is carried out.

19. I accept the respondent's case that in the early stages of this arrangement there was no mutuality of obligation. The arrangement was very much *ad hoc*. If Mr Smith came

in he would be provided with work to do. It was up to him whether he came in or not. If he did not come in then the respondent would simply give the work to somebody else and was under no obligation to provide the work to Mr Smith.

20. I find however that that loose or *ad hoc* arrangement segued into an employment relationship. I say this in the light of Mr Frith's fair acceptance that there came a point before Mrs Smith's employment where Mr Smith would come in upon a regular basis. I find that this came to be the established practice. Mr Smith's understanding that there was an expectation upon him to attend work was therefore reasonable.

21. As I say, upon this issue, the respondent is on the back foot upon the issue of the commencement date of the claimants' employments because of the failure to provide a contract of employment or statement of employment particulars. There is a paucity of contemporaneous written evidence. From the verbal evidence that I heard to the effect that Mr Frith viewed Mr and Mrs Smith as becoming employees at around the same time I therefore find that Mr Smith became an employee also on 1 November 2006.

22. Mr Frith says in paragraph 6 of his witness statement that, *"Initially both Richard and Michelle worked well with Ann and I. However, things changed from around March 2014. Michelle was pregnant and Richard insisted that Michelle should continue to receive full pay rather than statutory maternity pay throughout her undefined period of maternity leave even though he knew it would be to the detriment of the financial welfare of the company. From that time onwards, Richard became argumentative and unhelpful".*

23. Mr Smith gives a different account in paragraph 18 of his witness statement. He says, *"On returning from holiday in April 2014 and before he returned to work we called Ann and Antony over to our house one evening. This was to give them the happy news that we were expecting our first and only child. Ann was very happy for us but Antony was slow to congratulate which we though afterwards was very strange as we had always considered him to be a big family man".*

24. Mr Smith says that after April 2014 he noticed *"that Antony was becoming more and more reserved in his attitude towards us and on one occasion even agitated in his manner".* He says in paragraph 19 of his witness statement that on one occasion a *"full blown argument"* blew up in which Mr Frith said that *"Michelle being pregnant has wrecked my fucking life".* Mr Smith says (at paragraph 20 of his witness statement) that in reply he said to Mr Frith, *"'you idiot, you fool, you have just broken something between us that will never ever be fixed!' In making that stupid statement, I felt he had disrespected my wife, my unborn child and myself".*

25. Mrs Smith gave unchallenged evidence (in paragraph 6 of her witness statement) that she returned to work after her baby was only five weeks old. She only took nine days as paid maternity leave and she and Mr Smith had saved two weeks of their annual holiday *"to take as quasi-maternity leave with our overall intent being to lessen any impact upon the business".*

26. It was unclear what, if any, difficulty Mr Frith had with the fact of Mrs Smith's pregnancy. Whatever the situation, it is common ground that the relationship between the couples deteriorated badly from around that time. A mediation meeting conducted by the respondent's accountant in May 2014 failed. Mr Frith's evidence is that from around that time Mr and Mrs Smith were of the view that the couples should part company. Mrs Frith's account is corroborative of Mr Frith's. Mr Smith's evidence is that in 2016 Mr and Mrs Frith approached Mrs Smith intimating a willingness to sell their share of

the business to the Smiths. This approach took place just before the Great Yorkshire Show held in 2016. According to Mr Smith, Mr Frith then changed his mind.

27. In my judgment, it is not necessary to make detailed findings of fact about events between 2014 and the summer of 2017. It is sufficient, I think, to record that the friendship between the couples had gone and relations between them were strained. Arguments between Mr Smith and Mr Frith were frequent. It is common ground that on one occasion this descended into a physical altercation involving the grabbing of shirts. Perhaps unsurprisingly Mr Smith and Mr Frith both gave diametrically opposite accounts of this incident. Suffice it to say however that it was common ground between them that matters had deteriorated to the extent of frequent verbal arguments and the occasional physical altercation.

28. Mr Frith spent some of his time in South Elmsall. The Smiths and Mrs Frith worked exclusively in Doncaster. This appeared to diffuse the tension. However, it was not in dispute between the parties that there was mutual antagonism and suspicion between the Friths and the Smiths.

29. Matters then came to a head in August and September 2017. Mr and Mrs Smith went on annual leave between 14 and 28 August 2017. Mr and Mrs Frith were away on holiday between 29 August and 12 September of that year.

30. During Mr and Mrs Smith's absence on holiday, Mr and Mrs Frith fitted a new CCTV system. When Mr and Mrs Frith went on holiday Mr and Mrs Smith returned to find the new system *in situ*. Mrs Smith switched the system off shortly after her discovery of it. Her explanation for doing so is that it had not been registered with the Information Commissioner's Office and therefore the respondent was not compliant with the requirements of the Data Protection Act 1998. She gave evidence that the new CCTV system was registered with effect from 16 September 2017. I accept Mrs Smith's evidence which was corroborated by a certificate issued by the ICO confirming the date of registration.

31. Mr Frith's explanation for installing a new CCTV system was that there had been stock theft. He gave unchallenged evidence that Mr Smith objected to the installation of the new system upon the grounds of expense whereupon he and Mrs Frith said that they would pay for it. When asked about this in cross-examination, Mr Frith said that part of his motivation for installing the CCTV system was to *"monitor everyone"* which he candidly accepted included *"the directors".* Plainly, Mr Frith suspected Mr and Mrs Smith of being responsible for the stock losses.

32. Upon their return from holiday, Mr and Mrs Frith discovered that Mr and Mrs Smith had arranged for Graham Hinchliffe, an accountant, to see them in the Doncaster premises. I heard evidence from Paul Taylor who is an employee of the respondent. He says, in paragraph 6 of his witness statement, that, *"During the second week that* [Mr and Mrs Frith] *were away a gentleman who I had never seen before came into the shop in the afternoon and spent a considerable amount of time in the office with Richard and Michelle. He looked at many things including Ann's computer which keeps the Sage accounts. After he left, I spoke to Richard and asked him who the gentleman was. Richard told me he was an accountant. I asked him whether he was our accountant and Richard told me that he wasn't. He was someone they had got in to value the business. I didn't ask him anything more as I knew things weren't happy between everyone. I also saw Michelle making some notes of stock that day".*

33. Mr Taylor fairly accepted under cross-examination that he did not see what Mr Hinchliffe was looking at upon the computer screen. He was not a party to the meeting and therefore had limited knowledge as to what was being discussed.

34. It was suggested to Mr Smith by Mr Menon that the purpose of Mr Hinchliffe's visit was to value the business in order to put in an offer to buy out Mr and Mrs Frith's interest or alternatively to sell the Smith's interest to the Friths. This Mr Smith denied. Mr Smith said that *"We asked him to talk to us to find out how we could make it work for everyone. Mr Hinchliffe specialises in corporate disputes and mediation. We didn't need a valuation to put in an offer".* Mr Menon then asked how Mr and Mrs Smith would go about formulating an offer if they did not know the value of the business. Mr Smith said that Mr Frith had mentioned a price of £100,000 for the Friths' interest in the business which Mr Smith said he thought would be a fair offer. Mr Smith said that Mr Hinchliffe suggested that a price of £100,00 was too much. He says that Mr Hinchliffe's advice *"set us thinking about how much value there was in the business".* Mr Smith's account is that Mr Hinchliffe's advice prompted Mrs Smith to commence a stock take.

35. What everyone appeared to accept was an incomplete stock take prepared by Mrs Smith was in the bundle at pages 49 and 50. I find compelling Mr Menon's submission that Mr and Mrs Smith were evasive about this document. They appeared reluctant even to accept that this was a stock take. Both of them said that it was *"an incomplete stock take"* but appeared reluctant to accept that they had commenced a stock take exercise at all.

36. Mrs Smith said in evidence under cross-examination that the stock take was commenced *"after Mr Hinchliffe spoke about a figure to buy out Antony and Ann. That's why we brought him in – to show us the options".* Mrs Smith then said that she and Mr Smith were unaware of the value of the stock which she undertook *"out of curiosity".*

37. At my prompting, Mr and Mrs Smith produced a copy of Mr Hinchliffe's invoice for the work which he undertook for them. The invoice is dated 31 July 2018. The description of services is as follows:

> *"To consultancy services in respect of the dispute arising over the shares and business operation of The Shoe Healer Limited in Doncaster. Initial advice regarding options to negotiate a deal with fellow shareholders and preparation of letter and emails therein. Calls to shareholder and initial discussions therein. Attending meeting with lawyers Ironmonger Curtis to assist in brokering a deal for the employment claim and the subsequent matters arising therein re the shareholder dispute. Calls, emails and discussions re various options and advise therein re how the business was being operated post you leaving the venture. Ongoing advice and calls to lawyers in respect of the employment law claim".*

38. The Tribunal did not have the benefit of hearing from Mr Hinchliffe. There is no reference in the description of the professional services rendered to the Smiths of having advised about or carried out a professional valuation of their interest in the respondent.

39. I accept Mr Pochron's submission that Mr Taylor's evidence has to be treated with some caution. At paragraph 7 of his witness statement he has mistaken the dates and the weeks of relevant events which inevitably impact upon his credibility. His evidence must also be treated with caution given that he remains an employee of the respondent.

40. It is not in dispute that Mr Hinchliffe visited the business while Mr and Mrs Frith were away on holiday. There was no suggestion by the Smiths that the Friths were aware that he was going to attend during the course of that week. It appears to me to be inherently implausible that Mr and Mrs Smith would be discussing their options with an accountant such as Mr Hinchliffe and that the question of the value of their interest in the respondent would not feature. In the passages of evidence that I have cited from their cross-examination Mr and Mrs Smith both came very close to saying in terms that Mr Hinchliffe had discussed the issue of valuation with them. Further, there is no other credible explanation for the undertaking of a stock take than for the purposes of valuation. Mrs Smith's evidence that she was doing this to slake her curiosity is unconvincing.

41. Therefore, notwithstanding the note of caution sounded by Mr Pochron, I find credible Mr Taylor's evidence that when asked Mr Smith told him that Mr Hinchliffe was meeting the Smiths for the purpose of valuing the business. Mr Taylor gave unchallenged evidence that he asked Mr Smith whether Mr Hinchliffe was the respondent's accountant. That question being put, Mr Smith was faced with the choice of either dissembling or telling Mr Taylor the truth. He chose the latter course as he could not with any conviction tell Mr Taylor that Mr Hinchliffe was the respondent's accountant when in fact he was not. Further, there was therefore no other rational explanation that Mr Smith could give to Mr Taylor to explain Mr Hinchliffe's presence other than that he was in to value the business..

42. In all the circumstances therefore I am satisfied that Mr and Mrs Smith instructed Mr Hinchliffe to advise them in connection with what had become an intractable situation. One possible way out for each party was for one couple to buy out the other which would bring centre stage the issue of business value. There can be no sensible criticism of Mr and Mrs Smith for engaging the services of a business consultant about what had been an uncomfortable and difficult situation for several years. It is frankly difficult to see why Mr and Mrs Smith were so reticent before the Tribunal about the involvement of Mr Hinchliffe in the circumstances.

43. I do not accept Mr and Mrs Frith's account that Mr and Mrs Smith turned off the CCTV in order to hide Mr Hinchliffe's involvement. Mrs Smith's explanation for turning it off upon her return from holiday because it was not compliant with the Data Protection Act 1998 is credible. In any event, the meeting with Mr Hinchliffe was done during business hours in full view of the employees including Mr Taylor. Had Mr and Mrs Smith wanted the meeting with Mr Hinchliffe to be covert one may have expected an out of hours meeting to have been arranged.

44. Upon the first day of their holiday, the Friths discovered that the Smiths had blocked Mr Frith as an administrator for the respondent's Facebook account. The Smiths' explanation for this was that the respondent's Facebook account allowed a link to their own personal Facebook account. They did not want Mr Frith to have such access and therefore blocked him as administrator. There was some discussion before me as to the technical issues arising from the Smiths' explanation. I do not need to make any findings as to the rights and wrongs of those explanations. It is sufficient, in my judgment, for me to find that the Smiths blocked Mr Frith as administrator. It is not in dispute that they did so (albeit that the Smiths contend there to be a benign motive for so doing).

45. Given the build up of tension between the couples culminating in the actions of each during the others' holiday (around the installation and turning off the CCTV) the actions of the Smiths in blocking Mr Frith in this way (without prior consultation) was a move

that was hardly likely to pour oil on troubled waters. Regrettably, the reverse in fact turned out to be very much the case.

46. Upon Mr Frith's first day back at work following his holiday, Mr Frith went into the Doncaster store to speak to Mr and Mrs Smith and asked to be restored as an administrator to the Facebook account. The CCTV system had been turned off over the weekend (this time by Mr Frith). Mrs Smith had left a letter of explanation to the Friths as to the operation of the system and the need to comply with the 1998 Act. That letter is at page 52. It appears that Mr Frith had been in over the weekend, had seen the letter and turned the CCTV off.

47. At all events, Mrs Smith noticed that it had been turned off and switched it back on upon the morning of 18 September. Thus it was that on 19 September CCTV footage was recorded of the events that took place between 08.39 and 09.03 on the morning of 19 September.

48. I viewed the CCTV footage myself. I am satisfied having viewed it that Mr Smith has given an accurate description of it. I shall recite his evidence shortly (at paragraph 50).

49. The CCTV footage is vision only. There is therefore no audio footage. Mr Smith says in paragraph 86 of his statement that there was an exchange between Mrs Smith and Mr Frith. He asked her why he had been *"taken off Facebook".* Mrs Smith then explained that the Facebook account was connected to Mr Smith's personal account. It appears to be common ground (by reference to paragraph 13 of Mr Frith's witness statement) that there was then a discussion between him and Mrs Smith about Facebook.

50. It is then necessary to set out the subsequent events. I shall do so by reference to Mr Smith's witness statement:

(87) Antony said nothing [about the Facebook issue] *and walked away, returning perhaps a minute or two later with a lump hammer and going on a rampage. The CCTV footage shows the aggressive, erratic, confrontational and truly threatening conduct of Antony.*

(88) The CCTV footage shows Antony walking through the premises of the respondent at 08.50.36. He is off screen for a little while and then suddenly bursts back on screen at 08.51.21. At this point he is brandishing a lump hammer that he has located from within the premises. Antony's actions with a large lump hammer which he searched for (rather than using the smaller shoe repair hammers more easily to hand) is threatening and intimidating, and so is his irrational and unpredictable behaviour towards Michelle and I.

(89) The CCTV evidence speaks for itself, as does Michelle and my behaviour during the incident, which was designed not to inflame Antony's appalling behaviour.

(90) At the time when Antony races back on to the screen, Ann is attempting to physically restrain him. He pulls away from her aggressively and rushes off screen with hammer in hand.

(91) At this point Antony had gone to the back office of the respondent to find both me and Michelle working there.

(92) He waves the hammer he was holding around and then indiscriminately begins to use the hammer to smash the property around me and Michelle.

(93) He smashed the telephone and internet system under the desk in the office which is fixed to the wall. Whilst he is smashing this a bag falls off a shelf on the other side of

the wall (top left hand corner of the CCTV footage at 08.51.32). He had smashed the equipment in the office at least 10 to 12 times.

(94) During this time I am sat in my office chair, after he has finished smashing equipment under the desk Antony stands up and smashes his hammer into the iMac computer knocking it squarely into the shop (this is on the CCTV at 08.51.42). This action results in the computer knocking over a Pantharella Sock Stand causing it to come crashing to the ground with other products and debris falling into the main shop premises. The sock stand is also broken in this attack.

(95) At 08.51.46 Antony then stalks around the premises back on screen and proceeds to repeatedly smash the dishevelled iMac computer monitor with his hammer which sends glass flying across the shop floor. After smashing the computer monitor he moved towards the office doorway and threw his hammer on to the office floor narrowly missing Michelle.

(96) After we had recovered from the initial shock at what had happened I just stood in the middle of the shop with my hands on my hips surveying the carnage. Michelle went to speak to Antony who was now back behind the counter in the repair department. She asked him in a calm and reasonable manner "what was all that about?"

(97) Antony then came into the retail part of the shop where we were standing. His manner was agitated and at times very aggressive and confrontational. The CCTV footage proves my point on this and shows Antony gesticulating threateningly towards both me and Michelle.

(98) From 08.51.01 onwards he is pointing his fingers violently into my face. He repeatedly lunges and leans towards me. When I try and move away or look around him he fixes me throughout with a hard and intimidating stare. This continues with aggressive pointing and shouting in my face. Ann tries to pull him away at 08.56.10 but he simply shrugs her off and carries on in his tirade of abuse. His facial expressions and aggression clearly speak for themselves on the CCTV footage.

(99) Antony is unrelenting and (as shown at 08.56.57) when I look away from him he purposely moves himself into my eyeline, all the time in my personal space to try and be as intimidating as possible.

(100) I tried to back away but with every step Antony pursues me all the while using aggressive words, menacing behaviour and threatening body language. Antony was being very critical of work that I had agreed to undertake for a customer we had met at one of the country shows, who had later sent us two pairs of shoes. I checked and had the support of our senior repairer Paul Taylor to do this work on those shoes.

(101) Antony went on to ask me "who the fuck do you think you are?". This was as he was accusing me of overriding him by arranging for Paul Taylor to undertake some work in his own time for a customer that had spent us two pairs of old and incredibly rare and "treasured" shoes. Paul Taylor was more than happy and confident of effecting a good repair, as was I.

(102) Antony had other ideas and clearly wanted to "be the boss" and turned the work down after Paul and I had agreed to do it. As far as I can see this was for no other reason than to assert his "authority" and he was not acting with the best interest of the business in mind".

(103) Prior to the hammer attack on 19 September, Antony had taken the two pairs of shoes and thrown them across the shop floor into the office. During this earlier tirade I had

asked Antony in a very calm manner who did he think he was to disrespect a customer's property in this way. Antony brought this up during his outburst on the 19th.

(104) Eventually myself and Michelle are able to gather our coats and remove ourselves from the premises. There is no way that Antony had the best interest of the business in mind when he chose to attack the premises with a lump hammer".

51. Mr Frith's account does not differ significantly from that of Mr Smith. Frankly, it would be difficult for him to persuasively present a different account to the Tribunal given that the episode was captured upon CCTV. Mr Frith attributes the incident to the discussion between him and the Smiths about the Facebook account. He said that he found the Smiths to be unreasonable and confrontational. At paragraph 13 of his witness statement he says that he said to them, *"Put me back as an administrator on our Facebook account or I will pick up a hammer and smash the modem and then we will all be off Facebook".*

52. Mr Frith says that after he had *"bashed a modem with the hammer"* Mr Smith had called him a *"fucking idiot"* after having pushed his (Mr Smith's) own computer over on the desk. Mr Smith denied so doing.

53. Mr Menon fairly and candidly accepted that nothing will turn upon a finding from the Tribunal as to whether Mr Smith pushed over his computer or whether it toppled over because of Mr Frith's actions. I find as a fact that Mr Smith did not push over his own computer. As we shall see, he was concerned about the contents of the computer. Further, Mr Taylor and Lee Ashforth (another employee of the respondent from whom I heard evidence) both said that they did not find Mr Smith to be physically intimidating or confrontational. Given Mr Frith's demeanour as captured upon the CCTV that day, Mr Smith's concern for the work stored upon his computer and the evidence of the respondent's own employees I find it unlikely that Mr Smith would have pushed over his own computer bringing with it a risk of damage.

54. Mr Frith said that Mrs Smith was smiling at his actions. Having viewed the CCTV footage, I am satisfied with Mrs Smith's explanation that she *"smirked or smiled"* (as she herself put it) because Mr Frith was seeking to put the blame for what occurred that morning upon Mr Smith's actions. On the CCTV footage Mrs Smith does not appear to smile or laugh to convey amusement. I agree with her that her expression is one of bewilderment and astonishment.

55. When asked about the incident at the hearing, Mr Frith confessed that he was *"embarrassed and humiliated"* by it. He repeated the evidence in his printed statement that he threatened to smash the modem if not restored to the Facebook account or otherwise *"no one will get on"* (to Facebook).

56. Mr Frith accepted that Mrs Frith was distraught having witnessed his behaviour that day. He said that *"Mr Smith was glaring at me. My father's picture was on the wall. I said to Michelle "why are you with him* [Mr Smith], *you deserve better".* Mr Frith said that he was confident that had the Smiths remained in the business it would not have happened again it being "*a culmination of four years since the maternity issue".* He then went on to say that he had had *"four years of having to sit by these people".*

57. Mrs Smith fairly accepted, under cross-examination, that he relationship between the couples had deteriorated to such an extent that the Friths felt it necessary to install a new CCTV system to monitor stock shortages.

58. Mr and Mrs Smith stayed away from work until Monday 25 September 2017. Upon their return Mr Frith said nothing to Mr Smith. However, Mrs Smith's evidence is that

he said to her, *"Morning! talking through solicitors now are we? Well that's great, I might lose one of my shops, you might lose your house!"* Mr Frith gives a not dissimilar account at paragraph 15 of his witness statement. He said that *"Michelle was her usual chatty self. Richard was silent as usual."* He alleges that Mrs Smith, upon seeing Mr Frith pick up a hammer, said to him *"in a joking manner 'we don't want you using that hammer' and then she laughed"*

59. Mr Smith says that upon his return to work on 25 September he and his wife found that all of the work computers had been locked with passwords, the online banking password had been changed and that cheque books, credit cards and card readers had been removed from the premises. The Smiths had therefore been locked out of their business by the Friths.

60. On 22 September 2017 Mr Hinchliffe wrote to Mr and Mrs Frith. The letter is at pages 53 and 54. The purpose of the letter was said to be *"to put forward some options and proposals for the business going forward".* Mr Hinchliffe observed that there was no shareholders' agreement in place. The first option was for Mr and Mrs Smith to *"walk away"* from the business but retain their shares. Mr Hinchliffe went on to say that, *"a variant to this could be Richard Smith leaves the business and Michelle Smith remains in her current role".* The second option was for a buy out by one couple of the other's interest. Mr Hinchliffe concluded that Mr and Mrs Smith *"have taken themselves out of the business this week following the serious incident at the Scott Lane store but do intend to return to work next week".*

61. The contents of this letter corroborate my earlier findings that Mr Hinchliffe did discuss with Mr and Mrs Smith the question of the valuation of the business. He makes express reference in the letter to any buy out being as subject to an agreed valuation.

62. Mr Smith said that this letter was sent without his authority or consent. He said this when it was put to him by the respondent's counsel that the letter intimated an intention to return to work and even postulated the possibility of Mrs Smith working there un-accompanied by him. Mr Smith sought to explain away the letter as having been sent by Mr Hinchliffe in some haste after he instructed his advisor about the incident of 19 September.

63. On 25 September 2017 (upon her first day back) Mrs Smith downloaded the respondent's contact list of all customers to her personal email address (page 55). Upon the same day, she downloaded the respondent's members' export files to the same address. On 13 October she set up a drop box account which she used to store images of shoes and stock from the respondent's website and sent it to her personal email address. I refer to pages 56 and 62. On 15 October the respondent's photographs of Tricker shoes was sent to the claimant's personal email address (page 63).

64. Mr and Mrs Smith do not deny that these steps were taken. They said they did so in order to preserve the information. They feared that the information had not been backed up. Mr Smith says that some of the information and work upon his computer that had been damaged on 19 September had been lost. Mr and Mrs Smith deny using the information for the purposes of their own business which they established following their resignation.

65. Mr and Mrs Frith say that there was no need for Mr and Mrs Smith to take this step as the information was all stored *"in the Cloud"* as they put it. Mr and Mrs Frith may be correct to say this. However, the question for me is whether Mr and Mrs Smith

downloaded this information and intellectual property for the purposes of their own business.

66. The Friths allege further suspicious activity upon the part of the Smiths. The first instance concerns a purchase by Mrs Smith of two retail shop units. The eBay advertisement and some surrounding email correspondence can be found at pages 59 and 60. Mr and Mrs Frith say that these were purchased by Mrs Smith with her own money for the purposes of their new business. The shelving was purchased on or around 3 October 2017 (prior to the date of the Smiths' resignation).

67. Mr and Mrs Smith's explanation is that the units were a bargain and too good to miss. Mrs Smith said that she purchased them with a view to installing them in the respondent's Doncaster premises. Had they not been so installed and had they remained employed by the respondent then she was confident that they could have been sold on at a profit. Mr Smith says that Mr Frith had purchased a shoe repair machine using his own money and therefore it was not unknown for the directors and shareholders to proceed in this way. Mr Smith's evidence upon this point was not challenged.

68. The second instance of suspicious activity concerned the Friths' discovery of an online application for a business account. This was sent to Mrs Smith by the Royal Bank of Scotland on 16 October 2017. Mr and Mrs Smith say that the Royal Bank Scotland in fact sent them the wrong form. What the Smiths wanted to do was be removed from the respondent's banking facilities. The correct form was therefore sent the same day (page 136).

69. Mr and Mrs Smith produced some evidence that customers had to track them down so as to deal with them in their new business. I refer to pages 139 to 144. All of these emails appear to have emanated from customers accompanied by the sentiment that they had had to find out the whereabouts of Mr and Mrs Smith. This corroborates the Smiths' account that they have not used the contact lists which they had downloaded in order to solicit the respondent's customers.

70. Page 139 is addressed to Mr Smith. It is from a customer who tells him that Mrs Frith had told her that she thought that Mr Smith may have returned to professional driving. Mrs Frith accepted that she had told the customer an untruth.

71. The Friths also suggested that Mr Smith had given customers his personal mobile telephone details. Mr Smith accepted this to be the case but said that he considered it as a step to enhance the service that he was providing for customers when he was employed by the respondent.

72. Piecing all of this together I am satisfied that Mr and Mrs Smith did not act improperly when they downloaded the information upon their return to work on 25 September 2017 and had not utilised that information for the purposes of their own business. I say this for the following reasons:

72.1. Mr and Mrs Smith gave a plausible and credible explanation as to why the information was downloaded. In my judgment, it was unsurprising that they were fearful that Mr Frith may destroy more of the respondent's property. They had good cause to be fearful having witnessed the incident that took place on the morning of 19 September 2017. As a consequence of that incident Mr Smith had lost valuable work. In the circumstances Mr and Mrs Smith could hardly have confidence in Mr Frith (and to a lesser extent Mrs Frith) and in any assurances that they may have sought about the information being stored *"in the Cloud"*

72.2. There is no evidence that Mr and Mrs Smith have used the information obtained for the purposes of their own business. The evidence that I have in the bundle is in fact to the contrary and that customers have had to seek them out.

72.3. Mr and Mrs Frith sought to impugn the credibility of Mr and Mrs Smith by reference to the erroneous email from the Royal Bank of Scotland. They maintained the position that Mr and Mrs Smith were, in business hours, using the respondent's own equipment to further their own ends even when there was material which demonstrated that the Royal Bank of Scotland had simply made a mistake. That redounds against the Friths' credibility.

72.4. The retail units have been used by Mr and Mrs Smith in their new premises. However, I find it credible that Mrs Smith took the view that it was too good an opportunity to miss to acquire the units at a fraction of their retail price.

73. At paragraph 18 of her witness statement Mrs Frith says that, *"After Richard and Michelle resigned, we discovered that The Shoe Healer owed more money to its suppliers than ever before. There was an outstanding liability to Trickers of £38,000 rather than our normal sum in the region of £20,000. We discovered that the company was in dire financial straits which had been brought about by Richard and Michelle. It was necessary to increase our overdraft facility from our normal £6,000 to £15,000. Antony and I had to pay to the company some £13,000 of our own money in order to keep the company trading. As a result of the precarious financial position of the company, it has been necessary to stop paying any dividends to the shareholders.*

74. Mrs Frith struggled to articulate the basis upon which she sought to attribute blame for this state of affairs to Mr and Mrs Smith. I take the view that this was an unmeritorious attempt to impugn Mr and Mrs Smith's credibility (as was the Friths' persistence with the issue about the banking forms to which I refer at paragraph 72.3).

75. Mr and Mrs Smith resigned their position. They did so without notice on 20 October 2017. The resignation letters are identical and they are pages 67 and 68. The resignation letter says the following:

"Please accept this as my formal letter of resignation from my position of employee and director of The Shoe Healer Limited, 42 to 44 Scott Lane, Doncaster, South Yorkshire, DN1 1ES.

On 19 September 2017 you located a hammer on the premises of The Shoe Healer Limited and proceeded to use this to damage company property and further to act in a threatening, unreasonable and incredibly distressing manner. The adverse impact your actions have had on me cannot be understated.

Your conduct was nothing short of an assault. Your language towards me was littered with profanities and you were incredibly aggressive. Your physical conduct on the premises was menacing and erratic. I do not feel safe working around you and fear that you will act in this manner again. I have lost all trust in you and I am not confident that you will act reasonably in the future.

As you know immediately following your hammer attack on the business I took a leave of absence. This was to remove myself from the premises for fear of further reprisals.

From this point on I have tried to manage continuing to work with you but have found the situation untenable. Our working relationship has always been based on trust before, but this has fundamentally broken down following your actions.

I have put all my efforts into making The Shoe Healer Limited a success and I could not face walking away from this abruptly despite the atrocious conduct that you inflicted upon me.

I have come to the realisation that I cannot work any further under fear of further attack and the constant daily worry of waking up each morning is untenable. The stress and upset that this has caused me leads me to believe that I can no longer trust you. At no point have I condoned or accepted your actions as they are beyond what any person would consider an employee or fellow director should have to put up with.

You have fundamentally breached the terms of my implied contract of employment (as we do not have an express written contract) and I believe that you have constructed my unfair dismissal.

I am resigning summarily directly in response to your breach of contract and my final day of employment is the day of this letter. I expect you to honour my statutory entitlement to holiday pay and to pay any outstanding salary".

76. Mr and Mrs Smith accepted that they returned to work on 25 September. Although each of them found it difficult, they did work up to and including 20 October. The claimants were paid their salary on 31 October.

77. Mr and Mrs Smith have now opened up a rival business. They are operating through a limited company called The Shoe Room Limited. They are operating from premises at 8 Priory Walk, Doncaster which is 250 metres or so away from the respondent's Doncaster premises. They entered into a lease dated 24 November 2017 which commenced for a period of five years from 1 December 2017. Mr and Mrs Smith are now being paid a salary of £924.73 each. The transaction report attached to the schedule of loss shows that the first salary was paid on 21 December 2017. They complain that their salary compares unfavourably with that which they earned with the respondent. There is a yearly loss of £403.20.

78. I now turn to the consideration of the relevant law and principles. The claimants have brought a complaint against the respondent of constructive unfair dismissal. Whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once. Generally there is no difficulty in recognising conduct by an employer which under law brings a contract of employment to an end.

79. There is implied in every contract of employment a term that the parties will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.

80. To constitute a breach of this implied term by the employer it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the

employee cannot be expected to put up with it. It is this implied term upon which the claimants rely.

81. Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. The employee's resignation must be in response to the repudiation. It is enough that the employee resigned in response at least in part to fundamental breaches by the employer. The repudiatory breach by the employer need not be the sole cause of the employee's resignation. There may be concurrent causes operating upon the mind of an employee.

82. If one party commits a fundamental repudiatory breach of contract then the other party can choose either to affirm the contract and insist on its further performance or can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between these two possible causes. Once he or she affirms the contract the right to accept the repudiation is at an end. Mere delay by itself does not constitute affirmation of the contract but if it is prolonged it may evidence an implied affirmation. Affirmation may be implied if the innocent party calls on the guilty party for further performance of the contract.

83. In the context of the employment relationship, an employee faced with a repudiatory breach by his employer may, by continuing to work, act consistently with the continued existence of the contract and may be said to be affirming it. If the ordinary principles of contract law were to apply to a contract of employment then this may produce harsh results. An employee is therefore not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time even if his or her purpose is merely to continue to work to enable him to find another job. An employee will therefore not affirm the contract generally by delaying by a few weeks before acting upon the breach in order to find alternative employment.

84. The resignation from a job is a serious matter with potentially significant consequences for the employee. The more serious the consequences, the longer the employee may take to make such a decision.

85. If the Tribunal finds the employee to have been constructively dismissed, then it is for the employer to show a statutory permitted reason for the dismissal. I did not understand the respondent to be advancing a statutory permitted reason for the constructive dismissal of Mr and Mrs Smith (should such be established). That being the case, it follows that the complaint of constructive unfair dismissal will succeed should Mr and Mrs Smith have been constructively dismissed. In the absence of a potentially fair reason advanced by the employer that conclusion inexorably follows.

86. Therefore, if the Tribunal finds Mr and Mrs Smith to have been constructively unfairly dismissed the Tribunal will go on to consider remedy. In this case there is plainly no suggestion of re-employment and therefore the remedy will be an award of monetary compensation made up of a basic award and a compensatory award.

87. The basic award is calculated by reference to a statutory formula. This is determined by reference to the employee's gross wage (in this case £221.15 per week each), their age and their length of service.

88. The basic award may be reduced if the Tribunal considers it just and equitable so to do upon account of any contributory conduct upon the part of the employee. The respondent in this case is not advancing an argument in this case that Mr and Mrs Smith are guilty of any contributory conduct.

89. The compensatory award is in such amount as the Tribunal considers just and equitable in all the circumstances having regard to the losses sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal may, in assessing what is just and equitable to award, take account of the likely longevity of the employment relationship but for the unfair dismissal.

90. Mr and Mrs Smith also bring a complaint of wrongful dismissal. When considering a complaint of wrongful dismissal, the reasonableness or otherwise of an employer's actions is irrelevant. The focus for the Tribunal is upon a consideration as to whether the employment contract was breached. The Tribunal is concerned with the factual question of whether the employer was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employees to summarily terminate it.

91. It is open to an employer to justify summary dismissal (in this case, of course, summary constructive dismissal) by reference to repudiatory conduct upon the part of the employee even if the conduct was not known to the employer at the time of termination but was only discovered afterwards. Was I to determine Mr and Mrs Smith to be in repudiatory breach of contract, it was accepted on behalf of Mr and Mrs Frith and the respondent that such would not be a bar to Mr and Mrs Smith's unfair dismissal claim. This is because if one party commits a fundamental or repudiatory breach and the other does not accept that breach as bringing the contract to an end, whether through ignorance of the breach or otherwise, the contract continues. Thus, a party may accept a repudiatory breach upon the part of the other even if that first party has itself committed a repudiatory breach if that other has not accepted it.

92. Some employees may be subject to fiduciary duties which arise under equity rather than common law. These are more onerous than the common law duty of fidelity owed by employees to their employers. A primary example of a fiduciary relationship is that between a company director and the company. Directors remain fiduciaries even if they are also employees of the company (as in this case). The fiduciary duties of directors take a number of forms including the obligation to avoid a conflict of interest, not to profit from the directorship at the expense of the company, to use confidential information for the benefit of the company only and to give undivided loyalty. Thus, the taking of preparatory steps by approaching customers or retaining documents belonging to the company after departure with a view to using them in competition will be a breach of fiduciary duty.

93. The respondent has a number of legal duties. Amongst the obligations owed by the respondent is to provide employees with a safe system of work and safe and competent workmates. This extends to the protection of employees from unacceptable behaviour from other employees.

94. Although a trite observation, the respondent (as a juridical person) can only act through the human agency of its directors. It must act through the directing mind and will of its directors. The directing mind and will need not be one and the same person for all purposes.

95. The doctrine of attribution concerns the process by which the law identifies the circumstances in which an abstract legal entity such as a limited company is regarded as having itself committed the legal wrong. The doctrine of attribution is different from the doctrine of vicarious liability.

96. At common law, an employer can be held vicariously liable in tort for the civil wrongs of its employees committed in the course of employment. The doctrine of vicarious liability places legal responsibility upon a person for the wrong perpetrated by someone else. Liability will arise for acts done which have a sufficient connection between the job and the wrongful conduct making it right, as a matter of social justice, for the employer to be held liable.

97. The parties had co-operated and drew up an agreed list of issues. The first of these is *"which of the acts complained of on the part of Mr Frith on 19 September 2017 in paragraphs 9 to 18 of the grounds of complaint are proved?"* Paragraphs 9 to 18 of the grounds of complaint is very similar, in terms, to paragraphs 86 to 103 of Mr Smith's witness statement which I have cited above. Mr Menon, on behalf of the respondent, sensibly conceded those acts to have been proved.

98. The second issue, therefore, is whether the acts of Mr Frith amount to a breach of the implied term and can be attributed to the respondent. Mr Menon again sensibly accepted that Mr Frith's conduct was such as to be in breach of the implied term. I understood Mr Menon to be conceding that Mr Frith's conduct was undertaken without reasonable and proper cause such as to destroy or seriously damage the trust and confidence that Mr and Mrs Smith had in Mr Frith (as opposed to the respondent). Therefore, there remains the issue of attribution.

99. This then takes us to the third (and crucial) issue. It was put in this way: *"Given that the claimant*[s] *and Mr Frith were co-directors and equal shareholders in their employer, respondent company, can such actions on the part of Mr Frith as are proved to be attributed to the respondent,* qua *employer, and found a basis for the claim that it was guilty, without good reason, of breaching the implied term of trust and confidence in the claimant's contract of employment".*

100. The first limb of the formulation of the third issue is that given their status as directors and shareholders of the respondent the claimants ought to have taken action on behalf of the respondent and are barred from the pursuit of a constructive dismissal claim as would be available to an employee not having such parallel status. This is what I shall call *'the redress issue.'* The second limb is that Mr Frith's actions cannot be attributed to the respondent and cannot be relied upon as a breach of any contractual obligation on the part of the respondent. I shall call this the *'non-attribution'* issue. I shall start with the non-attribution issue.

101. In support of his case that the actions of Mr Frith could not be attributed to the respondent Mr Menon referred me to **RDF Media Group Plc and Another v Clements** [2007] EWHC 2892(QB). An issue in this case concerned alleged misconduct upon the part of a company director upon which the defendant sought to rely as liberating him from post-termination covenants. The misconduct at the centre of this issue was disparaging remarks made by a director of the claimant. This was held to be a remark attributable to the claimant but not a repudiatory breach as the remark was an observation made by a director of the juridical body (RDF Media) in the act or course of thinking to itself.

102. Mr Menon cited a passage in **RDF Media Group Plc and Another v Clements** [2007] EWHC 2892(QB). The passage cited is that at paragraph 113 which says:

> *"… where … allegations and representations are expressed between members of the board of directors of a company which is the employer, it is difficult to conceive of the circumstances which can give the employee the right to complain of a breach of the obligation* [of trust and confidence]. *That is because the board*

of directors is the controlling mind of the company and representations between the individuals on the board is merely equivalent to the company thinking aloud to itself. It is not yet the law that an employer is prohibited from thinking even negative and unworthy thoughts about an employee on his payroll".

103. The facts of **Clements** are far removed from the instant case. **Clements** concerned a sale and purchase agreement. The claim was of constructive dismissal concerning alleged reputational damage arising from comments made about him to the press and/or in emails. It was held that those individuals had reasonable and proper cause to make the comments (as part of the juridical body's appropriate thinking process at board level) and therefore there was no breach of the relevant implied term. The High Court held, effectively that a board of directors, in fulfilment of their fiduciary duty to the company, is entitled to a safe space in order to discuss issues (including employee performance) and that even negative and unworthy comments or observations if made with proper and reasonable cause may not found an action for breach of contract.

104. I cannot accept that **Clements** is authority for the proposition (if it is being advanced as such) that any misconduct of a director is to be disregarded as not attributable to the juridical body when considering the implied duty of trust and confidence. I do not read **Clements** as having held that the director's conduct was not attributable to the claimant: it was attributable but was not repudiatory on the facts.

105. I hold that Mr Frith's conduct on 19 September 2017 was attributable to the respondent. He wished to have restored his access to the Facebook account. He held administrator rights to it as a director of the respondent. His conduct that day was with a view to enabling him to give direction to the respondent's Facebook account: on behalf of the respondent (as the personification of its mind and will) he was set upon gaining access to it. His actions were intended to secure compliance of the Smiths with that aim.

106. The respondent owed a duty to the Smiths to provide a safe place of work and safe and competent workmates. The Smiths' status as statutory directors were not inconsistent with a parallel employment relationship for the purposes of section 230 of the 1996 Act. The respondent acted in breach of that obligation and exposed the Smiths to a reasonable apprehension of physical harm and such a serious breach of their legitimate expectation to be safe in the workplace as to be in breach of the relevant implied term. This was done while Mr Frith pursued the aim attributable to the respondent *per* paragraph 105.

107. If I am wrong to hold that Mr Frith's actions are not attributable to the respondent then I hold in the alternative that the respondent has vicarious liability for Mr Frith's actions anyway. Mr Frith acted in pursuit of restoration of his Facebook administration rights. His actions were connected with the workplace. They took place upon the workplace while the Smiths were going about their proper business upon it. Mr Frith's conduct had sufficient connection between the claimants' and his jobs making it right, as a matter of social justice, for the respondent to be held liable. Mr Frith was acting as director of the respondent that day and as the personification of it as far as the claimants were concerned.

108. I now turn to the redress issue. Mr Menon submitted that Mr and Mrs Smith are equal shareholders with Mr and Mrs Frith and therefore on an equal footing. They therefore had the power to discipline Mr Frith but did not do so. That was the proper cause open to them.

109. I asked Mr Menon what steps Mr and Mrs Smith, in his submission, could have taken in order to protect their positions without resigning as employees.. He said that action could have been taken by them for injunctive relief to prevent Mr Frith from re-entering the premises and in any way harassing Mr and Mrs Smith.

110. In effect, Mr Menon was advocating that Mr and Mrs Smith take a derivative action (pursuant to Rule 19.9 of the Civil procedure rules 1998) upon behalf of the respondent against Mr Frith. That would be to put Mr and Mrs Smith in the difficult position of embarking upon complex civil litigation. Mr Menon's submissions amounted to an assertion upon behalf of the respondent that a derivative action of that kind should be allowed to override Mr and Mrs Smith's rights as employees.

111. In my judgment, this is an unattractive position for the respondent to take. In practical terms, there was very little that Mr and Mrs Smith could do to procure the removal of Mr Frith from the respondent in the absence of support from Mrs Frith. She would also have had to support the bringing of proceedings in the civil courts. While both at the time (as can be seen on the CCTV) and before me she condemned her husband's actions that day, there was no evidence from her that she would have joined the Smiths in the pursuit of injunctive relief against him or agreed to a resolution for his removal as director or employee. There was no evidence that she had suggested any such course at the time.

112. Although I was not addressed upon this, I take judicial notice of the fact that the respondent was formed 'off the shelf' and is governed by table A in the schedule to the Companies (Table A to F) Regulations 1985. The removal of a director requires, under that table, a resolution under section 303 of the Company's Act 1985. That is to say, to procure the removal of Mr Frith as a director requires an ordinary resolution requiring the majority of the shareholders.

113. Mr and Mrs Smith, if they were to embark upon such a course, would therefore have to obtain the support of Mrs Frith. Even then, Mr and Mrs Smith's problems would not end as Mr Frith is the freehold owner of the property out of which the respondent operates at South Elmsall. Therefore, the relationship between Mr and Mrs Smith on the one hand and Mr Frith on the other would have to continue.

114. I can see the force of Mr Menon's submission if an employee (not being a director or shareholder as were the Smiths) had acted as had Mr Frith. Were the respondent, for example, to have employed a managing director (who was not a statutory director but who behaved as did Mr Frith) then there would be no scope for Mr and Mrs Smith to argue constructive dismissal in similar circumstances. The obvious course then would be for them to take steps to dismiss the individual in question. The actions of that senior employee could not be destructive of their trust and confidence in the respondent.

115. However, the matter is of an entirely different order where a statutory director behaves in what is conceded to be a manner in repudiatory breach of contract. In practical terms, there was very little that Mr and Mrs Smith could do to procure Mr Frith's removal from the business. Mr Frith was an employee of the respondent. The incident took place upon the respondent's premises in work time while Mr and Mrs Smith were about their business. I am satisfied that the connection with Mr and Mrs Smith's employment was sufficiently close that they were entitled to view Mr Frith's conduct as that of an employee of the respondent as well as of the respondent itself and, at that, an employee whom the respondent (as a juridical body) was very unlikely to be willing and able to dismiss. Indeed, there is compelling evidence (which I accept) that Mr Frith very much considered himself as *"first among equals"* in that his father had founded the business and he had been involved with it far longer than had any of the

other three directors. As such, and as a shareholder and director, he was immoveable absent the support of Mrs Frith.

116. The practical reality facing the Smiths was therefore stark. Absent the dismissal of Mr Frith, their choices were to continue to work alongside him (literally so upon the days that he came into Doncaster) or to treat his conduct as being undertaken in the course of employment and repudiatory action upon the part of the respondent. In my judgment the Smiths were entitled to accept Mr Frith's conduct as being that of the respondent (as an employee of it, as a director of it and effectively the senior figure within it). The suggestion that the claimants ought to have embarked upon complex and expensive litigation pursuing remedies that may be available to them and that such eclipsed their rights as employees and the duties owed to them as employees by the respondent is in my judgment untenable. The claimants had rights as employees and exercised them as they were entitled to do particularly in circumstances of corporate deadlock (being the reality of the situation facing them).

117. I accept that Mr Frith's conduct was the principal cause of Mr and Mrs Smith's decision to resign their positions. It is the case that the relationship had been fractured for a long time before the incident took place. However, the reason for their resignation at that particular time was in my judgment unquestionably Mr Frith's actions that day. It may well be that Mr and Mrs Smith would have left at some point in any event. That does not detract from my judgment that Mr Frith's actions were so deeply concerning and shocking as to precipitate Mr and Mrs Smith's decision to leave at that particular point.

118. I hold that Mr and Mrs Smith did not affirm the contract of employment. I accept that they took a short and reasonable period of around a month or so to make up their minds to leave. Given that they were putting themselves out of work and (as an aggravating feature) leaving behind a business in which they had invested much (both financially and personally) I do not hold that four weeks was an unreasonable time to take. There is, in my judgment, nothing in the respondent's point about the contents of Mr Hinchliffe's letter concerning a willingness to return to work. That statement does not bind Mr and Mrs Smith or constitute a waiver of their right to treat themselves as constructively dismissed by reason of Mr Frith's conduct.

119. I accept that Mr and Mrs Smith returned to work on 25 September 2017 and worked normally as possible in the circumstances. I also accept that they received (as they were entitled to do) their pay for the month of October 2017. However, continuing for a short period does not connote affirmation of the contract in these circumstances.

120. The claimants were then constructively unfairly dismissed. Upon the question of remedy, in light of my earlier findings concerning the date of commencement of employment, the Smiths are entitled to the basic awards as claimed.

121. I now turn to the compensatory award. It is my judgment that the relationship between the Smiths and the Friths was so fractured beyond repair that the end was nigh. The Smiths' conduct in commissioning the help of Mr Hinchliffe is indicative that they recognised the reality of the position. It is my judgment that had they not been constructively dismissed on 20 October 2017 then the Smiths would have left anyway shortly afterwards allowing a reasonable period for them to arrange their affairs. In my judgment, the relationship would have come to an end on or around 20 January 2018 anyway.

122. It is upon this basis that I make the compensatory award. The Smiths are entitled to compensation for loss of earnings for the month that they were out of work, that being

November 2017. They were paid up to 31 October 2017. Their new business commenced in early December 2017. They were paid a salary by it at the end of December 2017. They shall therefore be awarded one month's loss of earnings in the sum of £958.

123. As the relationship would have come to an end within three months of 20 October 2017 anyway, whereupon my judgment the Smiths would have followed the same course as they now have, they have effectively lost three months' earnings at the higher rate of pay that they enjoyed with the respondent. The annual loss being £403.20, I award £100.80 by way of three months' partial loss of earnings in addition to the one complete month's loss for November 2017.

124. Given the modest salary and the fact that they have chosen to be employed by a limited company owned and operated by them it is my judgment that the appropriate award for loss of the statutory right not to be unfairly dismissed is £250 each. The total compensatory award is therefore £1,308.80.

125. Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 the Tribunal may if it considers it just and equitable in the circumstances increase the compensatory award by up to 25% by reason of a breach upon the part of the respondent of the *ACAS Code of Practice: disciplinary and grievance procedures*. In my judgment, it is just and equitable to uplift the compensatory award by this amount. If Mr Frith had an issue with the claimants about barring him from the Facebook account, then the appropriate step would have been to instigate a proper disciplinary investigation into the matter. Mr Frith's conduct in seeking out a hammer (which took him around 20 seconds or so and gave him a short period for reflection) and taking the hammer to the respondent's property in the presence of Mr and Mrs Smith was a flagrant breach of the ACAS Code. It is difficult to see how an uplift of 25% may ever be justified if not in this case.

126. It follows from my findings that the respondent was in repudiatory breach of contract and wrongfully dismissed Mr and Mrs Smith. I find that Mr and Mrs Smith were not in repudiatory breach themselves for the reasons I gave at paragraphs 66 to 74 above. Therefore, they are entitled to compensation for wrongful dismissal. I agree with the claimants' solicitor that given their status as equal shareholders and directors they were entitled to a reasonable period of notice in excess of the statutory minimum. In my judgment, a three months' notice period is reasonable in this case. They shall therefore be awarded by way of damages for wrongful dismissal the sum of £2,874 which is three months' net pay. They shall give credit for the salary earned in their new employment of £1,849.46 each which gives damages for wrongful dismissal of £1,024.54.

127. Of course, the wrongful dismissal award and the compensatory award for the constructive unfair dismissal cover the same period and therefore Mr and Mrs Smith shall give credit to avoid double recovery.

128. Finally, I turn to the question of an award under section 38 of the Employment Act 2002. This may be awarded in these circumstances given that the claimants have succeeded with their constructive unfair dismissal and wrongful dismissal claims and I have found as a fact that the respondent failed to comply with section 1 of the 1996 Act in providing a statement of terms and conditions. In my judgment, the claimants' solicitor was correct to argue that the onus was in reality upon Mr and Mrs Frith who invited Mr and Mrs Smith into the business. In those circumstances the onus was upon Mr and Mrs Frith to hand to Mr and Mrs Smith a principal statement of terms and conditions of employment. True it is that technically Mr and Mrs Smith could have

done this themselves as co-directors and equal shareholders. In my judgment however that is an unattractive argument as it does not reflect the reality of matters on the ground. In my judgment, the appropriate sum under section 38 of the 2010 Act is two weeks' pay rather than four weeks' pay. I say this because once Mr and Mrs Smith got 'their feet under the table' and established themselves in the business it was open to them to issue themselves with a statement of terms and conditions. They did not do so and therefore for that reason the appropriate award in my judgment is two weeks' pay.

129. These conclusions at paragraphs 118 to 128 dispose of issues 4 to 9 inclusive of the agreed list of issues.

Employment Judge Brain

Date: 05 October 2018