EMPLOYMENT TRIBUNALS

Claimant: **Andrew Powell**

Respondent: **Decadent Vapours Limited**

Heard at: **Cardiff** **On: 11 and 12 July 2019**

Before: **Employment Judge R Brace**

Representation:
Claimant: Ms Louise Powell (claimant's spouse/representative)
Respondent: George Pollitt (counsel)

RESERVED JUDGMENT

The claimant was not constructively dismissed.

The claim of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. The claim is on the question of whether the claimant was constructively dismissed by the respondent and, if the claimant was dismissed, the lawfulness of the dismissal.

2. The respondent is an e-liquid manufacturer and employed the claimant from 1 August 2015 to the date of his resignation on 12 December 2018. The claimant's job title was Managing Director and the claimant received a gross annual salary of about £108,000.

The issues

3. The claimant contends that he was constructively dismissed.

4. The conduct that the claimant relied on as breaching trust and confidence was clarified at the outset of the hearing and repeated in the written submissions provided by the claimant as follows:

    a. The meeting on 20th September 2018 where it is contended that:

i. the claimant was told that he would be removed from his position as Managing Director and another less paid position be found for him
ii. personal insults were made including being referred to as '*pathetic'* and '*snowflake'*;
iii. he was told that he would have to work alongside two employees the claimant had previously dismissed.

b. being suspended with no reasonable explanation;
c. not being paid on time, and despite the respondent confirming employees being paid was their main focus, Mr Bullock (a self-employed consultant,) was paid before the claimant;
d. removing the claimant as a statutory director with Companies House;
e. poorly handling the grievance procedure where none of the claimant's key concerns were addressed;
f. Telling customers that the claimant had left the business before his resignation.

2. The claimant is seeking compensation for unfair dismissal, but it was agreed that liability would be addressed in the first instance.

The hearing

3. The claimant was represented by his wife, Louise Powell as a lay representative, and the respondent was represented by George Pollitt of Counsel.

4. The tribunal heard oral evidence from the claimant and from Peter Cole (shareholder and director of the respondent,) and Mr Henri 'Andy' Bullock (a cost and management accountant) for the respondent.

5. I had before me an agreed tribunal bundle (the 'Bundle') running to just over 460 pages which included documents relevant to remedy.

6. All witnesses were asked questions by way of cross examination and based on this evidence I made the following findings of fact.

Findings of Fact

7. Respondent is an e-liquid manufacturer founded in 2009 by Mr Peter Cole. Mr Cole continues to be the company's sole shareholder and is also a statutory director.

8. Since 2009 the Claimant has been the owner of a branding and marketing company, Create a Brand Ltd ("CAB",) which he owns in conjunction with his wife Louise Powell.

9. Mr Cole and the claimant first met in January 2014, when CAB was hired by the respondent to undertake a total rebrand of the respondent and its products. On 1 August 2015 the claimant was appointed as Managing Director on the terms of a service agreement, a copy of which was provided in the Bundle. The claimant retained his shareholding in CAB with the full knowledge of the respondent.

10. The terms of the service agreement were relatively standard, but the following provisions are relevant: –

a. Clause 3.1 provided that the claimant would, notwithstanding his job title, carry out the duties and functions, exercise the powers and comply with the instructions assigned or given to him from time to time by the board;

b. Clause 3.2 provided that the respondent reserved the right to move the claimant to any other role within the claimant's capabilities, either in addition to or instead of the role of managing director provided a new role was commensurate with the executive status of the claimant;
c. Clause 3.3 provided that the respondent could require the claimant to carry out some or all of his duties jointly with any other person or persons appointed by the respondent.

11. Clause 23.3 also provided that if during the employment the claimant ceased to be a director of the respondent, the employment would continue with the claimant as an employee only and the terms of the agreement would continue in full force and effect unless terminated in accordance with its terms. The claimant would have no claims in respect of cessation of such office.

12. The service agreement also made reference to the claimant's continued involvement with CAB.

13. In late August 2018 the claimant instructed accountants Broomfield Alexander to value the business of the respondent with a view to him purchasing the shareholding from Mr Cole. The valuation of the business was lower than anticipated by Mr Cole, and indeed the level was a surprise to both Mr Cole and the claimant. The valuers had valued the company at around £737,500 which was in contrast to an offer that Mr Cole had received in 2011 from a third party of between £3 to £4million for 65% of his shares.

14. As Mr Cole was concerned at the level of the low valuation, he engaged Mr Andy Bullock of RBA Consultants, an outsourced financial director and management accountant, to carry out an operating review of the financial performance of the respondent. Mr Bullock's brief was to prepare a report for discussions between Mr Cole and the claimant.

15. There was within the pleadings, and indeed within the witness statements, reference to the engagement of Paula Tonkin as financial controller and indeed the initial appointment of Andy Bullock. However, at the start of the hearing Louise Powell confirmed that neither the appointment of Mr Bullock, nor indeed any of the events prior to the meeting of 20 September 2018 (including the conversation between Mr Cole and the claimant on 13 September 2018) formed part of the breach of trust and confidence relied upon by the claimant. This was further confirmed by the claimant in cross examination, where he accepted that it was not unreasonable for Mr Cole to have instructed Mr Bullock.

16. Mr Bullock's brief was to prepare report for discussion, which he did over the August /September period. By way of email on 10 September 2018, Mr Bullock presented to the claimant a short note of his observations of the operating performance of the respondent company ("Observations Note",) which highlighted the following concerns:

a. the respondent company was 'extremely fragile' and that cash was 'tight', with 'absolutely no financial controls'. This required resolution as soon as possible;
b. There were no management information systems i.e. no management accounts, no cash management/forecasts or budgets;
c. The 2017 and statutory accounts were incorrect;
d. 3 out of the 4 directors should have their employment terminated and the claimant should cover the managing director position, sales and marketing;
e. CAB's involvement with the respondent should terminate;
f. the external accountants should be replaced, and a financial controller should be appointed.

17. The Observations Note also referenced the sales and distributorship positions and changes required to the culture of the organisation in addition to the redundancy programme that the claimant had put in place.

18. Whilst the claimant accepted the findings in the Observation Note, he felt that it contained an inference that he was underperforming and took this as a criticism and a 'slight'. This was admitted by the claimant on cross examination. The claimant did not consider that however that the Observational Note was deliberately drafted to exit him from the business.

19. On 13 September 2018 the claimant emailed Mr Bullock confirming that his services were no longer required and that he was not required to attend the meeting which had been arranged for 20 September 2018 to discuss Mr Bullock's Observations Note.

20. The claimant was aware since 18 September 2018 of the purpose of the meeting, namely the intention to discuss the Observational Note prepared by Mr Bullock, and of Mr Cole's intention to be present at the meeting. This is confirmed in the email sent by the claimant to Mr Cole on 18 September 2018, in which the claimant also suggests that he and the respondent 'part company' if Mr Cole did not consider that the claimant had been loyal.

<u>20 September 2018 Meeting</u>

21. A meeting took place on Thursday 20 September 2018 attended by the claimant and Mr Bullock. Mr Cole also attended the meeting. This was not a disciplinary meeting and the claimant had no right to be accompanied at that meeting.

22. The meeting covertly recorded by the claimant. The fact that the claimant was recording the meeting would and should have been disclosed to Mr Cole and Mr Bullock at the outset of the meeting if, which had been contended by the claimant, he simply wanted an accurate record of the matters discussed. He did not and I found that the purpose of the covert recording was because the claimant wished to entrap the respondent, and Mr Cole in particular.

23. A transcript of the recording was subsequently made and was provided in the Bundle. There was no suggestion by the respondent that this was in any way an inaccurate or unreliable transcript. I did not read the transcript in advance of cross examination, as it run to some 90+ pages, but I was drawn to sections of the document on cross-examination and, after completion of the evidence, I did take the opportunity to read the document in its entirety prior to reaching my findings and conclusions in this case as requested by both parties.

24. The meeting was lengthy (around three and a half hours in total,) and a full and frank discussion relating to the operational and financial state of the respondent, against the backdrop of the review undertaken by Mr Bullock.

25. The claimant took along to the meeting a report, prepared in September 2018, regarding the involvement CAB had with the respondent. This detailed, over some 30 pages the work that CAB had undertaken for the respondent including provision of labour.

26. An organisational chart was included within that report which presented the claimant's wife, Louise Powell, as the respondent's 'Marketing and HR Director', an individual named Tess, as the respondent's 'Finance and Operations Director' and a third individual, Paul, as 'Sales Director'. These three were not employees of the respondent but outsourced to the respondent by CAB. They were not statutory directors of the respondent but had the title of 'Director' within their job titles.

27. My attention was in particular drawn to sections of the transcript where the possibility of an agreed exit was raised by the claimant (in particular pages 326, 328 and 357 of the Bundle) and to Mr Cole's position on the continuance of the claimant's employment in the respondent and prospective future role in the respondent in particular pages 335-336, 358, 373, 377, 379 and 391).

28. I made the following further findings in relation to that meeting:

    a. There was nothing in the tenor of the meeting, that could be gleaned from the transcript, that indicated the meeting was intimidatory;

    b. It was the claimant that raised the possibility of an exit and/or settlement on three separate occasions, not Mr Cole.

    c. It was made clear that CAB's contract was to be terminated by the respondent and that the claimant would have realised that this would have resulted in the departure of the three CAB 'Directors';

    d. Mr Cole confirmed to the claimant that he did not want the claimant to leave the respondent's employment but did express concern that the current role was too much for the claimant and whether a creative director role would not be more suitable for him;

    e. Mr Cole did not tell the claimant that he could either accept a lesser paid role in a creative position or he could leave. Whilst the conversation between Mr Cole and the claimant did eventually turn to future options for the claimant to remain, it was not presented to the claimant in the manner pleaded or suggested by the claimant. Rather the claimant had repeatedly suggested an exit, and in response Mr Cole had indicated that if the claimant were to remain, that he couldn't see any alternative role, such as creative director earning as much as a managing director;

    f. Mr Cole did use the words 'pathetic' and 'snowflake' with reference to the claimant although he did not directly call him a 'snowflake' or 'pathetic'. However in the context of the general tenor of the meeting, and more particularly the language used by both Mr Cole and the claimant during that meeting, I did not consider that the claimant would have been upset or insulted by the language used, nor would it have been reasonable for the claimant have been upset or insulted;.

    g. Towards the conclusion of the meeting Mr Cole did tell the claimant that he was going to re-employ Sioned Doel and Shaun Loye;

    h. At the conclusion of the meeting, the claimant raised the possibility of a settlement again with Mr Cole.

29. I found that there was nothing in what was said at the meeting that amounted to or could be said to amount to a demotion of the claimant.

30. The two employees were not in fact re-employed by the respondent and this was confirmed to the claimant almost immediately after that meeting.

<u>Events following 20 September 2018</u>

31. The claimant did not attend work after 20 September 2018 but instead commenced a period of annual leave (three days) and thereafter presented a Fit Note from his GP dated 26 September 2018 and signing the claimant off work for 21 days with 'Anxiety with depression'.

32. In the days following the meeting the respondent's contract with CAB was reviewed with Mr Bullock holding concerns about, and in turn seeking to understand, what work had been authorised, completed and approved by the respondent under the claimant's remit as Managing Director.

33. Much evidence was contained in the witness statements and much cross examination took place of the respondent's witnesses, in relation to the work that had been undertaken by CAB. As I made clear during the hearing, this was not a relevant consideration for the claimant's breach of contract claim, and I make no findings on what work had been undertaken by CAB and/or whether charging for work was justifiable.

34. The CAB contract was terminated at some point in late September/early October which resulted in the departure from the respondent company of the three CAB personnel, named as 'Directors' i.e. Louise Powell, the claimant's wife and Marketing and HR Director, the Finance and Operations Director and the Sales Director.

35. On 27 September 2018 the claimant was advised by Mr Bullock by way of email that because of the state of the respondent's cashflow, the respondent had to delay making payments to the executives for September. Mr Bullock concluded that the situation would be rectified as soon as possible, and he would let the claimant know when he completed the cashflow forecast.

36. On Saturday 29 September 2018 the claimant emailed Mr Cole reiterating that he was keen to purchase the business. He made reference to the fact that Mr Bullock's appointment had been a shock and that he had felt demoralised at the conversation that he had with Mr Cole on 13 September 2018. The email presented his summary of the 20 September 2018 meeting and concluded that he understood that his salary wasn't going to be received which had compounded his belief that he had been constructively dismissed.

37. On 2 October 2018 the claimant emailed both Mr Cole and Mr Bullock stating that he was finding the situation was having a hugely detrimental impact on his health. The claimant attached an email from one of the respondent's suppliers which had been sent by Mr Bullock which confirmed that the respondent's cash flow was '*pretty grim thanks to the outgoing Directors'* which had worsened his health. Whilst Mr Bullock's email to the supplier referred to the three outgoing CAB 'Directors', and not to the claimant as Managing Director, the claimant considered Mr Bullock's email referred to him and reinforced his view that he was being constructively dismissed.

38. On Monday 3 October 2018 the claimant sent an email to Mr Cole after he had noticed that he had been removed as a statutory director with Companies House. He stated in the email that this was clear and unequivocal evidence of his dismissal and he considered this to be the last straw. He raised again that he would be agreeable to entering a settlement agreement. Mr Cole admitted removing the claimant as a statutory director at Companies House. This had been undertaken on his understanding that the claimant would be suspended, and on the mistaken belief that in order to stop the claimant having access to the respondent's bank accounts during suspension, this was required. He also could not reinstate the claimant unless he engaged with the respondent to sign the requisite paperwork and due to the claimant's grievances, this did not occur before the claimant resigned.

39. Mr Cole responded generally on Tuesday 4 October 2018 stating that he hoped that the claimant felt better and apologised for not responding sooner. He stated that he did not want to engage in dialogue in fear that it may cause the claimant further distress.

40. On 9 and 11 October 2018 the claimant sent further emails chasing and confirming that his sick note was expiring on Tuesday 16 October 2018.

41. On 3 and 15 October 2018 Mr Bullock's invoices, in respect of his consultancy work, were paid by the respondent. The claimant was paid throughout the remainder of his employment on the due salary payment dates.

42. On 17 October 2018 the claimant contacted the respondent with a view to returning to work on the expiry of his sick note. The claimant did not attend work as anticipated but was suspended by Mr Bullock on behalf of the respondent emailing a letter of suspension. The letter of suspension was dated 16 October 2018 and confirmed that he was being suspended due to serious allegations regarding his conduct pending a full investigation.

43. Whilst the letter did not articulate the facts supporting the allegation of misconduct, these relating to the concerns held regarding the financial status of the respondent highlighted in the Observation Note including in particular the level of financial payments made to CAM and the fact that the claimant had signed off on the 2017 statutory accounts which were incorrect.

44. Later that day the claimant was advised that he would be paid half of his September salary that day and that the balance would be paid 'shortly'. Apologies were made and the claimant was advised that this was due to cashflow issues and that employees would be paid at the expense of the executives. The claimant was paid half of his salary that date and the balance was paid on 19 October 2018.

45. The claimant emailed on 18 October 2018 asking for a summary of the issues under investigation.

46. On 23 October 2018 the claimant again emailed making reference to the emails of 29 September, 2, 3, 9, 11, 17 and 18 October 2018 emails, confirming that he was now raising a grievance and requested a copy of the grievance procedure.

47. A meeting was scheduled for 8 November 2018 to consider the claimant's grievance. The claimant objected to the grievance being considered by a member of staff at the respondent organisation and, by way of letter dated 5 November 2018, a number of alternative options were presented by the respondent to consider the grievance including Mr Cole, another member of management, or Crownford Consulting Limited, HR Consultants engaged by the respondent ("Crownford Consulting"). The grievance meeting was rescheduled for 1 November 2018.

48. By way of email dated 31 October 2018 sent at 18.10 to Mr Bullock the claimant queried if the meeting was still going ahead. Mr Bullock did not respond before the hearing as he was not working at the time. The claimant did not attend the hearing but in any event subsequently confirmed that he would be happy for Crownford Consulting to consider his grievances by way of correspondence.

49. The outcome of the grievance was confirmed in writing by way of letter dated 21st November 2018 which responded to the emailed grievances, in particular the email of 29 September 2018.

50. The claimant appealed the outcome by way of letter dated 28 November 2018 which set out the body of each email that the claimant relied upon. The claimant was invited to an appeal meeting arranged for 4 December 2018. The claimant chose not to attend and the appeal was dealt with on the papers and the appeal outcome letter was sent on 12th December 2018.

51. On receipt of the appeal outcome the claimant submitted his letter of resignation and the claimant's employment ended on that date.

52. The claimant subsequently presented this claim for constructive unfair dismissal seeking compensation.

The Law

53. Section 95 ERA 1996 provides that for the purposes of unfair dismissal, an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct.

54. In those circumstances, if the claimant was dismissed, I also have to consider what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA, and, in particular, did the respondent in all respects act within the "band of reasonable responses

55. In relation to the breaches I have to consider the following

    i. Did the respondent breach the implied term of mutual trust and confidence i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

    ii. If so, did the claimant "affirm" the contract of employment before resigning (i.e. act in a manner that indicates the claimant remains bound by the terms of the contract.) as if I concluded that he did, this would waive the breach

    iii. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation)?

56. The burden of proof is on the employee to demonstrate that the employer's actions have destroyed or seriously damaged trust and confidence or were calculated or likely to do so and that the employer had no proper cause for the actions in question.

57. Lord Denning, in Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713 sets out the approach to constructive dismissal as follows:

> '*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.'

58. Lord Steyn in Malik v Bank of Credit; Mahmud v Bank of Credit [1998] AC 20 gave guidance for determining if there has been a breach of trust and confidence, when he said that an employer shall not:

> *'…without reasonable and proper cause, conduct itself in a matter calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'*

59. Whilst conduct of the employer must be more than unreasonable, breach of trust and confidence will invariably be a fundamental breach.

60. The claimant needs to establish his decision to resign, on the basis of the 'last straw', which need not in itself be a breach of contract. Dyson LJ in Omilaju v Waltham Forest London BC [2005] All ER75 said that:

> *'If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.*

61. The tribunal is therefore required to decide whether the respondent's conduct in this case could objectively be said to be calculated, or in the alternative likely, to *seriously* damage confidence and trust between the claimant and the respondent. Thereafter we are required to examine whether the claimant resigned in response to that conduct, and that conduct must include a final event which contributes to earlier actions so as to make the entirety of the conduct, taken together, sufficiently serious so as to damage the relationship of confidence and trust between employer and employee.

62. Finally, the breach must cause the employee to resign which is a question of fact for the tribunal based on the evidence before it.

63. If the claimant was unfairly dismissed and the remedy is compensation:

    a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? [*See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*];

    b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA; and if so to what extent?

c. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA?

d. did either party unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase or decrease any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

Conclusions

64. The claimant had indicated that there had been nothing in the events leading to the meeting of 20 September 2018 that he relied upon to support his argument that the respondent had breached trust and confidence

65. With regard to the meeting of 20 September 2018, I concluded that the meeting was to undertake a robust, but reasonable assessment of the current financial and operational position of the respondent company by the shareholder owner of the business with the employed managing director. There was nothing that could be drawn either from Mr Cole's attendance nor indeed Mr Bullock's attendance that could have amounted to a breach of trust and confidence in the claimant.

66. Despite the claimant's pleading (para 8 ET3 Particulars of Claim,) Mr Cole did not turn up unexpectedly. Rather the claimant was on notice from at least 18 September 2018 that he would be in attendance. In any event, even if Mr Cole had turned up unexpectedly, this would not in my mind have been or should have been a significant issue for the claimant that would have led to a trust and confidence breach.

67. Despite the claimant's pleading (para 9 ET3 Particulars of Claim,) Mr Cole did not present the claimant with unequivocal options of taking a lesser paid role or leave with a business package. Whilst concerns were expressed about the claimant's ability to undertake a wide range of responsibilities within the respondent, and alternatives such as a more creative role were discussed, it was very much the claimant that presented an agenda of wanting to leave the respondent organization with an agreed package, and in response to that alternatives such as the claimant remaining in a creative director role was raised as a possibility for discussion.

68. Nothing in the language used by Mr Cole, in the context of a frank discussion flowing from both parties and in the context of the dialogue between two men, who clearly know each other very well, could be said to amount to a breach of trust and confidence.

69. Overall, there was nothing in the fact or content of the meeting of 20 September 2018 or in relation to the conduct of Mr Cole or Mr Bullock that constituted or was capable of constituting a breach of trust and confidence between the claimant and the respondent.

70. The claimant sent a number of emails to the respondent, either to Mr Cole or to Mr Bullock following the meeting of 20 September 2018, in particular on 29 September, 2 and 3 October.

71. Dealing firstly with the email of 2 October 2018, whilst I accept that the claimant perceived the reference to 'outgoing Directors' in the email of 2 October (sent by Mr Bullock to a respondent supplier,) referred to him, this was incorrect, and this was explained to the claimant as part of the grievance procedure. This was neither conduct

nor actions on the part of the respondent which could be said to likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

72. With regard to the claimant's removal as a statutory director (referred to in the email of 3 October 2018), whilst I accepted the rationale for the decision to remove the claimant as a statutory director, I did consider that this, and indeed the failure to notify the claimant that this was a step that was being taken, could amount to a fundamental breach going to the root of the contract enabling the claimant to resign and complain of constructive dismissal.

73. I therefore concluded that, despite the capacity for such action/inaction on the part of the respondent in relation to removing the claimant as a statutory director, to amount to a breach of trust and confidence, it did not in fact result in the claimant treating it as such.

74. Furthermore, I also concluded that Mr Cole had reasonable and proper cause to remove the claimant as a statutory director, in the context of his pending suspension and (albeit mistaken) belief regarding the banking mandate provisions. In those circumstances this was not a breach of the implied duty on the facts of this case.

75. The claimant did not resign in any event at this point, despite having knowledge of this fact on or before 3 October 2018.

76. Furthermore, the claimant indicated that he was in a position to return to work on 16 October 2018, on the expiry of his Fit note. Therefore by that date, the claimant had waived any breach caused by his removal as a statutory director.

77. The failure to pay salary on the due salary date is a breach of contract. However, in this case there was not a complete failure to pay, simply a delayed payment. There was nothing in the evidence before me to indicate that the respondent no longer intended to be bound by one or more of the essential terms of the contract and the claimant was in fact paid the September salary. There was no evidence that the respondent had adopted a cavalier attitude to payment of wages. Indeed, the claimant does not challenge the decision to make a late payment to executives in circumstances of difficult cashflow. He accepted that this was reasonable business practice. Rather, his issue is that Mr Bullock's invoice was paid prior to the claimant's salary.

78. I concluded that the claimant's concerns were specifically related to Mr Bullock's invoice only. The claimant had no objection to, or certainly raised no case that he objected to, other sub-contractors, including his own company CAB, being paid in advance of his salary.

79. On the facts as presented to me, particularly the fact that the claimant was not complaining of the delay in payment, simply that Mr Bullock's invoice was paid in advance of his salary payment, I did not consider that this was a significant breach going to the root of the contract. This was reinforced by the fact that the claimant received and accepted payment of salary for the months subsequent up to his resignation on 12 December 2018. Therefore, the claimant waived any breach by continuing to accept future payments and remaining in employment.

80. The short delay in sending a holding response to these emails, on 4 October 2018, was not an unreasonable delay.

81. The lack of detailed response is, furthermore, not unreasonable taking into account both:

a. the nature of the claimant's reaction to the meeting of 20 September, both in terms of commencement of sick leave; and
b. in terms of the tenor of the claimant's email of 29 September 2018.

82. The email of 29 September 2018 did not accurately reflect the discussions between Mr Cole and the claimant at the meeting of 20 September 2018. I concluded that it had been crafted by the claimant to improve his bargaining position on achieving an agreed exit, the claimant having made a covert and accurate recording of the meeting on 20 September 2018. I also concluded that it was difficult to see how else Mr Cole could have responded to it when it was sent at a time when the claimant was presenting as sick and presenting a very different version of events to that which had taken place at that meeting.

83. Even if the previous matters were capable of breaching the implied term of trust and confidence, the claimant had, by 16 October, when he evidenced an intention to return to work, affirmed any breach.

84. The reasons for the claimant's suspension on 16/17 October 2018 was not explained to him beyond the content of the letter of 16 October 2018. Whilst it is not a breach of contract to suspend, there must be some evidence to support that there is a reasonable and proper cause to suspend. I concluded on the findings of fact that I made that there was reasonable and proper cause to suspend. Whilst I concluded that it would have been more palliative of the respondent to have more fully articulated information supporting the allegation of misconduct, this did not amount to a breach of the implied term of confidence and trust.

85. The formal grievance was not submitted until 23 October 2018 and a grievance hearing was held on 1 November 2018.

86. The respondent responded reasonably to the claimant's concerns regarding the appointment of an appropriate individual to consider the grievance, in what is a difficult situation where the respondent is a small limited company and the grievance is being brought by the most senior employee, the managing director, against essentially the owner of the business. The respondent had limited options, but what options it did have, were agreed with by the claimant.

87. There was a breakdown in communication and the claimant did not attend the grievance hearing as a result. Notwithstanding that, the claimant subsequently agreed that the grievance be considered in writing by Crownford Consulting.

88. Their grievance outcome response was sent two weeks later and dated 21 November 2018.

89. I concluded that there was no unreasonable delay in the management of the grievance and did not consider that there had been anything in the management of the claimant's grievance in terms of process that was unreasonable.

90. The outcome of the grievance, and indeed the grievance appeal, dealt with the claimant's concerns, in particular the content of the email of 29 September 2018 which highlighted that the respondent's interpretation of the meeting of 20 September 2018 differed significantly from that presented by the claimant. Again, I considered that this was a reasonable response to the grievance, particularly taking into account my own findings in relation to the content of that email.

91. On balance of probabilities, I am not satisfied that the true reason for the claimant's resignation was the conduct of the respondent either taken cumulatively or individually.

92. In addition, the claimant submits that the outcome of the grievance appeal was the last straw. The respondent submits that even if we accept that the claimant resigned, at least in part as a result of the matters the subject of his claim, that is bound to fail as he cannot rely on the last straw doctrine.

93. Having reviewed the content of the grievance appeal I agree. The grievance appeal outcome dealt with the issues as presented by the claimant and it could not be said that receipt of the grievance appeal outcome was capable of contributing to a series of earlier acts.

94. I therefore cannot conclude that the resignation was tendered because of a breach of the implied term and in turn, conclude that the claimant was not dismissed within the meaning of s.95(1)(c) Employment Rights Act 1996.

95. The claim of unfair dismissal is not well founded and is dismissed.

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Employment Judge RL Brace
Dated: 26 July 2019

JUDGMENT SENT TO THE PARTIES ON

28 July 2019

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS