



EMPLOYMENT TRIBUNALS

Claimant:

Mr Lee Roberts

v

Respondent:

South London Residential 2
Limited

Heard at:

Reading

On: 6, 7 and 8 August 2019

Before:

Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant:

In person

For the Respondent:

Miss I Shrivastava of Counsel

JUDGMENT having been sent to the parties on **9 August 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim form presented on 23 September 2018, the claimant made a complaint of unfair dismissal. The respondent defended the claimant's complaints.
2. At the commencement of this hearing, I considered an application from the respondent to produce an amended witness statement on behalf of the witness, Mr Alexander Hugh St Pier. The request for the amendment was so that the witness statement could set out further evidence which Mr St Pier wished to adduce. It involved adding matters which had not been included in the original draft of the statement. I am satisfied the claimant can deal with the matters raised by addressing the additional matters by giving further evidence in addition to what is contained in his witness statement and by me taking note of any variations that may appear from the original version and if appropriate drawing inferences from the late inclusion of matters in the amended version of the statement. I granted the application to rely on the amended statement.
3. We discussed the fact that there were two bundles of documents: there is a trial bundle and a further bundle produced by the claimant. The reason for the second bundle is that the claimant asked the respondent's previous solicitors to include a number of documents in the bundle. They refused to

do so. The claimant produced a separate bundle containing the documents. The position of the respondent's former representatives was that the documents that the claimant wished to have included in the trial bundle were not relevant to the issues that needed to be decided. I proceeded to hear the case with two bundles of documents: the trial bundle, running to some 541 pages of documents; and an additional bundle from the claimant which contained 72 pages of documents as well as including the claimant's witness statement.

4. I was asked to consider whether the respondent should be permitted to rely on a document that had been produced late document by the respondent. This document is inserted in the main trial bundle at pages 88A and B. It is a candidate registration form completed by the claimant in relation to a position the claimant applied for during his employment with the respondent. The claimant says the document is irrelevant, but he does not object to it being relied on. I allowed the respondent to rely on the document because the claimant says that he suffers no prejudice by the late production. The claimant does not concede that the document is relevant or that it assists in the case.
5. I was also asked to consider the claimant's application to strike out the response on the grounds that the respondent had failed to comply with the tribunal's orders. I note that this application has previously been considered by myself and other employment judges and in the circumstances, it is not appropriate for me to reconsider the application. There is no change of circumstances since the application was previously considered and refused. The claimant poses the rhetorical question: what is the point of orders of they are ignored? However, the claimant does not go so far, in revisiting this application, as to say that a fair trial of the issues is not possible.
6. At the start of proceedings on the final day of the hearing, after the evidence had been concluded and before the parties made closing submissions, I was asked to permit the claimant to introduce further documents. The first document the claimant asked to be included was in fact already in the trial bundle. The second document was a statement by a third party which set out information contained in an email which the claimant had obtained overnight. The claimant could have obtained this information prior to the hearing. In his witness statement the claimant deals with the topic of the profitability of the respondent's business in broad general terms saying that it has millions of pounds in profit.
7. I refused the application to admit this statement. The issue goes to the credit of Mr St Pier. The specific evidence could have been produced by the claimant in his witness statement as he had access to the source of the information that he now seeks to rely upon. The evidence seeks to impugn part of the evidence given by Mr St Pier. This was evidence, to use a colloquial idiom, given off the top of his head, and indicated as such by being preceded with the plea that he should not be pinned down on the accuracy of the figures that he was providing. Even if I permitted the new evidence and accepted that as Mr St Pier's evidence was wrong it would not cause me to cast doubt on his other evidence. I was not satisfied that it would be in the interests of justice for me to allow the claimant to rely on

the new evidence and I refused the application.

8. The claimant's claim for unfair dismissal is based on section 98 of the Employment Rights Act 1996. The issues that I have to decide in this case are: -

(i) Was the claimant dismissed? The claimant contends that he was constructively dismissed. The claimant relies on a breach of contract which came about because Mr St Pier accessed his personal files without his knowledge or permission and then having done so lied to the claimant about it.

(ii) If there was a breach of contract, which was a fundamental breach of contract, was the breach the reason for the claimant's resignation? Did the claimant wait too long or waive the breach so as to lose the right to resign?

(iii) If the claimant was dismissed, the respondent does not say that there was a potentially fair reason for the dismissal.

(iv) If the claimant was not dismissed, how long would his employment have lasted in any event?

(v) Did the claimant contribute towards his dismissal?

9. The claimant was employed by the respondent from 8 September 2014 until 6 July 2018. The respondent was known as St Pier Limited and the CEO and majority shareholder was Mr St Pier. The claimant's terms and conditions of employment were set out in a service agreement made between the claimant and the respondent dated 10 September 2014.

10. In the course of evidence, the claimant sought to rely on the fact that there were earlier iterations of a draft service agreement which he was asked to sign during negotiations with Mr St Pier as to the terms of the service agreement. The claimant refused to sign until satisfied with the terms set out in the service agreement of 10 September. The claimant sought to rely on the contents of the earlier iteration of the service agreement in order to gain support for the points that he makes in this case. I am not satisfied that the contents of that document are relevant to any issue that I have to decide, and I disregard the contents for the purposes of this decision.

11. The claimant has relied on a number of sections of the service agreement, the respondent's office procedures and the respondent's employee handbook. These are:

11.1 Section 4.2 of the claimant's service agreement which provided that:

*During the Appointment the Employee shall:
(a) Unless prevented by incapacity, devote the whole of his time, attention and abilities during working hours to the business of the company and any group company of which he is an officer or consultant."*

11.2 Clause 4.3 which provided that:

“The employee shall familiarise himself with and comply with the rules, policies and procedures (including, but not limited to, the Company’s office procedures and staff handbook) issued and/or amended by the Company from time to time. Such rules, policies and procedures does not form part of this agreement and the company may amend them at any time. To the extent that there is any conflict between the term of this agreement then such rules, policies and procedures, this agreement shall prevail.”

11.3 Clause 4.4 which provided that:

“All documents, manuals, hardware, software provided for the Employee’s use by the Company, and any data or documents (including copies) produced, maintained or stored on the Company’s computer systems or other electronic equipment (including mobile phones), remain the property of the Company.”

11.4 The claimant’s contract also provided that was to be given a car allowance, originally £5,000, but at the date of the termination of the claimant’s employment this had increased to £6350.

11.5 Clause 22.1 of the service agreement which provided that:

“The Employee shall comply with the Data Protection Act 1998 when processing personal data in the course of employment including data relating to any employee, customer, client, supplier or agent of the Company or any Group Company.”

11.6 Clause 22.2 which provided that:

“The Employee consents to the Company or any Group Company processing data relating to the Employee or legal, personal, administrative management purposes and in particular to the processing of any sensitive personal data (as defined in the Data Protection Act 1998) relating to the Employee, including, as appropriate: ...”

The type of sensitive data referred to is then listed.

11.7 The claimant also relied on the respondent’s office procedures and the staff handbook. The claimant referred to various passages in the staff handbook. Clause 17.1 which provides that:

“Everyone has rights with regard to how their personal information is handled during the course of our activities or will collect, store and process personal information about our staff, and we recognise the need to treat it in an appropriate and lawful manner.”

11.8 Clause 17.2 which provides that:

“The types of information that we may be required to handle include details of current, past and prospective employees, supplier, clients and others that we communicate with. The information, which may be held on paper,

on the computer or other media, subject to certain legal safeguards specified in the Data Protection Act 1998 (the Act) and the other regulations. The Act imposes restrictions on how we may use that information.”

11.9 Clause 17.4 which provides that:

“If you consider that our provisions for complying with the Act have not been followed in respect of your personal data about yourself or others, you should raise the matter with your line manager.”

11.10 Clause 17.7 which provides that:

“Personal data means data relating to a living individual who can be identified from that data or that data and other information in our possession. Personal data can be factual, such as a name, address or date of birth or it can be an opinion such as performance appraisal.”

11.11 Clause 17.12 which provides that:

*“**Sensitive personal data** includes information about the person’s racial or ethnic origin, political opinions, religious or similar beliefs, trade union membership, physical or mental health or condition of sexual life, or about the commission of, or proceedings for, any offence committed or alleged to have been committed by that person, the disposal of such proceedings or a sentence of any court in such proceedings. Sensitive personal data can only be processed under strict conditions, and will usually require the express consent of the person concerned.”*

11.12 Clause 17.13 which sets out the data principles listing matters that emerge from Schedule 1 of the Data Protection Act 1998 (now repealed).

11.13 Clause 17.14 under the heading ‘Fair and Lawful Processing’ which provides:

“The Act is intended not to prevent the processing of personal data, but to ensure that it is done fairly and without adversely affecting the rights of the data subject. The data subject must be told who the data controller is, in this case St Pier Limited, who the data controller’s representative is, the purpose for which the data is to be processed by us, and the identities of anyone to whom the data may be disclosed or transferred.”

11.14 Clause 17.15 which provides that:

“For the personal data to be processed lawfully, certain conditions have to be met. These may include, among other things, requirements that the data subject has consented to the processing, or that the processing is necessary for the legitimate interest of the data controller or the party to whom the data is disclosed. When sensitive personal data is being processed, more than one condition must be met. In most cases, the data subject’s specific consent to the processing of such data will be required.”

11.15 Clause 17:19 relates to 'Timely processing' and provides that:

"Personal data should not be kept longer than is necessary for the purpose. This means that the data should be destroyed or erased from our systems when it is no longer required."

11.16 Clause 17.20 'Processing in line with data subject's rights' which provides that:

"Data must be processed in line with data subjects' rights. Data subjects have the right to..."

(d) Prevent processing that is likely to cause damage or distress to themselves or anyone else."

11.17 Clause 17.24 which provides that:

"Security procedures include:..."

*(b) **Secure lockable desks and cupboards.** Desks and cupboards should be kept locked if they hold confidential information of any kind. (Personal information is always considered confidential.)"*

11.18 Clause 17.25 'Dealing with subject access requests' which provides that:

"A formal request for a data subject for information that we hold about them must be made in writing. A fee is payable by the data subject for the provision of this information. Any member of staff who receives a written request should forward it to their line manager."

11.19 There is a section which deals with systems and data security and at 18.12 it provides that:

"We monitor all emails passing through our system for viruses. Workers should exercise caution when opening emails from unknown external sources or where, for any reason, an email appears suspicious (for example, if its name ends in .ex). We reserve the right to block access to attachments to emails for the purpose of effective use of the system and for compliance with this part of our handbook. We also reserve the right not to transmit any email message."

11.20 There is a section on email etiquette content. Clause 18.17 which provides that:

"Staff should not send abusive, obscene, discriminatory, racist, harassing, derogatory or defamatory emails. Anyone who feels that they have been harassed or bullied or offended by material received from a colleague via email should inform the line manager."

11.21 Clause 18.20 which provides that:

"In general, staff should not:"

- (a) *Send or forward private emails at work which they would not want the third party to read;*"

11.22 Under the heading 'Use of the internet, clause 18.24 which provides that:

"Staff should not under any circumstances use our systems to participate in any internet chatroom, post messages on any internet message board or set up or log text or information on a blog or wiki, even in their own time."

11.23 Under the heading 'Personal uses of systems', clause 18.25 which provides that:

"We permit the incidental use of internet, email and telephone systems to send personal email, browse the internet and make personal telephone calls subject to certain conditions set out below. Personal use is a privilege and not a right. It must be neither abused nor overused and we reserve the right to withdraw our permission at any time."

18.26 *The following conditions must be met for personal usage to continue:*

- (a) *use must be minimal and take place substantially out of normal working hours (that is during lunch hours, before 9 am, or after 5.30 pm);*
- (b) *use must not interfere with business or office commitments;*
- (c) *use must not disrupt other colleagues."*

11.24 Clause 18.27 which provides that:

"Staff should be aware that personal use of our systems may be monitored... and, where breaches are found, action may be taken under the disciplinary procedure. We reserve the right to restrict or prevent access to certain telephone numbers and internet sites if we consider personal use to be excessive."

11.25 Under the heading 'Monitoring use of systems' – clause 18.28 which provides that:

"Our systems enable us to monitor telephone, email, voicemail, internet and other communications. For business reasons, and in order to carry out legal obligations in our role as an employer, use of our system including the telephone and computer systems, and any personal use of them, is continually monitored. Monitoring is only carried out to the extent permitted or as required by law and as necessary and justifiable for business purposes."

11.26 Clause 18.29 which provides that:

"We reserve the right to retrieve the contents of messages or check searches which have been made on the internet for the following purposes (this list is not exhaustive):"

11.27 There are listed five matters of 'Inappropriate use of equipment systems' at clause 18.30 which provides that:

"Access is granted to the internet, telephones and other electronic systems for legitimate business purposes only. Incidental personal use is permissible provided it is in full compliance with our rules, policies and procedures (including this policy, the Equal Opportunities Policy and Anti-harassment Policy, Data Protection Policy and Disciplinary Procedure."

11.28 Clause 18.31 provides that:

"Misuse or excessive use or abuse of our telephone or email system, or inappropriate use of the internet in breach of this policy will be dealt with under our disciplinary procedure. Misuse of the internet can, in certain circumstances, constitute a criminal offence. In particular, misuse of the email system or inappropriate use of the internet by participating in online gambling or chain letters or by creating, viewing, accessing, transmitting or downloading any of the following material will amount to gross misconduct."

11.29 There then appears a non-exhaustive list of material which will amount to gross misconduct the list includes:

"Pornographic material ... offensive, obscene or criminal material or material which is liable to cause embarrassment to us or our clients ... false and defamatory statements ... material which is discriminatory, offensive, derogatory or may cause embarrassment to others ... confidential information ... or any other statement which is likely to create any liability (whether criminal or civil, and whether for you or us) ... material in breach of copyright."

11.30 Clause 18.32 which provides that:

"Where evidence of misuse is found, we may take more detailed investigation in accordance with our Disciplinary Procedure, involving the examination and disclosure of monitoring records to those nominated to undertake the investigation and any witness or managers involved in our Disciplinary Procedures. If necessary, such information may be handed to the police in connection with a criminal investigation."

11.31 Under the hearing 'Monitoring' at 19:11, it provides that:

"The contents of our IT resources and communications systems are our property. Therefore, staff should have no expectation of privacy in any message, files, data, document, facsimile, telephone conversation, social media post conversation or message, or any other kind of information or communications transmitted to, received or printed from, or stored or recorded on our electronic information and communications systems."

11.32 Clause 19.12 provides that:

"We reserve the right to monitor, intercept and review, without further notice, staff activities using our IT resources and communications"

systems, including but not limited to social media postings and activities, to ensure that our rules are being complied with and for legitimate business purposes and you consent to such monitoring by your use of such resources and systems. This might include, without limitation, the monitoring, interception, accessing, recording, disclosing, inspecting, reviewing, retrieving and printing of transactions, messages, communications, postings, log-ins, recordings and other uses of the systems as well as keystroke capturing and other network monitoring technologies.”

11.33 Clause 19.14 which provides that:

“Do not use our IT resources and communication systems for any matter that you wish to be kept private or confidential from the organisation.”

12. What the claimant says is that having regard to the contract of employment and the provisions contained in the staff handbook, what happened in his case was a breach of the contract of employment amounting to a fundamental breach.
13. The CEO and major shareholder (c.80%) of St Pier Ltd, Mr St Pier, on or around 1 March 2018 accessed and downloaded to his company password protected company file the personal files of at least three employees, including the claimant, which had been stored on the company's server. The files relating to the claimant included a copy of his passport, driving licence, medical records, bank details, tax returns, letters sent to and received from HMRC relating to personal tax matters and child benefit, investment details including passcodes, private correspondence, correspondence related to the claimant's parents' restaurant and private photographs.
14. The claimant says Mr St Pier's actions were equivalent to breaking into his work desk drawer, removing private correspondence and identity related to information which has been left in the drawer for safekeeping, copying it retaining a copy and then returning it to the claimant's drawer. All carried out without the claimant's knowledge or agreement.
15. The analogy of documents kept in the claimant's drawer in my view is not exact. The claimant was aware that by placing documents on the respondent's system he gave up some privacy by reason of the provisions he relies on his contract and the staff handbook.
16. The claimant produced a schedule (p72) setting out a list of the documents and correspondence which had been scanned onto the respondent's computers. It is personal documentation it is not of any interest to the respondent's business. It does not relate to any business that the claimant himself carried out. There is no suggestion that any of the documents that were placed on the respondent's system by the claimant are in any sense prohibited items of the type set out in the staff handbook.
17. On 2 March 2018, the claimant sent an email to Mr St Pier. The first two sentences of that email read as follows:

"I am extremely concerned to be informed that you have accessed my personal files to seek information to support an attempt to bring dismissal proceedings against me. Is this true?"

18. Mr St Pier describes how, on 2 March, he received the email from the claimant accusing him of looking at this personal information on the computer system and breaching his privacy in an attempt to find material to dismiss him. Mr St Pier says that the motive alleged by the claimant is not true. He explains that around this time, he had come across some material that appeared to be non-work related. He had been looking for a particular document when he had inadvertently come across other documents created by the claimant which aroused his suspicions because they related to property that he did not recognise.
19. Mr St Pier initially thought that the claimant had a small number of documents in his folder. However, when he opened a subfolder, he was alarmed to discover a significant volume of documents. This suggested to him that the claimant had not been devoting his full time and attention to his employment with the respondent and seemingly had been working in company time on his personal business which he considered was against the terms of the respondent's staff handbook that he characterised as stating that access to the respondent's system is for business purposes only.
20. Mr St Pier is not correct to say that access to the respondent's system is for business purposes only. It is clear from the terms of the handbook that incidental use was accepted in relation to non-business matters. In his evidence Mr St Pier accepted this in relation to documents stored on the computer by another employee whose documents he copied.
21. The timing of the interrogation of the claimant's document folder as set out in Mr St Pier's statement at paragraph 10 appears to be inconsistent with the evidence that I understood Mr St Pier to have given about the timing of his investigation of the specific documents. However, it may be that I misunderstood the chronology. In any event, a resolution of that issue is not a matter required to decide this case.
22. Having received the claimant's email on 3 March, Mr St Pier telephoned the claimant to discuss it. He denied copying the documents. He dismissed as baseless the allegation that he had accessed the claimant's personal file in order to obtain information to find grounds for dismissing the claimant. What Mr St Pier now says about this is as follows:

"With hindsight, I acknowledge that I should not have denied that I copied the claimant's files. The only reason that I do so was because I was taken aback by the claimant's email of 2 March which was out of character in its aggression and considering that the copying of the documents was necessary to protect the interests of the respondent and because I was concerned that the claimant would overreact if I acknowledged the copying of his files."

23. Mr St Pier accepts that he lied to the claimant. His reason for lying to the claimant in my view is not a reasonable. A reasonable employer would not

lie to an employee for the reasons that he has given. The reason given is underpinned by a suggestion that the email sent by the claimant on 2 March was aggressive. The directness of the paragraphs quoted above suggest indignation or annoyance but aggressive is not in my view an appropriate way of describing the email which set out the concerns that the claimant had about an invasion of his privacy. The email goes on to state that if Mr St Pier wished the claimant to leave the business, that it would be sensible to enter into discussions resulting in a fair settlement without the need for any acrimony. To describe the claimant's email of 2 March 2018 as aggressive is in my view simply wrong.

24. The claimant says that as a result of Mr St Pier's actions and his complete denial, he felt he had no choice but to seek alternative employment as quickly as possible, even if this resulted in a substantial drop in salary as he felt that he could not trust Mr St Pier to "*act reasonably, honestly, lawfully or with any integrity in any matter relating to his employment*". The claimant goes on to say that due to financial commitments he had to his wife, from whom he was separated, and his two teenage children, he could not risk the threat of being made redundant and having no income for any length of time. He had to secure alternative employment before taking any action. The claimant did not resign his employment until 5 June.
25. In the period between 3 March and 5 June, the claimant was seeking alternative employment. The claimant made it clear to Mr St Pier that he was seeking alternative employment and there were occasions when the claimant was given time to attend job interviews. The claimant secured employment with Criterion Capital Ltd and on 5 June, the claimant wrote to Mr St Pier resigning his employment with effect from 6 July 2018. The terms of the letter of resignation read as follows:

"In accordance with my service agreement dated 10 September 2014, I hereby confirm my resignation from the role of Senior Asset Manager by providing not less than one month's written notice. It is intended that my employment will end on close of business on 6 July."

26. The claimant also wrote to David Yates, Jonathan Mathias and David Adamson, who were on the board of directors of the respondent and the letter that he wrote to them in an email read as follows:

"Due to the uncertainty surrounding the forthcoming company/asset sale, I confirm that I have resigned today and I will be leaving on or before 6 July."

He then goes on to set out where he will be going and eventually concludes by saying:

"It was a pleasure to work with you all over the last three and a half years and I wish you all every success for the future."

27. The claimant wrote this email in order to say goodbye to the board of directors with whom he had been working. The claimant was questioned about the fact that the first part of his goodbye email to the board of directors included a reason for leaving the employment of the respondent:

the uncertainty surrounding the forthcoming company/asset sale.

28. I have come to the conclusion that there is no inconsistency between the claimant's letter to the board of directors and the reasons that he gives for resigning his employment with the respondent. Whilst in his resignation letter he did not give any reason, the reason for leaving that he gives in the letter to the board of directors is not inconsistent with the real reason for his leaving the respondent's employment. The company/asset sale may eventually have led to the end of his employment but it was the behaviour of Mr St Pier that caused the claimant to leave at the earliest opportunity for the first available role which was on inferior terms and conditions.
29. On 15 June, the claimant began drafting a letter of complaint to Mr St Pier. That letter was never sent.
30. On 20 June the claimant wrote to Mr St Pier setting out an allegation that he had been constructively dismissed. He set out seven points on which he relied in claiming constructive dismissal.
31. Point 7 reads:

“My discovery that you had accessed the stored personal data of mine and other members of staff which had been stored by us on our work computers but in files which were clearly marked as personal. The data of mine which I have seen that you have stored includes medical information, passcodes, correspondence relating to investments, private correspondence, bank correspondence and tax-related correspondence – all of which is unrelated to my role at St Pier Ltd, the purpose of which can only be in an attempt by you to consider dismissal proceedings against members of staff including me for gross misconduct. I have been advised by an employee of a government agency that you have breached the Data Protection Act in respect of storing this information. I have had little choice for the protection of my mental and financial state to seek alternative employment.”
32. It was put to the claimant that the quoted passage was an afterthought and that the real reasons for his resignation are set out in points 1 to 6. I do not accept that characterisation of point 7.
33. The claimant has put it that it was the 'grand finale'. To view it otherwise it seems to me ignores the circumstances in which these events occurred. The claimant considered that the reason that Mr St Pier accessed his emails was in order to find a reason for dismissing him. There is in the claimant's a close connection between the desire to dismiss the claimant and the pursuit of the company/asset sale. The claimant considers that the sale was more attractive if he was not an employee.
34. On 20 June 2018, Mr St Pier wrote in response to the claimant's letter and on 25 June 2018, the claimant was placed on garden leave. His employment with the respondent came to an end on 6 July 2018.

Breach of contract

35. The claimant states that as a result of Mr St Pier's actions and the complete denial - "*I felt I had no choice but to seek alternative employment.*" The claimant says that there was a breach of the Data Protection Act and also a breach of his right to privacy. I understand the claimant's case to be that there was a breach of the express term of the service agreement and also that there was a breach of the implied term of trust and confidence.
36. The claimant has made extensive reference to the company handbook and also to the office procedures. These do not form part of the contract of employment. However, they do contain provisions which set out the party's expectations in respect of dealing with the claimant's personal data. It is an implied term of the contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
37. When the claimant asks Mr St Pier "*Have you accessed my personal files to seek information to support an attempt to bring dismissal proceedings against me?*" And the employer lies in his answer, that is as clear a breach of the implied term of trust and confidence. While the actual processing of the claimant's personal data in this case may have been in accordance with the data protection principles of processing fairly and lawfully, processing for limited purposes, in an appropriate way, adequate relevant and not excessive etc, and in accordance with the terms on which the claimant was employed. It is however my view that when Mr St Pier lies about having done so, at best for no good reason, at worst to hide the fact he was looking for reasons to dismiss the claimant before the company sale, that is unacceptable and amounts to a fundamental breach of the claimant's contract of employment.

Reason for resigning

38. When the claimant resigned his employment, one of the principle and operative factor in the decision to resign was the way that Mr St Pier he had treated his data and then lied to him about it. Underpinning his decision to resign was the fact that he anticipated redundancy and thought that Mr St Pier was looking for a reason to dismiss him. The existence of more than one factor operating on the mind of the claimant does not in my view alter the fact that the reason for the claimant's dismissal was the conduct of Mr St Pier.

Affirmation

39. My approach to the question of affirmation is guided by my understanding of what was said in Chindove v William Morrison Supermarkets PLC [2014] UKEAT/0201/13. The passage of time may be sufficient for an employee to lose his right to resign. The matter is not one of the time in isolation. "He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might

reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test."

40. Did the claimant affirm his contract of employment? The claimant explains what he felt and why he acted as he did in paragraphs 43 and 44 of his witness statement where he says that as a result of Mr St Pier's actions, and his complete denial, he felt that he had no choice but to seek alternative employment as quickly as possible.
41. He goes on to say that due to his financial commitments to his wife, from whom he was separated, and his two teenage children, he could not risk being made redundant and having no income for any length of time, he had to secure alternative employment before taking action. I accept that this is correct, and it is the reason why he acted as he did. In the light of that, it seems to me that the claimant has acted in a way which was entirely reasonable. It would be unreasonable for him to be expected to place himself in a position where he was in greater financial jeopardy as a result of the actions of the respondent.
42. The claimant started looking for alternative work after 3 March. The claimant took the first job that was offered to him. He took a significant pay cut. I note that the claimant had been looking out for opportunities to advance, the document at page 88A supports this. However after 3 March the claimant was looking for any suitable employment not an advancement or a position amounting to a promotion. The position evidenced at page 88A would have been a promotion or advancement. The role that he took up was not.

How long would the claimant's employment have lasted in any event had he not been dismissed?

43. It is not clear what was to happen to the claimant after the company sale-whether his employment would continue or terminate lawfully e.g. by redundancy or agreement. I am satisfied that the claimant would have left the respondent's employment for a promotion or an equivalent role. At the time that the claimant left the respondent there was not an equivalent role or promotion for him to go to. But for Mr St Pier's actions the claimant's employment would have continued. The claimant would not have left the

respondent's employment for an inferior role but for the Mr st Pier's actions.

Contributory fault

44. I do not consider that it is possible to identify blameworthy conduct that contributed to the claimant's dismissal. The claimant used the respondent's computer in a way that was anticipated by the policy. The policy expressly allows use by the claimant for a purpose which was not business-related, incidental use was permitted and where that occurred, there was stated to be no expectation of privacy. The claimant's use of the computer was subject to limitations expressed at various places in the handbook. There is no evidence of misuse by the claimant.
45. The respondent states that there was excessive use. I do not accept that there was excessive use. The use of the computer was simply to store documents in digital form on that computer. There was no evidence that the number of documents stored on the computer caused any difficulties in the operation of the computer e.g. by taking up too much processing space or anything of that nature. There is no suggestion that there was any impact of any kind on the operation of the respondent's business by his doing so. There is no evidence that the claimant used or spent an inordinate amount of time in dealing with personal matters during the course of work. That is simply not evidenced by the documents that were stored on the computer.
46. The respondent has been keen in a different context in this case to emphasise that there was no misconduct or allegation of misconduct against the claimant. In those circumstances, it is not possible for me to conclude that there is a basis for saying that the claimant was guilty of blameworthy conduct which contributed to his dismissal.
47. For all those reasons, I am of the view that the claimant was dismissed and in view of the fact that the respondent does not seek to put forward a potentially fair reason for dismissal. I am not satisfied that there was a potentially fair reason for dismissal. I conclude that the claimant's dismissal was an unfair dismissal.
48. Having considered the question of liability, we went on to consider remedy.
49. The claimant's basic award it was agreed is in the sum of £2,286.00. The claimant's loss of earnings from the date of dismissal to the date of the hearing amount to £6,433.45. The claimant also sought to make a claim in respect of train costs. However, I disallowed any claim in relation to train costs in the sum of £59.90 because it seems to me that the claimant is either entitled to recover the train costs or alternatively, he is not entitled to recover the car allowance, the car allowance and the train costs it appears to me would be covering the same issue clearly indicating and anticipating the travel costs. I therefore disallowed any claim in respect of £59.90 per week's worth of travel costs. I made an award in the sum of £508.00 in respect of loss of statutory rights. The claimant's pension losses for a period of nine months amounted to £2,047.50.

50. The total award therefore is in the sum of £11,274.95.

Employment Judge Gumbiti-Zimuto

Date: 4 September 2019

Reasons sent to the parties on

.....10.09.19.....

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For the Tribunal office

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