EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107699/19

Held on 11 November 2019 and 22 January 2020

Employment Judge J M Hendry

Mr F MacLean	**Claimant** **Represented by** **Ms A Duncan,** **Solicitor**
Menzies Distribution Limited	**Respondent** **Represented by** **Mr D Bryden,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal finds as follows:

1. **That the claimant was unfairly (constructively) dismissed by the respondent company,**
2. **That the respondent company shall pay the claimant a monetary award of Fourteen Thousand One Hundred and Seventy Six pounds and Twenty Nine pence (£14,176.29) made up of a basic award of £2100 and a compensatory award made up of, £9440.78 as loss of net salary, £1421.54 as loss of pension benefits, £970.72 loss of car allowance, £243.25 loss of private medical care.**

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly, (constructively) dismissed from his employment as General Manager (Parcel Logistics) by the respondent company. The respondent denied that they had dismissed the claimant or they had breached an express or implied term of the claimant's employment contract. They further argued that the claimant had affirmed his contract and waived any possible repudiatory breach or that he resigned for another reason other than the respondent's repudiatory breach.

Issues

2. The issues for the Tribunal were whether or not the respondent company had committed a repudiatory breach of contract and whether the claimant through his actings had waived his right to resign by delaying the resignation. The Tribunal had to examine the reasons why the claimant resigned and the actions of the respondent's managers including the grievance process that was uncompleted when the claimant resigned. The Tribunal had to decide if there had been a 'final straw' prior to the claimant's resignation. No argument was presented that the dismissal would otherwise be fair on other grounds.

Evidence

3. The Tribunal heard evidence from the claimant on his own behalf and from James Ross the Customer Operations Group Director. The Tribunal considered the list of documents prepared by parties (JB1-33) and also the written submissions lodged by the parties following the hearing on 11 November 2019 and was then adjourned for submissions.

Procedure

4. In the interim the claim for holiday pay was settled. Parties lodged written submissions prior to the hearing which took place on the 22 January 2020.

5. The claimant's solicitor lodged an up to date Schedule of Loss at the hearing on the 22 January which was accepted as being correctly calculated by the respondent's agent.

Facts

The Tribunal made the following findings in fact:

6. The claimant for many years has been involved in the logistics of parcel delivery. He joined a company, AJG Parcels, in Inverness. He became a shareholder. He was pivotal in the growth of the company between 2010 and 2015 when the level of business trebled. The company was sold to the respondent in 2015 and the claimant began working for them. The claimant was given a Contract of Employment (JB9). The work was unrelenting and high pressure. Latterly, the claimant was in charge of the parcels division and involved in managing the incorporation of other businesses into the respondent's business.

7. In September 2018 the respondent company was sold to a private equity company "Endless". At or about this time the claimant decided to resign. He had a young family and wanted to spend more time with them. He planned to use the following summer to travel with his family. He formally resigned on 1 November 2018. He told the respondent that he would be prepared to work his notice and to be flexible in relation to working his notice. It was agreed that he would work until 1 May 2019 to allow a smooth handover to his successor and would be put on garden leave. His employment was due to terminate on the 30 June 2019.

8. One of the projects the claimant was involved in latterly was the incorporation of business from a company called "Yodel". As part of this an employee from

Yodel, Steven Mooney, was seconded to the respondent to work with the claimant consolidating the new business into the existing company.

9. In January 2019 the claimant was a member of the Senior Leadership Team as shown on a company organigram (JBp.40a).

10. On the 22 March the claimant received confirmation that Stephen Mooney would be appointed to the post of Operations Director for Parcels from 1 April. Mr Mooney had been earlier been seconded to the company from Yodel to assist with the incorporation of that company's parcel business. He was now to have full accountability for parcel operations.

11. The respondent company would produce management accounts every month which were distributed to the Senior Management Team. Budgets were set and the company's performance measured against the budgets.

12. The parcels business was seasonal/cyclical. It is busy over Christmas and into early January but quickly slows early in the New Year.

13. The incorporation of the Yodel business was found to be more difficult, time consuming and costly than previously anticipated.

14. The respondent has various policies that apply to employees including a Grievance Policy (JB5), Discrimination, Harassment and Bullying Policy (JB6).

15. The claimant had arranged a family holiday and agreed annual leave from 6 April to 22 April 2018. He did not intend working whilst on holiday and did not take his laptop with him. He did take his mobile telephone with him on holiday to be available if there was an emergency. He periodically checked messages. While he was on holiday the usual monthly management accounts were prepared and circulated. It was also the end of the company's first trading quarter of 2019 and thus a significant milestone to evaluate how the business was progressing.

16. When on holiday the claimant would also check his work e-mails in the evening. On the evening of 10 April 2018 he found that he had received an e-mail from Paul McCourt (referred to as the 'Humiliating email') the Chief Financial Officer of the respondents. The e-mail had been sent by Mr McCourt to 15 other people some of whom were the claimant's subordinates. The e-mail read:

> "*Ok. So we are £222k behind last year in a single month in Scotland, forget about budget growth, nearly 0.5m behind last year in our first three months. I am absolutely now writing off the budget for the rest of this year for parcels given this horrific result.*
> *Fraser – are you on the call on Friday? This is a complete mess. You can't give a hospital pass to the new teams; you need to explain this. Because it's certainly not APC….. given the nonsense over the past six months; it is certainly not DPD; it is certainly not UK mail. It is your ship and the only foghorn I've heard is to stop 30 pensioners participating in a shareholder meeting and once customer in one meeting in October last year.*
>
> *You are accountable for this omnishambles. And I want the numbers explained. There is no one else to point to. It is your voice and your voice alone.*
>
> *Let's discuss on Friday.*"

17. The claimant was upset and annoyed at the e-mail. He believed that he had been unfairly blamed for the budget difficulties and humiliated before his colleagues. The original budget target had been set high. He was upset that the e-mail had been written in these terms and distributed to other Managers including his subordinates. He was also irritated that Mr McCourt had not checked the holiday rota and seemed to expect him to take part in the discussion of the management accounts on Friday when he was still on prearranged annual leave.

18. The claimant returned from holiday. He was contacted by a number of colleagues who had seen the email including Mr Mooney on or about the 25 April who asked him what he intended doing about it. He was aware that both

Mr McCourt and the CEO were on holiday for a couple of days following his return on 21 April. He expected to be contacted either by Mr McCourt or by the CEO to apologise for the terms of the e-mail and its distribution. He waited but heard nothing. He spoke to his wife and discussed what he should do. He decided to write on the 30 April to Kay Simpson, the Head of the respondent's HR department setting out a grievance (JB p). He wrote:

"*Hi Kay please see e-mail below.*

I have given it some time to see if there was an apology, or intervention from anyone, but nothing has come, and I have now had time to visit a solicitor in relation to this.

I would like to raise a formal grievance against Paul McCourt.

If this email is not sufficient, I am happy to write a letter attaching this email, and other emails if required. Please let me know if I need to do this.

This is harassment, asking me to attend a call when on a family holiday, and bullying, by copying in so many people and using such emotive terms.

It is unacceptable behaviour and I should not have to tolerate it in the workplace.

A statutory director of the business should not be addressing a member of the senior team in this fashion, in front of others, and it is not the first time it is happened.

I have tried resolving through my line manager (I will forward on an e-mail I sent to Greg Michael in relation to Mr McCourt in December 2018).

I did not receive a reply to this e-mail my concerns at the time, hence why I am now left with no option but to go down the formal route of raising a grievance.

Greg was also copied on the e-mail below, has not written to me to apologise for its tone and content, or done anything to me to show that he finds this e-mail unacceptable in any way.

Greg actually pulled me up for e-mail tone in an e-mail he sent to me on 13 September 2018 which I will also forward to you.

Mr McCourt's behaviour towards myself has been a huge factor in my resignation, some of it Greg Michael and other senior managers are aware of.

I am keen for this grievance to be investigated fully.

I have done everything for the company has asked me since my resignation at the end of October.

I am so disappointed at the way I have been treated in return, whilst not telling anyone as per my letter, ensuring that no customers or you, were affected, I have done everything asked of me by the business, yet I continue to be harassed and bullied at work.

Please let me know if there is anything else you need from me in relation to this grievance.

Regards"

19. The respondent company had a Grievance Policy (p30-32) and a Discrimination, Harassment and Bullying Policy (p33-40). The policy stated (p35) ‘‘Harassment can be a single serious incident…’’ Examples of bullying were given (p360 which included ‘‘excessive, unfounded criticism’’ and ‘‘ridiculing or demeaning conduct’’ (p36) and included ‘‘Offensive emails’’(p36).

20. The respondent tasked Jim Ross to deal with the grievance. Mr Ross had been with the company since 1985. He was in a different division of the business from the claimant. He became Customers Operations Group Director on 1 May 2019 a role comparable to the claimant’s role in seniority. The claimant was unaware that this appointment was to be made and was concerned that Mr Ross did not have sufficient seniority. The grievance policy provided that a grievance should be heard by someone’s ‘line manager or another manager’ (JB p31). The claimant’s line manager was the CEO.

21. Mr Ross agreed to carry out an investigation. He wanted to find out the background circumstances but also to get views of other managers on the terms of the email. He spoke to Ms Simpson by telephone (JBp.73-74). Her view was that the e-mail should not have sent to others. She indicated that the claimant had not raised any concerns directly with her. She said that the

claimant had restrictive covenants as part of his employment contract which remained in effect for twelve months after termination of his employment.

22. On the same date the claimant spoke to Steven Mooney. Mr Mooney had worked closely with the claimant although recently the claimant had been involved in work that took him to London. They were on friendly professional terms.

23. Notes were taken of the call (JBp.75-76). Mr Mooney commented that the e-mail that was sent was *"straight talking, very direct but not inaccurate."* The contents and views expressed should, in his view, have been in a direct one to one conversation between the claimant and Mr McCourt rather than an e-mail. He observed that: "*maybe it was misjudged to send it as an e-mail."* He then made reference to the discussion he had with the claimant a couple of weeks earlier and that the claimant had been perturbed that the e-mail had been copied to others. He also mentioned a rumour that a new business was starting in Oban. He had asked the claimant about his future plans and whether he was starting a new business in Oban to be told he was not. He mentioned that the claimant had mentioned that he would like to have the length of time his restrictive covenants were to be in force reduced. He indicated that he would be in text contact with the claimant's solicitor about the e-mail that he had received from Paul McCourt.

24. Mr Ross also met the claimant on 9 May to discuss the grievance. Notes were taken of the meeting (JBp.77-80). The claimant stated that the e-mail was harassment: that it was humiliating and circulated to people that he worked with and who reported to him. He said: *"my reputation has been completely trashed"*. He was asked how long it took for him to raise his concerns. He said that he thought it was best to wait until he returned from holiday and then at that point the CEO and Mr McCourt were on holiday. He said that he then told Ms Simpson about the e-mail and awaited a response/apology which wasn't forthcoming so he raised a formal grievance.

25. The claimant prepared his notes of the grievance hearing (JBp.81-84).

26. Mr Ross believed that bullying required more than just one incident. He did not read the respondent's policy on harassment.

27. Mr Ross met Mr McCourt to obtain his position about these events on 10 May. The meeting was minuted (JBp.85-88). Mr McCourt was asked why he replied to 'All' on the e-mail. He indicated that he had replied to everyone as they were part of the finance operational management team and *"they were all in it together"*. He criticised Mr MacLean for not communicating with him about the difficulties. He had not alerted him to difficulties "the results are horrific". The claimant had not been open in his opinion. He confirmed that Mr MacLean had not raised any issue with Mr McCourt directly.

28. The claimant received a telephone call from Mr Mooney after being interviewed. Mr Mooney said …….. "*….as a consequence the claimant decided to resign with immediate effect*" (JBp.90/91). He wrote:

> "*I was on annual holiday from 6 April 2018 returning to work on Monday 22 April. At 2.01 hours on 10 April 2019, Paul McCourt sent an e-mail to Laura Boyd, Finance Analyst, in relation to parcels management accounts from March 2019, copying me and other people (the "humiliating e-mail"). The second and third paragraphs of the Humiliating e-mail referred to me directly. The e-mail stated that I was solely and directly responsible for the poor financial performance of parcels in Scotland with the financial year to date. Mr McCourt attributed all the blame for the poor financial performance without reservation or condition. The tone of the Humiliating e-mail was aggressive, sarcastic and mocking. The circulating list for the e-mail between 14 colleagues at a number of levels (junior and senior) including the managing director, employees that report directly to me and employees that have recently joined the Company. The wide circulation of the e-mail was the equivalent of being called out in the office, rebuked, belittled and humiliated in front of colleagues. It would taint the view of any reader on the circulation list. The e-mail undermined my position and was wholly damaging to my reputation. It constitutes bullying and/harassment in terms of the Company's bullying and harassment policy.*
>
> *I had expected some approach to have been made on my return from holiday about the humiliating e-mail. However, neither the sending or the humiliating e-mail nor the subject matter of the humiliating e-mail were*

raised with me. I was left to carry on with my duties as if nothing had been said. It may have been convenient to scapegoat an individual serving notice for poor financial performance. However the wholesale attribution of blame made by Mr McCourt was not fair or justified. The terms and the tone of the widely circulated e-mail were wholly inappropriate.

In the absence of any comment by Mr McCourt or any other of management by e-mail dated 30 April 2019, I submitted a formal grievance. By letter dated 3 May 2019 Kay Simpson, HR Director advised me that Jim Ross, Customer Operations Group Director had been appointed to investigate my complaint and by letter dated 3 May 2019 Mr Ross invited me to attend a grievance hearing on 9 May. I would note that Mr Ross is not senior to Mr McCourt. Mr Ross had not made any enquiries prior to the meeting. Whilst noting my position, he made no indication that he regarded the e-mail as much more than an emotive e-mail of the kind I might be expected to receive in the normal course. He left me feeling that he would go through the motions of speaking to some colleagues. My status as an employee serving notice diminishing the importance of the matter to the company. On Friday 10 May 2019 I had a call with another senior manager in the course of which he disclosed he had been contacted by Mr Ross in relation to the grievance. I was surprised a colleague would comment upon the ongoing process. I would have expected appropriate direction to have been issued to those involved. Mr Mooney told me he was "not fucking happy about it", and that he was "not happy about getting involved in your shite". He was aggressive and the call ended abruptly. I have little confidence in the grievance process after meeting with Mr Ross, following the call I have none.

The publication of the humiliating e-mail and its wide spread circulation by Mr McCourt to colleagues constituted a repudiatory breach of the implied term of mutual trust and confidence of my contract of contract, which entitled me to resign without notice. No comment has been made about the making of the humiliating e-mails since my return from holiday, indicating it is condoned by management. As noted above, I have no faith in the grievance process. In response to the Company's breach I hereby intimate my resignation with immediate effect. Accordingly, the effective date of termination of my employment is Monday 13 May 2019. I shall arrange for company property to be returned to the Inverness Depot by close of business today."

29. Ms Simpson responded to the claimant indicating that he would not be held to the remainder of his notice and that the 17 May would be his last date of employment. She indicated that the grievance process would continue (JBp.28).

30. Mr Ross decided to speak to two other senior managers, Mark Cassie and Craig McPherson, to understand if Mr McCourt's behaviour was common-place. Mr Cassie indicated that normally such exchanges would be face-to-face (JBp.93). Mr McPherson was asked whether in exchanges he had with Mr McCourt had he felt the tone to be unprofessional and he responded *"he is normally professional in his approach.*"

31. Mr Ross wrote to the claimant on 27 May setting out his findings:

"*Dear Fraser*
Grievance

I refer to your meeting on 9 May 2019 regarding the formal grievance that you have submitted on the grounds that you believe that you have been harassed and bullied by Paul McCourt, Finance Director.

I understand the key points of your grievance to be that you feel you were harassed by Paul during your family holiday by being sent an email and asked to attend a call, and that you feel that you were bullied by Paul in terms of the content of the email that he sent, the tone of that email and the fact that he copied the email to a range of people, including some who reported to you, using emotive terms.

I have spent time investigating your grievance and I apologise for the slight delay in getting back to you with a conclusion.

For clarity, I will cover each point of your grievance individually.

1. *You claim that you were harassed as you were asked to attend a call when on a family holiday.*

   I asked Paul McCourt why he asked you to attend the call when you were on holiday.

   I understand that there a weekly planner is created for the Senior Management team which comes out each week, on which holidays are noted. However, Paul had not looked at this and was unaware that you were on holiday at the time he wrote the email. Paul also confirmed that he did not make any further contact with you via email or phone insisting that you attended the meeting in person or by phone whilst you were on holiday.

   I therefore have come to the conclusion that Paul did not intend to communicate with you deliberately whilst you were on holiday and I do not uphold this point of your grievance.

2. *You claimed that you were bullied by Paul in terms of the content of the email that he sent, the tone of that email and the fact that he copied the email to a range of people, including some who reported to you, using emotive terms.*

   Having researched the term bullying it would normally be a pattern of mistreatment causing physical or emotional harm.

   I established through my investigation that the email group to which this email was addressed was not created by Paul, but by Lorna Boyd. Paul's email was responding to the financial issues that had arisen in Parcels and that had become apparent via Lorna's earlier email. Lorna's email had been was addressed to all the recipients, so when Paul responded to that email, he copied all the recipients by default.

   From questioning Paul on why he responded to all on the email, his position was that this was due to the fact that the group included were all Parcels and Finance operating team. His view was that all had a role to play in ensuring that the parcel business was profitable and therefore all should be subject to the same criticism about the financial performance.

   From my discussions with Paul, I am also satisfied that if any other business leader's trading position been similar to that of the Parcels division, then he would have responded similarly to them. From that, I conclude that his criticism was not aimed at you individually.

   With regards to your complaint about the tone of Paul's email, I agree that some of the content within the email is tough and could have been worded differently. I do not however agree that it goes so far as to be described as "bullying". At all times all employees within Menzies Distribution should ensure that all communication is conducted in a professional manner and this is something that should be addressed by the business going forward. I have recommended to Paul that he should moderate his language in future and consider more the impact that it has on the recipients of this type of email.

I appreciate that you may not agree with the outcome, but I hope that this offers a degree of clarity and closure for you.

Yours sincerely

Jim Ross
Customers Operations Group Director."

Witnesses

32. I found the claimant generally credible and reliable as a historian. I had some reservations understanding fully his reasoning both for waiting as long as he did before lodging a grievance or for resigning when he did with the grievance process not yet concluded but overall this did not detract from my assessment nor ultimately the conclusion that he was unfairly dismissed.

33. Mr Ross appeared to be generally also a credible and reliable witness to fact but I had stronger concerns about his credibility. It was puzzling that someone as experienced a he was, aided by HR, could conclude that one incident could not amount to harassment in terms of the policy. Given the apparent power and influence of Mr McCourt, and the fact that the claimant was leaving the organisation, Mr Ross gave some signs of believing that he had been passed a poison chalice. I ultimately concluded that he had decided that being critical of Mr McCourt, even if the grievance was not to be upheld, was not a route he would like to take despite there being evidence before him from senior managers that both the terms of the mail were highly critical and unusual and that there was agreement that copying it to more junior management was inappropriate as it put the claimant in an embarrassing situation.

Submissions

Claimant's submissions

34. Ms Duncan accepted that the onus was on the claimant to demonstrate a material breach of contract. Her client's position could be stated shortly, that he was entitled to terminate his contract of employment without notice by reason of the respondent's conduct, the respondent being guilty of conduct which was a significant breach of the implied duty of mutual trust and confidence going to the root of the contract. The "last straw" was the telephone call that the claimant had with Mr Mooney on 10 May 2019. The claimant had accepted the respondent's breach of contract and resigned in response to the breach on 13 May 2019.

35. Ms Duncan first of all referred to **Western Excavating (ECC) Ltd v Sharp (1978) ICR 221, CA.** To establish a fundamental breach of contract on the part of the employer the claimant has to demonstrate that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal. The law had developed and she made reference to the case of **Malik v Bank of Credit and Commerce International SA [1998] AC 20** which sets out the appropriate test for a breach of the implied duty of trust and confidence**.** In her submission, the fundamental breach of contract was the repudiatory breach of the implied term of mutual trust and confidence of the claimant's contract of employment occasioned by the content, publication and widespread circulation of the 'Humiliating Email' to colleagues of the claimant both junior and senior; the manner in which the claimant's subsequent grievance about the email was dealt with, culminating in the abusive phone call with Mr Mooney on 10 May 2019 which was the final straw. The case of **Wadham Kenning Motor Group Ltd v Wells *EAT 1048/95***, is authority for the proposition that undermining and humiliating an employee can amount to a fundamental breach of the implied term of trust and confidence.

36. The employer's intentions and/or motives are not determinative or even relevant in assessing whether there has been a breach of the implied term of trust and confidence. She submitted that reviewed objectively, the behaviour of Paul McCourt in sending the Humiliating Email, the handling of the grievance and the phone call by Stephen Mooney amounted to conduct which destroyed the implied term of trust and confidence between employee and employer.

37. Ms Duncan then referred to the case of **Morrow v Safeway Stores [2002] IRLR 9** and **Wadham Stringer Commercials (London) Ltd v Brown 1983 IRLR 46, EAT**. In the latter case E.A.T. expressly stated that the fact that the employer's behaviour towards the employee was explained by economic pressures was not relevant. The test was purely a contractual one and that

the surrounding circumstances are not relevant. Even if the Claimant had been solely responsible for the financial position of the Parcels Division (which is denied), the tone and content of the Humiliating Email could not be justified. An employer cannot justify an intolerable working environment even where the "norm" is high-pressured and high-handed behaviour **Horkulak v Cantor Fitzgerald International [2003] IRLR 756**. Treating employees badly as a 'norm' in a particular industry is also not a defence (**McBride v Falkirk Football and Athletic Club [2012] IRLR 22)**.

38. Turning to consider the "last straw" doctrine Ms Duncan discussed the case of **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**. The Tribunal should not apply the range of reasonable responses test to an employer's handling of a grievance process. **(GAB Robins (UK) Limited v Triggs UKEAT/0111/07)**

39. If the Tribunal believes that the claimant affirmed the contract then if the employer's conduct was continued by further acts, the employee could revive their right to terminate based on the totality of the employer's conduct. The court further noted that, if a tribunal considered an employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct, it should not normally matter whether the conduct had already become repudiatory at some earlier stage: even if it had, and the employee had affirmed the contract by not resigning at that point, the effect of the final act was to revive his or her right to do so.

40. A constructive dismissal claim may be based on the behaviour of a fellow employee, even in circumstances where that fellow employee did not have the authority to dismiss the Claimant in the conventional way. The test is whether the employer is vicariously liable for the relevant conduct (**Hilton International Hotels (UK) Ltd v Protopapa [1990] IRLR 316**.

41. In order to establish constructive dismissal, an employee must be able to show that they resigned in response to the relevant breach (**Nottingham County Council v Meikle [2004] IRLR 703)**. In that case it was held that although the resignation must be in response to the employer's repudiation, the fact that the employee also objected to other actions of the employer will not vitiate the acceptance of the repudiation. The Employment Appeal Tribunal provided further clarification on this in **Abbycars (West Horndon) Ltd v Ford UKEAT/0472**. Elias J expressed the view that that once a repudiatory breach of contract has been established, an employee can claim constructive dismissal as long as the breach "played a part"[1] in their leaving. The words of Elias J have since been endorsed in **Wright v North Ayrshire Council UKEAT/0017/13**. A final straw does not need to be a breach of contract in itself but must contribute something **(Omilaju v Waltham Forest Limited)**.

Respondent's Submissions

42. Mr Bryden began by outlining the issues as he saw them namely whether the various incidents taken cumulatively were sufficiently serious as to amount to a repudiatory breach of the claimant's contract of employment and if so did he resign in response to such breach? Did the claimant delay his resignation such that he should be taken to have affirmed such breach? Did the termination of claimant's contract of employment constitute an unfair dismissal?

43. Turning to the law the respondent's solicitor referred the Tribunal to the well known cases of **Western Excavating** and **Malik.** An employee must resign in response to the breach although it does not have to be the sole or principal reason. (**Nottinghamshire v Meikle and Abbycars (West Horndon) Ltd v Ford)**.

44. Any breach of trust and confidence must be extremely serious. The test is an objective one. Unless a repudiatory breach of contract can be made out, the claim must fail regardless of whether or not the employer's conduct was unwise or unreasonable in industrial relations terms (**Spafax Ltd v Harrison** (1980) IRLR 480). As the test objective, *"there will be no breach simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that belief is held"*.

45. In the present case the claimant relies on a number of incidents founding a 'cumulative breach' and a tribunal must have regard to those which did occur, and ask objectively whether, in the particular context of the case, they amounted to a breach of contract and whether, in the particular context of the case, that breach was so serious as to repudiatory (**Lochuak v London Borough of Sutton**).

46. Mr Bryden then considered the concept of the 'final straw' accepting that it does not need to be a breach of contract **(Lewis v Motorworld Garages Ltd**). However, where a last straw is relied upon, the final act must "contribute something" to the breach of trust and confidence In his submission the claimant did not regard the email of 10 April as sufficiently serious as to amount to a repudiatory breach of contract. It is possible that, but for the involvement of Mr Mooney, there would have been no grievance raised. The claimant does not appear to have a serious complaint about the grievance process. The telephone call on 10 May did not amount to a breach in its own right, and does not meet the tests required to constitute a 'final straw', such as would allow the claimant to resign in response. Neither individually or collectively do the three acts alleged amount to a repudiatory breach. If, he suggested, the email was considered sufficiently serious as to amount to a breach, the claimant delayed sufficiently as to waive the breach, and affirm the contract by waiting more than 30 days after its receipt to resign. In fact, there is a credible alternative explanation for the claimant's resignation, namely his wish to break his contractual restrictive covenants.

47. The so called ‘Humiliating Email’ was sent on 10 April 2019 by Mr McCourt, and it placed blame on the claimant for causing a significant loss to the respondent's business. Although the email had a wide distribution list, this was not created by Mr McCourt. The respondent's position is that the underlying financial position which prompted this email is correct. Following the submission of the claimant's grievance, he was contacted within 4 days by the grievance manager, Jim Ross. In the Particulars of Claim (page 15), the claimant alleged that the process had two flaws, namely: the appointment of Jim Ross was inappropriate, as he was subordinate to the claimant, and had only recently been appointed to his position, which was alleged to have represented a breach of the respondent's grievance policy, which states that a grievance hearing will be heard by the claimant's line manager or a senior manager; and the manner in which Jim Ross dealt with the grievance was inappropriate, as the claimant felt that Jim Ross regarded the process as a 'tick box' process rather than a genuine investigation.

48. Mr Bryden then went on to examine the evidence in relation to the telephone call with Mr Mooney. The claimant did not consider any one or two of these incidents, independently, to be sufficiently serious as to constitute a fundamental breach of trust and confidence. His claim is that the three events, taken together, constituted a breach. As stated in his evidence, the claimant received and read the Email on the day it was sent. His initial reaction was to wait and see what the respondent would do in relation to the email, though he stated that both he and his wife were upset by it. He returned to work on 22 April without raising any concerns and then waited until 30 April (nearly 3 weeks after the Email was received) to raise a grievance. In cross examination, the Claimant stated that Mr Mooney was instrumental in persuading him to raise the eventual grievance, and it is feasible to suggest that, but for the intervention of Mr Mooney, the claimant may not have raised a grievance. Thought the Particulars of Claim alleged that the grievance process was flawed, this was not in fact borne out by the evidence given by the claimant. With regard to the question of whether the appointment of Mr Ross was a breach of policy, the claimant was shown the organisational chart at page 40B of the bundle, showing that Mr Ross reported directly to the Chief

Executive, and was therefore not subordinate to the claimant. The claimant confirmed that he was aware that Mr Ross had been appointed to post of Customer Operation Group Director on 1 May 2019.

49. In evidence the claimant commented that he "*accepted the appointment of "[Mr Ross*]" and "*I had no issues with him doing it*". He also confirmed that he at no point before his resignation raised any formal objection to the appointment of Mr Ross.

50. Mr Bryden argues that there was in fact no breach of trust and confidence. The Email was sent by the Chief Financial Officer in response to concerns about the claimant's business performance, to employees who were involved in the management of that business area. While it may be argued that the Email, and its distribution list, were unpleasant, and perhaps even 'reprehensible', the cause of the email is clear, and by the respondent's case reasonable and proper.

51. The claimant and his legal representative relied heavily in oral evidence on the impact of the Email. In spite of the claimant's alleged reaction to the Email, he nevertheless waited 20 days to raise any sort of complaint, and eventually raised the final grievance only following persuasion from Mr Mooney. Following this act, the claimant then waited a further 14 days before his eventual resignation. As set out above, it is argued that neither the grievance process nor the call were sufficient to allow the claimant to resign. If the email was to be regarded as the moment of repudiatory breach, then the respondent submits that the claimant should have acted more promptly. The claimant's delay in raising the grievance suggests that the claimant did not regard the email as sufficiently serious for this action, and it is submitted that neither the grievance process nor the call meet the threshold for amounting to a ‘last straw’.

52. It was not admitted by the respondent that the alleged breach of contract was the effective cause of the claimant's resignation. The claimant had spoken to Mr Mooney (and potentially others) about wishing to have his restrictive covenants reduced, and his notice shortened (page 75). In cross examination, the claimant referred to a conversation which took place on 2 May 2019 between himself and Mr Mooney regarding the claimant's plans for the future. The claimant stated that he could not say what his plans were, as (one week before his grievance meeting with Mr Ross) he said that his relationship with the respondent was "*likely to be in dispute*" and he would "*see what came out*". It is submitted that the claimant resigned for the sole purpose of terminating his employment early, and either breaking (or at least reducing) his 12 month post termination restrictions.

Discussion and Decision

53. The Tribunal was greatly assisted by parties very full citation of authority and the detailed written submissions that were lodged.

54. The Tribunal first of all had regard to the terms of Section 95(1)(c) of The Employment Rights Act 1996 (hereinafter the 'Act') which is in the following terms:-

"**Circumstances in which an employee is dismissed.**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if) –

(a) …..
(b) …..

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

55. The section provides that when the employee terminates their contract (with or without notice) in circumstances in which they are entitled to do so because of the employer's conduct that will amount to a dismissal for the purposes of the Act. The focus is on the employer's actions not the employee's reaction to those actions and whether the employer, looked at objectively, has been guilty of a repudiatory breach of contract. This is often not easy to apply in practice as events occur against a particular background and context. The Tribunal therefore has to examine particular events closely but also to look objectively at the whole picture.

56. The Tribunal considered the guidance contained in well- known case of **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 Court of Appeal** which has laid down time honoured and helpful guidance on this matter. The nub of the matter is to be found in the judgment of the Master of the Rolls, Lord Denning, where he says at page 29, paragraph 15:-

> *"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."*

57. Both parties cited the case of **Malik v BCCI SA [1997] 3 All ER** and the dicta contained there: that a contract of employment contains an implied term to the effect that an employer: -

> "*would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"*.

58. The Tribunal also considered the observations of the Employment Appeal Tribunal in the case of **BG Plc v. Mr P O'Brien [2001] IRLR 496** in that in every case:-

> "*the question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee*. *If the employer is found to be guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal. Whether there is such conduct in any cases will always be a matter for the Employment Tribunal to determine, and having heard the evidence and considered all the circumstances"*.

59. In other words, the implied obligation enforces the principle that the employee is entitled to be able to have trust and confidence in his or her employer. In this case the Tribunal had to consider the actions of the employer starting with the email of the 10 April.

60. As has been noted the breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular in such a case the last act of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term (see **Woods v. W M Car Services (Peterborough) Ltd** ***1981 ICR 666***. This being reference to the classic "last straw" situation.

61. These matters were canvassed in the case of **Buckland v Bournemouth University [2010] EWCA Civ 121**. It was stated that:-

> "*(1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished* ***Mahmud*** *(****Malik****)test should be applied.*
>
> *(2) If, applying the* ***Sharp*** *principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed.*
>
> *(3) It is open to the employer to show that such dismissal was for a potentially fair reason.*

> *(4) If he does so, it will then be for the Employment Tribunal to decide whether dismissal for that reason, both substantively and procedurally (see **Sainsbury v Hitt** [2003] IRLR 23), fell within the range of reasonable responses and was fair."*

It should be noted that the respondents did not seek to argue that the dismissal would, in any event, be fair in all the circumstances rather their position was that they had not given the claimant sufficient cause to resign and that the Tribunal could infer from the evidence, particularly around his delay in lodging the grievance, that he was leaving for reasons of his own unconnected to his employer's actions.

Affirmation

62. The Court of Appeal in England provided further guidance as to what conduct might amount to a 'last straw' in the case of **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**. Lord Justice Prophet stated:-

> *"I see no need to characterise the final straw as `unreasonable` or `blameworthy` conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence."*

63. The first issue is to examine the so called ''Humiliating email'' and decide if that constituted a breach of the implied term. The claimant was unhappy at being expected to participate in the forthcoming conference call given that he was on holiday. Mr McCourt was unaware that the claimant was on holiday and it is something he should perhaps have checked given that he specifically asks the claimant for an explanation (*'And I want the numbers explained'*) and to discuss the matter ''*on Friday''*.

64. However, the accounts come out at about the same time each month and the claimant might have expected this monthly discussion to be fraught given the difficulties the business was experiencing whether he was on leave or not. I understand that he may have felt pressurised to defend his position, irrespective of being on leave but in my estimation this is a very minor issue.

65. The more important question is whether the terms of the email were unduly intemperate. He is accused of being responsible for ''*This complete mess''* and *'' this omnishambles''*. Looking at the email broadly it lays what appears to be sole responsibility for the state of affairs at the claimant's door before seeking any explanation or mitigation for the situation (''*There is no one else to point to. It is your voice and your voice alone''*).

66. There is no doubt that a single incident of abuse, verbal or written, can found a claim for ''constructive'' unfair dismissal. In the case of the **Isle of Wight Tourist Board -v- Coombes [1976] IRLR 413 EAT** the director of the Tourist Board, the most senior officer, said of and in the presence of his personal secretary, a woman of 58 years of age who had served the Board for some 15 years, "*She is an intolerable bitch on a Monday morning*". In **Courtaulds Northern Textiles Ltd -v- Anderson [1979] IRLR 84 EAT** an Assistant Manager had said to an employee: *"You can't do the bloody job anyway",* although not believing that to be the case. These cases suggest that even a single incident can ground a successful claim on the basis of its destructive effect on the mutual obligation of trust and confidence.

67. The Tribunal recognises that in business sometimes robust and direct language is used and the Tribunal must take care when examining such matters to bear in mind that the employer must go so far in their treatment of the employee as to commit a breach of the implied duty. The test that is to be applied is an objective one and each incident needs to be examined in the light of its surrounding circumstances. This includes the reason for the exchange, whether it was coming from some senior person in the organisation and generally the whole circumstances including factors such a

as the employee was being too sensitive in viewing the insult as destroying the implied term.

68. There is another factor which often appears and that is the public nature of any dressing down. This was a factor in the **Morrow** case and also in **Wadham**. Although it was initially argued that Mr McCourt had only replied to an email without thinking copied other in his meeting with Mr Ross dispelled any doubts as to his intentions. When asked by Mr Ross about the mail it was clear that he wanted everyone to see it (p86) as they were ‘‘*all in it together”* The claimant's evidence that the email was sent therefore to other colleagues including more junior colleagues some of whom he had worked with for many years led him to believe that it was a public humiliation as he put it. It was not disputed that the email had this circulation. It is interesting to note that some of his colleagues clearly though the terms of the mail sufficiently unusual at the very least to bring it's terms up with him on his return from holiday. Mr Mooney in his interview is noted as commenting ‘‘Maybe it was misjudged to send it as an email’’ and should not have been copied to *“new members of the team’*. I take the view that it was this part of the actions of Mr McCourt that put the issue beyond doubt that the terms of the email did amount to a repudiatory breach. If the email had just dealt with the financial difficulties and sought an immediate explanation that might, absent the language used and the allocation of sole responsibility y to the claimant, been understandable but the email appears clearly to be a public dressing down as Mr MacLean complained.

69. The Tribunal must now consider the two other matters that the claimant seeks to rely on namely the appointment of Mr Ross and the telephone call with Mr Mooney but first of all I will look at the respondent's arguments that the claimant had already waived the breach.

70. The chronology of the significant events was not an issue. The claimant received the offending email on the 10 April. He was on holiday until the 21 April. In his evidence he said that he was aware that Mr McCourt and the CEO Mr Michael were also away for a couple of days. He said that he waited to hear from either of them with an apology or explanation for the terms of the email but none was forthcoming. Mr Bryden referring to a conversation the claimant had with Mr Mooney queried if the resignation would have occurred had not been for the conversation with Mr Mooney about the email on or about the 25 April. We do not find the fact that the claimant wanted to know what other senior managers thought about the email. This seems a perfectly natural thing to do when trying to judge how to react to such a matter and whether others might see it in a different light. The step of raising a formal grievance against an important and senior officer of the company should not be underestimated and it appears that around this time the claimant also took legal advice. It was a little surprising that the claimant did not immediately resign but had recourse to the grievance process.

71. The starting point must be the words of Lord Denning in **Sharp** when he indicates that the employee must make up his mind soon after the conduct complained of or he may find he will lose his right to resign In **WE Cox Toner (International) Ltd v Crook** (1981) ICR 823 the EAT considered a case where a company director was accused of gross dereliction of duty on insubstantial grounds. He entered into six months of correspondence through his lawyers about the matter. When the allegations were not withdrawn he resigned. The claimant succeeded before the Tribunal but was unsuccessful at the EAT. It was held that the innocent party must at some stage elect between these two possible courses: to affirm or accept the repudiation. He is not bound to elect within a reasonable or any other time to do so. As was observed ‘‘Mere delay by itself’’ unaccompanied by an express or applied affirmation of the contract does not constitute affirmation but if it is prolonged it may be evidence of an implied affirmation. The EAT indicated that the Tribunal should have looked at the fact that the claimant continued to draw his salary and so forth.

72. The unusual feature here is that the claimant sought to use the grievance process but abandoned the process. I do not believe it was argued that the use of the grievance process itself with or without the delay amounted to affirmation. It is my judgment that there is insufficient to demonstrate that the claimant affirmed his contract at least to this point namely the 30 April. The period is relatively short as was stated in the **Cox Toner** case 'mere' delay is not enough. The issue of affirmation seems to have been raised but ultimately not argued in Buckland. In that case there was a discussion as to whether a breach could be cured. For our purposes paragraphs..of Lord Justice Sedley's Judgment are of interest:

"43. Mr Galbraith-Marten asks why, if on those general principles an anticipatory breach can be cured up to the moment of acceptance, a completed breach cannot be. The answer has to be that the anticipatory or threatened breach has by definition not yet occurred and, if withdrawn, never will. A completed breach, even if it can be compensated for, cannot be undone. The only hint of a doctrine of cure of completed breaches that counsel have been able to show us is in the judgment in W.E.Cox Toner v Crook (above), where the EAT said, citing Farnworth Finance Facilities Ltd v Attryde [1970] 1 WLR 1053:

"…. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation"

But this formulation explicitly leaves the option of acceptance or affirmation in the innocent party's hands.

44.Albeit with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that were capable of extension to other contracts, and for reasons I have given I do not consider that we would be justified in doing this. That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends. The present case, for reasons explained by Jacob LJ, may be seen as the kind of exception which proves the rule."

73. The claimant suggested that the appointment of Mr Ross was a breach of the grievance policy as the grievance should be heard by '' your line manager or senior manager'' I can understand the claimant's concerns that anyone 'below' as it were Mr McCourt in the management hierarchy would not be appropriate but the phrase 'senior' manager is wide enough in my view to allow the company to ask Mr Ross, who was on the same management level to investigate the matter. I do not find any material breach exits in relation to this matter.

74. Finally, the claimant argued that the telephone call with Mr Mooney was a 'final straw' Given that I have found the respondents in material breach of the implied term I am doubtful that the claimant needed a so called ''final straw'' to resign when he did as that option remained open to him. However, the claimant seems to have been taken aback by the terms of the call and the insinuation that he was just after money. I bore in mind the helpful guidance in the **Omilaju** case in which the Court of Appeal moved away from the pervious test of a final straw requiring some blameworthy behaviour to a more neutral one that the incident simply has to contribute to the breach. On either formulation such a call coming from a senior Manager in the company would in my view have been sufficient to contribute or add to any existing breach.

75. The call perhaps understandably undermined the claimant's confidence both in the grievance process and the way in which his complaint was likely to be received. It appears the call took place following the call with Mr Ross at which the claimant's motives were discussed. The sequence of events appears to have been that Mr Ross spoke to Mr Mooney on the 9 May it seems prior to the meeting that day with the claimant. Ion his evidence the claimant was a little discomfited at Mr Ross's recorded comment that his role was not to give a view on the terms of the email but to investigate the matter. It might have been better put that he would give his views once the investigation was complete as there is no doubt that at some point he would have to give his judgment on the grievance and the terms of the email. In the event the claimant appears to have been proven correct, although retrospectively, as

Mr Ross rejected the claim that there had been bullying coming to a view that he later recanted that more than one incident of bullying was required) and, somewhat surprisingly, that the email was not directed to the claimant as an individual.

76. As the quantum of the claim was not in dispute there is no been for a remedy hearing and the undisputed Schedule of Loss will be used to calculate the monetary award. The respondent company shall pay the claimant monetary award of Fourteen Thousand One Hundred and Seventy Six pounds and Twenty Nine pence (£14,176.79) made up of a basic award of £2100 (based on the claimant's age and service) and a compensatory award made up of, £9440.78 as loss of net salary, £1421.54 as loss of pension benefits, £970.72 loss of car allowance, £243.25 loss of private medical care.

Employment Judge:	**James Hendry**
Date of Judgment:	**05 February 2020**
Date Sent to Parties:	**06 February 2020**