



EMPLOYMENT TRIBUNALS

Claimant Mr Judah Gayle

Respondent Quarters Estate Agents Limited

HEARD AT: WATFORD **ON:** 16th and 17th January 2020

BEFORE: Employment Judge J Lewis (sitting alone)

Representation

For the Claimant: In person

For the Respondent: Mr Bansal (Solicitor)

JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.
2. The claim for wrongful dismissal fails and is dismissed.

REASONS

1. This was a full merits hearing of the Claimant's claims. I heard evidence from the Claimant and, on behalf of the Respondent, from its two directors, Gavin Higginson (Managing Director) and his wife, Eleanor Higginson (who deals with all HR, personnel and health and safety matters), and from Graham Cort, a Sales Progressor employment by the Respondent.

The Issues

2. As confirmed at the outset of this hearing, the Claimant's claims are for unfair dismissal and breach of contract by way of wrongful dismissal. The issues

were discussed and agreed at the outset of the hearing. A draft list of issues was produced by the Respondent and was agreed subject to the matters noted below.

3. The draft list of issues reproduced the wording set out in the claim form in relation to the particular matters relied upon in support of the contention that there had been a breach of the implied term of trust and confidence. The third matter was that the Respondent had conducted themselves in a way likely to destroy or damage the relationship with an employee. The Claimant clarified that in relation to this he relied in particular on the events referred to in his Grounds of Claim of 11 July 2018 (an alleged assault by Mr Higginson) and on 29 March 2018 (a further incident of alleged assault on 29 March 2018). On behalf of the Respondent Mr Bansal initially objected to the Claimant adding matters as particulars of this part of the claim if they were not referred to in the claim form. But he confirmed he had no objection to either of these matters being relied upon, given that they were raised in the Claim Form. Contrary to that position, in his written closing submissions he argued that the incident of 29 March 2018 was not pleaded. I reject that contention. It was sufficiently set out in the Grounds of Claim at paragraphs 9 and 19, read together with paragraph 16(b), and fully addressed in the witness evidence.
4. After an initial discussion of the issues at the start of the hearing, I indicated to the parties that there would be a break whilst I completed reading of the papers and I noted that this would be an opportunity for the parties to review what had been discussed to identify if there was anything else to be noted. Following the break the Claimant initially identified a further point related that an incident referred to in his witness statement alleged to have taken place in December 2017. It was noted that there was no mention of this in the details of his complaint in the claim form. The Claimant clarified in discussion that he was not making an application to amend the claim form to add this and did not seek rely on it as part of the conduct amounting to a breach of trust and confidence. It was noted that it may still be relevant background.
5. I noted from reading the Claimant's witness statement that one of the matters that he referred to was that his emails were cut off on 15 July 2018. The Claimant clarified that he did rely on this, which might broadly fall under the heading on failing to provide appropriate care or show concern for him following the alleged assault on 11 July 2018. There was no objection to this from the Respondent.
6. On the basis of the clarification that the Claimant was indeed relying on the alleged assaults and not just the Respondent's alleged failings in dealing with the issues thereafter, it was noted that an additional issue arose as to whether Mr Higginson's alleged conduct on those occasions was to be attributed to the Respondent given that they occurred outside of work. Mr Bansal's position was that it is a key aspect of the Respondent's case that they are not to be so attributed.

7. In relation to the Respondent's case if there was a constructive dismissal, Mr Bansal clarified on the first morning that the Respondent did still advance a case that the dismissal was fair, on the basis that there was some other substantial reason for it based on a breakdown in the relationship.
8. Mr Bansal also raised an issue as to the effective date of termination ("EDT"), which he contended should be taken as being 12 July 2018 rather than 20 July 2018. His initial submission was that this did not require amendment because the Grounds of Resistance did refer to the Claimant having confirmed on that date that he was resigning with immediate effect. However it was not pleaded that the employment ended on that date. On the contrary it was expressly stated, in agreement with the Claimant, that the employment ended on 20 July 2018. I therefore took the view that amendment was required. Mr Bansal made an application to make this amendment. He was not able to put forward an explanation for the lateness of the application to amend other than that it was a point just noted on reviewing the pleading. But he contended in support of this that the issue as to the EDT would be one I would need to consider in any event, that even if amendment was required the factual basis for it was already pleaded and there was no prejudice to the Claimant. For his part the Claimant's submissions in opposing the amendment focussed on the documentary evidence that the parties had treated the employment as continuing until 20 July. On being pressed he was not able to identify any prejudice caused by the amendment, though he noted that it was not something he had previously given consideration too. In the circumstances I indicated that my preliminary view was to permit the amendment in the absence of any prejudice. However I afforded the Claimant the opportunity to consider overnight whether there was anything he wished to raise in relation to any prejudice or otherwise in opposition to the proposed amendment. In the meantime the evidence would proceed on the basis that it was part of the issues.
9. In the event, given that oral evidence concluded late on the second day, both parties asked to deal with their closing submissions in writing and I acceded to that request, with the issue as to the application to amend in relation to the EDT also to be addressed in those submissions.
10. The final version of the issues as to liability, taking into account the above matters, was set out in a Case Management Summary sent to parties on 31 January 2020 and is therefore not repeated here. (Although this was, I note, not set out until after the date for closing submissions, it reflected the matters which I again went over with the parties and confirmed agreement at the end of the oral evidence).
11. I also provided the parties with copies Hilton International Hotels (UK) Limited v Protopapa [1990] IRLR 316 (EAT) in relation to the test for attribution of conduct for the purposes of constructive dismissal, and Bellman v

Northampton Recruitment Ltd [2019] ICR 459 (CA) in relation to vicarious liability at common law.

12. The parties made written closing submissions and the Claimant also served written reply submissions (as permitted but not required by my directions) which I have carefully considered.

Material facts

13. The Claimant commenced employment with the Respondent in April 2012. He was employed as a Sales Manager. The Respondent an estate agency business, that was started by Mr Higginson in March 2011. It is a small employer, with around 19 employees as of July 2018 when the Claimant's employment terminated. The Claimant was employed on the sales side of the business.
14. As noted above, the Respondent's two directors are (and were at all material times) Gavin Higginson and Eleanor Higginson. By July 2018 Mr Higginson and the Claimant had been friends for some 20 years. They had worked together in five previous companies. They had attended each other's weddings (in the Claimant's case to his first wife), and the Claimant was the Godfather of one of Mr Higginson's children. The Claimant also accepted that when he faced a difficult time on the breakdown of his relationship to his first wife, Mr and Mrs Higginson were supportive and helped him.
15. It was the Claimant's contention that the relationship with Mr Higginson had become "different" since he started seeing his current wife, Chernade, in April 2017. As he put it in oral evidence, Mr Higginson started to have issues with him, from December 2017. He said that he therefore started to minimise the time that he spent around him.
16. I address below the specific incidents upon which the Claimant relies in December 2017 and March and July 2018. Aside from these, I do not accept that there was a significant change in Mr Higginson's behaviour in December 2017 or that he ceased being supportive. The Claimant accepted that in March 2018 Mr Higginson agreed to a change in the Claimant's working hours so that he would have a half day off every other Saturday so as to be able to have more time to spend with his children at the weekend. That was not conduct of an employee who was being unsupportive, albeit that it was in the Respondent's interest to retain the Claimant in employment.
17. Leaving aside the incidents of March and July 2018 to which I refer below, I am not satisfied that any change in the nature of the relationship was of any significance in the Claimant's decision to resign or was a matter which was entailed or contributed to any breach of contract by the Respondent. Other

than those two incidents, the only other specific matter to which the Claimant referred was the alleged incident in December 2017. Indeed the Claimant's own oral evidence was that from his perspective he did not have direct issues outstanding with Mr Higginson, but relied on the three incidents were those of 29 March and 11 July 2018, and the December 2017 incident.

18. From Mr Higginson's perspective he felt that there had been a detrimental change in the Claimant's performance. Mr Higginson had regarded the Claimant as an excellent employee who consistently went the extra mile. He perceived a change in attitude and performance, by the Claimant's high standards, from around May or June 2017. One issue was a perception of the Claimant at times being more abrupt when in the office. He contended that another change was in the Claimant turning up later than he would previously do as a result of going out more drinking in the evening.
19. I accept that Mr Higginson perceived that there were some changes in the Claimant. He said as much in a message to the Claimant following the incident in March 2018 to which I refer below [48-49], saying that he had been disappointed in the Claimant for some time and that he had supported him to get him back to the "old happy Judah". Whilst Mr Higginson may have perceived that there were some changes in the Claimant I do not accept that there were any significant issues concerning his performance. Mr Higginson explained the lack of any performance management steps on the basis that he was mindful of the tough challenges Claimant was facing having separated from his wife, faced a custody battle and a divorce, left the marital home, met his fiancée and moved in with her. However the increase in commission offered to the Claimant on the evening of the incident on 11 July 2018 tended to point against and serious performance concerns. I also accept that there is force in the Claimant's submission that it is surprising if there had been any significant concerns that Ms Higginson appeared to be unaware of them. When asked in oral evidence of her view of the Claimant as an employee she made no mention of any such concerns and commented that he was a good employee.

1 December 2017 incident

20. The Claimant's account of the December 2017 incident was that it occurred later in the evening after a Christmas meal on 1 December 2017. He states that Mr Higginson grabbed Chernade by the hair "as if she was some sort of slut" and asked her if she "wanted a threesome".
21. Mr Higginson contended that he had no recollection of grabbing Chernade by the hair and that it was not mentioned to him at the time. Although he did not recall making the comment about a threesome, the Claimant had mentioned this, saying that although he had said it in a jovial way she had not taken it very well. The Claimant and Mr Higginson had a friendship in which they used to joke with and say silly things to each other. However in this instance the comment had been to Chernade. The Claimant asked Mr

Higginson to send a text to smooth over the waters and Mr Higginson did so. He referred to this in an email to the Claimant of 5 December 2017, in which he noted that he had just sent a message to Chernade apologising. He said that he did not remember doing anything but “it does sound like me” and that he hoped she knew he was only joking. He added “This is why I don’t like going out in town late night and prefer day time drinking. I just turn into a liability!”

22. On balance I consider that it likely that Mr Higginson did in jest make an inappropriate comment of the nature alleged to Chernade, and it was for this which he was apologising in the email. I do not accept that he pulled her hair. Nor am I satisfied that the Claimant attached the significance to it which he asserted in his evidence. In particular I am not satisfied that it was something that affected his decision to resign or that it was a factor in his mind by the time of his resignation or contributed to loss of confidence in Mr Higginson or the Respondent. I take into account the following:

22.1 I accept Mr Higginson’s evidence that the allegation of hair pulling was not made at the time. That is consistent with the fact that in the email of 5 December 2017 Mr Higginson stated of the incident that “it does sound like me”. Whilst I regard it as plausible the he would have said that in relation to an inappropriate comment made in jest, it is less plausible, that he would referred to having pulled Chernade’s hair as something that sounded like him. That suggests that the allegation of hair pulling was not made at the time.

22.2 Although the Claimant produced some contemporaneous documents relating to his resignation after the incident in March 2018 (to which I refer below), including the text communicating his resignation, there was no mention of the incident in December, as might have been expected if it had been as serious as described by the Claimant.

22.3 Similarly there was no mention of the December incident in any of the communications which followed the incident on 11 July 2018. Notably there was no mention of this incident in the Claimant’s resignation letter sent after he had taken advice from Citizen’s Advice Bureau. The Claimant did refer to there having previously been “several incidents of bullying and intimidation” of which the most serious was the incident in March 2018. However that was not apt to describe what on the Claimant’s account had happened in December 2017, and further if there had indeed previously been an incident of pulling his fiancée’s hair and making an offensive comment which he had not put to one side as having been in jest, it is surprising that the March incident was regarded as the most serious.

22.4 Again, there was no mention of the incident in the Details of Claim. The Claimant did refer to the incident of March 2018, which he referred to as “The previous assault”. That referred back to an earlier paragraph

in the Details of Claim (at paragraph 9) where he said “this was not the first incident involving Gavin.” The Claim Form therefore identified the previous incident as being what he referred to as the assault in March 2018, but made no mention of the incident in December 2017. That is inconsistent with the Claimant’s account which was to the effect that it had involved an assault on his fiancée by pulling her hair. If there had been an incident of the nature or seriousness described by the Claimant, or if it had played any part in his loss of confidence in Mr Higginson, it is to be expected that he would have referred to that incident in the Claim Form, and not referred alone to the March 2018 incident as being “The previous assault”.

29 March 2018 incident

23. The incident of Thursday 29 March 2018 occurred after work on an evening out at a local pub that had been arranged with a group of work colleagues. This was not a formal work event. There was no obligation to attend and drinks were not paid for by the Respondent. However it was arranged by a manager of the Respondent (Mr Higginson’s sister, Sadie) to say goodbye to a work colleague (MS) who was leaving, and attended by all at the company for that purpose.
24. The Claimant had initially gone to the pub directly from work. He subsequently left and returned with his fiancée, Chernade. When they returned MS had left, but others had remained.
25. One of the colleagues present was Sarah Goodman, who was a Lettings Manager and who was, at that time, on maternity leave. Later in the evening, the Claimant approached Ms Goodman who was at the bar speaking with Mr Higginson, and asked to speak to Ms Goodman outside. Ms Goodman, who was a close friend of the Claimant’s first wife, was initially hesitant about doing so. When not within earshot of the Claimant, she asked Mr Higginson if she needed to do so. Mr Higginson encouraged her to speak with the Claimant as he understood that she and the Claimant had not been on the best of terms and he believed that it would help the atmosphere when she returned from maternity leave if they were able to clear the air between them. Ms Goodman then went outside to speak with the Claimant.
26. When Mr Higginson went to sit down he was informed by Jennifer Garner (a friend of various employees of the Respondent) that she was aware that (she said) the Claimant was furious with Ms Goodman because she had told Ms Garner that the Claimant had changed since he met Chernade, and that his friends did not like how the Claimant was now and nor did they like Chernade. This caused Mr Higginson alarm because he believed that the conversation with Ms Goodman and the Claimant was likely to become heated once this issue was raised, and that he was the one who had encouraged Ms Goodman to go out to speak with the Claimant. He was also concerned that

this was not the right time for such a discussion between the Claimant and Ms Goodman because he understood they had both been drinking. He therefore headed out of the pub to try to stop the conversation before it escalated.

27. It is common ground between Mr Higginson and the Claimant that there was an altercation when Mr Higginson sought to break up the conversation, but there is a dispute as to the detail. Both of them commented in evidence upon a CCTV recording which had not been available to either of them at the time that their witness statements were compiled, or indeed at the time of a statement signed by Ms Goodman (who did not give oral evidence) on 11 July 2019.
28. There were two quite small steps leading up to a platform to the entrance to the pub. Before Mr Higginson came out, Ms Goodman had been speaking, for about a couple of minutes, with Ms Goodman on the top step and the Claimant on the bottom step. The Claimant suggested that when Mr Higginson came out he swung the door open aggressively. I do not accept that was the case. Given the context which led Mr Higginson to come outside, as noted above, it is in my view improbable Mr Higginson would be aggressive before the Claimant had refused to walk away. It is more likely that he came out in a hurry, but that this might have been difficult to distinguish from being aggressive. I also note that at the start of the CCTV footage, when it is accepted by both the Claimant and Mr Higginson that the conversation had already been interrupted, the Claimant is standing with his hands in his pockets speaking with Mr Higginson, suggesting that the conversation had not yet become heated.
29. The discussion did however quickly become heated after Mr Higginson tried to stop the conversation. Both Ms Goodman and the Claimant said they were fine to carry on talking. For his part Mr Higginson remained concerned that matters would escalate once the Claimant got on to dealing with what Ms Goodman had said to Ms Garner. Without going into any detailed explanation of what he was now aware the Claimant had heard from Ms Garner, Mr Higginson commented to the effect that they should stop as Ms Goodman did not know what had led to the Claimant wanting to speak with her. He said it would be better to have the conversation on another occasion when they had not been drinking and that it was not the right place or time.
30. The Claimant became angry as he did not agree that there was any good reason for Mr Higginson to interfere with the discussion. Whilst still standing on first step he squared up to Mr Higginson and started pointing at him. Mr Higginson, who was standing one step up on the platform, pushed the Claimant back, though not with sufficient force to dislodge the Claimant from the first step. The Claimant and Mr Higginson continued to face each other and there were angry words exchanged, with Mr Higginson continuing to insist that the conversation with Ms Goodman stop, and the Claimant being angered with the interference and continuing to remonstrate with him. About

15 seconds after the first push, Mr Higginson pushed the Claimant again more firmly. This caused the Claimant to take a step back off the step and onto the pavement behind him. At this point Chernade was between the Claimant and Mr Higginson. The Claimant stepped forward to pull out Chernade and Ms Goodman also walked out from the steps to behind him. The Claimant (who was then standing on the first step) and Mr Higginson again stood facing each other and there continued to be an angry exchanges between them. This continued for about 15 seconds after the Claimant had removed Chernade from the steps. The Claimant can be seen on the CCTV turning his head towards Chernade and Ms Goodman, and back to Mr Higginson who then came forward with force and pushed the Claimant causing him to take two steps back, one of the step and another to the end of the pavement behind him.

31. The Claimant reacted angrily, coming forward with Ms Goodman holding his jacket, which she pulled off, and then seeking to restrain him by his trousers, before leading him away, with Chernade following. There continued to be angry words exchanged, with the Claimant and Mr Higginson gesticulating at each other. About a minute after the first push, the Claimant walked off together with Chernade. The CCTV footage lasts about 2m 20 seconds in total.
32. The Claimant contended that during the altercation the Claimant shouted at him words to the effect of: "I am your boss sweetheart, I am your boss." Mr Higginson disputed that he shouted the words "sweetheart", but accepted that he had said words to the effect that the Claimant had attacked not only his friend but also his boss. Neither Mr Higginson nor the Claimant had a clear recollection of all that was said during the altercation or indeed when it was said. In the Claimant's Claim Form he had said that the comments had been made whilst pushing him down the steps, whilst in his witness statement he said it was whilst he was walking away. In my judgment little turns on the precise form of words. I accept however that in the course of the altercation Mr Higginson shouted at the Claimant more than once that he was the Claimant's boss. That was reflected in a text message sent by the Claimant to Matthew Day (which whom he co-managed the office) a day or so after the incident, in which he noted that Mr Higginson "kept shouting I'm your boss I'm your boss".
33. This was also consistent with Mr Higginson's own assessment in evidence that he was essentially wearing two hats when he went out to break up the conversation. In part he perceived that he was acting as a friend; both Ms Goodman and the Claimant were long-standing friends and he was concerned as to the impact were the conversation to take place at that time. However he was also acting at least in part with his director's hat on, because he was concerned as to the effect on the work environment in the conversation was to continue at that time, albeit that the immediate impact would be delayed as Ms Goodman was on maternity leave. I accept that as a fair description of the position. Mr Higginson saw himself at least in part as

exercising his managerial authority to avoid a flare up given what he had been told by Ms Garner.

34. It was Mr Higginson's evidence, supported by Ms Goodman's statement, that he had pushed the Claimant in response the Claimant having pushed him back into the pub front doors with aggression. I do not accept that evidence nor Ms Goodman's further contention to the effect that the Claimant had then pushed back again at Mr Higginson. It is not supported by the CCTV evidence. Mr Higginson suggested that it might have happened before the start of the CCTV evidence. However I consider that to be inherently unlikely. First, it is unlikely that if pushing had started earlier that part of the footage would not have been provided in the CCTV evidence which was supplied in response to the Claimant's subject access request. Secondly it does not fit well with the fact that the footage starts with the Claimant with his hands in his pockets before there appears to be some escalation with the Claimant gesticulating angrily to Mr Higginson. Third, there are three pushes from Mr Higginson with increasing force shown on the CCTV, whereas if there had been a response to a forceful push from the Claimant it is likely that there would have been a more immediate response.
35. I also consider that Mr Higginson's account, and that of Ms Goodman, is inconsistent with Mr Higginson's text message to the Claimant following the incident in which he stated that:

“The verbal abuse started with you, I retaliated ...” (my emphasis)
36. I note in particular that Mr Higginson stated that he retaliated in response to the Claimant's verbal abuse, not in response to anything physical from the Claimant.
37. I also note however that the Claimant's description in his witness statement of having been pushed “several times down steps” was liable to give a more serious impression of what had happened than in fact was the case. The Claimant was not pushed down steps. He was standing on a small single step. The first time he was moved back this came after the Claimant had been gesticulating angrily at him at close quarters, and nor was this with sufficient force to dislodge him from the step. Although there were two further pushes, this was back from a single step rather than “down steps”. It was still, though with increasing force, a matter pushing the Claimant away rather than coming to blows.
38. In the aftermath of the incident the Claimant initially tendered his resignation, giving three months' notice. However in the course of discussions over the following week the Claimant agreed to withdraw his resignation and they agreed to disagree over the incident and move on.

39. There was a dispute between Mr Higginson and the Claimant as to whether Mr Higginson explained in the course of the discussions the context of what he had heard from Jenny Garner. On balance I consider that it is likely that this was explained and in any event that the Claimant understood that Mr Higginson had become aware of the conversation between Ms Goodman and Ms Garner. In the context of the discussions following the incident it would have been natural for there to be some explanation of what had led to Mr Higginson seeking to break up the conversation.
40. One of the issues raised by the Claimant when considering whether to withdraw his resignation was whether he would be able to work with Ms Goodman in future. Mr Higginson noted that Ms Goodman's return was a long way off, being in October, so the Claimant would have time to consider his position and that the Respondent was also aiming to acquire a bigger office so that the Claimant's and Ms Goodman's paths would not necessarily cross given that she was on the lettings side and the Claimant was on the sales side. The Claimant's contention was that it was Mr Higginson who brought this up, that the Claimant did not say his concern was as to whether he could work with her and that he had never argued with her and just went about her business. On balance I consider that Mr Higginson's evidence was more plausible on this point. It is more consistent with the Claimant's own evidence that on the evening of the incident at the pub he had received an abusive call from Ms Goodman, and with a text message which Chernade sent to Jennifer Garner on 2 April 2019, which refers to that call and noted that Ms Goodman had "really burnt her bridges" with the Claimant this time.
41. After this the incident of 29 March 2019 was not raised again until after the incident of 11 July 2018, following which in support of his complaint relating to that incident the Claimant reported it to Bedfordshire Police.

11 July incident

42. The events which immediately precipitated the Claimant's resignation took place on 11 July 2018. The evening started with a social event at Mr Higginson's home, to watch the Croatia v England World Cup game and enjoy a barbeque. The evening had been organised by Mr Higginson whilst at work, and those in attendance were current and past employees, family and friends. During the course of the evening Mr Higginson offered the Claimant a pay rise, consisting of an increase of his commission by 0.05% (worth about £2,200 per year) effective from 1 August 2018 and commented on how much better the Claimant's attitude had been in the last few months.
43. At the end of the evening Mr Higginson and Graham Cort, a Sales Progressor with the Respondent, suggested going out to a casino in Milton Keynes. The Claimant agreed. By that stage of the evening each of them had been drinking throughout the evening, though I accept the descriptions given by each of the Claimant and Mr Higginson that they were merry rather than drunk.

44. The Claimant and Chernade were due to be married two days later, on 13 July 2019, and the Claimant had a period of annual leave starting on the 12 July 2019. As they were heading towards the train station en route to Milton Keynes, the Claimant messaged Chernade, who was at home with their children to check that she was OK with him heading to the casino. Chernade replied indicating that she did not want him to go. The Claimant showed the text to Mr Higginson and Mr Cort. Each of them had been laughing and joking and exchanging banter, and this continued with them encouraging the Claimant to come with. At one point they suggested “kidnapping” the Claimant so that Chernade could not blame him for heading to the casino against her wishes.
45. This continued when they reached the station. They initially stopped at an alleyway to the side of the station for a smoke. Mr Cort then picked up the Claimant and started carrying him through the alleyway towards the platform. The Claimant was saying that he did not want to go, but he was not at this stage struggling against Mr Cort. Mr Higginson came to help Mr Cort, so that they were carrying him together, standing either side of the Claimant each holding a shoulder and a leg. The Claimant continued to protest that he did not want to go as they approached the stairs, but this was still viewed by Mr Cort and Mr Higginson as a continuation of the joviality and banter between friends.
46. The stairs to the platform for the Milton Keynes train were separated into two isles by a rail. After an initial set of steps there was a platform before the next set of steps up to the train platform. There was no room for both Mr Cort and Higginson both to go up one side of the aisle whilst carrying the Claimant. They therefore manoeuvred the Claimant around so as to lift him over the rail, with Mr Cort and Mr Higginson each on opposite sides of the rail.
47. About half way up the steps the Claimant told Mr Cort and Mr Higginson that they had 10 seconds to release him, and started counting to (or from) 10. Mr Cort and Mr Higginson still thought this was part of the messing around and joviality.
48. It was the Claimant’s oral evidence that he had been struggling with Mr Cort and Mr Higginson as they approached the steps and was kicking out to try to release himself and was trying to wriggle free. On this issue I prefer the evidence that there was not a physical struggle at that stage. I do not regard the CCTV evidence as conclusive either way. The Claimant’s own written evidence was that the point at which he “started to struggle” was after he had been turned around to lift him up the steps. I also accept that Mr Cort and Mr Higginson were struggling to lift the Claimant above the rail and that had the Claimant really been struggling hard at the point of turning him round and lifting him above the rail it is likely that they would have become unstable earlier. I accept that the Claimant was telling Mr Cort and Mr Higginson to

“f...ing put me down”. However this was still seen by Mr Higginson and Mr Cort as part of the merriment and banter between friends on a night out, viewed in the context of having been joking about kidnapping the Claimant so that Chernade could not blame him for coming out.

49. After the Claimant had finished counting to (or from) 10 there was a pause. However as they reached the first platform the Claimant managed to put a foot on the floor. By this point, as the Claimant put it in his Grounds of Claim, he “lost [his] rag” and grabbed Mr Cort by the throat area, which was all he could reach. Mr Cort’s and Mr Higginson’s perspective, this was a sudden flip from jovial banter to angry confrontation. Mr Cort sought to fend off the Claimant by pushing him forcefully away. Mr Higginson tried to restrain the Claimant and in the process a button ripped of Mr Higginson’s shirt. Mr Higginson was worried that matters would escalate between Mr Cort and the Claimant, who appeared to Mr Higginson to have flipped to becoming very aggressive at this point. He tried to hold the Claimant back, whether from the Claimant attacking Mr Cort or, as Mr Higginson put it in a message to Chernade shortly after the incident, because the Claimant had gone at Mr Cort and he was concerned that Mr Cort would retaliate for having a hand around his throat and looked like he was about to hit him. To that end Mr Higginson put his arm around the Claimant’s shoulder and chest to pull him back. As he did so, he slipped and the Claimant and Mr Higginson fell together onto the steps behind them.
50. As they were on the ground, Mr Higginson kept hold of the Claimant, saying that he was not going to let him go until he calmed down. He did so for just under a minute and a half. It was the Claimant’s evidence that he was being held in a headlock which made it difficult for him to breathe. That was not Mr Higginson’s intention and nor was it suggested that the Claimant had said this at the time. I accept that Mr Higginson held the Claimant in a firm grip which was designed to restrain him but not hurt or strangle him, and did so with the intention of keeping him there to prevent an escalation and so that he would calm down. At the same time he repeatedly told the Claimant that he would not let go of him until he calmed down. Mr Cort had come across and also urged the Claimant to calm down. Like Mr Higginson, Mr Cort had been taken by surprise by the turn of events, having thought, until the Claimant had become angry and grabbed his throat, that what had been happening was merely joking around between friends.
51. At some point in the melée the Claimant chipped his tooth and suffered a busted lip and had markings to his neck area. This was not something inflicted deliberately or with intent to harm. Mr Higginson’s actions were designed to restrain the Claimant to prevent a conflagration. Mr Cort had pushed the Claimant away after being grabbed by the throat and then urged the Claimant to calm down.
52. In the Claimant’s witness statement he stated that he believed that in the struggle he had been struck in the face, and in his Claim Form he said that

he believed he had been struck by Mr Cort whilst he was being held by Mr Higginson. Whilst the Claimant's might have come to believe this was what happened, it was not the case. Neither Mr Cort nor Mr Higginson had intended to harm the Claimant and there were no punches or kicks by either of them. I note that in a message from Mr Cort to the Claimant sent at 11.47pm on 12 July 2018, Mr Cort commented that it was really unfortunate that the Claimant had somehow chipped his tooth on the way to the ground. I accept that this was his genuine understanding of what had happened, and that it was not the case that the damage was deliberately inflicted. That was also consistent with the Claimant's own evidence that he could not recall any angry words directed to him during the incident by either Mr Higginson or Mr Cort.

53. When Mr Higginson released the Claimant he got up and realised that his tooth had been chipped. He showed Mr Higginson and Mr Cort. Mr Higginson offered to get him an appointment with his private dentist so that it could be fixed in time for the wedding. The Claimant walked off. Mr Higginson followed with a view to checking if he was alright and to understand what had happened. Mr Cort also followed.
54. They reached a bus stop. In the Claimant's written evidence he claimed that Mr Higginson was then being very aggressive towards him at the bus stop, and in Re-examination he stated that Mr Higginson had been pushing him against the bus stop. The Claimant had not previously mentioned in his evidence being pushed, but did say in his resignation that Mr Higginson "continued to physically assault" him by pushing him around. I do not accept that as a fair description of what happened. I prefer the evidence that Mr Higginson was not aggressive but, as Mr Cort put it in a text to the Claimant on the following day, was being "very persistent in not wanting [the Claimant] to walk off on bad terms". Mr Higginson was anxious not to leave things as they were. He said he wanted to sort things out and asked him what had been going on, putting his hand on the Claimant's shoulder in the process and holding him back on several occasions to try to get the Claimant to talk to him. I regard this as more probable in circumstances where Mr Higginson had shortly before been expressing concern for the Claimant on learning he had chipped his tooth, and where on the Claimant's own evidence was not that Mr Higginson was saying anything threatening, but that he wanted to talk about what had happened.
55. The Claimant started to call the police, and at Mr Cort's urging, he and Mr Higginson then left. The Claimant took a taxi home.
56. Shortly after the incident, later the same evening, Mr Higginson called and messaged Chernade. He again offered to have his dentist look at the Claimant's tooth and expressed his wish to "get everything right" before their wedding and provided his account of what had happened on the evening.

57. There was also an exchange of messages between Mr Cort and the Claimant shortly after midnight after the incident. The Claimant referenced his count to ten, stating "Sorry mate but I did warn you both". Mr Cort replied that:

"... I was a bit surprised tonight the way you turned on me. I know we were having a laugh and trying to whisk you off to the casino, but I thought we were joking around to be honest."

58. Again I accept this was Mr Cort's (and indeed Mr Higginson's) perception of what had happened; that they had been joking about but that the Claimant had then turned on them, including grabbing Mr Cort by the throat.

59. In response the Claimant replied to Mr Cort stating that he had "no beef" with him. There was no suggestion at the time that he believed he had been struck by Mr Cort, and as set out above, I do not accept that he was.

60. At 7.26am on the following morning, 12 July 2018, Mr Higginson messaged the Claimant asking how he was and thanking him for moving his car. The Claimant did not respond. Mr Higginson also sent a message to Chernade at 8.09 that morning asking how the Claimant was doing. He said he was very sorry this had happened, and that he had thought they were "just having a laugh" carrying the Claimant up the steps after he had said he best go home, and that it was "just mates joking around that went wrong". I accept that was indeed Mr Higginson's genuine perception. He also asked Chernade to let him know if there was anything he could do.

61. Mr Higginson sent Chernade a further message at 3.40pm, noting that she had asked him not to contact the Claimant but asking if it was worth the Claimant, Mr Higginson and Mr Cort meeting for a ten minute chat to clear the air so that nothing was hanging over the wedding day. Shortly after, at 4.24pm, he sent a further message reiterating that he was happy to contribute to the tooth if that helped.

62. Mr Higginson sent one very brief email to the Claimant at 12.26pm on 12 July 2018, apologising for disturbing him but asking if a colleague would be working on Saturday. Otherwise he respected Chernade's request not to contact the Claimant.

63. The Claimant then messaged Mr Higginson at 6.30pm on 12 July 2018 stating that he was disinvited from his wedding and:

"Also with immediate effect I am resigning from Quarters. I don't want to discuss anything as I don't think there is anything to say."

64. Mr Higginson replied later that evening, noting that it was a shame and stating that "I really don't understand what happened" and that "I will take this

as your three months' notice again", being a reference to the notice that the Claimant had given following the incident in March 2018.

65. Mr Higginson sent a further message later that evening wishing the Claimant the best for the wedding, stating that he was glad that the Claimant was so happy and had found someone that appreciated him and that:

"I know work is done, but hopefully in time we can sort out friendship. Good luck tomorrow."

66. The Claimant had been due to be off work on annual leave until 19 July 2018. He came into the office on Sunday and collected a couple of pictures of his children from the desk and informed Mr Hall, who was present, that he would not be returning. Mr Hall in turn informed Mr Higginson of this. Mr Higginson then messaged the Claimant at 4.27pm that day referencing that he understood from Mr Hall that at present the Claimant was not planning to return to work on 19 July. He stated his agreement that it was time for the Claimant to "move onto pastures new" but expressed his belief that it would be mutually beneficial for the Claimant to work his notice period since it would allow Mr Higginson time to sort of the transition and give the Claimant an income whilst searching for alternative work. He offered the assurance that if he decided to do so there would not be any conversations in relation to any incidents that had occurred outside of work hours. He asked for written confirmation if the Claimant had decided not to return to work so that he could make plans to cover the workload.

67. Also on 15 July 2018, in the light of the Claimant having indicated he was resigning with immediate effect and then communicating that he did not intend to return, Mr Higginson arranged for the Claimant's password to be changed and his emails to be diverted so that he no longer had access to work emails on his mobile phone. He explained in evidence that he had done this because the Claimant had resigned and made clear that he was not returning. That was to some extent in tension with the fact that he had emailed the Claimant asking him to agree to work out his notice. But nor was it in my view something that could be a matter of serious complaint by the Claimant, given that he had already stated he was resigning, was in any event off work at that time, had informed Mr Hall that he would not be returning, had not responded to Mr Higginson with any intention to do so and did not raise any objection or question over what had been done.

68. At 1.33pm on 15 July 2018, the Claimant sent an email to Ms Higginson in her HR capacity. The email was sent to her personal email address, and the Claimant explained that he did so because he was unsure whether Mr Higginson had access to her work emails. He stated that there were a number of things that he needed to clarify and asked if Ms Higginson was available for a meeting.

69. Ms Higginson replied early on Monday 16 July 2018 asking for the Claimant to let her know the questions on which he needed clarification so that she could double check with Mentor, the Respondent's legal advisers, that she had the correct information. She agreed that a meeting was necessary and offered time either that afternoon subject to being able to collate the information in time, or on the following morning or, if better, on the Friday morning. She also tried to contact him by telephone and left a voicemail offering dates for a meeting.
70. The Claimant replied by email of 16 July 2018 noting that he was on honeymoon and not able to attend on any of the dates mentioned, but stating that he would respond on his return. Ms Higginson in turn responded at 9.24am on 17 July 2018 stating that she had arranged a meeting at a café for 9.30am on 19 July 2018, and explaining her understanding that this was the day that the Claimant should be returning to work after his holiday. She added that she would arrange to be accompanied by someone from the Respondent other than Mr Higginson and that the Claimant was also welcome to have someone with him. She asked that he confirm as soon as possible if he was able to attend.
71. Ms Higginson also sent the Claimant a personal email at 9.26am on 17 July 2018, adding to her previous email of two minutes earlier that if the Claimant ever wanted to speak to her outside of her HR role that was also fine. That reflected the dual nature of the relationship where Ms Higginson was both a director of the Claimant's employer and a friend, and I accept that it was sent out of concern for the Claimant.
72. The Claimant replied at 10.23pm on Wednesday 18 July 2018 to Ms Higginson's first email of 17 July 2018. He stated that he was not able to attend on the suggested date as he had been signed off work for two weeks. He did not otherwise take issue with Ms Higginson's understanding that he was due to return after holiday on 19 July 2018.
73. Ms Higginson replied to the Claimant at 10.02am on Thursday 19 July 2018 in the following terms:

"Dear Judah

I am sorry to hear that you are unwell. I hope that you feel better soon.

I understand that your resignation as per your text message on 12th July was with immediate effect and I am aware on Sunday you came into the office to collect your personal belongings, and you informed Matthew that you will not be coming back to work your notice period.

Please can you confirm if this is the case? Or can you clarify if you are coming back to work your notice period after the two weeks sick leave?

I look forward to hearing from you soon.

Ellie”

74. The Claimant was of the view that this email had probably not been written by Ms Higginson, and that it had instead been authored by Mr Higginson. He inferred this from the fact that it was in a different colour to the other emails and was not signed off in her usual way with the word “Thanks”. In fact the email had been written by Ms Higginson, and then run past Mentor. I accept that the difference in colour is likely to have resulted from copying and pasting it from an email to Mentor.
75. The Claimant replied a 1.02pm on the same day simply saying that he was not able to answer any of Ms Higginson’s questions at that time and that he would be in touch in due course. In fact he was in the course of obtaining advice from the CAB on 19 July.
76. Ms Higginson emailed the Claimant at 9.47am on 20 July 2018 asking him to send the original copy of his signed doctor’s note as soon as possible so as to ensure he received his statutory sick pay, as the payroll was due to be done on Monday. There was some criticism of this by the Claimant, but I am satisfied that it was a legitimate request. In any event, it had no impact on his decision to confirm his resignation.
77. Having consulted with the CAB, the Claimant confirmed his resignation by a letter dated 20 July 2018, referring to the letter as being “notice of my resignation with immediate effect”. That was intended by the Claimant as communicating immediate termination of his employment, and it was so understood by the Respondent as confirmed by a response of 23 July 2018.
78. In addition to referring to the incident on 11 July 2018, the resignation letter made various comments about what had happened since. He stated that he had raised the matter informally but had not been satisfied with the outcome or with “the direction of HR protocol within Quarters”. He complained that the stress of the incident had been “exacerbated by the constant phone calls, texts and emails my wife and I have received from you and your wife”. He claimed that Mr Higginson and his wife had been texting and emailing him “constantly demanding meetings”, most recently demanding sick notes.
79. The resignation letter also referred to there having been “several incidents of bullying and intimidation in and out of work hours”. I have addressed above the incident on 29 March 2018. Neither the incident in December 2017 nor the incident on 11 July 2018 are in my judgment properly characterised as one of bullying and intimidation. I heard no evidence of any other incidence

of bullying or intimidation and nor was anything put to any of the Respondent's witnesses of any other such incident.

80. In relation to the incident on 11 July 2018, the Claimant referred to Mr Higginson and Mr Cort having "dropped me" on the ground and injured him. As set out above, that was not a fair account of what had happened. He had fallen to the ground, with Mr Higginson, when Mr Higginson had tried to pull him back and restrain him after he had grabbed Mr Cort's throat. The Claimant also referred to Mr Higginson having continued to physically assault him after the incident, which again was not a fair description of what had happened. He also referred having had emergency dentistry work at his own cost, without mentioning Mr Higginson's offer to contribute to the cost of any dentistry work.
81. The Respondent replied on 23 July 2018 to the Claimant's resignation letter, and noted that he had resigned with immediate effect, and that he would be paid up to 20 July 2018. The Claimant was invited to a grievance hearing on 27 July 2018. He was told that Matthew Day (a longstanding friend both of the Claimant and Mr Higginson) would be in attendance for the company and that the Claimant was entitled to be accompanied. The Claimant replied that he was currently signed off sick and added that he would not be attending any meeting. Accordingly no such grievance hearing took place.
82. The Claimant reported the incident of 11 July 2018 to the police and also raised with them in that context the incident of 29 March 2018. A trial date was set with charges of assault by beating. However ultimately the prosecutor made the decision to discontinue the prosecution because on the evidence there was a lack of criminal intent and the injuries were not the result of an intended assault on the Claimant. That decision was upheld on review on the basis that on the evidence there was no a realistic prospect of conviction, albeit noting that the police had not supplied the CCTV or the stills. Whilst noting the conclusion reached, I do not consider that it is appropriate to give weight either to the decision to charge Mr Higginson and Mr Cort or the decision to discontinue the prosecution or to uphold that decision. I have reached my own conclusions on the basis of the documents before me and the evidence I have heard.
83. In his written submissions the Claimant argued that there was a discrepancy between the evidence of Mr Higginson and Mr Cort and what they said in response to the charge. I do not accept that was the case on the material before me. I was not shown any statement put in by Mr Higginson or Mr Cort in the criminal proceedings, though there was a "victim statement" submitted in support of a complaint which Mr Cort made. I was told that Mr Cort pleaded that he had been acting in self-defence, which would appear to be consistent with his having pushed the Claimant away after he grabbed Mr Cort's throat, and that Mr Higginson's case was that he acted to defuse the situation. The Claimant also relied on a letter from the CPS of 18 April 2019 which stated

that neither Mr Higginson and Mr Cort denied that the incident happened. I do not regard that as an admission of the Claimant's version of events.

84. The Claimant found alternative employment on 10 September 2018, at a salary of £20,000pa. This was 7 weeks after the termination of his employment with the Respondent.

Application to amend

85. As noted above, in the course of the hearing the Claimant made an application to amend to assert a case that the EDT was on 12 July 2018. I apply the test of balancing any injustice and hardship of allowing the amendment against that of refusing it, taking into account all the circumstances including the nature of the amendment and the timing and manner of the application. The amendment does not include any new cause of action and in addition the fact that the Claimant sent a text confirming he was resigning with immediate effect was already pleaded, though it was not pleaded that the employment thereby terminated on 12 July 2018 and instead positively asserted that it ended on 20 July. I also take into account that the application was made very late, not having been made until the first day of the hearing, and that there was no good reason advanced for it other than it was not a point that was spotted by the Respondent's legal representative prior to this.
86. As to prejudice, the perceived need for the amendment appears to have been that if there was a resignation on 12 July 2018 that the Claimant would then not be able to rely on any complaint about matters between 12 and 20 July to found or contribute the constructive dismissal. In reality there is nothing in that point. If there had been no repudiatory breach by the time of the resignation on 12 July 2018, then the Respondent would have been entitled to affirm the contract. The response stating that it was treated as the Claimant's three month notice would have had that effect and as such the Claimant would still have been entitled to rely on anything which added to any matters alleged to amount to a breach of the implied term of trust and confidence up to the written resignation letter on 20 July.
87. The only prejudice specifically identified by the Claimant was that he had not had an opportunity to take advice on the point. However I am satisfied that concern is met by the time afforded to the Claimant before submitting written closing submissions. It is not a matter which affects the evidence to be given.
88. Taking these matters together I permit the amendment, although in the light of my conclusions nothing in substance turns on this.

Relevant law

89. The first issue is whether the Claimant acted in breach of the implied term of trust and confidence. This has two elements: (a) whether, judged objectively, the Respondent's conduct was such as to destroy or seriously damage the relationship of trust and confidence and (b) whether there was reasonable cause or excuse for such conduct. Any breach of the trust and confidence term is inevitably repudiatory: Morrow v Safeway Stores Plc [2002] IRLR 9 (EAT).
90. It is possible for a course of conduct or a series of discrete acts cumulatively to give rise to a breach of the implied term of trust and confidence. The last straw must contribute something to the breach of the implied term. But there is no rule that the last act must be of the same nature as previous acts. The question remains whether cumulatively they are such as objectively to destroy or seriously damage the relationship of trust and confidence without reasonable cause or excuse.
91. The right to resign may be lost by virtue of express or implied affirmation of the contract. However the focus is on whether there has been affirmation following the last of the acts relied upon as contributing cumulatively to the breach of the implied term of trust and confidence. The mere fact that the contract has been affirmed following an earlier act, does not prevent reliance on that act as part of the conduct which cumulatively gives rise to a breach of the implied term if there is then a subsequent act which provides the last straw: Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 (CA). Even if the prior conduct (which was followed by affirmation) was such as to amount to a repudiatory breach, the last straw revives the right to resign.
92. Further, the resignation must be at least in part in response to the repudiatory breach of contract.
93. In relation to constructive dismissal, there is also an issue as to whether the alleged conduct of Mr Higginson and/or Mr Cort can be treated as being conduct of the employer, the Respondent, so as to be the basis for a repudiatory breach by the Respondent. Although in practice Mr Higginson may have been seen as the face of the employer, given the Respondent's separate legal personality, it remains necessary to consider whether his conduct in a social context is properly to be attributed as being conduct attributed to the employer.
94. In Hilton International Hotels (UK) Limited v Protopapa [1990] IRLR 316, the EAT held that the proper basis for identifying whether an employee's conduct was to be attributed to the employer was whether it met the requirements for vicarious liability. In that case the claimant had resigned, claiming constructive dismissal, after being reprimanded by her immediate supervisor. The EAT rejected an argument on the appeal that the supervisor's conduct could not lead to constructive dismissal unless the supervisor had authority to dismiss. In that context the EAT said, at paragraph 14, that:

“in relation to repudiatory conduct by what I will call a supervisory employee of the employer, the question whether the conduct binds the employer is governed by the general law of contract. If the supervisory employee is doing what he or she is employed by the employer to do and in the course of doing it he or she behaves in a way which if done by the employer would constitute a fundamental breach of the contract between the employer and the applicant, then, in our judgment, the employer is bound by the supervisory employee's misdeeds. We see no basis for drawing the line in any other place than that applied by the general law for vicarious liability of an employer.”

95. I address further, in the context of my conclusions which I set out below, whether the approach in Hilton Hotels of applying the test for vicarious liability can be distinguished in the present case, taking into account that Mr Higginson was not merely a supervisory employee, but the Managing Director, and one of only two directors of a small company, who could in practice be regarded as its directing mind.
96. As to whether there is vicarious liability for an employee's wrongdoing, this turns on whether there is a sufficient connection between the wrongdoing and what the employee was authorised to do, or his “field of activities” or role, broadly considered, such that it can properly be regarded as having been done in the course of employment. In Bellman v Northampton Recruitment Ltd [2019] ICR 459 (CA) this was applied in the context of an assault by an employee (M) who was not only the managing director of the employer company (a small employer) but also found to be its directing mind and will. The incident occurred in the small hours of the morning after returning to a hotel after a work Christmas party. M, who was drunk had started lecturing a group of employees on how he owned the company and could do what he wanted to do. When the claimant challenged one of his decisions, M punched him, causing him to fall back and fracture his skull. The Court (allowing an appeal) found that there was vicarious liability, taking into account not only the very wide scope of M's remit but also that he had been asserting his managerial authority at the time of the incident.
97. The conclusion in Bellman was recently endorsed by the Supreme Court in WM Morrison Supermarkets [2020] UKSC 12, at para 46, noting that although the assault occurred in the workplace, there was clearly a very close connection between the managing director's authorised activities as an employee and the commission of the assault. The SC in WM Morrison (at para 16, 31) was critical of the CA in that case for its emphasis on the principle of social justice and reliance on policy factors (which were instead relevant to whether to extend vicarious liability to relationships other than employees). It commented (at para 46) that in some respects the judgment in Bellman adopted a similar approach. Whilst the decision of the Supreme Court in WM Morrison was handed down after the parties had filed their written submissions, I have concluded that it is not necessary to invite further submissions from the parties on the effect of the decision given that (a) it endorsed the result on Bellman and the test based on whether the connection between the wrongdoing and field of activities was sufficient properly to be

regarded as in the course of employment, and (b) as I set out below my conclusions do not depend only on the findings in relation to vicarious liability.

Discussion

98. I address first the issue of whether Mr Higginson's conduct can be attributed to the Respondent.
99. The scope of Mr Higginson's role was undoubtedly very wide. Further his role was not limited to strict working hours. That is clear both from the incident of March 2018 when he warned the Claimant that he was his boss, and from his offer of a pay rise during a non-work event on the evening of 11 July. It does not however follow that in everything he was to be regarded as acting in the course of employment.
100. So far as concerns the events of March 2018 I reject the Respondent's contention that it is an answer that what occurred took place out of work. My conclusion on this issue does not rest on the fact that this was a work related evening arranged for a work-related matter (to say goodbye to a colleague). The crucial aspect in my view is that Mr Higginson acted at least in part for work-related reasons in seeking to break up the conversation and was exercising his authority as manager in doing so. That was then reinforced in the course of what followed he was cautioned the Claimant that he was his boss.
101. Clearly the events of March 2018 could not by themselves be sufficient to give rise to a constructive dismissal claim because the Claimant affirmed the contract by withdrawing his resignation. Contrary to the Respondent's contentions, that would not prevent them being something that could be relied upon in conjunction with some further event or final straw. I return to consider his further in the light of my conclusions relating to the events of 11 July 2018.
102. The position in relation to attribution is different in relation to the events of 11 July. At the end of the evening at Mr Higginson's house, Mr Cort, Mr Higginson and the Claimant had headed out together as friends to go to the casino. That was nothing to do with work. In my judgment that did not change during the remainder of the events that evening. Mr Higginson (and Mr Cort) were not purporting to exercise any managerial authority in later cajoling the Claimant to come with or in carrying him along the platform and up the steps. Even allowing for the wide remit of Mr Higginson's authority, there was no sufficient connection between the alleged wrongdoing and his role for his actions (or those of Mr Cort) properly to be properly capable to being viewed as having been done in the course of his employment.
103. I have considered whether the approach in Hilton Hotels can be distinguished given the nature of Mr Higginson's role. Vicarious liability is a common law

principle for attributing secondary liability in tort to the employer for the acts of an employee for which the employee is primarily liable. It might be thought that a test which is designed to determine third party liability in tort is not necessarily appropriate to determine whether conduct of someone in Mr Higginson's position is to be attributed to the employer for the purposes of determining whether there was a breach of the implied term of trust and confidence. Even allowing for the wide remit of someone in Mr Higginson's position, the test for vicarious liability could lead to anomalous results when applied to determine if there was a repudiatory breach. Given Mr Higginson's role any wrongdoing on his part which objectively would have the effect of destroying trust and confidence in Mr Higginson would also be likely to make it impossible to continue to remain in his employment. If for example I had found that Mr Higginson had deliberately beaten up the Claimant, albeit in the context of a social occasion and not exercising any managerial authority, it would be strange if the Claimant was not able to assert that there was a repudiatory breach on the basis that Mr Higginson had made it impossible for the employment to continue.

104. Whilst this may cast some doubt on the reasoning in Hilton Hotels it does not follow that the decision can properly be distinguished. The decision proceeds on the basis that vicarious liability is the correct test for determining whether conduct is to be attributed to the employer for the purposes of establishing a repudiatory breach. Whilst the seniority and role of the employee gives wider scope for there to be a sufficient connection with the wrongdoing, it does not follow that there is a yardstick other than vicarious liability which can be applied in such a case.
105. In the event however it is not necessary to rest my decision on the issue as to attribution and vicarious liability. Even if Mr Higginson's conduct could be attributed to the Respondent company, in the light of my factual findings I am not satisfied that it was conduct which entailed a repudiatory breach of contract, either taken by itself or together with the other matters on which the Claimant relied.
106. The social context in which the incident of 11 July 2018 occurred is not only relevant to the issue as to whether Mr Higginson's conduct is to be attributed to the Respondent. It is also in my judgment highly relevant in the assessment of whether in the circumstances what happened gave rise to a breach of the implied term of trust and confidence.
107. Of course, the incident would have been avoided if Mr Higginson and Mr Cort had taken the Claimant at his word when he said he did not want to go to the casino. However I accept that the incident is fairly to be viewed in the context of a group of friends (and at least in the case of Mr Higginson and the Claimant close friends), on a social night out and merry from alcohol, who had been joking around and exchanging banter. Whilst the Claimant saw it as having being carried against his will, Mr Higginson and Mr Cort had

genuinely thought they were all joking around and having fun up to the point where the Claimant lashed out.

108. I have considered whether the matter should be viewed differently on the basis that it was dangerous to have tried to carry the Claimant up the steps. I accept however that they were capable of carrying him up the steps and that it was only as a result of the struggle that the Claimant fell and was hurt. I do not accept that there was any aggression by either Mr Higginson or Mr Cort towards the Claimant, save possibly in Mr Cort's initial instinctive reaction in pushing the Claimant away after having been grabbed by the throat. When Mr Higginson sought to restrain the Claimant that was not with any intent to harm him, but with a view to preventing a conflagration in what he viewed as being a sudden turn of events.
109. Nor in my judgment were the events capable of amounting to a repudiatory breach when viewed cumulatively with the previous incidents. So far as concerns the incident in December 2017, whilst Mr Higginson did make an inappropriate comment for which he apologised as set out above I do not accept the allegation as to hair pulling. It is not in my judgment in any event available for the Claimant to rely on this as contributing to a repudiatory breach having accepted that it was relied upon only as evidence. I would not in any event have found that the comment for which Mr Higginson apologised, and which was not taken further at the time, taken together with the other matters on which he relied, would have given rise to a repudiatory breach. Nor was it something that played any part in the Claimant's reason for resigning.
110. Equally I do not consider that a different conclusion results from also weighing in the events of March 2018. I reject the Claimant's contention that there was a sequence where Mr Higginson's conduct was becoming more serious, tracing through from the events of December 2017, to the pushes in March 2018 to the events of 11 July 2018. That assertion is not justified on my findings. The events of March and July 2018 were very different. The March 2018 incident involved an assertion of authority and deliberate pushes. What happened in July did not involve any aggression on the part of Mr Higginson. It was the result of their joking around in a social context.
111. There is no requirement, in order for conduct cumulatively to amount to a repudiatory breach, for the separate incidents to be of a similar nature. However given my findings as to the events of March 2018 I am not satisfied that cumulatively there was conduct which objectively entailed a breach of trust and confidence. I accept Mr Higginson's evidence as to his reasons for seeking to break up the conversation with Ms Goodman. I also accept the Claimant's evidence as to why he was aggrieved by this and wanted to continue speaking to Mr Goodman and felt that it was an unnecessary interference. Both acted for reasons which go some way towards explaining why the matter quickly became heated. I do not accept that the fact that the Claimant was pushed three times puts a different aspect on matters. On each

occasion Mr Higginson was pushing the Claimant away from the position where he was stood face to face with Mr Higginson in an angry confrontation with him, having come out to break up the conversation for legitimate reasons. I take into account that on the third and most forceful occasion the Claimant had been momentarily turning to Chernade and Ms Goodman. However it remained the case that it was the Claimant who had moved back towards Mr Higginson, having taken a step back after the second push.

112. If, contrary to my findings, I had concluded that there was a repudiatory breach, I would have concluded that the effect of the Claimant's message of 12 July 2018 was indeed to terminate the employment at the time and without notice. In my judgment that was what was unambiguously communicated by his message that he was resigning with "immediate effect".
113. In the event since I have found that there had been no repudiatory breach, it was open to the Respondent to affirm the contract and hold the Claimant to his three months' notice. That was the effect of Mr Higginson's response stating that he would treat the resignation as the Claimant's three months' notice. As such I am satisfied that the employment continued until the Claimant's subsequent resignation letter, which the Respondent accepted as bringing the contract to an end. It follows that in principle there could have been conduct amounting to a repudiatory breach (either by itself or taken together with earlier matters) in the period between 12 July and the resignation letter of 20 July 2018.
114. However I do not consider that there was any such repudiatory conduct. In my judgment there is nothing in the complaint of failure to investigate. It was an appropriate response to arrange a meeting to discuss with the Claimant what had happened, as a starting point for any investigation. Indeed it was the Claimant who had asked for a meeting, and there was no proper basis for criticism in the resignation letter of Ms Higginson's response in offering meetings, and arranging a meeting for the date when the Claimant would have been due to return or in requesting a copy of his sickness certification or requesting clarification of whether he intended to return, given the terms of his message of 12 July.
115. Nor in my judgment is there any merit in the complaint as to failure to provide appropriate care or show concern for the Claimant after the incident. Mr Higginson had messaged the Claimant on 12 July to ask how he was and had also asked Chernade. He had respected the request not to contact him directly, save only for a short message on 12 July on a work matter, a warm text sent after the Claimant's resignation wishing the Claimant well, and the message on 15 July 2018 inviting the Claimant to agree to work out a notice period. He had offered to pay for a dentist, both in writing and in texts to Chernade. He had also, via Chernade, offered to meet with Claimant to clear the air but the Claimant did not wish to do so. Nor was there anything in the texts between Mr Higginson and Chernade on the night of the incident or on 12 July which merited the complaint in the resignation letter. For her part

Ms Higginson, in addition to arranging the meeting, had also offered the Claimant to speak to her in her personal capacity outside of her HR role.

- 116. Whilst in the Claimant’s submissions he placed some reliance on what would have been communicated to staff, there was no persuasive evidence of anything untoward that was said, and in any event the evidence from Mr Higginson, which I accept, was that the staff meeting to discuss what had happened was after the Claimant’s resignation on 20 July 2018/
- 117. I note that the resignation letter made no mention of the complaint raised in the Claimant’s witness statement in relation to having lost access to his work emails and as set out above I do not in any event consider that there is anything in that complaint in circumstances where it following the Claimant having said he was resigning with immediate effect, or that it played any part in the decision to resign.
- 118. Had I found that there was a repudiatory breach I would have accepted that the Claimant resigned in response to it and that the dismissal was both unfair and wrongful (as to which the notice entitlement from the Respondent would have been six weeks). There was no basis for the Respondent’s contention that if there was a repudiatory breach there was some other substantial reason for dismissal. In the event the Claimant fails on the issue of repudiatory breach.

Conclusion

- 119. Accordingly I reject the claim that there was a constructive dismissal. The claims of unfair and wrongful dismissal therefore both fail and are dismissed.

Employment Judge, Watford
14 April 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS

Notes

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunaldecisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.