



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr S Hodson

Aluminium Vent Company
Ltd

Heard at: London South
Employment Tribunal

On: 24, 25 and 26 November 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:

For the Claimant: Mr A Watson (Counsel)

For the Respondent: Mr S Okoronkwo (Counsel)

RESERVED JUDGMENT

The claim of constructive unfair dismissal is well founded and succeeds.

The claim for holiday pay fails and is dismissed.

REASONS

Claims

1. By a claim form presented to the Tribunal on 20 June 2019, the Claimant brings claims of constructive unfair dismissal and unpaid holiday pay.

Legal issues

2. The following questions were agreed as those which I needed to answer in order to determine the claims, this being a claim where it is argued that there

was a breach of the implied term of mutual trust and confidence, the Claimant's resignation triggered by a "last straw" event¹:

- (a) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his resignation?
 - (b) Did he affirm the contract after that act (or omission)?
 - (c) If not, was that act (or omission) by itself a repudiatory breach of contract?
 - (d) If not, was it nevertheless a part of a course of conduct² comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
 - (e) Did the employee resign in response (or partly in response) to that breach?
3. It was confirmed by Counsel for the Respondent that he was not putting forward the position, on behalf of his client, that the dismissal was fair, if the Claimant was found to have been dismissed. The Respondent's defence therefore relied solely on there being no dismissal.

Evidence

4. I heard evidence from the Claimant and his witness, Mr Clifford Smith; for the Respondent, I heard from brothers Ian Montgomery ("IM") and Andrew Montgomery ("AM").
5. The Tribunal was referred to documents in a bundle extending to 527 pages. References to numbers in square brackets below are to pages in the hearing bundle.
6. This is a case where, not surprisingly for a constructive dismissal case, there is much disputed fact. It is also a case where there is a lack of direct documentary evidence relating to certain important events. I therefore consider it important to make the following three general points which have informed my findings of fact.

(a) Credibility

7. I found the Claimant to be an honest, credible and reliable witness. Unlike much of the Respondent's evidence, my impression of the Claimant was

¹ These questions were also conveniently set out in the case of **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978**

² Applying the approach explained in **Omilaju v Waltham Forest LBC [2005] ICR 481**

that he did his best to give an honest account of matters which went back some years. Where he did not know or could not remember something, he was candid in his answer. For the most part, however, he was able to recall with clarity what happened. Whilst I only heard from Mr Smith for a short while, I also found him to be a truthful and reliable witness.

8. I did not find the evidence of AM and IM as convincing or reliable. Both had a tendency to give the evidence they thought would be more consistent with their defence to this case, rather than simply, to the best of their ability, tell me what they could genuinely remember. At some points it felt like IM, in particular, saw the process of giving evidence as a game of cat and mouse. When a piece of evidence was put to IM that was inconsistent with an answer he had given in cross examination, his response was to say “*you’ve got me*” as though he had been ‘caught out’ by Counsel for the Claimant . At one point I reminded IM that rather than assume Counsel was trying to trip him up, he should simply concentrate on giving an honest account of what he could recall.
9. In many other respects there was much that IM and AM could not remember with clarity.

(b) Disclosure

10. During this case, there were a number of points during the evidence when IM and AM were asked about a document they had referred to but which was not in the bundle, such as emails and text messages. There was even a document which was produced after the evidence had completed and just before we were due to start legal submissions. I found IM and AM’s reasons for their failure to disclose documents in this case wholly unconvincing.

(c) Matters not put during cross examination – the rule of Browne v Dunn³

11. There were certain important factual allegations contained in the witness statements of IM and AM that were not put to the Claimant in cross examination, and so he was not given the opportunity to reply to them. Equally there were matters in the Claimant’s witness statement that went unchallenged by the Respondent. Whilst allowances might ordinarily be made for, and assistance given to, litigants in person during their questioning, I am mindful of the fact that both parties in this case were represented by experienced Counsel. Accordingly, I consider it right to apply this rule more strictly notwithstanding the general rule under Rule 41 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that a Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective

³ (1893) 6 R. 67

Findings of fact

12. The following findings of fact were reached on the balance of probabilities having considered all the evidence given by witnesses during the hearing and documents referred to by them. I have only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
13. In July 1982, the Claimant started work at a company called Aluvents Limited ("Aluvents") a manufacturer of aluminium vents, louvres and diffusers.
14. The owners of Aluvents sold the business to Ian Blackwell in March 2005, at which point he employed his friend Ian Boushear to work for the company. Mr Boushear had no previous experience of working in the heating and ventilation industry and was brought in to oversee staff and deal with staffing issues.
15. For reasons which it is not necessary to go into here, Aluvents faced financial problems in 2007 and went into liquidation.
16. IM and AM were, at this time, owners and directors of a business called Montgomery Brothers Ltd ("MBL"). MBL traded under the name of Primus Quality Coatings, which was one of Aluvents' suppliers.
17. Seeing a potential opportunity from the difficulties faced by Aluvents, IM and AM decided to set up an identical business to Aluvents. That business is the Respondent in these proceedings.
18. The Respondent was incorporated on 1 August 2007. At all material times the Respondent was owned in equal shares by Ian Boushear and AM/IM. AM/IM's share was not owned by them personally, but rather by MBL. Mr Boushear owned 33.33% of the Respondent, whilst 66.67% was owned by MBL.
19. The Claimant's employment ended at Aluvents on 9 August 2007 when he was made redundant. Mr Smith was also employed by Aluvents and made redundant on the same date.
20. In July 2007, Mr Boushear spoke to the Claimant about the formation of the Respondent, and asked him to be its new sales manager. Mr Boushear asked the Claimant to approach all key clients of Aluvents to let them know that the business would continue, albeit under a different company name and with new owners. Mr Boushear informed the Claimant that MBL would be an investor in the new business but that IM and AM would not be involved in the day to day running of the business. Mr Boushear told the Claimant

that the new company could only be formed if he agreed to be its sales manager, dealing with sales, customers, pricing and technical matters; whilst Mr Smith would run the workshop where the grilles, louvres and vents were manufactured. Mr Boushear saw the Claimant's knowledge and experience to be vital to the success of the Respondent.

21. Mr Smith and the Claimant discussed Mr Boushear's proposal but agreed that they would only accept it if they were given shares in the company and the Claimant was made a director. This counter proposal was put to Mr Boushear.
22. The Claimant and Mr Smith duly started work for the Respondent. It was disputed in these proceedings exactly when they began their employment. The Claimant maintained that he started in mid to late August 2007. The Respondent says that the Claimant started employment in January 2008. The Claimant was very clear in evidence that the January date was wrong. The only evidence the Respondent could refer to in support of its position was an employee list produced by their accountants indicating that the Claimant started in January 2008. However there was some disagreement, even between IM and AM, as to when the Claimant's start date was: IM said January 2008 whilst AM suggested it was September or October 2007. The Claimant said that on 1 January 2018 he was put on the company's payroll but prior to that he had been paid by Mr Boushear by cheque in the sum of £500 per week but received no payslips.
23. I prefer the Claimant's evidence on the above point. One reason I found the Respondent's evidence wholly unreliable, apart from the differences in IM and AM's own recollections of when the Claimant started, was the evidence of IM when questioned about those people involved at the very beginning, when the company was started. IM initially said that the Claimant was not involved during the start up stage, but was forced to retract that position when it was put to him that in one of the letters written on his instructions by his lawyers, he said the Claimant was "*a valuable member of the start up team*". He also seemed to react as if he had been 'caught out' when that part of the letter was put to him; indeed he said to Counsel for the Claimant "*you've got me*".
24. As an aside, it was agreed at the outset of the hearing that it was not suggested that the incorporation of the Respondent resulted in a TUPE transfer of the Claimant from Aluvents. There is no suggestion that the Claimant's employment with the Respondent continued back to his time with Aluvents.
25. It was also a disputed issue in these proceedings, indeed a central part of this case, whether the Claimant was offered a shareholding in the Respondent by Mr Boushear, AM and IM. The Claimant says this was exactly the proposal put to him and Mr Smith by Mr Boushear (paragraphs

- 20 and 21 above). The Claimant said that Mr Boushear returned from his conversation with IM and AM and confirmed that 15% of the company would be given to Mr Smith and the Claimant to be shared equally (7.5% each).
26. There was then a meeting in February 2008 between the Claimant, Mr Boushear, Mr Smith, IM and AM. The Claimant said that the initial promise was reconfirmed by all parties; each would give 5% of their shares so that 15% could be divided equally between the Claimant and Clifford Smith. No payment would be made for the shares as the Respondent was in effect buying Mr Smith and the Claimant's "*wealth of industry experience and knowledge, including the customer base*".
27. The Respondent's evidence of this meeting was different. IM said in evidence that he, AM, Mr Boushear and the Claimant had a discussion about the business going forward, when the Claimant started pushing for an opportunity to be allowed to participate in the ownership of the business. IM said that they would offer the Claimant and Mr Smith an option to purchase up to 7.5% worth of shares in the Respondent at a later date on terms to be determined and depending on their performance and the success of the business ("the Share Option"). This account by the Respondent was not put to the Claimant in cross examination.
28. On this crucial issue, I prefer the Claimant's version of events, including what happened during the meeting in February 2008. Not only do I prefer the Claimant's oral evidence as being a more reliable, honest and truthful account of what was agreed, but when I look to supporting documentary evidence, there are a number of letters written by the Claimant, beginning with the one in 2018 to the Respondent, which set out the Claimant's position as to the agreement reached in 2007 and repeated in 2008, and are consistent with the Claimant's evidence at this hearing. These letters were an ideal opportunity for the Respondent to have put the Claimant straight in terms of any misunderstanding, and set out what it considered was a correct version of events, namely that there was a discussion about share options. However they failed to do so and I draw an appropriate inference from that failure, namely that the offer made was as the Claimant describes. Indeed, the first time the Respondent replied with reference to share options, was in a formal letter from their lawyers to the Claimant on 7 May 2019, after the Claimant had resigned, and doubtless at a point when they contemplated that a legal claim may be brought by the Claimant. Interestingly, even in a letter from the Respondent's lawyers to Mr Boushear dated 8 March 2019, the discussion, or alleged misunderstanding, in 2007/2008, is not even mentioned.
29. The Respondent quickly became successful, due in large part to the Claimant's industry knowledge, experience and his ability to bring over a number of Aluents customers. Mr Boushear was the Managing Director and the Claimant was the Sales Manager (later becoming the General

Manager).

30. I accept that Mr Smith often raised the issue regarding the promise of shares with the Claimant and wondered whether they should get confirmation that these were being dealt with. The Claimant continued to assure Mr Smith that Mr Boushear was dealing with it and that they could trust him; in the Claimant's view, a promise had been made and would not be broken. I accept that the Claimant asked Mr Boushear periodically about the shares but ultimately the Claimant placed his trust in Mr Boushear.
31. In 2018, the circumstances of the Claimant changed due to the birth of his daughter and his need to buy a house. The Claimant decided that he finally needed his position regarding the shares and directorship resolved. The Claimant raised this with Mr Boushear, who also agreed it was time the matter was resolved. On 25 July 2018, the Claimant sent a letter to Mr Boushear, with the intention that it would be shared with IM and AM [148]. It said as follows [sic]:

As you are aware I have been keen for some time to formalise my position within the Company, namely Aluminium Vents Company Ltd (AVC Ltd), I am currently an employee employed in the position of Sales Manager. When the company was incorporated in August 2007 and prior to the company being set up after the collapse of Aluvents Ltd I made my position very clear that would only be involved in this new company if my position was formalised and I had some control over the day-to-day running and future of the company. With time moving on and retirements approaching this needs now to be addressed.

The Company was incorporated on 1 August 2007 from the information recorded at Companies House the following are Directors: Ian Robert Montgomery (who is also the Secretary), Ian James Boushear (aka Tom) and Andrew James Montgomery. The split shares is not detailed but it has you, Ian James Boushear, as a 'person with significant control' meaning you have ownership of more than 25% but not more than 50% of the shares. During the meeting when the company was set up it was agreed that Clifford and I would be given 15% of shares between us i.e. 7.5% each, can you please confirm if this is documented anywhere namely in the Memorandum of Association or Statement of Capital Holdings and whether AVC Ltd has an Articles of Association.

It is my view that I work extremely hard for AVC Ltd and although I am remunerated for my position, I have no control over the decision-making process or the actions of the Company. I perform the role of a company director, I promote its success and manage the Company on behalf of the Shareholders often working 10-11 hour days to ensure that the business runs smoothly. I have always acted in the best interests of the Company, exercising care, skill and diligence that you would expect from a director but I am not one, I am an employee. This needs to be reviewed as I cannot continue to work for company that I have no influence over, yet take responsibility as if it were my company; this is exactly what happened at Aluvents Ltd and while I do not compare the shareholders of AVC Ltd with Aluvents Ltd I need to protect my future.

I understand that you, Ian and Andy made a financial investment into the Company to start it up, although I did not make a financial investment I did bring goodwill to the Company. AVC Ltd has had the benefit of my experience, reputation and connections within the industry. Although we were a start-up business due to Aluvents Ltd going into liquidation I was able to sustain our customer base having worked with them in the industry during my 25 years with Aluvents Ltd and maintain their continued custom,

Going forward I would like to be made a company director and given shares in the Company based on the goodwill that I have brought with me which has enabled the Company to flourish. The shareholders will need to decide what this goodwill is worth. Please can you consider this proposal, we are approaching the end of our financial year so if you are in agreement I would like this appointment to be made by September 2018.

32. There was no reply to the above letter but Mr Boushear acknowledged that it had been received.
33. In September 2018, the Claimant met with Mr Boushear and AM during which the share issue and directorship was discussed. During this meeting AM and Mr Boushear agreed that the Claimant should be made a director and gifted a 15% share of the business. This was 7.5% more than had originally been promised, due to the Claimant's commitment and contribution to the business.
34. Discussions continued between the Claimant and Mr Boushear; the Claimant felt that it was unfair and unreasonable that the original promise had not been formalised.
35. In December 2018, prior to the Christmas break, the Claimant reminded Mr Boushear that the deadline of September 2018 to formalise the Claimant's position regarding the shares and directorship had passed. By this stage, Mr Smith had left the company, seemingly on the grounds of redundancy, but the actual reason related to misconduct.
36. On 7 January 2019, there was a meeting between IM, AM, Mr Boushear and the Respondent's accountant, Mike Gill. The purpose of that meeting was to discuss the on-going issue concerning the gifting of shares to the Claimant. The meeting did not go well and Mr Boushear left the meeting when IM and AM changed their position and said that they would only sell their shares, which they valued at £600,000. IM could not explain in cross-examination what options were on the table regarding the Claimant's position. His evidence on this was strained. He gave evidence that Mr Boushear suggested that the Claimant should be gifted 20% of shares, which is not a figure which came from the Claimant. There was no discussion about the Claimant being given share options at this meeting.
37. During this hearing, IM was cross examined about a letter from the

Respondent's lawyers to Mr Boushear dated 8 March 2019. In it, Mr Hodson's situation was discussed and there is a paragraph headed "*Misunderstanding*". In cross examination IM could not give any explanation why the opportunity was not taken in this letter to correct any alleged misunderstanding on the part of the Claimant that he was to be gifted shares, as opposed to being given share options.

38. On 11 March 2019, Mr Boushear and the Claimant instructed a barrister on a direct access basis to advise on the Claimant's rights regarding the promise of the gift of shares and the directorship. In the instructions provided to the barrister, which I was shown, a version of events consistent with the Claimant's evidence that he was promised shares, is set out in detail.
39. During the process of collecting together information to provide to the barrister, the Claimant discovered that the owners of the Respondent had been drawing dividends since 2013, which was contrary to what the Claimant had been told, that all profits were being invested back in the business.
40. On 19 March 2019, Mr Boushear, his wife, Kath, and the Claimant's wife, Clare Hamilton-Hodson, met with the barrister. The Claimant did not attend as he had to work. On behalf of the Claimant, Ms Hamilton-Hodson confirmed that the Claimant would not continue to work for the Respondent if the original promise of shares was not fulfilled.
41. On 28 March 2019, Mr Boushear was given notice of a Board Meeting to take place at the offices of the Respondent's lawyers on 29 March 2019. Notwithstanding the short notice, Mr Boushear attended because he was keen to resolve matters with regards to the Claimant's shares and being made a director. Later that evening the Claimant received a text message from Mr Boushear saying "*everything fine, call you in the morning*". The minutes of the meeting is the first documented reference to share options but I do not accept that the minutes accurately reflect the discussion at the meeting; IM could not explain, for example, why there was no reference to what Mr Boushear said at the meeting.
42. On Saturday 30 March 2019, the Claimant said that Mr Boushear phoned the Claimant on his mobile and confirmed that after discussions at the board meeting, the Claimant would be made a director and shareholder of the Respondent and given shares of 7.5%. The Claimant said he questioned why the shareholding was no longer 15% as Andrew Montgomery and Ian Boushear had agreed in September 2018, but Mr Boushear confirmed that there was "*nothing he could do*". Mr Boushear also confirmed that IM would be working in the sales office of the Respondent from 1 April 2019 which came as a surprise to the Claimant as Mr Boushear had previously been so against IM and AM being involved in the day to day running of the business.

43. On 1 April 2019, the Claimant said he was invited to attend a meeting with IM, AM and Mr Boushear at the Respondent's premises. During this meeting the Claimant said that AM and IM confirmed that they agreed to make the Claimant a director and confirmed that he would be gifted a 7.5% shareholding in the company. IM did not refer specifically to a meeting in his evidence but said:

On 1 April 2019, I started to attend the Respondent's First Warehouse for 2-3 hours per day, as agreed during the March 2019 EGM and Board Meeting. Between this time and 3 April 2019, I remember a number of occasions where the Claimant started to aggressively pursue this idea of him being gifted shares. I assumed at the time, it must have been Tom who told him what was discussed at the March 2019 Board Meeting, I told him to be patient, that we were in the process of deciding the details of the offer and I would let him know the outcome soon. By this I meant the Share Option. I did not propose that the Claimant should be made a director at one and the same time, as he proposed.

44. The above account was not put to the Claimant in cross examination. Again I prefer and accept as fact the evidence of the Claimant regarding what was said and promised at the meeting.
45. On 2 April 2019, the Claimant approached Mr Boushear and asked him whether the shareholding was going to be backdated to 2007/2008 and if dividends were going to be paid to him as they had been paid to others. Mr Boushear said he would have to speak to AM.
46. On 3 April 2019, Mr Boushear invited the Claimant to a meeting at the Respondent's premises with IM and AM. The Claimant asked about the backdated dividends, but AM and IM remained silent. The Claimant started to feel betrayed.
47. On 4 April 2019, IM approached the Claimant and told him that he would be given a 10% shareholding in the Respondent which the Claimant agreed to accept.
48. On 5 April 2019, the Claimant wrote to AM, IM and Mr Boushear again setting out his position, referring to the promise of gifted shares and appointment as a director. No acknowledgment of this letter or response was sent to the Claimant.
49. The continuing situation was causing the Claimant stress and anxiety which resulted in him being signed off work from 12 April 2019 to 1 May 2019.
50. With no response received to the Claimant's 5 April 2019 letter, the Claimant wrote to Mr Boushear on 13 April 2019 chasing a reply.
51. On 24 April 2019, the Claimant sent an email to IM, AM and Mr Boushear

in which he said:

Further to my letter dated 4th April 2019 and email sent to Tom on 13th April 2019 I have not received a response from you. I'm unclear what the issue is as I'm just requesting what we discussed and agreed to be confirmed in writing. We all agreed that I am both a director and shareholder, this agreement was made when the company was incorporated and this needs to be formalised. As such I should be able to have a copy of the documents listed below so that there is complete transparency between all parties so that we can move forward.

As you are aware this is causing me great stress, can you please respond by the end of the week. If no response is received my legal representative will be taking the matter forward.

52. By 26 April 2019 the Claimant had not received a reply and therefore he felt he had no option but to resign. The last straw for the Claimant was the Respondent's failure to reply to correspondence regarding what the Claimant considered to be broken promises. In his letter he wrote:

In the light of everything that has happened, I consider that AVC's conduct has completely destroyed any trust and confidence which I may have had in them, The chain of events I have described above clearly shows a huge number of broken promises as far as transfer of shares, payment of dividends and payment of pension contributions are concerned.

Law

53. Section 95 Employment Rights Act 1996 ("ERA") defines what it means to be dismissed:

An employee is dismissed by his employer if and only if:

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(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.

54. The Claimant in this case relies on a breach of the implied term of mutual trust and confidence, which means that the employer "*shall not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee*": **Malik v BCCI [1997] ICR 606**. The test of whether there has been a breach of the implied term of trust and confidence is objective: the question is whether the conduct relied on as

constituting the breach, when looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

55. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA** the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act — the last straw — forms part of the series. The effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct. This, at any rate, is the case if the final straw incident is not itself so damaging as to comprise a repudiatory breach in and of itself. If, however, it does comprise a repudiatory breach in and of itself and thereby triggers the employee's resignation, there will be no need for the employee to rely on the last straw doctrine as the basis for claiming that he or she has been constructively dismissed.
56. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it.
57. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98(1) says as follows:

(1) In determining....whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

58. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

Submissions

59. Both Counsel had prepared written submissions and these were supplemented by oral submissions at the hearing. I have taken these submissions, including relevant case law referred to, into account in reaching my decision.

Analysis and conclusions

60. Answering each of the questions at paragraph 2 above and relying on the above findings of fact, I conclude as follows:

What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

61. The Claimant resigned in response to the broken promises and the Respondent's failure to address the issue or reply to letters sent. The last straw for the Claimant was the Respondent's failure to respond to his 24 April 2019 email, which itself was chasing a response to the his 13 April 2019 email. This was not an innocuous act but evidence of the Respondent's failure to deal with genuine and valid concerns raised by the Claimant that IM and AM had not honoured the agreement reached between them.

(b) Has he or she affirmed the contract since that act?

62. I find that the Claimant did not affirm the final act. Having given a reasonable opportunity for the Respondent to reply to the Claimant's 13 and 24 April 2019 emails, the Claimant resigned promptly.

(c) If not, was that act (or omission) by itself a repudiatory breach of

contract?

63. It is not suggested that the final act itself was a repudiatory breach of contract.

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

64. I am satisfied, relying on the above findings of fact, that the Respondent's behaviour, viewed cumulatively, amounted to a breach of the implied term of mutual trust and confidence. The Respondent did not have reasonable and proper cause for its conduct, and I am satisfied that it was calculated or likely to destroy trust and confidence.

(e) Did the employee resign in response (or partly in response) to that breach?

65. I conclude that the Claimant did resign in response to the above breach.
66. Having found that the Claimant was dismissed, I find that the Respondent has not established a potentially fair reason to dismiss. For the above reasons, the claim of constructive dismissal is well founded and succeeds.
67. As I did not hear sufficient evidence to determine the claim for holiday pay, this claim fails.
68. This case will now be listed for a remedy hearing in due course.

**Employment Judge Hyams-Parish
3 December 2020**