RESERVED **Case No: 2401815/2020**
Code A

EMPLOYMENT TRIBUNALS

Claimant: Mr C Jamison

Respondent: Rhino Design (Manchester) Limited

HELD AT: Manchester **ON:** 3 & 9 November 2020

BEFORE: Employment Judge Shotter (by CVP)

REPRESENTATION:

Claimant: In person
Respondent: Ms S Quinn, solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that the constructive unfair dismissal claim has no reasonable prospect of success and it struck out under the Employment Tribunals Rules of Procedure 2013 rule 37(1).

REASONS

1. The respondent seeks to strike out the claimant's claim as an abuse of process, and / or as having no reasonable prospect of success and order the Claimant to pay a deposit in the event of the Tribunal determining that the claim has little reasonable prospect of success.

2. No oral evidence was heard on the facts in this case, and these were still to be determined by an employment judge sitting alone at a final hearing had the claimant satisfied the Tribunal that his claim of constructive unfair dismissal should proceed to a final hearing.

The bundles

3. The Tribunal has before it a bundle of documents plus additional documents introduced on both hearing dates following the adjournment. The Tribunal has confusing been referred to three bundles of documents in addition to additional documents produced by the claimant. It has not taken into account emails sent by the parties after the 9 November 2020 hearing which included an attempt to introduce additional documents not before the Tribunal or respondent previously.

4. The preliminary hearing was adjourned part-heard from 3 to the 9 November 2020 with the agreement of both parties, in the interests of justice. The respondent had sent the amended electronic bundle to the claimant and Tribunal late afternoon on 2 November 2010, the day before the hearing. The original bundle produced earlier ran to approximately 400 pages, and the respondent had taken out a number of pages without consultation or agreement with the claimant. The claimant indicated that he did not have the time to check through the bundle to ensure all his relevant documents had been included and the respondent in the email heading had not put him on notice that documents had been taken out. The issue only came to light when the Tribunal took the parties to the bundle and checked with the claimant that the documents he wished to rely upon had been included. It transpired that there were missing documents and these have now been included in an updated bundle that runs to 304 pages, which is the second bundle sent to the Tribunal for the hearing on 9 November 2020.

5. The claimant has had time to review the bundle and now read the Skeleton Argument prepared on behalf of the respondent, which he did not have time to do prior to 3 November 2020, and as a litigant in person had that hearing proceeded without giving the claimant the opportunity to understand the respondent's position, an injustice would have taken place. Ms Quinn was uncertain whether the claimant had been sent a copy of the skeleton argument; the claimant was certain that he had not seen or read the skeleton argument which includes detailed reference to case law including the relevant Court of Appeal decision in Kaur v Leeds Teaching Hospital [2018] EWCA Civ 978 2018 WL 02008605 referred to the claimant by the Tribunal as a key case. As set out by the Tribunal in its case management order sent to the parties as a matter of urgency on 3 November 2020, the claimant is a litigant in person; constructive unfair dismissal claims are complex and the law needs to be carefully read to be understood especially when a party if not legally qualified and has no experience in such matters. It is unrealistic for Ms Quinn to expect the claimant to deal with her skeleton argument during the CVP hearing. Following the adjournment Mr Jamison confirmed he is now prepared for this hearing and has provided his own written skeleton argument in response, a statement dealing with means and a bundle of additional documents duly marked. There is now also a third bundle, and no reason why the hearing cannot fairly proceed with the claimant giving evidence on oath as to his means and providing oral submissions dealing with the respondent's application, Ms Quinn having made oral submissions on behalf of the respondent on the 3 November 2020.

6. The Tribunal has considered those documents to which it was referred and oral closing submissions made on behalf of both parties, which it does not intend to repeat in full. It also heard evidence under oath from the claimant as to his means.

The claim

7. By a claim form received on the 10 March 2020 following ACAS early conciliation that took place between 30 January to 1 March 2020, the claimant claims constructive unfair dismissal.

8. A preliminary hearing was heard on the 18 August 2020 at which the claimant's application to amend his claim to include an unlawful deduction of wages claim was dismissed, and he was ordered to provide further information on the breach of contract claim giving rise to the constructive unfair dismissal.

Further and better particulars

9. The claimant provided further and better particulars on 4 September 2020 setting out the reasons for his resignation and alleging he had "2 years of concerns that lead up to the decision…the Outcome Appeal was delayed and I felt that the gravity of the procedure and my deep concerns warranted the respect of a timely response. This delay was the straw that broke the camel's back…**Over 2 years I had continued to work for the Respondent because: I could not afford to not have a job, the only choice I was given was to leave…I did not have the funds to get detailed legal advice and go to court. I and many others, including a Board Director expected the main protagonist, DS to leave and we could restore the culture and relationships.** Due to the nature of the business I needed to work through the 2 distinct periods of troughs and peaks to prove the Indicative Commission Structure was never achievable…I believed that the only way to change my terms and re-instate the culture of the business was to work from within…The Respondent maintains that I was not capable in my role as Operations Director and was overpaid. The detail which supported this view was never shared with me, and I was not given the opportunity to defend myself and I was never taken down an official disciplinary route…" [the Tribunal's emphasis]. The points raised were largely repeated by the claimant in his written and oral submissions, and I took the view that based on the claimant's description of his case, it was problematic and there was a real issue with affirmation, not least by the fact that on the claimant's own account, he had not resigned waiting for the "main protagonist" to leave in order that the culture of the organisation and relationships could "be restored". The contemporaneous documents referred to below revealed the claimant's claim had no reasonable prospects of success for the reasons given below.

10. At today's adjourned hearing the claimant was invited to take me to the documents in the bundles (which the claimant has now had time to check and insert into the bundle during the adjournment ensuring that all relevant documents have been included) which refer to him having made it clear to the respondent he was working under objection to the new contractual arrangements which he had accepted under duress, and it clear to the Tribunal there were no such documents in existence. The claimant relies on oral evidence to the effect that he did not accept the contractual changes agreed under duress; however, the contemporaneous documents undermined the claimant's position for the reasons set out below. The Tribunal has spent a great deal of time carefully sifting and reading through documents to which it was taken given the fact that the claimant is a litigant in person and it is incumbent on it to leave no stone

unturned when considering the draconian step of striking out a claim without hearing evidence at trial.

The documentary evidence before the Tribunal as set out in the various bundles.

11. It is not disputed the Claimant from 1 July 2014 until he resigned on notice which ended on 3 January 2020 after serving his contractual notice, from his position of service director on a salary of £50,000 per annum. The case revolves around the reduction of the claimant's salary from £100,00.00 when he was the operations director to £50,000 plus bonus on 19 October 2017 when the Respondent terminated the claimant's employment and made an offer of re-engagement as a service director on a basic salary of £50,000 per annum with the potential to earn commission. In short, the claimant's case is that he worked under protest from 29 January 2018 (when he signed the new contract) until he gave notice on 4 December 2019, and the last act which led to his resignation was the respondent's failure to provide him with an outcome of the formal grievance issued on 16 October 2019, by 30 November 2019 when he had been informed it would be given no later than 7 December 2019, if not earlier.

12. In his skeleton argument the claimant submits the respondent did not use the correct ACAS procedure before it unilaterally reduce his pay by half. He referred to an appraisal document originally in the first bundle before it was taken out by the respondent without informing the claimant. The claimant also refers to other documents disclosed by the respondent for these proceedings but not shared with him at the time, which are not relevant to his claim as he was unaware of the documents when he resigned. It is also notable the claimant did not resign when the respondent allegedly failed to comply with the ACAS Code in 2017/2018.

13. The claimant referred the Tribunal to a bundle of additional documents he has produced, which have been read including the 12 July 2017 appraisal and 6 July 2017 performance measure review. Neither of these documents assist the claimant in establishing his claim and serve only to highlight the claimant's attempt to persuade the respondent that he was not underperforming in his role.

14. The claimant prepared a report dated 25 October 2017 titled "Notes and Observations Ref. Events Service Manager Role" that runs to many pages. It includes a reference to the claimant feeling pleased with the recruitment of a new operations director (the position previously held by the claimant) and offering to assist with handover, targets were referred to and a number of other matters which does not concern the Tribunal. The tone of the communication was positive and in the summary the claimant wrote "the changes from my current role as operations director to service director as described within your job title document is significant…the changes that the directors wish to implement must be seamless with minimal disruption…below I comment on the targets an objectives…You have explained to me that my current level of earnings will be "maintained" for a period of time in order to smooth the transition of my role from ops to service director…I feel this transitional period will be between 5 and 6 months…I assume that given the 5 to 6 months lead to adopting the new practices operationally that my annual targets would be adjusted pro rata." Reference was made to the claimant's commission package, and the claimant concluded "I believe it is right and proper to introduce change to our business in support of a more systematic, procedural and target driven performance measurement process…I welcome the

opportunity to meet and discuss with the management team details of how we can capitalize on this change." The claimant did not say he was objecting to the changes proposed; instead he was exploring how "we can best capitalize on this change" and the tone and content could not be interpreted as the claimant reserving his contractual and statutory rights. The steps taken by the claimant up to the date he submitted a formal grievance supports the Tribunal's view that the claimant had agreed the contractual changes and took part in "candid" conversations relating to commission structure which was renegotiated.

15. The offer of re-engagement was accepted verbally in October 2017 by the Claimant who then signed the "termination of your current contract and reengagement on new terms" offer letter dated 8 November 2017 which referred to discussions "ongoing since your review in March in respect of the changes to your terms and conditions of employment as of 13 November 2017". The letter set out the background to the changes and reference were made to the claimant's underperformance, why there was to be a reduction in salary and protection of his current earnings for a period of 4-months. The letter confirmed the claimant had been made aware of the decision in August 2017 and that a verbal agreement had been reached. The claimant acknowledged his re-engagement under the new contract, an indicative commission structure signed by the claimant indicating his agreement on the 11 November 2017, and a new job description.

16. It was submitted by Ms Quinn the Claimant only asked that it was recorded that he did not accept the allegation that he was underperforming as Operations Director and did not refer to working under objection in any documents. In closing submissions, the claimant explained that he had requested the new contract include concerns, this was refused and he was only allowed to add the note regarding performance. The Tribunal notes that there was nothing to stop the claimant writing to the respondent setting out all his concerns and objections before and/or after he had signed the offer letter followed by the new contract and then throughout the period up to and including the lodging of his grievance. The claimant wrote a letter of objection dated 11 November 2017 which he signed. The claimant's objections were limited to "Please note that I do not accept the analysis of my performance as stated in the termination of contract and re-engagement letter…I would like this note to be attached to my acceptance" undermining his argument that he was not "allowed" to add any notes to documents or send emails objecting to the contractual changes.

<u>The claimant's letter of objection dated 11 November 2017</u>

17. The claimant's case is that he was offered no choice; he was told to sign the new contractual terms or resign, and denies he verbally accepted the changes in his contract. The 11 November 2017 letter signed by the claimant undermines his position as it reflects he could and did write a letter of objection. The claimant denies he verbally accepted the change and had this matter proceeded to trial, intended to cross-examine his line manager together with other employees and directors who were, he says, aware of his concerns. The problem for the claimant lies with the contemporaneous documentation. The offer letter dated 8 November 2017 referenced a verbal agreement, and the claimant signed it without comment or amendment which suggests a verbal agreement had been reached. It is notable dates had been amended via hand-written insertions a number of times in the body of the letter, and there was nothing to stop the

claimant from disputing a verbal agreement had been reached as recorded. Further, in the claimant's letter of objection, the claimant made no reference to working under objection or agreeing to the contractual changes under duress. It is likely that he will fail to persuade a judge no oral agreement had been reached before his written agreement was confirmed in the offer letter signed by the claimant indicating his acceptance. The contemporaneous documents are an unsurmountable evidential problem for the claimant in that it supports the respondent's version of events, including his attempts at renegotiating commission structures. For example, the claimant wrote in an email dated 6 December 2017 sent to his line manager referencing "we can now see that the targets are impossible to achieve in the time given…can we set some time to discuss the points above and the impact on my target. I am excited about what I can achieve for Rhino focused on the job in hand passionate about what we do but worried about how long it will take me to get there and what impact this has on my earnings." This email reflects the true situation; the claimant had agreed the contractual changes and was concerned about commission payments which he then continued to negotiate hence the emails and communications that followed i.e. on the 17 January 2018, 24 January 2018 and 29 January 2018 leading to the claimant signing the new contract dated 29 January 2018 that included an amended commission structure and amended job description dated 26 January 2018.

18. The claimant complains of a lack of negotiation; which is irrelevant to the issue concerning whether the claimant had accepted the new contract or not. It is apparent from the bundle that whilst there may have been no negotiation on the unilateral reduction in pay and demotion, there appeared to be discussions and negotiations on the commission potential, which the claimant had not been happy with at the outset. During these negotiations it is not disputed the claimant worked to his new terms from November 2017. The claimant submits he had no choice and needed a job, so he delayed signing the new contract in order to negotiate a better package. The problem for the claimant is that he did have a choice; he could have treated the respondent's unilateral breach as a fundamental express breach of contract and a breach of the implied term of trust and confidence and resigned and/or accepted that his contract had been terminated and claim unfair dismissal given he had the requisite two-years continuous employment. The claimant chose not to do so, and that is a fundamental weakness in his case as he continued to work without objection until his resignation on notice.

19. The contemporaneous documents reflect following the commission structure negotiations the claimant signed the new contract of employment on 29 January 2018 amended to delete the requirement for the claimant to meet a minimum number of sales to earn commission. There is no reference on that document to the claimant signing under duress or objecting to the change in his contract, and the only logical conclusion that can be reached is that the claimant negotiated more advantageous terms with respect to commission before he finally signed the contract. The fact the claimant took the view commission would not replace the £50,000 reduction in salary is by the way. The Tribunal appreciates the claimant was unhappy with such a substantial salary reduction and the prospect of earning commission that may not be capable of replacing the shortfall, but he continued to work for the respondent meeting his contractual obligations for a period of approximately two-years before raising a formal grievance on 16 October 2019. The claimant had obtained alternative employment at a similar salary by the time he raised a grievance about the events leading to November 2017 when he

was allegedly "forced" to sign a new contract of employment under duress, the indicative commission structure produced in 2017 was unachievable; and management had failed to deal with his informal complaints appropriately. As the claimant's submissions progressed and were explored it became clearer that he relies on "informal complaints," maintaining in oral and written submissions that he had complained for two-years and this demonstrates (a) he did not affirm the new contract, and (b) the respondent was aware of his "deep concerns" and this must mean he "signed under duress." The claimant made the point that he should be given the opportunity to explore this evidence at the final hearing and he continued to work in order to "see out a full cycle to without doubt, prove to the Respondent their commission structure was flawed, I did this and put the same in writing to the Respondent."

20. In written submissions the claimant argued there was no affirmation of the contract, and this is shown in "all the emails" over the two-year period. He was invited to take the Tribunal to any documents that revealed there had been no affirmation of the contract, and the claimant was unable to do so. In oral submissions the claimant explained he did not "willfully" accept the change, there existed 30 emails complaining about the commission structure which the claimant believed was "flawed" and these were not "all" in the bundle before the Tribunal.

21. It is clear that no documents exist in the bundle put before the Tribunal which showed the claimant was complaining about the contract; he was complaining about commission and had not objected or reserved any right with respect to the changes in pay. The claimant explained the reason for this was that he was not allowed to and commented "now I know why", and yet the claimant submitted a formal grievance when it became clear to him that the commission arrangement he had agreed was not advantageous to him.

22. The "last straw" relied upon by the claimant relates to his grievance. It is not disputed the grievance hearing was held on 29 October 2019, and the minutes were sent to the Claimant on 31 October 2019. No timescales were guaranteed to the claimant at the conclusion of the grievance meeting.

<u>The 29 October 2019 grievance hearing</u>

23. The Tribunal has read the minutes taken at the grievance hearing in detail, which it does not intend to repeat in full as they run to many pages.

24. The notes reflect the claimant stating "I have tried to resolve this situation over the last couple of years with Simon a little bit, mainly with Johnny obviously and Lee…its just hit a brick wall each time…**if I had to put it in a succinct sentence…I would say that the commissions, the structure that was put to me was never achievable**…in October 1917 [2017]…I stated at that point it was impossible to achieve but I would give it a go, and very consistently as per everything I have got here, consistently questioning that this is not achievable…my salary was halved and to make up that half was never gonna be achievable…the document I signed was pretty much under duress." The claimant was asked to give an example of what he meant by signing under duress and he responded "No, yes because I needed the job and what do I do, I didn't agree with any part of the termination letter, it was put to me as a fait accompli as I saw it but I needed a job, **how could I challenge that at a point of time in my life**

when I really needed a job" [the Tribunal's emphasis]. It is clear from the claimant's own admission in the grievance investigation meeting that he had not challenged the new contract either before or after he had agreed terms.

25. Within the minutes reference was made to the negotiated commission structure and the claimant confirmed "so now I have done one complete full year of working to that structure and it is not achievable", and when it was pointed out to him that it "would be nice to replace your salary but here is not any guarantee it is just potential earnings" the claimant's response was "I think that's getting into semantics…" There followed a discussion about the commission structure with no target being potential earnings with no guarantee to make up the £50,000 which was the crux of the claimant's grievance and his claim for constructive unfair dismissal. In the grievance hearing the claimant stated, "it's about being given the opportunity to take my salary back to where it was…Jonny and Lee and Simon…we had a couple of long and deep discussions about the concerns I've had." Later, in the meeting after discussing a number of other matters the claimant stated "It's very simple, it's your salary was X, it was halved…I was given the opportunity to replace that with commissions. I said at that point it was not achievable…" An agreement was reached that the respondent had removed limits for the commission and added a discretionary payment to help the claimant after he had "signed this new arrangement" which indicates other discussions did take place and subsequent agreements reached "probably to try and keep me motivated." The claimant's clear issue was the amount of commission he had generated; it was "not enough" and a disincentive. The claimant made reference to "no one wanting to talk to me about resigning" and that "I know you've got a procedure" and a "speedy response" to the grievance was requested.

26. It was left that the respondent did not have sufficient information and "it's really important we get it in, the commission information…and let us know if you can find those emails." Ms Quinn submitted the cclaimant was asked to send on emails as the investigating officer found the Claimant's grievance to be so broad and vague. The Tribunal was doubtful that the email notes could be interpreted to mean that an agreement was reached that the process would be delayed pending the claimant providing further information, however is was undeniably the case that information relating to commission was outstanding and further investigation would need to take place. The claimant would have understood that this was the position at the time.

27. A grievance investigation subsequently took place and managers were interviewed including DS who related how the discussions with the claimant progressed and the claimant's "primary focus was if and how he was going to be able to get himself back to the income of the previous role, circa £100k..." The grievance investigation meeting was minuted and reference was made to a document titled "CJ response letter" referred to above. When asked whether the claimant had taken the position under duress DS responded "it is fair to say CJ was not happy and did not agree that his performance as Director of Operations was not working, despite the outcome of his review, but he did not take the new role or sign his contract under duress. The period between the initial presentation of the new contract and his signing of it gave lots of opportunity for review and amendments. By January 26, 2018 it appeared the contract was acceptable and he had discussed any outstanding concerns with those relevant to the issue." The contemporaneous documents before the Tribunal reflect this history.

28. At a grievance meeting with another manager JM, the claimant's line manager, was asked about the claimant's allegation that he had signed the contract under duress. He reported that legal advice had been mentioned and the claimant "off the cuff" said "perhaps I should go for unfair dismissal." JM described how the commission restrictions had been removed and in December 2018 commission rates were discussed and "CJ [the claimant] agreed that he was comfortable with the new proposed package."

29. On the 19 November 2019 the claimant was sent an email in response to his requesting a "speedy response and positive outcome," apologising for the delay in sending him the outcome. The financial director investigating the claimant's grievance wrote "you have my assurances that I am doing a thorough investigation into your grievance and do not wish to rush this process which is important."

30. On the 20 November 2019 a third grievance meeting took place with another manager, and prior to that on 19 November 2019, the financial director wrote updating the Claimant and informing him that "Due to me being away for a week and catching up with a backlog of work, this has put me slightly behind. In addition to trying to coordinate diaries with people I need to speak to as part of my investigations…I have further planned leave next week in addition to it being month end… realistically it looks like I will get an outcome to you by Friday 7 December 2019…".

31. The claimant responded on 20 November 2019 "The business has been aware of these issues for over 2 years. For me, this delay is a further example of how poorly I am treated, re-affirms all my concerns and causes me added distress…I would ask you to adhere to the 28 days in the company's handbook for a reply, I am not aware of any unusual circumstances that would not make this response time possible." In a second email sent 22 November 2019 the claimant acknowledged "I understand that the Handbook is there for guidance…" requesting an outcome by the 30 September 2019.

32. It is accepted by the parties that respondent's Grievance Procedure set out in the handbook refers to the following: - "…We will write to you, usually within 28 days of the final grievance meeting, to inform you of the outcome of your grievance and any further action that we intend to take to resolve the grievance. We will also remind you of your right of appeal. Where appropriate we may hold a meeting to give you this information in person…"

33. As submitted by Ms Quinn, the claimant was aware the delays had been due to co-ordinating diaries with witnesses, two trenches of annual leave pre-booked by the financial director/investigating officer, availability of witnesses, responsibilities of the financial director for payroll and month end which were due on 25th of each month and last working day of the month in addition to other work. The Tribunal found objectively the claimant could not have reasonably formed a view the delay was "a further example of how poorly I am treated," he was kept updated and there were valid reasons for the outcome being expected on 7 December 2019 at the latest.

34. The respondent sent an email to the claimant on 21 November 2019 reiterating the circumstances that will "not make a response possible within the ideal 28 days…This is not a compulsory obligation and the handbook is not contractual and is there for guidance purposes only." An outcome was given to part of the claimant's

grievance regarding sales leads and the investigation into the process for customer inquiries concluding "I do not agree with your comments that you have been treated poorly…a recent example being that we have just paid a briefing payment earlier than due, into your wife's bank account to your benefit at your request. I know this as I processed the payment…" The final paragraph of this email clarified the position as follows: "… if I can get the grievance outcome to you before 7 December 2019 I will endeavour to do so, but otherwise it will be on 7 December".

35. The claimant was aware by 19 November 2019 the grievance outcome was due no later than 7 December 2019, and the 21 November 2019 email referenced before the 7 December 2019 if possible or on 7 December. The claimant received the emails on the day they were sent and almost one-month letter verbally resigned and handed across a letter dated 4 December 2019 alleging he had asked for the grievance outcome deadline be the 30 November 2019 and **"I have not had a reply or acknowledgment to this request"** [the Tribunal's emphasis]. The claimant relies on the delay to the grievance outcome as a "last straw" and his statement that he had not had a reply or acknowledgment was incorrect and had the claim proceeded to a liability hearing would have raised credibility issues concerning the claimant as what he had written was not true.

36. The Claimant claims that he was unfairly dismissed in accordance with section 95(1)(c) of the Employment Rights Act 1996 The Claimant contends that the conduct of the Respondent as portrayed above amounted to a fundamental breach of the implied term of trust and confidence and that he resigned in relation to this breach.

Law: strike out on the basis of no reasonable prospects of success/deposit order

37. The Tribunal's power to strike out the Claim is set out in Employment Tribunals Rules of Procedure 2013 rule 37(1) that "*(a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious*".

38. The Employment Tribunals Rules of Procedure 2013 rule 39(1) provides that where "*the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument*".

39. in Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330. The Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in Ezsias, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ). I found that this was

indeed the case here, where Mr Jamison's assertions were contradicted and undermined by contemporaneous documents many which had been signed by the claimant, sent by the claimant and written by the claimant. As can be seen above, I have spent a great deal of time going through the documents, acknowledging that the claimant would have been upset by a fifty-percent unilateral reduction of his salary and with some cause. It is entirely understandable that he believed he had be treated shoddily the respondent who held most of the cards in an unequal employee/employer bargaining relationship. However, it does not necessarily follow that the claimant claim had a reasonable prospect of success two years down the line following the contractual changes.

40. In Ezsias, reference was made to 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence.' Lord Justice Morris Kay in paragraph 26 stated the issue was "whether an application has a realistic as opposed to a merely fanciful prospect of success" and he accepted that there may be cases which "embraced dispute of facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success. I took the view that Mr Jamison's case falls into the category that there is a dispute of facts concerning whether the claimant objected to the new contract and worked under duress that has no reasonable prospects of success given the contemporaneous documentation which reflected the dealings between the parties at the time and not the gloss now given to them by the claimant who has these proceedings in mind.

41. The basis for making a deposit order with reference to the provision "little reasonable prospect of success" imposes a lower threshold compared to a threshold for striking out a claim, thus a deposit order is a less draconian alternative to striking out a claim perceived to be weak but which could reasonably be described as having no reasonable prospect of success. I considered whether the claimant's claim of constructive unfair dismissal fell under the description of "little reasonable prospect of success" a less draconian outcome, and decided that it did not and fell under the definition of "no reasonable prospect of success". If my analysis is wrong, in the alternative I have dealt with a deposit order below, having heard evidence from the claimant under oath that was not entirely satisfactory, evidenced by the fact that he attempted after the hearing to reference additional documents not before the respondent or Tribunal when the claimant was giving oral evidence under oath.

42. In exercising these powers, the Tribunal has in mind at all times the overriding objective in seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute. This case has been listed for 4-days in 2022, the claimant is concerned with the fact that he is at high risk of being ordered to pay substantial costs when he is already in debt, and rightly so given the fundamental weaknesses in his constructive unfair case and the cost warnings he has been sent by the respondent.

Law: constructive unfair dismissal

43. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

44. In "Harvey on Industrial Relations and Employment Law" at paragraph DI [403]. "*In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.*" I took the view that the claimant's case, at its highest, failed at the fourth hurdle; he delayed over two-years and it is likely had this matter proceeded to trial he would be deemed to have waived the breach and agreed the new contract, in the event of the trial judge in the first instance not finding an express agreement by the claimant to vary.

45. The Tribunal's starting point would the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "*made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'*" (see Harvey DI [411]).

The implied term of trust and confidence

46. The claimant is relying on the alleged breach of the implied term of trust and confidence; he is not relying on an express breach of contract.

47. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test. I took the view that in the absence of an express agreement to vary, the respondent's unilateral reduction of the claimant's salary by 50 percent could well have amounted to

a breach of the claimant's express terms and the implied term of trust and confidence. The respondent was repudiating the contract; it had offered the claimant less advantageous terms and would have brought the employment contract to an end had not the claimant accepted them.

48. The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. In Mr Jamison's case it appears the proscribed conduct took place in August 2017 when the claimant was informed of the contractual changes and yet he remained in employment until 3 January 2020 after resigning when the grievance outcome was due no later than 7 December 2019 and the claimant wanted to be told by the 30 September 2019, a date the respondent had never agreed to. In Malik it was held that the employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

49. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis –v- Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term".

50. In Omilaju –v- Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer. Turning to Mr Jamison as set out above, I took the view if the matter proceeded to a contested hearing the anticipated date for the grievance outcome and reasons for it did not contribute at all to the breach of the implied term of trust and confidence. It is likely a judge taking the contemporaneous email exchange into account would find the anticipated date for grievance outcome was an entirely innocuous act on the part of the respondent which could not amount a final last straw. I have doubts that the claimant genuinely but mistakenly interpreted the act as hurtful and destructive on his trust and confidence in the respondent given his misconceived attempt to build up a case in the resignation letter, as set out above. The claimant had been given part of the outcome and he was aware that the remainder was

due on a set date, if not earlier. He had waited for over two-years to bring his grievance and it was difficult to understand the urgency of an outcome and in the claimant's eyes a "delay" of 5-working days.

The employee must resign in response to repudiatory breach

51. "The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation …" (see Harvey paragraph DI [508]).

52. Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105, the EAT held "… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … **And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him**" (per Arnold J) [the Tribunal's emphasis]. This point is relevant to Mr Jamison's case given the further delayed after he was told the anticipated date of the grievance outcome, and it is likely the claimant's case would have failed on the issue of waiver in addition to the other reasons for finding the claim had no reasonable prospect of success.

Waiver of breach

53. Weston Excavating cited above; The employee "*must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*".

54. In the case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, the employee was censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract (see Harvey DI [523]). Turning to Mr Jamison, he was informed on the 20 November 2019 the outcome would be sent to him on the 7 December 2019 and yet the claimant did not resign until the 4 December 2019, 3-days before the grievance outcome was expected if not earlier. It is undisputed that as matters transpired, the claimant would have received the grievance outcome on the 4 December 2019.

Last straw

55. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal set out the following five questions to consider: -

55.1 What is the most recent act which the employee is pointing to as a reason for resignation?

55.2 Has the employee done anything that suggests that they have affirmed the contract since that act?

55.3 If not, was the act alone sufficient to justify resignation?

55.4 If the act alone was not sufficient, was there a series of actions which cumulatively, resulted in a breach of contract? If the answer to this is yes, there is no need to give consideration to a previous affirmation.

55.5 Did the Employee resign totally or partially in response to the breach?

56. In *Phoenix Academy Trust v Kilroy (2020) UKEAT/0264/19*, the following main points were established to consider for constructive dismissal claims: -

(i) Accepting the employer's actions affirms the contract.

(ii) Once affirmed, the employee cannot argue that it amounts to a breach of contract. The employee's affirmation removes the breach.

(iii) If the employer does something else which amounts to a breach of contract, this will break the chain and amount to a last straw. This would entitle the employee to resign and claim the 'last straw'.

Conclusion

57. Rule 37(1)(a) provides that all or any part of a claim or response may be struck out if it is 'scandalous or vexatious or has no reasonable prospect of success'. Having considered all of the information before me, I was satisfied that the claimant's claim of constructive unfair dismissal has no reasonable prospects of success for the reasons set out mindful of the fact that Tribunals should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospect of success. As references above, strike-out is a draconian step that should be taken only in exceptional cases and caution should be exercised. It is more likely than not that if the claim were to proceed to a final hearing and the claimant given the opportunity he seeks today, namely, to cross-examine the respondent's witnesses, his constructive unfair dismissal claim would not succeed given the fact that the contemporaneous documentation supports the respondent's position that the claimant had not worked under protest, alleged duress at any stage or reserved his right to take action (e.g. unfair dismissal proceedings) against the respondent when he agreed the new contract.

58. On the face of the documentary evidence the claimant's new contract was expressly agreed by him and it was clearly enforceable as the claimant carried out his contractual duties for which he received and accepted a salary and commission under its terms having worked under those terms and negotiate changes to the commission structure before and after signature. The claimant effectively argues that his consent to the new contract was acquired through duress; had he not agreed it dismissal would have followed. It is clear the claimant was unhappy and remains unhappy with the fifty

percent reduction in his wages, understandably so. However, he was prepared to continue in employment of the respondent with some enthusiasm and generate commission payments, which he renegotiated, in the hope that they would cover his loss of earnings. It is also clear that the respondent had made it clear when it offered the claimant the new contract he would be dismissed if it was not accepted. When the claimant signed the new contract, he did not indicate on the contract itself or on the face of any other document that he was working under protest, which was a possible course of action open to the claimant. The Tribunal invited the claimant to take it to any document in the bundles which referenced the claimant working under duress, or reserving his rights to claim breach of contract/unfair dismissal and there were none.

59. The respondent was legally entitled to terminate the claimant's contract on notice, which it did offering the claimant a new contract. The claimant complains it failed to follow the ACAS Code and the procedure it adopted was unfair; however, such actions cannot without more amount to duress. In short, the claimant knew he would be dismissed if the contract including a pay reduction and commission was not agreed, and it was at that stage action for unfair dismissal/breach of contract should have been taken. It is not sufficient for the claimant to now say that he could not afford legal advice, given the amount of his salary and the fact he was in communication with lawyers over a business matter/property acquisition during the relevant period. It is notable that at no stage did the claimant assert the respondent prevented him from obtaining legal advice, and the notes of the grievance investigation meeting with the claimant's line manager records he was advised to take legal advice and the claimant mentioned constructive dismissal at the time. The claimant re-negotiated, signed the contract and continued to work for the respondent until he obtained alternative employment on similar terms which he took up approximately two years later after raising a grievance and then resigning.

60. Ms Quinn submitted the claimant only noted in November 2017 that he did not agree with the allegation of him underperforming, and there was no reference to him accepting the terms under duress and or working under protest. The Claimant only ever raised this after he resigned. The Tribunal agreed with Ms Quinn's analysis, and it appears from the claimant's own submissions (reflected in his formal grievance) that his objection after signing the contract was to the commission structure and his earnings under it given he was unable to make up the £50,000 shortfall.

61. Ms Quinn also submitted the claimant signed the new contract in January 2018. There was no note on the signed contract that the claimant was signing under duress or working under protest. The claimant only raised the reference to 'duress' and 'working under protest' after his resignation. The claimant worked to the terms of his new contract for two years before raising a grievance and resigning. The contemporaneous documents, taking the claimant's case at his highest, supports the respondent's position that the claimant's case is that he felt aggrieved that his role was changed. If this was how the claimant felt in October 2017, then was the appropriate time to bring a claim not over two years later. The claimant accepted he signed a new contract. He further accepted he had always been paid in accordance with his new contract of employment.

62. The Tribunal accepts Ms Quinn's submission that the claimant clearly affirmed the contract and new terms in October 2017, and as per the guidance provided in Kaur and Kilroy cited above, his argument that the imposition of a new contract incorporating

the wage reduction amounted to a breach of contract two years after affirming the agreement has no reasonable prospect of success.

63. Turning to the claimant's allegation that the way his grievance was handled was the '*straw that broke the camel's back'* the claimant has made much of the "delay" in the grievance outcome, the final part of which was sent to him minutes after his resignation. The Tribunal agreed with Ms Quinn that the manner in which the financial director dealt with the grievance cannot objectively amount to a breach of the implied term of trust and confidence. The Claimant wanted the outcome by the end of November, there was no agreement to this effect, and he was told it would be sent to him by 7 December or earlier if possible, and it was sent to him on the 4 December 2019, a difference of 4-days. The claimant was kept fully informed via email communications and sent a decision in part before his resignation. He accepted at the time the reference in the non-contractual handbook to 28 days was only for guidance purposes. He was aware that the financial director had two trenches of holiday absence and other responsibilities during the period when she was investigating and considering his grievance and this contributed to the time it took her to reach an outcome.

64. Ms Quinn accepted that the last straw could potentially be capable, under the definition in Omilaju , of contributing to a preceding history of acts that together constituted a breach of the implied term as to trust and confidence. She submitted "taking the claimant's case at its highest there is no reasonable prospect of the claimant establishing that the respondent did not have reasonable grounds for taking the time it did to complete the grievance procedure and it was proper to keep the claimant informed that the grievance investigation and outcome would be delayed, which the claimant accepted at the time. The Tribunal preferred Ms Quinn's submissions and concluded that there was no reasonable prospect of the claimant establishing in those circumstances that the delay in providing him with the final part of the grievance outcome amounted to anything other than an "entirely innocuous act": Omilaju. The fact that the claimant attempted to build up an entirely different version of the grievance outcome delay in the resignation letter in order to bolster up his case, points to its fundamental weakness. The claimant was aware by 19 November 2019 the grievance outcome was due no later than 7 December 2019, and after a delay of almost one-month, resigned. The resignation letter dated 4 December 2019 alleged he had asked for the grievance outcome deadline be the 30 November 2019 and "I have not had a reply or acknowledgment to this request." The claimant relies on the delay to the grievance outcome as a "last straw" despite the fact that (a) contrary to the claimant's version of events, he had received an acknowledgement to his request for the 30 November 2019 deadline, (b) was under no misapprehension for the reasons why the outcome could not be given by the 30 November including two holiday absences of the grievance decision maker, (c) the grievance was important and needed a full investigation and (d) he had received part of the grievance outcome with only one week remaining until it was dealt with in full.

65. Objectively assessed the grievance outcome date, whilst it does not need to amount to a breach of contract (which it clearly does not): Lewis –v- Motorworld Garages Limited cited above, does not contribute, "however slightl", to the breach of the implied term of trust and confidence. It is difficult to see how the claimant genuinely interpreted the delay as hurtful and destructive on his trust and confidence in the respondent when looking at the conduct of the grievance procedure as a whole within

the factual matrix. The investigating officer had a reasonable and proper cause for the outcome date taking it beyond .28-days, and it is unlikely the claimant will be able to establish that this central fact could be resolved in his favor, entitling him to rely on the new contract which he had, according to the contemporaneous documentation, entered freely and fully. Taking these two events together, and the claimant's case at its highest, the Tribunal took the view that when considering the issues in the case and the facts that can be disputed, the claimant would have an uphill struggle at a liability hearing given the contemporaneous documentation. The claimant wishes to cross-examine witnesses from the respondent to prove that he was unhappy with the new contract and the terms of commission payments negotiated and re-negotiated. The fact the claimant was unhappy with the bargain he struck is without doubt, and had he taken action against the respondent in 2017 it may well have been the case that it was in repudiatory breach of the express contractual term to pay. The issue was whether the claimant in accepting the new terms did so under duress on the basis that the only choice he had was accept or be dismissed. Given the documents set out within the bundle, including the minutes of the grievance investigation meeting, it is difficult to see how the claimant can establish duress when what he is complaining about was the fact the commission scheme would not provide the means by which he could cover the loss of earnings shortfall following the respondent's unilateral reduction of 50 percent of his pay two years previously. Despite the claimant's submissions and references to documents that do not cast any light on the issue of duress, it appears to be the case that there are no crucial facts in dispute.

Deposit order

66. In the alternative, if the Tribunal is wrong in its analysis of the claimant's claim and the claimant should be given an opportunity to cross-examine the respondent's witnesses and present oral evidence that he was working under duress at a final hearing, the Tribunal would have concluded that there was little reasonable prospect of the claimant succeeding in his claim for unfair constructive dismissal. Touching briefly on the claimant's means, it is undisputed he is in debt and has reached a IVA with creditors which is being paid off gradually.

67. The claimant earns over £50,000.00 per annum, a substantial income, his wife runs her own business which may have been adversely affected by the Covid pandemic notwithstanding financial measures put in place by the government for small businesses. The claimant has not disclosed all his bank accounts, he holds a joint account with his wife into which substantial amounts of salary was transferred as the claimant earns a similar amount to that salary he received under the new contract with the respondent. The claimant owns a house; it is mortgaged. No information was given on the amount of equity he holds.

68. The claimant's monthly expenditure is considerable; he finances three cars, pays for three vehicle insurance policies, pays money across for his independent daughter monthly, has taken out expensive house and building insurance, spends a considerable amount of his income on food and entertainment, pays for three mobile phones. In short, despite the IVA the claimant spends a considerable amount of his income per month on other people, including his wife who also earns her own money. It is undisputed the claimant can lay his hands of reasonably large sums of money when necessary, for example, to pay council tax underpayments. He also repays individual

family members monies owed, and confirmed that if a deposit order in the sum of £1000 was made he would be able to borrow the money so as to proceed with the litigation, but would not be able to pay the respondent's costs were he to lose his case. My preliminary view, based on the documents including bank statements that did not include the joint bank account, the claimant's written statement and oral evidence, was that it would be difficult for the claimant to pay £1000 as he is already in debt, but not impossible. It is more likely than not that the claimant will lose his claim and be on the wrong side of a costs application, which he can ill afford, and this is a risk he would take if the litigation were to proceed.

69. For all of those reasons set out above, and when taking into account the claimant's income as set out in the statement, schedule and bank statements, the Tribunal in the alternative to strike out, would have concluded that the constructive unfair dismissal claim has little reasonable prospect of success and ordered the claimant to pay a deposit of £350.00 (three-hundred and fifty pounds) as a condition of being permitted to continue to take part in the proceedings relating to that matter.

70. In conclusion, the constructive unfair dismissal claim has no reasonable prospect of success and it is and it struck out under the Employment Tribunals Rules of Procedure 2013 rule 37(1).

_____
19.11.20
Employment Judge Shotter

Judgment and reasons SENT TO THE PARTIES ON

4 December 2020

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS