



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Darracott  
**Respondent:** Samantha Denham Solicitors

**Heard at:** Ashford **On:** 11-13 March 2020

**Before:** Employment Judge Corrigan  
Mrs R Serpis  
Mr N Phillips

## Representation

**Claimant:** In Person  
**Respondent:** Mr P Tapsell, Counsel

## REASONS

*Judgment signed on 19 March 2020 and sent to the parties on 11 September 2020, reasons requested orally by both parties on 13 March 2020.*

1. The Claimant claims wrongful dismissal, unfair dismissal and detriment and/or dismissal for making a protected disclosure.
2. On the morning of the second day, after completing his evidence, the Claimant applied to include constructive unfair dismissal in the alternative. This was despite the issues having been canvassed at two preliminary hearings and the Claimant having confirmed at the preliminary hearing on 13 June 2019 that he no longer relied on constructive unfair dismissal (as recorded in my order dated 19 July 2019). He said he did not accept he had resigned but that he had been over-confident in respect of this issue and that he should now be allowed to rely on constructive dismissal in the alternative. The Respondent contested this due to the above history, but the Tribunal allowed the application on the basis that it depended on the same facts and the Respondent could deal with it. It was agreed the Claimant could be recalled to be asked further questions if necessary following the Respondent's witnesses' evidence.
2. The issues in respect of the claims at paragraph 1 are as set out in my Case Management Order dated 19 July 2019 and were confirmed with the parties at

the outset, and then amended as follows following the Claimant's application to include constructive unfair dismissal:

**Detriment/dismissal (PID)**

3. Did the Claimant make a protected disclosure in writing to Samantha Denham on 14 February 2018?
4. Did he disclose information which in his reasonable belief was in the public interest and tended to show that a criminal offence has been or was being committed and/or that Ms Denham had failed or was failing to comply with a legal obligation to which she was subject? The Respondent disputes it was made in the public interest and disputes that it tends to show either a criminal offence or a failure to comply with a legal obligation. Her accountant has spoken to HMRC about VAT and they are not concerned. Ms Denham has spoken with the SRA who are not taking any action.
5. Did the Respondent subject the Claimant to a detriment by:
  - 5.1 not actioning the matters or refusing the requests he raised in the meeting on 21 March 2018?
  - 5.2 ignoring the Claimant?
  - 5.3 refusing requests for leave?
  - 5.4 refusing to claim statutory sick pay?
  - 5.5 accepting the Claimant's resignation?
6. If so was this done because the Claimant had made a protected disclosure?
7. What date did the detriments occur? Is the complaint in time? Would it have been reasonably practicable to submit the claim in time? Has it been submitted within such further period as the Tribunal considers reasonable?
8. Was the disclosure made in bad faith (which can reduce any compensation)?

**Dismissal**

9. Was the Claimant dismissed or did he resign?

**Unfair dismissal**

10. If the Claimant resigned was it in response to a fundamental breach of contract by the Respondent?
11. The Claimant confirmed he relies on the term of mutual trust and confidence. Did the Respondent, without reasonable and proper cause, act in a manner

likely to destroy or seriously damage trust and confidence? The Claimant asserts that she did so by her continuing insistence that he produce fraudulent bills and refusal to give written assurance that would stop.

12. If so did the Claimant resign in response?
13. Did the Claimant affirm the contract?
14. If the Claimant was dismissed or constructively dismissed was there a potentially fair reason for dismissal? The Respondent relies on conduct. In particular the Respondent relies on the Claimant's alleged unauthorised absence, threatening behaviour and blackmail. The Claimant asserts the reason is that he made a protected disclosure (which would be automatically unfair).
15. Was dismissal reasonable in all the circumstances?
16. If the Claimant was unfairly dismissed, was there a chance the Claimant would have been dismissed fairly in any event?
17. Did the Claimant contribute to his dismissal?
18. Was there an unreasonable breach of the ACAS Code by either side? Should the award be adjusted (up or down) as a result?

### **Wrongful dismissal**

19. If the Claimant was dismissed was he entitled to notice or did he commit conduct that justified the Respondent withholding notice? The Respondent relies on the conduct of 20 April 2018 as justifying withholding notice.

### **Hearing**

20. We heard evidence from the Claimant on his own behalf. On behalf of the Respondent we heard evidence from Ms Samantha Denham (Solicitor) and Mrs Nichola Histed (HR Consultant).
21. There was a 253 page agreed bundle to which further pages were added during the hearing and a 19 page bundle of additional documents produced by the Claimant. The parties made oral submissions.
22. Based on the evidence heard and the documents before us we found the following facts.

### **Facts**

23. The Claimant began working for Ms Denham as her legal secretary on 6 October 2014. He has a lengthy career as a legal secretary.

24. Ms Denham is a solicitor and sole practitioner. She is a conveyancer. Initially she worked for a firm but set up her own practice in 2001. She initially had a legal secretary for 13 years or so who had worked with her at her previous firm.
25. We accept that until the allegations made to the SRA by the Claimant which are still being investigated the Respondent had an exemplary record with no client complaints. The Claimant accepts Ms Denham is a good conveyancer.
26. We were told that the relationship between the parties was fine for the first two years. The Claimant says that at the outset of his employment the Respondent told him to routinely double up disbursements to clients. He relies in particular on the fact he says that although 99% of titles are electronic and cost £3 there are no disbursements as low as that. The Respondent disputes this.
27. On the first day of this hearing the Claimant produced a spreadsheet (additional pages 254-256) which he said represented one year of Ms Denham's invoices, those which coincide with his first year. He says that he copied 100 invoices, with client details, onto a memory stick because he was beginning to suspect issues with the way clients were billed. This was the only information he downloaded or took on a memory stick during his employment. He claims to have done this in mid- 2016 and that he then forgot about it until much later, and he created this spreadsheet in January 2020. The spreadsheet does not give the raw data from invoices but lists what he alleges are doubling up of disbursements and bank account mark ups. The bank account mark ups are speculations based on the published information about current charges from Barclays. These were not in his mind back in 2016. He has no knowledge of the actual charges the Respondent had to pay the bank.
28. The Respondent in response said that it is impossible to tell from the spreadsheet what the actual disbursement costs were without double checking against the file. She says that they are all different amounts (and they are). She says there are multiple explanations for this. For example, one might apply for title deeds electronically but then be sent paper versions at the higher cost. She also said that if there are additional plans there are additional costs for each, which might be expressed as one charge on the file. She also said that it is legitimate where there is significant copying to add a charge for that and that the Claimant was not always marking the file clearly when that had happened.
29. We find the Claimant had questions about the Respondent's billing early on, sufficient to take client documents without permission for his own purposes, but did not act at that time. He carried on producing bills until the matters in 2018 addressed below.
30. We accept the Respondent's case that document 254-256 alone proves nothing. We accept the Respondent's account that it is necessary to refer to the file to see what the disbursements were. We note too that although the Claimant did not have much conveyancing experience prior to this, he did have experience of solicitors' billing and had been a bookkeeper.

31. The Claimant mentioned in evidence a conversation in which the Respondent said that his predecessor had not had an issue with this, suggesting that it had been discussed. However the Respondent disputes this and says that the predecessor worked with a different system prior to the electronic portal. We accept the predecessor had not had any issue with the billing but we do not find that the matter was raised by the Claimant until the email expressly raising it below. This was despite conversations about charging/VAT and changing standard letters (paragraph 51 of his statement).
32. We find matters changed in February 2018 with an incident involving Mrs Denham's parents' transfer. They had signed a deed but it had not been witnessed. It had been done some time before and was on the file, when the matter became urgent and completion was required that Friday (9 February 2018). Mrs Denham gave the Claimant a dictated letter on an MP3 file to be sent with the documents that day. Up to then that was normal practice. It is not disputed that the Claimant then signed the deed as a witness in the absence of the parents. He then sent the document out that day, with the letter, as he had been instructed.
33. The Claimant says that this was as a result of an instruction on the MP3 to witness the document. In addition he says there was a verbal conversation with the Respondent who said she had seen her parents sign and it was all right for the Claimant to sign it. He says he began to regret doing so after he left work at 2pm and that afternoon wrote the email at page 80 at 3.22pm. The email does record that the Respondent asked him to witness the document and that he was not happy about it and should have refused. He said he considered there was no dishonest intent so would not take the matter further. He asked that he not be put in this position again and that the parents come in with their ID and confirm they signed the document.
34. The Claimant says that there was then a conversation about this on 12 February when Ms Denham said it was his fault for agreeing and then the parents did come in, although he questioned whether in fact they were actors. He expanded on this account in a grievance written on 21 April 2018 (mentioned below). He had not mentioned it again in other grievances prior to this. In those contemporaneous accounts he did not say the instruction was on an MP3. He also without any evidence questioned whether the Respondent might have been doing something without her parents' knowledge. He also queried the veracity of her mother. He has not kept the MP3 file, despite taking the other documentation on a memory stick.
35. The Respondent says that she did not realise that the deed was not witnessed. She has witnessed her parents' signatures before as their legal representative and if she had been present when they signed she would have witnessed it. She says it makes no sense that she would not have. We also accept that she could have organised the document to be properly witnessed or signed it herself. Although that would also not have been when they signed, and we do not condone that, we accept her argument that it would have been a much less risky way to resolve the problem of the deed not being signed, as it was her parents and the likelihood of it ever being an issue is slim. She says she did

- not realise that it had not been signed. She signed the letter but left it for the Claimant to add the enclosures. The first she was aware the Claimant had witnessed the signatures was when the Claimant sent the email at 3.22pm. By this time the document had been sent out. She says she showed her parents his email and they were horrified. In order to rectify the situation she arranged for them to come the following Monday and reconfirm their signatures. There is a dispute about the date they attended but we find it likely it was the 12 February. She says the Claimant thanked her and she heard nothing more about it until the third grievance (below) which was the first time she saw the accusation that she had been angry and berated him. She also suggests it is the first time he said she was unprofessional but that had already been said in the first email. She did not put her own account in writing at that time or challenge the email on page 80 in writing, but she did dispute the account in response to the 21 April 2018 at p142 where she said it was vexatious and she questioned why he signed the document.
36. At no time did the Claimant mention the instruction being on the MP3 and the Respondent has routinely deleted it from her own records, and also deleted the Claimant's records when he left employment and a new staff member took over the account.
  37. On balance, we prefer the account of the Respondent as being the more inherently credible. There were other ways for the Respondent to rectify the problem if she had known about it before it was sent. She was the one who usually signed the deeds. Although the most contemporaneous account is that of the Claimant he had motive to write it to cover his own position. It is surprising that as a solicitor the Respondent did not keep her own contemporaneous account of a matter so serious, or take action in respect of the Claimant's actions and to rectify the position correctly given she was aware prior to the document arriving at the other firm (though we note we are not conveyancers and we did not put this to her for her comment). We accept that she did not do this as she thought she had placated the Claimant and the problem had gone away. It is not for us to decide whether her role in this was right or wrong, or indeed whether there are any implications for the Claimant.
  38. This event however caused a sea change in their relationship. On 14 February 2018 the Claimant (whilst off on self certified sickness & during working hours) raised the issue with the disbursements (p81). He felt the need to state it was not hostile. He raised overcharging clients and not adding, and therefore, not paying VAT. The sums involved were small in terms of each client. There was a demand in the letter that she "rectify [her] quotation and billing procedures without delay". He also expressly linked this email to the previous email (p80) and asked for formal acknowledgement of each. For the avoidance of doubt this email and the request for the acknowledgement of the previous email does not change our view that the Respondent's parents had attended on Monday 12 February 2018.
  39. The Respondent confirmed receipt of the email the same day (p83) (though not of the previous email) and asked for confirmation as to why he had not attended work and not informed her. He claimed in reply (p85) to have left a voicemail

- though we accept the Respondent had not received one. He said he had back pain, and that he might be fit for the next day but if not he would email. He added by way of a post script: "please also acknowledge receipt of my [email] of 9<sup>th</sup> February".
40. The Respondent replied (p88) saying she had not received the answer phone message and asked him to email if he was unable to attend the next day. We note that both were sending these emails in the evening.
  41. Around the time of her reply on 14 February 2018 the Respondent contacted Ms Histed. We accept the evidence of Ms Histed that the Respondent was very distressed in that call. She already perceived that she was being threatened and wanted support to deal with it. She was also finding it hard that the Claimant was absent and therefore not completing his work.
  42. The next day the Claimant did not come into work. The subject header said "still afflicted – staying home". It was sent at 12.43 though he said he had also sent it earlier but there may have been problems with his account. He also included a record of his phone call the day before. The Respondent replied acknowledging three emails and saying it was odd there had been no message the day before but there were messages from various people that day (p89).
  43. Again on Friday 16 February the Claimant contacted the Respondent saying he was "still not feeling up to it- staying home again". He offered to do extra hours the next week if there was a backlog (p90).
  44. The Respondent asked her accountant to look at the disbursements and VAT. She also contacted HMRC. This was on the advice of Ms Histed.
  45. The Claimant returned to work for 7 days and then commenced a further extended period of absence. This time the issue was his toe. He again updated the Respondent on a day to day basis, but in the event that was an 8 day absence for gout. He returned to work on Monday 12 March 2018 after a GP appointment. There was a conversation between the parties about the fact he was not entitled to sick pay without a fit note. It was recorded in an email (p99) that the Claimant agreed to forego it. By this time the Respondent was recording conversations by email.
  46. In the same email (p99) Ms Denham questioned the Claimant about the GP's advice as her concern was whether it was going to recur.
  47. The Claimant then did not do a full day on 13 March 2018 either, saying he had a sickness bug, but communicated this on 14 March 2018 when he also remained off sick. He was off sick the remainder of the week. By this time he had had almost three weeks off work. Since his email of 14 February raising the issue of disbursements/VAT the Claimant had attended work for only 7 ½ days approximately. This had a significant impact on the Respondent who is a sole trader and has only the Claimant for support. We accept the evidence of Ms Histed that this was leaving the Respondent's business very vulnerable and

- she was even contemplating ceasing trading as she could not cope, trying to do her own work and the Claimant's in the pressured conveyancing sector.
48. On Monday 19 March 2018 (the day the Claimant returned to work) he sent the email at page 103 at 10.48 in response to the Respondent's questions about the GP's advice. He said the GP had said he should be sufficiently hydrated and had decided to start drinking tea instead of coffee. He asked the Respondent to provide tea bags. He raised the office temperature as a possible cause of the gout and requested that the Respondent buy a thermostat and timer for the heater. He said that in future he would return home if the office was not at 19 degrees which was the minimum temperature he was prepared to work in.
  49. Later the same day he wrote the email at page 105. He said that she had a duty of care to him as her employee. He again said the gout attack was caused by the office temperature and asked the Respondent to take responsibility and not to deduct pay during his absence due to the gout. He again said he would go home if the office was this cold again.
  50. The Respondent replied that evening (p107) at 11.45pm. She acknowledged his concerns and requested a meeting the next morning. The Claimant replied the next morning saying he might have to go home again and that he was not feeling like a discussion that day. He said "Maybe tomorrow morning" (p108). The Respondent agreed to this (p109).
  51. The meeting took place on 21 March 2018. The discussion was documented and the Claimant amended and signed the record (p111). It lists that VAT on disbursements was raised (although not the doubling of disbursements but does refer back to the 14 February email). The Claimant accepted that the office temperature had been dealt with. He made a number of other demands with respect to his work station such as a foot operated pedal transcription system; a conveyancing management system; a stand alone scanner; the provision of tea bags and milk; a water filter jug; caller ID and fibre broadband. He also asked for a pay rise and £2,000 for unpaid overtime.
  52. The Respondent provided her response on 16 April 2018, after the Easter bank holidays and some additional leave (pp115-117).
  53. She explained her position regarding the VAT and disbursements. She said she had been undercharging and set out how her systems would be changed and what she required of the Claimant. She also addressed the Claimant's requests and explained why she could not provide each of them. She said that her family style of management was not working and she needed to put their relationship on a more formal footing, by which she meant appraisals, setting expectations, performance management and an absence management policy and procedure. This was on the advice of Ms Histed.
  54. The next day the Claimant was absent saying he was "feeling sick". On 18 April 2018 he was still unwell giving the reason as an upset stomach. On 19 April



- he said his digestion was upset, but also that he was upset and stressed at their dispute. He said he would draft a formal grievance (pp118-120).
55. The Respondent replied saying there was no need to be stressed or upset. She felt he had aired his concerns and she had listened and explained her response. She did not consider it a dispute. She offered to discuss the matter but said that if he chose a formal route she would respect that and follow the correct procedure (p121).
  56. On 19 April 2018 the Claimant submitted grievance number 1 (pp 123-124). He raised the question of VAT and said his email of 14 February 2018 had not been properly investigated. He said his expectation was that she would involve an accountant and an audit in order to sort the matter out with HMRC. The grievance suggests that not only did he want the issue rectified for the future but that the Respondent should rectify past underpayments. The grievance is written in a demanding tone and threatens a report to the Solicitors Regulation Authority, at some unknown moment. He said that asking him to continue to with the wrong procedure would be grounds for constructive dismissal (p123). He ended the grievance saying he would not return to work until she assured him in writing that he would not have to produce any incorrect invoices with respect to VAT. This was despite the change in the templates the Respondent had already put in place.
  57. The Respondent replied saying she took this as a threat and found it incredibly upsetting. She said it would need to be addressed formally and she would seek legal advice. She said she would be sending a meeting invitation in due course (p125). This was sent at 8.37pm. He replied at 10pm saying "you assume incorrectly", asking for a copy of the grievance procedure and querying the need for a meeting.
  58. He remained absent on 20 April 2018 without communication. The Respondent responded by email at 12.50pm saying she attached the ACAS Code. She asked for him to clarify the reason for his absence. She said "is it a refusal to attend or sickness? She said that as the grievance was preventing the Claimant fulfilling his duties a formal procedure was required and a meeting necessary. The Claimant replied at 2.36pm (the end of his working day) and said he had a migraine which is why he was absent. He said he could come to meeting any time, that he would be recording it and may bring someone. He asked for 5 days holiday the following week (p135).
  59. The Respondent replied (p136). She said he needed to let her know in advance if he was not coming in. She said she could not sanction the leave request due to the backlog of work that had accumulated during his absences. She invited him to a hearing the following Thursday. She refused consent to recording the meeting but said there would be minutes that he would have an opportunity to approve. A grievance invitation was attached from Ms Histed (p137).
  60. The same evening the Claimant submitted grievance number 2 asking for sick pay and double holiday pay (on the basis that he had to make up the work afterwards). He said if he was to continue working for the Respondent he

- wanted his monthly salary with “no petty deductions”, at least 3 weeks of his holiday a year covered by a temp and 10 days’ sick pay per year. He raised the refusal to sanction his last minute leave request (p138).
61. The next morning (Saturday 21 April 2018) the Claimant sent grievance number 3, resurrecting the issue of his signing as witness on the Respondent’s parents’ transfer document. He gave his account of what had happened and said he wanted an apology in writing. He queried whether he should be working for her (p139).
  62. At 8.01 am on Monday 23 April 2018 the Claimant sent a further email (p140) asking the Respondent to reconsider and confirm that she would allow him that week as holiday. He said “the alternative would be my resignation with immediate effect and a constructive dismissal claim in the Employment Tribunal. It’s your decision.”
  63. The Claimant did not attend work and gave no other reason for his absence.
  64. At 9.53am that morning the Respondent replied to the 2<sup>nd</sup> and 3<sup>rd</sup> grievances saying “I am finding this all very hurtful and unfair”. She said she denied the Claimant’s version of events on 9 February 2018 and said “this appears to be another of your vexatious claims and I question why you signed the document”. She said the response to the grievance will be dealt with in the correct way and referred the Claimant back to the procedure set out in the grievance meeting invitation (p142).
  65. At 10.13 the Respondent replied with respect to the holiday (p144). She said due to the Claimant’s high level of absence she could not sanction the holiday request at such short notice.
  66. There was no reply from the Claimant in respect of his attendance at work that day. So, after advice from Ms Histed, the Respondent wrote at 7.47pm that evening saying she confirmed his resignation (as indicated in the email at 8.01 am that morning) “effective from close of business on 20 April 2018” (p146).
  67. At 9.06pm the Claimant sent an email reiterating his request for a foot pedal operated transcription system, providing a link to ebay. For the first time he mentioned he sometimes get physical symptoms using the keyboard and mouse. He sent this after he had received the email from the Respondent with the subject header “confirmation of resignation”. He said in evidence he had not seen it before sending this email, but we find it incredible that that he would not have noted that header.
  68. He then wrote at 9.23pm in response to the Respondent’s email confirming the resignation (p152) “I think you are being somewhat hasty. I’ve just sent you an email that could be a way forward. I sent it before seeing your message. I hope you will reconsider, as if I received a positive response to my last [email]... I was prepared to go back to work tomorrow.” We find this was essentially an acceptance that he had not attended work deliberately on that day.

69. At 10.28pm he wrote a further email entitled "resignation or dismissal?". He said "I didn't actually send you an [email] saying "I resign" did I? Maybe you were hoping for me to resign so you thought you would help the process along?..." He finished saying he trusted the grievance hearing would continue anyway (p154). At 11.29pm the Claimant sent yet a further email about the pedal operated transcription system, with a further ebay link (p155).
70. The Claimant said he had had a draft resignation ready to go. He was also looking for other jobs.
71. Around 17 April 2018 the Respondent had been contacted by a law graduate, a remote contact of Ms Histed. She had come into the office on the 23 April 2018 for a coffee with the Respondent. The Respondent accepted the resignation and then invited the law graduate to start the next day. Initially it was to be temporary work experience and then an employment contract began on 8 May 2018. She still works for the Respondent part time while she completes her law studies.
72. The Respondent replied the next day. She confirmed she was not allowing the holiday and not purchasing any of his many requested items as she could not "be held to ransom any more". She said he had resigned with immediate effect at 8.01am the day before. She said "I allowed you the whole day to turn up for work or respond which you did not. I therefore accepted your resignation after the working day having allowed you a cooling off period. As a small business I cannot absorb this kind of absence and uncertainty and your failure to attend was deemed confirmation of your resignation as no further contact was made." She said she felt very stressed and threatened by his actions. She said that she had accepted the resignation and therefore the employment and "constant out of hours harassment must now end" (p157).
73. The Claimant sent a further email on 24 April 2018 (p156) at about the same time as the above message from the Respondent. He said he assumed the grievance hearing was going ahead and that it could be an opportunity to clear the air, but then proceeded to threaten drafting an ET1. He took issue with the Respondent's mother's signature on the transfer document, suggesting it was not genuine, with a threat to contact the other side of the transaction's representative and to make reference to it in this claim (p156).
73. The Respondent replied referring back to her previous response and saying this email above "continues to demonstrate the lengths you will go to bully...me and the constant demands and threats make me feel unsafe in your company".
74. The Claimant then wrote to Ms Histed saying he expected to attend a grievance meeting that week but that he now believed he had been constructively dismissed. Ms Histed replied confirming the meeting would not now go ahead as the resignation had been accepted and the employment had ended (p161).
75. The Claimant has since reported the Respondent to the SRA and that was ongoing at the time of the hearing. At p197 is a letter from the Respondent's accountant saying she had discussed the VAT in relation to Land Registry fees

- with both the Respondent and HMRC's VAT department and she confirmed there was no issue in this regard. She said there are occasions where VAT was under charged, but also occasions where it was overcharged and the net effect was negligible. She confirmed the error has been corrected and it is now charged appropriately. We had no reason to question this and accept this evidence.
76. By the end of the employment the relationship between the parties had broken down and was not salvageable. We agree with the Respondent that the Claimant was using the information he believed he had over Ms Denham to dominate her and threaten her if she did not comply. We find this based not on the timing, but the quantity of emails from the Claimant and the clear threats within them along with unreasonable demands. Whereas some were minimal in cost he was consistently trying to get money out of the Respondent. In terms of the timing of messages we note that both of them were emailing each other out of hours.
77. We are satisfied that if the Claimant had not sent the email threatening to resign he would, given the involvement of Ms Histed, have been dismissed for gross misconduct for his threatening behaviour and his absence without permission. This was an unsustainable situation for any small business but particularly a sole practitioner. We also note that the fact that the Respondent had found a potential suitable replacement promptly was not the reason for accepting the Claimant's resignation. We accept the Respondent was in urgent need of additional support.

## **Relevant law**

### **Detriment/dismissal for making a protected disclosure**

78. A protected disclosure is defined in sections 43A and 43B Employment Rights Act 1996. Not only must there be disclosure of information that in the reasonable belief of the worker tends to show one of the matters listed in section 43B(1) but it must be in the reasonable belief of the worker that it is made in the public interest.
79. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure (s47B Employment Rights Act 1996). It is for the employer to show the ground on which the act or deliberate failure to act was done (s48 (2)).
80. An employee shall be regarded as unfairly dismissed if the reason for the dismissal is that he made a protected disclosure (s103A Employment Rights Act 1996). Section 123(6A) provides that where it appears to the Tribunal that the disclosure was not made in good faith then the Tribunal may, if it considers it just and equitable, reduce the compensatory award it makes to the Claimant by up to 25%.

## Constructive dismissal

81. Section 95 of the Employment Rights Act 1996 states:

**(1) For the purposes of this Part an employee is dismissed by his employer if . . . \_**

. . .

**(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.**

82. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:

82.1 a repudiatory breach of contract by the employer (i.e. a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract and which entitles the employee to leave without notice);

82.2 the breach caused the resignation; and

82.3 the employee did not delay so long before resigning that he is regarded as having affirmed the contract and lost the right to treat himself as discharged.

83. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall 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.

84. A breach of the implied term involves conduct which seriously damages or destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160\_00\_3009).

## Unfair dismissal

85. In relation to ordinary unfair dismissal the law is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

**(1) In determining for the purposes of this Part 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.**

**(3) . . .**

**(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.**

86. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

87. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

## Conclusions

### Detriment/d dismissal (PID)

*Did the Claimant make a protected disclosure in writing to Samantha Denham on 14 February 2018? Did he disclose information which in his reasonable belief was in the public interest and tended to show that a criminal offence has been or was being committed and/or that Ms Denham had failed or was failing to comply with a legal obligation to which she was subject? Was the disclosure made in bad faith?*

88. We accept the Claimant genuinely believed that there was wrongdoing in respect of disbursements and VAT. However he was using this to hold power over the Respondent which led to his demands and attempt to get money from the Respondent. We find his statements about disbursements and VAT were not made in order to benefit the public. He took no action when he was first concerned and had downloaded files without the Respondent's consent or knowledge. We do also consider he acted with bad faith.
89. The Claimant's email does not therefore meet the necessary test in s 43B. Nevertheless we went on to consider the other issues raised below.

*Did the Respondent subject the Claimant to a detriment in the following ways. If so was this done because the Claimant had made a protected disclosure?*

*not actioning the matters or refusing the requests he raised in the meeting on 21 March 2018?*

90. The Respondent did take action in respect of the complaints about office temperature and obtained a digital thermometer. She took action in respect of the VAT issue and explained the new process she had put in place and what the Claimant should do to comply with it. She gave her reasons for not providing every item requested and for each she gave a considered response. To a degree she was motivated by his emails about VAT in that she did not want to be held to ransom. She was motivated by the Claimant's threats not the content of any disclosure about disbursements and VAT. This she treated seriously and addressed. She also wanted to put the relationship on a more formal level once she had involved Ms Histed.

*ignoring the Claimant?*

91. The Respondent did not ignore the Claimant. As above his concerns in respect of the office temperature and VAT were addressed. She responded to all the issues raised. There is multiple correspondence between the two and he was frequently absent. The relationship was deteriorating due to the Claimant's

conduct. There was a meeting and the Respondent's emails remained courteous and she accommodated his requests with respect to the meeting time for example.

*refusing requests for leave?*

92. The Respondent was entitled to refuse the leave request and did so because it was a very last minute request when the Claimant's absences had already caused a backlog and she herself had just taken leave. If there was any link to his email it was again that she did not want to be held to ransom by the threats, not because he had raised an issue in relation to VAT and disbursements.

*refusing to claim statutory sick pay?*

93. The Respondent did not refuse to claim statutory sick pay. The Claimant did not provide the necessary documentation. If he had done, we accept she would have claimed this on his behalf.

*accepting the Claimant's resignation?*

94. The Respondent accepted the Claimant's resignation to draw an end to what had become an untenable situation, with the Claimant being absent and making multiple threats.
95. Having found that the Respondent's actions were not done because the Claimant had raised an issue about VAT/disbursements there was no need to address the time limit issue.

## **Dismissal**

*Was the Claimant dismissed or did he resign?*

96. We find the Claimant resigned. In his email on 23 April 2018 at 8.01am he gave the Respondent a binary choice between allowing him to take holiday or his resignation with immediate effect. He said it was the Respondent's decision. She refused the leave request at 10.13. The Claimant did not attend work that day or communicate further. We find in all the circumstances that this was a resignation. The Claimant has accepted as much in the application for leave to amend to include constructive dismissal, after he had given evidence.

## **Unfair dismissal**

*If the Claimant resigned was it in response to a fundamental breach of contract by the Respondent? The Claimant confirmed he relies on the term of mutual trust and confidence. Did the Respondent, without reasonable and proper cause, act in a manner likely to destroy or seriously damage trust and confidence? The Claimant asserts that she did so by her continuing insistence that he produce fraudulent bills*



*and refusal to give written assurance that would stop.*

97. The Respondent was not in fundamental breach of the contract. She did not insist on the Claimant continuing to provide false bills. She explained how she had amended her template going forwards and how he was to proceed as set out at page 115.
98. Having found that the Claimant resigned and it was not in response to a fundamental breach by the Respondent it was not necessary to consider the other issues. However we do note that, even if we are wrong and there was either a dismissal or a constructive dismissal, we consider this relationship had irretrievably broken down due to the Claimant's conduct and a fair dismissal and/or a resignation was likely in the near future. The Claimant was dominating the Respondent with threats and withholding his work without permission. The Respondent could not be expected to tolerate this any longer.
89. We also note that we do not consider there was an unreasonable breach of the ACAS Code by the Respondent. The Respondent had offered a meeting. The Claimant had resigned and also by his conduct was making matters untenable. It was not unreasonable to regard the relationship at an end and cancel the meeting.

### **Wrongful dismissal**

89. Having found the Claimant resigned the claim for wrongful dismissal is unsuccessful.

### **Costs**

90. Following the oral decision the Respondent's Representative made an application for the Respondent's costs of £5,750 on the basis that the claim was vexatious and had been conducted in a way that amounted to harassment at times. It had caused incredible upset to the Respondent and had been going on for two years. The Claimant's case had shifted in the preliminary hearings and particulars of claim culminating in the late admission of evidence based on stolen documentation. The Respondent referred to the way the Claimant had conducted the case at pages 178,181 and 198. He also said that after one of the Preliminary Hearings the Claimant had shouted words to the effect of "that's one-nil" at the Respondent in the corridor. The Claimant made counter allegations about the Respondent's conduct of the case.
91. Our decision was that the claim was not completely vexatious. We considered there had been a genuine issue to resolve as to whether the email chain between the parties on 23 April 2018 was a resignation or dismissal. We also considered there was an arguable case in respect of whether the Claimant had made a protected disclosure, noting that even where there is bad faith this only effects remedy. The fact we found against the Claimant does not make the claim vexatious.

92. We also considered the fact that we found the Claimant behaved in a threatening manner during the employment does not make the claim vexatious where there were genuine issues to be determined between the parties. However we noted that the tone of the Claimant's emails that was evident whilst in employment continued in the way he conducted the case. We were also particularly concerned at the unchallenged account of Ms Histed that the Claimant had shouted one nil in the corridor after one of the hearings. We also considered the unpleasant name calling by the Claimant in the conduct of the proceedings was not necessary, for example: "crook", "liar", "unprofessional" and "fraudulent". We considered the Claimant had acted "abusively, disruptively, or otherwise unreasonably" in the way the proceedings were conducted. Therefore, although it is the exception, applying rule 76 (1) Employment Tribunals Rules of Procedure, we considered we must consider an award of costs, and did do so.
93. We considered the Claimant's ability to pay though we are not obliged to. He is on Universal Credit of £317.80 per month, owns his own house and will in some years have a pension and could cash it in now. He would not disclose how much. He had asserted that he is now unemployable. We do not accept that he is unemployable. This case may impact his ability to work in the legal sector but we consider there is no reason why his skills could not be valuable in another sector at a similar rate of pay. We took account of the fact that the Claimant was not a high earner and when he worked he worked part time at £9 per hour.
94. We took some time to have an extended discussion about what we found a difficult decision. Ultimately we decided not to make an award of costs. We took into account Universal Credit and how low it is. We also took into account the nature of this dispute and felt it would be too draconian to put him in a position where the Respondent could seek to enforce an award against his home or force him to cash his pension early.

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Employment Judge Corrigan  
9 December 2020

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