EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr David Morris	**AND**	Currie & Brown UK Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (via Cloud Video Platform) **ON** 08 and 09 February 2021

EMPLOYMENT JUDGE Ms K. Halliday

Representation

For the Claimant: Ms Anderson of counsel
For the Respondent: Ms Snocken of counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1 The claimant was unfairly dismissed by the Respondent.
2 There is a 50% chance that the claimant would have left the respondent's employment after one year in any event.
3 The claimant did not contribute to his dismissal and no deduction for contribution is ordered.
4 No adjustment is ordered under section 207A(2) of the Trade Union and Labour Relations Consolidation Act 1992 for the failure by either party to follow the ACAS Code on Disciplinary and Grievance Procedures.
5 The Tribunal will decide the remedy for unfair dismissal at a further hearing.

REASONS

Introduction

1. The Claimant, Mr Morris was employed by the Respondent until he left his employment on 5 July 2019 following his resignation on 22 May 2019.

2. The Claimant claims that he has been unfairly constructively dismissed. He claims that he resigned from his employment as a consequence of a fundamental breach on the part of the respondent of both the express contractual terms relating to his role/job description and the implied term within his contract relating to trust and confidence. He relies on the fact that he was relieved of operational responsibility for the Southampton office; the appointment of a new Director and Head of Office to replace him; and the fact that he would need to report into his replacement. He says these incidents amounted to treatment which constituted a fundamental breach of both these contractual terms and this resulted in his resignation.

3. The Claimant also claims that he was constructively wrongfully dismissed.

4. The Respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.

5. The claimant was represented by Ms Anderson of counsel and gave sworn evidence. The respondent was represented by Ms Snocken of counsel and I heard from Mr Brierley, Regional Managing Director – England and Wales and Mr Grinnell, Group People Director for the Respondent.

6. I have also reviewed the documents referred to in the witness statements and documents drawn to my attention during the course of the hearing contained in the bundle (276 pages).

Preliminary Matters

7. Immediately before the hearing I was provided with a list of issues to be determined which had been agreed between the parties and with the claimant and respondent's skeleton arguments. To the extent that the list of issues and the respondent's skeleton demonstrated a potential line of argument (and likely cross-examination of the claimant on that basis) that the claimant was himself in fundamental breach of contract and this was relevant to the substance of the claim and not just contribution, Ms Anderson objected to this argument being pursued on the basis that this had not been pleaded and the claimant had not therefore addressed this issue in his witness statement.

8. I adjourned to consider the issue and concurred with Ms Anderson's submission. The Respondent was invited to make an application to amend its grounds of resistance but decided not to do so.

Issues for the Tribunal to decide

9. The issues for the Tribunal to decide were set out in the agreed list of issues provided by the parties. Although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's complaints of unfair and/or wrongful dismissal succeeded, the agreed list of issues and both skeleton arguments addressed these issues and I agreed with Ms Anderson and Ms Snocken that I would consider them at this stage, but that remedy would not be dealt with at this hearing.

Constructive Dismissal

10. Can the claimant show that his resignation should be construed as a dismissal under section 95(1)(c) Employment Rights Act 1996 in that the respondent breached either an express term of the contract or the implied term of trust and confidence considered individually or cumulatively by:

    10.1. relieving the claimant of all operational duties for the Southampton office;

    10.2. appointing a new Director and Head of Office for the Southampton Office who would take on the operational management and leadership for the office;

    10.3. changing the claimant's reporting line to the new Director and Head of Office for the Southampton Office.

11. Did the claimant resign (with notice on 22 May 2019) wholly or partly in response to that breach?

12. Did the claimant affirm the contract of employment either prior to 22 May 2019 and/or by giving notice?

13. If so, did the respondent Mr Brierley mislead the claimant by stating that Paul Johnson of Southern Health Foundation NHS Trust was happy with the proposed handover of a project to Mr Taplin?

14. If so, was the effect of that final act to revive the claimant's right to terminate his employment based on the totality of the respondent's conduct?

Unfair Dismissal

15. If there was a constructive dismissal, was the claimant dismissed for a potentially fair reason pursuant to section 98(1)(b) Employment Rights Act 1996, namely some other substantial reason to justify the dismissal of the claimant. The Respondent relies on the need to ensure business continuity in light of the risks arising from the claimant's behaviour.

16. If so, did the respondent act reasonably in treating that as a sufficient reason for constructively dismissing the claimant and was the dismissal of the claimant fair in all the circumstances (having regard to equity and the substantial merits of the case) pursuant to section 98(4) ERA 1996.

17. Was the constructive dismissal to any extent caused or contributed to by any actions of the claimant?

18. If so, by what proportion would it be just and equitable to reduce the amount of the claimant's compensatory award?

19. Was any conduct of the claimant before the dismissal such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent?

20. If so, by what amount should the tribunal reduce or further reduce that amount?

21. Is it likely that the claimant's employment would have come to an end even without any fundamental breach by the respondent and if so when?

22. Did the respondent fail to treat the objections raised in the claimant's email of 16 April 2019 as a formal grievance? If so, was that an unreasonable failure by the respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedure? If so, should any increase up to 25% be made to any compensation awarded to the claimant?

23. Was there an unreasonable failure by the claimant to follow the ACAS Code of Practice on Disciplinary and Grievance Procedure and if so, should any reduction up to 25% be made to any compensation awarded to the claimant?

Findings of fact

24. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary and after having read and listened to the factual and legal submissions made on behalf of the respective parties.

Background

25. The Respondent is an asset management and construction consultancy business providing services to public and private sector clients across the UK.

26. The claimant is a quantity surveyor and was employed by the Respondent under a contract dated 3 April 2008 originally with Cyril Sweett Limited (Sweett) as Regional Director.

27. Under the contract, the notice he was required to give and was entitled to receive was 6 months and he was subject to 12 month post termination restrictive covenants that prevented him for soliciting or dealing with customers or prospective customers and from poaching employees. The contract did not contain a non-competition restriction. Clause 4.6 of the contract did however provide (inter alia) that, "the Executive shall

not during the Employment without the prior written consent of the Board …. be directly or indirectly …. engaged, concerned or interested in … the setting up of any other business … where such involvement is inconsistent with the Executive's ability properly to carry out the duties of the Employment".

28. The claimant had previously been involved with a predecessor business Nisbett LLP/Nisbet Project Safety Limited which was acquired by Sweett in 2008 and had established its Bournemouth office in 1989. The office had relocated to Southampton in 1997. The Southampton office of Sweett was then taken over by the respondent in 2016 and the claimant's employment transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. The claimant had responsibility for running initially Sweett's, and then the respondent's, Southampton office, including being responsible for the profit and loss, HR and people management, marketing, customers and generally overseeing the running of the respondent's local business. His job title was changed to Director in December 2017, but this did not affect his responsibilities I note that Mr Brierley referred to the claimant as "Head of Office" in passing when giving evidence and the grounds of resistance refer to the claimant as having responsibility for running the Southampton office. I find that this was de facto his role.

29. It was common ground that the claimant had particular strengths in business development and client and project management, and that he had been key to the success of the Southampton office over a considerable period of time.

30. In addition to his role as Head of Southampton Office, the claimant provided project management consultancy services to a number of the respondent's key local clients including Southern Health Foundation Trust, Bournemouth University and the Royal Bournemouth Hospital

31. In September 2018 Mr Brierley joined the Respondent as Regional Managing Director – England and Wales.

32. On 14 September 2018, as part of his introduction to the business, Mr Brierley met with the claimant. I find that this was the first time that the two had met. I found Mr Brierley's evidence on what he had gleaned from this meeting to be inconsistent and unpersuasive and do not accept that after one meeting and limited time in the business he could in fact legitimately have reached the conclusion that the claimant did not want to engage with the business. For example, in his witness statement Mr Brierley refers to "erratic contributions" to weekly operational notes, but this conclusion was apparently reached at most, two weeks after he joined. I am also satisfied that the claimant did hold business development meetings and that Mr Brierley's conclusion that he did not was erroneous.

33. As established under cross-examination, I find that Mr Brierley invited the claimant to the meeting so they could be introduced to each other and in order that Mr Brierley could understand any issues that the claimant wished to raise. I further find that there was a discussion about the Portsmouth (also known as the Fareham) office and that the claimant did express his unhappiness with the way that Mr Brierley's predecessor and the Chief Operating Officer Alan Manuel had dealt with the situation, I find that no comments were made about the respondent's CEO. I also note Mr Brierley's reference to a grievance brought against the claimant by another employee, with which he states he was not directly involved and to the reference in Mr Grinnell's witness statement to the fact that he had supported Mr Brierley with "corporate knowledge" when he had joined the respondent. I find that Mr Brierley had already been "briefed" against the claimant and that this more than his personal engagement with the claimant, led him to the conclusions he subsequently expressed.

34. I find that during the meeting on 14 September 2018, the claimant expressed his interest in a wider more senior role and it is not disputed by the respondent that there was discussion about managing the Exeter office and that the clamant stated that he felt he had more to offer in a strategic role. I find that reference was made to him working for at least another five years.

35. On 1 October 2019 Mr Brierley presented a new leadership structure to staff in which ten cost centres were consolidated into three sub-regions and three new Operations Director roles were created. The presentation made to staff included the statement "No appropriate internal candidates – recruitment needed", Mr Brierley having concluded on the basis of the 14 September 2019 meeting that the claimant "was not aligned to the way the busines was progressing". This restructure had not been previously discussed with the claimant and he had not been offered the opportunity to be considered for the role of South Central Operations Director. Following a failed recruitment exercise, Trevor Essex, who was employed by the respondent as head of Bristol office was then appointed to the role effective from 1 October 2019 and became the claimant's line manager.

36. The claimant was unable to attend the presentation due to client commitments, but he made his objections to the new structure known after it had been implemented.

37. On 16 October 2019 Mr Brierley and the claimant met for the claimant's performance development review meeting. There was further discussion about some of the historic issues and areas for development were identified: delegation; soft skills/people management; and stress management. A number of objectives were set including, "to develop a clear succession plan for Southampton at all current roles of Associate Director and above".

38. In his email also of 16 October 2018, sending the claimant the pdr form, Mr Brierley stated: "Your open and candid comments were appreciated, and whilst you clearly feel frustrated by many aspects of the business and what has gone before, your underlying passion and drive to do the right thing for our Clients, our staff, and the business came through loud and clear".

39. I do not find, as suggested by Mr Grinnell under cross-examination, that the PDR constituted or formed part of any informal or formal performance or capability process.

40. Mr Brierley asked to meet with the claimant in December and they met informally on 19 December 2018. There are no notes of this meeting but as confirmed by Mr Brierley in cross-examination, I find that the claimant stated he was unhappy with the business but not unhappy with his role. The claimant indicated that he felt his contribution to the company was not recognised or valued sufficiently. I find that the claimant was encouraged by Mr Brierly to consider his options. Mr Brierley stated that following this meeting, he was left with the impression that the claimant would leave some time soon and that he was concerned that the claimant might not work his notice period if he resigned. No evidence of any objective basis for this "impression" or conclusion was put before me. As a consequence, Mr Brierley asked Tim Richard Group Head of Recruitment to undertake a "quick search" of the market.

41. Mr Brierley and the claimant met again to continue their discussion on 14 January 2019. It is common ground that at that meeting the claimant stated that that his preferred option was to leave the business. The claimant states however, and was consistent throughout his evidence in repeating, that he was only considering leaving on mutually beneficial terms. His proposal was that he provided project management services to the respondent on a sub-contract basis, specifically in relation to some of the long-term projects he had been engaged on. He would continue to refer other services to the respondent. I accept his evidence that he had no intention of making a "leap in the dark" by simply resigning and walking away from the business and its clients which he had built up over the previous 30 years.

42. It is further agreed by the parties that in that discussion, the claimant stated he felt he had no influence and would therefore always be "on the outside sniping", and also that he wanted to leave in the right manner, on good terms, such that he would look to pass quantity surveying and building surveying opportunities to the respondent, given that he intended to focus solely on project management in his new venture.

43. It is further not disputed that the claimant made reference in that meeting to conversations he had had with three current clients: Southern Health, Bournemouth University and Royal Bournemouth Hospital where projects were on-going, and with another member of staff, Sam Tufnall.

44. Mr Brierley sent an internal email on 15 January 2019 to Alan Manuel in which he stated: "Whilst last night I initially thought how we could keep David in the business……. Having slept on it, I am not sure this is the best course of action." I find that Mr Brierley changed his mind overnight and having given the claimant reasonable cause to believe that an exit would be discussed and potentially agreed (if not necessarily on the terms proposed by the claimant), Mr Brierley had, from that point on, ruled this out as a potential solution. Mr Brierley stated in his evidence that he did not communicate with the claimant: his concerns about the claimant contacting clients to discuss his plans; his decision that the respondent would not enter into discussions with the claimant about an amicable agreement to end the claimant's employment with the respondent; or his concern that the claimant would leave without giving proper notice.

45. Mr Brierly immediately commenced the search for a replacement of the claimant as evidenced by his email to a potential candidate Chris Webb on 16 January 2019 and the "Authority to Recruit" form dated 18 January 2019 which expressly states both that this is a "Replacement Role", and that "it is required following the resignation of David Morris". I find that at this stage the claimant had not in fact resigned or in any way indicated to the respondent that he would leave the respondent's employment without an agreement on terms.

46. On 17 January 2019, Mr Brierley emailed the claimant at 12:05 referring to the 20 December 2018 and 14 January 2019 conversations and asking the claimant to confirm his intentions and the preferred date of leaving so the business could give it consideration.

47. The claimant responded at 13:04 on the same day to confirm that he did desire to leave and setting out the basis on which he envisaged this happening: sooner rather than later and continuing to provide project management services to certain existing clients. He acknowledged that this would require discussion. The claimant also asked about whether there was an alternative role as had been discussed at the 14 January 2019 meeting. Mr Brierley responded at 13:38 confirming there was no alternative position that would align with the claimant's personal requirements and asked for details of the claimant's current projects.

48. The claimant sent two emails the same day at 14:16 and 14:49 setting out the relevant details.

49. On 21 January 2019, Mr Brierley asked by email at 08:43 for further details of the projects and the claimant responded the same day at 15:11 providing the requested information. Mr Brierley forwarded this response to Ish Carrim and James Grinnell in the HR team as evidence that the claimant had spoken to clients, but Mr Brierley did not raise this is an issue with the claimant or provide any response to the claimant's proposal and specifically did not inform the claimant that either his actions or his proposal were unacceptable. A further request for Work Order numbers was sent by Mr Brierley to the claimant on 23 January at 11:49 and he chased for these details on 28 January. The claimant responded the same day with the details requested.

50. On 1 February 2019, Ms Carrim, Head of People – Europe, sent the claimant an email asking if he had officially submitted his resignation. The claimant responded the same day indicating that he did not think it was as simple as submitting a formal resignation, confirming it was his intention to leave and had hoped that this could have been at the end of January and that he wanted to agree a leaving date and negotiate suitable terms. He also stated: "My clients are my first priority, and their interests will come first". I find that at this point the claimant had not resigned and indeed had made it clear that he would only be doing so if a leave date could be agreed and on negotiated terms. I further do not find that the reference to "my clients" can be relied on by the

respondent as evidence that the claimant was intending to breach his obligations to the respondent. In the context of his understanding that the respondent was prepared to consider a negotiated departure, I accept the claimant's evidence that he understood that the accounts he managed were the respondent's accounts. The proposal he was making was that the respondent would sub-contract project management to him and retain overall client account management and I accept that he therefore felt that prioritising client interests was not in opposition to his duties to the respondent but aligned with them.

51. There were further email exchanges relating to project details on 4 February 2019.

52. On 7 February 2019, the claimant sent a chasing email expressing his disappointment that the respondent had not engaged with him to progress the discussions in relation to his departure. The claimant stated that "unless I receive some positive movement by the end of the week, I will be forced to seek alternative resolution".

53. The claimant was then on annual leave for two weeks until 25 February 2019.

54. On 11 February 2019, Mr Brierley responded to the claimant stating that he was unable to discuss exit arrangements until the claimant had formally resigned.

55. I find that on 25 February 2019 a letter (incorrectly dated 25 January 2019) was sent to Chris Webb offering him a position as Director working in the Southampton Office. The claimant had not been made aware of this appointment, nor had he resigned from his position. I do not accept Mr Brierley's evidence (par 20 WS) that the respondent had reasonable grounds to conclude at that stage that the claimant intended to leave, or that his resignation was likely unless terms could be agreed, or that there was any basis to assume that the claimant was unlikely to work his notice period. I do however accept that Mr Webb was "a strong candidate" and that the respondent did not want to lose him.

56. On 27 February 2019 Mr Brierley sent a further email to the claimant asking for confirmation of his plans around resignation and leaving the business. Reference was made to the need to clarify the position in a manner which aligned with the claimant's contract of employment. The respondent had still not communicated its position in relation to the claimant's proposal to the claimant, i.e. that his proposal was unacceptable. The claimant had still given no indication to the respondent that he had resigned or intended to resign other than following agreement with the respondent.

57. On 1 March 2019, Mr Webb accepted the offer of employment made to him.

58. The claimant and Mr Brierley met on 5 March 2019. Mr Brierley summarised the discussion held at the meeting in an email sent on 11 March 2019. The claimant did not challenge the accuracy of this note and in relation to the relevant matters before this Tribunal, I find that the claimant felt that there was nothing to prevent him from seeking to negotiate an exit from the business but stated explicitly that he would not be resigning at this stage as his resignation was predicated on him negotiating commercial terms acceptable to him. Mr Brierley clearly understood this to be the claimant's position stating (par 21 WS) "Unless we negotiated commercial terms that were acceptable to him, [the claimant] would not be resigning."

59. I also find that that there was further discussion of the restructure and resultant trust issues between the parties and that the respondent for the first time raised with the claimant that they were unhappy with him discussing his plans with clients. To the extent that the respondent is alleging that this was a fundamental breach of the claimant's obligations to them, I find that firstly it was not, and secondly in the alternative, if it were, that the Respondent had waived the breach by continuing to engage with the clamant as an employee in all respects without raising this issue with the claimant or objecting to his behaviour from the time they discovered the claimant's action on 14 January 2019 until the 5 March 2019.

60. In relation to future plans, Mr Brierley records the claimant's intention not to work as hard in 2019 as he had in 2018 to ensure his long term health and happiness. The claimant also referred to the fact that he was some considerable way down the path of forming a new consultancy but had not worked on this for a couple of weeks given his other commitments and that his focus was on his Clients and Currie and Brown second. Mr Brierley did not ask about the plans for the consultancy or indicate that this was in breach of the claimant's obligations to the respondent and the claimant gave oral evidence under cross-examination that he had not in fact progressed plans for a consultancy but that this statement was made with a view to encouraging the respondent to enter into negotiations with the claimant. I accept the claimant's evidence on this point but find that it was reasonable of the respondent to assume that the claimant was speaking the truth and was progressing his plans to establish a consultancy business at this time. Mr Brierley did not however, raise any concerns about the establishment of a consultancy by the claimant. Mr Grinnell refers in his witness statement to the obligation in the claimant's contract of employment not to set up in business whilst an employee of the respondent (there being no post termination restriction on setting up a competing business) and at par 9 of his witness statement relies on this as a breach of the claimant's contract of employment. I find that this had not in fact occurred as the claimant did not incorporate a business until 3 July 2019.

61. Mr Brierley did however object to the claimant making reference to "his clients" making the point that all clients were Currie and Brown's and not the claimant's personal clients. The details of the other matters referred to in the note have not been relied on expressly by either party although reference is made to an issue raised by Sue Thorne, to an Employment Tribunal claim and to another issue raised by Ursula Gentle in Mr Grinnell's witness statement as background and in support of the contention that it was reasonable of the business to take the claimant's comments about his intention to leave seriously. I do not find that this was a reasonable conclusion for Mr Grinnell or the respondent to reach on this basis, but I do find that there are sufficient references to these issues in the papers and witness evidence to indicate that the respondent was influenced by them in their dealings with the claimant and that these issues provided grounds for the respondent to welcome the suggestion that the claimant might choose to resign from his employment.

62. On 27 March 2019 the claimant spoke to Mr Brierley and Ms Carrim on the telephone. Both parties remained of the same view: the respondent that they would not discuss the claimant's departure until he had formally resigned; the claimant that he would not resign if terms could not be agreed. The clamant states that this was the first time that he clearly understood this to be the respondent's position and I accept his evidence.

63. On 2 April 2019 there were further email exchanges between the claimant and Mr Brierley in which the claimant repeated that he had no immediate intention of resigning and was working and intended to work to the terms of his contract. He reiterated his commitment to the Southampton office which "had been under [his] care for just over 30 years". He referred to the previous discussions of issues that "vexed" him and his hope that a meaningful conversation could be held and also referred to the need to manage his heightened level of stress. Work related stress management had been identified as a priority in his pdr meeting on 16 October 2018 and had not yet been addressed. He proposed working compressed hours over four days.

64. Mr Brierley responded to this email on 8 April 2019. Neither party suggested that there had been any intervening discussion prior to this response being sent. Mr Brierley proposed a reduction in hours from 37.5 to 30 hours per week; offered to meet with the claimant to investigate the issues he had raised; informed the claimant that he "would be relieved of all operational responsibility for the Southampton office"; informed the claimant that, " We will appoint a new Director and Head of Office for the Southampton office who will take on operational management and leadership of the office – you will report to this new individual as and when they come into post"; and that Mr Brierley would inform clients previously spoken to by the clamant to let them know that the claimant would be remaining with the respondent.

65. I find that Mr Webb had by then already been appointed to the new role but this was not referred to in that email which misleadingly stated "We *wil*l appoint a new Director". The claimant states in his witness statement (par 55, 56) "It appeared that as soon as I considered I was considering leaving the [respondent] immediately started the process of replacing me but did so without engaging in discussion or decision making on the possible terms of exit. Had the [respondent] rejected my position outright from late 2018 or early 2019 I would have known exactly where I stood and acted accordingly". I accept this is an accurate statement of the situation. The respondent did not communicate its position to the claimant or engage the claimant in discussions about a negotiated departure, instead electing to protect its business by recruiting a replacement for the claimant without his knowledge or agreement.

66. The claimant responded to this proposal by email on 16 April 2019 confirming he did not wish to reduce his working hours; noting the offer to discuss his issues; confirming he was "passionate about his role in its entirety and do not wish to be relieved of operational responsibility for my office leaving me just to look after customer care and business development"; and asking for a response to his request for a more flexible compressed working arrangement. I find that this response evidences that at this stage, the claimant believed that the discussions were on-going.

67. Mr Brierley responded on 23 April 2019 agreeing to the compressed working arrangement but stating that the appointment of a new Director and the requirement that the claimant reported to him "is not open for debate and the change is being implemented".

68. The claimant's flexible working request was formally accepted by letter dated 30 April 2019 from Ms Carrim.

69. A skype call was held on 1 May between Mr Brierley, the claimant and Ms Carrim in which the claimant again objected to the management changes. An email was sent by Mr Brierley to the claimant at 15:59 the same day. This confirmed the appointment of Chris Webb with a start date of 3 June 2019 and that the claimant would be required to report into him and to vacate his current office. Mr Brierley attached the announcement which he planned to make to staff on 3 May 2019 for the claimant's comments. The announcement confirmed the new arrangements were to take full effect from 1 July after a transition period.

70. The announcement was made to staff by Mr Brierley on Friday 3 May 2019. To the extent that Mr Brierley maintains and the respondent's case relies on the fact that this change was implemented for the claimant's benefit, I find that this was not the case. Mr Grinnell was clear in his evidence that starting a recruitment process when a senior member of staff had indicated he might leave was something that the respondent had done in the past with a view to protecting the respondent's business and that appointing the successor before the claimant had resigned was also done to protect the business, not for the benefit of the claimant. I do not accept Mr Grinnell's contradictory evidence that the decision to remove operational responsibility for the Southampton office was a separate decision made after the claimant had identified the need to manage his stress levels, I find that it had always been the intention that Mr Webb would replace the claimant as Head of the Southampton office. It is surprising that a senior HR professional feels that to appoint a replacement when an employee has not confirmed his intention to resign rather than engaging in discussions is a proportionate approach to managing this risk.

71. I accept the claimant's contention that the appointment of Chris Webb to take over all operational responsibilities for the office removed from him all managerial responsibilities without his agreement and that this appointment resulted in a fundamental change to his role (par 60 WS)

72. On 22 May 2019 the claimant submitted his resignation. He referred to the actions of senior management and specifically to the announcement on 8 April that a new Director would be appointed to take on the operational management of and leadership for the Southampton office, the email of 23 April where it was confirmed that this

change was not open for debate and to the skype call when the claimant made it clear he did not agree to the change in his role, but following which the announcement of Mr Webb's appointment had been made on 3 May 2019. The claimant stated that the imposition of these changes without prior discussion and agreement was a fundamental breach of confidence and trust. He further stated that in the interests of being professional and in support of his clients and colleagues he would work his notice. I accept the claimant's evidence that his principal reason for working his notice was not to leave his client's "in the lurch".

73. Mr Brierley sent a lengthy response to the claimant's resignation refuting the alleged breaches and stating that the operational changes had been discussed with the claimant in detail and had been made in response to the changes in working hours requested. I find that both these statements are untrue. The role of Director had been advertised in January 2019 as a replacement role and no meaningful discussions had been held with the claimant. On the contrary the respondent had misled the claimant by implying that the appointment of a new Director had yet to be made when in fact Mr Webb had been offered the role on 25 February 2019 and accepted the offer on 1 March 2019. The claimant was reminded of his contractual obligations and his post termination restrictions. I find that as the claimant's contract had been breached, the post-termination restrictions ceased to apply.

74. Mr Webb commenced his employment with the respondent on 3 June 2019.

75. The claimant's departure from the business was announced to staff on 14 June 2019.

76. On 17 June there was an email exchange between the claimant and Mike Boyd at Magma Global in which the claimant confirmed he would be leaving the respondent and a date was agreed to meet.

77. A meeting was held on 25 June attended by Mr Brierley, Mr Webb and the claimant. Again, there are no notes of the meeting, but Mr Brierley summarised the discussion from the respondent's perspective in a lengthy email sent on 26 June 2019. The claimant reiterated that he believed the respondent had acted in breach of his contract by appointing Chris Webb to replace him and that the restrictive covenants contained in his contract of employment therefore fell away. Mr Brierley understandably refuted this. Reference was made to meeting to discuss the claimant's issues outside the formal grievance procedure.

78. In this email, Mr Brierley also set out the basis on which any claim brought by the claimant for constructive dismissal would be defended and this provides some insight into the respondent's motivation in dealing with the claimant in the way that they did. Mr Brierley refers to the claimant's "unsettling and disruptive actions, including [you] openly stating over a number of months, your intention to leave, approaching a member of staff to coerce them into leaving with you, to set up your own consultancy business and to continue to do business with [the respondent's] clients". Mr Brierley further states: "it has been made clear to you over this period of time that this is not acceptable to Currie & Brown". I find that this is not correct, and that the respondent did not at any point prior to 27 March 2019 expressly communicate to the claimant that his proposal to leave the business and act as a sub-contractor was not acceptable to the respondent. The first time that the claimant was notified that he should not discuss the issue with his clients was in the discussion on 27 March 2019.

79. Reference was also made by Mr Brierley in his email to the enforceability of the restrictions and to the Respondent's intention to enforce them. The claimant responded on the same day indicating he would respond once he had taken advice.

80. Also on 25 June 2019 Mr Brierley and Mr Webb attended a meeting with Southern Health to discuss the arrangements that would be put in place following the claimant's departure. Following that meeting a letter dated 27 June 2019 was received from Southern Health setting out their concerns with the revised project management arrangements. I heard evidence from both parties about the circumstances that gave rise to what the respondent considered to be a significant change in opinion following

the meeting and which the respondent suspected was due to the claimant's interference. The claimant maintained that Mr Brierley lied about the outcome of the meeting. On this point I prefer Mr Brierley's evidence about the content of the meeting, which the claimant did not attend. Mr Brierley's account is also supported by the reference in the letter of 27 June 2019 to subsequent discussions with the project team. I find that the response of Mr Johnson in the meeting was initially positive but that he subsequently changed his mind about the proposed project management option due to the nominated manager's previous involvement with the proposed project manager in the wider business. I do not find that this was as a result of the claimant's actions.

81. On 3 July 2019, the claimant incorporated a limited liability partnership with Neil McMullen, MMC Project Consulting Limited. I accept the claimant's evidence that despite his previous comments to Mr Brierley, this was in fact the first time he had taken practical steps to establish a consultancy business.

82. On 5 July 2019 Mr Brierley send an email to Ms Carrim expressing his concerns in relation to contact between the claimant and two clients, Southern Health and Sussex Partnership. In particular a conversation had been overheard on 4 July in which the claimant confirmed he would be leaving the respondent's employment on 5 July 2019. The claimant confirmed in his evidence that he did in fact hold this conversation.

83. On 5 July 2019 the claimant brought forward the date of termination of his employment to that day. He sent a letter to Mr Brierley in which referred to the reasons for his initial resignation and the fact that he had been prepared to work his notice for professional reasons, particularly to support clients and colleagues and to maintain continuity of project management. However, he felt that the further conversations with clients held by the respondent and what was in his view, misinformation in relation to the meeting with Southern Health on 25 June 2019, made continuing to work his notice unsustainable. The respondent confirmed the termination of the claimant's employment with effect form 5 July 2019 by letter dated 8 July 2019.

84. Subsequent communications between the parties and their lawyers are only relevant to the matters before this Tribunal in relation to arguments on contribution but as I have found that the respondent was in fundamental breach of the claimant's contract of employment, the restrictions ceased to apply and the clamant cannot therefore have acted in breach of the post termination restrictions.

The Law

85. Having established the above facts, I now apply the law.

86. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.

87. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. 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".

88. I have considered the cases of *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Morrow v Safeway Stores plc (2001) EAT/0275/00, [2002] IRLR 9; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666*

CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; WE Cox Toner (International) Limited v Cox (1981) ICR 823; Cockram v. Air Products plc EAT - [2014] IRLR 672; Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN Drs Burton, McEvoy and Webb (a partnership) v Curry (2010) UKEAT/0174/09 UKEAT/0302/09; W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 HL; Steen v ASP Packaging Ltd UKEAT/23/13 [2014] ICR 56; Frith Accountants v Law [2014] IRLR 510 EAT; and Hollier V Plysu [1983] IRLR 260 CA; .

89. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s 207A(2)") and the ACAS Code of Practice on Disciplinary and Grievance Procedures 2019 ("the ACAS Code").

90. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27*: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he 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. He will be regarded as having elected to affirm the contract."

91. In *Tullett Prebon PLC and Ors v BGC Brokers LP and Ors* Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract." Ms Snocken submits that this includes consideration of the claimant's own conduct and in this case that the claimant's argument that the respondent was in fundamental breach was constructed in order to avoid "[his] notice period and irksome covenants".

92. In *Courtaulds Northern Spinning Ltd v Sibson* it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from *Meikle, Abbey Cars and Wright*, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.

93. With regard to trust and confidence cases, *Morrow v Safeway Stores* holds that all breaches of the implied term of trust and confidence are repudiatory, and Dyson LJ summarised the position thus in *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA*: "The following basic propositions of law can be derived from the authorities:
1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761*.
2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between

employer and employee: see, for example *Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D* (Lord Nicholls) and *45C – 46E* (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".
3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, *per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A*; "the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship".
4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer"."

94. This has been reaffirmed in *Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA*, in which the applicable test was explained as:
(i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test should be applied;
(ii) If, applying *Sharp* principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
(iii) It is open to the employer to show that such dismissal was for a potentially fair reason;
(iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see *Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA)* fell within the range of reasonable responses and was fair."

95. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (*Claridge v Daler Rowney [2008] IRLR 672)*; and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (*Lewis v Motorworld Garages Ltd [1985] IRLR 465*). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (*Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA*).

96. The judgment of Dyson LJ in *Omilaju* has recently been endorsed by Underhill LJ in *Kaur v Leeds Teaching Hospital NHS Trust*. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

97. In addition, it is clear from *Leeds Dental Team v Rose* that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed and does not turn on the subjective view of the employee. In addition, it is also clear from *Hilton v Shiner Ltd - Builders Merchants* that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

98. Ms Anderson relies on the cases of Hilton v Shiner and Drs Burton, McEvoy & Webb in which it was found that the demotion of an employee may be a breach of an express term i.e. the term specifying the role of an employee and the fact that in the absence of an express job description, it is open to an employment tribunal to determine an employee's duties.

99. On affirmation and waiver I have considered the case of *WE Cox Toner (International) Limited v Cox (1981) ICR 823*, and specifically the premise that at some stage the employee must elect between affirming the contract or waiving the breach. Although there is no need to do this in a reasonable time and delay by itself does not constitute

affirmation, if the innocent party calls on the guilty party for further performance, s/he will normally be taken to have affirmed the contract. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.

100. Ms Snocken has referred me to the case of Cockram v Air Products which states that whether the giving of notice constitutes an affirmation of any breach is a question of fact and degree in relation to constructive unfair dismissal and in relation to wrongful dismissal she argues this case supports her contention that the giving of any notice at common-law would amount to affirmation. Ms Anderson invites me to prefer the approach set out in Quilter by Mr Justice Calver who disagreed with the approach of Simler J in Cockram and stated that an employee who wished to resign and claim constructive unfair dismissal would not necessarily have to resign without notice and the facts of the particular case and in particular the length and circumstances of the delay should be examined in each case.

101. As re-emphasised by the EAT in the decision of *Upton-Hansen Architects ("UHA") v Gyftaki*, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.

102. The case of *Devis v Atkins* confirms that in considering the principal reason for the dismissal the tribunal must not take account of events subsequent to the dismissal although such conduct should be taken into account when considering contribution.

103. On contribution, Ms Snocken has helpfully set out in her submission the different tests to be applied in relation to s 123(6) ERA 1996 and s 122(2) ERA 1996 as well as asked me to consider an overall reduction in reliance on Devis v Atkins. I have also been asked by Ms Anderson to consider *Steen v ASP Packaging* in relation to the four stage test to be addressed by a tribunal: firstly identifying the conduct giving rise to the potential contributory fault, secondly identifying if that conduct is blameworthy, thirdly considering for the purposes of s 123(6) if the conduct causes or contributed to the dismissal and if so fourthly to what extent is it just and equitable to reduce the award and to the case of *Frith Accountants v Law* in support of the premise that a finding of contributory fault will be unusual in a constructive unfair dismissal case concerning breach of the implied term of trust and confidence. Ms Anderson also referred me to the case of *Hollier v Plysu* in relation to four categories of reduction, 100% where ethe employee was wholly to blame; 75% where the employee was mainly to blame; 50% where the employee and employer were equally to blame and 25% where the employee was slightly to blame.

Decision on liability.

Constructive Dismissal

104. I find that relieving the claimant of all operational duties for the Southampton Office was in fundamental breach of the express term of his contract of employment, that he was appointed to act as Head of Office, a term incorporated into his contract of employment by custom and practice. I accept Ms Anderson's submission that the claimant was unilaterally and in breach of contract removed from his role and that this breach was fundamental. Further and in the alternative I find that relieving the claimant of all operational duties for the Southampton Office; appointing Chris Webb as a new Director and Head of Office for the Southampton Office to take on the operational management and leadership for the office; and changing the claimant's reporting line to Mr Webb as the new Director and Head of Office for the Southampton Office are both individually and collectively a fundamental breach of the implied term of trust and confidence. I further find that failing to disclose the appointment of Mr Webb during discussions with the claimant relating to his exit arrangements and pressurising him to resign when a replacement had already, without his knowledge, been recruited was a further breach of the implied term of trust and confidence. The respondent has sought to rely on the need to protect the Southampton office against the loss of the claimant as justification for its actions. However, given my findings that the claimant

was invited to raise any concerns with Mr Brierley and encouraged to consider his options, and the fact that Mr Brierley began the recruitment process only two day after he had met with the claimant and listened to the claimant's proposal, I do not find that the respondent had reasonable or proper cause for its actions. The claimant's resignation should therefore be construed as a dismissal under section 95(1)(c) Employment Rights Act 1996

105. I further find that the claimant resigned (on notice) in response to those breaches on 22 May 2019 as set out in his resignation letter of that date. Whilst the claimant may have intended to and indeed did set up a consultancy, it is clear from *Meikle*, *Abbey Cars* and *Wright* that the crucial question is whether the repudiatory breach "played a part in the dismissal" and "was an effective cause of the resignation" and I am satisfied that the repudiatory breaches identified above, did play a part and were an effective cause of the claimant's resignation.

106. I find that the claimant did not affirm the contract either prior to 22 May 2019 and/or by giving notice. The claimant was first advised of the respondent's intentions on 8 April 2019 by email as part of on-going discussions about his flexible working request and the proposed changes to his hours. He responded on 16 April in relation to the reduction in his hours and his flexible working request, reiterating his commitment to his role and making it clear that he did not wish to be relieved of operational responsibility for the Southampton office. The fact that the Respondent intended to impose the changes on him without his consent was not made clear until Mr Brierley's email of 23 April 2019 and was not discussed with him until the skype call on 1 May 2019, the same day on which he received an email confirming the appointment of Mr Webb with effect from 3 June 2019 and setting out the transition of all operational responsibility to Mr Webb with effect from 1 July 2019. I find that in his email of 16 April 2019 and in the call on 1 May 2019, the claimant made his objection to the appointment of a Director and specifically Mr Webb as his replacement clear and took only a further 21 days to take legal advice and submit his resignation, a significant decision after over 30 years as Head of the Southampton Office. I am further mindful that delay in itself does not constitute affirmation as set out in *Toner v Cox.*

107. In relation to giving notice, s 95(1)(c) ERA 1996 provides that a dismissal will take place where an employee reigns with or without notice in circumstances in which he is entitled to terminate it without notice. I therefore conclude that giving the required contractual notice does not in itself amount to affirmation for the purposes of a constructive unfair dismissal claim. I further accept the fact that the claimant was motivated by not wishing to let his clients down and whilst a 6 month notice period is a considerable period of time, I do not find that working his 6 month notice period would have in itself affirmed the contract. I follow Jacob LJ's obiter comment in *Buckland* that if the issue had been before the court, he would have agreed with the employment tribunal that the employee's long notice did not amount to affirmation of the contract. Neither do I find that from 22 May 2019 to 5 July 2019, the claimant did in fact affirm his contract.

108. Ms Snocken in her oral submissions invited the tribunal to conclude that as the effective date of termination of employment was the 5 July 2019, the "last straw" test should therefore be applied to the events of 25 to 27 June 2019. I have found that the claimant resigned in response to a fundamental breach by the respondent of the terms of his contract of employment on 22 May and that he had not affirmed the contract either prior to his resignation or by continuing to work (part of) his contractual notice. I therefore conclude that the operative breaches by the respondent were those that predated the claimant's resignation on 22 May 2019 and consequently the subsequent actions of Mr Brierley are not relevant nor does the last straw principal apply in this case, notwithstanding that the claimant curtailed his notice period by leaving employment on 5 July 2019 as a consequence of these actions. To the extent that it is relevant to the wrongful dismissal claim, I find that Mr Brierley did not mislead the claimant by stating that Paul Johnson of Southern Health Foundation NHS Trust was happy with the proposed handover of a project to Mr Taplin .

Unfair Dismissal

109. The respondent claims that if there was a constructive dismissal, the claimant was dismissed for a potentially fair reason pursuant to section 98 (1) (b) Employment Rights Act 1996, namely some other substantial reason to justify the dismissal of the claimant. The Respondent relies on the need to ensure business continuity in light of the risks arising from the claimant's behaviour including his expressed desire to leave the business without serving his notice period and as submitted by Ms Snocken, the risk that he would not comply with his restrictive covenants. As stated in *Devis v Atkins* the tribunal should not take account of events that occurred after dismissal. I have found that the respondent started looking for a replacement for the claimant on 16 January 2019; at which point the decision to act in repudiatory breach of contract had effectively been taken. I do not find that at this time the claimant's actions (or indeed any subsequent actions of the claimant prior to the announcement of Mr Webb's appointment on 1 May 2019) justified the dismissal of the claimant on the grounds stated or that these constitute "some other substantial reason" for dismissal within s98 (1) (b).

110. If I am wrong on this, I further find that the respondent did not act reasonably in treating this reason as a sufficient reason for the dismissal.

111. I therefore find that the claimant was unfairly dismissed.

Adjustments

112. Given my findings that the respondent had decide to replace the claimant by 16 January 2019 and that prior to that he had been invited by Mr Brierley to discuss any issues he had, and encouraged to consider his options, I do not find that the claimant contributed to his dismissal for the purposes of s123(6) or by his behaviour prior to his resignation for the purposes of s122(2) ERA 1996. Specifically, I do not find that: raising issues (interpreted by the respondent as being negative); speaking to Samantha Tufnell or contacting clients in January 2019; stating his preference was to leave on agreed terms; "failing to resign"; expressing his view that he would be "on the outside sniping"; or stating that he put his clients; interests first; or indicating his intention to set up a consultancy, all in the context of what he perceived to be discussion about his negotiated exit, caused or contributed to his constructive dismissal.

113. I therefore do not find that it would it be just and equitable to reduce the amount of the claimant's compensatory award.

114. In relation to those issues relied on by the respondent to reduce the basic award, before his resignation, or in the alternative in reliance on *Devis v Atkins*, I do not find that any conduct of the claimant whether before or after the claimant's resignation was such that it would be just and equitable to reduce the basic award to any extent. Specifically, given that the respondent was in repudiatory breach of the claimant's contract of employment, I do not find that it would be just and equitable to reduce the basic award because of the conversations with clients about his departure from the respondent's employment in June/July or the establishment of a consultancy business on 3 July 2019.

115. I find that although the claimant had indicated his intention to stay with the business for another five years, and his stated position was that he had no intention of resigning his employment without a negotiated exit by taking "a leap in the dark", given his concerns with the restructure of the business and the concerns that the respondent had about the claimant's wider behaviours, there is a 50% chance that he would have left the respondent's busines after one year in any event. I do not find that the respondent had grounds to fairly dismiss the claimant summarily and fairly.

116. I do not find that the respondent unreasonably failed to treat the objections raised in the claimant's email of 16 April 2019 as a formal grievance. The claimant was offered the opportunity to raise a formal grievance and chose not to do so. No increase

should therefore be made to any compensation awarded to the claimant on this account.

117. I further find that there was no unreasonable failure by the claimant to follow the ACAS Code of Practice on Disciplinary and Grievance Procedure. In response to the email of 8 April 2019 stating that he would be lose operational responsibility for the Southampton Office, he stated that he did not wish this to happen and received an unequivocal response that this was “not open for debate”. On 1 May the claimant was notified that the appointment of Chris Webb had been confirmed and an announcement was made to the wider office on 3 May 2019. As submitted by Ms Anderson, I find that it was reasonable of the claimant to conclude that pursuing a grievance was pointless and no reduction should therefore be made to any compensation awarded to the claimant.

Wrongful Dismissal

142. I accept Ms Snocken’s submission that at common law the giving of notice would constitute an affirmation of contract and therefore the claim for wrongful dismissal fails.

143. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 10 to 23 the findings of fact made in relation to those issues are at paragraphs 25 to 84; a concise identification of the relevant law is at paragraphs 85 to 103; and how that law has been applied to those findings in order to decide the issues is at paragraphs 104 to 142.

Employment Judge K Halliday

Date: 08 March 2021

Judgment sent to the parties: 09 March 2021

FOR THE TRIBUNAL OFFICE