EMPLOYMENT TRIBUNALS

Claimant: Mr S McCombe

Respondent: Bollin Group Limited

Heard at: Manchester (by CVP) **On:** 3, 4 and 5 March 2021

Before: Employment Judge Leach
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms R Wedderspoon, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant was not dismissed by the respondent and therefore the claimant's claim of constructive unfair dismissal does not succeed.

REASONS

Introduction

1. This case is about the claimant's employment with the respondent and particularly whether the claimant was constructively dismissed by the respondent.

2. The claimant is an accountant. He was employed by the respondent in the role of Group Accountant, from August 2015 to 31 October 2019 although his last day in work was on 4 September 2019.

3. The claimant claims that the respondent (specifically its Chief Executive Officer ("CEO") and its HR Consultant) engaged in a course of conduct between May and early September 2019 which was designed to undermine the claimant and force him out of his employment with the respondent.

4. The respondent denies this, stating that it managed the claimant appropriately throughout his employment and including during the period May to early September 2019 when it consulted about changes to the respondent's group finance function.

The Issues

5. These were identified at the outset of the hearing and are set out below.

Was the claimant dismissed? In other words:-

(a) Did the respondent breach the so-called Trust and Confidence term – did it without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant (I refer to this as the Trust and Confidence Term) (see below)?

(b) If so, did the claimant affirm the contract before resigning?

(c) If not, did the claimant resign in response to the respondent's breach of the Trust and Confidence Term (was it a reason for the resignation even if it was not the only reason for the resignation)?

(d) If the claimant was dismissed, what was the principal reason for dismissal and was it a potentially fair one in accordance with section 98 of the Employment Rights Act 1996?

6. The claimant set out in an email of 29 April 2020 the alleged conduct which he relies on as a breach of the Trust and Confidence Term. These are as follows:

(a) 31 May 2019 – A meeting, designated a discussion of the structure of the Finance Department, which involved an external HR consultant. In the course of the meeting the CEO made reference to a conversation with the MD of a customer regarding "getting rid" of their Marketing Director.

(b) 4 June 2019 – Claimant's expense claim being questioned by the CEO. Similar actions were used against a subsidiary MD when the CEO wanted to get rid of him.

(c) 20 June 2019 – Claimant excluded from a meeting arranged by the CEO with the insurance brokers.

(d) 24 June 2019 – Claimant's timekeeping challenged by the CEO. Similar actions were used against a subsidiary MD when the CEO wanted to get rid of him.

(e) 5 August 2019 – Claimant was called into the CEO's office, ostensibly on a work matter but which the CEO then said would be a "protected conversation". This conversation was minuted by the CEO.

(f) 7 August 2019 – Claimant was required to attend a meeting with the CEO and external HR to be informed of the planned new structure and to be told that his role would no longer exist.

(g) 15 August 2019 – Respondent's email reply, to the claimant's comments on the new finance structure, which re-affirmed to him that *"*[the claimant's] *position as group Accountant will not be a role in the revised structure".*

(h) 2 September 2019 – Un-announced alleged "protected conversation" with the CEO and external HR to be informed that Board approval had been given to appoint a new Group Financial Controller "GFC"). The new GFC would subsequently appoint a replacement Management Accountant. The claimant was told he would be free to apply for the GFC role, but when he asked what his chances of success would be the CEO stated 80/20 against.

7. If the claimant was unfairly dismissed and the remedy is compensation, should there be any adjustment made to any compensatory award to reflect the possibility that the claimant would have been dismissed anyway?

Case Management

8. It is relevant to note one aspect of case management in this Judgment. A preliminary hearing (case management) was held on 1 April 2020. At that hearing the parties discussed with the Judge the claimant's reference in his evidence to so-called **protected conversations** that are referred to above having taken place on 5 August 2019 and 2 September 2019. At the time the respondent sought an order that those parts of the claimant's evidence referring to such discussions were inadmissibly pursuant to section 111A of the Employment Rights Act 1996 ("ERA") and/or the principles of without prejudice.

9. It was decided to list the case for a preliminary hearing to determine whether or not section 111A ERA applied and/or whether the discussions were privileged and therefore not disclosable unless both parties agreed.

10. That preliminary hearing (which was listed in October 2020) did not take place. The parties had by then agreed an approach in relation to these two discussions. In short, the respondent accepted that they were not protected pursuant to the terms of section 111A ERA. Both parties had agreed that evidence could and should be provided in relation to these discussions, which I heard and considered in reaching my decision.

The Hearing

11. The hearing took place during the ongoing COVID-19 pandemic. It was held by Cloud Video Platform ("CVP"). The connections were good on all three days and I am satisfied that the parties had an opportunity to provide all relevant evidence and to ask questions of witnesses. I am satisfied that a fair hearing took place.

12. I heard evidence from the claimant. I then heard evidence from the following witnesses on behalf of the respondent:

(1) Mr Stephen Cann (SC) – the respondent's Chief Executive Officer;

(2) Mr Anthony Cann (AC) – SC's father. AC founded the respondent and continues to participate as the Chairman of the respondent and its group of companies;

(3) Mr Adrian Hodgson (AH) – an HR consultant engaged by the respondent.

13. I was provided with a paginated bundle of documents. Some additions to this bundle were made during the hearing. When documents were added, page numbers were provided.

14. I refer below to a number of documents in this bundle. When I do so, I provide the relevant page reference.

Findings of Fact

15. The claimant is a chartered accountant who began working for the respondent in August 2015. His job title was "Group Accountant" and was based at the respondent's office in Macclesfield.

16. The respondent owns several businesses. It is a holding company. Some businesses are based in the UK (for example in Belfast, Hyde and Leicester) and some overseas (Germany, the US and Canada for example).

17. In his role as Group Accountant the claimant was part of the group finance team. Some of the subsidiary businesses employ finance professionals directly and the claimant's role involved working with subsidiary businesses, often with the finance professionals employed directly by those subsidiaries.

18. AC is the respondent's founder and chairman. His son, SC, has been the Chief Executive Officer since 2003. They also have business interests outside of the respondent's group of companies and sometimes the claimant was asked to carry out accounting functions for these businesses. One of these businesses is called Spring Parts Limited.

19. At the time of the claimant's appointment, the respondent employed a Group Financial Controller ("GFC") called Ian Bickerstaffe ("IB"). IB had worked for the respondent for a long time. He started working with AC started in the 1980s. The respondent knew that IB was intending to retire in 2018. It was hoped that the claimant would work towards and succeed IB, taking on his role following retirement. There was no contractual promise that this would happen but that was generally the expectation. It would however, be important that the respondent was confident that

the claimant was suitable for the role. AC's evidence on this point (which was not challenged) was that the claimant would have to *"earn his right"* to be promoted in to the GFC role.

The claimant's appraisals, 2016-2018

20. An appraisal took place on 24 August 2016. The claimant had been in the respondent's employment for a year by then. A record of the appraisal is at pages 23-25. The appraisal meeting was between the claimant and IB. I note the following comments on the appraisal review form:

> *"Since Steve started in August 2015 the pressures within the office have meant that he has tackled more transactional work than would normally be encompassed within the role of Head Office Accountant. The transfer of duties from IB has really yet to commence."*

21. The review form noted a number of successful tasks that the claimant had completed. It also noted that another accountant had recently been recruited to provide the claimant with more time for "personal/professional development".

22. The review form then noted objectives that had been set and identified training needs.

23. The appraisal review in 2017 took place on 8 June 2017. This was also carried out by IB. It noted those objectives which had been set in the previous year which had in part (but not in whole) been achieved. It also noted that the reason why some of the objectives had not been achieved was down to IB. It noted that over the previous 12 months the claimant had taken on added responsibilities and was keen to *"examine the roles"* that IB had not passed over.

24. Again, objectives were set which included:

(1) Increasing the number of visits to Spring Part and Bridge Dale (Spring Part being a related business but not within the Bollin Group, and Bridge Dale being within the Bollin Group); and

(2) In relation to foreign subsidiaries, to offer accounting support to "*OSCI/BCI until such time as in country book-keeping is established*".

25. In the comments section of the appraisal it was clear that IB and the claimant were looking towards IB's retirement and a transfer of duties from IB to SC. It is clear from the comments section that significant work was still required in relation to the transfer of duties.

26. By the time of the 2018 appraisal IB had retired from his full-time employment with the respondent although he continued to be engaged as a consultant.

27. In his evidence SC noted IB's engagement in 2018 was significant as he provided 139 days of consultancy work in that year. This was to a large extent "front loaded" in the first four months of 2018 as IB had kept responsibility for finalising the 2017 statutory accounts for the respondent and other group companies. Even so, I

note that 139 days is around 50% of a full-time contract (assuming working five days a week and with a standard holiday entitlement).

28. The claimant's appraisal in 2018 was carried out by SC. As with previous years, the appraisal review form noted those objectives that had been achieved and those not achieved and noted the following comments:

> *"Steve is very thorough and organised but we have not made as much progress as I would have expected towards the higher added value tasks and I do not understand exactly why. We have made good progress on process tasks but not on management tasks. Is it because speed is compromised for thoroughness or that Ian was exceptionally fast? We have now recruited additional support and I would hope to see significant progress over the next few months.*
>
> *I do have some concerns that Steve cannot manage tasks that are outside the routine/ad hoc and does not communicate well, allowing frustrations to build. To operate at a higher level some tasks will not have boundaries, certainty to timescale and more responsibility taken."*

29. I also note the following comments:

> *"A clean slate needs to be started on communication with Karina and some thought given on how to improve it. Suggestions, such as saying 'good morning' and telling whereabouts etc would be good starters.*
>
> *There is a higher-level job but we need to see more progress being made and would tend to confirm when we see the job being done not in anticipation of it. I suggest we review the appraisal every four months i.e. in January and May, to discuss progress."*

30. I make the following findings as at October 2018:

(1) The claimant was still working on taking over tasks from IB.

(2) The claimant was required to work with and report directly to SC. This was a challenge for the claimant. At the Tribunal hearing the claimant described his work as structured and organised. When asked for his views of SC's work he described SC's approach as *"chaotic"* and as *"the opposite of structured and organised".*

(3) SC relied heavily on his PA, Karina. Unfortunately, the claimant and Karina did not have a good relationship. The claimant accepted in the hearing that this was the case, although did not expand on the reasons for this. The claimant was asked to try to improve his relationship with Karina but he chose not to do so.

(4) SC was open and candid in the October 2018 appraisal. He made clear that the claimant had some strengths but that he was not demonstrating the qualities that SC considered were necessary for the claimant to be offered the senior finance role (GFC).

31. In his evidence the claimant said this in relation to the appraisal in October 2018:

> *"In Oct '18 my third year appraisal was carried out by the CEO. It showed that further progress had been made against the objectives set in 2017. (Seven objectives; three achieved; three progress made; one not yet done)."*

32. The claimant makes no reference to the concerns about his ability to step up to the senior finance role. I find that those concerns were made clear to the claimant in October 2018 yet he appeared not to recognise them.

Events at end of 2018 and beginning of 2019.

33. The respondent recruited a Management Accountant who was employed from September 2018 until she departed unexpectedly, for personal reasons at the end of 2018. This meant that the claimant did not have the availability of support that had been identified.

34. The claimant and SC met on their return to the office following the Christmas and New Year break. A note of the meeting was made by SC although not shared at the time. The note is headed "interim review – January 2019". In his evidence the claimant agreed that some issues referred to in that note were discussed although he was not aware that the meeting was an interim review.

35. I find the following was discussed at this meeting:

(1) That the recently recruited Management Accountant had left and that SC offered to contact the runner-up in the recruitment process and offer the vacant job to them. The claimant declined that offer of assistance at that time because he did not consider it was an appropriate time to bring another accountant into the business. The respondent's Group operates a financial year on a calendar year basis and the claimant was going to be heavily involved in the production of statutory accounts and the respondent's annual audit for 2018 (see page 33). As a temporary measure therefore a Project Accountant (Mike Gough("MG")) who had been working primarily with SC would assist the claimant.

(2) That SC did raise that the claimant was still not moving onto higher level tasks although some progress was being made.

(3) SC's ongoing concern about communication and that it had not improved, notably with his PA, Karina, and himself.

36. The meeting did not move on to discuss communication issues further as SC was leaving the office to travel to Switzerland and the meeting ended on SC needing to leave.

37. The first four months of the calendar year are busy for the accountants at the respondent Group. That is when the audit takes place and the statutory accounts are prepared ready for filing. The statutory accounts for 2018 were filed in May 2019.

Decision to review the respondent's finance function – January to May 2019

38. It is clear from my findings above that SC was concerned about whether the claimant would be able to undertake the senior finance role. I also accept the evidence of SC that others raised concerns that SC required more senior support.

39. SC's evidence (which I accept) is that recommendations that he find additional support, came externally from the respondent's auditors and their bankers. I accept that, as part of the audit process, there was a review of the senior management structure.

40. A file note dated 28 May 2019 from the auditors is at page 34. This is evidence of a discussion in which the auditors provided feedback about the audit but there was also a discussion with an eye on a proposed intended finance review/restructure. The note records that the audit partner expressed a view that the claimant may not be up to the role of GFC.

41. I accept the evidence from SC and AC that discussions took place with the respondent's banking partners, about a lack of support for SC.

42. I accept that SC's concerns about the claimant's ability to move up to the GFC role were genuine. The claimant was aware of these concerns as they had been shared with him, from October 2018 latest.

43. The respondent had the benefit of long, loyal and expert service from IB. It was perhaps going to be difficult to find a replacement. A review would enable the respondent business to decide what was required following his retirement, as it was clear that the structure was not working well enough. There were genuine business reasons for engaging in a rethink and restructure. It was not, as the claimant has alleged, a sham.

44. Given the audit and accountancy processes that were undertaken in the first months of 2019, it was not surprising that the respondent (specifically SC) did not turn his attention fully to a review until May 2019, at which stage he retained a HR consultancy.

Events of end May 2019

45. The HR consultancy (led by AH) was engaged by the respondent to assist with a process of restructure. A significant focus of that restructure was the claimant and the claimant's role. He was by that stage still contracted as the Group Accountant but had been asked to undertake a number of key tasks that IB had previously been responsible for. The recruitment at a more junior level (Group Management Accountant (GMA) post) to help free the claimant up had not been successful, in that the person recruited had only stayed for a few months. MG's temporary assignment, took resource and support away from SC.

46. In addition, the auditors had expressed a view that if a GFC was recruited, then there was unlikely to be a need for a GA role as long as the company was employing a GMA.

47. The proposed restructure therefore might potentially affect the claimant in 2 ways; by opening up recruitment in to a senior role (rather than allowing the claimant to automatically progress in to the role) and also by questioning the need for the role which the claimant was then employed in (GA role).

48. SC held a meeting with the claimant on 31 May 2019. AH was also at the meeting. SC and the claimant were due to hold a review meeting. Instead, at this meeting SC informed the claimant that the respondent was to undertake a review in to its finance function. SC also informed the claimant that it was not clear that the claimant was able to step up in to the GFC role and provided some explanation of the concerns; in essence that technical competencies were not in doubt but that pro-active management, communication and leadership capabilities needed review and improvement.

49. The claimant was asked to participate in a competency assessment in advance of a review meeting.

50. The claimant's evidence is that he became aware at this meeting that the respondent's CEO was looking to remove him from the business. As far as the claimant's case is concerned, this was a pivotal meeting. The claimant's case is that his belief that the respondent was looking to get rid of him is supported by several events. These are listed in the List of Issues. I set out my findings of fact below on these events.

51. Whilst there is agreement about much of what was said at the meeting on 31 May, there is one clear factual dispute. The claimant claims that SC gave an example of one a company known to SC having dismissed their marketing director and that he did so as some sort of warning or threat to the claimant. The evidence of SC is that he has no recollection of making such a comment and would not have done so. SC's evidence is supported by AH.

52. I find that the comment was not made as described by the claimant. Further, I fail to understand what would have been achieved by such a comment. If, as the claimant claims, the respondent (through SC especially) was intent to remove the claimant from the business by (in the claimant's words) *"a campaign of fault finding, petty criticism and exclusion"* then it would be surprising for the respondent to effectively signpost its strategy by telling the claimant about a time when such a strategy was successful.

53. My finding is that the meeting went ahead as it did because the respondent was by then concerned about the finance function and the claimant's ability to step up to the senior GFC role, that a review was needed and changes were likely. That was why AH was present at the meeting. SC spoke openly with the claimant at this meeting, explained the concerns and the next steps.

Attendance times

54. On 26 June 2019, SC emailed the claimant to inform him that there had been a review of peoples' working time at the respondent's office. The office hours were fixed as 08.30am to 5pm but:-

(a) The review was to assist the respondent consider whether to move to more flexible hours at the start and end of the working day

(b) The review had noted the claimant attending work after 08.30am on the majority of days.

(c)The claimant had not been in work on one of the days

55. The claimant replied to express surprise at the analysis, to note that he usually cycled in to work and would undertake some initial work before washing and changing but no account had been taken of this, that he had always worked in excess of his contracted 37.5 hours and also to provide detail of where he was on the day he was working but not in the office (he was visiting a group company premises). In response to the information about being out for the day, SC asked the claimant to tell Karina his whereabouts. (I note that this was a continuing communications issue that the claimant had been asked to address), to acknowledge that the claimant worked additional hours on occasions and to reiterate the proposal to look at flexible start and finish times which may well suit the claimant.

56. On 9 July 2019, the respondent introduced flexible start and finish times on an initial trial basis until December 2019. I accept that the recording of working times of the claimant and all other employees at the respondent's Macclesfield office, was part of a review leading up to this change to working hours, for everyone employed at that office.

Expenses issue

57. The claimant submitted an expense claim, claiming mileage for a visit to an associated company (Spring Part). The mileage claimed was from his home to Spring Part's location. SC queried this as he understood mileage should be claimed from an employee's normal place of work. The claimant had made a mileage claim for this journey on a few previous occasions, claiming mileage from his home, and had not been challenged.

58. SC's evidence was that he checks mileage on a sample basis. Previously the claimant's expenses had been signed off by IB; SC had asked the claimant to visit Spring Part more regularly. This was the first time that SC had seen an expense claim for a visit by the claimant; SC was familiar with the mileage there and the amount claimed by SC was more than this.

59. I accept that SC did check expense claims on a sample basis. I have heard evidence from SC and also seen the terms of a later grievance report written by another employee (Adam Clayton) which included a reference to SC having checked mileage expense claims for Adam Clayton himself and for MG. Clarification was provided about mileage expense claims, after the claimant had raised this as a grievance, to note that they should be limited to the shorter of mileage from permanent workplace to location visited and (2) home to location visited. It is not disputed that the claimant's mileage expense claim was for more miles than the journey from the respondents Macclesfield premises to Spring Part (as it was mileage recorded from the claimant's home). Clearly, more clarification around

mileage claims was needed and was provided. SC's actions were part of his day to day management activities. There was nothing more sinister to them.

Payments made on behalf of another company

60. The claimant was instructed to ensure payments were made to various employees, contractors and suppliers of a company that is not within the Bollin Group but in which SC had a business interest. A list of payees, amounts due and bank details was provided to the claimant by SC. A redacted copy of the list is at page 189.

61. At the time of the instruction the claimant asked whether the payments had to be made that day and was told they did. The claimant did not raise any concerns about the instruction in his grievance of 28 August 2019. His evidence at the Tribunal was that this task was not part of his role, that he was being potentially set up to fail and that it was additional, time consuming work that kept him away from the tasks he had to do for Bollin Group.

62. I note that occasionally the claimant was involved in businesses that did not fall strictly within the structure of the Bollin Group. SC and his father appear to have a wide range of business interests. The payments were made and nothing turned on the episode. The timing of the instruction was unfortunate as the claimant considered that attempts were being made to remove him from the business. However, the instruction to make these payments was not unreasonable.

Competency framework review

63. AH carried out a competency framework review exercise with the claimant. It was part of the review of the respondent's finance team structure.

64. It was clear from the review that the claimant and respondent had different opinions of the claimant's competencies.

65. The claimant was concerned that AH would not be able to assess his competencies. AH gave evidence (which I accept) that he consulted with some individuals within the group who were working with the claimant.

66. There was a marked difference in opinions in relation to some of the competencies. Communication for example, the claimant gave himself 8 out of 10. AH's comments at the time of the review were as follows:-

> "*This is perhaps the area where most improvement is required with managers, peers and colleagues to meet the needs of a manager I the business. A greater openness and respect all round."*

67. This was consistent with concerns raised in previous reviews. Comments against this and other competencies indicated a continuing concern about whether the claimant would be competent to step up to the more senior role of GFC.

68. Whilst the claimant disagrees with the outcome of this competency framework review, I do not find that it was carried out in bad faith. It was a more structured

process of delivering a message that had by that stage been communicated to the claimant over a period of time.

Meeting with Insurance Brokers.

69. On 20 June 2019, SC met with the respondent's insurance brokers. The claimant had been invited to insurance broker meetings. This meeting was put in SC's diary but not the claimant and the meeting went ahead without him. SC apologised to the claimant for not inviting him. He did so before the claimant raised his non-invitation as part of his grievance. I do not find that the respondent intentionally excluded the claimant.

Claimant's Appraisal in 2019.

70. The claimant and SC met on 17 July 2019 to engage in a further appraisal. By this stage, working relations between them were not good. The claimant was convinced that his job was at risk. Further, it was clear by this stage that the views of claimant and respondent about the claimant's competencies were different (see competency framework above). Notably, the respondent acknowledged some areas of improvement in this meeting and that the claimant was *"competent at the process parts of the role."*

71. A number of communication issues were raised and the following comment was noted on the appraisal form *"The issues at present with regard to the management competencies make it hard for him to progress to a more senior role within our business unless they are agreed and any issues resolved."*

72. The claimant was unhappy with the appraisal and emailed SC following then to note that little or no notice of the appraisal meeting had been given. The claimant called it "spur of the moment" and alleged that SC had engaged in petty criticisms.

73. Over the weeks that followed, the relationship between claimant and respondent deteriorated further.

The claimant's actions in looking for other employment and negotiations between the parties.

74. The respondent believed that the claimant was looking for other employment. SC had been informed that the claimant had a conference call/interview about another role. That is confirmed by a print out of a 41 minute skype call to a recruitment consultant called Roy Duncan. In his evidence at the Tribunal hearing, the claimant denied that he was looking for another job and that he sometimes received unsolicited calls from recruitment consultants either about candidates for the Bollin Group or about roles for the claimant. I note however that this was a long video call. I also note SCs evidence that another employee overheard parts of the call and relayed to SC that it sounded like a job interview. Given what the claimant believed was happening to him, it might be surprising if he was not looking for a new role.

75. As SC had received this information, he broached the topic. On 5 August 2019 he sought a discussion with the claimant and introduced it as a protected conversation (although, to be clear, the parties accept that the terms of s111A

Employment Rights Act 1996 do not apply). He asked the claimant whether he was happy in his work. I find that SC did this in order to try to open up a discussion with the claimant about possibly agreeing an exit with him which might assist the business and the claimant. However, the conversation did not develop as SC expected. In response to SC's question, the claimant asked SC if he was wanted there?. SC responded that he had some minor issues with the claimant in his current role but considerable concerns about the claimant taking on the role of GFC. The conversation went no further.

The restructure and the claimant's resignation

76. On 7 August the claimant was provided with details of the proposed new structure to the respondent's finance team. The claimant was asked for his comments by 15 August 2021. The structure as put to the claimant showed the following

(1) A GFC position reporting directly to SC

(2) A "management accountant" position. It is clear that the parties recognised that this role and title was less senior than the "Group Management Accountant" role that the claimant had been recruited in to.

(3) A small team of accountancy roles all reporting in to the GFC. SC would have less direct management reports in the proposed structure as the GFC would take up some of these.

77. The claimant was also provided with a job description and person specification for the various roles in the proposed new team.

78. On 8 August 2019 (a day after SC sent the proposals to the claimant for his comments) SC also emailed the proposals to the respondent's external accountants/auditors and to AC. Their input was requested. The email also noted that they were awaiting comments from the claimant and from IB and that it was hoped that the structure would be agreed by the middle of the following week.

79. On 14 August 2019, claimant emailed SC and AH to note the following:-

(1) That he was already carrying out the role of GFC so shouldn't they simply appoint an assistant for him?

(2) To ask when the recruitment was planned and whether he needed to apply.

80. AH replied the following day (15 August), noting as follows:-

(1) That he did not consider the claimant was carrying out all aspects of the GFC role and that there were concerns about the claimant's suitability for the role.

(2) That SC was due to speak with the chairman (his father) to consider the options and points raised by the claimant, IB and the auditors.

(3) That hopefully those discussions can happen quickly and *"the final proposal and the start of any formal process will commence following this."*

(4) Under the proposal as it was, the claimant's position as group accountant was not in the new structure and therefore *an "at risk of redundancy process will be initiated. You would need to apply for one or both roles, unless we agree an alternative proposal as part of the consultation process, or you are appointed to any other role during the consultation process, to remain in employment with the Company."*

81. It was in fact another 2 weeks or so before the structure of the finance team was finalised and approved. Relations between the claimant and respondent remained poor. The claimant was genuinely concerned that the respondent would not appoint him to the GFC role and would recruit someone else to carry out the role. The claimant actively looked for alternative employment with a new employer and asked IB if he would provide a reference. The respondent learned of this whiuch confirmed or strengthened their belief that the claimant was looking for another role and to some extent that influenced their timings in finalising the proposals.

82. On 31 August 2019 the claimant presented a written grievance (dated 28 August 2019 but sent to SC on 31 August 2019). This raised various issues covered already in this judgment. It noted a belief that there had been a change in attitude towards him and his work since 31 May and, whilst it acknowledged that SC was taking a view on that resource was required going forwards, he should not be *"targeting a hardworking and capable employee in an attempt to either discredit them or make their work circumstances particularly difficult."*

83. On 2 September 2019 a further discussion took place between the claimant and SC. The parties agree that:-

(a) the claimant was informed that a structure had been approved following discussions by the board of directors.

(b) That the respondent would recruit in to a GFC role. The claimant would not automatically be offered that role.

(c) That the claimant was free to apply for the role but that it was unlikely his application would be successful.

84. The parties disagree about what the claimant was told in relation to the less senior accountant role. The claimant claims that he was told that he could apply for a more junior management accountant role. The respondent's position is that the claimant was told that the position of Group Accountant was being retained. Having heard the evidence of SC, TC and AH on this and considered the terms of an email from AH to the claimant dated 3 September 2019, on balance I find that the claimant was told that a decision had been made to retain the Group Accountant position. As the respondent noted in the email of 3 September, this was intended as a holding position pending the appointment of a GFC and a further review following then. However, as at the 2 September 2019 the role of Group Accountant was unaffected.

85. The claimant was also informed by SC that if he was unhappy with the new structure and wished to move, then the respondent would assist the claimant. No specific offer was made other than indications about a reference and a shorter notice period. I find, that the conversation was described by SC at this stage as a protected conversation as it was intended to try to engage with the claimant in a frank discussion about his intentions. As it was, the conversation about the claimant's wishes or intentions did not develop.

86. Later on the same day (2 September 2019) the claimant gave notice of resignation stating as follows:-

> *"I feel that your intentions regarding the restructuring of the finance department have made my situation untenable and oblige me to take this action."*

Was the claimant effectively carrying out the GFC role in the period prior to his resignation?

87. The claimant's position was that he was already fulfilling the role, as the handover from IB was effectively complete. The claimant presented a second grievance on 27 September 2019 in which he stated:

> *"Given that I have taken on all the duties of the previous Group Financial Controller (as referenced in the "Handover Tasks" Schedule) it is recognised across the group that I am fulfilling the role of the Group FC. Furthermore I am also satisfying the responsibilities and requirements outlined in the job description for the new Group FC role."*

88. The handover tasks schedule was put together in or about May 2018 to assist with the handover of tasks on IB's retirement.

89. This schedule was reviewed by IB in October 2019 when the claimant's grievance was being investigated. IB provided written comments as to what the claimant was and was not doing. IB was not a witness at the tribunal. However, from the claimant's evidence and from the evidence from SC and TC, I gained some impression of IB. He appears to be respected by both claimant and respondent. The claimant appeared to enjoy working with him. He had a long history of working with the respondent and no doubt knew the business well. He had to some extent stepped away from the respondent (or was in the process of trying to do so) and I was not given any impression by either party that he would have behaved unfairly to the claimant. I have considered IB's comments on the schedule against that background (pages 140 and 141 – replaced with a more readable version part way through the hearing). IB's comments largely support the respondent's position; that SC was carrying out some, but not all of the tasks associated with the GFC role; that IB's input and assistance was still required.

Actions/conduct of the claimant

90. The respondent presented evidence about 2 areas where they claim that the claimant's conduct would justify a reduction to an unfair dismissal compensation award in the event that a finding of unfair dismissal is made.

91. The first of these relates to errors in revenue filing or declarations in the US. I heard some evidence on this and, part way through the hearing, the respondent provided documents indicating that they received a large fine in the US.

92. I do not have enough evidence to be able to fairly form a view as to whether fault lay with the claimant, with others in the respondent or with third parties (for example retained US accountants) for the fine and I will not therefore do so.

93. I do however observe from the evidence I received, that the issue appears to have been in part caused by inadequate communication between claimant and respondent. For example, the claimant understood the position in relation to instructed US accountants to be different to what SC's evidence on this was. It was apparent from what I did hear that communication should have been better, a factor raised in the claimant's reviews from October 2018.

94. The second issue related to a photograph taken by the claimant of the instruction provided to him to effect various payments (see para 60 above). The claimant accepts that he took a photograph on his mobile phone of a document which contained the names and full bank details of various employees, contractors and suppliers. These details, (including personal data) was then retained on the claimant's personal phone. Whilst the claimant was upset at what he believed was happening to him at the time, he should not have done this.

The Law

Constructive and unfair dismissal

95. The claimant claims (1) that his resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996 ("ERA").

96. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c) ERA:

> *"…..an employee is dismissed by his employer if…….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."*

97. In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract (***Western Excavating (ECC) Limited v. Sharp*** **[1978] QC 761**).

98. It is an implied term of every employment contract 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. BCCI*** **[1997] IRLR 462** at paras 53 and 54). This is the "Trust and Confidence Term."

99. In considering the Trust and Confidence Term, Browne-Wilkinson J in ***Woods v WM Car Services (Peterborough) Limited*** **[1981] ICR 666**, said that the Tribunal must *"look* at *the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

100. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: ***Lewis v Motorworld Garages*** **Limited [1986] ICR 157 CA**.

101. In the judgment of the court of appeal in ***Omilaju v Waltham Forest London Borough Council*** **[2005] 1 All ER 75.** Dyson LJ stated as follows in relation to the last straw.

> *"A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant."*

102. The recent Court of Appeal decision in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] IRLR 833 ("Kaur")**, commented on the last straw doctrine. The judgment included guidance to Employment Tribunals deciding on constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ stated:-

> *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in* [LB Waltham Forest v. Omilaju [2005] ICR 481] *of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* [implied term of trust and confidence]*? ……*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*
>
> *None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.*

103. Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in Nottinghamshire County Council v. Meikle [2004] IRLR 703, is helpful.

> "33. *It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation.*

104. In the event that an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for dismissal and that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (*Berriman v. Delabole Slate Limited [1985] IRLR 305* at para 12).

105. A delay in resigning may indicate that the employee has affirmed the contract, so losing the right to claim constructive dismissal. In the Western Excavating case, Lord Denning stated that the employee *'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'*

106. The more recent case of *Bournemouth University Higher Education Corporation v* Buckland [2010] ICR 908, CA, confirmed this although in his judgment Lord Justice Jacob noted the requirement for Tribunals to review the particular facts of a case very carefully before deciding whether the employee has affirmed the contract.

> *"Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have*

affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation." (Para 54)

Discussions and Conclusion

Was the claimant dismissed?

107. The claimant alleges a breach of the Trust and Confidence term. He relies on a series of events which he claims amount to a breach of this term. I comment on them below

108. 31 May 2019 – A meeting, designated a discussion of the structure of the Finance Department, which involved an external HR consultant. In the course of the meeting the CEO made reference to a conversation with the MD of a customer regarding "getting rid" of their Marketing Director (paragraph 6 (a) in the List of Issues) . I have made findings of fact in relation to this meeting – see paragraphs 48 to 53. I have no criticism of the respondent as far as this meeting is concerned. The concerns raised about the claimant's ability to step up to the more senior role was understandably a difficult message for the claimant to receive. His working relationship with SC was not going as he had hoped, now that IB had become less involved in the respondent and the claimant was reporting directly to SC. However the respondent's concerns about the claimant's suitability for the senior GFC role were genuine and it was entitled to continue to inform the claimant of its concerns and its plan to review the structure.

109. The incidents noted at paragraph 6 (b)(c) and (d) in the List of issues. I have set out my findings of fact on these incidents. I have no criticism of the respondent. In relation to incidents (b), (c) and (d). Had these incidents occurred in a different time, when the claimant had not received the difficult message on 31 May 2019, it is unlikely that they would have concerned the claimant.

110. As for the so called protected conversations (incidents at paragraphs 6(e) and (h)) these were against a background where it was apparent to the respondent that the claimant was looking for employment elsewhere and relations between claimant and respondent appeared to be breaking down. The respondent was willing to speak with the claimant about whether he wanted to remain and, if not, to factor in the claimant's wish to leave and to provide assistance. As it was, the communication between claimant and respondent was not sufficiently good to enable the parties to engage in a frank discussion and nothing was gained. However, the respondent did not breach the employment contract in attempting these discussions.

111. That leaves the incidents at paragraphs 6 (f) and (g) of the List of issues. As noted in my findings of fact, the claimant was informed of the proposed structure on 7 August 2019. He was not told that was the final position. The respondent asked for his comments and the claimant was able to provide feedback.

112. The respondent's email of 15 August 2019 (Issue 6(g)) was consistent with the position on 7 August as noted above. It made clear that the structure was at that stage a proposal and that it was still to be agreed. The discussion on 2 September 2019, was a continuation of the process.

113. Employers are entitled to review staffing structures and propose workforce changes. They may be criticised if they make changes without consulting with affected employees and making changes with little or no notice. That did not happen here.

114. Applying the guidance in Kaur, the most recent act was the discussion on 2 September 2019. The respondent did not commit a repudiatory breach of contract on that date. Nor did its conduct form part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach.

115. I have concluded that the respondent did not breach the Trust and Confidence Term either by a single act or by a course of conduct which when viewed cumulatively amounted to a breach of the Trust and Confidence Term. Therefore, the claimant was not dismissed and his constructive unfair dismissal fails. I do not need to reach conclusions on the remaining issues.

Employment Judge Leach

Date 25 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 March 2021

FOR THE TRIBUNAL OFFICE