EMPLOYMENT TRIBUNALS

Claimants: Mr C Fagan
Mr L Dickinson

Respondent BES Metering Services Limited

HELD AT: Manchester **ON:** 13-15 July 2020,
3+6 August 2020,
8+9 October 2020,
12+13 January 2021 and
4 + 5 March 2021

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:
For the Claimants: Mr N Grundy, Counsel
For the Respondent: Ms K Barry, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. the claimants have the necessary 2 years' continuous employment to present claims of unfair dismissal;

2. the claimants were constructively dismissed, and their claims of unfair dismissal are well-founded.

3. The claims shall proceed to a remedy hearing on a date to be fixed.

REASONS

Background

1. By individual claim forms submitted by Mr Fagan on 5 November 2019, and by Mr Dickinson on 8 January 2020, the claimants presented claims of constructive unfair dismissal. The respondent entered its responses to the claims on 10 and 28 January 2020 respectively.

2. The claims were joined and originally listed for a 3-day hearing in July 2020. The hearing proceeded as an in-person hearing with social distancing in place, but the evidence was not completed in the time available and so the hearing was adjourned, part-heard, and was listed for a further 5 days in August 2020. Unfortunately, when the Tribunal reconvened, on Monday 3 August 2020, it was reported that the respondent's witnesses had been taken ill with COVUD symptoms and were required to self-isolate in accordance with UK Government guidelines at the time. The hearing was therefore postponed initially until Wednesday, 5 August 2020 and the witnesses were required to produce their COVID test results to the Tribunal. The resumed hearing on 5 August 2020 was subsequently cancelled as the health position and availability of the respondent's witnesses remained unclear. On Thursday 6 August 2020, the hearing was adjourned upon the application of the respondent and relisted on dates in October and December 2020. Unfortunately, the December dates had to be postponed and relisted in January 2021 due to witness unavailability and further dates were listed in March 2021.

3. As the oral evidence and submissions were completed only at the very end of the eleventh hearing day, the Tribunal reserved its judgment. The Tribunal is grateful to the parties, and to Counsel representing them, for their patience and forbearance through the difficulties which have led to the hearing of the claims becoming protracted.

Evidence

4. An agreed bundle of documents comprising 3 lever-arch files and 1173 numbered pages (which included numerous sub-numbered inserts) was presented at the commencement of the hearing. Further documents were introduced by the parties during the course of the hearing and formed a second, separate bundle, labelled "A" of the additional documents. The documents in the main bundle were not compiled in chronological order and were often out of any logical order, making it difficult to follow the sequence of events or to identify pertinent documents. Page numbers in

these Reasons are references to the page numbers in the main bundle unless the second bundle is specified.

5. The claimants each gave evidence from a witness statement. In addition, they called Ms Kiran Hayre, a former work colleague as a witness in support of their case. The respondent called its Human Resources Director, Ms Tania Blench and its Chief Executive, Mr Andrew Pilley, to give evidence on its behalf. Each of the witnesses gave evidence from a witness statement, with Mr Pilley producing a supplemental statement on 6 October 2020, and all were subject to cross-examination.

6. In addition, in December 2020, the respondent produced a witness statement of Mr Edward Wetton, an Insolvency Practitioner. Mr Wetton did not attend the Tribunal to give oral evidence or be cross-examined. At the hearing on 12 January 2021, the Tribunal heard submissions from the parties as to relevance of Mr Wetton's evidence. The Tribunal decided that Mr Wetton's statement was not relevant and would not be taken into account.

Issues to be determined

7. At the outset, and by agreement of the parties, it was confirmed that the issues to be determined by the Tribunal were as follows.

8. Did the claimants or either of them have the necessary 2 years' continuity of service as employees which is required to present a claim of unfair?

9. Whether the claimants have established that they were constructively dismissed, that is to say:

   a) Was the respondent in fundamental breach of the claimants' contracts of employment?

   b) If so, did the claimants resign in response to that fundamental breach or for some other reason?

   c) Did the claimants delay in resigning so as to have waived the breach?

10. If the claimants were constructively dismissed, what was the reason for their dismissal and was that reason a potentially fair reason?

11. If so, was the claimants' dismissal fair within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA")?

Identity of the respondent employer

12. The claimants had brought their claims naming as respondents both Mr Andrew Pilley and the company, BES Metering Services Limited. Mr Pilley is the Chief Executive and owner of that company. It was agreed at the beginning of the hearing that the claimants' employer at the time of their dismissal was the company and that a claim of unfair dismissal cannot be brought against Mr Pilley as he was not the employer of the claimants. For the record, the correct respondent is therefore "BES Metering Services Limited" and Mr Pilley cannot be the respondent to the claims of unfair dismissal.

Findings of fact

13. Having considered all the evidence, the Tribunal made the following findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues which have been determined are as follows.

14. In 2015, the claimants started a business concerned with metering for the utility supply industry. In February 2015, they incorporated a company, 'Access Install Limited', through which the business was conducted. The claimants were directors of the company and worked in the business as employees although they drew no salary in the early days of the business.

15. On 9 March 2018, the claimants incorporated a second company, 'AI Asset Provider Ltd' of which the claimants were directors and worked in the business as employees.

16. On 14 October 2018, the claimants incorporated a third company, 'AI Home Services Ltd' of which the claimants were directors and worked in the business as employees.

17. The metering business known as "Access Install" was thereafter transferred to and operated through the 2018 companies, namely AI Asset Provider Limited and AI Home Services Limited. As a result, the claimants' employment transferred from Access Install Limited to AI Home Services Limited and they were paid by AI Home Services Limited going forwards. This was a transfer of the claimants' employment between associated companies in the Access Install group of companies.

18. On 20 December 2018, Access Install Limited went into a Corporate Voluntary Arrangement and in 2019 a Creditors Voluntary Liquidation commenced, with a winding up order on 22 August 2019.

19. On 22 May 2019, the respondent company was incorporated (initially under the name 'BES Metering Solutions Limited' which changed to the title of the respondent in these proceedings on 26 June 2019). The respondent is part of the BES Utilities group, which Mr Pilley described in his witness statement as a commercial utility group, supplying gas and electricity to businesses in the UK.

20. On 24 May 2019, the respondent together with BES Utilities Holding Ltd bought the metering business known as "Access Install" by purchasing the shares of AI Asset Provider Limited and AI Home Services Limited from the claimants under a Share Purchase Agreement ("SPA") which appears in the bundle at page 12 onwards. A list of the employees of the metering business was provided to the respondent in the course of the due diligence process prior to the share purchase. The claimants are included in the list of employees, with the job title of director in each case (second bundle section A5).

21. All employees including the claimants continued to work in the metering business uninterrupted. It was an express condition of the share purchase that the claimants shall continue to work in the metering business for at least 12 months. The respondent wanted to benefit from the expertise, contacts and product/operations/market knowledge that the claimants possessed. Ms Hayre, the Head of Operations for the metering business, was advised by Mr Pilley that it was "business as usual" when the respondent took over and that the claimants would continue to run the metering business as before, from the existing office in Liverpool.

22. The SPA provides:

    22.1 that the 'business' which was the subject of the sale is the business carried on by the 2 companies, AI Asset Provider Limited and AI Home Services Limited (bundle page 14);

    22.2 for a series of deferred payments for the business to be made to the claimants quarterly, with the first payment to be made 3 months and 7 days after completion of the SPA. The payments are conditional upon the claimants achieving objectives set out in schedule 5 to the SPA (bundle pages 13 and 23);

    22.3 that the metering business had to achieve forecasted quarterly targets for meter installation and net profits and, if not, the deferred

payment(s) were to be adjusted. In the event of less than 50% of the targets being achieved no payment would be made (bundle page 23 and 24);

22.4 that the claimants would within 2 weeks of completion enter into new contracts of employment with AI Asset Provider Limited for a fixed term of 12 months (bundle page 16 and 52);

22.5 that in the event that the claimants did not comply with the terms and conditions of their employment contracts, the respondent would not be required to pay any of the deferred payments thereafter (bundle page 26);

22.6 that the claimants undertook, for 24 months after completion of the SPA, that they would not be engaged or concerned in a restricted business, which was defined as one which is or would be in competition with the business as defined at 20.1 above (bundle page 35-36 and 8); and

22.7 the details of 62 employees of the metering business and the principal terms of their employment were included in an anonymised spreadsheet annexed to a Disclosure Letter. The list of employees includes 2 directors, understood to be the claimants (main bundle page 67 and 81-89, second bundle section A5).

23. On 30 May 2019, each of the claimants signed a contract of employment with 'BES Metering Solutions Group'. The contract stated that the claimants' employment "with BES" started on 28 May 2019" and that the "Fixed Term Employment End Date" would be 29 May 2020. This was not in accordance with the terms of the SPA in that the contracts were not with AI Asset Provider Limited nor for a fixed term of 12 months. There is no statement as to continuity of employment as required by section 1(3)(c) ERA. However, this was a transfer of the claimants' employment between associated companies in the BES group of companies.

24. The claimants' job titles remained as "Director" in each case although they were not to be directors of BES Metering Solutions Group. The claimants remained as directors of AI Asset Provider Limited and AI Home Services Limited. The claimants were given no specific job description nor written list of duties, responsibilities or authorities, albeit that their contracts stated that their line manager would be Adrian Cieslake, the Group Commercial Director. The claimants believed that they would continue to run the metering business out of the Liverpool office as before and would work to achieve the targets and objectives set by the respondent so that they

could earn the payments for the shares which they had sold to the respondent.

25. On 10 June 2019, Mr Pilley was appointed as a director of AI Asset Provider Limited and AI Home Services Limited together with Michelle Davidson, who is Mr Pilley's sister and also a director of the respondent. The respondent became a "person with significant control" of the 2 companies.

26. The respondent began to review the day-to-day operations of the metering business in the Liverpool office and, as a result, things began to change. The respondent sent a number of its senior and management personnel to the Liverpool office to review procedures and ways of working. These visits were on occasion unannounced and without reference to the claimants who were managing the metering business and its office in Liverpool.

27. The respondent introduced a signing-in book at the Liverpool office, which the respondent said was a health and safety measure. However, the metering business staff were then questioned if they were not in the office at 9am each day, despite that a number of staff had worked flexibly and logged on to their lap tops, to deal with early morning issues, sometimes from 7am and from home. At one point, Ms Hayre was given a verbal warning about what the respondent perceived as lateness arriving at the office. Ms Hayre had previously enjoyed flexible hours of work under the claimants and she often stayed late in the office, but the respondent gave no credit for such.

28. The claimants were soon required to complete daily reports of their work including each task, phone call(s) and duties undertaken so as to produce an audit trail of their activities. The claimants were told to gain approval for diary commitments for the following week.

29. The claimants found that they were unable to access financial information or forecasting and when they requested this data, the respondent's finance manager told them that he had been told not to provide them with financial information. The claimants found that the lack of financial information inhibited their ability to run the metering business, to manage costs against budget and to track work towards targets and objectives. Likewise, the IT manager in the Liverpool office was told not to discuss IT related matters with the claimants and to go through Mr Cieslake instead.

30. In June 2019, the claimants carried out annual reviews and requested pay rises for the senior metering business staff in the Liverpool office. The respondent refused, saying the action had not been agreed with the

respondent's Group HR director and would need Board approval. The claimants believed that the monies had been included in agreed budgets for the metering business and felt that their authority was being undermined. The respondent's HR director, Ms Blench, then insisted that all matters to do with staff, however minor, must be reported to her for approval.

31. During the summer of 2019, the respondent's assistant billing manager was sent to work in the Liverpool office to observe day-to-day operations. She interviewed a number of the staff and questioned them about how the business was run. Ms Hayre found that the questioning became intrusive and her day-to-day work was often interrupted as a result. For example, the assistant billing manager questioned Ms Hayre about how she had achieved the position of Head of Operations, at 26 years old. The assistant billing manager also gave Ms Hayre work to do without reference to the claimants, who were managing Ms Hayre, and which interrupted the work that the claimants expected Ms Hayre to do for the metering business in Liverpool, thereby creating confusion.

32. Later, the respondent decided that it required senior staff based in the Liverpool office, including Ms Hayre and the claimants, to work at the respondent's Fleetwood offices for up to 3 days per week. This meant that the individuals concerned had up to 3 hours' additional travelling per day; alternatively, personnel were expected to stay over in Fleetwood without regard for their personal circumstances or wishes. The respondent justified its requirements by saying that it needed to see how the managers of the metering business worked, to shadow them and to share information. Whilst personnel were content to travel for meetings they were concerned that their work with and management of colleagues in Liverpool, and deliveries arriving in the Liverpool office could not properly be attended to when they were spending a significant part of the working week in Fleetwood, leading to delays and longer working hours when in the Liverpool office, to complete outstanding work in a timely manner.

33. Shaun Robinson, who was the recruitment manager for the metering business was instructed by the respondent to attend a recruitment day in Manchester to carry out recruitment of personnel from a company called Eversmart which was insolvent. Recruitment for the metering business had previously involved the claimants but they were told not to attend.

34. As a result of the controls and restrictions placed on the claimants by the respondent and its personnel, the claimants became increasingly concerned about their ability to achieve the earn-out payments under the SPA. In one case, Mr Fagan had negotiated and agreed with the manufacturers for the purchase of smart meters required for the metering

business to install. The delivery timescale was circa 3 months. However, the respondent told the claimants to hold off progressing what had been agreed with the manufacturer while its Board decided on a source of finance for the purchase of the smart meters. The resulting delay impacted on the installation target under the SPA. Further, the claimants sought to recruit engineers to carry out the installation of meters. The claimants' experience was that engineers usually needed to give notice to their current employer of up to 3 months and then would need to undertake a period of training upon joining the business. However, the claimants were told they could not take decisions on staffing without the agreement of Ms Blench, at a time when she went to South Africa for 2 weeks and when other relevant personnel of the respondent were also on holiday, leading to delays in the recruitment of engineers. In addition, logistics discussions initially took place without the involvement of the claimants although later, the respondent's Fleet manager and Commercial manager asked the claimants to review matters of logistics.

35. The claimants reported progress to the respondent when they attended its Board meetings. On 2 July 2019, the claimants attended and reported to the Board meeting that they were struggling to recruit 12 installers which were required for the business start-up, called the "go live" and, on 16 July 2019, Mr Fagan advised the Board that he believed the metering business was running behind budget.

36. On 31 August 2019, the first quarter of the deferred or earn out payments was due to be paid to the claimants under the SPA, in the total value of £200,000.00. The parties agreed that the relevant targets had not been met but were "satisfactorily on track" at the end of August 2019. The respondent therefore proposed to pay the claimants £150,000 of which the respondent had paid the claimants £50,000 as an advance, on 29 August 2019, thereby reserving £50,000. The claimants agreed and accepted the reduced payment, and expressed their thanks for the respondent's support, signing letters to confirm acceptance, on 5 September 2019.

37. During a visit to the Liverpool office in early September 2019, Ms Blench told one of the metering business employees, Shaun Robinson, that he would be lucky to come back to a job after his holiday, which caused distress to the employee and also amongst the wider Liverpool staff who felt uncomfortable.

38. Shortly afterwards, Ms Hayre handed in her notice, citing the strained atmosphere in the office and issues arising from the respondent's managers' approach. She withdrew her notice after assurances from the claimants that the issues would be addressed. As a result, Mr Fagan wrote to the respondent's Board about Ms Blench's behaviour towards the

Liverpool staff and HR issues. On 9 September 2019, Mr Dickinson sent an email to Mr Pilley and Mr Rimell of the respondent. The email appears in the bundle at pages 1147 – 1148. Mr Dickinson informed the respondent of the resignations of Ms Hayre and 2 other managers working in the metering business in Liverpool and that he expected others to leave also. He described how unsettled he believed the staff were feeling as a result of the respondent's actions and the many changes, and he expressed his view that such matters were impacting the claimants' ability to manage the priorities of the "go live" and the installation of meters and was also impacting staff morale. He asked for the respondent's support and to discuss matters at a meeting planned for the next day.

39. On 10 September 2019, the claimants attended for a meeting with Steve Rimell about the metering business' ability to deliver on targets under the SPA. Mr Dickinson went first and alone - Mr Fagan was told he had to meet Mr Rimell separately and he waited several hours to do so. The claimants each said they felt that obstacles were being put in their way, hampering their ability to make targets as required in order to be paid for the business which they had sold to the respondent. Mr Dickinson raised issues of working arrangements and said they felt they were subject to micro-management. Mr Rimell assured the claimants that the matters raised would be resolved.

40. On 13 September 2019, Mr Rimell sent each of the claimants a letter about their meetings. The matters stated in the letters to have been 'agreed' were not so agreed. In his letter, Mr Fagan was criticised for 2 emails to the respondent on 6 September 2019, about employee absence and HR concerns, which were described as disrespectful to senior staff of the respondent. The letters warned the claimants that lack of adherence to the terms of their employment may lead to disciplinary action being taken and ended with a statement that the letter(s) would be held on the claimants' personnel files for 12 months. The claimants were shocked and felt that their meetings had been turned into a form of disciplinary warning.

41. Mr Fagan had negotiated business with utility companies which was worth several million pounds. His efforts had at first been congratulated by the respondent's Board but, as time went on, Mr Pilley became critical of Mr Fagan's efforts, eventually telling Mr Fagan that he did not have permission to agree any contracts and that his financial authority was limited to £500 which was less than the authority given to other managers.

42. On 17 September 2019, the claimants attended the respondent's Board meeting at which Mr Pilley declared his view that the claimants were not performing to their job descriptions and sought to discredit them. Mr Pilley asked Mr Dickinson who he thought he was, and the claimants were met

with aggression from the respondent's managers. The Board meeting minutes do not reflect the nature or content of the discussions at the meeting.

43. The respondent announced that all financial sign-offs over £500 for the metering business must be approved by the respondent's directors and the authority of the claimants was removed in that regard. That evening, 17 September 2019, Mr Fagan learned that the engineers' expenses had not been paid and complaints were coming in as some engineers could not afford to be away from home without their expenses paid.

44. The Board meeting was followed by letters sent from the respondent to each of the claimants on 19 September 2019, although Mr Fagan's letter is dated 13 September 2019. The letters set down "ground rules" about what the claimants could and could not do in their roles. The claimants were issued with job descriptions which included that they could not make any contractual, legal, commercial or staffing commitments as all such decisions had thereafter to be approved by the respondent's Board and a limit was formally placed on their authority to approve expenditure to a maximum of £500.00.

45. On Wednesday, 25 September 2019, Mr Dickinson was off work, sick. The respondent's Group HR director visited the Liverpool office unannounced and declared that she was holding a "consultation meeting" to inform the staff that the metering business would be re-locating to Manchester by the end of October 2019, that staff would be transferring to the employment of the respondent and that any member of staff who was not willing to move would be made redundant. The claimants, as directors, had no knowledge in advance of the meeting with the staff although Mr Fagan had previously heard, from staff feedback, that a possible move to Manchester was being considered by the respondent. However, the claimants had not been told formally nor involved in any planning or discussions about a business move. All staff who attended the meeting conducted by Ms Blench were given a pre-prepared letter confirming the information relayed at the meeting. The letter included notice that the respondent had recruited 2 new department heads: Dan Jones, as Head of Metering BES Supply; and Jordan Benbow, as Head of Smart Metering. These 2 appointees were to work with the Board and the claimants. Lines of accountability and how this affected the claimants' positions were not explained.

46. The following day, Mr Dickinson returned to work to find that the Liverpool office staff were upset by Ms Blench's announcement. Mr Dickinson emailed Mr Pilley to point out that he had not been informed of the consultation meeting, even though they had spoken on the Monday

before, to which Mr Pilley replied that he would have briefed him but that the decision had not been made when they spoke on Monday.

47. On 27 September 2019, the claimants' solicitors sent 3 letters to the respondent. The first and third letters concerned the SPA and alleged breaches of that agreement. The second constituted a grievance and detailed what the claimants described as a diminution of their authority and powers to run the metering business. The grievance letter runs to 5 pages, with 19 points of grievance. The points of grievance are re-iterated in the third letter which sets out, in a schedule, the key issues and operational concerns that the claimants sought to resolve. A response was requested by 3 October 2019.

48. On 30 September 2019, Mr Fagan's fuel card was declined at a petrol station causing him embarrassment. He subsequently discovered that the fuel card had been cancelled by the respondent, as had Mr Dickinson's fuel card and, further, that Mr Fagan's car insurance had also been cancelled without notice. This raised an issue as to whether Mr Fagan may have unknowingly driven the vehicle without valid insurance in place.

49. On 1 October 2019, the respondent formally suspended the claimants and their access to the respondent's IT and email systems was withdrawn. The reasons for the suspension of Mr Dickinson, as set out in his suspension letter, was that the respondent suspected him of gross misconduct by having an interest in a competing business. The respondent considered that this would constitute a conflict of interest and may also amount to a breach of the claimants' fiduciary duties. Mr Fagan's suspension letter includes the above allegations and an additional allegation that he had provided false information to the Board in respect of the number of engineers engaged, which it was said had a detrimental impact on the respondent's performance. On 11 October 2019, a further allegation was added in respect of Mr Fagan, that he had made contact with an employee regarding work matters during his suspension.

50. During the night of 1 October 2019, after the Liverpool office had closed and all staff had gone home, Ms Blench and other managers of the respondent visited the Liverpool office with black bin bags and removed a number of items of documentation. The visit was described by Counsel for the claimants as a "raid". A transcript of a recording of a telephone conversation between Ms Blench and another person just before the "raid" shows Ms Blench saying that she had been instructed to "get stuff out of the drawers if there is anything there" and she comments "not that we are raiding or anything" and "I feel like we need balaclavas". In the course of the "raid", Mr Pilley found a draft of a promotional summary, written by Grant Thornton UK LLP about Callesti Energy Supply Limited ("Callesti").

The document is undated but was drafted in 2018, or early 2019 as it says that Callesti "will function as an authorised UK domestic energy supplier from April 2019" and the document mentions preparing the business for an April 2019 launch. Financial forecasts are included for 2019. The 'Advisory Board' members listed in the document include the claimants who are said to have invested money in the business (second bundle, section A9).

51. The next day, 2 October 2019, the staff in the Liverpool office were told of the claimants' suspension, instructed not to communicate with the claimants and to report any communications received from the claimants to the respondent. Ms Hayre, the Head of Operations and Justine Cawley, the Head of IT for the metering business were placed on 'gardening leave'.

52. The rationale for the claimants' suspension was said to be Mr Pilley's belief that they remained interested in Callesti which held a domestic energy supply licence. Mr Pilley sought to suggest in cross examination that he had learned of Callesti through an informal contact with a business consultant in September 2019 and that it was information gathered during the "raid" and also from a Mr Steven Warren which had led to the claimants' suspension. Mr Pilley's supplemental witness statement, introduced in October 2020, concluded with a contention that as a result of all the information (from the "raid" and Mr Warren's email) he "believed there was evidence that the claimants were involved in a competing business and therefore the decision was made to suspend them on 1 October 2019 pending an investigation". The Tribunal rejected Mr Pilley's evidence on this aspect, which was unsubstantiated and because, in the course of cross-examination, Mr Pilley realised that the dates in his account did not accord with the date of the night-time "raid" on the Liverpool office (1 October 2019) - Mr Pilley's supplemental statement said 30 September 2019 until he changed that date, which took place after the claimants had been suspended. The email received from Mr Steven Warren, which Mr Pilley relied upon as containing certain information and allegations about Callesti, was dated 2 October 2019.

53. Callesti Energy Supply Limited has never in fact traded nor did it commence the supply of electricity to any premises. As a result, its licence was revoked by Ofgem for lack of use, by notice of revocation dated 26 November 2019, effective 10 January 2020.

54. Mr Pilley also believed that the claimants owned a business based in Cyprus called Ekavi Limited although the Tribunal was presented with no evidence for this belief nor any evidence to link the claimants to that company.

55. On 3 October 2019, the claimants' solicitors wrote to the respondent about the claimants' suspension, which was described as a knee-jerk and unlawful reaction to the claimants' grievance, and to deny the allegations of gross misconduct. The letter sought to explain the position with Callesti as above in paragraph 53 and sought to add the claimants' suspension and latest treatment to the grievance submitted on 27 September 2019.

56. On 8 October 2019, the respondent sent letters to the claimants inviting them to investigation meetings arranged for 15 October 2019 under the disciplinary policy and also to formal grievance hearings to be held on the same day.

57. On 9 October 2019, the claimants resigned with immediate effect, by letter sent from their solicitors to the respondent's solicitors, contending that the respondent was in repudiatory breach of the SPA and their employment contracts. The letter also stated the claimants' view that the meetings arranged for 15 October 2019 did not have legitimacy or credibility and appears in the bundle at page 164.

58. The claimants did not attend any meetings on 15 October 2019 and further communications took place through the parties' solicitors.

59. At the end of October 2019, the respondent issued each claimant with a P45.

60. On 20 January 2020, the claimants were removed as statutory directors of AI Asset Provider Limited and AI Home Services Limited.

The applicable law

61. A concise statement of the applicable law is as follows.

Employee status and continuity

62. The Employment Rights Act 1996 section 230(1) ("ERA") defines an 'employee' as:

"an individual who has entered into or works under … a contract of employment".

63. Section 230(2) ERA provides that a 'contract of employment' means:

"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"

64. Pursuant to section 108(1) ERA, a claim of unfair dismissal ordinarily requires a claimant to first show that they are an employee and have at least 2 years' continuous employment service ending with the effective date of termination of employment in order to qualify to bring such a claim.

65. There is a presumption of continuity of employment in favour of an employee under section 210(5) ERA, unless there is evidence that continuity was broken as opposed for example to there being a gap in employment which may not, of itself, operate to break continuity. The burden of rebutting continuity falls on the employer, per *Nicoll v Nocorrode Ltd [1981] ICR 384*.

Constructive dismissal

66. Section 95(1)(c) ERA provides that an employee is dismissed if the employee terminates their contract of employment, with or without notice, in circumstances such that the employee is entitled to terminate their contract without notice by reason of the employer's conduct.

67. The case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 provides that the employer's conduct that gives rise to a constructive dismissal must involve a repudiatory breach of contract, or a significant breach going to the root of the contract of employment, showing that the employer no longer intends to be bound by one or more of the essential terms of the contract of employment. In the face of such a breach by the employer, an employee is entitled to treat themself as discharged from any further performance under the contract, and if the employee does treat themself as discharged, for example by resigning, then they are constructively dismissed. If, however, the employee delays in resigning after the employer's breach, the employee may be taken to have affirmed the contract and, if so, may lose the right to claim that they have been constructively dismissed.

68. A course of conduct by an employer can, cumulatively, amount to a fundamental breach of contract entitling an employee to resign following a "last straw" incident even though the last straw does not by itself amount to a breach of contract, as held in the case of Lewis –v- Motorworld Garages Ltd [1985] IRLR 465. However, the last straw must contribute in some way to a breach of the implied term of trust and confidence.

Unfair dismissal

69. If a claimant establishes that they were constructively dismissed, section 98 ERA sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for

dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent in this case has not advanced any reason for the claimant's dismissals.

70. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in the circumstances of the case, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

71. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of a claimant's dismissal. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

72. The Tribunal also considered a number of cases to which it was referred by the parties in submissions on liability. The cases were:

Associated Tyre Specialists Limited -v- Waterhouse [1976] IRLR 386
WE Cox Turner (International) Limited -v- Crook [1981] ICR 823
Woods -v- WM Car Services (Peterborough) Ltd [1981] IRLR 347
WA Goold (Pearmak) Ltd -v- McConnell [1995] IRLR 516
Malik -v- BCCI SA [1997] ICR 606
London Borough of Waltham Forest -v- Omilaju [2005] IRLR 35
Schwarzenbach T/A Thames-side Court Estate -v- Jones [2015] UKEAT/0100/15

The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

Submissions

73. Counsel for the claimants produced a written skeleton argument and made a number of detailed oral submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the claimants were hands-on directors and employees with continuity of employment from Access Install through its associated companies and that, upon completion of the SPA, the respondent became

an associated company to which the claimants' employment transferred; there is a presumption of continuity of employment and that Ms Blench, who drafted the new contracts of employment, accepted that the claimants did have continuity; that the indemnity in the SPA (clause 10.1(c)) is void under section 203 ERA; that the respondent acted in breach of the fundamental term of mutual trust and confidence by frustrating or preventing the claimants from fulfilling their obligations under the SPA and so denied the claimants the ability to earn the deferred payments; the respondent suspended the claimants and then "raided" the Liverpool office in order to find evidence to justify the claimants' dismissals, thereafter setting up disciplinary hearings about baseless allegations; and that the respondent intended to remove the claimants from the business because they were no longer needed and so as to save on the deferred payments under the SPA which were payable to them otherwise.

74. Counsel for the respondent also tendered written skeleton submissions and made a number of detailed oral submissions which the Tribunal has considered with care but again does not rehearse in full here. In essence it was asserted that: - the claimants did not have the necessary qualifying service to bring their claims of unfair dismissal, that the burden of proof fell on the claimants in this regard and they had brought little evidence of such; that the respondent did not set out to undermine the claimants nor to thwart their efforts to earn payments under the SPA; instead the claimants were unable to transition from being owners of the metering business to become subordinates of the respondent, reporting to its Board and that it was reasonable for the respondent to exercise controls and checks on the metering business; that the claimants had made broad allegations about the respondent's conduct which conduct was reasonable in the circumstances and did not amount to a breach of the implied term of trust and confidence; and that Mr Pilley had been advised that the claimants were interested in a competing business which was evidence by the Grant Thornton document and the energy supply licence leading Mr Pilley to form the reasonable belief that the claimants were intending to or were trading as Callesti whereupon he was entitled to protect the business as he did.

Conclusions (including where appropriate any additional findings of fact)

75. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

76. First, dealing with the issue of <u>whether the claimants or either of them have the necessary 2 years' continuity of service as employees</u> which is required to present a claim of unfair dismissal, it has been the respondent's case that the claimants were not employees and/or did not

have continuity of employment although the thrust of the respondent's evidence had been about a lack of continuity.

77. The claimants gave unchallenged oral evidence that they had set up the 'Access Install' metering business and worked in it as hands-on directors, building that business up over time and as employees in the business. The Tribunal considered the paucity of the documentary evidence before it, noting that the Liquidation of Access Install Limited meant that relevant contemporaneous documents may no longer exist or had not been retained by the Liquidators and so were not available to the Tribunal. The claimants have produced payslips for the period from 31 March 2017 to 31 March 2018 showing Access Install Limited as employer but with the claimants being paid nil on each payslip during that period and payslips from June 2019 showing their employer to be AI Home Services Limited. The Tribunal has found that AI Home Services Limited had been the claimants' employer at the time of the SPA. It was Ms Hayre's evidence that payslips had been and continued to be issued in the name of AI Home Services Limited to the employees of the metering business, under the respondent's ownership of AI Home Services Limited, as before then. The claimants also received payslips naming AI Home Services Limited even though the claimants signed contracts with the respondent at the end of May 2019. The Tribunal considered that the respondent would not have caused or allowed those payslips to be issued to the claimants unless it understood that the claimants had been so employed prior to the SPA. In any event the respondent produced no evidence, for example from the due diligence process surrounding the SPA, to suggest that the claimants had not been employed by AI Home Services Limited, or instead had been employed by another company within the Access Install group.

78. Within the bundle, there is a document at page 94a listing certain employees of the metering business, including the claimants and Ms Hayre, under the heading "AI Group Holdings Limited". The document is a payment summary dated 31 May 2019. The Tribunal understood AI Group Holdings Limited to be another company in the Access Install group of companies. In the course of the hearing, a contract of employment with AI Group Holdings Limited, dated 1 May 2019, was produced for Ms Hayre and other senior employees in the metering business. Ms Hayre was asked about the contracts and she gave evidence, which the Tribunal accepted, that she understood those contracts to have been issued in error, in that the wrong company had been named in the contract and that it was not her employer. Ms Hayre's evidence was that her payslips named AI Home Services Limited and that company was her employer. There was no similar contract(s) disclosed by the respondent for the claimants. If such had existed, the Tribunal considered that the respondent would have disclosed them.

79. Nevertheless, the respondent sought to suggest that the Tribunal should conclude that the claimants were employed by AI Group Holdings Limited because of their names being on the payment summary. This argument was pursued by the respondent's witnesses, in evidence, to support an argument that the claimants could not have continuity of employment if employed by AI Group Holdings Limited, because they would not have been employed by an 'associated company' when they signed the new contracts with the respondent. The burden of proof is on the respondent to show a break in continuity. The Tribunal considered the evidence to be conflicting on this matter but concluded, on a balance of probabilities, that even if the claimants had at some point been employed by AI Group Holdings Limited, they were not so employed when the SPA concluded nor when they signed their new contracts on 30 May 2019. Prior to the SPA, and even if the claimants had, at some point been employed by AI Group Holdings Limited, the Tribunal considered that company to have been an associated employer within the Access Install Group. The claimants as directors of all the Access Install companies were in a position to decide any changes to their employment. By the time of the SPA, the Tribunal has found that the claimants were employed by AI Home Services Limited. Further, the respondent had not suggested that the other senior employees of the metering business, who are listed on page 94a, including Ms Hayre, were not employees of AI Home Services Limited when the SPA completed and there was no evidence to suggest the claimants were viewed any differently to the other employees listed in terms of their employer.

80. There is a presumption of continuity of employment in favour of an employee under section 210(5) ERA, unless there is evidence that continuity was broken as opposed to there being a gap in employment which may not of itself operate to break continuity. The burden of rebutting continuity falls on the employer, per *Nicoll v Nocorrode Ltd [1981] ICR 384*.

81. Section 218(2) ERA provides that if a business or undertaking is transferred from one person to another, the period of employment of an employee in the business or undertaking at the time of the transfer counts as a period of employment with the transferee and the transfer does not break continuity. The Tribunal considered that the claimants were employed in the metering business at the time of its transfer from Access Install Limited to the 2018 companies, and to AI Home Services Limited, as in paragraph 17 above. This constituted a transfer between associated companies (as between Access Install companies). The claimants as directors of all the Access Install companies were in a position to decide any changes to the running of the business and their employment and

they did so, such that their continuity of employment was preserved upon the transfer between companies in the group.

82. Alternatively, the Tribunal considered that the transfer of the metering business from Access Install Limited to AI Home Services Limited constituted a transfer of an undertaking pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Thereby, continuity of the claimants' employment was preserved in accordance with Regulation 4 of TUPE when the claimant as directors and employees continued to work in the metering business after it transferred to AI Home Services Limited and continuity was not then broken. Either way, the Tribunal considered that the transfer of the business in late 2018 operated to preserve the claimants' employment continuity from 2015.

83. That leads to the issue of what happened on 30 May 2019 when the claimants signed new contracts of employment with the respondent. The contracts state that the claimants' employment "with BES" started on 28 May 2019". There is no statement as to continuity of employment in the new contracts, produced by the respondent's HR director, despite that such a statement is required by section 1(3)(c) ERA. However, the Tribunal has found that, at the time they signed the new contracts, the claimants were employees of AI Home Services Limited.

84. Section 218(6) ERA provides that if an employee of an employer is taken into the employment of another employer who is, at the time, an associated employer of the first employer, then the employee's period of employment with the first employer, in this case AI Home Services Limited, counts as a period of employment with the second employer, in this case the respondent, and the change of employer does not break continuity of employment.

85. Associated employers are defined in section 231(a) ERA as where one company is under the direct or indirect control of the other; alternatively, under section 231(b) ERA, associated employers arise where both are companies of which a third person directly or indirectly has control. The SPA was completed on 24 May 2019 and AI Home Services Limited became part of the BES group of companies, with the respondent having purchased the shares. Therefore, AI Home Services Limited became a company under the direct control of the respondent. Another analysis is that both were companies over which a third person, Mr Pilley, had control. Either way, the Tribunal had no hesitation in concluding that what happened when the claimants signed new contracts of employment with the respondent, on 30 May 2019, was a transfer of the claimants' employment between associated companies in the BES group of companies and under the control of Mr Pilley.

86. The claimants' continuity of employment was therefore preserved, and the Tribunal finds that the claimants each had the necessary 2 years' continuity of service as employees which is required to present their claims of unfair dismissal.

87. It should be noted that the respondent made significant efforts to rebut the presumption of continuity in this case through the evidence of Ms Blench who is an experienced HR manager, with CIPD qualifications. She sought to argue in evidence that, when the claimants entered into new employment contracts on 30 May 2019, for fixed-term of 12 months, this somehow broke continuity of employment, alternatively it did not preserve continuity, and therefore she believed the claimants did not have 2 years' service or continuity of employment to bring their claims of unfair dismissal. This was a surprising position to take for a seasoned HR manager, particularly as her witness statement contends that the claimants did not have continuity because they entered into the new contracts after the SPA was completed and because the contracts "do not provide for a period of continuous employment to be expressly incorporated …nor is it implied". Mr Pilley's evidence was that he never agreed to the claimant's having continuity as from AI Home Services Limited to the respondent, but his agreement or otherwise matters not. Agreeing to a new fixed-term contract does not break continuity. Continuity of employment is a statutory construct which cannot be ignored as Ms Blench would know. Her stance on the matter did her no credit. In any event, under cross-examination, Ms Blench was forced to admit that, if she had looked at matters properly when drafting the claimants' contracts of employment ,she would have realised that the claimants did have continuity of employment in excess of 2 years and she accepted that the Access Install companies were associated companies for this purpose.

88. In addition, the Tribunal noted that a list of the employees of the metering business was provided to the respondent in the course of the due diligence process leading to the SPA and that document was disclosed only within the course of the hearing. The claimants are included in the list of employees, with the job title of director in each case (second bundle section A5). Ms Blench accepted in cross-examination that it had been clear to the respondent at the time of concluding the SPA that the claimants were employees. The Tribunal was provided with no evidence that the disclosure list of employees had been disputed by the respondent at the time, nor had there been any suggestion that the claimants were not in fact employees or that their employment might cease or that continuity might somehow be broken by or because of the SPA. The Tribunal concluded, from the evidence before it, that it had been envisaged by all parties to the SPA that the claimants would continue to work as

employees in the metering business as they had done beforehand. To ensure their continued efforts, the purpose of the fixed term contracts which the claimants signed on 30 May 2019 was to ensure the claimants continued to work in the metering business for at least 12 months after the SPA. Ms Blench's evidence was that the respondent needed the claimants' experience and knowledge of the metering business. It seems to the Tribunal that, since these proceedings commenced, the respondent has sought to adopt a self-serving view, that the claimants were either not employees or did not have continuity of employment, in an effort to defeat the claimants' claims on a technicality. In that respect, the respondent's arguments fail.

89. Next, the Tribunal considered whether the claimants had established that they were constructively dismissed, first in terms of whether the respondent was in fundamental breach of the claimants' contracts of employment.

90. The claimants rely on the implied term of mutual trust and confidence and an implied terms that the respondent would co-operate and support the claimant to achieve the required objectives and targets under the SPA so as to give effect to the intention of the parties. Mr Pilley's evidence was that he made his wishes very clear to the claimants, namely that their roles were to deliver performance of the terms of the SPA for a year, and that the respondent would support that performance.

91. In light of its findings at paragraphs 26 to 51 above, the Tribunal considered that the actions of the respondent cumulatively frustrated and obstructed the claimants, increasingly as time went on, culminating in their suspension and being locked out of the business systems at the beginning of October 2019, before the metering business had achieved the "go live". In reaching this conclusion, the Tribunal took account of the following matters.

92. The Tribunal accepted the respondent's evidence that changes would inevitably be made following the SPA. That is to be expected in any business takeover where the bought operation is integrated into a purchaser's systems, with new personnel and procedures being introduced. However, the respondent had assured the claimants that they would be able to continue to run the metering business and retain control over their ability to achieve the earn-out payments under the SPA. The Tribunal considered that what the respondent sought to put into effect and what in fact happened in that regard, went beyond the usual business integration.

93. Notably, the Tribunal considered that Ms Blench and other managers became heavy-handed in their visits and approach to staff at the Liverpool office. Ms Hayre's evidence was that this approach had a negative effect on staff morale and was a major reason why she and another senior manager decided to resign. The claimants needed a stable team with knowledge and experience, to deliver the "go-live" and metering targets. In evidence, Ms Blench was dismissive of the concerns that were put to her and demonstrated an approach and attitude to staffing which the Tribunal found accorded with that described by Ms Hayre. The Tribunal preferred Ms Hayre's evidence, that staff were unsettled and shocked when, at one point, Shaun Robinson was effectively threatened by Ms Blench with dismissal, thereby damaging morale. Further, the fact that Mr Cieslake conducted one-to-one meetings with each of the senior managers in Liverpool, during which he questioned them about the claimants' management style, communications and attendance in the office, served to undermine the claimants' positions.

94. Demands were made by the respondent that the claimants and other senior staff in the metering business spend the majority of the working week away from the Liverpool office, travelling to and working at Fleetwood. In addition, the claimants had to report in writing on a daily basis to the respondent's Board on what work they had done and what had been achieved each day. The claimants suggested weekly reports would suffice but this was refused. The respondent's witnesses were unable to explain how these demands were conducive to the claimants being able to focus on the metering business and to achieve the earn-out payments. As Counsel for the claimants described it, there was an evolving picture of attempts to frustrate the claimants, minimise their roles and responsibilities, and effectively prevent them from achieving the deferred payments.

95. In September 2019, the respondent removed the claimants' ability to enter into commercial contracts for the metering business and the processes for approval of contracts and strategic items, for example for the supply of meters, was dragged out by the requirement to seek approval for anything over £500 from the respondent's Board. Delays became a regular occurrence. Given the lead-in times involved, this had a direct impact on the claimants' ability to make targets. When the claimants raised these and staffing issues with Mr Rimell he assured them that matters would be resolved but, within a few days, he instead issued letters to the claimants which the Tribunal considered amounted to a warning of disciplinary action if they complained again. That complete turn-around was capricious and in breach of trust and confidence.

96. Also in September 2019, the respondent acquired the business of Eversmart out of insolvency and embarked upon a process of recruiting staff from Eversmart, for the metering business without reference to or consultation with the claimants and it excluded them from the recruitment process. Eversmart had been based in the Manchester area and the respondent unilaterally decided to move the metering business to Manchester, by the end of October 2019, again without reference to or consultation with the claimants. Ms Blench's announcement to the staff in the Liverpool office, to the effect that if they did not move they would be redundant, was a significant and destructive announcement, demonstrating a complete disregard for those staff upon whom the claimants relied to help deliver the performance required under the SPA.

97. The decision to suspend the claimants on 1 October 2019, was taken before the 'raid' on the night of 1 October 2019. The transcript of Ms Blench's telephone conversation includes a comment that "the recorded delivery stuff's gone", which the Tribunal found was a reference to the suspension letters which had been sent to the claimants earlier that afternoon.

98. The respondent contended that it found documents during the "raid" that it believed supported Mr Pilley's suspicions. Ms Blench's evidence had been that the documents found during the "raid" had led to the claimants' suspension when the evidence showed that was simply not the case. Following Ms Blench's testimony, Mr Pilley tendered a supplemental witness statement, and later changed his evidence on the dates of key events set out in that statement – see paragraph 52 above. Mr Pilley also introduced further events only in his oral evidence, such as a suggestion that he had spoken to Ben Jones, the CEO of Callesti, on the day before the "raid". As a result, the Tribunal found Mr Pilley's evidence about the sequence of events, and what the respondent knew about Callesti prior to suspending the claimants, to be confused and contradictory. The Tribunal took the view that Mr Pilley's new evidence was unreliable, noting importantly that none of this new evidence had been put to the claimants in cross-examination.

99. It is to be remembered that the business operating out of the Liverpool office was owned by the respondent and there was arguably no need to visit under cover of darkness. The respondent could have investigated in a transparent manner, held a meeting and put allegations to the claimants about Callesti, asking for an explanation. The respondent chose however to go looking for evidence in an underhand manner, taking black bin liners and removing whatever documents it found in drawers, regardless of their usefulness, in an effort to gain evidence against the claimants. In fact, the respondent found very little of use through the "raid" and, for example, the

Grant Thornton document, upon which the respondent relied heavily in evidence, does not show the claimants to have been involved in Callesti after April 2019 at the latest – see paragraph 108 below. The Tribunal therefore found that the "raid" was a 'fishing expedition' and that the claimants' suspension was not a neutral act. Combined also with the cancellation, the day before and without notice, of the claimants' fuel cards and most seriously for Mr Fagan, his motor insurance, evidenced that the respondent no longer intended to be bound by the claimants' contracts of employment. In those circumstances, the Tribunal considered that the "raid", in the context of the suspension of the claimants, constituted a fundamental breach of trust on the part of the respondent.

100. The Tribunal considered the relative positions of the parties. The claimant had agreed to significant and onerous terms under the SPA in relation to the objectives and targets to be achieved by the claimants before they could receive the deferred payments for their shares. The claimants were not ordinary employees; they remained as statutory directors, heading up the metering business and they needed access to financial and business information, which was soon denied to them, in order to ensure they could earn the deferred payments for their shares. In contrast, the respondent would arguably benefit if the claimants did not achieve the earn-out payments, or were removed altogether, in that the respondent would need to pay significantly less than had been envisaged for the shares in the metering business.

101. Counsel for the claimants submitted that, by September 2019, the respondent formed the view that they did not need the claimants any more and sought to remove them. It was pointed out that, in the letters to staff following Ms Blench's "consultation" meeting on 25 September 2019, the respondent announced that it had recruited a new Head of Metering BES Supply and a Head of Smart Metering. The Tribunal found the nature and timing of these appointments to be significant and considered that it was highly irregular, amounting to a breach of trust, for the respondent not to have even mentioned such appointments to the claimants nor to discuss lines of accountability, any overlap between them and how the appointments might affect the claimants' positions. The claimants believed that they would be reporting to Mr Benbow as Head of Smart Metering, despite previous assurances given by the respondent about the claimants' ability to run the metering business with a view to earning deferred payments for the shares.

102. The respondent submitted that the claimants' case about the respondent's behaviour was fanciful. The basis for such a contention was the suggestion that, to embark on a course of undermining and obstructing the claimants, who were running a business that the respondent needed to

succeed, would be a high-risk strategy because there was no guarantee that the claimants would resign. It was submitted that both parties had much to gain from the commercial success of the metering business and that the claimants were only tied into the respondent for 12 months in any event. However, the Tribunal considered, in light of the evidence before it, that from early September 2019, the respondent had in fact changed its approach to the claimants and to the running of the metering business significantly and adversely.

103. Counsel for the respondent submitted that the claimants simply found it difficult to transition from being the owners of the metering business to being part of a much larger organisation and accountable for their actions. The Tribunal considered the respondent's submissions and the chronology of events. The Tribunal considered that, whilst in the early weeks after the SPA, the respondent had sought to introduce and/or integrate its systems into the metering business run in Liverpool, a number of events and actions went beyond that process and have not been satisfactorily explained by the respondent's witnesses. In respect of the respondent's actions and interventions, the Tribunal preferred the evidence of Ms Hayre, who had no interest in the proceedings. Ms Hayre gave cogent testimony under cross examination about the respondent's attitude and approach as she experienced it, from Ms Blench and her effect on staff morale, in being questioned by the respondent's assistant billing manager and in terms of the requirement that she be in Fleetwood 3 days per week to the detriment of her work in Liverpool. Ms Hayre was clear that working under the respondent was frustrating and that its actions towards the metering business displayed a level of distrust from the respondent.

104. The Tribunal considered the competing submissions of the parties and the sequence of event in September 2019 up to and around the claimants' suspension. The Tribunal found that the basis for and timing of the claimants' suspension itself constituted a fundamental breach of trust and confidence. The claimants had been suspended upon hearsay which was not corroborated. Rather than investigate matters properly, the respondent launched its "raid". It may well have suited the respondent to have found evidence that the claimants had an interest in Callesti but no such evidence was discovered. In addition, or in the alternative, the Tribunal considered that the suspensions were the last in a series of breaches of trust and confidence by the respondent, in particular its actions in relation to Eversmart, the move to Manchester, the meetings with Mr Rimell and his subsequent letters, the Board meeting of 17 September 2019 and the issue of job descriptions severely limiting the claimants' authority and thereby their ability to make targets for the deferred payments under the

SPA. Suspension constituted a 'last straw', thereby entitling the claimants to resign and claim constructive dismissal.

105. The question then arises as to whether the claimants resigned in response to the respondent's fundamental breach or breaches of the implied term of trust and confidence or for some other reason.

106. The Tribunal considered that the claimants did resign promptly, within a matter of just over a week, after seeking legal advice as was reasonable in the circumstances given the existence of the SPA, in the face of the respondent's latest conduct towards them, being their suspension on 1 October 2019 and subjection to disciplinary allegations. In the circumstances, the claimants could not in any sense be said to have waived the breach(es) set out above.

107. As the Tribunal has found that the claimants were constructively dismissed, it is for the respondent to show what was the reason for their dismissals and that such a reason was potentially fair in law under section 98(1) and/or (2) ERA. In this case the respondent has not advanced a reason for the claimant's dismissals. In the absence of the respondent showing a fair reason or any reason, the claimants' dismissals must be held to be unfair and the claims of unfair dismissal are therefore well-founded. There is no need for the Tribunal to consider whether the claimants' dismissals were fair within the meaning of section 98(4) of ERA in the absence of the respondent showing a fair reason for dismissal.

108. The Tribunal did however consider the matter of Callesti, which was raised by Mr Pilley in evidence, namely that it was his belief that the claimants were in breach of their duties to the respondent and restrictive covenants, through what he alleged was an involvement in the company, 'Callesti Energy Supply Limited'. The Tribunal noted that all Mr Pilley had at the time of the claimants' suspension was a suspicion. The 'raid' took place after the claimants had been suspended and turned up the Grant Thornton document which itself was not evidence that the claimants remained involved in Callesti at all. The Tribunal also considered the draft promotional summary, prepared by Grant Thornton UK LLP, which did not show that Callesti had in fact traded. It is a draft of a summary of the business proposed, compiled at a time well before the SPA was envisaged. The contents of the document do not support Mr Pilley's suspicion that the claimants were somehow involved at the material time either in competition with the respondent or in breach of their obligations under the SPA – see the findings of fact, paragraphs 50 and 52 above.

109. The evidence before the Tribunal, as on many matters in this case, was limited, unclear and confusing. There was no evidence before the Tribunal

that Callesti had ever in fact traded; quite the opposite. Documents in the bundle show that Callesti had its electricity supply licence revoked on 26 November 2019 because it had not commenced the supply of electricity to any premises within a year of the licence coming into force (second bundle section A13). In addition, the Tribunal noted that Callesti had proposed to supply electricity to the *domestic* market, in contrast to the respondent which was operating in the *commercial* market, supplying to utility companies and business customers. This casts significant doubt on whether, even if it had traded, Callesti could be described as a (potential) competitor to the respondent.

110. Mr Pilley's suspicions arose from an informal conversation with a business associate at a time that was never clear from the evidence. The information Mr Pilley relied upon was not substantiated until the email of 2 October 2019, from Steven Warren to Mr Pilley. This was another document which was disclosed only in the course of the hearing, in October 2020, even though it should have been disclosed in compliance with directions in these proceedings if the respondent considered it relevant. No explanation for this failure to disclose was provided. However, the Tribunal considered that the content of that email is inconclusive. It attaches a list of employees of Callesti which does not include the claimants. Mr Warren suggests that prior to April 2019 the employees of Callesti were "employed and paid by AI" but he says that the respondent should "check AI's payroll" to ascertain this, as if Mr Warren does not know for certain of the claimants' position. Mr Warren goes on to state that the April 2019 payroll sheets were passed to the claimants for payment by a third party and he admits that "I have no idea how the employees [of Callesti] ended up getting paid but I am sure the money will have been transferred from AI somehow". Mr Warren was not called to give evidence to explain and substantiate the claims made in his email and the respondent produced no corroborating evidence of what was suggested in the email.

111. Although not pleaded nor formally advanced by the respondent as the reason for the claimants' dismissals, the Tribunal considered that the allegation made by Mr Pilley was not made out, and in light of the findings about Callesti in paragraphs 52 - 54 above.

112. In respect of Ekavi Limited, the Tribunal was presented with no evidence for the suggestion that the claimants had an involvement in Ekavi Limited. In the respondent's solicitors' letter of 14 October 2019, the claimants are asked to explain this, indicating that the respondent had little or no basis for its allegation. Beyond the suggestion that a deed of trust concerning the ownership of Ekavi Limited may exist, the respondent offered no evidence to support its contention that the claimants were involved in

Ekavi Limited, nor any explanation as to how Ekavi Limited constituted a competing business to the respondent.

113. In light of the above, the Tribunal did not consider that the respondent had shown the claimants' conduct to be the reason for their constructive dismissals having regard to the allegations of involvement with Callesti or Ekavi Limited. The Tribunal concluded that Mr Pilley could not be said to have had a genuine belief on any or any reasonable grounds, that the claimants had committed any misconduct in respect of Callesti at the material time or at all.

114. The indemnity clause, in the SPA at clause 10.1 of the document, was raised by the respondent, in Mr Pilley's evidence and the Tribunal was asked to consider whether it was applicable to the claims brought.

115. The clause provides that the claimants shall indemnify the respondent against all liabilities, costs expenses, damages and losses suffered or incurred by the respondent in respect of, at 10(1)(c), *any claim that they were or which is dependent or contingent upon them being employees of workers of the Access Install companies at any time prior to the completion date of the SPA*. It has been argued by the respondent that such a clause arises or is applicable in relation to these proceedings.

116. The Tribunal considered the wording of clause 10.1(c) and concluded that is did not fall within section 203 ERA because it, and the SPA as a whole, do not comply with the requirements of section 203(3) ERA which sets out the conditions required for a written agreement to preclude a person from pursuing certain statutory rights including the right to pursue a claim of unfair dismissal in the Employment Tribunal. The claimants are not therefore precluded from pursuing their claims in the Employment Tribunal by the provisions of clause 10(1)(c).

117. The claims presented are of constructive unfair dismissal which requires a claimant to be an employee with at least 2 years' continuity of service. In the claimants' case, the Tribunal has found that the claimants were employed by AI Home Services Limited at the time the shares were purchased and immediately before they entered into new contracts of employment with the respondent. In its responses to the claims, the respondent did not dispute that the claimants had been employed by an AI company at that time; rather the respondent therein contended that the claimants had less than 2 years' service as employees. The question of whether the claimants were employees was only later brought up by the respondent's witnesses in the course of the hearing.

118. From reading the wording of clause 10.1 of the SPA, the Tribunal considered that the clause seeks to give a right to the respondent as buyer of the shares, rather than placing restrictions on the claimants, as employees, in relation to enforcing their statutory rights. Any issue as to the applicability or enforceability of such an indemnity is not a matter within the jurisdiction of the Employment Tribunal.

Remedy

119. In light of the Tribunal's decision that the claimants were unfairly dismissed by the respondent, the claims shall be listed for a remedy hearing on a date to be fixed.

_____
Employment Judge Batten
Date: 16 July 2021

JUDGMENT SENT TO THE PARTIES ON:

27 July 2021

AND ENTERED ON THE REGISTER

FOR THE TRIBUNAL OFFICE