



EMPLOYMENT TRIBUNALS

Claimant: Mr Morgan Capstick

Respondent: CCTV Monitoring Ltd

Heard at: Leeds Employment Tribunal

On: 28, 29, 30 November and 1 December 2022

Before: Tribunal Judge Sills sitting as an Employment Judge

Representation

Claimant: Mr Roxborough

Respondent: Mr McFarlane

RESERVED JUDGMENT

The Claimant's claim for unfair dismissal is dismissed.

REASONS

INTRODUCTION

1. The Claimant (C) brings a claim for constructive unfair dismissal against the Respondent (R). R is a provider of bespoke monitored security solutions to the construction industry throughout the UK. At the time the ET3 was drafted, R had around 24 employees. C worked as a design technician from 19 March 2018 until 3 December 2021.
2. The issues to be determined are set out at para 41 of the Case Management Order of 23 May 2022. At the outset, Mr Roxborough confirmed that C was relying on a series of events as breaching the implied term of trust and confidence and the last straw doctrine. Mr McFarlane confirmed that R was not seeking to argue that if there was a dismissal that this was a fair dismissal. In addition, C prepared a schedule of R's acts and omissions that he claims amounted cumulatively to a breach of the implied term of trust and confidence. The representatives agreed that these were the issues to be determined.

PROCEDURE, DOCUMENTS, AND EVIDENCE HEARD

3. I heard evidence from C, Mr Babenko, Mr Brownhill, and Mr Wright on behalf of C. I heard evidence from Mr Forward, Mr Johnson, Mr Ewing and Ms Cannell on behalf of R.
4. The documentary evidence consisted of a bundle of 427 pages with some additional documents handed up in the course of the hearing, and the witness statements.
5. Due to an oversight, Mr Brownhill initially gave evidence without giving his affirmation. He was then recalled, and gave the affirmation including in relation to the evidence he had given. He again adopted his witness statement and Mr McFarlane was given the opportunity to ask any further questions. After Mr Brownhill had been recalled, neither party made further reference to this issue.

PRELIMINARY ISSUE – STRIKE OUT APPLICATION

6. The hearing was listed for 4 days. We concluded the evidence at the end of day 3, with submissions to be made first thing on day 4. At the beginning of day 4, I was told that settlement negotiations were at an advanced stage and the parties asked for time for this to be concluded. I received updates on this in the course of the morning. Just before 1pm I asked for a further update, and was told that the settlement negotiations had broken down. Instead, there would be an application by C to strike out the response. I indicated that I would hear the strike out application and full submissions at 2pm and would reserve my decision on both issues.
7. The facts giving rise to the strike out application are not in dispute. Mr Forward, the owner and managing director of R, began giving his evidence towards the end of day 2. It is agreed that at the end of that day and during any breaks in giving his evidence, Mr Forward was given appropriate warnings in that he was told that he was in the middle of giving his evidence under oath, and that he must not discuss his evidence with anyone. It is clear from the correspondence subsequently disclosed that Mr McFarlane repeated this warning to Mr Forward after the end of the hearing on day 2. However, despite these warnings, that night Mr Forward emailed who I understand are his accountants and also telephoned a Mr Jackson to try to find out details of the redundancies that had taken place in 2020 and 2021. Mr Forward forwarded details of this communication to Mr McFarlane. I understand that Mr McFarlane became aware of this at some point either during or at the end of day 3. Mr McFarlane then informed Mr Roxborough of Mr Forward's actions. It is on the basis of this conduct that Mr Roxborough makes the strike out application.
8. The relevant procedure rules state as follows:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

9. Mr Roxborough made the following submissions. He pointed out that Judge Jones had already found that R had acted unreasonably in these proceedings but had found that a fair trial was still possible. R had failed to provide full disclosure. Mr Forward had acted unreasonably by acting in contravention of the warning. This was part of a pattern of contemptuous behaviour by R that had wasted Tribunal time. Mr Forward's evidence was tarnished by his actions, his evidence was not his own but a collaboration. There was a risk that this undermined the whole process and the trust that the Tribunal could have in R was irreparably damaged.

10. I have applied the approach set out in Abegaze v Shrewsbury College of Arts & Technology [2009] EWCA Civ 96. Having considered these submissions and Mr McFarlane's submissions in response, I have decided not to strike out the response for the following reasons. I take into account that strike out is a draconian sanction. Mr Forward's conduct of the proceedings as set out above was unreasonable, but it was not scandalous or vexatious. I formed the view that Mr Forward's actions were unthinking, rather than flagrant disregard of a Tribunal direction. I reach this view at least in part because Mr Forward, having received the same warning from Mr McFarlane, fully disclosed his actions to Mr McFarlane. This is not to excuse Mr Forward's conduct. He should have appreciated that his actions were in breach of my directions. But this is in my view a case where he acted without thinking.

11. I am satisfied that a fair trial is still possible. I agree with Mr McFarlane that the matter that Mr Forward discussed with others in the course of his evidence was not a matter in dispute in any significant way, or even central to the issues to be determined. Mr Roxborough did not challenge the suggestion that redundancies took place in 2021.

12. This issue arose after Mr Forward had given evidence. I agree with Mr Roxborough's summary of his evidence in his submissions, that he had no

control over the narrative, was chaotic and at times inconsistent and evasive. That is not to say that I have rejected Mr Forward's evidence in its entirety, but that this issue has come to light after Mr Forward had already given evidence that was on the whole unsatisfactory. The reality is that Mr Forward was unprepared for the hearing. Not only had he failed to produce a witness statement of any substance, which itself added to the duration of the hearing, but he had also failed to make up for that by preparing for the hearing and reminding himself of what had happened in the business at that time. His uncertainty of the precise details of who was made redundant is an example of that. And the enquiries he made in my view reflect his realisation that he was unprepared.

13. So, while Mr Forward acted unreasonable in the way identified, this did not go to a central or even disputed issue in the claim. His actions came after he had already given unsatisfactory evidence. The issue came to light after oral evidence had been completed. It was possible to hear the submissions in the time allocated to the case. I am satisfied that C can still have a fair trial despite Mr Forward's actions. Noting the draconian nature of the sanction, striking out the response is disproportionate in the circumstances. I dismiss the application for strike out.

FINDINGS OF FACT

14. Looming large over these proceedings, though playing no formal part in them, is C's father, Mr Stuart Capstick (Mr Capstick). Mr Capstick was R's managing director until December 2020 when he left the business. The precise details and terms of his exit from the business are subject to a non-disclosure agreement and I have been told little about them. However, I am satisfied that Mr Capstick's departure from the business was acrimonious. I acknowledge at the outset, and discuss further below, that this left both Mr Forward and C in difficult positions. Mr Forward clearly had ongoing concerns that Mr Capstick would seek to set up a rival business and that C may have divided loyalties. C in turn no doubt felt uncomfortable remaining in the business in which his father had until recently been the managing director and which he had left in acrimonious circumstances.
15. I find that on the evening of 25 November 2020, Mr Forward discovered Mr Capstick had deleted over 600 emails from the server. Mr Forward then took steps to remove the access of both Mr Capstick and C to R's IT systems and this appears to have happened on the evening of 25 November and morning of 26 November 2020. It is not in dispute that at that time, C's access to R's computer and email systems was removed. I accept that C was not able to perform his duties at this time. The email chain at pp208-210 shows that his access was restored on Monday 30 November 2020.
16. I find that C had his access to the computer systems removed because Mr Forward had discovered that Mr Capstick had deleted a significant number of emails and OneDrive content. I am satisfied that Ms Forward was

concerned about the risk to the business posed by Mr Capstick and C and he removed C's access for this reason. It is clear that Mr Forward had ongoing concerns about the possibility that Mr Capstick would wish to compete with R in some way and that he considered there to be a risk that C would assist Mr Capstick in some way to R's detriment.

17. C was asked in evidence about whether he spoke to his father about this issue on 26 November when he first realised that he could not access the system. He stated he did not remember. His evidence was that he was 'oblivious' to his father's employment with R coming to an end until he received an email later in December when Mr Forward described himself as the managing director. I do not find this credible for the following reasons. C and Mr Capstick were living together and working for the same company. Both had their access restricted at the same time. Employees of the company were mainly working from home at that time. An obvious person for C to raise this with would be his father. C himself stated he could not recall raising this with his father. Mr Ewing's statement states that Mr Capstick raised his inability to access emails at 8.23am on 26 November. The earliest documentary evidence of C raising this issue is his email to Mr Wright on 30 November at p211. C states in his statement that his access was blocked on 25 November 2020. Having considered R's evidence I am satisfied that this was on 26 November 2020. C has not claimed that he was not working on Thursday 26 November 2020 and so I find that he became aware of this on that day. In these circumstances, I am satisfied that C spoke to his father about this and that he knew both his and his father's access was blocked on 26 November 2020. As a result, I also find that C did know about his father's problems with R, at least in general terms. I find that C found out from Mr Capstick that he was no longer working for R before he received the email from Mr Forward in which Mr Forward described himself as the managing director.

18. It is not in dispute that R removed C from the Allstaff email list at this time. I find that the reasons for this was to limit the information that C would receive about the business. Mr Forward wished to limit the information that C received about the business due to the issue he was having with Mr Capstick, and his concerns about C's relationship with Mr Capstick. As a result, C did not receive the Allstaff email send on 15 December 2020 confirming Mr Capstick's departure from the business. I also accept that C did not receive any email advising him that Guy Statham had re-joined the business. I accept that C's mother formed a new company called Ecosec, or something to that effect, around the end of December 2020. This added to Mr Forward's concerns about C's position in the business.

19. C claims that on a number of occasions between January and March 2021, Mr Dean Johnson, in praising him, made derogatory comments about his colleague, Mr Brownhill. At p252 are what I am told are contemporaneous notes of these conversations. I note that C is frequently praised for the speed at which he worked by R and accept that the comments were made by Mr Johnson as claimed.

20. C makes a number of complaints about a meeting that took place on 25 January 2021. The meeting was initially between C, Mr Forward, and Mr Brownhill, and then between C and Mr Forward when Mr Brownhill left the meeting. The meeting was recorded. It is accepted by the parties that the recording was covert. While R has taken no issue with this, I observe that it does reflect the low level of trust between C and R at that stage. The first claim is that there was an undisclosed participant at the meeting. R's response to this has been inconsistent. At para 46 of the response, R states that Mr Johnson had been present at the meeting but that his presence was announced. However, in oral evidence, Mr Johnson denied being there, and Mr Forward denied anyone else being present at the meeting. While I take into account R's inconsistent response, I do not accept there was an undisclosed person for the following reasons. R's response to the claim has been chaotic in some respects, and the fact that R's response changed may reflect that chaos, rather than a dishonest approach. The meeting was between not just between C and Mr Forward, but Mr Brownhill too. The transcript makes at least one reference to an undisclosed person being present while Mr Brownhill was still at the meeting (p237). There is no suggestion that R had any issue with Mr Brownhill. Mr Brownhill has given no evidence about this claim by C. I struggle to see why Mr Forward would wish to have a secret person attend this meeting with both C and Mr Brownhill, or even just with C. I also note that Mr Forward's evidence was that he was at home at the time of the meeting, and there may have been some background noise as a result. For these reasons I do not accept that there was a secret attendee of the meeting.

21. As to the content of the meeting, the meeting discussed C's difficulties with time lapse due to the bandwidth at his home. Mr Johnson also raised the possibility of Mr Brownhill taking on some of C's duties and performing them in the office, in particular time lapse, as Mr Brownhill was able to drive. At that meeting C does raise the issue of having his access to the IT removed and asks why it was removed. Having considered the transcript, Mr Forward does not provide an explanation. He is recorded as saying, and I accept he said words to the effect of 'apologies if that, you know if that did happen and for the confusion'. Mr Forward's response is disingenuous so far as it suggests Mr Forward did not know about this issue. This shows Mr Forward being evasive when asked about the actions taken when the dispute with Mr Capstick began.

22. C claims that in January 2021, Mr Forward told his colleague Mr Brownhill that 'he could not, in all good faith, keep Morgan in the business'. P254 indicates that this conversation took place on 29 January 2021. I do not accept that Mr Forward made these comments for the very simple reason that this is not what Mr Brownhill states he said. Mr Brownhill's statement was that Mr Forward stated that he 'could not, in all good faith, allow Morgan access to important parts of the business' or words to that effect. I consider that there is a significant difference between these two statements. I do not consider that 'words to that effect' could encompass

what C states was said. I also consider it likely that if Mr Forward had told Mr Brownhill that he couldn't keep C in the business, he would recall this rather than the more limited statement Mr Brownhill refers to. As to Mr Forward's evidence on this issue, he stated in evidence that 'Ben wouldn't lie'. I take into account the fact that C was shortly afterwards placed on full furlough. But nonetheless, as C was not there, I prefer the account given in Mr Brownhill's statement. Having found Mr Brownhill's evidence to be credible and measured on this issue, and in view of Mr Forward's assessment of his honesty, I also accept Mr Brownhill's claim that Mr Forward told him that he would put C back on full furlough to prevent him from gaining access to the CCTV monitoring server and email system. Mr Brownhill states he told C about this conversation the same or the next day.

23. While neither party has set this out clearly, having considered the transcripts of the various meetings, I find that C was put back on full furlough around the end of January or the beginning of February 2021. I also accept Mr Brownhill's oral evidence that at that point he moved from being on flexi furlough to working full time again. In evidence C accepted that he was furloughed like everyone else, and that the pandemic did affect the business. I accept that the Covid 19 pandemic was a difficult period for the business. I accept that there was a reduction in work. Mr Babenko's evidence was that the business was going through a difficult time. Mr Forward had explored whether Mr Brownhill could cover C's work at the meeting on 25 January 2021 and there were issues with C working from home and carrying out the time lapse work. However, while in a general sense C was put on furlough like everyone else, this was not the case at the end of January. When C was put on full furlough, Mr Brownhill's hours were increased to cover C's hours. While at the meeting on the 25 January, there was discussion of how Mr Brownhill could cover C's duties, there was no discussion of steps that could be taken to assist C to perform those duties. Mr Brownhill took over C's duties and hours of work. I am thus satisfied that the principal reason that C was placed on full furlough around the end of January was the explanation Mr Forward gave to Mr Brownhill, to prevent him accessing the server and emails. This was due to his concerns about C's relationship with his father, and Mr Forward's concerns that his parents were setting up a rival company, given that Mr Capstick had departed from the business less than two months earlier, and the perceived risk that this posed to the business.

24. A Teams meeting took place on 24 March 2021 between Mr Forward, Mr Johnson, and C. C states at the meeting that this is his first day back. At that meeting it was confirmed that C would be returning to work and working 50% of his normal hours. There is reference to C learning to drive. Mr Johnson refers to it being great if C could be driving by the time of the proposed return to the office, but adds that however he gets to work that is down to him. At that meeting, C raises the issue about not having received an email about 'Guy' returning to work. In response, Mr Forward stated that fully furloughed people had not been receiving their emails. While I accept Mr Forward's claim that fully furloughed people did not

receive their emails, or at least received different communication to those who were not fully furloughed, this does not explain why C did not receive any email about Guy's return, as that predated C being placed on full furlough. So, while Mr Forward's answer is correct so far as it goes, it does not address the issue raised by C. I accept that it shows Mr Forward being evasive when asked about the restrictions place on C's access to information following the dispute with Mr Capstick. That meeting was terminated on the basis that Mr Forward was having connection difficulties and rearranged for next day at the point at which C sought to raise concerns about his treatment at the time Mr Capstick left the business.

25. At the meeting on 25 March 2021, C claims that he was told that his Level 3 CMI Certificate was not relevant to his job, that the business was not in a position to offer pay rises despite other staff being granted pay rises, that he was told that his access to emails had been cut off for reasons connected to the termination of Mr Capstick's employment, and that Mr Forward told C that he was arrogant. I accept the first three claims. I do not however accept that Mr Forward told C that he was arrogant. I accept that Mr Forward told C that he liked his confidence but that it should not be mistaken for arrogance. I accept this as C made this claim in his first grievance meeting, and this was not disputed in the second grievance meeting.
26. C's next complaint is that in April 2021, on 7 and 23 April in particular, he is contacted outside of his working hours. I accept that this happened, that he was emailed and texted out of hours.
27. C submitted a grievance on 23 April 2021. The grievance complains about being contacted outside his working hours and being bullied and intimidated. He also raises trust issues from when his father left the business. The trust issues raised are his emails being cut off, lack of communication including Guy's return, and Mr Forward telling people that he could not trust C as his father was working with competition and C was feeding information to him.
28. The grievance was forwarded to Mr Forward on 29 April 2021. His response at p296 'this email has stuart's hand in it'[sic] shows his ongoing concern at C's relationship with his father.
29. C claims that at the grievance meeting on 4 May 2021 R's behaviour was intimidating and dismissive of his concerns. C's witness statement does not expand upon this claim. Having read the transcript I do not accept that either Mr Johnson or Ms Webster was dismissive of C or his concerns or intimidating. C claims that he felt pressurised into naming the source of his information. I accept that C was told that the investigation into the comments would be constrained if C would not reveal who informed him of these comments. At p302 Mr Johnson is specifically recorded as saying no one is putting pressure on C but it would be helpful to get to the bottom of what has gone on. I do not accept that C was pressurised into naming the source.

30. At the grievance meeting, C claims that Mr Forward told someone 'in all good faith I can't have Morgan in the business.' He stated he heard that he had been furloughed because they thought he was going to feed information to competitors. At the meeting there is a discussion of working hours, the difficulty caused by furlough and people working different hours. Mr Johnson states he had told Mr Warth what C's working hours are. Mr Johnson also explained that the business may seek some flexibility from C under the furlough scheme either by working different hours or some extra hours (e.g.p314). R addressed this particular concern at the meeting.
31. There was a follow up meeting on 21 May 2021 and C states that his grievance was not fairly investigated. Mr Johnson reported that Mr Forward denied making the comments C attributed to him concerning furlough. In relation to being contacted outside working hours the investigation showed that 'Andy' had thought that C worked to 4.30pm and not 4pm, and that had been clarified. Andy apologised for a particular incident where he was under pressure from a client (p344). In relation to the comments about C's confidence, Mr Forward had stated he had not meant to offend C, he just wanted C to be mindful that some people can see confidence as arrogance. In relation to the restriction of IT access, Mr Johnson explained that Mr Forward could not go into the exact reasons because of the agreement with Mr Capstick, but that he thought his actions were justified at the time, and that C's access was reinstated shortly afterwards, and that Mr Forward was genuinely sorry. So, while the comments about furlough were denied, C had the situation with his working hours clarified, a response from Mr Forward that he had not meant to offend C by referring to his confidence, and an explanation about why his access to the server was removed and an apology – confirmed in writing the same day by Mr Forward. I add that in evidence Mr Forward denied being contacted about this grievance between the two meetings. Having read the two transcripts, which I accept are broadly accurate, and indeed his email of 21 May 2021, it is obvious he was. His evidence on this issue was an example of him being completely unprepared for the hearing, having no clear recollection of events, and denying the obvious as a result.
32. I accept that C was considered for redundancy around June 2021. I found Mr Babenko's evidence to be measured and reliable and I accept his evidence. He clarified at the outset that in June Mr Forward's desire to remove C from the business was known by management staff. I consider that an important clarification. I accept his evidence that Daniel Wright, the former IT manager, was aware of this. Mr Babenko's evidence was that after analysis of the situation, it was decided not to proceed with redundancy against C. His evidence was also that other staff were considered for redundancy, not just C. I accept that the company remained in a difficult financial position at the time and so redundancies amongst the staff were being considered. I also accept that Mr Forward's concern about C's relationship with his father was an additional reason he

wanted C to be considered for redundancy. However, I do not accept that there was ever a 'sham' process. Mr Babenko's evidence does not support that claim. His evidence was that he prepared a business case for making C redundant, but Mr Forward ultimately decided not to put C through a formal redundancy process. Mr Babenko stated that after deciding not to make C redundant, Mr Forward promoted Mr Brownhill. So that means the decision that no redundancy action was going to be taken against C must have been taken by the end of June, as that is when Mr Brownhill was promoted. I accept Mr Babenko's evidence that he first told C about this in October 2021 after his working relationship with R had ceased. I accept that this was when Mr Capstick contacted Mr Babenko and informed him and informed him that C was bringing a claim against R and he asked him to be a witness.

33. Mr Wright claims that Mr Johnson told him that C was likely to be made redundant if he didn't leave himself. In view of Mr Babenko's evidence, I accept that Mr Wright would have been aware that C was being considered for redundancy. I accept that at some point in June it may have seemed likely that C would be made redundant. Given that both Mr Johnson and Mr Wright were aware of C being considered for redundancy, I accept that Mr Johnson stated to Mr Wright he thought it likely that C would be made redundant. While Mr Wright stated that he was told this at the end of July, I do not accept this. It was clear by the end of June that C would not be made redundant and so I do not accept the comments would have been made towards the end of July. It is clear that Mr Wright appreciated that that was confidential information as even on his case he did not mention anything to C about him being at risk of redundancy until after he left R's employment in September 2021.
34. At the end of June, after it had been decided not to proceed with a redundancy process against C, Mr Brownhill was given a pay rise and promoted and became C's manager. I accept Mr Forward told Mr Brownhill that he had the 'caveat of managing Morgan'.
35. C next claims that on 19 October 2021 he was asked to provide a proof of a positive Covid 19 test to explain his absence from an office party. I have considered the email correspondence at pp425-6. There is an email from C stating that a family member has tested positive for Covid 19 with an attached image. For this reason, C states he will not be attending the gathering. There is what appears to be a response from Ryan Marsh. Mr Marsh notes the image is a lateral flow test and asks if the family member is getting a PCR test to confirm they have covid. He states that C would obviously have to self-isolate pending the result 'but just making sure that this will be happening?'. There is then a further email from C stating 'They will be doing a PCR test also' P410. So, the evidence before me shows that Mr Marsh asked C if his family members would be getting a PCR test. The evidence does not show that C was asked to provide proof of a positive PCR test for covid 19. I do not accept that R insisted on further proof in the form of a PCR test. While C claims that Mr Brownhill was asked if he thought C was lying about the positive test to avoid attending,

Mr Brownhill does not repeat this claim and so I do not accept anyone asked Mr Brownhill this. In evidence C stated that it was Mr Forward, not Mr Marsh, who didn't believe him. C did not explain how he claimed Mr Forward was involved in this, and he is not involved in any of the email correspondence I so I do not accept that he was involved at all.

36. C claims that Mr Johnson accused him of lying about his previous training and work experience on 2 November 2021. I have been taken to the email correspondence on this issue which is incomplete from p413. There seems to be an initial email from Mr Brownhill asking C to 'take care of timelapse images' while he is off sick. C replies to Mr Brownhill and Mr Johnson that he doesn't know how to do this as he had not been shown and seems to ask if someone else can take this on. C also emails Mr Brownhill directly and states that he doesn't 'have a clue' how to take care of the timelapse folders. Mr Johnson's reply states that he is surprised that C hadn't been shown how to do this. The only person who would be able to help is Ben. Ben then replies stating that C had been shown this back in Emley, by logging into filezilla, going to each camera, and dragging them into the corresponding folder. There is then a further email from Mr Brownhill stating that C was 'on with it now and knows what he's doing'. Having considered this email chain I am satisfied that C was incorrect in stating that he had not been shown how to perform this task. I do not accept that Mr Johnson implied C was lying. He simply expressed surprise at C's claim that he had not been shown how to do a certain task, and was indeed vindicated as it transpired that C had been shown how to do the task. Mr Forward may have implied C was mistaken, as indeed he was, but there is no implication that C was being dishonest.

37. On 5 November 2021 C resigned with notice. He referred to issues that he had raised and the lack of corrective action. A number of further allegations had been brought to his attention which had left him feeling vulnerable and unappreciated. His final day of work was 3 December 2021.

THE LAW

38. S95 of the Employment Rights Act 1996 (the Act) defines a dismissal for the purposes of a claim for unfair dismissal. S95(1)(c) is relevant to the present case and states:

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –
(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

39. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA, Lord Denning MR stated as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

40. The component parts of a constructive dismissal which need to be considered are as follow. First, there must be a repudiatory or fundamental breach of the contract of employment by the employer. Second, , the employee must terminate the contract because of that breach. Third, the employee must not have lost the right to resign by affirming the contract after the breach.

41. C relies on the implied term of trust and confidence, formulated in Malik and Mahmud v BCCI [1997] ICR 606 as being an obligation 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.”

42. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, the conduct relied on as constituting the breach must:

“impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”

43. C’s case is that a series of events or course of conduct amounted to a breach of trust and confidence and so he relies on the last straw doctrine. I have considered the guidance in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

CONCLUSIONS

44. I now consider whether R breached the implied term of trust and confidence in the manner claimed by C. C has produced a schedule of the claimed acts which cumulatively amount to a beach of the implied term of trust and confidence. I will consider the claimed breaches in turn and whether they could each amount, when considered cumulatively, to a breach of that implied term.

45. The first claimed breach (1) is blocking C’s access to R’s computer system. I find that R had reasonable and proper cause for taking this action. There was a dispute between Mr Capstick and Mr Forward leading to Mr Capstick leaving the business. Mr Capstick deleted a significant

amount of data. It was reasonable for Mr Forward to consider that there was a risk that C may try to access company data to assist his father. It was reasonable for Mr Forward to take steps to protect the business from that risk. I do not suggest that C did anything improper to assist his father. But by virtue of his relationship with his father, Mr Forward acted reasonably in considering that there was a risk that he would do so and taking action to address and mitigate this risk. So, R and Mr Forward had proper cause for this action and so whether singly or cumulatively, this action does not amount to a breach. This conduct does not form part of a course of conduct capable of breaching the implied term.

46. C complains about being removed from the Allstaff email list (2). The evidence is that C was excluded from certain all staff emails in December and January. While the Allstaff email list does not appear to have been used for sensitive matters, I am satisfied that R acted reasonably and with proper cause due to the risk posed by C's relationship to Mr Capstick, Mr Capstick's departure from the business, and Mr Forward's legitimate concerns that Mr Capstick may seek to go into competition with R. Also, I do not consider that such an action reaches the threshold of seriousness to amount to a breach of the term, even as part of a series of actions. I do not accept that restricting the emails sent to C in this way is an act calculated or likely to destroy or seriously damage the relationship of trust and confidence when viewed objectively. This conduct does not form part of a course of conduct capable of breaching the implied term.
47. C makes a particular complaint about not receiving an email announcing his father's departure from the business (3), and only finding out when Mr Forward sent an email describing himself as managing director. I do not accept that C found out about Mr Capstick's departure from the business in the manner claimed. I do not accept C's evidence that he did not discuss the restrictions on his access to the system with his father when this occurred in November 2020. As C's evidence on this is not credible, I do not accept he did not know about his father's departure from the business before receiving the email from Mr Forward. Also, for the same reasons as (2), this act did not amount to a breach whether singly or cumulatively. This conduct does not form part of a course of conduct capable of breaching the implied term.
48. C complains about not receiving an email about Guy Statham re-joining the business (4). I have already made findings on C's exclusion from the Allstaff email list in relation to (2). In any event, I do not consider that the failure to inform C of a new member of staff joining the company is a matter of sufficient severity, whether singly or cumulatively to amount to a breach. This is not an act calculated or likely to destroy or seriously damage the relationship of trust and confidence when viewed objectively. This conduct does not form part of a course of conduct capable of breaching the implied term.
49. C makes a number of complaints about Mr Johnson praising C and either implicitly or explicitly criticising his colleague Mr Brownhill (5), (8), (9), (10)

(13). I accept praise by comparison may be poor practice, though also perhaps difficult to avoid when two people are performing the same or similar role. Ultimately C was being praised in a somewhat inappropriate way. Noting the threshold of seriousness, I do not accept that the comments C claims were made were either calculated or likely to seriously damage or destroy the relationship, whether considered singly or cumulatively. This conduct does not form part of a course of conduct capable of breaching the implied term.

50. I turn to the meeting on 25 January (7). The meeting discussed a legitimate problem, namely C's inability to carry out the Timelapse due to his internet connection at home. This was an entirely legitimate matter to raise, whether it implied redundancy or not. While the only solution discussed was Mr Brownhill taking over this work, R did not act in a manner, whether singly or cumulatively, calculated or likely to destroy or serious damage the relationship by raising this issue.

51. As to Mr Forward's response when asked about C's access to the system being restricted, 'apologies if that happened', I accept that is somewhat evasive and disingenuous. He is also in my view evasive concerning the use of the Allstaff email address. However, I find that Mr Forward had reasonable and proper cause not to provide a full explanation, namely his concern over the non-disclosure agreement with Mr Capstick, and indeed C's relationship to Mr Capstick. This is also a case where full and frank disclosure by Mr Forward of the reasons for restricting C's access to information to the business itself could have undermined the relationship of trust and confidence between R and C. This was, in short, a difficult situation, and at that time, there was reasonable and proper cause for not providing a full explanation. I also find that the lack of a full explanation was neither calculated nor likely to seriously damage the relationship in circumstances where C himself was aware that his access had been restricted at the same time as his father and he knew this, sufficient access had been restored for C to perform his role, C's father had left the business, and C's mother had set up a new business in an apparently related field. In short, C would have been aware of Mr Forward's concerns. I have found that there was no undisclosed participant at the meeting. This conduct does not form part of a course of conduct capable of breaching the implied term.

52. I turn to consider the phone call between Mr Forward and Mr Brownhill on 29 January 2021 and the comments that he could not allow C to have access to important parts of the business and that he would put C on full furlough to prevent him having full access to the server and emails (6). Both the communication and the action itself is deemed to be a breach. I deal with the communication first. They cannot have been calculated to destroy or seriously damage the relationship because the comments were not made to C, but Mr Brownhill. Mr Forward clearly made these comments in confidence. He told Mr Brownhill he did not want anyone to hear what he had to say and advised him not to discuss this with anyone. So, the comments were not calculated to destroy or seriously damage the

relationship, because they were made in circumstances where Mr Forward clearly did not expect C to hear the comments. I consider that when Mr Forward made these comments, it was more likely than not that they would be treated in confidence by Mr Brownhill. Given that Mr Forward made clear that these comments were made in confidence, that Mr Forward was the owner and managing director of the company that employed Mr Brownhill, it was not likely that Mr Brownhill would disclose them to C. The fact that Mr Brownhill did disclose this information does not mean that it was likely that he would do so. This conduct does not form part of a course of conduct capable of breaching the implied term.

53. I turn to the actions themselves. As I have found, R had proper cause for restricting C's access to important parts of the business so this does not amount to a breach. The question of the use of furlough is different. I do not consider that R can show reasonable and proper cause for excluding C from the entire business for a period, given steps were put in place to restrict his access in December. While there were other legitimate reasons for placing staff on furlough at that time, C was treated differently to other staff and Mr Brownhill in particular. The decision was taken to place C on full furlough and increase Mr Brownhill's hours. While C had difficulties performing one part of his role from home, there was no attempt to resolve these difficulties beyond giving the work to Mr Brownhill. The principal reason for placing C on full furlough was as stated by Mr Forward to Mr Brownhill, from to prevent C from gaining access to the CCTV monitoring server and email system. I do not consider that there was reasonable or proper cause for doing so. Mr Forward had already taken steps to restrict C's access to information. I take account of the build up to this decision. C was aware that his IT access had been restricted for a period. He was aware that he had not been receiving emails other staff had been receiving. He was aware that Mr Forward had considered Mr Brownhill taking over his duties and was likely to find out that as his hours were reduced to zero, Mr Brownhill's had increased. In these circumstances I am satisfied that placing C on full furlough for this reason is capable of forming part of a course of conduct likely to seriously damage the relationship of trust and confidence and so breach the implied term.

54. C complains about comments being made about him learning to drive and how he will get to work at the meeting on 24 March 2021 (11). The comments recorded in the transcript are entirely innocuous and were neither calculated nor likely to damage the relationship in any way. C also complains that that the explanation given for the restriction of his IT access was untrue. Mr Forward was evasive, but I have already found that he had reasonable and proper cause for not providing a full explanation due to the non-disclosure agreement with Mr Capstick, and concern about C's relationship with Mr Capstick. For reasons already stated the lack of a full explanation at this point was not conduct calculated or likely to seriously damage or destroy the relationship whether consider singly or cumulatively (see 7). This conduct does not form part of a course of conduct capable of breaching the implied term.

55. C's next complaint (12) is that he was told at a meeting on 25 March 2021 that his Level 3 CMI Certificate was not relevant to his job. I accept that this statement is factually accurate. The comment is entirely innocuous and does not breach the implied term. C states he was told at the meeting that R was not in a position to grant a pay rise. C has not submitted any evidence of pay rises being given to other staff around that time not linked to a change in their role. C has not shown this comment was untrue. This conduct does not form part of a course of conduct capable of breaching the implied term.
56. C's next complaint is that he is told at the meeting that his access was cut off for reasons connected to Mr Capstick's departure from the business. This is despite his earlier complaint that he was not provided with an explanation for why this was done. C has not claimed that the explanation itself damaged the relationship in any way, but if it did it was reasonable and for good cause, namely giving C an explanation which he had repeatedly sought. Nor can R be criticised for providing an explanation repeatedly sought by C. R's actions in giving this explanation were neither calculated nor likely to damage the relationship whether consider singly or cumulatively. This conduct does not form part of a course of conduct capable of breaching the implied term.
57. C complains about Mr Forward's comments that his confidence should not be mistaken for arrogance. In the context of a difficult relationship Mr Forward was unwise to make such a comment. However, a manager is entitled to comment to employees about how they might be perceived. The comment does not in my view come close to being either calculated or likely to destroy or seriously damage the relationship, whether singly or cumulatively, even in the context of a complicated working relationship. This conduct does not form part of a course of conduct capable of breaching the implied term.
58. There was no breach of the implied term relating to C being contacted out of working hours (14 and 15). Context is important. Many staff were on flexible furlough working different hours. There was some misunderstanding about C's working hours. There were at times business pressures meaning C was chased for work. But ultimately, C was not required to do anything outside of his agreed working hours or anything in breach of the furlough scheme. He was at times asked to show flexibility but this was just a request. C raised the issue with R and that led to an investigation that established there was a misunderstanding over his hours and this was clarified. Nothing R did in relation to this issue was calculated or likely to damage the relationship to the extent required. This conduct does not form part of a course of conduct capable of breaching the implied term.
59. C complains that at the grievance meeting on 4 May 2021 R was dismissive and aggressive (16). The transcript of the meeting does not indicate R was aggressive or dismissive. C was not pressurised to name

his source, just informed refusal to do so would limit the investigation. The way R conducted this meeting did not breach the implied term. This conduct does not form part of a course of conduct capable of breaching the implied term.

60. I do not accept that the grievance was not fairly investigated (17). The issue concerning contacting C outside his hours was investigated and resolved. C received a response to the comment regarding confidence and arrogance. C received an apology for having his access to information to company data restricted. I do not accept that the grievance was unfairly investigated in relation to these matters. C's grievance letter does not specifically raise the reason why he was placed on full furlough (p296-7). At the meeting on 4 May 2021, C states he was told he was put on furlough because 'someone thought I was going to feed information to competitors'. Mr Forward had said 'and I quote, "...in all good faith I can't have Morgan in the business" because he thinks I'd be shot-gunning information everywhere...' (p300). Mr Forward denied making the statement and without the source being named, no further action was taken (p339). The difficulty for C in relation to this issue, is that C did not name the source of the information, Mr Brownhill, and so he was not interviewed as part of the investigation. Further, I have found that Mr Forward did not make the statement set out above. Finally, I consider that C's claim that someone thought he would feed competitors, or shot-gun information, goes beyond what Mr Brownhill states he was told. Mr Brownhill's statement only refers to Mr Forward stating he would place C on full furlough to prevent him gaining access to the server and email system. Mr Brownhill does not claim that Mr Forward told him that he thought C was going to feed information to competitors or shotgun information. As set out above, there is a distinction between taking action to mitigate a risk, namely that C would feed information to competitors, and accusing someone of intending to feed information to competitors. What this means is that Mr Forward was entitled to deny the particular claims made about what he had said and the reasons he was placed on furlough. As C would not name his source, there was nothing further that could be done to investigate this issue. I thus do not accept that the investigation was inadequate in the ways claimed or that it could form part of a course of conduct breaching the implied term. This conduct does not form part of a course of conduct capable of breaching the implied term.

61. C has not clearly set out how he claims the email sent by Mr Forward on 21 May 2021 breached the implied term. I do not consider that it was calculated or likely to do so. It is innocuous and an attempt to move forward. There is no breach of the implied term whether considered singly or cumulatively. This conduct does not form part of a course of conduct capable of breaching the implied term.

62. I do not accept that Mr Forward instructed Ms Webster to find a case to make C redundant under a sham process (18) (19). I do not consider that R breached the implied term by considering the possibility of making C redundant in June 2021, even if one reason why Mr Forward wanted this

to be considered was because of C's relationship with his father. C was one of a number of individuals who were considered. The company was in a difficult financial position. Mr Forward was entitled to consider the business case for making various members of staff redundant in confidence. The process was not a sham as after the business case for making C redundant was considered it was decided not to proceed. Ultimately R took no action against C in relation to this issue. The fact that C was under consideration for redundancy, while known amongst management, was kept confidential within the management team. Mr Babenko did not disclose what he knew to C about this until his contract with R had ended and he was contacted by Mr Capstick with a view to bringing proceedings against C. Considering C for redundancy in this way was not calculated or likely to destroy or seriously damage the relationship because the process was not a sham, there was a genuine consideration of the case for making C redundant, C was one of a number of people whose positions were considered, ultimately R did not take any formal redundancy action against C, and R was entitled to expect that those advising or within the management team aware of this information would treat it confidentially. Mr Bebenko's disclosure of this information to C was not R's act as he informed C after he had stopped advising R. This conduct does not form part of a course of conduct capable of breaching the implied term.

63. C claims that the comment to Mr Brownhill in June on 2021 that he would receive a pay rise but he would have the caveat of managing C amount to a breach (20). This is in my view an innocuous comment. It does not contain a negative connotation concerning C. The caveat is not that Mr Brownhill had to manage C in particular, but that with his pay increase he would have additional responsibilities, namely management. This is supported by Mr Brownhill's own evidence. He stated he asked for pay rise, which led to his promotion, and 'to balance it out' Mr Johnson added the responsibility of managing Mr Capstick. This innocuous comment was not calculated or likely to breach the implied term. This conduct does not form part of a course of conduct capable of breaching the implied term.

64. C claims that Mr Johnson told other employees that C would be made redundant (21). Before me, the claim was that he told Mr Wright that C was likely to be made redundant if he didn't leave himself around the end of July 2021 and Mr Wright told C of this after his employment with R ended. I have accepted that Mr Johnson made such a comment, but that it was made earlier in June 2021, in the context of the management team being aware that C was being considered for redundancy. I have found that Mr Wright appreciated that the comment and the fact that C was being considered for redundancy were confidential as reflected in the fact that he did not mention this to C until he had ceased to be employed by R. The comment was not calculated or likely to destroy or damage the relationship as it was not made to C and it was made to a member of the management team in circumstances where Mr Johnson could expect that it would be treated in confidence and it was likely to be treated in confidence. The disclosure of the comment was not the act of R as it was made after Mr

Wright was no longer employed by R. This conduct does not form part of a course of conduct capable of breaching the implied term.

65. I add that there is a final unnumbered and undated allegation that Mr Johnson made comments to other employees about C's pending redundancy. I accept that C's possible redundancy was discussed within the management team, including by Mr Johnson. However, I consider that such discussions were treated confidentially as C did not find out about this until after Mr Wright and Mr Bebenko had ceased working for R. I do not accept that Mr Johnson discussed this issue within anyone outside the management team. The only specific allegation came from Mr Wright, who was himself a member of the management team and did treat the information with confidence while he remained an employee. I do not accept that the intended removal of C from the company was widely known around the business. Mr Babenko's evidence was more limited than that, and I accept that it was known amongst the management team that C was considered for redundancy, but that this was resolved by the end of June 2021. Had this been widely known, C would have found out about this sooner than he did. The fact that R considered the possibility of making C redundant in confidence, and members of the management team knew about this and treated it with confidence, is not conduct that was calculated or likely to destroy or seriously damage the relationship. This conduct does not form part of a course of conduct capable of breaching the implied term.

66. C claims that he was told to provide proof of a positive Covid 19 test to explain his absence from an office party and that R did not believe what he was saying (22). I do not accept this. I have analysed the exchange above and it is entirely innocuous. Mr Marsh asks if the relevant family member will be taking a PCR test. C is not accused of lying. This is not implied from the email exchange before me. I do not consider that Mr Marsh acted inappropriately in asking whether the family member would be obtaining a PCR test. This conduct does not form part of a course of conduct capable of breaching the implied term.

67. The final act complained of, the last straw, is the claim that C was accused of lying about his previous training on 2 November 2021. I reject that claim. I have found that C (incorrectly) stated he had not received training on a subject. Mr Johnson expressed surprise at this, at most implying C was mistaken, which he was. Mr Brownhill confirmed that C had received training and reminded him what to do. So far as I understand it C then carried out the task. Mr Johnson did not accuse C of lying or imply he was lying. He was entitled to express surprise given C himself was mistaken about his training. This is innocuous. R cannot be criticised for this exchange. This conduct does not form part of a course of conduct capable of breaching the implied term.

I have thus found that placing C on full furlough from the end of January or early February 2021 until 24 March 2021 to prevent him gaining access to the server and email system was conduct capable of forming part of a

course of conduct likely to seriously damage the relationship of trust and confidence and so breach the implied term. However, I have found that no other actions of R were capable of forming part of a series of such actions or course of conduct contributing to the breach. The final two matters relied upon in particular by C were utterly trivial. As I have only found one matter capable of contributing to a breach, I have not found that there was any course of conduct or series of actions that cumulatively amounted to a breach. C did not argue that any single allegation alone was sufficient to cross the Malik threshold. In any event I find that placing C on full furlough in late January/early February 2021 until 24 March 2021 was not conduct on its own so serious as to destroy or seriously damage the relationship of trust and confidence and so did not breach the implied term of trust and confidence.

68. In case I am wrong in this assessment, and this matter did cross the Malik threshold, C was placed on full furlough around the end of January or early February 2021 returning to flexi furlough on 25 March 2021. As he did not give notice of resignation until 5 November 2021 I must consider whether C affirmed the contract after any breach. C did not give notice of resignation until over 7 months after full furlough came to an end, and over 5 months after his grievance had been concluded. Whether a 7 month or 5 month delay, both amount to a very significant period of time, given that Western Excavating states that an employee 'must make up his mind soon after the conduct of which he complains'. C was not on sick leave; he was continuing to perform his contractual duties. I do not consider the fact that C was working from home to be of particular significance. The length of delay must also be considered in the context of the length of employment, which at just over 3 year and a half year at the point of resignation is not particularly lengthy, and does not justify such a lengthy delay. For all these reasons I find that even if the Malik threshold was crossed when C was placed on full furlough between around the end of January or early February 2021 and 24 March 2021, C affirmed the contract by not giving notice of his resignation until over 7 months after his return to flexi furlough, and over 5 months after the conclusion of his grievance. I therefore dismiss C's claim for unfair dismissal.

Outstanding matters and directions

69. The outstanding matters relate to C's application for a preparation time order and the possibility that C, in the light of the matters leading to the strike out application before me, will instead make an application for costs in view of Rule 75(3). In considering whether to make an application for costs, C should consider the extent to which any additional costs were incurred as a result of the matters raised in the strike out application.
70. Having considered Procedure Rule 77, I am satisfied that the question of any preparation time order or costs order can be dealt with by way of written submissions and I issue the following directions:

- a. No later than 28 days after this judgment is sent to the parties, C must:
 - i. Confirm whether he wishes the Tribunal to make a costs order or a preparation time order; and either:
 - 1. File and serve written submissions in support of his application for a preparation time order further to the order of Judge Jones at p105 and justifying the sums claimed in the schedule or;
 - 2. File and serve written submissions in support of an application for costs including a cost schedule justifying the sums claimed;
- b. No later than 5 weeks after this judgement is sent to the parties, R must file and serve written submissions responding to C's written submissions.
- c. No later than 6 weeks after this judgement is sent to the parties, C must file and serve any final written submissions in response.

Employment Judge Sills

Date: 5 January 2023