



# **EMPLOYMENT TRIBUNALS**

**BETWEEN:**

**Claimant**

Mr David Stevenson

And

**Respondent**

Design Locker Limited

## **AT A PRELIMINARY HEARING**

**Held:** At Leicester **On:** 3 & 4 February 2025

**Before:** Employment Judge R Clark (Sitting alone)

### **REPRESENTATION**

**For the Claimant:**

Mr Stevenson in person

**For the Respondent:**

Ms Gumbs, of Counsel

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## **JUDGMENT**

1. The claim of unfair dismissal **fails and is dismissed**

## **REASONS**

### **1. Introduction**

1.1 By a claim presented on 16 October 2024, the claimant presents a single claim of constructive unfair dismissal.

1.2 Mr Stevenson took up new employment at the same rate of pay immediately following the termination of his employment with the respondent. He does not claim any financial loss. His claim was initially put as notice or redundancy but was clarified as being for the basic award only.

## **2. Preliminary Matters**

2.1 This is not a shining example of case preparation. Self-represented parties can be expected to be unfamiliar with the practicalities of what is involved with disclosure, bundles and witness statements. Represented parties should not. The bundles have not been sent in time for them to reach me at this hearing centre. Fortunately, I had a digital version and because the volume of papers was limited, I was prepared to ask my clerk to arrange a hard copy for the witness stand. Both parties can be criticised for their disclosure searches. Both parties' witness statements also left out of account significant aspects of relevant evidence. Both appear to have been content to present their cases in a patchwork, with no cross referencing to contemporaneous documents as if intending to make the task of understanding their respective cases as difficult as possible. However, I received no consequential applications for any default beyond permitting late disclosure to be relied upon and further evidence in chief to be given. The case is what it is, and my decision is based on the evidence put before me.

2.2 The second day started with an application by Mr Stevenson under rule 49. This was prompted by some late disclosure from him which went to the circumstances and timing of his search for what became his new employment. This initially appeared to be an application to redact the name of the person he had been dealing with to secure alternative employment, as she was known to the respondent. However, Mr Stevenson explained that his concern was actually that she had corresponded with him on the understanding he would not tell Mrs Forbes. The application was essentially because he felt bound by that obligation of confidence. In the event no rule 49 order was needed. The documents were disclosable, and I ordered them to be shown to the respondent. To the extent that Mr Stevenson owed any obligation of confidence to the third party, he has not breached that. It is my order which means Mrs Forbes then learned of the identity of the third party. In any event, the circumstances of confidence that would have potentially engaged under the now repealed section 10A of the Employment Tribunals Act 1996, and remain to some degree within rule 49, did not persuade me the principle of open justice should be diluted with any order.

## **3. Issues**

3.1 As is usual for this type of claim, the case has not been subject to a prior case management hearing. Standard directions were issued at service. Whilst the claim is straight forward, the issues arising under it need to be set out.

3.2 The only issue is whether Mr Stevenson's resignation amounts to a dismissal in law. There is no alternative plea of fairness if it is a dismissal. It is, therefore, for him to show repudiatory breach and that he resigned in response, without prior affirmation, so as to engage section 95(1)(c) of the Employment Rights Act 1996.

3.3 The term of the contract relied on is the implied term of trust and confidence.

3.4 The conduct alleged to breach that term is: -

- a) The claimant was ignored by Mrs Forbes for 3 weeks after requesting a pay rise for other employees on 3 July 2024.
- b) At a “clear the air meeting with the director”, Mr Stevenson says he was (i) told that he had no right to request a pay rise and to just do his job and (ii) was informed of complaints raised against by other staff members. He says if complaints had been raised then the company should have followed the correct handbook procedures.
- c) Not getting a response to the grievance he raised on 25 July 24 despite a promise by Mrs Forbes on 31 July to address all emails.
- d) Thereafter consistently ignored by Mrs Forbes who no longer discussed customer orders with him.
- e) That on or around 16 August he found out there were a secret recruitment, and interviews held in the warehouse and a new team member introduced without his knowledge.
- f) Around 10 August, he received calls from third parties telling him that the respondent’s director was actively seeking to replace him. The claimant says he took no notice of this as he had a “strong notice” with a 6 month notice clause.
- g) On 27 August, Mr Stevenson discovered a printout of an email on his desk dated 6 August. He says it was placed there purposely. He says it showed Mrs Forbes and Mr Patel were clearly looking to recruit for his position at a cheaper cost.

3.5 The acts take place over a period of a little under 2 months. I clarified with the parties whether this case was a “last straw” case or whether the nature and temporal proximity of these 7 events was such that I should regard it all as part of a single continuing act of conduct. It was not immediately clear whether affirmation was a live issue in this case although aspects did come to light where it is potentially engaged, depending on how it was finally analysed. For his part, Mr Stevenson did make clear that it was the discovery of the e-mail that made his position untenable and prompted the resignation. For those reasons, I have treated this as a last straw constructive dismissal case in which there is potential for the issue of affirmation to arise in the earlier alleged conduct.

3.6 The respondent’s defence goes to the facts of the matters alleged by the claimant and their proper context from which, it says, the implied term of trust and confidence has not been breached. It challenges whether the conduct was in fact the reason for the claimant’s resignation or whether that was solely in respect of his new employment opportunity. It does not plead an alternative case of fairness.

3.7 If this resignation was a dismissal, the claim will succeed and the claimant will be awarded a basic award in the sum of £13,300, subject only to any reduction made under section 122(2) of the 1996 Act.

3.8 The issues pleaded in respect of contributory conduct under section 123(6) of the 1996 Act, and adjustments under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, do not engage because no compensatory award is being sought.

#### **4. Evidence**

4.1 For the claimant I heard from Mr Stevenson himself. Mr Stevenson's witness statement is made up in part of an expansion of the ET1 grounds of complaint. The bulk of it is in the nature of responses to the respondent's ET3.

4.2 For the respondent I heard from: -

- a) Nema Forbes, the respondent's director.
- b) Debbie Pattern Senior Pattern Tech.
- c) Josie Rossa, Testing and label.

4.3 I received a small bundle running to 221 pages including the additional disclosure

4.4 Both parties made oral closing submissions.

#### **5. Facts**

5.1 It is not my role to resolve each and every last dispute of fact between the parties. My role is to make such findings of fact as are necessary to determine the issues before me and set the case in its proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent is a designer, manufacturer and supplier of fashion clothing. It supplies its products to the high street retailer River Island. It is a small employer. At the time relevant to Mr Stevenson's claim there were no more than six employees including Mrs Forbes, the director and owner. Although not an employee, Mr Ashok Patel, a financial or business adviser, supports her and is consulted regularly on a range of management issues. It had been a larger employer in the past but various pressures, COVID in particular, led to a reduction of employees in recent years and other measures to reduce hours. Since Mr Stevenson's resignation, the respondent has increased its staff slightly once again and now employs something in the region of 10 employees.

5.3 Mr Stevenson's employment with the respondent commenced in 2011 as its production manager. It was a senior position, effectively the number two to Mrs Forbes for which he was paid £50,000 per annum. His employment was governed by a detailed written contract of employment, last issued in or around 2016. It contains all the heads of terms one would expect including various obligations of confidentiality and post-employment restrictions. The period of notice required to terminate the contract was six months on either side. The employment relationship is also regulated by a staff handbook of policies and procedures which is also before me but to which next to no reference was made.

5.4 Like many businesses of this size, job role demarcation is sometimes blurred. All can be expected to turn their hand to other tasks, within reason. Over time, relationships can develop a degree of informality that might not happen so readily in larger, complex, more formally structured organisations. It is equally the case that the relationships can start to feel like family relationships.

5.5 There is no dispute that Mr Stevenson was excellent at his job, and I find Mrs Forbes held that view throughout. I find his resignation was a blow to her and the business, which was made all the more difficult to manage because of its timing.

5.6 In his evidence, Mr Stevenson starts the chronology on 3 July 2024, but I need to go back some years to set the events in context. I find the relationship between Mr Stevenson and Mrs Forbes was good throughout and contained the same occasional tresses and tensions as is to be expected in this close working relationship. Despite that normality, something was causing Mr Stevenson dissatisfaction with his employment. I have already referred to the reduction in the number of employees this employer employed since COVID. I find that had placed a particular burden on Mr Stevenson in the nature and breadth of additional duties he had to pick up. There may be other factors that have not been articulated but this seems to have been an issue for Mr Stevenson. Like most specialist sectors of the economy, many of the people working in the different companies in this industry are known to each other. At some point around October 2023, Mr Stevenson was in contact with another company. There is no dispute that other company is regarded as a competitor of the respondent. Those extended discussions led to an informal interview. That in turn led to a job offer. I find Mr Stevenson was interested in working for this new company but declined the offer because of the restrictions in his contract and the fact he would have to give 6 months' notice.

5.7 A few months later, in or around January 2024, Mrs Forbes had a serious accident injuring her ankle. It was put in a cast for a number of months, reset and cast again. At a later date she was required to wear a protective boot up to and including the time the events in this case begin to unfold. I find she was still suffering with the effects of that and not as mobile as she ordinarily would be. She spent more time than she ordinarily would away from work recovering and when at work, spent more time in her office. It is no surprise that the extent to which Mrs Forbes relied on the support of Mr Stevenson increased what was already a demanding workload. Whilst I find Mr Stevenson carried out his duties to the full, this can only have added to his discontentment and interest in looking elsewhere.

5.8 The commercial pressures on the respondent that had led to it reducing its staff numbers in recent years had also meant the staff had not had any meaningful pay rises for some time. I find that some of those junior staff spoke to Mrs Forbes in or around the last week of June 2024. I find Mrs Forbes understood the request from the staff. She told them that at an informal meeting that she could not address it at that time in the year, but that she had already planned a pay review for December that year and would address it then. After explaining the position to the staff, all were content to wait save for one who raised the issue

with Mr Stevenson. Mr Stevenson was not aware that this discussion had already happened with Mrs Forbes. He took up the cause with her.

5.9 For his part, I do not characterise his subsequent actions as being in the nature of a staff representative or trade union official. His motivation was mainly business continuity and the implications to the business of losing any of the team. As a result, he wrote an email to Mrs Forbes explaining what had been said anonymously, suggesting a 5% pay rise and explaining the commercial reality of having to replace any of them if they left. He ended with:-

***If you and Ashok want a chat in private then let me know, otherwise I will leave it with you.***

5.10 I find there was nothing more to this email. I find the fact that Mr Stevenson sent it and the terms in which he put it did not cause any issue to Mrs Forbes. In fact, I find she recognised the manner in which he had communicated the issue to her was focused on business interests. She was, however, very unhappy with the staff who had gone to Mr Stevenson to advance this cause so soon after she had had the meeting with them. As to what she did about it, in view of the way Mr Stevenson had framed his e-mail, Mrs Forbes did not understand it required a response and so did not respond.

5.11 Around the same time, the respondent had been dealing with a design issue on one of the garments it makes for River Island. It is clear to me, and I therefore find, that Mrs Forbes and Mr Stevenson were continuing to communicate with each other. This design issues establishes that. I accept Mrs Forbes' evidence that her foot was continuing to cause her difficulties, and she was herself exceptionally busy. Mr Stevenson may have assumed he had caused an issue by his email about staff pay rises, but I find that was not the case. However, his perception affected the way he then interacted with Mrs Forbes. Whilst the two continued to communicate perfectly normally through e-mail they did not spend as much time as might otherwise have been the case in each other's company discussing things face to face in the weeks that followed.

5.12 Late on Sunday, 21 July, Mr Stevenson sent an e-mail to a contact at the respondent's client to cancel a meeting due to take place the next day. This was so he could take the day off at short notice. First thing on Monday morning, Mrs Forbes replies to Mr Stevenson in supportive terms saying "OK, is everything OK?". He replied late Monday afternoon saying

***All fine. I'll be back in tomorrow. Although I do need to sit down with you, or possibly you and Ashok sometime tomorrow. If you could arrange for a time to suit for both then that will be great"***

5.13 This short notice leave is consistent with the accounts of other members of staff of Mr Stevenson changing his usual approach to work over these summer months including leaving early and having others at lock up for him. There is nothing inherently wrong with that, but they were such a change in his approach that they became noticeable to his colleagues. Those staff had also noted Mr Stevenson had become uncharacteristically abrupt and disinterested when, for example, they approached him for advice on work issues. This is consistent with Mrs Forbes perception of him. Again, all were under pressure to do an increased volume of work within their roles, and it may simply be that Mr Stevenson was too

busy, nonetheless that is how they perceived it. It is understandable why, in the context of everything else, that Mrs Forbes suspected this short notice absence might have been for a job interview. I have no documentary evidence of the actual reason for this short notice absence. When asked Mr Forbes said it was to attend to a family members health issue some distance away which I accept.

5.14 Mrs Forbes set about arranging the meeting as soon as all three could make it. It took place at the end of the working day on 23 July with Ashok Patel also in attendance although I find he did not contribute.

5.15 This meeting is what Mr Stevenson refers to in his claim as the “clear the air” meeting. There are no minutes, and the actual topics of conversation are not all before me. However, the essence of it seems to be that both parties do seem to have shared their perception of how the other was acting. During the course of that meeting, I find: -

- a) Mr Stevenson believed his e-mail concerning staff pay rises had been the cause of a change of attitude towards him. Mrs Forbes denied that. She did however explore the issues behind the discussion about the pay rise and I find there is no doubt she expressed her upset and dissatisfaction with the staff, and not with him, in the way one or more of them had pursued matters with Mr Stevenson after she had already had the meeting with them. His e-mail did not identify which member of staff had approached him. Mrs Forbes wanted to know but he would not disclose it. Later in the meeting, in the course of discussions about the amount of work Mr Stevenson had to do Mrs Forbes linked the two saying, along the lines of, he should concentrate on his own role because he was overwhelmed and allowed the staff members who want to discuss pay rise to do so with her.
- b) For her part Mrs Forbes also put to Mr Stevenson the perception she and other staff had of him becoming volatile and abrupt in recent times which he denied. Mrs Forbes gave examples of concerns being raised by colleagues about what they had noticed. This was an appropriate matter for Mrs Forbes to put to Mr Stevenson, but it inflamed the situation as Mr Stevenson considered this to be an accusation of disciplinary misconduct matters which I find it was not, but his reaction is itself indicative of a tension that had not been present in earlier years. Thereafter, that became the focus for him which manifests in the “grievance” that he would lodge the following day.
- c) Mrs Forbes gave an example of his change in demeanour in that she had understood him to have called her a muppet on one occasion.
- d) She put to him that he was doing too much as he was reluctant to hand over responsibility and they needed to remove some of the pressure by giving some of his work to others.
- e) I do not accept Mr Stevenson's account that during that meeting Mr Patel said to him “to stay out of it” in respect of the pay dispute. Elsewhere he says Mr Patel said

nothing during this meeting and, to the extent that he might have contributed any comments, the only direct instruction within that part of the discussion about pay was when Mr Stevenson himself refused to tell Mrs Forbes who had raised the issue with him.

f) There is no dispute that at one point Mr Stevenson suggested to Mrs Forbes that she sack him and pay him off. I find Mrs Forbes responded by saying how dare you ask me and that she had no problem with him and his work but did have an issue with the way he was speaking to her.

5.16 As a result of this meeting, I find Mrs Forbes set about the task of reorganising duties and also began exploring whether they could recruit to a new role to support Mr Stevenson. I find she and Mr Patel also discussed whether Mr Stevenson was planning to leave. Some discussion took place between them about the prospects of being able to replace him if he did leave.

5.17 The following morning further emails were exchanged. At about 9:30 Mrs Forbes emailed Mr Stevenson and two other key colleagues Debbie Payne and Jose Rossa. That was in respect of the changes that would need to be made to Mr Stevenson's duties, and she proposed a meeting for all four in his room at 4:00 PM. It is clear to me that she was taking seriously the need to change the distribution of work responsibilities to relieve Mr Stevenson of some of his heavy workload and she was acting promptly in making those changes happen sooner rather than later. I find she believed this was part of the reason for Mr Stevenson's apparent change of attitude towards them all. The second email was from Mr Stevenson to Mrs Forbes at about 10.15 with the subject "response". Whilst he indicated a fuller response would be sent separately, this email concerned what he described as "the priority from a company perspective" and covered the operational issues arising out of the previous day's meeting. This was also focused on changes to duties and responsibilities and set out 4 numbered points identify the key areas of responsibilities that the two had discussed in the previous day's meeting as having scope to be redistributed. He gave his views on the handover and the suitability of some being done by a part time employee. I don't therefore accept his contention he did not know there was some plan to recruit some form of assistant role.

5.18 At the end of the day on Thursday 25 July, Mr Stevenson emailed both Mrs Forbes and Mr Patel. He did so by replying to an existing e-mail in the chain from his original "response" e-mail, albeit he added to the subject line "- Raising a grievance". There are various attachments to that e-mail which neither party has addressed in evidence. Although the subject says raising a grievance, the email opens with: -

***I'm sending this for no other reason than to put the record straight from my point of view in the politest way possible.***

5.19 The body of the e-mail denies, with assurances, that he did not refer to Mrs Forbes as a muppet. In respect of what he considered to be the complaints against him from the team,



he maintained that these should be dealt with on a formal basis. He attributes the source of their present disagreement as his e-mail regarding staff pay rises and restates his rationale and concern of the cost to the business of losing a member of staff. The email concluded with: -

***You do of course have a right to reply to the above, but if you do let's keep it to the above points so that we are not going around in circles. Otherwise lets move on from here***

5.20 This does not engage with the respondent's grievance procedure or comply with it. Curiously for someone involved in staff recruitment and management at a senior level from the very formation of this business, Mr Stevenson was unsure if he was even aware of the policy. In any event, he never raised it again or chased for any progress or response, supporting the interpretation that none was expected by him.

5.21 There are no significant events for the next week. I don't accept Mrs Forbes began or "continued" to ignore the claimant. I find their contact was appropriate and reasonable in the circumstances, including to some extent Mrs Forbes being careful not to allow the opportunity for tension to escalate. On 31 July, Mrs Forbes emailed the claimant to say she "would reply to all of his emails sent over the last few days and any updates before and I will e-mail you before".

5.22 I find she did respond to Mr Stevenson on those matters that required her input. She did not respond to the other matters, including the "raising a grievance" email. I find the reason why she did not respond was because she reasonably read those as not requiring any response. I find that interpretation to a reasonable construction of the communication. I find she was also concerned by now of Mr Stevenson's own change in behaviour towards her and did not want more confrontation as she feared revisiting those matters would escalate, rather than resolve, matters.

5.23 Other emails between the two around this time demonstrate the tensions Mrs Forbes felt from Mr Stevenson and that the tension between them in their communications was felt to be originating from him. Mr Stevenson accepted that there had been arguments over nothing and that she was in fact engaging with him. She concluded one of these emails at this time, which had been enquiring about the status of a job, with the comments: -

***All I am saying if I question things it is about me and I have all rights to ask – I hope we can move forward and the above gives you reassurance as I really do not have time to play silly mind games I just want to ensure my time is being managed how I feel is best for me without effecting the company (no offence and is not to say you do)***

5.24 As part of the plan to change responsibilities and relieve Mr Stevenson of his additional duties, I find Mrs Forbes set about recruiting some additional support for his production manager role. The evening after the meeting with Mr Stevenson she had begun messaging contacts who might be able to identify a suitable person to support production management. I find it must be through these contacts that some message found its way back to Mr Stevenson from a third party in early August questioning if he was still in the business. It was

one contact, not many calls as alleged. The evidence of this has been next to none. In fact, Mr Stevenson did not address it at all. I am unable to find what conversation actually took place. I do find there is nothing in the facts of what Mrs Forbes was communicating to third parties for them to reasonably interpret that she was seeking to replace Mr Stevenson. If nothing else, the role she was seeking was part time over a couple of days each week. In any event, as Mr Stevenson puts in clear terms in his claim, he ignored these comments because of his “strong notice period in the contract”.

5.25 On 6 August 2024 Mr Stevenson booked another ½ days annual leave at short notice. There is nothing at all wrong with that, but it formed part of what was now becoming a noticeable change in his previous work routines. More particularly, this and the way Mr Stevenson had dressed for work that day reinforced Mrs Forbes’ concern that he might be attending an interview. For that reason, she had an email exchange with Mr Patel stating: -

***Looks like he may be looking for another job.***

***Have you asked around to see if you know anyone that can do his job or have any c.v's***

***I have to ask around otherwise I will need to go to agencies and pay huge commission.***

5.26 To which Mr Patel replied: -

***Don't' worry.***

***We will find someone if he goes and at cheaper cost than what you pay him.***

5.27 Mrs Forbes held an interview for an assistant to Mr Stevenson on 16 August 2024. No one has explained why Mr Stevenson was not involved in this, but neither is it said to form part of his claim of breach of contract. The potential to recruit was not secret as alleged as it was something the two had explored previously in the context of his workload. He believed this person who attended was “Viraj”, who would later be appointed. I am satisfied it was not. I find Viraj was interviewed at a later date as a referral from Mr Patel who had interviewed her for a role in his business. He had suggested she might be suitable for the respondent and made the referral at a much later date in August. I find she was introduced to the staff and Mr Stevenson as assisting Mr Stevenson.

5.28 On 27 August the claimant found some papers had been left on his desk which appeared to relate to some design patterns or fabric choices. There is nothing untoward in that except that, within those papers, he says he discovered a printout of the email exchange between Mrs Forbes and Mr Patel of 6 August, set out above. Neither party can say how that email came into Mr Stevenson’s possession. Mrs Forbes says she did not print it out and had no need to print any emails still less this one. She also pointed to the innocuous content and that it does not convey the meaning that Mr Stevenson takes from it, which further supports why she would not plant it for him to see. On the other hand, there is no proper basis to conclude Mr Stevenson had accessed Mrs Forbes email account to obtain it himself, which he denies. I am left reaching only the following limited findings: -

- a) Mr Stevenson came into possession of the email in hard copy on 27 August.
- b) I find, on balance, that Mrs Forbes did not print it out and did not deliberately leave it on the claimant's desk. I accept the unlikelihood of this as a means of pushing Mr Stevenson out and the timing is itself inconsistent with that, when the parties had otherwise seemed to settle the tensions and misperceptions of the previous month.
- c) I do not need to find that Mr Stevenson therefore must have improperly accessed Mrs Forbes email account as the only other explanation. There are any number of other possibilities, including that Mr Patel, who was said to be a regular visitor to the respondent's premises, may have printed it and that it has subsequently accidentally got gathered up with the other pattern papers that were left for Mr Stevenson

5.29 However, Mr Stevenson says he took this email to mean he was out of a job. He resigned two days later on 29 August 2024. The day after, he visited the company he had been interviewed at the previous October and was offered a role which he started on Monday 2 September 2024.

5.30 It is understandable why the respondent is concerned that Mr Stevenson has engineered a claim of constructive dismissal to overcome both his six months' notice period and his post termination restrictive covenants. It is understandable why it is concerned that the interview was much earlier in the events of July and August than Mr Stevenson states. The state of disclosure in this case and the speed with which the new job was secured and commenced leaves me extremely cautious but, on the other hand, this was an appointment the new company wanted to make the previous year and there is no reason in principle why such an appointment could not then take effect extremely quickly. I have something in the way of contemporaneous correspondence supporting that account and nothing but caution to reject it. I therefore accept Mr Stevenson's evidence of when the new employment was secured. That finding, in turn, then supports the fact that the discovery of that 6 August email was at least a material part of the decision to resign at that time.

5.31 The immediate consequences of the resignation to the respondent were significant. The small team was already depleted by absences and Mrs Forbes was herself about to go on a foreign holiday to celebrate a birthday. There was much work to do for the client that the respondent needed Mr Stevenson to manage. In order to keep the business running, Mrs Forbes had to persuade an ex-employee who had been made redundant in previous years to help out as best she could. The work load the business faced was known to Mrs Forbes, as was the fact that a number of people would be out of the business in the coming weeks. I simply do not accept that Mrs Forbes did anything deliberately that might reasonably have caused Mr Stevenson to resign, still less to do so without notice.

## **6. Law**

6.1 It is axiomatic that in order to claim unfair dismissal, the claimant must have been dismissed. In this context, section 95(1)(c) of the Employment Rights Act 1996 (“the Act”) provides the statutory definition of dismissal: -

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—*

*(a)...*

*(b)...*

*(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.*

6.2 I remind myself of the essential authorities on “constructive” dismissal generally. They start with **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761** on the application of common law principles of repudiatory breach of contract, acceptance and causation as they arise within the context of contracts of employment. The definition of the implied term of trust and confidence originates in **Mahmud v BCCI [1997] UKHL 23** that: -

*“an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence”.*

6.3 Assessing whether that term has been breached is an objective test. (**Leeds Dental Team Limited v Rose [2014] ICR 94**).

6.4 The case is put on a “last straw” basis. That requires consideration of **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** on the necessary contribution of a “last straw” event not needing to be a breach in itself, as long as it adds something of substance to the character of the overall state of affairs. It also requires consideration of **Kaur v Leeds Teaching hospital [2018] EWCA Civ 978** in particular to the five-step approach to take in last straw cases.

6.5 As to causation, it is not necessary that the contractual breach is the only reason for the resignation or even that it is the principal reason for the employee's resignation. It is sufficient that the repudiatory breach “played a part in the dismissal” (**Nottinghamshire County Council V Meikle [2004] EWCA Civ 859 [IRLR] 703**)

6.6 If there has been a breach of contract, the employee has a choice to make between accepting the repudiatory conduct or affirming the continuation of the contract. **WE Cox Toner (international) Ltd v Crook [1981] IRLR 443** at paragraph 13 puts the choices of the innocent party in these terms: -

*he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied*

*by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: Allen v Robles (1969) 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.*

6.7 In other words, the right to claim he has been dismissed will be lost where, the continuation of the contract is affirmed.

### **7. Was there a breach of contract.**

7.1 Following ***Kaur***, focus should begin with the last straw by asking the first question of whether the alleged conduct happened and, if it did, whether it amounts to a breach of contract in its own right. The final straw is the discovery on 27 August of the 6 August emails.

7.2 I am not satisfied that amounts to a breach of the implied term of trust and confidence in itself. I did not find it was deliberately left for Mr Stevenson to see. It comes to his attention by accident. In any event, the content does not support the conclusion Mr Stevenson sought to infer from the e-mail and it does not amount to conduct likely to seriously damage trust and confidence. Any employee can leave employment with the result that the vacancy puts the employer in a difficult position. That is even more of a concern with a critical member of the team, such as Mr Stevenson was. It is perfectly natural that his change in behaviour particularly the short notice booking of leave, could lead to speculation that he might be looking for another job. It is a perfectly proper response for the employer to start thinking about what might have to happen if that turns out to be true. In any event despite his protestations during his oral evidence that he was loyal and committed to the business, he had in fact been actively looking to leave in the relatively recent past and there was sufficient unusual behaviour in a particular context for the respondent to suspect he might be about to leave.

7.3 For those reasons, even if this conduct were capable of being likely to seriously undermine trust and confidence, I conclude that there was reasonable and proper cause for the reasons just given.

7.4 Mr Stevenson cannot, therefore, rely on this conduct alone as a basis for constructive dismissal. For the resignation to amount to a dismissal in law, this conduct must be seen in the context of the other conduct relied on, insofar as it has been established in fact. Applying ***Omilaju***, it must add something to the totality of the earlier conduct that has been made out. In that regard, I start with the conclusion that most of that alleged conduct has not been made out at all, or I have found it to be in a different context to that which Mr Stevenson seeks to put it. I am not satisfied that the discovery on 27 August adds something to the totality of the earlier events to turn the totality of the events into a breach of the implied term of trust and confidence.

7.5 Taking the specific elements in turn: -

- a) I do not accept that the claimant was ignored after the email of 3 July about pay rises, or after his “grievance” email of 25 July. There is clear evidence that the working relationship continued, and Mrs Forbes continued to engage with the claimant. He accepted she did so in emails but said she was distant in face-to-face meetings. That, I am satisfied, is down to him distancing himself from her because of his incorrect perceptions. To the extent there was any distancing by Mrs Forbes, it was done to avoid the conflict and avoid escalating the challenging behaviour she was experiencing from Mr Stevenson. In isolation, it would mean the claimant has not established conduct likely to seriously damage trust and confidence and, to the extent that there was any conduct by Mrs Forbes within this allegation, it was with reasonable and proper cause.
- b) I do not accept that the meeting he calls the “clear the air” meeting can be said to be likely to seriously damage trust and confidence. The high point is that Mrs Forbes clearly was angry with the situation about the staff asking Mr Stevenson for a pay rise only days after she had had the meeting with them and explained the timescale for review. I can see that Mr Stevenson may have felt this was a case of her shooting the messenger, but I do not accept that someone of his seniority, working as closely as he had with Mrs Forbes for that length of time, could say anything found to have happened in that meeting was likely to seriously damage his trust and confidence in his employer. There were of course the other elements of the concerns by colleagues about Mr Stevenson’s change in behaviour and attitude which seem to be the real reason for his outburst about sack me and pay me off. The respondent had reasonable and proper cause to raise these matters with the claimant. It did not level them as formal complaints and never intended to.
- c) I do not accept that the respondent failed to respond to a grievance. Although Mr Stevenson added to the title of the email chain “- raising a grievance”, he did not follow the employer’s policy on raising a grievance and it is clear from the body of the email that he was not doing so and did not need a reply. He was explicitly “putting the record straight” on his position and not only does it explicitly not require a response, but the email also concludes by drawing a line under the episode and moving forward.
- d) I do not accept that the claimant then faced a further period of being ignored. The relationship continued as before, albeit Mr Stevenson’s own conduct added tension to the relations.
- e) I do not accept that the respondent set about a secret campaign to recruit to replace the claimant, at least not in the way the claimant has advanced his claim. It is true that the respondent was contemplating what position it would be in if the claimant left, and to that extent it was thinking about the potential need to replace him if he left. It is also the case that Mr Stevenson appears not to have been involved in the recruitment process of his assistant but, as neither party raised that as an issue or explained it as being anything other than the normal way staff are hired, I cannot conclude it was aimed

at the issue of trust and confidence. What is clear is that this was not a campaign, secret or otherwise, to get someone in as part of a plan to get Mr Stevenson out. What the respondent did to recruit an assistant, and what it did to contemplate what it would do if it needed to replace Mr Stevenson, were actions with reasonable and proper cause.

f) The contact Mr Stevenson had with a third party adds nothing. First, it seems there was one, and not many contacts as alleged. Secondly, Mr Stevenson has not included evidence of this in his witness statement. The evidence came out in cross examination in a way that meant I cannot be satisfied whether the third party's comments flowed in any sense from words or conduct of the respondent. Thirdly, even if they were so informed, I have heard from Mrs Forbes, and not the third party, and seen her messages to others asking for help finding a part time assistant to recruit and preferred her account.

7.6 Much of what I am asked to consider is based on Mr Stevenson's perception of what certain things mean which were, frankly, misplaced. The totality of the picture is one of a senior employee with a wide range of peripheral tasks to cover in his role, that had become disconnected with the business he had been involved in from the start. The picture is one of a very small employer nonetheless taking positive steps to remedy that position by changing roles and by hiring additional support. For those reasons, the claimant has not established a breach of contract, and the claim must fail.

**8. Did the claimant affirm the contract.**

8.1 This does not arise as there is no breach. I should add, however, that there appears to be a point at the end of July when, whatever the nature and legal status of the events that happened before, was then subject to affirmation by the claimant. He expressly writes to draw a line under the past and move forward. That sort of affirmation may or may not arise as a live issue in a last straw case, but to the extent the issue might have arisen for analysis, it would have amounted to affirmation at the point.

**9. Was the conduct a material cause of the claimant's resignation?**

9.1 Again, this is academic because of my other conclusions. Whilst I continue to recognise the suspicion that the employer held that this resignation was contrived, on the findings of fact the steps to resurrect the job offer from the previous year arise after the claimant has made the decision to resign and has actually handed in his notice.

EMPLOYMENT JUDGE R Clark  
DATE 22 February 2025  
JUDGMENT SENT TO THE PARTIES ON  
.....17 March 2025.....  
AND ENTERED IN THE REGISTER  
.....  
FOR THE TRIBUNALS