



EMPLOYMENT TRIBUNALS

Claimant: Mr B Wicken

Respondent: Akita Systems Limited

Held at: London South Employment Tribunals

On: 4, 5, 6 and 7 February 2025

Before: Employment Judge Burge

Representation

Claimant: Mr Ismail, Counsel

Respondent: Mr Charity, Consultant

JUDGMENT having been given orally to the parties on 7 February 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed by the Respondent, an IT services company as a junior network manager and then later a director from March 2014 until the Claimant resigned, without notice, on 28 June 2022. He claims constructive unfair dismissal. The Respondent defends the claim.

The evidence

2. The Tribunal heard evidence from the Claimant, Ben Wicken.
3. The Tribunal also heard evidence from Christophe Boudet (Managing Director and founder of the Respondent) and David Charity (HR Consultant) on behalf of the Respondent.
4. A bundle of 458 pages was provided to the Tribunal. Both parties gave written and oral closing submissions.

The Issues

5. A hearing before EJ Jones KC took place on 6 September 2023 who decided that two telephone calls were admissible in evidence but that evidence as to negotiations carried out on 17 May 2022 and 8 June 2022 were not admissible as they were covered by Without Prejudice Privilege.
6. A Preliminary Hearing for Case Management took place before EJ Rahman on 8 May 2024 and the issues were set out therein apart from Further and Better Particulars needed in respect of (2)(a) which were subsequently given. The issues were discussed and confirmed at the start of the hearing to be:
 - (1) Did the Claimant resign from his employment on 28 June 2022? (this is agreed)
 - (2) Did the Respondent's acts and/or omissions towards the Claimant constitute a breach of the term of mutual trust and confidence implied into the Claimant's contract of employment, such acts and/or omissions including:
 - a. Mr Boudet's conduct towards the Claimant between 21 February 2022 and 28 June 2022 as detailed in the Claimant's solicitor's email on Friday (24 June 2022) and the Claimant's grievance dated 19 May 2022.
 - i. Mr Boudet would confront the Claimant with ad hoc inappropriate discussions designed to cause arguments at critical business times - right before the Claimant was interviewing new candidates
 - ii. Whilst the Claimant was on annual leave, Mr Boudet undermined the Claimant by giving pay rises to senior members of the Claimants department to cause rifts between the Claimant and his department members, despite the Claimant having a discussion with Mr Boudet about their pay increases were given to undermine the Claimant's position
 - iii. Mr Boudet bullied the Claimant with unjustified comments to undermine and belittle his character, comparing him to another member of staffs and say how they were much better than him
 - iv. Mr Boudet verbally attacking and belittling the Claimant on 5 May 2022;
 - b. 16 May 2022: Maria Cruse confirming to the Claimant that the other Board members had lost trust and confidence in the Claimant, without explaining why.
 - c. 24 May 2022: the proposal to appoint, and appointing, Mr Charity, a friend of Mr Boudet, to deal with the investigation of the Claimant's grievance (re the Claimant's grievance dated 19 May 2022).
 - d. 15 June 2022: Mr Charity's telephone call to Mr Hadrill on 15 June 2022 in which he insisted that he would continue to deal with the Claimant's grievance and that he was advising the Respondent (when he was supposed to be nominally independent and investigating the Claimant's grievance).
 - e. 20 June 2022: Mr Charity's refusal to recuse himself from the grievance process.
 - f. 27 June 2022: Mr Boudet's refusal to remove Mr Charity from the grievance process.
 - g. 28 June 2022: Mr Charity unilaterally deciding to 'close' the Claimant's grievance.

- (3) Were the above breach(es) of the Claimant's contract of employment sufficiently important to the Claimant to justify him resigning?
- (4) Did the Claimant leave in response to the above breach(es) or for some other, unconnected reason?
- (5) Did the Claimant resign in a sufficiently timely manner? Mr Charity, on behalf of the Respondent, conceded that he did.

Remedy

- (6) If there is a compensatory award, how much should it be? The Tribunal will decide:
 - a. What financial losses has the dismissal caused the Claimant?
 - b. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - c. If not, for what period of loss should the Claimant be compensated?
 - d. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - e. If so, should the Claimant's compensation be reduced? By how much?
 - f. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
 - g. If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
 - h. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
 - i. Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?
 - j. What basic award is payable to the Claimant, if any?
 - k. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
7. Liability and potential adjustments to compensation (contributory conduct, ACAS Code and *Polkey*) were decided first. Remedy would then take place on the final afternoon of the hearing, if the Claimant was successful.

Findings of Fact

8. The Respondent is a managed IT services provider. The Claimant started work with the Respondent in March 2014. The Claimant owned 12,000 out of the 100,000 ordinary shares issued, so owned 12% of the Respondent's issued share capital. The Claimant purchased this shareholding after the commencement of his employment. The Claimant, Charlie James, Christophe Boudet, Sion Harrington, and Sean Williams were directors of the Respondent. Christophe Boudet was the founder of the Respondent, the Managing Director and the Claimant's line manager.
9. The Claimant worked his way up to Director level over the course of his 8 years' employment and in August 2020 he was appointed as Technical Director. Mr Boudet's evidence is accepted that the Respondent was a

friendly business. At the time, the Respondent turned over £6-7 million. The Directors are all friends, many have known each other for years. One of the other Directors was best man at the Claimant's wedding. However, the relationship between Mr Boudet and the Claimant became strained by early 2022.

10. Mr Boudet's evidence is accepted that in January 2022 it was decided that all directors would have a meeting with him to talk about aligning their departments with the business's overall strategy. The meeting with the Claimant had to be rescheduled numerous times and subsequently took place on 25 January. However, the Claimant had not prepared and messaged Mr Boudet in the morning to say he did not see the point in going 'over the same things'. Mr Boudet found the meeting was awkward and not productive, although they did then agree on some objectives.
11. The Respondent recruited a graduate in the role of Business Manager, Ms Enser. One of her roles was to put processes and systems in place. The Tribunal finds that the Claimant was resistant to working with Ms Enser. Mr Boudet wanted the Claimant to utilise her experience. He said to the Claimant that Ms Enser had a first class degree and management experience, that Ms Enser knew how to put in the systems of framework but the Claimant did not. At Director level the Claimant considered himself to be more senior than Ms Enser and found Mr Boudet's comparison with her demeaning. The Tribunal finds that the Claimant did not effectively engage with meetings with Ms Enser and with the systems that she attempted to put in place such as with the Helpdesk Issue Tracker which she had created and shared with him as a live document.
12. The Claimant went on honeymoon from 7 to 18 February 2022. While he was away, Mr Boudet gave two Helpdesk Supervisors that reported to the Claimant pay rises to their salary. He accepted that pay rises were "to a degree" determined by each individual Director, although would have to be signed off by him as the Managing Director. Mr Boudet accepted that what he did was "unusual" but not unheard of. The Tribunal finds that the reason why he gave them pay rises was because a new hire required a salary that exceeded those of existing employees in similar roles, which could have led to dissatisfaction or resignations among the current staff. The Claimant was aggrieved because Mr Boudet had not contacted him while he was on honeymoon to run this past him, he had already been discussing a bonus scheme with them and felt undermined.
13. On 24 March 2022 the Claimant sent an email to all heads of departments to say Mr James would be covering his absence on leave during the period 11 to 14 April. Mr Boudet spoke to the Claimant prior to an interview meeting that was due to be run by the Claimant. Mr Boudet did not think that Mr James was the right person to be on the Claimant's out of office for his leave, in Mr Boudet's view it should have been himself and Ms Enser. Neither the Claimant nor Mr Boudet can remember the conversation clearly but on balance the Tribunal finds that it turned into an argument, with the Claimant feeling defensive and under pressure due to the imminent interview and Mr Boudet feeling frustrated that the Claimant would not take on board a point that he felt was important at a business level and needed

to be addressed. Ms Cruse (an external HR professional) was there to help with interviews and offered to mediate at a later date to help with effective communication between the two of them.

14. Mr Boudet gave evidence, that is accepted by the Tribunal, that the breakdown of communication was because he and the Claimant are “of two different personality types” and “the approach [for mediation] was to collaborate rather than point fingers”.
15. Both the Claimant and Mr Boudet provided their views in writing to Ms Cruse on 29 March 2022. On 30 March 2022 there was a mediation meeting between Mr Boudet and the Claimant facilitated by Ms Cruse. Both raised communication as an issue and both wanted to resolve the issue. Mr Boudet raised the following concerns:
 - ❖ Communication - open & honest
 - ❖ Respect & trust of Mr Boudet & his position as MD
 - ❖ Lead by example & be in amongst the HD team
 - ❖ Avoid being stubborn - it's ok to make a mistake - it's learning from the mistake that's important
 - ❖ Accept feedback - good & bad
 - ❖ Stop comparing TD role to MD role - manage expectations
16. The Claimant raised concerns about communication difficulties, comparisons with Ms Enser, feeling vulnerable in his role and a lack of respect/understanding for his role. They agreed that a weekly one to one meeting would take place and communication would be discussed.
17. Mr Boudet wrote to all of the directors including the Claimant on 31 March saying:

“[the Claimant, Ms Cruse] and I had an interesting, positive and productive meeting yesterday to help improve communications between [the Claimant] and I. We have a strategy to build on going forward and intend to put the issues of the past behind us and look to the future with a greater mutual understanding, trust, and honesty. We will be meeting weekly on Tuesday morning to keep a clear comms channel open. I appreciate these past frictions can lead to frustration for all of you which you should not worry about now. We should all look outward and to build our business together.”
18. The Tribunal finds that the initial mediation meeting was productive and positive where both sides were able to discuss their frustrations with the other side and that there was hope for an improved working relationship moving forward.
19. Mr Boudet was on holiday on 5 April and so the first follow-up mediation meeting took place on 8 April and was attended by Mr Boudet, the Claimant, and Ms Cruse. There was no agenda and general operational issues were discussed.

20. A follow up mediation meeting was due to take place on 12 April 2022 but rearranged for 19 April as the Claimant was on annual leave. It took place at Mr Boudet's house, which was not uncommon for directors meetings. The Claimant did provide an Agenda but Mr Boudet ignored it as it was operational rather than points about how to improve communication. The Tribunal finds that the Claimant said he would produce an agenda for the next meeting.
21. On 26 April 2022 the next follow-up mediation meeting took place and was attended by Mr Boudet, the Claimant and Ms Cruse. The Claimant provided an agenda but it was not sent to Mr Boudet in advance. The Tribunal accepts Mr Boudet's evidence that he led the discussion and they did talk about their relationship and how the Claimant communicated with others.
22. The next mediation meeting was due to take place on 3 May 2022 but the Claimant called Mr Boudet and asked if they could move the meeting to a Teams meeting and change the time to 11am as he needed to work from home for the rest of the week because he had work being done in the garden and so he would need to be there. The Tribunal accepts the evidence of Mr Boudet that he was very disappointed about this and told the Claimant that it appeared he was not taking the process seriously. The Claimant did then attend the office.
23. On 5 May 2022 the next follow-up mediation meeting took place and was attended by Mr Boudet, the Claimant and Ms Cruse. Ms Cruse's notes show that she questioned the Claimant's decision to prioritise working from home to sort out his gardeners rather than attend the office for the one to one meeting with Mr Boudet and that initially the Claimant could not understand what he had done wrong. "After lengthy discussion [the Claimant] conceded that in hindsight he should have communicated better with Mr Boudet and he should have attended the office for the 1:1 meeting". The Claimant gave evidence, that is accepted, that he felt attacked during the meeting. The Claimant told Mr Boudet that he felt undervalued. Mr Boudet was frustrated with the Claimant. They had an "off the record" meeting and the Claimant broke down in tears. The Claimant remained emotional after the meeting and Mr Williams took the Claimant for a walk and then to the pub. Other directors Mr James and Mr Harrington went to the pub also to show support for the Claimant and they arranged for a further meeting on 11 May 2022 "as the 3 directors were keen to show their support" to the Claimant (notes from Ms Cruse).
24. When asked whether Ms Cruse had done a good job with the mediation process Mr Boudet gave evidence, that is accepted that "whether or not Ben and I did a good job is questionable".
25. On 11 May 2022 the Claimant attended a meeting with Mr Harrington, Mr James, Mr Williams and Ms Cruse. The Claimant agreed to draft an "improvement plan" for his relationship with Mr Boudet. The Claimant worked as normal on 12 May 2022.
26. On 13 May 2022 the Claimant was to meet with Mr Harrington, Mr James and Mr Williams but before the meeting, at lunch time, he said he had not

had enough time to prepare as he was very busy with work and did not understand the task. The Claimant's evidence is accepted that the Directors were disappointed and very cold towards him and said they would cancel the meeting and gave no further indication or guidance on what would happen next.

27. That evening, on Friday 13 May, the Claimant spoke with Ms Cruse who told him to think over the plan over the weekend and to have a further call with her on Monday at 3pm whereby he "should be in a position to discuss the areas he feels he needs to improve upon as Technical Director, explaining how he plans to make those improvements".

28. On Sunday evening, 15 May the Claimant wrote to Mr Boudet, Mr James and Mr Harrington:

"I'd like to thank you for your time on Wednesday and Friday and for your involvement in this matter.

I really do appreciate the difficult position all the directors have been put in and I appreciate your time in trying to help find a resolution.

I apologise for wrongly committing to have a plan on Friday, it was too soon, and I was not ready and should have recognised and communicated that.

During this weekend I have spent a lot of time thinking about an improvement plan and I am now ready to meet and discuss these points, please let me know your availability."

29. On Monday 16 May 2022 at 16.00 the Claimant spoke with Ms Cruse and set out his improvement plan. Ms Cruse's notes of the conversation record:

"BW confirmed 6 key points for improvement:

- Not to wear his jacket at all times, purchase thermal undergarments, purchase new clothes - work on his image.

- Work on open communication. Be less defensive. Acknowledge & greet people - BW admitted that he did not do this ordinarily.

- Committing to sit among his helpdesk team at least once a week. Accepted that he needed to get more integrated with the HD team.

- Embark on external counselling/therapy..

- Weekly meetings with Mr Boudet, with a clear agenda. BW accepted he had already been asked but failed to provide agendas for his 1:1 meetings with Mr Boudet. BW also wanted weekly meeting the other directors as a "bonding session". Ms Cruse pointed out that the other directors do meet on most Fridays for a catch up but BW does not always attend. BW accepted this point.

- Weekly meetings with [Ms] Enser. BW wanted to try to repair and build bridges with LE."

30. Ms Cruse told the Claimant that these 6 points did not address the key issues facing the Claimant in his capacity as a technical director. She then telephoned the Directors. Neither Ms Cruse nor the Directors gave evidence

to the Tribunal, despite all the Directors still being employed at the Respondent. The Tribunal does not know what happened during that call, whether or not Ms Cruse communicated the 6 points or not. The Tribunal finds, on balance, that she did not because they did go some way towards addressing Mr Boudet's concerns and given how supportive the Directors had just been, their decision that they had lost trust and confidence in the Claimant does not make sense.

31. At around 18.30 the Claimant and Ms Cruse spoke again. Ms Cruse said she was disappointed that the improvement plan did not address his capacity as Technical Director and informed the Claimant that the directors were unanimous in their view that they had lost trust and confidence in the Claimant and that a meeting would be held the next day.

32. The Claimant called Ms Cruse back and recorded the conversation, an agreed transcript is before the Tribunal. Ms Cruse said the Directors are "...saying that they've lost trust and confidence" and "there's four of them and they're all unanimous in their decision". She says further

"This isn't a disciplinary Ben, this is a, this is an initial conversation with your codirectors. So they've made a decision as shareholders and directors. You should go to that meeting with a very open mind hem and hear what they've got to say. If their decision is they've lost trust and confidence in you, you can't change that decision, can you? That is their decision."

33. On 17 May 2022 a without prejudice meeting between the Claimant, Mr James, and Mr Boudet took place.

34. On 19 May 2022 the Claimant submitted a grievance to the Respondent. He set out a time line of what had happened and then made complaints including that

"any dismissal that takes place at a later date will inevitably be unfair, given that the Respondent had already unambiguously announced its resolve to dismiss [him] prior to any form of performance improvement process (or any other form of process) being followed..."

35. The Claimant concluded his letter by saying "I reserve the right to resign as a result of [the Respondent's] fundamental breach of contract, and I shall be considering whether to take this step in the coming days".

36. On 24 May 2022 the Respondent wrote acknowledging the grievance and confirming that David Charity would be appointed to deal with the grievance investigation:

"I refer to your letter dated 19th May 2022 in which you raise complaints about alleged bullying and harassment, and allege that the Company has breached your contract of employment."

As you are aware, we have some serious concerns about your conduct and performance; it will be necessary to deal with these in due course. I am advised that the fairest way to proceed is to resolve your complaints first and then follow any further formal procedures that may be required to address these concerns, so this is our intention.

I am sorry to hear that you feel you have been treated badly Ben: for my part I feel we have been very patient and considerate toward you, and I am disappointed that you feel otherwise.

Your letter is understood to be in the nature of a formal grievance and accordingly I have instructed our HR advisor David Charity to investigate your complaints so that another director, Charlie James, can then hear your concerns under our grievance policy, make formal determinations and draw conclusions in relation to the same.

If I, or others within the Company, have acted incorrectly: we will do whatever is reasonable to make amends for this.

I understand that I am the main target of your complaints and therefore feel it best that I take no decision-making role in the grievance process. I will, of course, assist David with my recollection of relevant events as may be required.

37. Mr Charity was a friend of Mr Boudet's, they had known each other 32 years. Mr Charity gave evidence that he would not have compiled an investigation report and that his role was no more than an admin role. This is rejected. The process of deciding what is and is not relevant, which questions to ask, how to ask them, how to record them, which documents to seek out and which to include require more input than that. As he said himself, there were also issues about without prejudice communications and protected conversations. In evidence to the Tribunal, that is accepted, Mr Boudet accepted that Mr Charity had no experience conducting any workplace investigations for the Respondent.
38. The Respondent's grievance procedure provides that the Respondent "reserves the right to instruct an external person to conduct grievance hearings". The Respondent chose Mr James to decide the grievance.
39. On 25 May 2022 the Claimant sent an email to the Respondent complaining that the performance improvement process was a sham and that instructing Mr Charity to investigate the complaints "would be an unfair and pointless exercise considering David is a good friend of yours outside of work, would not be impartial, and is not the HR advisor for the Respondent." The Claimant again reserved his right to resign as a result of the Respondent's fundamental breach of contract.
40. The Claimant was signed off as unfit to work for the period 25 May 2022 for two months for "stress at work".

41. On 30 May 2022 the Claimant set up a company on Companies House, "Wiki-Tech Limited".
42. On 10 June 2022 the Claimant submitted a complaint to the Respondent.
43. On 13 June 2022 Mr Charity emailed the Claimant inviting him to a meeting to discuss his grievance and that once this had happened he would "obtain statements from those at [the Respondent] who are implicated in your grievances, gather any missing evidential materials and collate the same into a bundle which will be shared with you." A grievance meeting would then take place between the Claimant and Mr James, who would hear and determine the Claimant's grievances.
44. On 15 June 2022 the Claimant emailed the Respondent saying that he was feeling better and expected to be able to return to work on Monday, 20 June 2022.
45. On 15 June 2022 a telephone conversation took place between the Claimant's solicitor and Mr Charity who questioned Mr Charity's impartiality. This was repeated in a letter the next day, on 16 June 2022.
46. On 17 June 2022 Mr Charity sent an email to the Claimant's solicitors confirming that he would continue to deal with the grievance process and would not recuse himself.
47. On Sunday 19 June 2022 Mr Charity wrote to the Claimant noting that he was due to be returning to the office the next day and proposing a meeting to "make progress with the investigation...".
48. The Claimant did not attend work on 20 June 2022. At 17.37 Mr Charity wrote and asked whether or not the Claimant was fit for work and whether he wished to pursue his grievance.
49. On 21 June 2022 at 11.36 the Claimant wrote to the Respondent saying that he could not return to work due to Mr Boudet's conduct towards him, his concern that once he returns he would be subject to a sham disciplinary proceeding, that it was clear the Respondent was unwilling to deal with his grievance fairly and that he was currently unfit to work. He ended the letter "The primary reason for my continued absence from work is, however, my current ill health...".
50. On 22 June 2022 the Claimant's solicitors wrote to Mr Charity:

"Should Akita continue to instruct you to deal with the grievance process then my client shall treat such as a (further) serious breach of contract, and he reserves the right to resign as a result of such breach(es) and pursue a claim in the Employment Tribunal for constructive dismissal. Please confirm whether you are therefore withdrawing from dealing with my client's grievance process and, if so, who has been appointed to deal with such."

51. On 22 June 2022 Mr Charity wrote to the Claimant, noted he remained unfit for work and said that

“The Company needs to know if you wish your concerns addressed as grievances: if you do, I suggest you and I have a telephone call later today to discuss how this can be achieved.

If you do not, please just let me know by return and I'll stand down in my capacity as investigating officer.”

52. The same day Mr Charity wrote to the Claimant's solicitors "... I can inform you, however, that I am and will remain the person who has conduct of the grievance investigation.”.

53. On 23 June 2022 Mr Charity wrote to the Claimant that if he did not hear from him by close of business the next day he would take it that the Claimant did not wish to proceed with his grievance.

54. On 24 June 2022 the Claimant wrote to Mr Charity saying that he wished to proceed with his grievance, but the he objected to Mr Charity dealing with it. The Claimant said that he had raised his concerns with the Board and had asked for a response by 5:00 PM on Monday.

55. On 24 June 2022 the Claimant's solicitor wrote to the Respondent saying that it was a fundamental breach of contract for Mr Charity to continue to have any involvement in the Claimant's grievance process and that should the Respondent continue to instruct Mr Charity to deal with the grievance then the Claimant reserved his right to resign and pursue a claim for constructive dismissal.

56. Later that day Mr Boudet wrote to the Claimant saying that Mr Charity had been appointed by the Respondent because he was "suitably skilled and experienced" to assist them in ensuring the Claimant's grievances were "addressed correctly and lawfully". He further stated "I should point out that your grievance involves consideration of technical legal issues regarding the without prejudice rule and the admissibility of evidence; It is not practical for us to use our normal HR resources in these respects". The letter went on:

“David remains the grievance investigator and you are instructed by me, on behalf of your employer, to cooperate with him in this respect.

I must also warn you Ben, that if you persist in your refusal to cooperate, we will consider your grievances closed.

We have put our formal processes on hold pending the outcome of your grievances (as advised in my initial letter to you). In view of your continued refusal to cooperate in relation to our attempts to address your grievances, and the delay you yourself have caused in this respect, my decision is that our formal processes and your grievances will now have to run concurrently.”

57. On Sunday 26 June 2022 Mr Charity emailed the Claimant saying he had now been appointed as investigating officer in regard to concerns about the Claimant's conduct, performance and a breakdown in relations between the Claimant and Mr Boudet. With the letter Mr Charity provided 62 pages of allegations against the Claimant.
58. On 28 June 2022 Mr Charity closed the Claimant's grievance because the Claimant had "failed to actively pursue" it.
59. On 28 June 2022 the Claimant summarily resigned from his employment because
- "Ongoing: your conduct towards me between 21 February 2022 and today's date, as detailed in my solicitor's email on Friday (24 June 2022) and my grievance dated 19 May 2022*
- 16 May 2022: Maria Cruise confirming to me that the other Board members had lost trust and confidence in me, without explaining why*
 - 24 May 2022: the issuing of a letter to me by Akita proposing that I be placed under a performance improvement plan, which was clearly a sham designed to screen the organisation's previous conduct towards me*
 - 24 May 2022: the proposal to appoint Mr Charity, a friend of Mr Boudet's, to deal with the investigation of my grievance (re my grievance dated 19 May 2022)*
 - 15 June 2022: Mr Charity's telephone call to my solicitor on 15 June 2022 in which he insisted that he would continue to deal with my grievance and that he was advising Akita (when he was supposed to be nominally independent & investigating my grievance)*
 - 20 June 2022: Mr Charity's refusal to recuse himself from the grievance process*
 - 27 June 2022: Mr Boudet's refusal to remove Mr Charity from the grievance process*
 - 28 June 2022: Mr Charity unilaterally deciding to 'close' my grievance*
- Mr Charity unilaterally deciding to close my grievance is the last straw for me, and I cannot continue to work for Akita for the reasons outlined above."*
60. The Claimant contacted ACAS on 30 June 2022 and a certificate was issued on 15 July 2022.
61. The Claimant submitted his claim on 1 September 2022.

Relevant law

62. As the Claimant resigned his employment and relies upon a constructive dismissal, he must establish that he terminated the contract under which he was employed (with or without notice) in circumstances in which he was entitled to terminate it without notice by reason of the Respondent employer's conduct (s.95(1)(c) Employment Rights Act 1996).

63. A constructive dismissal is not necessarily unfair and a tribunal that makes a finding of constructive dismissal will err in law if it assumes that the dismissal is unfair without making explicit findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances.
64. The relevant principles are found in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221. The test of a constructive dismissal is a three-stage one: (1) was there a fundamental breach of the employment contract by the employer? (2) did the employer's breach cause the employee to resign? and (3) did the employee resign without delaying too long and thereby affirming the contract and losing the right to claim constructive dismissal?
65. The House of Lords in *Malik and Mahmud v BCCI* [1997] ICR 606 describe the implied term of trust and confidence 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.”*
66. In *Woods v W M Car Services (Peterborough) Ltd* [1981] IRLR 347 the EAT held that it is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
67. Simply acting in an unreasonable manner is not sufficient, it has to be calculated/likely to “seriously damage” the relationship of trust and confidence where the balance has to be struck between an employer's interest and the employee's interest in not being unfairly and improperly exploited, as per Langstaff J in *Frenkel Topping v King EAT/01606/15*:

We would emphasise that this is a demanding test. It has been held (see, for instance, the case of *BG plc v O'Brien* [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying “damage” is “seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in *Malik v BCCI* [1997] UKHL 23 as being:

“... apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.”

13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in *Morrow v Safeway Stores* [2002] IRLR 9.

68. The employee must leave in response to the breach, it must be an effective cause. The employee should leave because of the breach and this should demonstrably be the case, it is not sufficient if he merely leaves; and it is

not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him: see *Walker v Josiah Wedgwood & Sons Ltd* [1978] IRLR 105).

69. The employee must not affirm the contract - an employee must make up his or her mind soon after the conduct of which they complain; for, if she or he continue their employment for any length of time without leaving, they will lose their right to treat themselves as discharged (*Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 per Lord Denning).
70. In *Omilaju v Waltham Forest LBC* [2005] ICR 481, the Court of Appeal held that the act constituting the last straw does not necessarily have to constitute unreasonable or blameworthy conduct, but it must contribute, however slightly to the breach of the implied term of trust and confidence.

Compensation

71. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought compensation is awarded by means of a basic and compensatory award.
72. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited*) [1988] ICR 142.
73. S.124A ERA provides for adjustments to the compensatory award if a party has failed to comply with the ACAS Code of Practice on Discipline and Grievance Procedures (2015).
74. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

75. A reduction to the compensatory award is primarily governed by section 123(6):

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding..."

76. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or

blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Conclusions

77. The parties agree and the Tribunal concludes that the Claimant resigned from his employment on 28 June 2022. Did the Respondent's acts and/or omissions towards the Claimant constitute a breach of the term of mutual trust and confidence implied into the Claimant's contract of employment?

78. Mr Boudet was the founder and managing director of the Respondent. There was a clash in working styles between him and the Claimant. His concerns were that:

- ❖ Communication - open & honest*
- ❖ Respect & trust of Mr Boudet & his position as MD*
- ❖ Lead by example & be in amongst the HD team*
- ❖ Avoid being stubborn - it's ok to make a mistake - it's learning from the mistake that's important*
- ❖ Accept feedback - good & bad*
- ❖ Stop comparing TD role to MD role - manage expectations"*

79. The Claimant also thought that communication was an issue between them. He did not like the comparisons with Ms Enser, he felt vulnerable in his role and that there was a lack of respect/understanding for his role.

80. When Mr Boudet raised that Mr James was not the right person to be on the Claimant's out of office, the Claimant did not like the timing and manner that it was raised by Mr Boudet and they had an argument that then led to the mediation process with Ms Cruse. It is not a fundamental breach of the employment contract by the employer. It is not likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It cannot even be characterised as unreasonable conduct by Mr Boudet. It was a valid concern that could perhaps have been delivered at a different time, but given communication difficulties already existed between the Claimant and Mr Boudet, led to an argument between them.

81. Whilst the Claimant was on annual leave, Mr Boudet gave pay rises to two of the Claimant's team because he had made a job offer with a higher salary to an external candidate which meant that two of the Claimant's team members were paid less. Could he have messaged the Claimant while he was on honeymoon? Yes. Was it unreasonable that he did not do so? No. It was a reasonable action for a managing director to take. It is not a fundamental breach of the employment contract by the employer. It is not likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

82. The Claimant was resistant to working with Ms Enser. She had a first class degree and was putting in place systems and processes at the Respondent. Mr Boudet was keen for the Claimant to utilise her skills and work well with her. He did say this to the Claimant and the Tribunal accepts that the Claimant felt belittled. While the encouragement to work well with another employee and value her skills is understandable, to do it in a way where you directly compare one person's strengths to another in this way was probably unreasonable conduct. But was it a fundamental breach of the employment contract by the employer? No. It is not likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
83. On 5 May 2022 Mr Boudet and the Claimant had their final mediation meeting. Mr Boudet was frustrated with the Claimant. He and Ms Cruse questioned the Claimant's decision to prioritise working from home to sort out his gardeners rather than attend the office for the one to one meeting with Mr Boudet and that initially the Claimant could not understand what he had done wrong. "After lengthy discussion [the Claimant] conceded that in hindsight he should have communicated better with Mr Boudet and he should have attended the office for the 1:1 meeting". The Claimant felt undervalued and attacked at the meeting. Where there are issues between a managing director and a director, in order for there to be a positive working relationship both parties must take an ongoing rift seriously. It is not unreasonable to have difficult conversations about this. It was not a fundamental breach of the employment contract by the employer. It is not likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
84. After the 5 May meeting the Claimant was upset and the directors took him for a walk and then to the pub to show support. On 11 May the Claimant and the Directors discussed an improvement plan for the Claimant's relationship with Mr Boudet. The Claimant worked as normal on 12 May 2022. The Claimant was not ready to present his improvement plan on 13 May and the directors were disappointed and cold towards him. Ms Cruse then spoke to the Claimant that evening and told him that they would have a call on Monday at 3:00. On Sunday 15 May the Claimant wrote to Mr Boudet, Mr James and Mr Harrington thanking them for their time saying he really did appreciate the difficult position all the directors have been put in, apologised for wrongly committing to have a plan on Friday but it was too soon, he was not ready and he should have recognised and communicated that. He said further that during the weekend he had spent a long time thinking about the improvement plan and that he was now ready to meet and discuss the points. On 16 May the Claimant spoke with Ms Cruz and set out his improvement plan that improvement plan, included things that Mr Boudet had been concerned about - he talked about working on open communication, being less defensive acknowledging and greeting people, sitting amongst his team having weekly meetings with Mr Boudet with a

clear agenda . He said that he was doing bonding sessions with directors and having weekly meetings we have Ms Enser as he wanted to repair and build bridges. The Claimant seemed to be addressing issues that Mr Boudet had been frustrated about. The Tribunal has found that Ms Cruse did not pass on the information to the directors. Her view was the Claimant had not provided points which addressed the key issues facing him in his capacity as technical director. She then spoke to the Claimant and told him that the directors had lost trust and confidence in him and that they were unanimous in their decision. She said the *"decision is they've lost trust and confidence in you, you can't change that decision, can you? That is their decision."* This is a fundamental breach of the employment contract by the employer. It is likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The very words show that the Respondent no longer has trust and confidence in the Claimant and there is no prospect of the Claimant altering that decision.

85. The insistence upon and appointment of a friend who is an HR professional to investigate a grievance is not always going to be a fundamental breach of the employment contract by the employer. However, it is in circumstances where the directors, who were supportive a week previously and who do not wait to be presented with information on how the Claimant intends to repair his relationships before telling the Claimant that they have lost trust and confidence in him which is a clear breach of the fundamental term. The Claimant raised his concerns about Mr Charity being a long standing friend of the Respondent and therefore biased. The Respondent's argument that the Claimant should have accepted the appointment and then raised bias if it arose is not persuasive. It looked like the Respondent wanted to summarily end the Claimant's contract of employment *"...you can't change that decision, can you? That is their decision"*. An old friend of the Managing Director was then brought in. Once the perception of bias was raised, why was an independent HR professional not appointed, had the Respondent truly wanted an independent investigation?
86. The insistence that Mr Charity remain as the HR professional compounded the perception of bias. Mr Charity's telephone call to Mr Hadrill on 15 June 2022, Mr Charity's refusal to recuse himself from the grievance process on 20 June 2022 and on 27 June 2022 Mr Boudet's refusal to remove Mr Charity from the grievance process cumulatively and in the context of the "decision" that the Directors had lots trust and confidence in the Claimant, are further fundamental breaches of the employment contract by the employer. They are likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Looking at the Respondent's conduct as a whole and determining its cumulative effect, the Tribunal concludes that the Claimant could not be expected to put up with it.

87. On Sunday 26 June 2022 Mr Charity emailed the Claimant saying he had now been appointed as investigating officer in regard to concerns about the Claimant's conduct, performance and a breakdown in relations between the Claimant and Mr Boudet. With the letter Mr Charity provided 62 pages of allegations against the Claimant. On Tuesday 28 June 2022 Mr Charity closed the Claimant's grievance because the Claimant had "failed to actively pursue" it. The Claimant alleged, and the Tribunal accepts that this was "the last straw". In of itself it is not unreasonable or blameworthy but it did contribute to the breach of the implied term of trust and confidence. The Claimant and his solicitors had repeatedly said that they objected to Mr Charity being the HR representative. On the Sunday the Respondent sent the Claimant 62 pages of allegations and then closed the grievance procedure even though the Claimant wanted to pursue it. Moreover, the Claimant remained off sick at this point and so the swift decision to close it in this context further contributes to the fundamental breach of trust and confidence.

88. The above breaches of the Claimant's contract of employment were sufficiently important to the Claimant to justify him resigning. The Tribunal rejects the Respondent's contention that he resigned due to the 62 pages of allegations. The Claimant was clear in his words and actions that he resigned in response to the above breaches. Further, he resigned in a sufficiently timely manner (as conceded by the Respondent).

89. The reason for the Claimant's dismissal was the breaches identified above. The Tribunal now has to consider whether the dismissal was fair. Did the Respondent act reasonably in all the circumstances? The Tribunal concludes that they did not. The way that they treated the Claimant from the telephone conversation with Ms Cruse on 16 May 2022 was outside of the band of reasonable responses of a reasonable employer. The Claimant was therefore unfairly dismissed.

Adjustments to compensation

Polkey

90. It is difficult for a Tribunal to enter into the realms of what might have happened had a fair dismissal process been followed. Nevertheless, it is necessary in order to decide on whether a *Polkey* deduction is warranted. A *Polkey* deduction potentially reduces the compensatory award to reflect the chance that an individual would have been fairly dismissed in any event.

91. In this case it is difficult to know what would have happened had a fair dismissal taken place. The Claimant asserts that he would not have resigned. However, the Respondent may well have dismissed him for Some Other Substantial Reason, namely a breakdown in communication and relationships. Mr Boudet had already identified issues with the Claimant in his role as a director which included communication:

- ❖ Communication - open & honest
- ❖ Respect & trust of Mr Boudet & his position as MD
- ❖ Lead by example & be in amongst the HD team

- ❖ Avoid being stubborn - it's ok to make a mistake - it's learning from the mistake that's important
- ❖ Accept feedback - good & bad
- ❖ Stop comparing TD role to MD role - manage expectations"

92. The Claimant also identified issues with communication, he did not like being challenged at short notice and had a difficult relationship with Ms Enser. The first mediation meeting had gone well but the next few not so well. The directors were supportive, they were all friends with the Claimant. But when the Claimant failed to deliver his improvement plan they appeared to lose faith in him. The Claimant did deliver the improvement plan to Ms Cruse but it was not relayed to the directors and thereafter Ms Cruse told the Claimant that they had lost trust and confidence in him. What would have happened if the Claimant had been given a proper opportunity to respond to the concerns that had been set out? His response to the concerns that he relayed to Ms Cruse did address many of those concerns. On 16 May the Claimant spoke with Ms Cruse and set out his improvement plan which included things that Mr Boudet had been concerned about - working on open communication, being less defensive acknowledging and greeting people, sitting amongst his team having weekly meetings with Mr Boudet with a clear agenda. He said he was doing bonding sessions with directors and having weekly meetings, he wanted to repair and build bridges with Ms Enser.

93. The task for the Tribunal is all the more difficult because none of the directors gave evidence to the Tribunal. It might be that the Claimant's improvement plan had been enough to reassure the directors, had it been relayed to them. It might be that it was enough to reassure the directors for a period of time but not for long. It might be that the directors still would not have been reassured, even if the Claimant had been allowed to present the information to them, although given that they were friends of his, the Tribunal considers that this is unlikely. However, these relationships have to be taken into the context of the fact that this was a director talking to other directors and the managing director. Mr Boudet was not only the managing director of the company but he had also founded the company, his views would be highly persuasive. He had already attempted a process of mediation with the Claimant that had not resolved matters. It is very difficult for a tribunal to determine what would have happened or what was likely to have happened but for the purposes of *polkey* it must do so. The Tribunal concludes that it is 50% likely that the Claimant would have been fairly dismissed for some other substantial reason, namely a breakdown in communication and relationships at senior levels within the Respondent. The Claimant's compensatory award should therefore be reduced by 50%.

ACAS

94. In relation to an increase up to a maximum of 25% to reflect an unreasonable failure by the employer to comply with the ACAS disciplinary code (s207A TULR(C)A)), the Tribunal has found that the Respondent did attempt mediation with the Claimant from February 2022 and so they ought to be given some credit for following some sort of procedure, even though

it ended prematurely and unfairly. The compensatory award should therefore be uplifted by 15%

Contribution

95. In relation to contributory conduct, the Tribunal concludes that the Claimant did not contribute to his dismissal. There were some concerns raised with him at the start of the mediation process, but these were not “culpable or blameworthy” behaviours. The Respondent submits that the Claimant admitted that his decision to prioritise arrangements with his gardener over attendance at a one-to-one mediation follow up meeting was a mistake and that he refused to cooperate with the grievance investigation. However, these actions, in the context of the facts found and detailed above, do not constitute “culpable or blameworthy” conduct. The Tribunal therefore concludes it is not just nor equitable to reduce the award.

Employment Judge Burge

Date: 25 February 2025

Reasons sent to parties on
Date: 22nd April 2025

For the Tribunal Office

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