EMPLOYMENT TRIBUNALS

Claimants: Mr D Coppinger and Mr J McInerney

Respondent: P.J. Carey (Contractors) Limited

Heard at: London Central (by CVP) **On:** 3 & 4 March 2025

Before: Employment Judge K Loraine

REPRESENTATION:

Claimant: Mr Jackson, Counsel
Respondent: Mr Milner, Solicitor

JUDGMENT

The judgment of the Tribunal is as follows:

Unfair Dismissal

1. The complaints of unfair dismissal are well-founded. The Claimants were unfairly dismissed.

2. There is a 100% chance that the Claimants would have been fairly dismissed in any event.

3. The Claimants caused or contributed to the dismissals by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to each Claimant by 100%.

4. It is just and equitable to reduce the basic award payable to each Claimant by 100%.

Wrongful Dismissal

5. The complaints of wrongful dismissal are not well founded and are dismissed.

REASONS

1.By claim forms dated 24 September 2024 [8] [27] the Claimants bring complaints of unfair dismissal and wrongful dismissal which are disputed by the Respondent. The Claimants allege that they were expressly dismissed in a meeting on 24 June 2024 or alternatively that they were constructively dismissed due to the conduct of the Respondent in that meeting and the days that followed, having resigned in response to the alleged breach of contract in letters dated 9 July 2024. They also complain that they were not paid contractual notice pay. The Claims were ordered to be heard together and the Claimants were jointly represented in the hearing by Mr Milner.

2.The Respondent denies the claims and denies that the Claimants were dismissed, either expressly or constructively. In the alternative the Respondent asserts that the Claimant's were in fact guilty of serious misconduct and if they are found to have been dismissed then the dismissal was for the reason of conduct or alternatively SOSR and was fair. It is agreed that notice pay was not paid, but the Respondent's position is that this is because the Claimants resigned without giving notice and therefore no sums are due or alternatively, that the Claimants conduct amounted to gross misconduct and therefore if they were dismissed, the Respondent was entitled to dismiss without notice.

3.The background to the claims is the Respondent's discovery that a particular project for which it says the Claimants held responsibility, was very seriously over-budget resulting in a sudden change of position from an expectation of substantial profit to that of a multi-million-pound loss at a meeting on 24 June 2024.

The Issues

4.The issues were discussed at the outset of the hearing. The parties had largely agreed a list of issues save that there was a dispute in relation to one matter being included. It was agreed that matters of liability and the issues of Polkey and contributory fault would be dealt with first and then if the claims succeeded further evidence and submissions would be heard to deal with the remaining remedy issues, at a further hearing if necessary.

5.In relation to the disputed item in the list of issues, the Claimants sought to include an allegation of subjecting them to a 'sham investigation' as part of their allegation of a breach of the implied term of trust and confidence in relation to their claims of constructive unfair dismissal. Mr Jackson objected to this allegation being included on the basis that it was not said to form part of the unfair dismissal claim in the pleadings. However, the allegation does appear in the 'Claim Details' in respect of Mr Coppinger [24] under the heading 'Events following 24 June 2024' and also appears in similar form in relation to Mr McInerny [43]. While the Claimants primary case is that they were expressly dismissed in a meeting on 24 June 2024, in the

alternative they allege that they resigned in circumstances amounting to a constructive dismissal on 9th July 2024. The allegation in relation to a 'sham' investigation, said to be part of that alternative constructive unfair dismissal claim, is clearly contained within the claim forms and therefore it was appropriate to be included in the list of issues.

6. With that matter resolved, the issues were agreed as per the attached List of Issues document.

Evidence and Submissions

7. I was provided with an agreed bundle of 612 pages together with some additional documents which were provided by the Claimants comprising:

    a. A letter from the Claimant's solicitors to the Respondent's solicitors dated 17 January 2025;

    b. A photograph of two pages of handwritten notes from Mr McInerney's personal diary dated 24 June 2024;

    c. A booking confirmation email dated 21 May 2024 in respect of a flight booked by Mr Coppinger to travel from Stansted to JTR (Santorini) on 28 June 2024

    d. A booking confirmation dated 21 May 2024 in respect a flight booked by Mr Coppinger to travel from Santorini to Gatwick on 1 July 2024;

8. References in square brackets are to pages of the agreed bundle unless otherwise stated.

9. I was also provided with witness statements of both Claimants and of Mr Jason Carey, CEO of the Respondent, Mr Tom Wraight, Regional Director (Midlands) of the Respondent, Ms Nicola Saye, Executive Office Lead of the Respondent and Ms Michelle Buchannan, Head of HR of the Respondent.

10. The witness statements of Ms Saye and Ms Buchannan were provided late and in response to the Claimant's own witness statements, however Mr Milner did not object to their inclusion, they appeared to be relevant to the issues to be determined and I therefore accepted them.

11. I took some time to read the witness statements and documents referred to therein and the hearing continued at 12pm.

12. All witnesses adopted the witness statements they had previously given and were cross examined. Evidence was heard over the remainder of the first day and through to the afternoon of day 2. Mr Milner had provided written submissions, which he briefly supplemented orally and Mr Jackson made oral submissions at the conclusion of the evidence. I reserved my decision. I am grateful to the parties and the representatives for their assistance throughout the hearing and in getting the case heard within the allocated time.

13. I have considered all of the evidence and documents to which I was referred as well as the submissions made, however I will only refer to such matters as are necessary in order to resolve the issues in dispute.

Findings of Fact

14. The Respondent is a family-owned construction business that provides building and civil engineering services on construction sites throughout the UK and which acts as a subcontractor to main contractors. The Respondent was engaged in a number of large projects, including, from May 2023 the Riverside Waste to Energy plant in South East London ('Riverside project'). This project had a tender cap of £39 million and the Respondent initially hoped to generate a profit of approximately £4.9 million in relation to it.

15. The Riverside project was complex, both operationally and commercially and was unfortunately beset by difficulties from an early stage. It was a 're-measurable' project which meant it required more work and oversight from the commercial team than other projects because the cost and value of the work done had to be re-assessed during the life of the project as the initial figures used were estimated. While complex, this is not a particularly unusual type of commercial arrangement in the construction industry but it is one that requires a high degree of commercial oversight and a tight grip of the project finances.

16. Monthly 'Contract Review' meetings took place in relation to the Riverside project at which the status of the project and the financial position was discussed and recorded. This would include the costs incurred on the project and those expected to be incurred up to completion, the expected value of the project and the expected profit or 'margin'. These meetings were an opportunity to identify whether there had been or needed to be any changes made to expectations in relation costs so that any issues could be identified as early as possible so that steps could be taken to mitigate any risks. The contract review documents in relation to the Riverside project between June 2023 and May 2024 were provided in the bundle.

17. It was agreed that those documents were important and that the information contained in them, in particular the front-page summary, would have been relied upon by the Respondent in relation to its understanding, at a corporate level, of the status of the Riverside project and its impact on the Respondent's overall financial outlook.

18. Mr Martin McGuire, Director of Operations, was involved in the Riverside project from approximately May 2023 as were Mr Stephen McKerracher, Group Commercial Director, and Ms Claire Kettle, Finance Director, from approximately June 2023. Their involvement included attending the monthly contract review meetings and feeding back the information from those meetings. I was not

provided with job descriptions in relation to those individuals' roles, however as is apparent from their titles they were in very senior positions in the Respondent's organisation with national, as opposed to regional, responsibilities.

The Claimants' Roles

19. The Claimants were employees of the Respondent. Mr Coppinger was initially employed as a Site surveyor in 2015 [103] and was subsequently promoted a number of times, most recently by letter dated 30th October 2023 to the role of Regional Commercial Manager with effect from 1 September 2023 [152] at a salary of £120,000 p/a. The job description for this role is at page 477 of the bundle. The role reports in to the Regional Director and has line management responsibilities for Commercial Managers and Quantity Surveyors. The 'purpose of role' includes the following statements:

"The Regional Commercial Manager is responsible for the management and implementation of the commercial function on appointed projects.
Reporting to the Commercial Director, the Regional Commercial Manager heads the Commercial team on appointed projects and will:
 Ensure their teams have a thorough understanding of project(s) contractual and commercial requirements
 Ensure their teams have a thorough understanding and competent execution of the monthly reconciled values and updated forecasts"

20. The 'Main Responsibilities' of the role includes 'Cost Management, Reporting and Supporting' as follows:

"Cost Management, Reporting and Supporting
 Commercial responsibility from successful bid to through construction to final account.
 Represent the commercial team in all matters
 Review and agree budgets for projects within 6 weeks of commencement
 Ensure Commercial budgets are managed accurately by QS teams
 Review cost monitoring, expenditure planning and benchmarking
 Support/review cost management, monitoring, trending estimating and forecasting
 Review analysis of cost performance data and provide accurate input for monthly performance reports
 Support management of budget and spend profiles continually identifying ways to improve cost performance " [emphasis added].
 Review cost impact analysis of proposed changes to scope/schedule
 Review cost reports and analysis prepared by surveying team, identifying areas of learning and any recommendations for improvement

21. The role is therefore a senior one with significant responsibility in relation to the commercial aspects of projects.

22. Mr McInerney was initially employed as a Project Manager in October 2018 [128] and was also promoted within the company, being appointed to the role of Regional Director by letter dated 14 July 2023 with effect from 1 July 2023 [151] at a salary of £145,000 p/a plus a car allowance of £9,000. The job description for

this role is at page 500 of the bundle. It is a senior role, reporting into the Managing Director of the Respondent and the responsibilities of the role are wide ranging. The role purpose includes the following statement:

"Reporting to the Managing Director of Careys, the purpose of the Regional Director is to develop, present and gain approval for the regions strategic plan. The role directs a team of Contracts Managers, Project Managers, Regional Operations Manager and Commercial to **ensure the safe operational delivery of the region's strategic plan and portfolio of projects that vary in scale, risk and complexity**, in line with agreed targets, and ensures that they are delivered to meet the requirements and metrics of Operational Excellence. Supported by the Regional Commercial Director/Manager, the Regional Director works strategically, **holding overall accountability for the region's successful performance and delivery of all financial metrics, ensuring the region's commercial positioning is strengthened, and margin and profitability maximised**." [Emphasis added]

23. The 'key competencies' include Leadership and "*Manages Risk & Commercial effectively – safely and effectively manages multiple and complex construction programmes*". Commensurate with the seniority of the role, the job description therefore reflects a high degree of responsibility and accountability for the overall performance of a portfolio of complex projects. It therefore follows that based on the job descriptions, Mr Coppinger would have reported in to Mr McInerney from September 2023 onwards. However, Mr Carey, in cross examination accepted that in fact both Claimants in practice reported to Mr McGuire.

24. In relation to both of these most recent promotions I note that the letter confirming the promotion post-dates the effective date of the promotion, however I accept that the promotions in fact took effect on the dates stated in the letters following verbal agreements as this was accepted by the Claimants in evidence and is also consistent with the fact that it is agreed the Claimants were paid at the promoted rates from those dates.

<u>The Claimants' involvement in the Riverside Project</u>

25. There is a dispute as to when the Claimants first became involved with the Riverside Project. Mr Carey says in his statement at paragraph 8 that his understanding accords with an organisation chart [235] showing Mr McInerney as being involved in the project as 'Regional Operations Director' starting from 'Gateway 5' from May-June 2023 and Mr Coppinger involved as 'Regional Commercial Director' from 'Gateway 6' from July 2023-June 2024.

26. The Claimants dispute their involvement prior to their promotions. Mr Coppinger states at paragraph 6 of his witness statement that he first attended meetings about the project in September 2023 and states that due to resourcing issues no one had been carrying out (what then became) his role in relation to the project

prior to his promotion into that role, and further, that the project was generally in a poor commercial state with tasks not having been completed in line with expected timescales. I prefer and accept Mr Coppinger's evidence on this issue. This is because it is agreed that Mr Coppinger was never in the role of 'Regional Commercial Director' and was not promoted into his role as Regional Commercial *Manager* until September 2023. Mr Carey himself gave those dates in relation to Mr Coppinger's promotion and, as he was not directly involved in the Riverside project on a day-to-day basis at those points in time, his understanding in relation to the minutia of it in this regard is understandably less reliable. I find Mr Carey has simply relied on the organisation chart which I find is unfortunately inaccurate as it was completed at some point after October 2024 (as can be seen by the annotations in relation to certain staff members having left the organisation in October 2024).

27. I find that Mr Coppinger did not have any involvement in the Riverside project until his promotion took effect in September 2023, but that from that point onwards it was an 'appointed project' within his remit as Regional Commercial Manager for which he held full responsibilities within the scope of his role.

28. In relation to Mr McInerney, his promotion took effect from 1 July 2023 and his evidence was that he first attended a meeting in relation to the Riverside project in June 2023, which was a handover meeting from the 'work winning' team to the 'project team'. He said in his witness statement that he was 'visiting site approximately twice weekly' paragraph 19. There is a significant dispute as to whether, when Mr McInerney became involved with the Riverside project, this was on the basis that it was part of the 'portfolio' of work he was responsible for within the region in his role as Regional Director or on a different, lesser basis. Mr McInerney states in his witness statement paragraph 17:

> "*The project went to site in June 2023. I was asked to attend the handover meeting from the work winning team to the project team (in June 2023). In this meeting I was asked to provide assistance to the Riverside project team with releasing resource from other projects but that my focus was to remain on the Audley Square House project*."

29. It was put to Mr Carey in cross examination that Mr McGuire would 'direct' Mr McInerney on a day-to-day basis as to where to go or where to direct his focus. In response Mr Carey expressed confusion at the question as Mr McInerney's role had responsibility for the whole of the region and would he not expect him to be 'directed' on a day-to-day basis. Similarly, his evidence when it was put to him in cross examination, that Mr McInerney and Mr Coppinger did not 'purely focus' on the Riverside project was that as regional managers and directors they would not be focussed solely on any single project.

30. I do not accept Mr McInerney's evidence that he was only asked to become involved in the Riverside project on some specifically limited basis that excluded the usual requirements of his promoted role. The reasons for this are that the promoted role Mr McInerney accepted is clearly one with regional responsibility for all projects within his region. Both Riverside and Audley Square are agreed to be within that region. I do not consider that there is any conflict between Mr McInerney being expected to continue to have involvement in the Audley Square project and also being expected to be fully involved, within the remit of his role as Regional Director, in the Riverside project. On the contrary, that is precisely what the job description of the role envisages (together with further responsibilities for any other projects in the region). While I accept that this is a large workload, that is the reality of the role that Mr McInerney accepted. Further, there is no record of any such instruction and Mr McInerney was the only person in the role of Regional Director with *any* responsibility for the Riverside project, so that if he was not undertaking that role in relation to that project, it would have been essentially left without anyone performing that role. Having promoted Mr McInerney into that role it would have been an extremely strange decision for the Respondent to take to then not require him to fulfil its responsibilities in relation to a particularly complex project that was in clear need of oversight.

31. I therefore find that with effect from his promotion on 1 July 2023, the Riverside project, being a project within his region, fell within the remit and therefore responsibilities of Mr McInerney's role as Regional Director and he was expected to fully undertake the duties of his role in relation to it. While it may well have been the case that initially the most pressing issue in relation to the project was indeed resourcing, that was not the limit of Mr McInerney's remit and responsibility.

Progress of the Riverside Project

32. Unfortunately the Riverside project faced a number of difficulties including a shortage of staff in the commercial team working on the project. Mr Coppinger's unchallenged evidence was that when he was promoted and began working on the project, it was hugely behind schedule from a commercial point of view and there had not been anyone carrying out the role of Regional Commercial Manager on the project until he became involved (which as I have found was from 1 September 2023). A key step which ought to have been completed within 6 weeks of the project commencing was a 'budget to build' but this had not been done as of September 2023, seemingly due to lack of commercial resource. This was ultimately carried out in October 2023.

33. Separately a 'Peer Review Report' was completed in relation to the Riverside project [279]. This was undertaken by Mr Morgan and Mr Austin who had no other involvement in the project and is a standard part of the Respondent's practice. It took place in early-mid September 2023 and the report produced includes the

following description of how the review commenced:

"*The review started with a site walk which was led by Matt Kirsop, Paul Moran and Spencer Walden. We were also joined by Donal Coppinger and John McInerney by way of an introduction to the project."*

34. Contrary to the assertion in Mr McInerney's witness statement I find that this describes Mr Morgan and Mr Austin being introduced to the project by Mr Coppinger and Mr McInerney, the latter having been involved in the project for over 2 months at that time, rather than this being an introduction to/for the Claimants (which Mr Morgan and Mr Austin clearly would not have been in any position to give).

35. The review notes that there were over 100 'milestones' on the project and that when each was completed it a 'comprehensive remeasure' on those works was to be submitted for approval. The review summary notes that there had been delays to various aspects of the project, in part because of technical issues (such as issues related to de-watering), in part due to issues with suppliers and contractors, but also that some other elements of the works were ahead of schedule. The number one recommendation of the report was for additional commercial staff to be recruited by Mr Coppinger [283] followed by finalising the construction budget. That latter task, and the remainder of the recommendations, were not assigned to either of the Claimants but rather variously to Mr Connellan, Senior Quantity Surveyor, Mr Kisop and Mr Moran. However, in the 'Areas of Best Practice' the person detailed as the 'Owner to Share' is 'JM' which is understood to be a reference to Mr McInerney. This included at No 3 "*The team are fully aware of the contractual obligations and have recognised the risks associated with the project and are putting steps in place to mitigate their impact*."

36. In the detail of the report in the section titled "End of Life Forecast' it is noted that the budget to build had not been finalised and there was a need to challenge forecasted resources and review opportunities. It was specifically noted that due to a subcontractor increasing costs by c.£3m and issues needing to be reviewed including inflation and overtime costs there was a need to review the risks on the project.

37. Mr Carey accepted in cross examination that in light of the peer review the business was aware of an increase in costs to the project of around £3m. While the review recommends seeking ways to mitigate the impact of this, inevitably that increase in costs meant the expected margin on the project at that stage was at risk, although as recorded in the report, it still left an expected profit of c.£1.77m even if the increase in costs could not be mitigated at all. The report noted an opportunity to potentially mitigate costs to a value of approximately £275,000 and therefore at that stage the hope was that the project could generate profit of up to

approximately £2.2m [280]. This was based on expected costs to end of life (ELF) of c.£37.3m.

38. The monthly contract review meetings considered the financial position a month in arrears so that the document titled 'October 2023' is reviewing the financial position as of the end of September 2023 [330]. As can be seen in that document, both Claimants are listed as part of the team on the project at that time, with Mr McInerney described as 'HOD/Contracts Manager' and Mr Coppinger described as 'Regional Commercial Director/Manager' [331]. The Project Lead Quantity Surveyor on the project was Mr Connellan.

39. It is agreed that in the ordinary course of events, it was not the responsibility of either Claimant to directly carry out the background work to produce the financial information provided in the Contract Review documents. This would have been done primarily by Mr Connellan with support from his own team. However, the Respondent says that the role of the Claimants (and indeed of Mr McGuire) was to be sufficiently challenging of the information, and knowledgeable about the project, to ensure that the report was not signed off unless they were confident that it was correct in relation to the big picture i.e. costs incurred and expected, receipts incurred and expected and therefore margin. The Claimants' position is that it was not their responsibility to interrogate the data provided and not their responsibility to ensure it was accurate or to escalate any concerns in relation to it beyond discussion with Mr McGuire. They say it was the responsibility of Mr Connellan to accurately produce the data and of Mr McGuire and Mr McKerracher to ultimately approve it. They contend that it was well known by both Mr McGuire and Mr McKerracher that the sums stated in the Contract Review documents were based on unverified information, because there was a backlog of work to be done by the commercial team.

40. It is not in dispute that between September 2023 and January 2024, the Contract Review documents were approved by the Claimants and Mr McGuire without objection and showed an expected margin of around £3.5/£3.6m. It is also not in dispute that this figure was in fact inaccurate. It is difficult to reconcile those numbers with the figures produced by the Peer Review document and no explanation has been provided for the discrepancy.

41. In January 2024 Mr Carey visited the Riverside project site and spoke with the client in relation to it. He was made aware of concerns/frustrations from the client in relation to aspects of the project, including a delays in providing costs and a 'variation' of approximately £800,000 related to increased costs that was largely disputed. Following this on 31 January 2023 Mr Carey sent an email to his senior leadership team (but not to the Claimants) summarising his visit to the site [386]. In that email Mr Carey gives candid feedback, sometimes very positive for example in relation to interactions with junior staff members and the operational

side of the project and at times less so, particularly in relation to the commercial team and Mr Coppinger. Under the heading 'first impressions' Mr Carey wrote:

> "*My only niggle on my first impression was Donal Coppinger, I asked him a couple of questions and he made it clear he was "just heading off to 105" … maybe I'm over sensitive but I always feel Donal is heading off, I really hope the Commercial Directors step up next week and communicate against the strategy and their targets and it's not left to you guys as senior leaders to communicate for them, these guys need to step up and grow*."

42. It was put to Mr Carey that this was an example of him needing to have his words 'filtered' by his senior leaders because he knew that he was in essence too blunt/abrasive in the way he communicated. Mr Carey rejected this and his evidence was that he would expect to communicate at a high level to his senior leadership team and trust them to pass on relevant information, although he accepted that he would not expect this to be word for word and that it was necessary for him to be able to speak more candidly with his senior leaders than he might speak directly to a more junior member of staff.

43. Mr Carey expressed that he felt "*uneasy about Donal* [Mr Coppinger] *and the commercial team*…" before setting out the concerns raised by the client and stating:

> "*Anyway I could go on and on but we are simply NOT managin* or building the commercial relationship on this job and I am asking you to grab hold of this with immediate effect and close the gap*"

44. In his summary he also stated "*Job is operationally strong but margin is drifting, we are not closing up behind quick enough on the commercial management of the job*.." In oral evidence Mr Carey said that the £800,000 issue raised by the client did give him concerns and that he wanted the project team to get on top of it as soon as possible, but that it was not a 'profoundly difficult' problem to resolve it just required the commercial team to 'get hold of' the job as it related to being behind schedule in processing the commercial work which should be able to be resolved.

45. I accept his evidence that this issue did not indicate to him that the job was seriously off the rails at that point or give any reason to doubt the overall picture of the project that was being communicated via the Contract reviews. In February 2024 [391] and March 2024 [403] the Contract Review documents continued to show an expected profit on the Riverside project of approximately £3.6m and £3.3m respectively. This was also the case in April 2024 [416] and May 2024 [429] which showed expected profit of approximately £3.3m.

46. However, looking into the more detailed breakdown of the report for May 2024 reveals a discrepancy. On the 'commercial' page of the report [433] there is a table described as 'Commercial Summary' which has a row for 'Margin £' broken down to four columns, of these three ('Applied to date', 'Expected to Date' and 'Certified to Date') show a red number indicating an expected loss of between around £3.1m and £4.25m and one ('IV') shows a profit of approximately £2.25m plus a 'revenue recognition adjustment' of approximately £850k. Below this is a section titled 'End of Life Breakdown' which includes a 'Contract to Date Position' which shows totals for 'Applied to Date' of £33,8m, 'CDT IV' of £39.2m and 'Certified to Date' of £32.7m. There is therefore a discrepancy between the 'CTD IV' sum and the certified to date (i.e. approved by the client for payment sums) of approximately £6.5m, while the overall summary still shows an expected profit of c.£3.3m.

47. Similar discrepancies can be seen in the 'commercial' page of the report February 24 [395] March 24 [407] and April 24 [420].

48. Looking back to the start of the project, initially in June and July 2023 substantial sums are accrued in the 'applied to date' and 'CTD IV' columns with zero sums having been certified at that point (see e.g. p256). This continued in August [271].

49. In September 2023 the 'CTD IV' figure was less than the 'certified to date' figure, however the 'applied to date' figure was around £3m higher. It is not clear whether this corresponds to the c.£3m increase in costs highlighted in the peer review document. I note that in the October 2024 contract review document [334], produced after the peer review report, the CTD IV number remains lower than the certified number, but the 'applied to date' and 'certified to date' sums are closely matching. In the November contract review, the CTD IV number remains lower than the certified number, but the 'applied to date' number is c.£2m higher [347] and the picture is similar in the December 2023 review document [361].

50. In January 2024 the 'CDT IV' number and the 'certified to date' number were very close (but not exactly matching) [379]. Mr Careys oral evidence was that these numbers should match and if they don't that is a sign of concern. He pointed to the numbers on page 379 and said that he expected the 'CTD IV' which he described as the 'earned value measured' to be the same as the 'certified to date' value and in his view on page 379 they essentially were the same. However, in contrast, on page 395 (the commercial page in relation to the February 2024 review document), the 'earned value measured' or CTD IV number was higher than the certified number, on that occasion by almost £5m. As can be seen from the discussion above, although there had initially been a period where the CTD IV number was higher than the certified number, it had been less than or equal to it, since September 2023. Mr Carey said that he would have expected some action from the Claimants in response to such a large discrepancy and that it ought not have gotten to that point in the first place. Mr Carey pointed to the February 2024

Contract Review document in particular as being the point at which, in his view, it was clear that the information available to the Claimants was such that they ought to have urgently taken action to highlight and resolve the problem.

51. As discussed above, the Claimants evidence was that due to their other responsibilities and the nature of their roles, they were not in a position to know the details behind the figures and were reliant on Mr Connellan in this regard. However, they did consider the information provided and were aware that the numbers were not reliable because of the backlog of commercial work and complex nature of the project which required remeasuring before figures could be finalised. Their evidence was that everyone in attendance at the Contract Review meetings, including Mr McGuire, but also Mr McKerracher et al knew that this was the position and that the project was high risk.

52. In May 2024 Mr Connellan resigned from the Respondent and handed over his work to Mr Coppinger. Mr McInerney states that he left '*at the start of June 2024'*. Mr Coppinger's evidence is that it was only at that stage, when he was required to look more closely into the finances of the project due to Mr Connellan's departure, that he noticed that there were 'commercial issues' and 'financial errors'. Mr McInerney states that '*it became apparent that there was an issue with the reported position of the project*' during the 'commercial handover period' which presumably would have occurred during Mr Connelly's notice period.

53. Mr Coppinger and Mr McInerney raised the fact that they had concerns about the financial position of the Riverside project with Mr McGuire on 13 June 2024 prior to the Contract Review meeting which took place later that same day. Mr Coppinger states they told Mr McGuire that they had noticed that the costs required to complete the project had been underestimated and having looked into the issue of labour costs alone the shortfall was c.£2m. Mr McGuire told them that they should not bring the issue to the attention of the business until they that investigated further and knew the full extent of the issue (at that point they did not know the full extent of the problem). The Contract Review subsequently proceeded and neither Claimant, nor Mr McGuire, raised the wider concerns or known labour costs shortfall, in that meeting. As discussed above, the figures presented indicated an expected profit of c.£3.3m and the Contract Review document was approved by everyone present, including the Claimants, without any caveat in relation to the concerns and shortfall they had identified.

54. The following day, Mr McGuire contacted Mr Tommy Carey, Director of Operations, and informed him that issues had been identified in relation to the financial reporting on the Riverside project but no details were provided. Mr (Jason) Carey then asked for a meeting to be arranged so that the Claimants and Mr McGuire could explain the position to the Respondent's senior leadership team. In the meantime the Claimants were to investigate the issues in the financial reporting

in order to asses the correct position.

55. The Claimants' informed their teams that they would be spending the following week focused on that task. Ultimately the Claimants discovered that the project was very seriously off-track and over-budget. Contrary to the position as stated in the Contract Review documents of an expected profit margin of c.£3.3m, the reality was an expected loss of c.£4.m, a 'swing' of over £7m.

24 June 2024 Meeting

56. A meeting was arranged for the purpose of the Claimants and Mr McGuire informing the senior leadership of the Respondent what the actual financial position of the Riverside project was and explaining what had happened. The meeting was due to take place at 11.30am at the Respondent's office a 1 Hand Axe Yard. Prior to that meeting the Claimants' met with Mr McGuire, Mr McKerracher and Mr Kelly, Pre-Construction Director).

57. The meeting then commenced at 11.30am and in addition to those who attended the pre-meeting, Mr Jason Carey and Mr Tommy Carey, Mr Bigley, director of Operations (North), Mr Neilson, Group Chief Financial Officer and Ms Saye, Executive Office Lead were in attendance. No one was assigned as notetaker in the meeting and no one took any notes during the meeting itself.

58. Ms Saye made a typed note of her recollection of the meeting shortly after the meeting concluded [518]. There is a dispute as to the accuracy of those notes in certain respects. Mr McInerney made a handwritten note in his personal notebook on the train home after the meeting. Mr McInerney subsequently provided a typed note of his recollection of the meeting (based upon his earlier handwritten notes) to his solicitor [598] around 26/27 June 2024 and Mr Coppinger also provided his own typed note at around the same time [600]. The Claimants subsequently complied a document based on both of their recollections, which was sent to the Respondent on 27 September 2024 and is at page 547.

59. It was agreed that the meeting started with Mr Coppinger setting out the position, as he then understood it, with reference to slides that he was displaying to the room that contained a detailed breakdown of the financial position of the project. Mr Jason Carey asked, in effect, what the overall position was in terms of the likely costs/loss on the project and Mr Coppinger stated that as things stood it was approximately a £7.3m movement due to increased costs. It was agreed that following this confirmation Mr Carey told Mr Coppinger that he did not need to continue presenting his slides.

60. I find that Mr Carey then said 'what the fuck' and 'how was this possible/how could this happen'. I find this because it is recorded in Ms Saye's near contemporaneous

notes that '*WTF was said a few times. How could this happen'*, both Claimants also recall that this was said and Mr Carey fairly accepted in his evidence what while he did not recall saying that, it was something he might have said in the circumstances. It is also an entirely understandable and plausible reaction to the information that was being presented, particularly in an industry where I accept that swearing is not particularly unusual (although far less common in formal meetings than on the construction site itself). Neither Claimant suggested that they were shocked or upset by the use of this language.

61. It is agreed that Mr Carey then asked when the issue arose but there is a dispute as to what was said in response to this. The evidence of Mr Carey is that the Claimants said they had become aware of the issue in April when reviewing the financial data for March 2024 based on Ms Saye's note which reads;

> "*D responded by the recent leaving of personnel on site, he had discovered this in March.*
>
> *John also reported this started to show in March*."

62. In his witness statement paragraph 26 Mr Coppinger states that Mr McInerney was the one who responded:

> "*John McInerney responded by saying it became apparent over the last few weeks. After the Senior Quantity Surveyor on the project handed in his notice of resignation (beginning of May where he served his 1-month notice period), we started doing checks on the account when his notice period was nearing completion. It was then we noticed an issue which was going to bring financial stress to the project and as soon as we were aware of this, we brought it to the attention of the business on Thursday 13 June 2024."*

63. In his statement, paragraph 36 Mr McInerney said:

> "*Jason asked "how the fuck" is this movement possible and when did it come to light? I said it had only come to light in the last few weeks after the Senior Quantity Surveyor left the company. I said that we undertook checks on the account and as soon as we became aware of an impact to the End of Life position of the job we advised the business."*

64. Mr McInerney's handwritten notes record the following:

> *"- I replied that it is only the last few weeks that we became aware of the issue after senior QS handed in his notice. We did some checks and advised the business as soon as we understood."*

65.In the Particulars of Claim attached to Mr Coppinger's ET1 [21] it is stated;

> *"At the beginning of May 2024, the Senior Quantity Surveyor on the Riverside project handed in his notice of resignation, before leaving the business in early June 2024. At the end of May or beginning of June, Mr Coppinger and Mr McInerney undertook checks on the project account. They noticed issues that would affect the overall spend on the project. While these issues had not been clear at the time, looking back over previous figures, it was apparent that the issues had been occurring since the March Contract Review was completed in mid-April."*

66.I find that what was said in the meeting, on the balance of probabilities, was in similar terms to the that set out in the Particulars of Claim, that the Claimants' had only actually become aware of the shortfall after Mr Connellan handed in his notice but that having undertaken a review, the signs were there in the financial reporting from March 2024. Mr Carey interpreted what was said as an admission that the Claimants knew, or had the information available to them to know, that there was a serious problem from March 2024, but the Claimants' position was that they did not in fact know until late May/early June 2024.

67.The reason for this is because both the Claimants' notes and the Respondent's notes are consistent with that finding, the Claimants' evidence has been consistent that they were not aware of the detail of the issues in relation to the project until Mr Connellan left the business and it was not put to either Claimant that they deliberately withheld information about the project from the Respondent. The Respondent's case was not that they knew about the issue earlier, but on the contrary that they negligently failed to identify the issue sooner.

68.There is a substantial dispute as to what happened next in the meeting. Mr Coppinger alleges in his witness statement that Mr Carey called him a 'cunt' and then said "*you cunt, I always knew you were dodgy, shifty and untrustworthy*" and pointed his finger at him while speaking in an aggressive manner. Mr Coppinger alleges Mr Carey said the commercial team were '*shady'* and that '*no one could look him in the eyes'* and accused Mr Coppinger of leaving site when he turned up. His statement mirrors what he wrote in the notes he provided to his solicitor [600].

69.Mr McInerney's handwritten notes record:

> *"- Jason accused Donal of being shady, leaving site when Jason turned up and that commercially no-one on the job could look him in the eye when he was onsite*

- *He shouted at Martin M that I told you 9 months ago there were commercial issues on that job and you did fuck all about it."*

70. In the typed notes Mr McInerney sent to his solicitor [598] he recorded:

> *"Jason then started shouting at Donal and accused him and the commercial team on the job as being shady, untrustworthy and stated that no one on the job could look him in the eye when he was on site. Jason stated that Donal left site when he turned up, which he felt was shady….At a couple of points in this conversation he directed the c*** word at Donal."*

71. Ms Saye's note records;

> *"J then was addressing MM, asking how on earth had this not been brought to anyone's attention for such a long period. The loss back in March would be smaller and more manageable but instead it has been left to run away. When made directors it is not just in title and it comes with the burden of a responsibility.*
>
> *Carried on to say "he told MM about "him", about how when he arrived at site, D was always on the way to another site, packing up his stuff, that he had could never look him in his eye and he didn't trust him."*

72. Mr Carey's evidence in his statement is that what he said is in accordance with Ms Saye's note and he refers to the email he sent on 31 January 2024 in relation to the point he was making about having previously raised his concerns about Mr Coppinger and the commercial team. He specifically denies calling Mr Coppinger a 'cunt' or using that word at all during the meeting. Ms Saye's evidence is that Mr Carey did not use that word at any point during the meeting. In cross examination Mr Carey was adamant that he never used the word 'cunt' that he 'does not use that word' and that he did not like having to say it even for the purpose giving his evidence to deny saying it. Mr Coppinger and Mr McInerney maintained that the word was used. Mr McInerney denied in cross examination that it was not recorded in his handwritten account because it was not said at the time. Both Claimants were consistent and clear in their oral evidence that the word was said and was directed at Mr Coppinger. They both complain about both the language used and the way they were spoken to by Mr Carey.

73. It is alleged that Mr Carey subsequently made a comment towards the Claimants along the lines of ""*What have you two been doing for the last 12 months? Tickling each other's bollocks*?". In cross examination he accepted he may well have said that and he acknowledge in his statement that he was angry and frustrated in the meeting. That comment is not recorded in Ms Saye's notes and she does not address it in her witness statement, however in cross examination she also

accepted that words to that effect were said by Mr Carey. I therefore accept that Mr Carey did make that statement.

74. I find that Mr Carey did call Mr Coppinger a 'cunt' in the meeting of 24 June 2024. This is because both Mr Coppinger and Mr McInerney made a note complaining about that language being used within a few days of the meeting and have been clear and consistent in their evidence in relation to what was said and the context in which it was said. I find that Ms Saye's note, while made in a genuine effort to record what she considered to be the pertinent points form the meeting, is not and was not intended to be verbatim and is incomplete. This is because she accepted that she did hear Mr Carey say the comment in relation to '*tickling each other's bollocks'* but this was not recorded by her. I also take into account that in light of the concession made in relation to that later comment and the earlier comments of '*what the fuck'* this was a meeting where swearing and foul language were being used repeatedly by Mr Carey in the context of him being angry and frustrated.

75. Mr Carey had formed a negative view of Mr Coppinger previously as he referred to in relation to his email of 31 January 2024 and felt he had been 'proved right' that he was untrustworthy. Mr Carey was not angry and frustrated in the abstract, but at the Claimants and Mr McGuire and was particularly angry with Mr Coppinger in part because he already held a negative view about him. I find that both Mr Carey and Ms Saye's evidence was based on an assumption that her note was accurate and further that Mr Carey did not want to accept that he said the word 'cunt' because he finds the word offensive and inappropriate. However, I find that on 24 June 2024, faced with the sudden discovery that the company's financial position was over £7m worse off, Mr Carey lost his temper and swore at Mr Coppinger as alleged.

76. There is then a key dispute as to how the meeting ended. Ms Saye's note records:

> *"Said he wasn't going to go in as hard as he wanted to on them but they were still young men and he hopes that there would be lessons for them to learn from this mess but they would not be making those lessons under Careys roof. The best thing for all 3 of them to do was to get out of his site and leave today and he wouldn't be speaking again to them on the matter. The next contact will be through HR."*

77. Mr Carey's evidence is that this reflects what he said, although 'site' was a typo and should have read 'sight'. In cross examination he said that when he referred to 'lessons' not being learned under Carey's roof he meant that although the Claimants were 'young men' they were holding senior positions and they should not have been in a position where they needed to '*learn on the job*' and that '*given their seniority the time for learning lessons was done'*. He again accepted that he

had been angry.

78. The Claimants' accounts are different. Mr Coppinger said in his witness statement

> *"Just before 11.50am, Jason Carey turned to Martin McGuire, John McInerney and me and told us to pack our things, get out of his business and not to return. He said they would communicate with us through HR. He also said the three of us should get out before he does something he regrets."*

79.Mr McInerney states at para 41:

> *"Jason then said "Martin, Donal and John get your stuff and get the fuck out of my business. We'll communicate with you through HR"."*

80.Mr McInerney's handwritten notes are in the same terms as para 41 of his statement as are the amalgamated notes at page 548. In oral evidence Mr McInerney said Mr Carey's words were "*get the fuck out of my business*" but accepted that this is not how Mr Carey would usually describe the company, generally referring to it as 'the business' and not 'my business'. Mr Carey was adamant in his evidence that he would not refer to the company as his business because that was not correct, he was not an owner or shareholder of the business. In cross examination, Mr Coppinger accepted that it might have been that Mr Carey said 'get out of my sight' rather than 'get out of my business'.

81.I find that Mr Carey was angry when he was speaking and that on balance what he said is as is set out in Ms Saye's note, save that I find he also said words to the effect of 'get your stuff' before telling the Claimants and Mr McGuire to 'get out'. This is because Mr Coppinger accepted in cross examination that it may have been 'get out of my sight' rather than 'my business' and because Mr McInerney's note is also not a verbatim record of what was said. It was not put to Mr Carey that he had not made the comments in relation to 'learning lessons', rather it was put that the implication of that statement was that the Claimants were dismissed.

<u>Events following the 24 June meeting</u>

82.After the meeting on 24 June 2024, Ms Buchannan, Head of HR, was told (by Mr Tommy Carey) to contact Ms Saye to get an overview of what had happened in the meeting as HR would need to get involved. She then spoke to Ms Saye who summarised what had happened in the meeting and that it had been left that HR would be in touch with the Claimants and Mr McGuire. Ms Buchannan understood from her conversations with Mr T Carey and Ms Saye that there were performance concerns and potential misconduct in relation to the Claimants and Mr McGuire.

83.Ms Buchannan had a prior professional relationship with Mr McInerney as she

provided HR support to him in the context of his role at the Respondent. She called Mr McInerney following her call with Ms Saye on 24 June 2024 to let him know she had heard about the meeting and to check how he was doing. Mr McInerney told her the meeting had not gone well and she expressed sympathy. Mr McInerney's notes [599] state:

> *"Michele asked how I was doing. I explained what had happened. She said "will we ever learn, we keep making the same mistakes".*
>
> *She said she would be in touch formally once she had been briefed by Jason. She said the process was 'heavy' but to go with it…"*

84. Ms Buchannan does not recall making the comment '*when will we ever learn'* but otherwise she broadly agrees with this note including that she described the process as '*heavy'*. She also states that during the call Mr McInerney asked if he had been dismissed and she said no, however Mr McInerney disputes this. Ms Buchannan did not make any notes of the call and was not asked to provide her account until 27 February 2025. While I accept that Ms Buchannan was a straightforward witness who was doing her best to tell the truth I prefer the evidence of Mr McInerney on this issue. This is because his evidence is based on a near contemporaneous note which does not say anything about 'dismissal'. Mr McInerney was, at the time acutely concerned with what had happened in the meeting on 24 June 2024 and I find that if he had heard that he had not been dismissed from Ms Buchannan, he would have made a note of this as that was contrary to his understanding at the time. The following day it is agreed that Ms Buchannan called Mr McInerney to let him know that he was being suspended and would shortly receive a suspension letter by email. It is also agreed that in response Mr McInerney stated that he had been dismissed. Mr McInerney's notes do not make specific reference to this call with Ms Buchannan on 25 June 2024 in his notes [599] however he accepts that this call occurred in his witness statement.

85. On 25 June 2024 Mr Coppinger logged in to his work IT systems and emailed Mr McKerracher. He submitted a holiday request form to take the following Friday and Monday (28th June-1st July) off work. He said that the reason for the request was that after the meeting on the 24th June, he needed '*a few days off work to get my head straight'*. In fact, Mr Coppinger had already booked flights to go on holiday over those dates (having made the bookings on 21st May 2024). When asked about why his email stated the reason for the request was in response to the meeting, Mr Coppinger said that he had forgotten to make the request earlier and so had emailed to check if it was ok to take the days off, as he would have been willing to cancel his plans if he was needed as this was something he had done previously. However, that did not answer the question, as the email does not make any reference to Mr Coppinger having planned to go on holiday or having forgotten

to ask about having the dates off earlier, neither does it indicate that Mr Coppinger would be happy to cancel his plans if he was needed. The email is in clear terms and states that the reason Mr Coppinger is asking to take the time off is because he felt he needed some time away from work because of the meeting on 24th June, not because he had planned a holiday. I accept that Mr Coppinger had in fact planned to take holiday on those dates so that he could travel and find that this was the reason he emailed Mr McKerracher to request those dates as annual leave.

86. I find that Mr Coppinger's evidence that he would have been willing to cancel his leave if he was needed at work, coupled with the fact he had logged into work on 25 June 2024 and continued working until his access was suspended, indicates that his own view on 25 June 2024 was that his employment with the Respondent was continuing.

87. Ms Buchannan called Mr Coppinger via Teams on 25 June 2025 at about 1.30pm as she was made aware that he was accessing the Respondent's IT systems. She subsequently spoke to him over the telephone. She advised him that he was suspended and blocked from using the Respondent's IT systems. He received a letter confirming the suspension the same day [519]. During their conversation, Mr Coppinger expressed that he was not happy with the way he had been spoken to by Mr Carey during the meeting on 24 June 2024 and Ms Buchannan sympathised with Mr Coppinger and agreed that what he was describing was 'not good'. Mr Coppinger did not query his suspension with Ms Buchannan. Mr Coppinger attended his GP later that day and the notes record that he stated he had been '*fired'* the previous day but then that he had '*received official letter from employer today saying he had actually been suspended, and not fired'*. I find that the GP records indicate that Mr Coppinger had initially believed he was dismissed in the meeting on 24 June 2024, but had then been unsure about whether the dismissal had been really intended or intended to have immediate effect and was then confused as to what the correct position was after he received the letter of suspension.

88. The letters of suspension sent to the Claimants state that they are suspended pending investigation into their 'current performance in role' and that they would continue to be paid full pay. They were to remain contactable during working hours, but not required to work and were not to attend or to contact the company's clients, suppliers or their colleagues without prior written consent.

89. On 25 June 2024, Mr Tommy Carey, Mr Wraight and Mr Aherne visited the Riverside project site and the following day sent an email summarising the visit and the actions arising from it [449]. In that email he stated that they had updated the site team in relation to the 'new leadership team' to support the project. This essentially described personnel who were assigned to the project to replace the

roles that had previously been undertaken by Mr McGuire and the Claimants. The email does not record any information being shared as to why the replacements had been made, but it is implicit in the actions to be taken, that the project was not in a strong commercial position and that remedial work was required to be done.

90. Mr Carey has produced photographs of his mobile phone showing text of what is said to be an email dated 28 June 2024 [451]. It is not possible to see from these photographs who that email was sent to, or indeed whether or when it was sent. The subject of the email is 'London leadership update' and it explains that Mr McGuire 'was not dismissed' on Monday and had in fact resigned but would be assisting in a 'transfer of leadership'. The clear implication of this message is that there had been sufficient misunderstanding as to whether or not Mr McGuire had been dismissed that it was felt necessary to clarify the position. The Claimants are not named in the email but it contains the following paragraph:

> "*A number of other senior leaders have been asked to step away from the business while a full review takes place on our Riverside site to understand both fully the scale of the issue and to establish an exit strategy with minimum impact on the company. Tom Carey is leading on this and we will update in due course."*

91. This must be a reference to the Claimants as Mr Carey accepted that they were the only people who were suspended and investigated in relation to the issues at Riverside.

92. It is agreed that letters were sent by email to the Claimants on 3 July 2024 by Mr Wraight inviting them to investigation meetings on 5 July 2024 [493] [520]. The meeting was described as a fact-finding meeting in relation to the allegation of poor performance which led to gross negligence in the management of the Riverside project.

93. On 4 July 2024, the Claimants' solicitor wrote to the Respondent and asserted that they had been summarily dismissed in the meeting on 24 June 2024 and would not attend the fact find meetings. Consequently the meetings on 5 July 2024 did not go ahead.

94. On 9 July 2024 the Claimants wrote to the Respondent in identical terms [464] [465] alleging that they had been summarily and unfairly dismissed on 24 June 2024 or alternatively that they were resigning in response to allegedly repudiatory conduct by the Respondent, listed in a bullet point list (a) to (h).

95. Mr Wraight proceeded with his investigation notwithstanding the Claimants' refusal to participate and produced a report dated 2 August 2024 [473]. Mr Wraight reviewed some documentation but did not interview any witnesses and, other than

the final presentation Mr Coppinger presented on 24 June 2024 (which showed the £7.3m negative change of position), he did not review any of the financial reporting in relation to the Riverside project. He found that it was grossly negligent for the Claimants to '*have allowed the situation to have reached a £5.3m loss by June 2024'* and further found that the Claimants had filed '*misleading'* contract review documents and that '*Had Mr McGuire not reported the anomalies they would no doubt have remained concealed."* He would have recommended summary dismissal had the Claimants not resigned. Under the Respondent's disciplinary policy [140], if a matter is to proceed to a disciplinary meeting, the investigation report should be sent to an impartial manager to review and a disciplinary meeting would then been held and chaired by a disciplinary manager (separate from the investigating manager) [145]. However in the circumstances, as the Claimants had resigned, Mr Wraight did not refer the matter on and instead gave his own view.

96. Separate from the disciplinary investigation by Mr Wraight, the Respondent's board commissioned a detailed review of the Riverside project itself and this was completed in August 2024 [527]. The 'Key Findings' of that report include:

> *"The financial performance has been impacted by significant overspends across labour, prelims (staff and supervision), and plant due to over-resourcing, a free run on overtime, wastage on outputs, as well as quality issues. The driving reason was that we entered a contract programme that we could not deliver; however, we endeavoured to chase it by allocating additional resources, with exceptional levels of overtime, which required additional supervision and plant that were unable to achieve outputs and led to significant loss. This was done without understanding the financial impact, which was grossly mismanaged by the project and regional team.*
>
> *The contractual and commercial administration of the project was extremely poor, with a complete lack of control being implemented and a failure to capture change and administer the contract to gain any recovery."*

97. Further in the 'Governance & Control' section:

> *"The reporting of the project, from planning reports, cash flow reports, CVRs (Cost Value Reconciliation), and end-of-life forecasts were wholly inaccurate and made the monthly contract review meaningless. However, key indicators did appear earlier in the year, which should have led to deeper dives by the leadership team."*

98. In the detailed findings in relation to 'End of Life Forecast',

> *"It is now apparent that the basis of the ELF cost to complete calculation, from February 2024 onwards, was fundamentally flawed on the basis the planned*

staff, labour and plant resources were not adequate for the resource required to execute the works. The resources allowed for in the February cost plan were inadequate which the project should have identified in regular planned vs actual resource and cost comparisons. Either these comparisons were not conducted or alternatively the team deliberately supressed the true position."

99. Ultimately, the detailed review of the project found that the actual increase in costs was over £14m.

The Law

Dismissal

100. Section 95 of the Employment Rights Act 1996 states, as far as is relevant:

> (1) For the purposes of this Part an employee is dismissed by his employer if……
> (a) The contract under which he is employed is terminated by the employer (whether with or without notice);

101. The burden of proof falls on the employee to show that a dismissal took place and the standard of proof is on a balance of probabilities. Therefore, the question for the tribunal is "Was it more likely than not that the contract was terminated by dismissal rather than by resignation?"

102. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances. A helpful and full summary of the applicable legal principles relevant to determining whether a dismissal (or resignation) has occurred is set out at paragraph 97 of the judgment of the EAT in *Omar v Epping Forrest District Citizen Advice* [2023] EAT 132:

> *"97. With that very considerable preamble, the principles applicable to the construction of (putative) notices of dismissal or resignation in the employment context seem to me in the light of the authorities to be as follows:-*
>
> *(1) There is no such thing as the 'special circumstances' exception; the same rules apply in all cases where notice of dismissal or resignation is given in the employment context. That is the view that the Court of Appeal took in **Willoughby**, and the judgment in **Willoughby** is, it seems to me, consistent with the judgments of the Court of Appeal in **Sothern** and **Sovereign House**, which did not use the language of 'exceptions'.*
>
> *(2) A notice of resignation or dismissal once given cannot be unilaterally retracted (**Willoughby** at [25], and **Denham**). The giver of the notice cannot change*

*their mind unless the other party agrees (**Martin** is wrong on this point insofar as it suggests otherwise: see **Willoughby** at [38]).*

*(3) Words of dismissal or resignation, or words that potentially constitute words of dismissal or resignation, must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation (**Willoughby** at [37]).*

*(4) Rephrasing Lord Hoffmann's well-known dictum from **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1988] 1 WLR 896 to fit the dismissal/resignation situation, the circumstances that may be taken into account in my judgment include 'absolutely anything' that was 'reasonably available' to the parties (i.e. that they knew or ought to know) 'that would have affected the way in which the language used would have been understood by a reasonable bystander'.*

*(5) The perspective from which the words used are to be judged is that of the reasonable bystander in the position of the recipient of the words used, i.e. where the employee resigns, the relevant perspective is that of the employer who hears the words of resignation; where the employer dismisses, the relevant perspective is that of the employee (cf **Willoughby** at [26]).*

(6) What must be apparent to the reasonable bystander in that position, objectively, is that:

i. the other party used words that when construed in accordance with normal contractual principles constitute words of immediate dismissal or resignation (if the dismissal or resignation is 'summary') or immediate notice of dismissal or resignation (if the dismissal or resignation is 'on notice') – it is not sufficient if the party merely expresses an intention to dismiss or resign in future (cf the Tribunal's decision at first instance in the Sothern case); and

*ii. the dismissal or resignation was 'seriously meant' (**Chesham**, **Gilbert**, Dame Elizabeth Lane in **Sothern**), or 'really intended' (**Tanner**, Lord Cowie in **Mackay**, **Kwik-Fit**, **Willoughby**) or 'conscious and rational' (the EAT in **Barclay** and Lord Ross in the Court of Session in **Mackay**). Henceforth in this judgment, I will use only the term 'really intended', but the alternative formulations are equally valid. What they are all getting at is whether the speaker of the words appeared genuinely to intend to resign/dismiss and also to be 'in their right mind' when doing so. I must add a word of caution, however, about the use of the word 'rational' in this context: it is not part of the test that resignation or dismissal needs to be*

'rational' in the sense of reasonable. It may be completely unreasonable for the employee to resign or the employer to dismiss, but the resignation/dismissal will still be effective if it reasonably appears to have been 'really intended'. That said, if the speaker of the words appears to be acting irrationally, as in 'not in their right mind', then that will be a circumstance in which it should be concluded that the words were not 'really intended').

*(7) In the vast majority of cases where words are used that objectively constitute words of dismissal or resignation there will be no doubt that they were 'really intended' and the analysis will stop there: **Sothern**, **Sovereign House** at [7] and **Willoughby** at at [37]). A Tribunal will not err if it only considers the objective meaning of the words and does not go on to consider whether they were 'really intended' unless one of the parties has expressly raised a case to that effect to the Tribunal or the circumstances of the case are such that fairness requires the Tribunal to raise the issue of its own motion.*

*(8) The point in time at which the objective assessment must be carried out is the time at which the words are uttered (**Sothern**, **Sovereign House** and **Willoughby**; again **Martin** is wrong insofar as it suggests otherwise). The question is whether the words reasonably appear to have been 'really intended' at the time they are said.*

*(9) However, evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation/dismissal was 'really intended' at the time (see **Tanner** at [4], **Barclay** at [12] and **Willoughby** at [27] and [38]). If that leads to the conclusion that it was not 'really intended' at the time (as in **Tanner**, **Martin** and **Barclay**) then the putative notice will not have been effective. If, however, consideration of subsequent events leads to the conclusion that, objectively, resignation/dismissal was 'really intended' at the time but the giver of the notice has since changed their mind (as in **Mackay** and **Denham**), then the notice stands as when originally given and the change of heart is of no legal effect (unless accepted by the other party). The distinction between the two situations is likely to be very fine because, as the Court of Appeal observed in **Willoughby** at [38], even in the cases where it has been held the resignation/dismissal was not 'really intended' at the time, it is likely that the giver of the notice did intend to give the notice at the time (in the sense that the giving of the notice was not an accident and was heartfelt at the time) and thus that the giver of the notice could be described (as happened in **Martin**) as subsequently 'recanting' or 'having a change of heart'. The distinction between the not really intended' and 'change of mind' cases is, though, a real one, long established in the authorities, and it is a matter for a Tribunal to*

decide on the particular facts on which side of the line a case falls.

(10) There is no limit to the period of time after the putative resignation/dismissal to which the Tribunal can have regard, but common sense suggests that, the longer the time that elapses, the more likely that any evidence will not be evidence of the person's intention at the time but, rather, of a subsequent impermissible change of mind.

*(11) The sorts of circumstances that might lead to a conclusion that, objectively, the sayer or writer of the words did not have the necessary 'real' intention at the time, as drawn from both the obiter and actual examples in the case law, include where the speaker: is angry and behaves out of character (**Chesham** - obiter); is angry and overhasty (**Martin**); is just plain angry (**Tanner**, **Sovereign House**, **Kwik-Fit**); has a relevant mental impairment or is immature (**Sothern** and **Barclay**); or is under extreme pressure/'jostling' from another party (**Sothern** and **Kwik-Fit** both obiter). However, none of those circumstances necessarily mean that the words of termination were not 'really intended'. Thus, the dismissals/resignations were held to be effective in the authorities despite the giver of notice being angry (**Tanner**, **Gilbert**, **Mackay**), stressed or depressed (**Denham**), or mistaken about the other parties' wishes (**Willoughby**). Again, which side of the line a case falls is a question of fact for the Tribunal.*

*(12) The uncommunicated subjective intention of the speaker is not relevant (**Sothern** at [19] per Fox LJ, **Willoughby** at [26]; the Court of Appeal in **Sovereign House** was wrong insofar as it held otherwise, as were some of the earlier authorities such as **Tanner**). However, any communication by the speaker of the words to the other party in the relevant period thereafter as to their subjective intention will be relevant evidence to take into account in assessing the position objectively.*

*(13) What the recipient of the words subjectively understood is relevant evidence as it may assist the Tribunal in forming a judgment as to what the reasonable bystander would have thought, but it cannot in my judgment be determinative. Dame Elizabeth Lane in **Sothern**, the EAT in **Barclay**, and the Court of Appeal in **Sovereign House** are right in this respect, while the EAT in **Gilbert**, and Fox LJ in **Sothern** are wrong. There are three reasons for this: (i) so to hold would be inconsistent with an objective test; (ii) it would mean that all the cases where the other party took what was said at face value, but the Tribunal subsequently decided they should not have done, were wrongly decided; and, (iii) it allows opportunistic employers/employees to take advantage of words spoken that are not 'really intended' either to 'get rid' of an employee who did not really want to resign and who could not have been fairly dismissed or to 'manufacture' an unfair dismissal claim against an*

employer who did not really intend to dismiss.

*(14) Finally, the same rules apply to written notices of resignation or dismissal as to oral ones (**Willoughby**, [37]), save that where a notice is given in writing that will normally indicate a degree of thought and care that will make it less likely that there are circumstances which, objectively, would lead the reasonable bystander to conclude that the notice was not 'really intended' (cf **Denham, Willoughby** and **Mackay**)."*

103. There is a well-established principle in the construction of commercial contracts that any ambiguity is likely to be construed against the person seeking to rely on it. In *Graham Group plc v Garratt* EAT 161/97 the EAT held that this principle should also be applied to ambiguous words or acts in the context of a dismissal or resignation.

104. Broadly speaking, the test as to whether ostensibly ambiguous words amount to a dismissal or a resignation is an objective one; all the surrounding circumstances should be considered. If the words are still ambiguous, the tribunal should ask itself how a reasonable employer or employee would have understood them in light of those circumstances.

105. When considering all the circumstances, tribunals will look at events both preceding and subsequent to the incident in question and take account of the nature of the workplace in which the misunderstanding arose, however the question remains whether the words used amounted to an immediate dismissal (or of dismissal on notice) that was 'really intended' at the time they were issued.

Constructive dismissal

106. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:

> "95 Circumstances in which an employee is dismissed
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)— …
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

107. The Tribunal's starting point is the test set out by the Court of Appeal in *Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27. An employee seeking to establish that he has been constructively dismissed must prove:

a. that the employer fundamentally breached the contract of employment;
b. that he terminated the contract by resigning

c. that he resigned in response to the breach.

108. The term of the contract upon which the Claimants rely in this case was the implied term of trust and confidence. It is an implied term of any contract of employment 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*: Malik v Bank of Credit and Commerce International SA* [1997] ICR 606, as clarified in *Baldwin v Brighton & Hove City Council* [2007] IRLR 232.

109. The test of whether there has been a breach of the implied term of trust and confidence is an objective one in which the subjective perception of the employee can be relevant but is not determinative. As Lord Nicholls said at page 611A of *Malik* in relation to the conduct relied on as constituting the breach:-

> *"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. This requires one to look at all the circumstances."*

110. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

111. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Frenkel Topping Limited v King* UKEAT/0106/15/LA (in paragraphs 12-15):

> *"12. 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.*

*14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In **Woods v W M Car Services (Peterborough) Ltd** [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in **Tullett Prebon plc v BGC Brokers LP & Ors** [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.*

*15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see **Hilton v Shiner Builders Merchants** [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."*

112. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, 350.

113. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in *Kaur v Leeds Teaching Hospitals NHS Trust [*2018] EWCA Civ 978.

114. The last straw doctrine is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach.

115. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in *Wright v North Ayrshire Council* [2014] IRLR 4. If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause.

116.An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

117.An employee is entitled to a reasonable period of time in which to resign before being taken to have affirmed the contract*: Air Canada v. Lee* [1978] ICR 1202, EAT. The length of that period is not fixed. Relevant factors include the consequences to the employee of losing their job and their prospects of finding alternative work: *Chindove v. William Morrison Supermarkets* EAT/0201/13.

Unfair Dismissal

118.By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

119.Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

120.Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach.

121.*British Home Stores v Burchell* [1980] ICR 303 EAT (*Burchell*) which provided a three fold test required to show misconduct was the reason for dismissal. The respondent must show that:

a. It believed the claimant was guilty of misconduct.
b. It had in mind grounds upon which to sustain that belief, and
c. At the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

122.*British Leyland (UK) Ltd v Swift* [1981] IRLR 91 CA (*Swift*) which approved the principal that employers often have at their disposal a range of reasonable responses to matters such as misconduct of an employee, which may span summary dismissal down to an informal warning. Swift approved the fact that it is inevitable that different employers will choose different options. In recognition of

this and in order to provide a standard of reasonableness that tribunals can apply the "band of reasonable responses" approach was approved. This requires tribunals to ask: did the employer's action fall within the band (or range) of reasonable responses open to an employer. Lord Denning MR said in Swift "it must be remembered that in all these cases there is a band of reasonable responses, within which one employer might reasonably take one view: another quite reasonably might take a different view".

123. The legal test in relation to whether an employer's investigation was reasonable, as emphasised in *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

Polkey

124. What is known as 'the *Polkey* principle' (*Polkey v AD Dayton Services* [1988] I.C.R. 142,HL) is an example of the application of section 123(1). Under this section the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the '*Polkey'* exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: *Hill v Governing Body of Great Tey Primary School* [2013] I.C.R. 691, EAT.

125. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in *Software 2000 Ltd v Andrews* [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

Contributory conduct

126. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (*Swallow Security Services Ltd v Millicent* [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory

award) must have actually caused or contributed to the dismissal: *Nelson v BBC (No2)* [1980] I.C.R. 110, CA. The conduct need not be a breach of contract, or illegal conduct. It may be conduct that was 'perverse or foolish' or 'bloody-minded' or merely unreasonable in all the circumstances. Langstaff J offered tribunals some guidance in the case of Steen v ASP Packaging [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

127. There is an equivalent provision for reduction of the basic award, section 122(2) which states that 'where the tribunal considers that any conduct of the complainant before the dismissal…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'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

128. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Wrongful dismissal – breach of contract

129. If an employee is dismissed with no notice or in adequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

130. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case. However, the courts have considered when 'misconduct' might properly be described as 'gross': Neary v Dean of Westminster IRLR [1999] 288 (para 22). In Neary, Lord Jauncey of Tulichettle rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing.

Discussion and Conclusions

Dismissal

131. The Claimants' assert that Mr Carey summarily dismissed them on 24 June 2024. I have found that Mr Carey's words, directed at the Claimants and Mr McGuire were essentially; '*I'm not going to go as hard on you as I would like to*, y*ou are still young men, hopefully there will be lessons for you to learn from this mess, but you will not be learning those lessons under Carey's roof. The best thing for you to do is get your stuff, get out of my sight and leave today. I won't be speaking you again about this, the next contact will be through HR'*.

132. Those words were spoken in the context of the fraught meeting of 24 June 2024, following Mr Coppinger having told Mr Carey that the Riverside project which had until very recently been reported as on track to make over £3m in profit was now facing a deterioration in outlook of over £7m. Mr Carey was angry and had called Mr Coppinger a 'cunt'. Mr Carey had also said that he had already raised concerns about Mr Coppinger and didn't trust him and had queried what Mr Coppinger and Mr McInerney had been doing for the previous 12 months and asked if they had been '*tickling each other's bollocks'*.

133. In my view the words used by Mr Carey are not ambiguous and are a clear statement that the Claimants and Mr McGuire were sacked. This is because although the language 'dismissed' or 'sacked' is not used, the language that was used is incompatible with any other implication – if the Claimants had lessons to learn but would not be learning them 'under Carey's roof', the only sensible implication of this is that they would no longer be working for Careys. When said alongside telling the Claimant's to get their stuff and leave (immediately) I find that the words used by Mr Carey unambiguously amount to words of immediate dismissal.

134. In his oral evidence Mr Carey said that he was 'in shock' at the time and that what he had heard 'beggars belief'. However he did not suggest that he had not meant what he had said. As set out in *Omar*, in the absence of any dispute as to whether the words used were 'really intended' the issue of dismissal can be resolved in the Claimant's favour at this point. However, I consider it is appropriate to go on to consider the issue of whether the words used were 'really intended' in light of the Respondent's submissions on the issue of dismissal.

135. In all the circumstances, objectively, would a reasonable bystander the position of the Claimants at that meeting have reasonably understood that Mr Carey 'really intended' to dismiss the Claimants? I note that in this context Mr Carey's subjective intention is not relevant to my determination. The subjective understanding of the Claimants is a relevant, but not determinative, factor. I consider the following factors to be relevant:

    a. Mr Carey was the CEO of the company and therefore speaking with

considerable authority;

b. Objectively, the Claimants were in that meeting (together with Mr McGuire) being asked to account for what was on any analysis a monumental failure in the financial reporting on the Riverside project;

c. Mr Carey was angry and shocked by the extent of the increase in costs;

d. Although Mr Carey was angry and somewhat aggressive in the way he spoke to the Claimants, and to Mr Coppinger in particular, his words at the end of the meeting were more considered. The reference to 'lessons to be learnt' and that the Claimants' were 'still young men' implied thought had been given to their position, not only within the Respondent, but within their careers more generally;

e. Mr Carey did not contact the Claimants after the meeting, did not retract what he had said and never indicated to either of them that he had not meant what he said in the meeting;

f. Mr McInerney's subjective understanding when the words were spoken was that he had been dismissed. I find this because I consider that his evidence has been consistent that this was his subjective understanding at the time and consistent with the handwritten notes he made after the meeting.

g. Mr Coppinger's subjective understanding is more complicated. As set out above I find that he initially understood he had been dismissed in the meeting of 24 June 2024, but was not sure if the dismissal was really intended or intended to take immediate effect and continued to attend work the following day until his suspension, following which he was unsure as to whether his employment had been terminated or not until he took legal advice;

h. Ms Buchannan did treat the Claimant's employment as continuing and the Respondent sought to instigate a disciplinary process in relation to them on 25 June 2024.

136. I find that an impartial observer in the position of the Claimants in the meeting of 24 June 2024 would have understood that Mr Carey's words unambiguously amounted to an immediate dismissal of the Claimants and that he 'really intended' the dismissals. I have carefully considered my finding that Mr Coppinger's subjective understanding was not that a dismissal had been really intended (or really intended with immediate effect) however I note that although always

relevant, the subjective understanding of the employee is not determinative. The particular circumstances of this case are illustrative of the fact that different people can quite reasonably form different subjective understandings from the same objective information. Mr McInerney's subjective understanding was that all 3 individuals, himself, Mr Coppinger and Mr McGuire had been summarily dismissed and I do not consider it appropriate to place more weight upon Mr Coppinger's subjective understanding that that of Mr McInerney.

137. I have placed greater weight on the objective factors including that Mr Carey's words were not immediately reactive in the context of an argument, but rather, while he was angry, were considered and reasonably restrained (referencing that he was consciously holding back from a more robust response) and that he was speaking with the authority of the CEO of the company in the context of an objectively very serious financial failure on one of the Claimant's projects. The meeting was not impromptu – Mr Carey had known since 14 June 2024 that there were serious concerns in relation to Riverside and he had had time to consider how he would respond. Further, Mr Carey did not subsequently retract his words or give any indication that they had not been seriously meant. While I accept that further confusion arose on 25 June 2024 when the Claimants were informed that they were suspended, I find that this confusion arose largely because the Respondent was in effect seeking to unilaterally reverse the dismissals and treat the Claimants' employment as continuing. However, as a matter of law, having orally dismissed the Claimants on 24 June 2024, the Respondent could not unilaterally reverse that decision and the Claimants did not agree, as they made plain in their letter of 4 July 2024.

138. I therefore find, on the balance of probabilities, that the Claimants were summarily dismissed on 24 June 2024.

Constructive dismissal

139. As I have found that the Claimants were expressly dismissed on 24 June 2024 the alternative arguments in relation to constructive dismissal do not strictly arise, however I will briefly set out my findings on this issue for the benefit of the parties. If I had not found that the Claimants' had been expressly dismissed, I would have found that they had been constructively dismissed. The reasons for this are:

    a. Mr Carey's conduct during the meeting of 24 June 2024 did in my view amount to conduct likely to at least seriously damage the relationship of trust and confidence. While I accepted that there was reasonable and proper cause for the Respondent to investigate the financial position of the Riverside project, and the Claimants' conduct in relation to it, there was no reasonable and proper cause for the manner in which Mr Carey conducted the meeting in particular;
        i. Expressing a clear view that the Claimants were at fault in

relation to the losses on the project before any investigation had been carried out;

ii. Swearing at the Claimants and accusing them of 'tickling each other's bollocks' in front of the senior leaders of the Respondent organisation;

iii. The fact that in behaving in that way, as CEO, Mr Carey's actions carried significant weight with the Respondent;

iv. In the circumstances the Claimants were humiliated in that meeting by Mr Carey;

v. Additionally in relation to Mr Coppinger, calling him a 'cunt' in the meeting and stating that he did not trust him and had held that view for some time.

140. I would not have found that the other actions of the Respondent complained about amounted to or added to a breach of the implied term. This is because in my view the Respondent had reasonable and proper cause to suspend the Claimants pending the disciplinary proceedings in light of the very seriousness nature of the allegations against them and in particular, the risk (albeit one that was ultimately found not to have occurred) of there being fraud in relation to the reporting on the project. I did not accept the allegation that the Respondent had told anyone that the Claimant's had been dismissed because in oral evidence Mr McInerney confirmed that what he actually alleged was that a colleague had told him there was '*a rumour that they [the Claimants] weren't performing on Riverside and that had led to huge losses'*. This does not amount to an allegation that anyone was told that the Claimants had been dismissed. It is also, in my view, the inevitable consequence of the (reasonable) actions that the Respondent took in suspending the Claimants and investigating the true position of the Riverside project. The Claimants' accepted that if they had not been dismissed, then the disciplinary process was not a 'sham' – this allegation had been premised on their belief that the Respondent had already dismissed them on 24 June 2024 and was therefore acting disingenuously in purporting to conduct a disciplinary process.

141. I would also have found that Mr Coppinger's attendance at work briefly on 25 June 2024 and his request to book holiday did not amount to any waiver of the breach or, in the circumstances, to an affirmation of the contract. I note that employees are entitled to a 'reasonable' amount of time to decide whether to accept a breach and resign and while this is not a defined amount of time, in my view Mr Coppinger was very comfortably within that period at that point. I would also have accepted that the Claimants' resignations on 4 July 2024 were, at least in part, in response to the repudiatory conduct of the respondent on 24 June 2024.

Unfair Dismissal

Reason for Dismissal

142. The burden is on the Respondent to establish a potentially fair reason and the Respondent relies on the reason of conduct or alternatively SOSR. I have found that Mr Carey dismissed the Claimants in the meeting of 24 June 2024 as set out above. What was the reason for his decision? I find on the balance of probabilities that the reason for Mr Carey's decision was his view that the Claimants' were responsible for the failure to manage the commercial aspects of the Riverside project so that it had run up excessive costs and had failed to bring issues that ought to have been known by them to the attention of the business from March 2024 onwards. Mr Carey believed that the Claimants had, at best, been grossly negligent in their duties and this was a genuinely held belief. I accept Mr Carey's evidence in this regard and find that the reason for the dismissals was the potentially fair reason of conduct.

Reasonable Grounds for Belief following a Reasonable Investigation?

143. At the time Mr Carey dismissed the Claimants no disciplinary process had been commenced at all. Mr Carey's belief was based upon the information provided to him in that meeting by Mr Coppinger and Mr McInerney themselves. This provided reasonable grounds to believe that the Riverside project was very substantially over-budget and that there had been information available in the financial records related to the project that, with hindsight, indicated the problem was there to be seen from approximately March 2024 (because this is what Mr McInerney told him). However, no investigation had been carried out as to what precisely had gone wrong or how and Mr Carey said in his evidence that there was at that point uncertainty as to whether the issue was that costs had been allowed to run up without oversight or whether any fraudulent activity had occurred. Given that fraud (not necessarily committed by either Claimant) was a real possibility and no investigation had been conducted, I find that the Respondent did not have reasonable grounds for the belief in the Claimant's guilt at that time because a reasonable investigation had not taken place. To come within the band of reasonable responses, any investigation ought to have thoroughly examined the financial reporting in relation to the Riverside project to ascertain what had gone wrong, when and why.

144. It follows that I find that the Claimant's dismissals were unfair because of the failure to follow any disciplinary procedure.

Polkey

145. If a fair process had occurred it undoubtedly would have affected the timing of the Claimants dismissals. I find that the Respondent would have acted promptly, as evidenced by the invitation to investigation meetings on 5 July 2024. However, a fair process would have included a broader consideration of the financial documents than that undertaken by Mr Wraight, such as those considered in the completion of the Review document. That document is dated 'August 2024' and Mr Wraight produced his investigation report on 2nd August 2024. Mr Jackson's submissions were that a fair process would have concluded within '2-3 weeks'.

146. As discussed above, under the Respondent's disciplinary policy, having concluded his investigation, if there was a case to answer, Mr Wright would have then referred the matter on to a disciplinary manager who would have held a disciplinary meeting and made the decision in relation to dismissal.

147. Doing the best I can, I find that had this employer undertaken a fair disciplinary process, that process would have concluded by the end of August 2024. The last working day in August 2024 was Friday, 30th August 2024 and therefore I find if the Claimant's would have been dismissed by a fair process any such dismissal would have taken place by 30th August 2024.

148. What then is the percentage chance that a fair dismissal would have taken place on that date in respect of each Claimant?

149. I remind myself that in this exercise it is the Respondent's likely decision that must be considered, based upon what it would have reasonably known in light of a fair disciplinary process having been followed.

150. I find that the Riverside Review, while not directly concerned with disciplinary matters, is important evidence of the information which would have been available to the Respondent in such circumstances. I do not accept Mr Milner's submission that once in receipt of that review the Respondent would have been bound to conclude there had been 'no misconduct or negligence'; that is simply not consistent with what the report concludes as discussed above. While the Review found that there were criticisms to be made of various aspects of the way the project was planned as well as the way it was managed, and some increases in costs were due to factors beyond anyone's control, it clearly contains substantial evidence that the Claimants and Mr McGuire had seriously failed in their management of the project in accordance with their roles within the Respondent, from October 2023 onwards and in particular from February 2024. I also note that the Claimants' accepted, in the meeting of 24 June 2024, that having looked at the reporting in more detail the issues on the project could be seen by March 2024. The Review also concluded that the actual increase to costs to the end of the project was over £14m.

151. The Claimants' position was that it was not their fault because it was not their responsibility to scrutinise the financial reporting on the Riverside project to that extent until May 2024. However, I find that the Respondent never accepted and would never have accepted that view and considered that the Riverside project was within the ambit of the Claimants' responsibilities in accordance with their job descriptions. This was the consistent evidence of Mr Carey and aligns with the contemporaneous documents in the sense that there are no documents which suggest any narrower remit was ever agreed in relation to the Riverside project in respect of either Claimant. In relation to Mr Coppinger his job description included:

“ *Ensure Commercial budgets are managed accurately by QS teams*
  Review cost monitoring, expenditure planning and benchmarking
  Support/review cost management, monitoring, trending estimating and forecasting
  Review analysis of cost performance data and provide accurate input for monthly performance reports **“**

152. The Riverside review found that this work had essentially, not been done or had been done seriously negligently. While I accept that in a fair process the fact that Mr Coppinger had a clean disciplinary record and 9 years of service at the Respondent would also have been considered, in my view these mitigating factors would not have been likely to outweigh the serious nature of the failures on this project and the Respondent’s concerns would have been exacerbated by Mr Coppinger’s refusal to accept responsibility for his role in the project. I find that there is in reality no prospect that Mr Coppinger’s employment would have continued had a fair disciplinary process taken place as it is 100% likely that he would have been summarily dismissed for gross misconduct in relation to serious negligence in the performance of his role.

153. In relation to Mr McInerney his job description included: “*Supported by the Regional Commercial Director/Manager, the Regional Director works strategically, holding overall accountability for the region’s successful performance and delivery of all financial metrics, ensuring the region’s commercial positioning is strengthened, and margin and profitability maximised*”. The Riverside project was within Mr McInerney’s region and the Respondent considered him accountable for it. The Respondent’s Review found that the financial management of the project had been seriously negligent and this had contributed to the accrual of additional costs of over £14m. I find that as with Mr Coppinger, there is a 100% chance that in those circumstances, had a fair process been followed, Mr McInerney would have also been summarily dismissed.

Contributory Fault

154. I am bound to consider the issue of contributory fault in the circumstances of this case and in doing so I must make my own findings as to the Claimants’ conduct, whether it was culpable or blameworthy, and the extent to which it caused or contributed to their dismissals.

155. I find that the Claimants’ failed to scrutinise the financial reporting on the Riverside project in accordance with the responsibilities of their respective roles and that from at least February 2024, those failures were grossly negligent. I find this because the Claimants’ evidence was that they knew the financial reporting in relation to the Riverside project was inaccurate from the outset of their involvement with it and knew that it was a complex project with a high degree of risk. They say that others carried greater responsibility than they did, however for the purpose of assessing contributory fault, it is only the conduct of the Claimants themselves with which I am concerned. I have rejected their evidence as to any specially agreed narrower remit in respect of the Riverside project and find that their conduct in failing to adequately scrutinise the

financial position of the project does amount to culpable and blameworthy conduct. This is because the scale of their failure was both long-standing, over a period of many months and extreme in the sense that they failed to recognise and act on a misreporting of financial figures that was there to be seen in the sum of many millions of pounds (and ultimately found to be over £14m). That is an extremely serious failure.

156. I find that this conduct was the sole reason for their dismissals because it is the only reason that Mr Carey behaved as he did and dismissed the Claimants on 24 June 2024; he acted directly in response to learning of their conduct.

157. Having found that the Claimants' culpable and blameworthy conduct was the sole reason for their dismissals, I must then make a reduction to the compensatory award by such amount as I consider just and equitable. Mr Milner submitted that no reduction ought to be made because there was no culpable or blameworthy conduct by either Claimant, however I have rejected that submission. Mr Jackson addressed this issue only briefly and said that a 'large' reduction was appropriate but that he was not seeking a 100% reduction.

158. It is clear on the authorities that I must make my own assessment of what reduction is just and equitable. While a finding that a claimants' culpable and blameworthy conduct was the sole reason for their dismissal does not preclude a lesser reduction than 100% if in the circumstances a lesser reduction is just and equitable, in this case, in my view a 100% reduction is the appropriate conclusion, notwithstanding the submission of Mr Jackson. I have found that the Claimants' dismissals were procedurally unfair, however their culpable and blameworthy conduct was the sole reason for the dismissals and it would not be just and equitable to make a compensatory award in those circumstances.

159. For the same reasons I find that it is also just and equitable to reduce the basic award by 100% due to the Claimants' contributory fault.

Wrongful Dismissal

160. For the same reasons I have set out above in relation to contributory fault, I find that the Claimant's conduct amounted to gross misconduct and therefore the Respondent was entitled to terminate their employment without notice. Therefore while it is agreed that notice was not given, no notice was required and therefore no sums are due.

Employment Judge Loraine

5 June 2025

Judgment sent to the parties on:

12 June 2025