



THE EMPLOYMENT TRIBUNALS

Claimant: Mr A Whitehouse

Respondents: Gymshark Limited

Heard at: By CVP **On:** 13, 14, 15, 16 July 2026

Before: Employment Judge Beever

Appearances

For the claimant: in person

For the respondent: Mr Curtis, counsel

FULL WRITTEN REASONS

Introduction

1. The Claimant represented himself and the Respondent was represented by counsel. The matter was heard via a video hearing over 4 days between 13 – 16 July 2026. The parties concluded their cases and the Tribunal reached a decision and gave an oral judgment and summary reasons on 16 July 2026. The Claimant's claim was not successful and was dismissed.
2. The written judgment dismissing the claim was sent to the parties on 17 July 2026. By a request dated 31 July 2026 the Claimant requested summary written reasons. These are full written reasons pursuant to rule 60(4E) of the Employment Tribunal Rules 2024 .

The Issues

3. By a claim form dated 7 February 2025, the Claimant complained of constructive unfair dismissal.

4. The Grounds of Claim and also the Claimant's document entitled list of issues, done as part of his preparation for this hearing and taken directly from the Grounds of Claim, helpfully make clear that this claim is about the consequences of a series of acts and/or omissions on the part of the Respondent which cover an approximately 12-month period from June 2023 up to the date of the Claimant's resignation by email on 9 July 2024. These are acts and/or omissions which when taken individually or collectively are said to result in the Respondent being in fundamental breach of contract.
5. The Claimant accepted in cross examination that the list of 16 alleged acts and/or omissions set out in his Grounds of Claim, at paragraph 32 [28], formed a complete list of events alleged to amount to a fundamental breach. The list was subject to a minor and undisputed amendment to a date within the penultimate allegation, see below. These acts and/or omissions culminated in a "last straw" being the Respondent's rejection on 3 July 2024 of the Claimant's project management resource requirements and instead the Respondent directed its recruitment efforts into Real Estate, as explained further below.
6. The contract terms relied on by the Claimant are both express (the express "duties clause"), at clause 3.1 of the contract [73]) ("the Express Term") and implied. The Claimant relied on implied terms of: (i) trust and confidence, (ii) to take reasonable care for the health and safety of its employees; (iii) to provide a reasonably suitable working environment; (iv) to provide reasonable support and/or a duty not to frustrate the employee's ability to perform their duties (together, "the Implied Terms").
7. At the outset of the Final Hearing the parties helpfully confirmed that the issues that the Tribunal was required to determine were as follows:

The List of Issues

1. Did the Respondent commit the following acts and/or omissions:
 - 1.1. From June 2023 until his dismissal, the Respondent unreasonably expanded the scope of the Claimant's role by increasing the desired retail store openings for which he would be responsible, without consultation or agreement
 - 1.2. On or around 9 June 2023, the Respondent disregarded the Claimant's concerns about internal capacity, which he had raised
 - 1.3. On or around 31 August 2023, Mr Healey dismissed the concerns raised by the Claimant in relation to the additional workload caused by the NYC pop-up
 - 1.4. On or around 31 August 2023, Mr Healey failed to respond to the Claimant's email which, among other things, set out the Claimant's concerns about "burning out from working around the clock"
 - 1.5. On or around 28 October 2023, Mr Healey failed to reply to the Claimant's email and/or Mr Sanders failed to speak to the Claimant in relation to the concerns he had raised about his excessive workload and the stress it was causing him
 - 1.6. On or around 28 October 2023, the Respondent failed to provide any, or any adequate, resource as requested by the Claimant to support him and his colleagues in the workplace

- 1.7. On or around 16 February 2024, the Respondent ignored the Claimant's concerns about the impact that accelerated store openings would have on the Claimant's and colleagues' workload and/or failed to invest in any, or any adequate, additional resources to support the acceleration plan, and therefore the Claimant
 - 1.8. On or around 13 March 2024, Mr Healey and/or Mr Sanders dismissed the Claimant's request for additional resource as "too expensive" and "ridiculous"
 - 1.9. Following 13 March 2024, the Respondent failed to implement any, or any adequate, additional resource despite requests by the Claimant and/or failed to discuss how many hires would be feasible for the business and/or failed to discuss any alternative solutions following the concerns raised by the Claimant as to resource
 - 1.10. From 13 May 2024, Ms Mercer added to the Claimant's workload despite him being under-resourced and failed to provide any (or any adequate) managerial support
 - 1.11. Following 30 May 2024, the Respondent failed to hire additional resource to support the Claimant and other areas of the business, despite the Claimant's request in his presentation
 - 1.12. From May 2024, Mr Healey and Ms Mercer excluded the Claimant from Chief meetings and/or other key strategic meetings or governance forums relevant to matters falling within the scope of the Claimant's role thereby diminishing his role and/or impeding the performance of his contractual duties
 - 1.13. From May 2024, Mr Healey and Ms Mercer made key programme decisions without the Claimant's input, thereby diminishing his role and/or impeding the performance of his contractual duties
 - 1.14. On or around 24 June 2024, Ms Mercer and/or Mr Healey instructed Mr Dorling to reduce some of the Claimant's resource and reduce his programme team
 - 1.15. On or around 2 July 2024, Mr Healey prevented the Claimant from attending the Retail Compliance Committee
 - 1.16. On 3 July 2024, Ms Mercer rejected the proposition that the Claimant required additional resource, said he had sufficient resource, and suggested that any recruitment efforts should instead be directed to Mr Dorling's team [also the "last straw"]
2. Did the alleged treatment set out above individually, or cumulatively, amount to a fundamental breach of the employment contract? The Claimant relies on the following clauses being breached:
- 2.1. The express 'Duties Clause' 3.2
 - 2.2. The implied term of trust and confidence
 - 2.3 The implied term that the Respondent should take reasonable care for the health and safety of their employees
 - 2.4 The implied term that the Respondent should provide, so far as reasonably practicable, a working environment which is reasonably suitable for the performance by the employee of their contractual duties
 - 2.5 The implied term that the Respondent has a duty to provide reasonable support and/or duty to not frustrate an employee's ability to perform their contractual duties.
3. If so, did the Claimant affirm / waive the breach?
4. If not, did the Claimant resign in response to the breach?
5. If the Claimant was dismissed within the meaning of s.95(1)(c) ERA 1996, was the dismissal unfair?

The Evidence

8. Both parties were diligent in assisting the Tribunal to manage this Hearing in accordance with a hearing timetable so that the Hearing could be concluded within the allotted time and a decision provided to the parties.
9. The Tribunal heard oral evidence from the Claimant. The Tribunal also heard oral evidence from the Respondent's witnesses: Mitchell Healey, Hannah Mercer, Matthew Rogers (Grievance Manager) and Christopher Perrins (Grievance Appeal Manager).
10. Both parties provided helpful oral closing submissions which the Tribunal has taken account of.
11. There was an electronic bundle of documents numbered to 733 pages which was placed before the tribunal, as well as a useful opening note and draft list of issues from the Claimant which assisted the Tribunal to understand the Claimant's case.
12. The Tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities. These findings focus on matters relevant for the purpose of deciding the issues set out in the List of Issues.
13. In assessing evidence relating to this claim, we have borne in mind the guidance given in Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560; that research shows that human memories are fallible and memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. The process of going through tribunal proceedings can create biases in memories. The judge in Gestmin said, "above all it is important to avoid the fallacy of supposing that because a witness has confidence in her or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

The Facts

Background

14. The Claimant was employed by the Respondent from 7 February 2022 as a Retail Programme Manager, on a part time and fixed term basis. His work was valued to the extent that with effect from 1 August 2023, he was appointed to a permanent position of Head of Programme IRL. IRL means "in real life" which is to be contrasted with the Respondent's established online branding and presence.

15. In August 2023, the Claimant's line manager was Mr Healey until the latter's move to a USA role, and then from May 2024 (until the Claimant's resignation) it was Ms Mercer.
16. The Claimant resigned his employment on 9 July 2024, and he worked his notice until a period of sickness absence commencing in August 2024 and continuing until the Termination Date of 27 September 2024.
17. Immediately prior to the Termination Date, the Claimant on 24 September 2024 raised a grievance and it was heard by Mr Rogers, which required the input of the Claimant, Mr Healey and Ms Mercer. The outcome, communicated to the Claimant on 13 November 2024 partially upheld the Claimant's grievance [599]. The relevant matter related to performance objective setting. The Claimant appealed the grievance outcome and the appeal was heard by Mr Perrins whose outcome dismissing the appeal [673] was disclosed to the Claimant on 10 January 2025.

The General Landscape

18. By 2022, the Respondent already had a successful on-line business and social media branding. Its first foray into "bricks and mortar" resulted in a retail store opening in Regent street in October 2022. The Claimant was the retail programme manager; and he made a valuable contribution.
19. In 2023, the Respondent established a new growth strategy, its "Day zero strategy", which was described by the Respondent's witnesses as an ambitious plan for the Respondent heading into major retail development, entailing a significant scaling up of stores, and which was evidently new territory for the Respondent.
20. The Claimant was taken on permanently in August 2023. The Respondent's Day Zero strategy was a 3-yr plan and warranted a full-time employee. In addition, the Claimant had already shown his positive impact and value to the Respondent.
21. The new role was Head of Programme IRL. It was a permanent role and represented a promotion for the Claimant. It was common ground that the new role signified a wider remit and greater responsibility. In terms of structure, the Claimant reported into the "Director" level at the Respondent; Mr Healey and latterly Ms Mercer. They in turn reported into the "Chiefs" level, as the latter have been termed in these proceedings.
22. What underlies this case is a picture of a moving and changeable retail plan which the Respondent was pursuing. It was a bricks and mortar strategy that changed from time to time manifesting itself most visibly in moving targets of store openings:

- 22.1. in July 2023, there was a plan for 15 stores over 3 yrs (and that was what warranted the Claimant's recruitment into FT role);
 - 22.2. there was a "rebalancing" in October 2023, in Mr Healey's words, a "slower or lower delivery plan";
 - 22.3. then, an "acceleration" in February 2024, resulting in a predicted need for a 100+ FTE headcount increase (at a cost equivalent to five times the Respondent's then annual profit level). This headcount increase included specifically 9 FTE in the IRL retail team
 - 22.4. a period of limbo or stasis, which was reignited with arrival of Ms Mercer, such that, by May 2024, there was in place a highly ambitious expansion plan for 41 stores (by FY27).
23. This was evidently a change environment. It was fast paced activity, and was evidently a challenging environment to work in. This was no less true for the Claimant whose core task, in project management terms, was identifying the correct allocation of resources. At Tribunal, the Respondent's witnesses acknowledged the challenging environment that the Claimant faced. Mr Healey, in his verbal evidence, reflected that when a new plan was formed, "we would have to stop what we are doing and re-kick off the new plan. As head of programme, [the Claimant] would have to stop and start all over again. It was not a nice part of the role."
24. All that said, and despite the plans, the reality on the ground was somewhat different. By the time of the Claimant's resignation and departure from the Respondent, only one additional store had opened (following Regent Street in October 2022, the Stratford store had recently opened in July 2024 (in which Ms Mercer was involved).
25. As the Claimant acknowledged, it is no part of the Tribunal's role to assess whether such decisions were wise or even sensible. That belongs to the business. It is properly for the Respondent to decide what business decisions to take. So also, it is not for the Respondent to get the Claimant's agreement on those decisions. Such decision making lay with Chiefs.
26. As so often proves to be the case, this is a set of circumstances which boil down not to whether the decisions were right or not but the manner in which the decisions were made and the manner in which the Claimant was treated as part of that process.

The Retail Plan

27. June 2023 marked a new phase in the Respondent's business. In his pre-permanent role, the Claimant had been the Respondent's "first and only project manager" who had co-created an expansion plan (the Retail Plan), in conjunction with BCG consultants.
28. The Claimant had concerns that the Respondent did not have the capacity to deliver on the Retail Plan. According to the Claimant, it would need additional resources and

that this was evident within the written Retail Plan. This was part of his discussions with BCG and also (the Tribunal accepted the Claimant's evidence) the Claimant referred to capacity issues in a presentation he made to the Chiefs in June 2023. At that point in time, he was arguably the subject matter expert in programme management, which was a new foray for the Respondent business.

29. The Claimant had described it in terms of a, "lack of humans in order to execute the store opening Retail Plan". At this point though the Plan was no more than a "proposal" for change and, as Mr Healey asserted, it was "exploratory in nature" and would be subject to ongoing review consultation and change. The Retail Plan had "next steps" [118] which were that, the "chiefs align on resource allocation ... to be completed before end of June". The Retail Plan was at this stage subject to decisions from the Chiefs, including for example the option to delay recruitment.
30. There was a follow up presentation prepared in July 2023. The Claimant provided it to Mr Healey, which the Claimant and Mr Healey discussed. There was then a further opportunity taken by Mr Healey to present to Chiefs as to what was needed for the Retail Plan. It included, in terms of recruitment, a final page which recorded that "what we need to enable delivery" included approval to proceed with key hires, including retail support roles. Mr Healey supported the Claimant's stance that further resources would be necessary for the Plan to succeed.
31. There was recruitment. See email at [132], which identifies with some clarity 12 roles being advertised, or "going live", in early August 2023. The Claimant's evidence (which the Tribunal accepted was given honestly to the Tribunal and with his best efforts to assist the Tribunal) was that he did not believe that the jobs were in fact advertised. He conceded however in verbal evidence that, "I suppose I have no cause that they didn't go live".
32. The advertised roles included retail project manager and retail project co-ordinator roles. This recruitment sits in the chronology directly as a response to concerns raised within the Retail Plan about the need for additional capacity. The Claimant accepted that there was some additional recruitment following on from the Retail Plan; it follows that the recruitment was – in part at least - a response to the concerns raised by the Claimant. The Claimant says it was a delayed action; but it is not a disregard of the Claimant's concerns.
33. At end of August 2023, the Claimant had expressed to Mr Healey a continuing concern about lack of resource to execute plan. The Tribunal finds that Mr Healey was discussing these concerns about resources with the Claimant and in a supportive manner. It was part of the frequent 1-2-1s that they held; all of which without any suggestion that they were unproductive or unhelpful. On a balance of probabilities, the Tribunal finds that the Claimant was able to freely express himself in Plans drawn

up by him and in emails; and also equally able to express himself to Mr Healey in their frequent discussions.

34. It is furthermore noteworthy that Mr Healey was sympathetic to the Claimant's concerns. See[159], an email to the Brand Chief, which can fairly be said to be supportive of the Claimant's concerns, including: "...*Speaking with my Retail support Team and other teams across the business the past few weeks, there is a shared concern that getting this open in time for November is going to be a stretch and December would be preferred given tight timelines*", and, "...*I need to highlight the risk this pop-up imposes to the wider retail program. Given that the retail team is currently Sarah, Adam and Henry, it would rely on Adam to Project Manage, Sarah to execute from a retail perspective and spend a lot of time in NY, and we should not distract Henry from Reg St going into peak. Ad is pulling together a list of what will be impacted by doing this, but essentially it is going to cause significant risk....We do not have the support staff in the office to be able to support multiple projects*".
35. The email also flagged the additional roles and responsibilities that were needed to be filled. The Claimant in cross examination conceded that his concerns were conveyed by Mr Healey to the Brand Chief.
36. One of those expressed concerns was the risk to the "pop up", which is a reference to the plan to open a New York pop-up store. There had been an initiative to accelerate its opening. I find that this did fall away, and an operative factor for that was the risk environment that the Claimant and Mr Healey had discussed and that Mr Healey had shared with the Brand Chief. This conclusion is reinforced by a piece of evidence that NYC pop up only reappeared in a later Plan for opening in April 2024. Email threads in December 2023 and January 2024 were not inconsistent with that conclusion; nor was the Claimant involved or had time taken up with that in any event.
37. The following day, on 31 August 2023, in an email [490], the Claimant is setting out "Risks to PGM". This was written following a 1-2-1 between the Claimant and Mr Healey; see Mr Healey's witness statement, at paragraph 25. This email shows the Claimant putting the risks to Mr Healey in more eye-catching terms. Yet Mr Healey remained sympathetic. In cross examination, directly in response to Issue 4 (failure to respond), the Claimant conceded, "it is likely that we did have a conversation about it; although I cannot recall what was said". The Tribunal finds that Mr Healey did discuss with the Claimant and take the Claimant's concerns on board.
38. Issue 4 also alludes to burn out. The allegation refers to the Claimant setting out concerns about "burning out from working around the clock". See email at [500]. Digging into this a bit deeper, the Tribunal is not prepared to find from the single line [500/at top] that a significant take-away for Mr Healey from this email is that it bears down on the Claimant's wellbeing. It is a single line within in an email which points more toward programme feasibility. It is within a section that is talking of operational

risks and capacity issues. There is no other evidence of any other communications with Mr Healey at this time about wellbeing/personal issues. Reflecting on the context that this email was following a 1-2-1, in which the Tribunal has found that Mr Healey was receptive and supportive, the Tribunal concludes that any discussions between them reflected a different line of thought; more likely, for example, as Mr Healey put it in evidence, the risks being highlighted were not personal burn-out issues or risks that the Claimant's team could not deliver but instead, "[the Claimant] was *nervous that other teams could not deliver*" .

39. This episode is illustrative of a number of features of this case: (i) the challenges and stresses of dealing in a dynamic and changing environment; (ii) the Claimant continuing to make a valuable and valued contribution to the process; (iii) of Mr Healey communicating with the Claimant and taking on board his position, and (iv) indeed materially aligning himself with those risks including (v) supportively discussing the Claimant's work with him and reflecting for example on the level of "unnecessary detail" that the Claimant provided. This was supportive management feedback.
40. The episode is also illustrative of the limits of the Tribunal's role. This Tribunal is not equipped to venture into the field of business decision making. What should the Respondent business do in the face of those risks? This is a business prerogative and not apt to be a matter for the Tribunal.
41. Recruitment to the Retail Project team did take place: with Dani recruited in September 2023 and Serina in October 2023.
42. By October 2023, the Retail Plan had been modified. The Tribunal accepted Mr Healey's evidence (which the Claimant conceded in cross examination) that as at October 2023 the Plan was "rather more modest than in July 2023".
43. This was no doubt challenging work for the Claimant: not that the scope of the Retail Plan had increased, but it was the challenges that were inherent in keeping up with changing plans. The Claimant wrote an email on 28 October 2023 (the email referred to in Issue 5). See [498]. It was written at 4am on a Saturday. The Tribunal recognises at the very least the diligent approach of the Claimant to his work.
44. However, the Tribunal is more cautious of drawing the inference sought by the Claimant that the email evidences unacceptable working practices. There is no evidence of the circumstances or reasons why the email came to be written at 4am. The Tribunal does not find that this was common or expected practice. The Respondent's witnesses asserted that they did not expect weekend working. Ms Mercer for example stated that she had no such expectations: she said in evidence that she would write to her team to that effect. An example of this is in June 2024, at [426]. The recipient of the [498] email, the Strategy Director, actually takes notice and is appreciative and his response was supportive.

45. The email itself is headed “retail programme”. The allegation at Issue 5 is that the Claimant was raising concerns about, “his excessive workload and the stress it was causing him”. The contents of the email do not reflect this picture. Thus, (i) it focuses on work deliverability, (ii) whilst there is a single reference to the Claimant saying the “position is untenable”, there is no overt reference to stress.
46. This is not merely a semantic point. The evidence of Mr Healey and Ms Mercer did not recognise this communication as a wellbeing issue. Ms Mercer was only apprised of the Claimant’s well-being concerns in a post-resignation lunch meeting with the Claimant. Mr Healey saw it as a work capacity issue which, at paragraph 32 of his statement, which the Tribunal accepts, was the subject of coaching from Mr Healey to the Claimant about stepping back from the “level of detail” the Claimant was engaged in. This point is corroborated by the @mitch comment within email itself.
47. Furthermore, the Strategy Director’s same day response to the email provided prompt feedback in several productive ways including that Finance had in fact approved additional resource, a practical plan to be more efficient in the case of future approvals and the email also ended constructively, with a question to the Claimant: “what can we do to make it better?”.
48. All of which, the Tribunal finds, was discussed between the Claimant and Mr Healey. The Claimant conceded this in his verbal evidence. He accepted that he spoke to Mr Healey about the email. He accepted that Mr Healey thus had responded to him. He accepted also that the Strategy Director had responded and had invited the Claimant’s further comments. The Claimant did not respond to that invitation. Mr Healey also took action: in his verbal evidence, Mr Healey confirmed that he got approval for contractor project management resources of £70,000, which was a significant spend allocated for immediate start pending permanent recruitment. Mr Healey said that this was as a result of the Claimant’s request.
49. This set of events hints at the tension which runs through the Claimant’s allegations: i.e., of the Claimant informing the Respondent of resource shortfalls, and the Respondent engaging with the issues, not disregarding them. But what the Respondent is not doing however is putting in the resources that the Claimant maintains are needed.
50. In terms of the implied term of trust and confidence, the Tribunal reminds itself that relevant facts must impinge on the employment relationship. Primarily it is a matter for the Respondent as how to manage its Retail Plan and what resources to prioritise and allocate. It does not naturally impinge on the employment relationship.

51. Issue 6, at around the same time, refers to a failure to provide any or any adequate resource. The Claimant accepted in his verbal evidence that two contractor resources were provided to him following the email albeit he maintained that it was insufficient. He also accepted that, "[the Claimant's] resource requests were making their way to the Chiefs". Mr Healey in his verbal evidence reinforced that he obtained approval: he fairly reflected in his evidence (and see [444]) that, "I do acknowledge that [the Claimant] wanted resource quicker; but [the Claimant] got more resource than any others in the business at that time; and at a significant cost". The Claimant stated, in paragraph 32 of his witness statement, "whilst I was grateful, unfortunately it remained woefully insufficient as hiring was consistently out of step with the ever-increasing demands of the Retail Programme".

52. There is then a gap in time relating to the allegations, a gap stretching between October 2023 and February 2024. At this point in the fact finding, it is an opportune point to take stock and consider whether the Claimant has established that the Respondent had done the acts and/or omissions he has alleged in Issues 1-6.

Issue 1: From June 2023 until his dismissal, the Respondent unreasonably expanded the scope of the Claimant's role by increasing the desired retail store openings for which he would be responsible, without consultation or agreement

53. It was the Claimant's role to manage the Retail Programme. The Claimant played a key role in identifying resource implications which Mr Healey himself substantially aligned with and also took to the Chiefs, and which resulted in additional headcounts in both employees and contractors.

54. There was not a lack of consultation. There was no need or requirement for the Claimant's agreement. The Claimant's own relied-on express term brings into focus the reasonable flexibility required of the Claimant, particularly given his seniority and remuneration levels. The Claimant has not made out the facts of Issue 1.

Issue 2: On or around 9 June 2023, the Respondent disregarded the Claimant's concerns about internal capacity, which he had raised

55. As is apparent, see above, the Respondent did not disregard the Claimant's concerns. The Claimant has not made out the facts of Issue 2.

Issue 3: On or around 31 August 2023, Mr Healey dismissed the concerns raised by the Claimant in relation to the additional workload caused by the NYC pop-up

56. Mr Healey did not dismiss the Claimant's concerns regarding additional workload. By the end of August 2023, it would seem that the opposite was the case. Mr Healey was sympathetic, largely aligned to the risks raised by the Claimant, and was expressing himself accordingly to the Chiefs. It brought about a deferral of NY pop-up plans.

57. The Claimant has not made out the facts of Issue 3.

Issue 4: On or around 31 August 2023, Mr Healey failed to respond to the Claimant's email which, among other things, set out the Claimant's concerns about "burning out from working around the clock"

58. Mr Healey did respond. Furthermore, in frequent 1-2-1s, Mr Healey was sympathetic both to the risks raised by the Claimant and also to discussions and coaching about the Claimant's workload. The Claimant has not made out the facts of Issue 4

Issue 5: On or around 28 October 2023, Mr Healey failed to reply to the Claimant's email and/or Mr Sanders failed to speak to the Claimant in relation to the concerns he had raised about his excessive workload and the stress it was causing him

59. Mr Healey plainly did respond, as the Claimant accepted in Tribunal. Mr Sanders may have failed to speak to the Claimant, but Mr Sanders plainly responded to the Claimant in an appreciative and supportive manner and invited the Claimant's further responses. The Claimant has not made out the facts of Issue 5.

Issue 6: On or around 28 October 2023, the Respondent failed to provide any, or any adequate, resource as requested by the Claimant to support him and his colleagues in the workplace

60. The Tribunal is not permitted or qualified to decide for itself what resources could or should have been allocated or prioritised so as to meet the demands of the Retail Programme. However, resource was provided to the Claimant, and his Team headcount had evidently increased since his role was made permanent, a point when he was in a Team of 1. The Claimant had an audience for his concerns. Mr Healey was receptive and Mr Sanders, the Strategy Director, was supportive.

61. Whatever the Respondent had decided to do about its level of resources in those circumstances leads to two fundamental conclusions: (i) the Tribunal is not in a position to make a finding that resources were inadequate for the business; (ii) the Tribunal finds that that Respondent's actions did not impinge on its employment relationship with the Claimant. The Claimant has not made out the facts of Issue 6.

February 2024 – accelerating the Retail Programme

62. Events then move to February 2024

Issue 7: On or around 16 February 2024, the Respondent ignored the Claimant's concerns raised about the impact accelerating opening stores would have on the

Claimant's and colleagues' workload and/or failed to invest in any (or any adequate) additional resources to support the acceleration plan (and therefore the Claimant)

63. The Claimant relies in the evidence within the IRL Chiefs update in February 2024 [312]. It is not in dispute that the document in its "native format", i.e., the formal originally sent to Mr Healey also contained the words as described in the Claimant's witness statement, at paragraph 36, "MITCH – IF WE WANT TO DO THIS, BIZ WE NEED TO RESOURCE-UP MASSIVELY [NOW] E.G. GREEN LIGHT NOW, REST OF FY24 TO RECRUIT – CAN'T WAIT UNTIL NEW FINANCIAL YR."
64. The effect of these words was plainly that the Claimant was alerting Mr Healey to a warning that "we needed to recruit and we cannot wait". The Claimant's case is that despite his warning the outcome following the subsequent Chiefs meeting on 13 February 2024 was in fact an increase of the Retail Programme to 20 additional stores. This has led the Claimant to the conclusion that (a) either his warning was ignored or if not (b) the Chiefs did not put the necessary resource in place.
65. Were the Claimant's concerns ignored? It is necessary to take into account some of the content of the update, such as [317]-Summary of retail readiness, which recounts that a slow start from Day Zero has led to, "workload pinch over the last 5 months resulting in enrolment fatigue and burnout within Retail Teams", and in terms of support needed, that "recruitment needs approval now".
66. Mr Healey presented to the Chiefs on 13 February 2024. He said in his verbal evidence that (see [324]) that he had cascaded the ambition of 20 stores and that it would be necessary to follow up with headcount numbers that, "were so significant that it stopped there...". Mr Healey said that it didn't get approval. It appears also that a part of the reason for that may be the imminent arrival of Ms Mercer who, given her wide sector experience, was liable to create a new strategy in any event.
67. The Tribunal finds that Mr Healey fairly represented the Update and the Plan to Chiefs and that this included risks and the recruitment challenges. The Tribunal accepted his evidence that, "I cascaded the ambition, but the numbers were so significant that it stopped there and didn't get approval. What was embedded in the process was an eye to cost, including recruitment". The Claimant did not get what the Claimant wanted in terms of recruitment; but nor did the Respondent in fact approve a Plan. The Tribunal rejects the Claimant's analysis at this point that, "this was a green light for more stores".
68. The Respondent did not ignore the Claimant's concerns. By contrast, the relationship between the Claimant and Mr Healey was such that Mr Healey constructively engaged with the Claimant as to: (i) how to cascade risks; (ii) how the Claimant might work more effectively; (iii) their ongoing 1-2-1 relationship, in which there is no compelling evidence that the Claimant ever told Mr Healey that work for him personally – as

opposed to the Programme/Retail Team in the abstract - was overwhelming. If that had been the case, there would be evidence in communications or meeting notes.

69. The Claimant has not made out the facts of Issue 7.

Issue 8: On or around 13 March 2024, Mr Healey and/or Mr Sanders dismissed the Claimant's request for additional resource as "too expensive" and "ridiculous"

Issue 9: Following 13 March 2024, the Respondent failed to implement any, or any adequate, additional resource despite requests by the Claimant and/or failed to discuss how many hires would be feasible for the business and/or failed to discuss any alternative solutions following the concerns raised by the Claimant as to resource

70. Mr Healey in his verbal evidence accepted his use of the word "ridiculous" or at least a similar word and also "too expensive" or at least the gist of it.

71. Mr Healey's words reflected the outcome of his assessment of the cost of the accelerated Retail Programme which was not disputed as amounting to 100+ FTE (of which a small part only, approximately 9 FTE, related to the IRL Team) and at what was said to be at a cost of more than five times (5 x) the Respondent's then annual profit level.

72. Is that "too expensive"? That was the question posed to the Claimant in cross-examination, to which he replied that, "they would be entitled to that view". That is a significant (and realistic) concession. The Tribunal finds that the Respondent did hold that view; that Mr Healey genuinely held that view; that it was not an objectively unreasonable view to hold but in any event it is not the function of the Tribunal to review that from a business perspective.

73. The Chiefs took a bigger-picture viewpoint, unsurprisingly. For example, the Chief Technology Officer reviewed the tech element of the costing, and he reviewed the proposed 60+ FTE proposal and concluded that a 5+ FTE headcount was a feasible assessment. All of this is business decision-making, in which the Tribunal should be cautious to venture.

74. The Claimant saw it as a response that affected him personally. In his verbal evidence, he stated that, "I was hurt; as I had been invited to undertake the work". Nonetheless, the Claimant all but acknowledged that the description of "too expensive" was acceptable in the circumstances.

75. Was it "ridiculous"? this is much more an emotive word. Having regard to all the circumstances, most importantly Mr Healey's ongoing support and alignment with the Claimant's concerns, the Tribunal finds that this was a rational response by Mr Healey to the cost of acceleration which was plainly at a level that put a stop to the Plan.

76. There is no material evidence available to the Tribunal that it was aimed at the Claimant and no evidence of communications with the Claimant that he was in any way wrong or misguided or incompetent. It was a comment that was not about the Claimant's work but instead it was a legitimate reaction to the levels of cost identified. It did not have the intention or effect of seriously damaging the parties' employment relationship. The Tribunal accepted Mr Curtis' submission that in any event in a challenging and dynamic senior business environment where millions pounds of business investment is at stake, there must be considerable latitude shown towards free even robust expressions of opinion.

77. There is no evidence that Mr Healey failed to discuss the implications or indeed alternative scenarios with the Claimant.

78. The Claimant has made out the facts of Issue 8. The Respondent (Mr Healey) did use the words alleged. They were a legitimate reaction to the levels of cost identified.

79. The Claimant has not made out the facts of Issue 9.

May 2024 – The arrival of Ms Mercer

80. The remaining issues (Issues 10-16) reflect the arrival of Ms Mercer into the Respondent in May 2024 as the Global General Manager – Wholesale and Retail, and as a result the increasingly distant role taken by Mr Healey and the increasing role taken by Ms Mercer. Ms Mercer became the Claimant's line manager when she joined the Respondent. Her arrival also marked a change-point in the Retail Programme because, as Mr Healey, explained to the Tribunal, the accelerated plan was in "limbo" pending the arrival of Ms Mercer, a highly experienced and senior retailer.

Issue 10: From 13 May 2024, Ms Mercer added to the Claimant's workload despite him being under-resourced and failed to provide any (or any adequate) managerial support

Issue 11: Following 30 May 2024, the Respondent failed to hire additional resource to support the Claimant and other areas of the business, despite the Claimant's request in his presentation

81. Ms Mercer did add to the Claimant's workload. This was perhaps inevitably so for example given Mr Healey's acknowledgement that "stopping and re-starting" plans was a challenging part of the Claimant's role; and when Ms Mercer arrived she was plainly pushing for a further expansion plan, and one which, by her own account, was highly ambitious.

82. It was a plan for 41 stores, albeit spread across to the Financial Year 2027. It was, on any view, a significant increase and the Claimant was raising concerns about the Respondent's ability to resource and deliver such a plan. As he put it in his evidence, "... all I can see is more stores (doubled in size) and no evidence of additional resources".
83. The reality was again somewhat different. Whilst there may be "plans" it is necessary to compare the "reality". The Claimant, in his evidence, accepted Ms Mercer's description (in paragraph 5 of her statement) that the plan was "not concrete" and was "flexible and responsive" and that it was more like simply "a proposal of what we could achieve".
84. Crucially, in terms of the Claimant's allegations, recruitment was not far from the mind of Ms Mercer. See paragraphs 5- 6 of her statement, which the Tribunal accepted, Ms Mercer refers to the Claimant's strategy presentation and notes that recruitment was a key focus. She noted that the Claimant had highlighted that 20 critical hires were needed, at a cost of £1.6m. There is no suggestion that Ms Mercer ignored this or indeed took any view – either then or now – that the Claimant's work was wrong or substandard.
85. The Claimant was asked in detail in his evidence about the email thread, starting at [399], of 24 May 2024. The email is from Mr Healey to the Brand Chief. In it, at [398], Mr Healey faithfully recounts the headcount request of £1.6m and notably says, "...there are some roles we need immediately" and makes the following request, which was in bold and underlined in the original email: "**immediate request of salary cost circa £705,000 to hire**". The email finishes with: "*@Noel Mack can you please support to get these over the line?*".
86. The email thread is a key part of evidence which is consistent with the Tribunal's finding that in all the communications with the Claimant, whether email or in 1-2-1s there is no suggestion that the Claimant was underperforming or was getting the analysis wrong or was/should be ignored. This is true not just of Mr Healey but also increasingly of Ms Mercer. Instead, the Tribunal finds that there was at the relevant time, and it remained throughout the course of the Tribunal hearing when the Respondent's witnesses were giving evidence, a recognition that the Claimant was diligent and competent and that the Respondent's witnesses did not want him to leave.
87. There was no substantial conversation with the Claimant, or disclosure by the Claimant, about his own well-being in terms for example that he personally was overwhelmed. Ms Mercer described how post-resignation disclosures (at a lunch between the two of them) from the Claimant gave her "fresh insight" after the event. The Tribunal accepted the evidence of Ms Mercer, including at paragraph 5 of her statement, that she had discussions with the Claimant subsequent to the presentation. Email threads do not flag up the Claimant's own coping ability. He may of course have

been naturally reluctant to do so but nonetheless the Claimant does not flag his own personal “wellbeing” or “health”; and by contrast email communications suggest ongoing support from managers, for example, at [419], on 7 June 2024, where the Claimant is thanking Mr Healey and Ms Mercer for helping to retain Serina in the Programme team.

88. Ms Mercer did add to the Claimant’s workload. It should be seen in the context that the Claimant’s senior role entailed flexibility and indeed this was embedded in the express term of the contract. To that extent, the Claimant has made out the facts of Issue 10.

89. The Respondent did not fail to provide managerial support and did not fail to hire additional support. The Claimant has not made out the remaining facts of Issue 10 or any of the relevant facts of Issue 11. The Claimant has failed to show on a balance of probabilities that there was inadequate managerial support. The obvious attempts by Mr Healey in particular to seek additional resource perfectly illustrates that the Claimant’s situation falls well short of conduct impinging on the relationship between the Claimant and the Respondent such that trust and confidence was at least being seriously damaged.

Issue 12: From May 2024, Mr Healey and Ms Mercer excluded the Claimant from Chief meetings and/or other key strategic meetings or governance forums relevant to matters falling within the scope of the Claimant’s role thereby diminishing his role and/or impeding the performance of his contractual duties

Issue 13: From May 2024, Mr Healey and Ms Mercer made key programme decisions without the Claimant’s input, thereby diminishing his role and/or impeding the performance of his contractual duties

90. This allegation relates to events from May 2024. Prior to that, the Claimant had attended a Chiefs meeting in July 2023 and this was at a time when the Respondent’s retail strategy and the project management role was embryonic.

91. The Claimant did not attend Chiefs meetings thereafter and including from May 2024. Instead, for present purposes, it was Mr Healey that attended the Chiefs meetings and in turn Ms Mercer. When Ms Mercer took over from Mr Healey, Mr Healey himself recognised (without complaint) that Ms Mercer was the senior Director and would be reporting to Chiefs. These circumstances present an unlikely scenario for the Claimant, in a more junior role of “Head of....”, to successfully complain of exclusion.

92. The Claimant was not invited to Chiefs meetings. However, this was not “exclusion” in a detrimental sense or with a meaning or effect that might impinge on the Claimant’s employment relationship with the Respondent.

93. By contrast, Since July 2023, apparently without complaint by the Claimant, it was the practice that the Claimant discussed and reported into Mr Healey (latterly Ms Mercer) and they were his seniors. They presented at Chiefs meetings. This entirely aligned with what both Mr Healey (in his statement, at paragraph 52) and Ms Mercer (in her verbal evidence) spoke of: that, in business terms, it was the Chiefs who make the decisions about store expansion plans at the highest levels and it was appropriate for Directors to present at relevant meetings.
94. In parallel, the Claimant was inevitably less involved following the business decision to recruit a Head of Real Estate, Mr James Dorling, and the Tribunal accepts the Respondent's evidence that, as a result, the Claimant did not hold an active role in assessing/shortlisting/finding sites or lease arrangements. At the same time, the Claimant acknowledged, in his verbal evidence, that there remained a range of meetings at which his attendance remained important, such as the NAM steering meeting. A slide at [413] evidences the Claimant's role in attending monthly steering and fortnightly brand alignment meetings as other examples.
95. The Claimant has not proven on balance of probabilities that he was excluded from key meetings that were objectively necessary for the performance of his role:
- 95.1. The fact that he may have believed he could or indeed should have attended is not a determinative factor.
- 95.2. The nature of the Claimant's relationships with his managers is inconsistent with detrimental exclusion, i.e., the good communications and the supportive management and an absence of any criticism or challenge to the Claimant; let alone suggestion of underperformance
- 95.3. It was the role of most senior manager, for example, Ms Mercer, as described by her in her statement at paragraph 10, that it was always necessary to take into account broader needs of business in allocating resources across all teams and projects
- 95.4. There is no evidence that decisions affecting the Claimant were made in an arbitrary fashion
- 95.5. Nor is there evidence that that any exclusion that the Claimant may have felt was in fact done in the teeth of objection or challenge from the Claimant.
96. The Claimant has proven the facts of Issues 12 and 13 to this extent: he has established that he was not invited to Chiefs meetings, and also not invited to other senior meetings. The Respondent conceded these facts and it was consistent with the Respondent's case that "key decisions" might well be taken at an appropriately senior level and not involving the Claimant. The Claimant has not established on a balance of probabilities that he was excluded from meetings that were objectively necessary for the performance of his role.

Issue 14: On or around 24 June 2024, Ms Mercer and/or Mr Healey instructed Mr Dorling

to reduce some of the Claimant's resource and reduce his programme team

97. By 24 June 2024, headcounts across different areas were under focus. This was Mr Healey's evidence, and it led to meetings, in the Claimant's words "surgery meetings", which were a means to exert pressure and with the intention to seek headcount reductions. Mr Healey, at paragraphs 56-57 of his statement, describes these meetings. One such meeting had taken place with the Head of Real Estate, Mr Dorling, when Mr Dorling received news also that his headcount was under scrutiny. This is also a reminder of the competing needs and demands of different parts of the Respondent's business. Ms Mercer's evidence was that, at this time, the Respondent's business needed a focus on Real Estate: there needed to be a property "pipeline" and without that, Ms Mercer said in her verbal evidence, "any Retail Plan would never get off the table". Thus, Mr Dorling also was expected to look at his own departmental headcount [421].

98. The results of this can be seen in an email thread, at [422]. This is what Issue 14 is centred on. It shows that Mr Dorling too was under pressure to reduce his resource. It is useful to consider the email in full:

"Hi Adam,

I was at the resource discussion earlier and was rightfully challenged to reduce some of my resource and lean of your programme team a little more.

It did make me reflect that there are probably ways that we could make more of our working relationship across our teams...shall we use that meeting you suggested on Sat to discuss?

Very best,
JD"

99. It is plain that Mr Dorling is not instructing the Claimant at all; nor is this an instruction to reduce the Claimant's programme team. The facts of Issue 14 have not been made out by the Claimant. It appears to stem from a misunderstanding; one which the Claimant accepted in his verbal evidence. In the following exchange with Mr Curtis, the Claimant recognised that this was not detrimental:

Q – this is not Mr Dorling saying he has authority

A - well, its authority to "lean" on your programme

Q – but that means collaborative working?

A- yes, that's how I understood that meaning

100. It was also Ms Mercer's evidence that this is illustrative of collaborative working; and not an instruction or a reduction in resource. It came specifically from Ms Mercer's understanding relating to Dani, who was a member of the Claimant's team. Ms Mercer said this in evidence in answer to questions from the Claimant:

A – you had Dani on your team; you couldn't utilise; so, perhaps Dani could support James; because you couldn't utilise her as her skills were not in PM

You had PMs, we hadn't signed Amsterdam etc, maybe we couldn't fully utilise Dani yet– if you need her to do things, then I said to James., utilise Dani... so lean in, and work together....

....

Q – but at the same time, I needed additional resources?

A – its for the future expansion,

Q – what is the evidence that resources would improve?

A – we discussed scaled growth many times; you knew that Dorling was prioritised ; this is transparent; otherwise cost based; it had to be a scaled approach.

101. This is business decision making. It is also evidence of collaboration and consultation with the Claimant even though the Claimant's role was not as senior as Ms Mercer. None of this impinges on employment relationship or the relationship of trust and confidence that should exist between the Claimant and, in this instance, Ms Mercer.

Issue 15 On or around 2 July June 2024, Mr Healey prevented the Claimant from attending the Retail Compliance Committee

102. The Respondent did not object to what was said by the Claimant to be a date error. The Claimant is referring to a meeting that took place on 2 June 2024 which he alleges he was prevented from attending.

103. Notwithstanding that change, the allegation remained vague. The Claimant in evidence stated that he had been a “standing attendee” at such meetings and assumed therefore that this signified his input was needed. This suggested that the Claimant had not adopted a flexible approach to meeting attendance such as in the manner of Mr Healey who described an occasion that he was invited to a meeting and took the view that in fact his attendance would not add value and consequently did not attend.

104. What the Claimant said in evidence about this allegation was that he had been prevented from attending meetings (it remained unclear whether this was a specific reference to a meeting on 2 June 2024, but it was the Claimant's evidence that he did attend one such meeting on 2 July 2024) by Mr Healey. The manner in which he came to learn of this was, according to his verbal evidence:

A- from 2/7 I was given a verbal disinvite, I understood it came from Mr Healey but conveyed to me by Sarah Rule.

105. The nature of the relationship between Mr Healey and the Claimant has been examined already. It was supportive and constructive. There is no sound evidential basis for the Tribunal to conclude that the Claimant was “prevented” from attending meetings by Mr Healey and in so far as Mr Healey had concluded that the Claimant

did not need to attend a specific meeting, it is likely that it was dealt with between the Claimant and Mr Healey in a supportive and constructive manner. The Tribunal was referred to a covert recording (done by the Claimant) of a conversation between him and Mr Healey that took place on about 23 July 2024. The Claimant is not recorded as suggesting any unhappiness with issues of attendance at meetings. To the contrary, it records the Claimant sharing with Mr Healey his sense of frustration as to the purpose of such meetings, using the phrase at one point, that the retail compliance meeting was “laughable” [438].

106. The Tribunal also took into account Ms Mercer’s perspective of the Claimant after she joined the Respondent.:

A – You wanted to be in all meetings; you found it difficult; [workload was] self-inflicted; attendance of PM didn’t always need; until there was output for programme management; it alleviates workload.

107. The Claimant has failed to establish the facts of Issue 15.

Issue 16: On 3 July 2024, Ms Mercer rejected the proposition that the Claimant required additional resource, said he had sufficient resource, and suggested that any recruitment efforts should instead be directed to Mr Dorling’s team
[and also relied on by the Claimant as the “last straw”]

108. The Claimant said this in his verbal evidence:

Q – Ms Mercer does not recall such a conversation on 3 July? You are mistaken?

A- I don’t believe I am mistaken on either the date or the conversation, given how it made me feel. It was at a fortnightly recruitment meeting, I was a required attendee, including my peers: Dorling and Rule and Collis; it was a meeting to keep a regular drum beat on progress on critical hires –I was told by Mercer directly that efforts to resource team would be focussed on Dorling

109. Ms Mercer accepted in her evidence that Mr Dorling’s remit had been prioritised (and see above). Ms Mercer had spoken to the Claimant “many times” about scaled growth and the need to prioritise Real Estate.

110. The Claimant has established the facts of Issue 16. Ms Mercer did suggest that resources were directed to Mr Dorling’s team. This was a decision about prioritising available resources. Ms Mercer has explained why that was needed; the Tribunal is satisfied that this was transparently dealt with by Ms Mercer. Prioritisation is a clear example of a business prerogative and in any event that focus or emphasis on Real Estate, and its pipeline, was sufficiently explained in evidence by Ms Mercer.

111. It was, in short, Ms Mercer’s call given her seniority and her evidence regarding the need to keep in sight of the broader interests of the business. Logically the Real

Estate pipeline comes first; Ms Mercer evidently had good reason for the decisions that she took.

112. The Claimant resigned by email on 9 July 2024 [457]. It took effect on 27 September 2024. In the meantime, on 13 August 2024 [464], the Claimant commenced a period of sickness absence which was continuing at the point of the termination of his employment.

The Law

113. The principles behind a “constructive dismissal” were set out by the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
114. The Claimant relies upon an express term of the contract. It is a term, at clause 3.1, which identifies the Claimant’s duties from time to time and includes the need for the Claimant’s flexibility. The Claimant contends that the clause restricts the ability of the Respondent to ask him to do tasks that fall outside of his job role. This, in a senior position, carrying with it, expressly and impliedly, the need for flexibility does create a tension. For all practical purposes, the Claimant, including both in his evidence and in his closing submissions, placed central importance on the implied term of trust and confidence.
115. The implied term was considered in Malik and Mahmud v Bank of Credit and Commerce International SA [1998] AC 20. The House of Lords considered the scope of that implied term and Lord Nicholls expressed it as being that the employer would not: “...without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.” This conveys a 2-stage test: (i) examination of the conduct itself, and (ii) whether the employer had reasonable and proper cause.
116. It is also apparent from Malik that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:
- “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. That requires one to look at all the circumstances.”*
117. In Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 the Court of Appeal confirmed that the test of the “band of reasonable responses”

is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in Malik.

118. 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 formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015 the EAT chaired by Langstaff P put the matter this way (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.”

119. The “last straw” cannot be wholly innocuous and must at least contribute something and must be at least part of the reason for the resignation: Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493.

120. The test about what amounts to a repudiation of the contract is also helpfully summarised in a number of cases namely Briscoe v Lubrizol Limited [2002] EWCA

Civ 508, Dunn and Davidson v AAH Limited [2010] EWCA Civ 183 and Palmeri v Charles Stanley & Co Limited [2021] IRLR 563 (HC). Those cases were about what can justify summary dismissal by an employer of an employee, but the description of the conduct required is helpful when considering whether that conduct is repudiatory, and by analogy to a situation where the employee accepts the repudiation by the employer by resigning. Palermi, at [42] stated:

“42. The test I am required to apply for that is variously formulated in the authorities. It includes considering whether, objectively and from the perspective of a reasonable person in the position of Charles Stanley, Mr Palmeri had “clearly shown an intention to abandon and altogether refuse to perform the contract” by repudiating the relationship of trust and confidence towards Charles Stanley (Eminence Property Developments v Heaney [2011] 2 All ER (Comm) 223). In a case like this “the focus is on the damage to the relationship between the parties” (Adesokan v Sainsbury's Supermarkets Limited [2017] ICR 590 per Elias LJ paragraph 23).”

Discussion and Conclusions

121. The Tribunal turns now to apply the law to the findings of fact and the allegations.
122. The test for fundamental breach, and significantly, the test for breach of the implied term of trust and confidence requires the Tribunal to examine whether the acts and/or omissions, taken both individually and cumulatively, amount to a fundamental breach.
123. The Tribunal has examined in detail the facts underlying each of the 16 Issues relied on by the Claimant. For the reasons set out above, the Claimant has failed to establish the facts necessary for Issues 1-7, 9, 11, 13, 14 and 15. The Tribunal concludes that the Claimant has failed to establish that these Issues amounted to any breach at all of the Express Term or any breach at all of any of the Implied Terms.
124. The Claimant has established facts in part relating to Issues 8, 10, 12 and 16.
- 124.1. Mr Healy did use words, “ridiculous” and “too expensive” or words generally to that effect (Issue 8): this was as a legitimate reaction to the significant high costs involved. It was in no sense a criticism of, or aimed at, the Claimant. Regardless of whether the Claimant felt it to be unfair, when viewed objectively, and taking account of the consistently supportive nature of the relationship between Mr Healey and the Claimant, this was not conduct that was likely to destroy or seriously damage their relationship, in the sense required by Malik. In any event, given the sheer size of the costs predicated, there was reasonable and proper cause that Mr Healey acted as he did
- 124.2. Ms Mercer did add to the Claimant’s workload (Issue 10): however, Ms Mercer satisfied the Tribunal that she acted transparently both in terms of explaining her “accelerated” plan and in terms of coaching and supporting the

Claimant in managing his own workload. The workload required of the Claimant, and the manner in which it was conveyed to the Claimant by Mr Healey and/or Ms Mercer, must also be seen in the context that the Claimant's senior role at the Respondent entailed flexibility and indeed this was embedded in the Express Term of the contract of employment. Adding to the Claimant's workload did not, in all the circumstances, fall outside the scope of the Express Term, and was not conduct that was likely to destroy or seriously damage their relationship, in the sense required by Malik. In any event, given the seniority of Ms Mercer, the positive nature of her relationship with the Claimant, and given the Tribunals' finding as to her responsibility for business decisions on a wider scale, there was reasonable and proper cause that Ms Mercer acted as she did

124.3. The Claimant was "not invited" to key meetings (Issue 12): the Claimant was not "prevented" in a detrimental sense, and there is no evidence of his unhappiness or objection at the relevant time. The Tribunal finds that the decisions taken were consistent with the Respondent's case that "key decisions" are taken at an appropriately senior level and not involving the Claimant. Mr Healey and Ms Mercer were to all intents and purposes transparent with the Claimant. Decisions were essentially matters of business prerogative. This was not a breach of the Express Term, or of the Implied Terms, and in particular was not conduct that was likely to destroy or seriously damage their relationship, in the sense required by Malik. In any event, given the Tribunals' finding as to their responsibility for business decisions on a wider scale, there was reasonable and proper cause that Mr Healey and Ms Mercer acted as they did

124.4. Ms Mercer did suggest that resources were directed to Mr Dorling's team, not the Claimant's (Issue 16): This was a decision about prioritising available resources and Ms Mercer transparently explained why that was needed to the Claimant. This is a clear example of a business prerogative. Logically the real estate pipeline comes first; Ms Mercer evidently had good reason for the decisions that she took. This was not a breach of the Express Term or the implied terms and in particular was not conduct that was likely to destroy or seriously damage their relationship, in the sense required by Malik. In any event, given the reasons above, there was reasonable and proper cause that Ms Mercer acted as she did.

125. For these reasons, to the extent that the Tribunal has found that the Claimant has established in part the Issues that he relies on, there was no breach individually, either of the Express Term or the Implied Terms including the term as to trust and confidence.

126. Turning to the question of whether the Claimant has shown that cumulatively the alleged acts and/or omissions amounted to a fundamental breach, the Tribunal took a step back to consider the evidence as a whole. The Tribunal has taken into account that a last straw need only "add something" and in that sense it (Issue 16) did do so given the Claimant's case that there was inadequate resources available to him for him to be able to do his job.

127. That said, the Claimant has not satisfied the Tribunal that, taken cumulatively, the allegations, as found by the Tribunal to have taken place, amounted to a fundamental breach, either of the Express Term or the implied Terms including the term as to trust and confidence. When seen cumulatively, which means having regard to the whole picture, these key features are evident:

127.1. The Claimant was plainly highlighting to the Respondent that there were risks involved in the implementation of the Respondent's Retail Programme, including the need for additional recruitment and the risks of not doing so

127.2. At no point was his work disparaged or his performance challenged

127.3. Nor was his output subject to personal criticism

127.4. The feasibility of the Retail Programme, even in context of considering headcount in IRL team, is not apt to be a "trust and confidence" consideration, as opposed essentially to being a business prerogative for the Respondent

127.5. Instead, the Claimant had and maintained strong working relationships with his managers, through 1-2-1s and regular discussions. Managers were supportive and were engaged with the Claimant's work and with coaching the Claimant, for example in ways to reduce his attention to "unnecessary" detail

127.6. In all the circumstances, there is a notable absence of any evidence that speaks to the Claimant disclosing that he was overwhelmed and felt personally unsupported: by contrast, the evidence of both Mr Healey (that the Claimant did not raise issues of an excessive workload with him) and Ms Mercer (for whom insight only came when the Claimant disclosed to her in their post-resignation lunch meeting)

128. Even when considered cumulatively, the Tribunal concludes that the Respondent was not in breach of the Express Term or the Implied Terms and did not conduct itself in a manner that was likely to destroy or seriously damage the employment relationship. In any event, for the reasons set out above, there was reasonable and proper cause for the Respondent to act as it did.

129. The Claimant's claim fails in its entirety and is dismissed.

130. For completeness, and in terms of ACAS uplift arguments, if the Claimant had succeeded, the Tribunal would not have awarded any uplift. The Claimant understandably sought to identify shortcomings in the grievance process but in the Tribunal's judgment they fall well short of significance required to show unreasonable breach of ACAS; which is a scheme which is not aimed at gold plated standards but at minimum levels of grievance compliance. In the Tribunal's judgment, the Respondent met those reasonable levels.

EMPLOYMENT JUDGE BEEVER

WRITTEN REASONS SIGNED BY EMPLOYMENT
JUDGE ON

14 August 2026

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