EMPLOYMENT TRIBUNALS

Claimant: Mr R Shah

Respondent: [redacted] Advisors (UK) Limited

Heard at: London Central On: 3, 4, 6, September 2013
In Chambers: 9 September 2013

Before Judge: Mr J Burns
Members: Mrs W Bishop
Ms R Dasey

Representation
Claimant: In person
Respondent: Mr C Milson, of Counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

i) The claims are dismissed,

ii) The counterclaim succeeds,

iii) The Claimant must pay the Respondent £619.90 in 14 days.

REASONS

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Issues

1. These were claims by the Claimant of: (i) unfair constructive dismissal, (ii) detriment arising from protected disclosures during employment and (iii) pay in lieu of holidays not taken.

2. At the outset of the hearing the Claimant confirmed that he relied upon the following alleged protected disclosures:

   a) The 6 bullet points cited in the Claimant's appraisal as: *"Issues that I have come across for which I am unsure of the ethical and/or compliance consequences for the business"*.

   b) Comments made orally to Mr [redacted] on 18 January 2012.

c) Comments at the grievance hearing on 30 January 2012: *("RS claimed that MM has filed a false declaration on a tax return and has evidence of this")* page 161,

d) A repetition of the 2011 gift declaration issue on the P11 D's in an email of 7 March 2012.

3. At the outset of the hearing also the Claimant confirmed that the detriments/alleged breaches of contract relied on by him were as follows:

i) Comments made by Mr Maloney on 19 December 2011,
ii) Mr Maloney calling the Claimant *"stupid"* and *"an idiot"* from 9 December 2011 onwards,
iii) The Claimant being ignored and ostracised by Ms Pattni and Ms Fang and by Mr Maloney from 9 December onwards,
iv) Mr Maloney threatening to dismiss the Claimant on the spot if he did not comply with an instruction that the Claimant become an authorised representative with the Environment Agency on 17 January 2012,
v) Mr Kramer's comments to the Claimant on 18 January shortly before the Claimant was sent home,
vi) Refusal by the Respondent to investigate the Claimant's whistleblowing allegations from 20 February 2012 onwards,
vii) Not dealing with the Claimant's grievances properly and/or carrying out a flawed or improper grievance in that there was collusion between witnesses in that a confidential grievance letter dated 27 January 2012 at page 245 was disclosed to Mr Maloney and in that there was not a proper investigation,
vii) Removing the Claimant's role and giving it to another employee Harpreet Pal on or before the Claimant's return to work on 5 March 2012,
viii) Excluding the Claimant's access to the Respondent's "S Drive" which he required to do his job,
ix) Not providing any mediation of the dispute,
x) Requiring the Claimant to carry out 2 CRB checks,
xi) Not paying his pay rise until after his resignation,
xii) Mr Sherrington asking the Claimant to put his grievances on hold,
xiii) The last straw was said to be a letter or email from Mr Turner solicitor to the Claimant on 9 March 2012.

4. The scope of the Claimant's constructive dismissal claim had been narrowed by a decision by Employment Judge Grewal on 25 April 2013 which had ruled out the possibility of the Claimant relying on two privileged letters in support of his constructive dismissal claim.

5. In defence of the claims the Respondent relied on an alleged misrepresentation by the Claimant before he was employed and submitted further that the Claimant had himself breached the contract thus precluding a constructive dismissal claim in any event. The Respondent also relied on alleged affirmation by the Claimant of any breaches by the

Respondent, none being admitted. The Respondent also denied that the last straw relied on could be properly so-called.

6. The Respondent made a counterclaim for repayment of course fees incurred by the Respondent within 1 year of the Claimant's resignation.

7. The Claimant admitted the contractual provisions and the quantum referred to in the counter claim but in defence contended that given the Respondent's own breach of contract the Respondent was precluded from relying upon the contract in this regard.

Documents

8. The documents were in two bundles, one supplied by each party. Page references in these reasons are references to the Respondent's bundle.

9. We also received a Respondent chronology (not agreed) and draft list of issues and the Respondent's written final submissions, and the Claimant's skeleton argument and written legal submissions.

Witness statements

10. The parties had exchanged main witness statements before the hearing. On the morning of the first day of the hearing the Claimant produced two additional witness statements which the Respondent had not seen before. The first of these entitled: "*Supplementary Witness Statement of Mr Raj Shah*" was not objected to by the Respondents and so we admitted it although it consisted mainly of cross examination points for the Respondents witnesses. The second additional witness statement at tab 5 of the Claimant's bundle entitled "Statement of truth by Mr Raj Shah" running to some 88 paragraphs was objected to and we decided not to admit this document because the Respondent could not be expected reasonably to deal with it given its very late production. We explained to the Claimant however that he could put any matters in it to the Respondents witnesses during the course of cross-examination.

Witness evidence

11. We heard evidence from the following witnesses : the Claimant; Mr Martin Maloney, (the Respondent's Group Financial Controller and the Claimant's Line Manager); Ms Poonam Pattni, (Management Accountant and colleague of the Claimant); Mr Christopher Constantinou, (Respondent's Office Manager); and Mr Robert Sherrington, Independent HR Consultant.

12. We read a statement from Miss Chantelle Irish, (PA to Chief Executive, Mr D Kramer). Miss Irish did not appear for cross-examination so we gave her statement less weight.

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Findings of fact

13. Between August 2005 and August 2008 the Claimant was employed by a company called Landau Morley, a firm of Chartered Accountants (44).

14. Between November 2008 and October 2009 he was employed by Royal Fashions London.

15. During the period November 2009 to June 2010 the Claimant was

engaged in some business ventures with the Bhojwani family which included the Claimant being briefly registered at Companies House as a director of a company called Viking Capital Limited, of which Sunil and Anjou Bhojwani were also directors, and so that his personal residential address was given for that company and also for a related company (Supercar Finance Limited) in which the Bhojwani's also had an interest. (547).

16. The business relationship between the Claimant and the Bhojwani's did not end happily and on 4 June 2010 Anjou Bhojwani wrote an email to Mr Paul Kutner of Landau Morley (whose details the Claimant must have previously provided to the Bhojwanis). (574) as follows: *"Dear Paul Kutner re. Raj Shah of 25 Moreland Road, Harrow, HA3 9LU. We write to you in respect of the above. We employed him in an accounting position and he soon gained our trust. He was handling company funds and when he had £2,000 he suddenly resigned but promised to return the funds. However, he never showed up for the times he said to come back and return the funds and eventually stopped taking all calls or replying to emails. More alarmingly he had since sent out anonymous emails with confidential spreadsheets to our competitors and clients; the damage has been immeasurable. We are a small company and the cost for litigation is higher than the amount lost. However if he finds himself in a larger company with greater access to company funds it is very worrying. If he has asked for a reference you can pass on my details as a reference source. His theft is fully documented. Yours sincerely Anjou Bhojwani, Director".*

17. On receipt Mr Kutner kept this email for further reference.

18. In June 2010 the Claimant instructed Robert Walters (an employment agency) to try to find him employment and, based on information provided by the Claimant Robert Walters produced a CV for the Claimant which stated the Claimant's employment history up to October 2009 but stated, falsely, that the Claimant had been travelling between November 2009 and March 2010 and that he had been job seeking from March 2010 to June 2010.

19. In providing information to Robert Walters the Claimant concealed his work with the Bhojwani family because he realised that, if it was disclosed, information could come out about this which would damage his future work prospects.

20. The Robert Walter's CV was provided to the Respondent which interviewed the Claimant in June 2010. The interview was conducted by a number of persons on behalf of the Respondent including Ms Liza James-Holmes. The Claimant was asked during the interview about the period of travelling referred to on the CV and in response he gave false information to the effect that he had been travelling in India, which detail Ms Holmes noted on the Respondent's copy of the CV. As a result of the Claimant providing this false information the Respondent was satisfied with the Claimants employment history and decided to employ him, firstly as a temporary employee. Had this false representation not been made and had the Respondent therefore found out the true position it would certainly

not have offered employment to the Claimant.

21. The Respondent is a London based financial management services company with between 14 and 20 employees at any one time and it deals with managing the assets of high net worth individuals and the work involves handling highly confidential and sensitive financial and other information on a daily basis.

22. The Claimant was employed by the Respondent firstly as a temporary worker from 2 July 2010, and he was then issued with a formal contract on 2 October 2010.

23. The contract provided inter alia that the Claimant would be entitled to 25 days holiday running from 1 January to 31 December each year and that 8 days holiday could be carried forward (53).

24. The written contractual provisions concerning holidays were subsequently varied orally so that the holiday year ran from the date that the employee started employment, (which in the Claimant's case was 2 July), and so that the Claimant became entitled to 26 holidays per year instead of 25, and so that he could carry forward 12 days rather than the 8 days mentioned in the written contract. (110/ 111).

25. On the basis of his contractual entitlement, on his resignation on 12 March 2012 he had accrued 18.5 untaken holidays. (110).

26. The contract also included provisions prohibiting the Claimant both during his employment or any anytime after termination from disclosing to any other persons confidential information as defined within Clause 12 of the contract, including information in relation to which the company owed a duty of confidentiality to any third party.

27. The written contract was supplemented by a supplementary study policy (67) which provided for the Respondent to pay for further professional development courses subject to the proviso that: "*If you resign from the company or are dismissed for gross misconduct at anytime before the date which is 12 months after the date the course is scheduled to finish, any sums paid to or connection with you as study assistance will be immediately repayable by you in full to the company...*"

28. During the last twelve months of the Claimant's employment the Respondent paid £619.19 for a course of professional study undertaken by the Claimant.

29. The Claimant's employment with the Respondent went well at first and he received a pay rise in February 2011. The Claimant's main job was basic accounting and routine book keeping.

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30. During the course of his work he would regularly identify mis-recording by the Respondent of staff benefits such as gifts and Christmas party expenses which had been placed on incorrect ledgers and which, if not corrected, would result in under-recording for tax purposes of expenditure on staff.

31. When the Claimant identified these matters he would pass them on to his line manager, Mr Martin Maloney who would deal with them on a routine basis without any fuss. (68 to 75). This type of query/report was not unusual. Mr Maloney did not take exception to these reports from the Claimant and regarded them as part of the Claimant's normal job. When the Claimant drew these matters to Mr Maloney's attention he would either deal with them himself or pass them onto the CEO Mr Kramer who would make a decision, - for example, as to whether the Respondent would pay the tax itself or leave the employees to do so.

32. Mr Maloney had a meeting with the Claimant to discuss the Claimant's personal annual appraisal on 9 December 2011. The Claimant had completed a section of the appraisal form entitled: *"Corporate Responsibility and Ethics"*. The Claimant had written: *"I demonstrate exceptional integrity in all work and make an exceptional contribution to the efficient operation of Onyx, consistently seeking ways to improve work methods. For example please find below some issues which I have come across for which I am unsure of the ethical and/or compliance consequences for the business:"* The Claimant then set out (under 6 bullet points) various issues relating to the treatment of staff gifts and movements of cash within the company, some of which the Claimant had already mentioned to Mr Maloney on previous occasions.

33. Mr Maloney understood these matters as being put forward by the Claimant simply as illustrations of the Claimant's concerns about ethical matters, rather than on the basis that he was formally raising them as a whistle-blower. The Claimant made no reference to whistle blowing or to protected disclosures at this juncture and we find, was simply putting forward these matters as an illustration of the fact that he was doing his normal job properly. There was no argument or difficulty over these issues during the appraisal meeting and after the meeting Mr Maloney passed some of these matters at least onto Mr Kramer for his decision in the normal way.

34. Also during the meeting on 9 December, Mr Maloney raised with the Claimant a query as to whether the Claimant intended to continue with his employment with the Respondent or become a self-employed contractor. Mr Maloney suggested that if the Claimant became a self-employed contractor he might increase his income. Initially this sounded very interesting to the Claimant and he showed interest. However after his appraisal the Claimant stated he would prefer to remain in permanent employment and the matter was dropped.

35. The raising of this issue by Mr Maloney was not related to the items which the Claimant had mentioned as illustrating his concerns about corporate responsibility and ethics.

36. After the 9 December 2011 meeting a good relationship continued between the Claimant and Mr Maloney until 17 January 2012. Mr Maloney did not call the Claimant "an idiot" or "stupid" or abuse him in any other way at this time or at all.

37. We also reject the Claimant's allegations that Ms Pattni and/or Ms Fang ostracised or ignored the Claimant.

38. Mr Maloney informed the Claimant that he would receive a substantial pay rise in mid-January to £30,200 per year and told him that his role would be expanded.

39. The trouble started on 16 January 2012 when Mr Maloney asked the Claimant to register himself with the Environment Agency as an authorised representative for the purposes of writing emission-compliance reports for a company called Marco Polo Aviation. The Claimant had written such a report before but the regulations had changed so as to require the Respondent to provide two formal authorised representatives to the Environment Agency. Formal registration required the representative to provide a clear CRB check and also to provide personal identification such as residential addresses and date of birth so as to verify personal identity. This was an evolving area of registration and law.

40. The Claimant was genuinely concerned about incurring personal liability and/or expenses or other problems if he became a formal authorised representative. We make no findings about whether his concern was well-founded or not and we note that other employees such as Mr Maloney and Mrs Pattni evidently did not share these concerns because they registered themselves as authorised representatives without difficulty.

41. However the Claimant consulted with his professional body namely The Institute of Chartered Accountants and conceived the idea that he should ask the Respondent to provide him with a written form of indemnity as a condition of him agreeing to become an authorised representative. The Claimant then drafted a somewhat amateurish form of indemnity and asked Mr Maloney to sign it on 17 January (137). Mr Maloney refused to do so whereupon the Claimant said he would decline to become an authorised representative with the Environment Agency.

42. There was then a meeting between Mr Maloney and the Claimant. Mr Maloney threatened to: "*Sack the Claimant on the spot*" if he did not comply with Mr Maloney's instructions. This is the Claimant's version of this meeting and we accept it because it is corroborated by the Claimant's contemporaneous complaints to HR (141/142) which Mr Maloney did not materially contradict at the time (143). We do not accept as true the watered-down version of this exchange which was provided some time later by Mr Maloney (166).

43. As a result of this coercion and threat of dismissal on 17 January the Claimant reluctantly agreed to comply with Mr Maloney's demand. He dropped the condition that the Respondent give him a signed indemnity, and he agreed to proceed with registration without one. However he did so very reluctantly and he felt very aggrieved about this and the progress of his subsequent application to the Environment Agency was slow and unsatisfactory.

44. The Claimant complained to HR about what Mr Maloney had said and he asked for a copy of the disciplinary complaints and bullying policy. There

followed further strongly worded emails between the Claimant and Mr Maloney (142/144). The last of these is an email was sent late in the evening of 17 January by the Claimant after he had an opportunity to discuss matters with his sister who evidently has some legal background or training. The email culminates in a reference to the fact that the Claimant felt that he had been: "*potentially constructively dismissed*".

45. The Claimant came to work on 18 January and found that his access to his email system and to the Respondent's S Drive (the means of access to the financial records) had been blocked. Mr Maloney had done this because he felt that the Claimant had now become a risk to the confidentiality of the Respondent's business. The Claimant was not allowed to work and eventually called into a meeting with Dag Kramer the Chief Executive Officer. We did not hear evidence from Mr Kramer at the Tribunal and we accept the Claimant's version of what Mr Kramer then said to the Claimant. Mr Kramer stated it would be better for the Claimant to seek alternative employment as Mr Maloney no longer wanted to work with the Claimant and that Mr Maloney was harder to replace than the Claimant. Mr Kramer also stated that he would not advise the Claimant to seek legal representation in his dispute with the Respondent, because if he did Mr Kramer would: "*hound him*" and take "*full legal action against the Claimant to a point where (he) would enjoy it*". Mr Kramer made references to having taken such legal action against other ex-employees such as Ms Lisa-James Holmes. Mr Kramer said that the Claimant should leave the company: "*immediately and quietly*" in which case Mr Kramer would provide the Claimant with an employment reference. The Claimant was then forced to leave the office immediately and instructed not to speak to clients or colleagues and not to represent the Respondent in any way. This arrangement was described to the Claimant as: "*Suspension on full pay*". The Claimant went home.

46. On 19 January Chantelle Irish, Mr Kramer's PA, sent the Claimant an email saying "*Following the discussion you had with Dag yesterday it would be useful if you propose a solution to resolve the situation. Dag has proposed a meeting at 9 O'clock on Monday 23 January 2012 to explore your solution with the aim of reaching a compromise which is fair and amicable*". (145). The Claimant responded with a very formal legal email saying that the meeting proposed would have to be postponed. (146).

47. On the evening of 19 January, Mr Kramer, possibly feeling a degree of awkwardness about the way he had behaved on 18 January, sent the Claimant a somewhat placatory email stating that Mr Kramer was: "*Very sympathetic about your personal situation and the tragedy with your father passing away*" but which also said that he was seeking legal advice as to how to deal with the Claimant (148).

48. On 25 January 2012 Chantelle Irish sent a letter to the Claimant inviting him to a grievance meeting on 27 January and saying that: "*Given the sensitive nature of your work the company does not think it appropriate for you to attend the office while the disciplinary issue outstanding*". (150).

49. On 27 January the Claimant sent a letter to the Respondent saying that he was: "*Shocked and dismissed that (the Respondent) was considering*

disciplinary action against him" and setting out a long list of complaints and grievances. For the first time he linked his problems with Mr Maloney to the "*Non-compliance and potential tax evasion issues*". He also suggested that Mr Maloney's treatment of him was "*racially motivated*" (152).

50. On 30 January 2012 the Respondent convened a grievance meeting attended by the Claimant Chantelle Irish and Kris Constantinou. In a minute prepared by the Claimant for this meeting he asked for information about: "*The date he could return to work*" (158). At the grievance hearing which took place at the Claimant's home the Claimant was supported and represented by his sister. A minute was kept. The Claimant made the false suggestion that his problems with Mr Maloney dated back to December 2011, but he also said that he was willing to resume his role with the Respondent immediately (161) and that: he "*felt that working with Mr Maloney again would not be a problem*" (162).

51. Following this meeting up until 20 February the Respondent busied itself with interviewing witnesses and corresponding with the Claimant in relation with his numerous complaints and grievances which by then the fact that the pay rise notified in January 2012 had not yet been implemented.

52. In fact pay rises across the Respondent's company had been approved in principle but required signing off by Mr Kramer before they were confirmed and this only took place in March.

53. On 20 February 2012 Miss Irish wrote to the Claimant requesting him to return to work but asking him to provide a doctor's certificate saying that he was fit to do so. The Respondent also informed the Claimant that the Respondent was appointing Robert Sherrington as an external HR Consultant who try to assist with dealing with the Claimant's issues. The Claimant responded describing this as a "*positive initiative*" (217).

54. The Claimant obtained a medical certificate and returned to work on 5 March 2012 to find that he was not doing his previous duties. He was given access to his email account for a day and a half in order to prepare himself for a further forthcoming grievance hearing. He also found that the Respondent had employed a temporary employee Harpreet Pal who was doing the Claimant's old job. The Claimant also found that his access to the S drive was blocked. He raised these issues with Mr Constantinou the same day (227) and (229) and Mr Contantinou replied, explaining that these were temporary measures pending a forthcoming grievance hearing the following day. The background to this was that the Respondent was still concerned about the Claimant still having full access to confidential information and it wanted to delay the restoring of full access until such time as the Claimant's problems had been resolved.

55. A further grievance hearing attended by the Claimant, Mr Constantinou and Mr Sherrington then took place on 6 March and the Claimant was allowed to explain all his problems and grievances fully (237). After the grievance hearing Mr Sherrington had a second meeting with the Claimant and he made a note of it (250). The Claimant denies that this second

meeting took place but we prefer Mr Sherrington's evidence on this point. Mr Sherrington asked the Claimant what he wanted and the Claimant responded by suggesting that the Respondent pay him off in the sum of £40,000. The Claimant then started making references to the fact that he had allegedly been in touch with a member of the press and that the reporter wanted to discuss one of Onyx's important clients by the name of Mr Benny Steinmetz and also the Chief Executive Officer Mr D Kramer. These references were crude attempts by the Claimant to blackmail the Respondent into agreeing to a settlement in his favour by means of threatening to disclose confidential information to outsiders in a way which he knew would be very damaging to the Respondent as well as a breach of paragraph 12 of his employment contract.

56. On 7 March the Claimant wrote a further email repeating his allegations of tax-evasion. By this stage he was describing these references as "*protected disclosures*".

57. On 7 March the Claimant left the office to collect his passport for purposes of registering himself as an authorised representative with the Environment Agency. He said first that his passport was: *"in storage"* (273). Later the same day he said that he had found his passport at his home but that builders had spilt paint all over it so that it was completely destroyed. The Claimant was lying about his passport and the true reason for him not bringing it to the office on 7 March was that he feared disclosure of the fact that he had not been travelling during the period when he had been working with the Bhojwani family shortly before taking up his employment with the Respondent.

58. A further meeting took place between the Claimant and Mr Sherrington on 9 March. The Claimant admitted that this meeting took place but denied Mr Sherrington's account about what took place at the meeting. Again we prefer Mr Sherrington's account. The Claimant had increased his demands to £45,000 and he repeated his references and threats to speak to a reporter about Benny Steinmetz, and he also introduced a new threat to report the Respondent's employees such as Mr Maloney to professional bodies such as the ICAEW and ACCA (303).

59. After the meeting Mr Sherrington reported these threats to Mr Constantinou and the Respondent got in touch with Mr Turner, a solicitor trading as Gordon Turner Employment Lawyers, who wrote the Claimant an email see page 364 which reads as follows: *"Dear Sir a letter has been emailed and posted to you in this evening's 1st class it reads as follows: I am the solicitor instructed by Onyx in relation to various employment law issues which are being addressed under the grievance procedure. A formal response to the grievance will be provided probably on Monday morning after some items raised by you this week are addressed. In the meantime it has been brought to Dag Kramer's attention via Robert Sherrington that you have indicated that you have been approached by a journalist. Under your duties as an employee with an express and implied term to your contract, you are required to refer press related issues to a relevant director, in this case Dag Kramer. Disclosures to the press are addressed within Section 43(G) of the Employment Rights Act 1996 for the purposes of protected disclosures. As you have legal advice*

important that you fully consider and comply with all relevant legal obligations and I have instructions to take appropriate legal action immediately should there be any breaches. You have been told that you should raise any concerns with the auditors and they will be happy to listen to your concerns. If you request this a meeting can be set up. Please confirm by return that you will comply with your legal obligations regarding the above. Yours faithfully".

60. The Claimant then discovered and read further letters between Mr Turner and the Respondents which are legally privileged. Employment judge Grewal has ruled in her previous decision that the contents of these letters should not be disclosed to the Tribunal and we did not see these letters. After seeing these letters the Claimant resigned by letter dated 12 March 2012 with immediate effect.

61. The letter of resignation crossed with Mr Constantinous' full reply to the various grievances (311).

62. On or about 15 March 2012 the Respondent paid the Claimant's pay up until the end of March 2012. This included pay for 15 working days after the Claimant's last day at work.

63. Later on, during Mr Turners preparation of the Respondent's defence of the Claimants Employment Tribunal claims, he contacted Mr Paul Kutner of Landau Morley who indicated he had something which he would disclose only with the protection of an Employment Tribunal order. Mr Turner obtained such an order, and following this Mr Kutner released a copy of Anjou Bhojwani's email of 4 June 2010, which caused Mr Turner to make further investigations at Companies House etc, which provided corroborative detail indicating that the Claimant had misrepresented his employment history when he obtained his employment with the Respondent.

<u>The Law</u>

<u>As to Unfair Constructive Dismissal</u>

64. In order for an applicant to establish constructive dismissal he must establish a breach of contract by the employer.

65. The breach must be fundamental and repudiatory and going to the heart of the contract – ie sufficiently serious to have justified the employee resigning immediately. The test is whether the employers conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after he has discovered it and can walk out of his job without prior notice.

66. It is necessary that the employee left his employment with the employer in response to the breach and not for some other unconnected reason. It is sufficient for this purpose if the breach is one of the reasons amongst others for the resignation.

67. The employee must also not wait too long and so affirm the contract before resigning. Acts which positively affirm the continuation of the contract can amount to affirmation, especially if coupled to delay. It i

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possible to avoid affirmation by continuing to work under express protest. Mere delay and acceptance of sick pay does not constitute affirmation.

68. The breach of contract can be of an express or an implied term.

69. There is a term implied by law in all employment contracts that an employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

70. The implied term will be breached only where there is no reasonable or proper cause for the employers conduct.

71. The test as to whether there has been a breach of the implied term is an objective one. The motives of the employer are not determinative or relevant. If conduct, objectively considered, is calculated or likely to cause serious damage to the relationship between employer and employee, a breach of the implied term may arise.

72. The range of reasonable responses test does not apply in establishing whether a breach has taken place.

73. The breach can be by means of a single act or by a series of acts which cumulatively amount to a repudiatory breach, though each individual incident may not do so. In such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract – the question is – "does the cumulative series of acts taken together amount to a breach of the implied term?" This is the last straw situation.

74. Where there is a last straw this can revive previously affirmed breaches so that they can be relied on together with the last straw to establish a final repudiatory breach

75. The act constituting the last straw does not have to be of the same character as the earlier acts nor must it constitute unreasonable or blameworthy conduct although in most cases it will do so. But the last straw must contribute however slightly to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employer's trust and confidence has been undermined is objective. And while it is not a prerequisite of the last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable will satisfy the final straw test.

76. There is no special rule applying to the assessment of an employers conduct in the way it provides or operates its internal procedures. The same approach as above will adopted in assessing that conduct as with any other, for purposes of establishing whether a repudiatory breach has occurred.

77. It has been held that a failure to provide any grievance procedure and also that a breach of the principles of natural justice, such as actual or apparent bias affecting the decision maker, can amount to a breach of the implied term.

78. Once an employer is guilty of repudiatory breach he cannot make amends so as to preclude legal acceptance. All the cards are then in the employees hands and the employer can only make amends so as to try to secure affirmation

Effect of fraudulent misrepresentation

79. Where a fraudulent misrepresentation induces a contract and there is no rescission of the contract by the representee, the misrepresentation which would have justified rescission may also be used as a defence to an action on the contract brought by the representor against the representee.

Effect of fundamental breach by a claimant in a contractual claim

80. An employee who is himself in repudiatory breach of contract/mutual obligation cannot rely on the employer's subsequent repudiatory breach so as to claim constructive dismissal because the employees own conduct has already seriously damaged or destroyed the relationship.

Protected disclosure

81. Sections 43B and 43 C ERA 1996 prior to their amendment in June 2013 apply.

82. A protected disclosure is a disclosure of information which in the reasonable belief of the worker (which term includes but is not limited to "employee") making it, tends to show one of the states of affairs listed in section 43B(1)(a) to (f) and it must be made in accordance with any of the sections 43C to 43H ERA 1996.

83. A "disclosure" does not include behaviour related to or leading up to the disclosure. The belief must be reasonable, judged at the time, even if the information is incorrect.

84. Under section 43C it is necessary that a disclosure made to an employer should be made in good faith. It is open to an employer (the onus being on it) to show that a disclosure was not made in good faith. In good faith means more than a reasonable belief in the truth of the information disclosed. A disclosure will not be made in good faith if an ulterior motive was the dominant or predominant purpose of making it. Where the main motive is self-interest or private matters such as antagonism towards a colleague the disclosure will not be made in good faith, even if was based on a reasonable belief.

85. By virtue of section 47B a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure.

86. Section 48(2) provides that in a complaint about detrimental treatment it is for the employer to show the ground on which any act or deliberate failure to act was done.

87. Whether or not the detriment or dismissal flows from a protected disclosure is a question of causation. Under Section 47(B) it must be established that the detriment complained of was done: "On the ground that the worker has made a protective disclosure". The detriment must be more than just related to the disclosure for a link to be established. It is not enough to establish that but for the disclosure the employers act or omission causing the act of detriment would not have happened. The Tribunal must consider the mental processes that caused the employer to act or fail to act to determine whether the disclosure actually caused the detriment or dismissal.

Conclusions

88. We find that the Respondent carried out a thorough investigation into the Claimant's numerous grievances and complaints and that it referred the tax issues raised by the Claimant to its auditors for proper treatment within the tax process.

89. We do not agree with the conclusion which Mr Constantinou came to about Mr Maloney's conduct on 17 January 2012 and Mr Kramer's conduct on 18 January 2012 (which was to exonerate them) but apart from that we find that the formal processes carried out by the Respondent in response to the Claimant's various complaints from 17 January onwards were full and reasonable.

90. We think that the Respondent's decision to suspend the Claimant's access to confidential information from 17 January onwards was understandable and vindicated in the light of the Claimant's threats made in early March to disclose the Respondent's confidential information to journalists.

91. We find that the Respondent's decision to appoint Harpreet Pall to cover the Claimant's work during his absence from work was reasonable and necessary for its business.

92. The temporary re-arrangement and restriction of the Claimant's work on his return to work pending the resolution of his grievances was also fully understandable and reasonable.

93. The appointment of Mr Sherrington was a sensible step which was initially agreed to by the Claimant. The Respondent through Mr Sherrington tried to make amends as much as possible and to restore the employment relationship. Mr Sherrington repeatedly offered the Claimant a number of "options" to try to assist him to get back into the workplace. There was no specific mediation attempted between the Claimant and Mr Maloney and Mr Kramer but the Claimant did not actively pursue this at the time and it is unlikely that it would have been practical.

94. It was reasonable, given the Claimant's eventual agreement to register himself with the Environment Agency, that he made two CRB applications. The first one had been done online and a paper application had to be submitted.

95. The delay in implementing the Claimant's pay rise was reasonable seeing that this matter had to be signed off by Mr Kramer before it became effective and the same applied to all other pay rises throughout the Respondent.

96. We do not find any of these above matters to amount to breaches of contract.

97. However, we do find that Mr Maloney's coercion and threats of immediate dismissal of the Claimant on 17 January 2012 followed by Mr Kramer's denigrating comments to the Claimant on 18 January 2012 did amount to a fundamental breach of the implied term of the Claimant's employment contract. Even if the Claimant's concerns (about the risk of personal liability flowing from an Environment Agency registration) were not well founded, the Claimant had genuine concerns and it was quite wrong of Mr Maloney to bulldoze and threaten the Claimant as a means of overcoming the Claimant's concerns in this regard. The matter should have been dealt with in a far more careful and deliberate fashion to find out what the Claimant's concerns were, to see if these concerns were genuine and to see if they needed to be addressed in a formal manner rather than simply resorting to issuing threats of dismissal.

98. Mr Kramer's comments on 18 January were wholly unwarranted and amounted to bullying and clear repudiation of the employment relationship.

99. Mr Maloney's and Mr Kramer's actions on 17 and 18 January 2012 were the effective cause of the rupture of the Claimant's employment relationship which previously had been going well.

100. However, subsequent to these fundamental breaches, the Claimant repeatedly indicated his unconditional willingness to return to work under Mr Maloney (see pages 146, 158, 161, 162, 174, 187, 193, 217). On these occasions the Claimant indicated that he regarded his contract as continuing and he tendered his services unconditionally under it. He thereby affirmed the contract and waived the employer's fundamental breach.

101. For these reasons he is not entitled to rely upon the employer's breach of contract unless he can revive the affirmed breaches under the last-straw doctrine.

102. The last straw relied on by the Claimant was Mr Turner's warning email to the Claimant sent on 9 March. However in the light of the conversations which the Claimant had had with Mr Sherrington on 6 and 9 March in which he had attempted to blackmail the Respondent by threatening to disclose confidential details about its most important customer to the outside world through the press, the email was entirely reasonable and justifiable and cannot sensibly be regarded as contributing in any way to any breach of the implied term.

103. For these reasons alone, the Claimant's claim of constructive dismissal would have to fail by reason of the fact that, although the

Respondent fundamentally breached the contract, the Claimant had subsequently affirmed the contract before resigning.

104. The Respondent is also entitled to set up the Claimant's fraudulent misrepresentation made at the time of his interview by Liza James-Holmes in June 2010 as a complete defence to the constructive dismissal claim.

105. Furthermore by the time of his resignation the Claimant was himself in repudiatory breach of contract in that he had attempted to blackmail the Respondent on 6 and 9 March, and he would thereby have disqualified himself from resigning and claiming constructive dismissal in any event.

106. For these reasons the constructive dismissal claim must fail.

107. In so far as the claim for pay in lieu of holidays is concerned, if the Claimant had been entitled to rely upon his contract, then he would have been entitled to 26 days holiday per year and in addition entitled to carry forward 12 days holiday from one year to the next and on that basis, he would have been entitled to pay in lieu of holidays to the extent of 18.5 days untaken holiday at the effective date of termination. However, as already found, the Respondent is entitled to set up the Claimant's fraudulent misrepresentation as a defence to all claims of a contractual nature. Without reference to his contract the Claimant is reduced to relying upon the Working Time Regulations, under which from 2 July 2011 to 12 March 2012 the Claimant's entitlement would have been 15 days holiday with no ability to carry forward undertaken holidays from a previous leave year. During that period the Claimant had taken 13 days holiday leaving him with an untaken holiday entitlement of 2 days on the effective date of termination. Any entitlement on his part to be paid for those 2 days was extinguished by the fact that the Respondent paid the Claimant for 15 working days after the date of his resignation i.e. from 12 March until the end of March 2012. Hence the holiday pay claim must also fail.

108. In so far as the claim for detriment for making protected disclosures is concerned, the tax matters identified by the Claimant on 9 December 2011 fall within the description in section 43(B)1(b) of the Employment Rights Act 1996 and were made but in good faith as required by Section 43(C). They were made for the legitimate purpose of demonstrating to Mr Maloney how well the Claimant did his job for purposes of a personal appraisal. However we find that there was no detriment or difficulty suffered by the Claimant at all flowing from the disclosure in December – it was simply business as usual after that.

109. On 17 January 2012 the trouble started over an unrelated matter, and from then on the Claimant repeatedly made reference to tax matters but on those occasions he did not do so in good faith. By then the Claimant was making references to "Protected disclosures" and to "Whistle blowing" for the ulterior purpose of pressurising the Respondent and aggravating and exaggerating the Claimant's grievances about Mr Maloney's and Mr Kramer's behaviour on 17 and 18 January 2012, and hence the requirements of section 43C are not met.

110. From then on all the adverse matters about which he compla

were caused not by the so-called protected disclosures and references to tax matters but rather by the dispute which had been triggered by Mr Maloney and Mr Kramer's inappropriate response to the Claimant's reluctance to become an authorised representative with the Environment Agency.

111. We do not find that the Claimant suffered any detriment by reason of a qualifying protected disclosure so this claim fails also.

112. In so far as the counterclaim is concerned, following the Respondent's breach of contract on 17 and 18 January the Claimant repeatedly affirmed the contract and waived those breaches and hence he is not entitled to set them up as a defence to the counterclaim. It is not in dispute that the Claimant resigned within one year of the Respondent spending £619.15 on a course for the Claimant's further professional development and under the terms of his contract he is due to repay it to the Respondent. Hence the counter claim in that amount succeeds.

Employment Judge

Date 2/9/2013

JUDGMENT & REASONS SENT TO THE PARTIES ON

4 October 2013

FOR THE TRIBUNAL OFFICE