



EMPLOYMENT TRIBUNALS

Claimant: Mr N Elgey

Respondent: Cumberland Estate Agents Limited

HELD AT: Carlisle **ON:** 25 – 29 September 2017

BEFORE: Employment Judge Hill
(Sitting Alone)

REPRESENTATION:

Claimant: Mr Ian Kitchen, Lay Representative (Friend)
Respondent: Miss A Smith, Counsel

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for Constructive Unfair Dismissal fails and is dismissed.

REASONS

The Evidence

1. The Tribunal was provided with the following:
 - (1) An agreed bundle of documents page numbered 1 – 503 (an additional document at pages 502 and 503 being added during the proceedings with the consent of both parties).
 - (2) A second smaller bundle containing the witness statements and various other documents including a list of issues and Chronology.
 - (3) Witness statement for the Claimant, Mr N Elgey

- (4) Three witness statements for the Respondent: Ms Nyree Legge, General Manager; Miss Chloe Turner, HR Controller and Mr Peter Temple, Deputy Chief Executive.

Issues for the Tribunal to determine

2. The Claimant complained of constructive unfair dismissal by way of a Claim (ET1 form) presented on 23 September 2016. The Claimant further particularised his claim on 30 January 2017 setting out the specific breaches relied upon complaining of a series of breaches and a last straw incident which entitled him to resign and consider himself constructively dismissed.

3. The Respondent resisted the claim by way of a Response (ET3 form) presented on 27 October 2016 and an amended response dated 21 February 2017.

4. At the beginning the Tribunal agreed with the parties that the list of issues within the second smaller bundle contained all the issues the Tribunal was required to determine. For the purposes of this judgment set out below are the issues in respect of Constructive Unfair Dismissal.

Constructive Unfair Dismissal

5. Was the Claimant constructively unfairly dismissed in accordance with Sections 94 and 95 (1)(c) of the Employment Rights Act 1996?

S95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if.....

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

6. The leading case in respect of constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] QB 761**. The Tribunal should ask itself the following questions:

- a. Did the Claimant resign in circumstances in which they were entitled to resign without notice by reason of the respondent's conduct?
- b. If so, what was the repudiatory breach that entitled the Claimant to resign?
- c. Was there a series of breaches which entitled the Claimant to resign and, if so, what was the last straw in such a series?
- d. Did the Claimant resign in response to this breach?
- e. Did the Claimant delay in resigning and reaffirm the contract?

7. The Claimant made a number of allegations that he said amounted to a series of breaches or potential breaches over a period of time leading to a final straw incidence that entitled him to resign and claim constructive dismissal. For the purposes of this judgment the general findings of fact leading up to the Claimant's employment ending are set out first and each allegation relied on by the Claimant is set out separately with the findings of the Tribunal.

Relevant Findings of Fact

8. The Claimant was employed as Managing Director of the Respondent Company. His employment commenced May 1992 and was terminated by way of a resignation letter dated 18 April 2016 received by the Respondent on 20 April 2016. During the course of his employment, the Claimant had a clean disciplinary and sickness record. The Claimant had appraisals and the Tribunal was provided with copies of his appraisals from 2007. There was a gap in his appraisal history in around 2012/13 when Mr Parr managed him, although it was accepted that no concerns were raised. The Claimant had until his final appraisal in June 2015 achieved a satisfactory or above satisfactory outcome.

9. During his employment the Claimant was directly line managed by various people, most recently he was line managed by the Chief Executive Mr Kevin Parr until around December 2013 when Ms Legge took over Executive line management responsibility for the Respondent's estate agency business. It was at that point that Ms Legge also took over direct line management responsibility of the Claimant.

10. At that time the estate agency market was going through rapid change with the development of online and fixed fee services being offered by other providers and the Respondent business was not profitable. As a result Ms Legg and other Directors requested that a review of the business should take place. This included a complete Income and Costs review. The Claimant as MD was obviously required to be part of the process.

11. The Accounts and business development departments produced detailed information setting out all income streams and expenditure. It was the Claimant responsibility to analyse the information and produce an income and costs review. A report was produced which included a range of recommendations and this was presented to the Board and the outcome was that a major restructuring of the Respondent business would be required to achieve profitability. A major Project was set up to deliver the restructuring programme including amalgamating the Respondent's branches with those of Cumberland Building Society, creating a centralised sales and letting team and adjusting responsibilities of staff employed in the Respondent business.

12. During the course of the evidence the Claimant asserted that he was solely responsible for the costs review the restructuring programme was a result of his recommendations alone. The Claimant sought to use it as an example of 'Strategic thinking'. In particular in the Claimant's submissions the Claimant stated "...revised business model was at the Claimant's owe initiative" and "the Claimant initiated the revised business model and structure for the respondent". However the Claimant also sought to rely on the changes as an example that the Respondent was

intending closing the business. The Tribunal found this to be inconsistent evidence and preferred the evidence of the Respondent.

13. During this period Ms Legge started to have some concerns regarding the Claimant's performance and in particular in respect of the strategic aspect of his role. This has first concerned her during the period of the review and whilst the Claimant was extremely competent on the operational side of his role the Respondent required the Claimant to move the business forward and in particular the restructuring project from a strategic point of view.

14. Ms Legge therefore decided to appoint an Operations Director, Angela Fergie, who commenced employment on 1 April 2014. The purpose of this appointment was to allow the Claimant more time to spend on strategic work while Ms Fergie concentrated on operational issues.

15. In May 2014 the Claimant had his first appraisal with Ms Legge. Overall, it was a positive appraisal and the Claimant achieved a Grade 4, which is above satisfactory. However, Ms Legge did identify issues that the Claimant needed to work on during the coming 12 months including a desire to see the Claimant's confidence and engagement in Board meetings grow; to reduce the amount of time he spent on operational issues and for him to allow time to develop the business and initiatives (page 38-40 of the bundle).

16. It was usual for Ms Legge and the Claimant to meet regularly usually weekly and they also worked in an open plan office where informal conversations could take place. In addition Ms Legge emailed the Claimant regularly and the Tribunal was shown various emails and notes where Ms Legge had highlighted concerns/issues with the Claimant either by email or by discussing them with him. The Claimant disputed that Ms Legge had had discussions with him regarding any concerns and suggested that handwritten notes attached to emails where Ms Legge confirmed discussions had taken place with the Claimant had been fabricated for this Tribunal. The Tribunal finds that the evidence of Ms Legge was credible and finds no evidence to support the Claimant's assertion that the contemporaneous notes made on the emails were falsified. Further the Tribunal finds that the documentary evidence eg emails supports Ms Legge's version of events and that it is clear that Ms Legge raised a number of concerns with the Claimant during this period.

17. In particular in October 2014 there are various emails between Ms Legge and the Claimant and Ms Legge spoke to the Claimant during one of their weekly meetings highlighting his lack of strategic input (page 70A of the bundle).

18. In November 2014 Ms Legge carried out a half-yearly review with the Claimant at which further concerns were raised and again Ms Legge said that the Claimant needed to develop his strategic input into the Board. Ms Legge highlighted the example of the income and costs review and that she had had to input into this more than she felt she should and she had also been required to provide suggestions on what the strategic review actions should be. Ms Legge stated that she felt the Claimant was too focused on day to day matters and that he was not driving or leading the Board on the future strategy of the business. The Claimant confirmed that he agreed with the comments made by Ms Legge in this review and

stated "I agree that the CEAL MD role should become more focused on driving CEAL's strategic development going forward and I aim to address this with vigour provided I can derive the expected assistance and benefits from the Operations Director.....". The Claimant signed the half yearly review document along with Ms Legge.

19. The Tribunal was provided with various emails after this date showing Ms Legge requesting input from the Claimant in respect of strategic points and other emails/notes highlighting points of concern. In particular in an emailed dated 19 January 2015 Ms Legge informed the Claimant that she did not consider a paper he had prepared for a Board meeting was adequate and that the missing detail was the strategic elements and her thoughts were that the meeting should be cancelled and rearranged.

20. An additional issue that arose during this period was the amount of time the Claimant was spending out of the office and this was raised with the Claimant and it was emphasised that he needed to prioritise the Project.

21. On or around 23/24 February Ms Legge became aware that the Claimant had booked to go on a course. She sent an email to the Claimant at page 126 of the bundle expressing her surprise that he had attended a conference in the middle of a priority project and did not inform her particularly when certain actions were behind schedule.

22. On 24 February 2015 held a meeting with the Claimant. At this meeting Ms Legge made it clear that it was not a formal appraisal and did not comment on the entirety of the Claimant's role. At this meeting the Claimant's strategic function was discussed and Ms Legge explained that the strategic function was an important part of his role and needed to be in all elements of his work. Ms Legge referred to the discussions they had had and email exchanges since his half-year appraisal. Ms Legge in particular noted that these areas of concern had arisen in the last 3 months and more specifically in the last 3-4 weeks. She set out a number of issues including poor mystery shopping results, having to postpone the CEAL Board meeting due to unpreparedness; lack of understanding of the CEAL restructure objectives in relation to strategy and then set out some concerns regarding project issues.

23. The Claimant alleges as part of his claim that this meeting on 25 February was the first time any criticisms had been raised about his performance. The Claimant stated in his witness statement and in evidence to the Tribunal that he was completely shocked and distressed as he had never received any form of criticism from her in the year to date and that he had had a positive half-yearly review in November 2014. The Tribunal finds that this is not the case and it is clear from the evidence both from Ms Legge in person and from the contemporaneous evidence made available to the Tribunal in the bundle that there were a number of occasions where Ms Legge had raised concerns. Indeed the Claimant himself had acknowledged that he needed to develop his strategic thinking.

24. The Tribunal finds that the Claimant was fully aware that Ms Legge had identified a number of concerns with his performance over the period since his last formal appraisal and that these had been raised with him in a constructive way

through the year including his half-yearly review. The Tribunal does not accept that the issues identified in the meeting on 25 February would have been a surprise to the Claimant. It is clear that at this meeting Ms Legge took the opportunity to address some minor concerns in addition to her main points but she had confirmed that this was not a formal appraisal and did not comment on all of his work. Ms Legge informed the Claimant that if his performance did not improve she anticipated awarding a grade 2 at his annual appraisal. She therefore deferred his appraisal from late March until late May in order to give the Claimant an opportunity to improve.

25. On 2 March 2015 the Claimant spoke to Miss Turner, HR Controller and informed her that he was suffering from work related stress as a result of the meeting on 25 February 2015 and that he felt like he was being unduly criticised and treated unfairly. The Claimant also stated at that meeting that he considered he had an unmanageable workload. Ms Turner confirmed her discussions with the Claimant in writing on 6 March 2015. Ms Turner was very clear that the Respondent wanted to support and assist the Claimant in any way it could. This letter also confirmed that since their meeting (Miss Turner and the Claimant) that the Claimant had met with Ms Legge and was happy to move forward after discussing workload and that the Claimant would respond to the points raised by Ms Legge on 25 February and if he was not happy to refer back to Ms Turner. The Claimant did not raise any points of disagreement with the contents of the letter.

26. On 16 March the Claimant was required to attend a pre-planned project-restructuring meeting at which the Claimant was to give an update on the restructuring project. This involved the Claimant preparing a paper to present to the attendees for discussion and update. This paper was discussed with Ms Legge on 4 March at their usual weekly update meeting. The meeting and the paper had also been discussed at the Group Board meeting in February 2015. At the meeting the Claimant was asked questions on the paper and in particular the level of detail contained within it. The Claimant was also asked questions and it was felt that his answers were not clear. As a result the Claimant was asked further questions and challenged on the paper. Ms Legge subsequently had to rewrite the paper for submission to the Group Board on 25 March 2015.

27. After the meeting on 16 March 2015 the Claimant visited his GP and was signed off with acute stress reaction. The Claimant emailed Ms Turner and informed her that he had been signed off and the reason why. Ms Turner subsequently wrote to the Claimant to arrange a meeting with him to discuss his concerns and for permission to contact his GP.

28. Ms Turner met with the Claimant on 27 March 2015 where the Claimant provided a detailed note set out at page 70 of the bundle. Ms Turner and the Claimant went through the note in detail. Ms Turner also wrote to his GP who confirmed the Claimant's condition. No recommendations were made by the GP. The Claimant was absent from work until 15 April 2015.

29. Just prior to his return to work on 10 April 2015 the Claimant met with Ms Legge and agreed certain actions, which would assist the Claimant in returning to work. In particular it was agreed that Ms Legge would continue to monitor his emails

as she had been doing during his absence and only forward emails to him (via his PA) that required attention each day in order to avoid the Claimant becoming overwhelmed. The Claimant agreed to this course of action and this was put in place. The Claimant returned to work on 15 April 2017.

30. On 6 May 2015 the Claimant had been required to prepare and produce business performance update for the restructuring meeting. The Claimant had been sent an email on 1 May 2015 attaching some slides from the Project Manager along with a project update (the email had been forwarded by Ms Legge to the Claimant's PA). Within those slides was a section for the Claimant to provide an update to the meeting. The Claimant also received hard copies of the email and slides on the morning of 5 May 2015 however he did not read the contents of this email until the night before the meeting.

31. The Claimant had not prepared a report and spent the following morning telephone around the branches to get management information despite having access to the relevant information from the Respondent's internal systems. The Claimant also faced difficult questions at the meeting and was unable to respond to points raised. In particular the Claimant demonstrated a lack of knowledge on three marketing messages, which had been launched in the Respondent's branches.

32. Ms Legge met with the Claimant on 8 May 2015 to feedback regarding his performance. The Claimant's view was that Ms Legge was being unreasonable and nit picking. The Claimant was upset with Ms Legge and informed her that he felt her treatment of him had led to his initial period of sickness and that he felt it was appropriate to raise a grievance about her.

33. Ms Legge acknowledged that this was a serious allegation and encouraged the Claimant to speak to her line Manager Mr Temple. During this meeting the Claimant became aggressive and waved his pen and arms around. Ms Legge had to ask him to calm down and ended the meeting.

34. The Claimant met with Mr Temple on 11 May 2015 and became aggressive said that he felt that he was not wanted in the business. Mr Temple reassured the Claimant that this was not the case and that during this period of change for the business his technical expertise was needed and that nothing could be further from the truth. Mr Temple told the Claimant that it was his (the Claimant's) decision if he wanted to raise a grievance and asked him to put it in writing if he chose to do so.

35. The Claimant decided that he would write an email explaining why he did not agree with Ms Legge's comments in the meeting on 8 May 2015. He also said that Ms Legge had been excellent since his return from sick leave and that Ms Turner had also been very supportive. The Claimant also accepted that if he was not performing parts of his job satisfactorily then it was proper for those issues to be brought to his attention.

36. The meeting ended with it being agreed that Ms Legge would provide comments on the email and if he was satisfied with the responses that there would be no need for a grievance.

37. After this meeting the Claimant sent a lengthy email to Ms Legge setting out his perception of events and Ms Legge sent a response on 15 May 2015, which the Claimant never read which he confirmed during these proceedings.

38. On 1 June 2015 the Claimant and Ms Legge met for his appraisal. The Claimant was awarded a grade 2 which indicated he was under performing and below standard. It was Ms Legge's view that despite numerous meetings and email exchanges some of which the Claimant had not read that there had been no significant improvement in his performance. Ms Legge also commented on positive aspects of the Claimant's performance. During this meeting the Claimant asked whether there was any time limit in raising a grievance. Ms Legge sought advice from Ms Turner and confirmed to the Claimant on 8 June 2015 that there was no time limit. By the time Ms Legge sent this letter the Claimant had been signed off work due to stress.

39. After the Appraisal meeting the Claimant was signed off work for two weeks. The Claimant informed Ms Turner of his absence and it was agreed that she would contact him again after two weeks for an update. Ms Turner wrote to the Claimant informing him that he could contact her if he felt there was anything the company could do to assist him.

40. Ms Turner and the Claimant communicated by letter and on 24 July the Claimant informed Ms Turner that he was not progressing as quickly as he had hoped and thanked her for his concern and that he would contact her when he felt ready to speak by telephone or meet up but that in the meantime she should write to him when necessary.

41. On 29 July Ms Turner wrote to the Claimant suggesting that an occupational health assessment may be appropriate and sent him the referral form on 4 August 2015. The Claimant declined the offer of an assessment and stated that he considered he needed a report from a psychiatrist.

42. Ms Turner considers that as this was the second period of absence for the same reason that it was appropriate particularly as she wanted to be certain that they (the Respondent) were doing all they could to support the Claimant and assist him in returning to work with any reasonable adjustments that were appropriate. The Claimant again refused.

43. On 23 September the Claimant appointed a solicitor to represent him. Ms Turner thereafter communicated with the Claimant's solicitor. She pointed out to his solicitor that she considered that it was important that the Claimant attend an occupational health assessment. The Claimant chose to obtain his own medical report from a consultant psychiatrist and a copy of this report was sent to Ms Turner on 3 November 2015. Ms Turner did not consider that the report was helpful to her and therefore requested again in February 2016 that the Claimant attend an occupational health assessment. The Claimant agreed and attended a meeting on 12 February 2016.

44. Ms Turner received a copy of the report on 19 February however, it did not address specific questions posed by the Respondent so Ms Turner raised this with

company who carried out the assessment who apologised and set up another appointment with another doctor without charge. Ms Turner informed the Claimant via his solicitor but as informed that the Claimant would not attend a further appointment.

45. During this period the Claimant started 'therapeutic work' with a friend's property development and investment business from 1 December 2015. The Claimant did not discuss this with the Respondent or seek its approval before starting this work. Ms Turner wrote to the Claimant via his solicitor expressing her concern and asked his solicitor to inform the Claimant to cease this work due to a conflict of interest. In further correspondence Ms Turner pointed out that the Claimant's contract of employment prohibited him from disclosing confidential information; that the Claimant had been signed as unfit for work; it was not appropriate that he had not sought the respondent's permission; that Citadel Estates was in competition with the Respondent and therefore it was not appropriate and there was a clear conflict of interest; that as a director of the Respondent business the Claimant owed a fiduciary duty always to act in the best interest of the company and that his contract of employment expressly prohibited him working or being engaged whether directly or indirectly in another business trade or occupation. Ms Turner was particularly concerned because prior to the Claimant being off sick he had been involved in the sale of a piece of land that Citadel has also had an interest in purchasing.

46. The Claimant continued working for Citadel and is now currently employed by them.

47. Ms Turner made further appointments for the Claimant to attend occupational health, which he failed to attend and on 22 March she wrote to the Claimant via his solicitor pointing out that in order for the Claimant to return to work the Respondent needed him to attend an occupational health assessment. In this letter she states 'if it is not your client's intention to return to work then I would recommend that he inform the Company....' And refers to an earlier letter from the Claimant's solicitors referring to a termination package and advised that this is not something the Company is considering.

48. A response to this letter is sent on 24 March 2016, which amongst other things puts forward opening discussions on a negotiated settlement with or without a return to work or a settlement/judgment following litigation.

49. On 18 April 2016 the Claimant resigns citing Ms Turner's letter dated 22 March 2016 as a last straw incident.

50. I will now deal with the specific allegations made by the Claimant.

Alleged breaches

a) During 2014 Mr Parr became cold towards him.

51. The Claimant produced no evidence to the Tribunal and no specific examples. Mr Temple confirmed in his evidence that he had been present at many of the

meetings at which both Mr Parr and the Claimant were present and had never noticed any changes in Mr Parr's attitude towards the Claimant. For the reasons set out below regarding the Claimant's credibility the Tribunal prefers the evidence of Mr Temple.

- b) During 2014 Mr Parr threatened to close the Respondent business.

52. Again this allegation was not supported by either Mr Temple or Ms Legge and the Tribunal finds that this was not the case and indeed the evidence was that the Respondent business was going through difficulties but that the Board was concerned about the profitability of the business and wanted the cost review to ensure the business was viable.

- c) On 24th February 2015 the Claimant attended a conference in London and Ms Legge was irritated by this.

53. Ms Legge gave evidence that she had raised with the Claimant the fact that he was away from the office too frequently and in particular that he did not need to attend as many courses and she had asked the Claimant to discuss any courses or external meetings with her before booking them. When this course was booked the Claimant was behind with a number of actions on the restructuring project and Ms Legge had attempted to contact the Claimant to ask him not to attend this conference. In the event the Claimant had already travelled to London where the conference was being held and there was little point in 'recalling' the Claimant. Ms Legge confirms she did speak to the Claimant about this and that she was entitled to be concerned. The Tribunal accepts Ms Legge evidence in this respect. The Tribunal finds that Ms Legge was entitled as his line manager to raise with him her concerns over his attendance at a conference she considered was not necessary at a time he was behind with actions on an important project.

- d) On 25 February 2015 Ms Legge held a meeting with the Claimant to tell him he would not be getting a grade 4 if his appraisal were done then. Also at this meeting Ms Legge criticised the Claimant producing a document dealing with minor retrospective criticism despite not raising any criticism before and despite having had a positive half year review.

54. The Tribunal finds that the evidence before it both from Ms Legge and the Claimant and the documentary evidence does not support this view. It is clear that Ms Legge raised a number of concerns with the Claimant over several months. The Tribunal also finds that the Respondent acted appropriately in raising concerns at an early stage and gave him an opportunity to improve. Ms Legge agreed to defer his appraisal in order to give the Claimant an opportunity to improve.

- e) On 15 March 2015 the Claimant was asked to produce a paper for the restructuring project at short notice.

55. During cross examination the Claimant acknowledged that he had had sufficient time for this task.

- f) During the meeting on 15 March 2015 the attendees of the meeting criticised the content of the paper.

56. The Tribunal finds that it was reasonable proper and normal for the Claimant to be asked questions by the attendees of the meeting on the paper he had prepared.

- g) The paper was resubmitted with only minor changes.

57. The Tribunal had the benefit of seeing the two versions and it was clear that there were substantial amendments. What was concerning to the Tribunal was that the Claimant made this allegation and yet confirmed during cross examination that he had not actually read the second version.

- h) On 6 March 2015 the Claimant was asked to prepare and deliver a current business performance update for the restructuring project meeting that day

58. The Tribunal finds that the Claimant had been notified, by email and in hard copy, prior to 6 March 2015. In cross examination the Claimant agreed that he had received them but that he had not read them.

- i) Upon the Claimant's return to work after his first period of sick leave he was merely an observer at meetings.

59. Ms Legge's evidence was that she would continue to monitor his emails but no mention was every made regarding being an 'observer' at meetings. The Tribunal accepts the evidence of Ms Legge in this regard.

- j) Upon return to work the Claimant had no access to emails or management information so had to ring around the branches to gather information.

60. During cross examination the Claimant accepted that he did have access to company information.

- k) At a meeting on 8 May 2015 Ms Legge criticised the Claimant's delivery of the update.

61. The Tribunal finds that the Claimant did have some negative feedback from Ms Legge. However, the Tribunal does not accept that this was a breach of contract or the implied term of trust and confidence. The Respondent was entitled to raise concerns or issues with the Claimant.

- l) On 11 May 2015 the Claimant attended a meeting with Mr Temple where Mr Temple was aggressive towards him.

62. The Tribunal finds that Mr Temple was not aggressive to the Claimant at that meeting. The Claimant had a meeting with Ms Turner shortly after this meeting and did not raise it and the Tribunal found Mr Temple's evidence to be clear and credible on this point.

- m) At that meeting Mr Temple goaded the Claimant into bringing a grievance against Ms Legge.

63. The Tribunal finds that it was reasonable and proper for Mr Temple to advised the Claimant of his right to raise a grievance.

- n) Mr Temple would not have upheld a grievance against Ms Legge as he also had criticised his performance.

64. The Claimant when cross-examined on this point made serious allegations that the Respondent had in the past pre determined outcomes of disciplinary hearings and grievances. The Claimant alleged he would be given a 'script' and therefore he knew the grievance would not be upheld It would appear that advice would be sought from HR on issues that arose and that the Claimant considered that was 'pre-determination' of the outcomes. The Tribunal finds that it is normal procedure for Companies who have the support of a HR team to seek advice when dealing with such matters.

- o) The Claimant did not trust Mr Temple due to him influencing the Claimant's brother in law, Mr Wilkinson to agree to construct an extension at Mr Temple's home for cash to reduce cost and continued to make payments to Mr Wilkinson when he became bankrupt during the works.

65. This was an extremely serious allegation made by the Claimant. The Claimant alleged that Mr Temple had influenced the Claimant's brother in law, Mr Wilkinson, to construct an extension at his home an pay him in 'cash' in order to reduce the cost and that Mr Temple continuing paying him even when he knew that Mr Wilkinson had been made bankrupt. As a result he did not trust Mr Temple.

66. Mr Temple was the Chief Executive of the Cumberland Building Society (CBS) and such an allegation was extremely serious and could have serious implications for his continued role at the Building Society. Further the claimant alleged that the payment in cash was made knowing that VAT would not be paid. Mr Temple completely refuted the allegation.

67. The incident referred to events that occurred in 2007. At that time the Claimant took no action despite being a Director of the Respondent the Tribunal finds that if the Claimant had a genuine belief that Mr Temple had acted inappropriately he would have raised his concerns at the time. Instead the Claimant only contacted the Respondent in August 2016. The Respondent immediately commenced and investigation and invited the claimant to attend a meeting with the Chairman of CBS in November 2016. As a result CBS convened a panel and investigated the Claimant's allegations. In addition the Respondent requested formal written advice from their accountants. Mr Temple was not found guilty of any wrongdoing and the Claimant was informed in writing on 19 June 2017. All findings were also reported to the Financial Conduct Authority and the Prudential Regulation Authority.

68. The Tribunal finds that the allegations made by the Claimant during these proceedings were misleading. He submitted his witness statement to the Tribunal on or after 27 July 2017 after being informed of the outcome and again during cross examination continued to raised these issues despite having received the outcome on 19 June 2017.

69. Further during a meeting with Ms Legge on 26 August 2017 the Claimant told Ms Legge that he did not care if he lost the Tribunal but that he wanted to 'bring down' Mr Parr and that he would 'expose' Mr Temple regarding the 'money issue'. He also told Ms Legge that he was arranging for it to go public and had invited the press. When cross examined on Ms Legge's evidence regarding this point the Claimant confirmed the accuracy of Ms Legge's statement. The Tribunal finds that the Claimant knew the allegations to be untrue an despite that consciously included the allegations in his witness statement and restated those allegations at this hearing.

- p) Ms Legge awarded him a score of 2 (underperforming and below standard) in the Claimant's appraisal on 1 June 2015 and that she was instructed to do so by Mr Parr. Mr Parr had previously overruled scores awarded to Mr Doyle and Miss Kinsella.

70. The Tribunal heard evidence that it was not unusual for senior managers to discuss scores awarded in appraisal and sometimes that may result in changes. In this case Ms Legge was clear that the score awarded was her decision and Mr Parr had no input on this occasion. The Tribunal accepts this evidence as credible.

- q) At a meeting on 1 June 2015 Ms Legge informed him that she had considered disciplinary action for allegedly telling branch managers about the restructuring of the business and the closure of the branches. The Claimant said he had not done so.

71. The Tribunal heard evidence that Ms Legge had become aware that the Claimant had disclosed this information to branch managers. The Claimant accepted in evidence that it was reasonable for Ms Legge to have raised this with him and in any event the Tribunal does not consider that this amounts to a breach of contract.

- r) At that meeting on 1 June the Claimant asked for his appraisal to be deferred but Ms Legge refused to do so.

72. The Tribunal finds that Ms Legge had already deferred his appraisal once and that it was reasonable for her to conduct the appraisal. The Tribunal accepts that the Claimant had been off sick with stress so may have found the process stressful but that although he did not receive a score of 4 as he had usually that he was not being threatened with capability proceedings and that Ms Legge was providing the Claimant with a great deal of support and feedback on his performance.

- s) Given the Claimant's seniority it was unusual to be scored in an appraisal.

73. The Tribunal find this to be untrue. The Claimant's own evidence was that he had previously received scores of 4.

t) The Respondent credited an article written by him to another employee.

74. The Tribunal heard evidence that an article the Claimant had written was attributed to another colleague in the Respondent's publicity. The Tribunal heard evidence from the Respondent that it was normal practice for staff to write material and HR would then release the articles and it was not unusual depending on the circumstances to attribute it to someone else. The Tribunal accepted this evidence.

u) Ms Turner harassed the Claimant in June, July and August 2015 by writing to him.

75. The Claimant alleged that the letters from Ms Turner while he was off sick was harassment. The Tribunal had copies of all the letters sent by Ms Turner during this period. The Claimant suggested in cross-examination that it was the number of letters and the references to raising a grievance that he considered was harassment. The Tribunal finds that the letters did not amount to harassment and that Ms Turner sent 6 letters in 3 months which is not excessive and that the letters at the time were received well by the Claimant and indeed he thanked Ms Turner for her concern in response to her.

v) The Respondent forced the Claimant to attend a grievance hearing.

76. The Tribunal found no evidence to support this allegation, as there was never a grievance meeting held.

w) Ms Turner proposed to have the grievance heard by two subservient executives.

77. The Tribunal finds that it was reasonable for the Respondent to offer to have two people not involved in the issues hear the grievance. The proposed staff members were senior executives of the company.

x) The Respondent tried to expert shop with Occupational Health Doctors.

78. The Tribunal find that Ms Turner clearly explained at the time why she wanted the Claimant to see someone else in order that the Respondent's questions were answered. The Claimant used the phrase 'expert shop' but did not suggest what he considered they were 'shopping for'. Ms Turner was very clear that she considered that in order for the Claimant to return to work in a managed way that it was important that all points were addressed. The evidence supported the fact that the first doctor had not responded to the questions posed by the Respondent in their letter of instruction.

y) The Respondent was unsupportive of his therapeutic employment and tried to stop it and suggested he work at a local charity.

79. The Tribunal finds that the 'therapeutic employment' was in breach of the Claimant's contract. The Tribunal finds that it was entirely reasonable for the

Respondent to have asked him to cease the work and there was a potential conflict of interest. The Claimant confirmed that he had been involved in the proposed sale of land that Citadel were also interested in purchasing and confirmed that he held information that could be useful to Citadel. In cross examination the Claimant said that he was following the advice of his solicitor. As a Managing Director the Tribunal considered that the Claimant should have had an understanding of his duties to the Respondent and that whilst he may not have believed there was any conflict that the potential for a conflict of interest was high.

80. The offer from the Respondent regarding therapeutic work was a reasonable offer. The Respondent were not unsupportive and made offers within the business or Group if the Claimant felt that unable to return to the Group or that they would try and source some work at a local charity.

- z) Ms Turner sent a letter to the Claimant saying he should resign and they had received confirmation that he was fit enough to attend a disciplinary hearing.

81. The Tribunal finds that Ms Turner did not say her 'should' resign in her letter dated 22 March 2016. The Claimant was not engaging with Ms Turner or the Respondent and previous correspondence from the Claimant's solicitor discussed settlement/termination packages. The Tribunal finds that it was reasonable for Ms Turner to enquire whether it was his intention to resign along. The same letter also referred to the Claimant returning to work.

- aa) The Claimant's solicitor wrote to the Respondent on 24 March 2016 to try and establish the type of disciplinary charge but Ms Turner failed to reply until 18 April 2016 almost four weeks.

82. The Claimant resigned prior to a response being received by his solicitor. Ms Turner did respond to the letter 3-4 weeks later. The Respondent states that this was not a long time for the response to be sent. The letter from the Respondent dated 22 March did not refer to a disciplinary hearing and was referring to a grievance hearing, in any event by working for Citadel the Respondent had made it clear in previous correspondence that the Claimant was in breach of contract. The Tribunal finds that this was not a breach by the Respondent.

The Law

Constructive Dismissal

83. Section 95 (1)(c) of the Employment Rights Act provides:

95 Circumstances in which an employee is dismissed.

- (1) For the purposes of this Part an employee is dismissed by his employer if.....
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he

is entitled to terminate it without notice by reason of the employer's conduct.

84. The leading case in respect of constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] QB 761**. The Tribunal should ask itself the following questions (agreed between the parties)

- a. Did the Claimants resign in circumstances in which they were entitled to resign without notice by reason of the respondent's conduct?
- b. If so, what was the repudiatory breach that entitled the Claimants to resign?
- c. Was there a series of breaches which entitled the Claimants to resign and, if so, what was the last straw in such a series?
- d. Did the Claimant's resign in response to this breach?
- e. Did the Claimants delay in resigning and reaffirm the contract?

Conclusions

85. In this case the Claimant relied upon a number of incidents/events over a period of time and a final straw incident. Each allegation/incident has been considered above and for the avoidance of doubt the Tribunal finds that none of the incidents/events complained of amount to a breach of contract and do not amount to repudiatory breaches either individually or collectively.

86. The Tribunal also found the Claimant's evidence to be unreliable and lacked credibility. On many occasions throughout his evidence and cross examination, the Claimant would avoid answering questions; would be unable to recall events; would change his answers or amend his allegations.

87. As referred to above the leading case for constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] QB 761** and it is clear that in order to be successful in a claim for constructive unfair dismissal, the Claimant must show that there has been a repudiatory or fundamental breach of contract going to the root of the contract and it is not enough to show that an employer has merely acted unreasonably. Further in cases where an employee is relying upon the implied term of mutual trust and confidence the Tribunal must consider the House of Lords decision **Mahmud v BCCI SA, Malik BCCI SA (In Liquidation) [1998] AC 20, [1997] 3 All ER 1**, where it sets out that an employer shall not 'without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'.

88. A course of conduct may have the effect of undermining mutual trust and confidence and consequently amount to a fundamental breach following a last straw incident

89. The Tribunal is further assisted by the case of **Wood v WM Car Services**, where it states that the function of the Tribunal is to look at the employers conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly is such that an employee cannot be expected to put up with it.

90. The Tribunal, when considering whether an employer's conduct has destroyed the relationship of trust and confidence is an objective test and the burden of proof rests with the Claimant.

91. The Tribunal has found when considering the above that the Respondent did not conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

92. The Tribunal has found that the Respondent conducted itself proper and that the majority of the incidents complained of were normal day to day management business activities. The Claimant himself confirmed during evidence that it was normal and reasonable for an employer to raise performance issues directly with an employee. The Claimant did not assert that there was any 'bad behaviour' on the part of the Respondent other than Ms Legge being irritated and another occasion when he said Mr Temple had been aggressive towards him in a meeting but the Tribunal has preferred the evidence of the Respondent in that regard.

93. It is clear that the Claimant was unhappy at having his work/performance criticised. This as a time of change for the Respondent and the Claimant was being asked to take a more strategic role. However, the Claimant was the MD and it is therefore reasonable for the Respondent to expect the Claimant to be able to deal with what was being asked of him. It is clear that the Claimant did not agree with Ms Legge's view or some of the comments made by members of the Board that is not enough reason for this Tribunal to make a finding of constructive unfair dismissal.

94. The Respondents gave clear and cogent evidence that whilst the Claimant was excellent in some aspects of his role that they have some concerns over his lack of strategic thinking and drive. At no point did the Respondent place the Claimant on any sort of capability procedure and from the evidence before the Tribunal it is clear that every attempt was made to support the Claimant both from a line management point of view and from a resources point of view.

95. It would appear that the Claimant's perception of the events is at odds to the evidence in this case. The Tribunal's role is to look at the evidence objectively, having done this the Tribunal finds that the Claimant has not shown that Respondent acted in a way likely to destroy the employment relationship.

96. Finally the Tribunal noted that the Claimant two matters. Firstly the Claimant included in evidence potentially damaging evidence against Mr Temple in respect of the 'cash in hand' incident referred to above whilst being fully aware that the matter had been investigated and concluded and Mr Temple found not guilty of any wrong doing. The Claimant pursued in this course of action including allegations in his witness statement and during evidence despite having had a letter in June 2017 confirming that the matter had been investigated and closed.

97. Secondly, The Claimant confirmed during evidence that he had met Ms Legge shortly before the Tribunal hearing and told her that his motivation for bringing these proceedings was to damage the reputation of Mr Temple and 'bring down' Mr Parr. This Tribunal views this conduct as a deliberate attempt to mislead it by giving evidence he knew was untruthful.

98. In all the circumstances the Tribunal finds that the Claimant's Claim for constructive unfair dismissal fails and is dismissed.

Employment Judge Hill
Date 13 December 2017

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 January 2018

FOR THE TRIBUNAL OFFICE