EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4104557/2016

Held at Glasgow on 14, 15 and 16 March 2017

Employment Judge: Mr C Lucas (Sitting Alone)

Dr Joanna J Oliver	**Claimant (Present but not represented)**
Avanticell Science Limited	**Respondent Represented by: Mr C Robertson – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the employment Tribunal is in four parts, namely,-

(Firstly) That because the Claimant did not terminate the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the conduct of the Respondent as her employer she was not constructively dismissed as envisaged by Section 95(1)(c) of the Employment Rights Act 1996, in which case her claim that she was unfairly dismissed by the Respondent in terms of Sections 95 and 98 of that Act has failed and is dismissed.

(Secondly) That because she was not owed notice pay by the Respondent as at the effective date of termination of her employment with it the Claimant's claim that she was owed notice pay by the Respondent has failed and is dismissed.

(Thirdly) That because she was not owed holiday pay by the Respondent as at the effective date of termination of her employment with it the Claimant's claim that she was owed holiday pay by the Respondent has failed and is dismissed.

(Fourthly) That the Claimant's claim that the Respondent had breached its contract with her and that she was wrongfully dismissed by it – (a claim based on the claimant's contention that even if she was not unfairly dismissed by the Respondent it, the Respondent, nevertheless repudiated a fundamental term or fundamental terms of its contract with her) - is not well-founded and is dismissed.

REASONS

Background

1. In her ET1 as presented to the Tribunal office on 2 September 2016 the Claimant made four discrete claims. The first of these was that she had been unfairly (constructively) dismissed by the Respondent on 20 May 2016. The second was that she was owed notice pay by the Respondent. The third was that she was owed holiday pay by the Respondent. The fourth was that the Respondent had breached her contract of employment with it.

2. In respect of that fourth claim it was contended in the paper apart attached to – (and deemed by the Tribunal to form part of) – the ET1 that "the Claimant's Contract was terminable on six months' notice which had been given by the Claimant on or around 10 February 2016", that "the Claimant's Contract of Employment was due to end on 10 August 2016", that "the Respondent wrongfully and in breach of contract summarily terminated the Claimant's Contract by virtue of repudiatory conduct culminating in the said e-mail of 18 May 2016 at 09:02 hours resulting in the Claimant having no alternative but to immediately rescind the Contract which she did by letter of

20 May 2016" and that "the Claimant was entitled to damages for breach of Contract…."

3. The remedy that the Claimant sought in respect of her claim of unfair constructive dismissal was compensation only, such compensation to include – (but not to be restricted to) – notice pay and holiday pay.

4. The remedy that the Claimant sought in respect of her claim that the Respondent had breached its contract with her and had wrongfully dismissed her was "damages" including – (but not being restricted to) – "net loss of salary and holidays for the period 20 May 2016 to 10 August 2016" and "loss of pension rights" and "loss of other benefits, specifically payment of monthly mobile phone bills".

5. The ET1 as presented to the Tribunal office on 2 September 2016 is hereinafter referred to as "the ET1".

6. The ET1 had been prepared on behalf of the Claimant by solicitors then acting on her behalf. Those solicitors had presented the ET1 to the Tribunal office. Notification of early conciliation had been received by ACAS from the Claimant or from the Claimant's then solicitors on 25 May 2016. ACAS had issued its Early Conciliation Statement, by e-mail, to the Claimant or to her then solicitors on 8 June 2016.

7. When the ET1 was presented to the Tribunal office it was "flagged" by Tribunal office staff as being a claim which appeared to be time barred. The relevant Tribunal office note that the claim as made in the ET1 appeared to be time barred remained on the Tribunal office correspondence file where it was eventually seen by the Employment Judge on the first day of the eventually-scheduled Final Hearing of the Claimant's claim.

8. In a form ET3 as received by the Tribunal office on 3 December 2016 the Respondent resisted the Claimant's claims in their entirety.

9. Within a paper apart attached to – (and deemed by the Tribunal to form part of) – the ET3 it was alleged in the context of the Claimant's claim that she had been constructively dismissed that "the Claimant did not resign as a result of a breach on the part of the Respondent" and it was "denied that the Respondent acted in a manner calculated or likely to destroy the relationship of trust and confidence between employer and employee" and that the Claimant had been "subjected to treatment", which would allow her to consider that her contract of employment had been repudiated as alleged or at all.

10. In the context of the Claimant's claim that the Respondent had breached its contract with her and had wrongfully dismissed her it was alleged in the ET3 received by the Tribunal office on 3 December 2016 – (hereinafter, "the ET3") – that "the Claimant's employment was due to end on 10 August as she had provided written notice on 10 February" and that "it is the Claimant that has breached her contract by failing to work her notice".

11. No Employer's claim in respect of such alleged breach by the Claimant was included in the ET3. No such claim has been pursued by or on behalf of the Respondent. And no such claim is being considered by the Tribunal.

12. Prior to a scheduled Final Hearing on the merits of the Claimant's claim taking place an Employment Judge, acting under Rule 29 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 – (hereinafter, "the Regulations") – issued a (routine case management) Order to each party that "no later than 28 days prior to the final hearing, the parties shall provide copies to each other of any documents upon which they intend to rely". That Order was sent to the parties by the Tribunal office on 12 October 2016.

13. A Final Hearing on the merits of the Claimant's claims as made by her or on her behalf in the ET1 was scheduled to take place at Glasgow on 14, 15 and 16 March 2017.

14. After the end of normal business hours on Friday 10 March 2017 the Respondent or the Respondent's representative sent an e-mail to the Claimant's then solicitors which enclosed, as an attachment, a document entitled "Report to Board of Directors" and sub titled "October 2016 – **DRAFT**". It was clear from the email that it was the Respondent's intention to seek consent from the Tribunal both to such document being accepted by the Tribunal as part of the Respondent's bundle of productions and to it being referred to in evidence at the Final Hearing.

15. At 14:53 on Monday 13 March 2017, having seen the 10 March email earlier that day, the Claimant's then solicitors sent an email to the Tribunal office, with a copy to the Respondent's representative, referring to that 10 March email and to the document attached to it and making application for strike out of "part of the Respondent's response to the claim in so far as it refers to, relies upon or purports to include as evidence, whether verbal or in writing, draft or final, a Report by WRI Associates dated October 2016 or a subsequent or prior date… including all references to said Report, its contents or its findings…". In that 13 March email the Claimant's then solicitors set out arguments in support of their application for such strike out of part of the Respondent's response.

16. In that same 13 March 2017 email the Claimant's then solicitors made application, on an *esto* basis, "for a Case Management Order under Rule 29 to disallow said Report for being included within the Joint Tribunal Bundle or any Bundle lodged on behalf of the Respondent ….". The 13 March email set out arguments in support of that, *esto,* application.

17. At 16:59 on Monday 13 March 2017 – (one minute before the end of the normal working day on 13 March, and with the Final hearing on the merits of the Claimant's claim scheduled to begin at 10am the following morning) - the solicitors who until then had been acting on behalf of the Claimant – (and who were disclosed in the ET1 as being the Claimant's representatives) - sent an e-mail to the Tribunal office, with a copy to the Respondent's representative, which stated that "…. While the Claimant

continues to be a client of our firm and a client of our employment team… we can advise that our client intends to represent herself at the forthcoming hearing fixed for tomorrow, Tuesday 14 March 2017 and the two following days."

18. When the case called for Final Hearing at 10am on 14 March the Claimant was present but not represented. The Respondent was represented by Mr Robertson.

19. On that first day of the Final Hearing of the Claimant's claim, at a stage prior to any evidence being led and when preliminary discussions were taking place among the Claimant, the Respondent's representative and the Employment Judge, the Employment Judge determined that the draft Report that the Respondent or the Respondent's representative wished to be accepted by the Tribunal as a production which could be referred to in evidence would not be permitted as a production and would not be permitted as a document to which reference could be made in evidence. Reasons for that determination were given by the Employment Judge and were accepted by both the Respondent's representative and the Claimant. It was made clear to both the Respondent's representative and to the Claimant that it was the document, as such, to which the employment Judge took exception in the context of it being admitted as a production or permitted to be referred to in evidence and that, subject to relevance being apparent, it was completely open to the Respondent's representative to otherwise elicit information relevant to any of the matters which might otherwise have been referred to in such document if such evidence could be obtained from any witness called by the Respondent to give evidence to the Tribunal.

20. The Employment Judge also determined that the application made on 13 March inviting the Tribunal to strike out part of the Respondent's response "in so far as it refers to, relies upon or purports to include as evidence, whether verbal or in writing, draft or final, a Report by WRI Associates dated October 2016 or a subsequent or prior date… including all references to

said Report, its contents or its findings…" on the grounds argued in that 13 March e-mail was refused and that the alternative application included in the 13 March e-mail, the application that if the Tribunal did not disallow such Report the three days scheduled for the Final Hearing of the Claimant's claim should "be discharged and re-scheduled for a later date" was refused.

21. The scheduled Final Hearing of the Claimant's claim continued with the hearing of evidence from the Claimant and on behalf of the Respondent and with closing submissions being made both by the Claimant personally and by Mr Robertson on behalf of the Respondent.

22. Prior to the Final Hearing of the Claimant's claim being concluded – (in fact, at the stage after evidence had been obtained from all intended witnesses and prior to any closing submissions being made by the Claimant on behalf of the Respondent) - , having established as a matter of fact that the effective date of termination of the Claimant's employment was 20 May 2016 and having considered the relevant legislation – (particularly, Section 207B of the Employment Rights Act 1996) – , the date of presentation of the ET3 to the Tribunal office, the date of receipt by ACAS of the early conciliation notification and the date of issue by ACAS of the Early Conciliation Statement, the Employment Judge determined both that presentation of the ET1 to the Tribunal office on 2 September 2016 was presentation in time and that the Tribunal had jurisdiction to consider and to make determinations in respect of the Claimant's claims as set out in the ET1. Those determinations having been made, they were immediately intimated to the Claimant and to the Respondent's representative, so ensuring that each of them might take such determinations into account before proceeding with their respective closing submissions.

23. In his closing submissions the Claimant's representative invited the Tribunal to consider and to take into account the decisions in the cases of Western Excavating (E.C.C.) Limited v Sharp and of Omilaju v Waltham Forest London Borough Council as well as the provisions of the Employment Rights Act 1996.

Findings in Fact

24. Having heard evidence from the Claimant and on behalf of the Respondent and having considered the documents provided by the parties which were both accepted as productions by the Tribunal and referred to in evidence the Tribunal found the following facts, all relevant to the Claimant's claims as set out in the ET1, to be admitted or proved.

25. The Respondent is a limited liability company incorporated under the Companies Acts. Its primary activity is the conduct of a commercial business which specialises in the isolation and culture of human primary cells, in cell-based analysis of human primary and stem cells and in the provision of services for bio activity and bio safety testing and for pre-clinical therapeutic development.

26. The Respondent company was incorporated in 2006 at which time its shareholders and initial directors were the Claimant and a Dr Colin Wilde.

27. Over the approximately 10 year period since incorporation of the Respondent company the shareholders and directors changed from time to time but with the Claimant and Dr Wilde remaining as directors and shareholders throughout that period.

28. As at 10 February 2016 the directors of the Respondent company were the Claimant, Dr Wilde, Mr Douglas Thomson and Mr Peter Bishop.

29. In the case of the Respondent company – (as is far from uncommon) - there is a distinction between a person who is a director – (hereinafter, where the context permits, "Director") – for the purposes of the Companies Acts and a person who is an employee of the Respondent company and who is give the job title of, for example, "Finance Director" or "Chief Executive Officer". That distinction applied in the case of the Claimant who, from time to time,

held both office as "Director" for the purposes of the Companies Acts and employment which carried the job title of "Finance Director" or "Chief Executive Officer".

30. Mr Thomson had first been appointed as a Non-Executive Director of the Respondent company in 2012. He is now the Chairman of the Respondent's Board of Directors and where the context permits is hereinafter referred to as "the Chairman" or as "the Chairman of the Board".

31. As Chairman of the Board Mr Thomson had more interaction with the Claimant on a day to day basis than other members of the Respondent's Board of Directors did and met her or was in touch with her much more frequently than at periodic Board meetings.

32. As well as being a shareholder in and Director of the Respondent company throughout the period which began with the Respondent company's incorporation and continued to 10 February 2016, for much of the period which began with incorporation of the Respondent company and continued to and including 10 February 2016 the Claimant was employed by the Respondent.

33. On or about 1 August 2006 the Claimant was employed by the Respondent and given the job title of "Finance Director". On or about 1 October 2007 her job title and responsibilities were changed to those of "Chief Executive Officer" – (hereinafter, where the context permits, "CEO") – but there was no break in her period of continuous employment.

34. On or about 28 September 2007 the Respondent provided the Claimant with a Statement of Terms and Conditions of Employment – (hereinafter, where the context permits, "the Claimant's Contract").

35. The Claimant's Contract was issued on behalf of the Respondent by Dr Wilde and was signed by the Claimant to signify her acceptance of the terms and conditions set out in it.

36. Under the heading, "Pay and Job Title", the Claimant's Contract stated that the claimant had been appointed by the Respondent as "Chief Executive Officer" and stated that that post was, at the time, "designated as a key worker post" which required that the Claimant "undertake certain responsibilities outside normal working hours whilst the post continues to be a key worker post and you continue to hold it."

37. The Claimant's Contract stated that her appointment as CEO would take effect from 1 October 2007 "and will be at 67% of full-time working hours", and that "the date on which your current period of continuous employment began is 1 August 2006".

38. The Claimant's Contract envisaged that the Claimant would, in addition to her salary, "receive a contribution towards a Group Personal Pension Plan" which, subject to certain conditions, "shall be payable by the Company directly into the chosen scheme at a rate twice that of the employee contribution, up to a maximum contribution of 10% of salary."

39. Under the heading, "Notice", the Claimant's Contract stated that,-

> "(a) You will be entitled to not less than the minimum period of notice stated below, unless you are summarily dismissed on disciplinary grounds, and provided there has been at least four (4) weeks' continuous employment.
>
> (b) On resignation you are required to give not less than six (6) months' notice. The Company reserves the right to make a payment in lieu of notice. Payment in lieu of notice shall be not less than the full salary payable during the minimum notice period, inclusive of pension contribution."

40. Under the heading, "Use of Computing Facilities", the Claimant's Contract stated that,-

> "As part of your duties you will be granted access to AvantiCell Science Ltd computing facilities, including the use of e-mail and Internet systems. …."

41. From time to time during the period which began with the Claimant's appointment to the post of CEO and continued to and including 10 February 2016 the Claimant's hours of work were increased. From January 2012 until, at the earliest, 10 February 2016 she worked 100% of "normal full-time hours" – (the hours expected by the Respondent of anyone holding the post of CEO in its business) - and she received 100% of the salary appropriate to that post.

42. By 10 February 2016 the Claimant typically worked 70 to 80 hours per week to fulfill her role as CEO.

43. From time to time during a period which began not later than the Spring of 2012 and continued to, at the earliest, 10 February 206 the claimant perceived that her role as CEO was being frustrated by "difficult relationships at Board level and with investors", that "the Board lacked strength and depth" and that "it was a constant challenge to get the non-Executive Directors" – (by which she meant Mr Thomson and Mr Bishop) – "to engage, even at Board meetings." Separately, but at about the same time, the Claimant perceived that the Respondent's cash-flow, "always a constant concern", was becoming an increasing issue and that "no one other than me was interested or willing to take ownership of that problem" with the result, as she perceived it, that "I carried the strain."

44. By 10 February 2016 the Claimant perceived that she was the only Director of the Respondent company who supervised the Respondent's financial issues and, notwithstanding that by then the Respondent had employed a finance executive, Ms Anne Young, she had taken it upon herself, as part of her CEO role, to maintain a daily watch, "a very close eye, daily", on the Respondent's cash-flow.

45. Following a meeting of the Respondent's Board of Directors – (hereinafter, "Board") - on 16 December 2015, and prior to 19 January 2016, the Claimant had decided that she wished to terminate her employment as the Respondent's CEO.

46. At a meeting with the, by then, Chairman, Mr Thomson, on 19 January 2016 the Claimant informed Mr Thomson that she felt that the time was right for her to resign from her employment as the Respondent's CEO.

47. The Claimant accepts that at that meeting on 19 January Mr Thomson, as Chairman and therefore acting on behalf of the Respondent, as such, tried to dissuade her from resigning from her employment as CEO.

48. The Claimant accepts that at that meeting on 19 January she made it clear to Mr Thomson that she would not be persuaded to continue her employment with the Respondent for any longer than was appropriate to affecting a smooth handover of responsibility.

49. In essence, by 19 January 2016 the Claimant was keen to relinquish her role as CEO and to end her employment with the Respondent.

50. Following the meeting on 19 January the Claimant had regular discussions with Mr Thomson about managing the process of her proposed resignation.

51. On 26 January 2016, at a further meeting between the Claimant and Mr Thomson, it was agreed that although, in terms of the Claimant's Contract, the Claimant was obliged to give the Respondent six months' notice of termination of employment such a six month period "was lengthy and could be disadvantageous to both parties". That consensus having been reached there was discussion about the contractual six months' notice period being used for the benefit of both the Claimant and the Respondent by ensuring

that during the first three to four months after resignation was tendered by the Claimant "business as usual" would prevail – (but with a transition being effected) – and that after that initial three to four months period a transfer of responsibilities would take place. It was also agreed that during that second period, the final two to three months of the contractual six months' notice period, the Claimant would "step back but – (if required by the Respondent) – would be "available" to the Respondent.

52. At that meeting on 26 January 2016 it was agreed that at the end of the six months' contractual notice period the Claimant's employment with the Respondent would end completely. It was anticipated that this end-stop date would be a date in August 2016.

53. The Claimant accepts that at that meeting on 26 January 2016 she "agreed" – (her word) – to stay on as a Director of the Respondent company until a replacement CEO had been appointed after which, as she put it, "I could then switch to 'observer status'."

54. The Claimant perceived that even after August 2016 she would still have some ongoing "ad hoc" relationship with the Respondent's business – (possibly working on an as-and-when-required basis as a consultant giving advice to the Respondent, particularly in respect of European Commission funding which had always been, and was then still, of major importance to the Respondent's business and in respect of which the Claimant held particular expertise) – but no agreement was reached between the Claimant and the Respondent to that effect at any time prior to the Claimant tendering her resignation – (or either resignation) – or prior to the effective date of termination of the Claimant's employment with the Respondent.

55. The Claimant's intention was that that disclosure made by her to Mr Thomson on 19 January 2016 was a disclosure being made "in confidence" but the meetings with Mr Thomson on 19 and 26 January 2016 were meetings between the Claimant as an employee of the Respondent and Mr Thomson as Chairman and although the Claimant had intended the

discussions to be "in confidence" Mr Thomson participated in such discussions in his capacity as Chairman, i.e. as a Board-level representative of the Respondent.

56. The Claimant accepts that the discussions that she had with Mr Thomson in January 2016, discussions prior to the First Resignation letter being tendered, were "positive and constructive and aimed at ensuring a smooth transition". Indeed, she accepts that until she sent the First Resignation letter to the Respondent the relationships between her and it, including the relationships between her and her co-Directors, was "very good".

57. On 10 February 2016 the Claimant had discussions with Dr Wilde. She had not had any discussion with Dr Wilde about her intention to resign from her employment as the Respondent's CEO before then but she wished to personally inform him of her intention before tendering her resignation.

58. Having spoken to Dr Wilde the Claimant, later on 10 February 2016, wrote to Mr Thomson in his capacity as Chairman of the Board. That letter of 10 February 2016 was headed "CHIEF EXECUTIVE OFFICER – RESIGNATION" and, where the context permits, is hereinafter referred to as "the First Resignation" or as "the First Resignation letter".

59. The First Resignation letter stated,-

> "With effect from today's date, I write to tender my resignation from the post of Chief Executive Officer of AvantiCell Science Ltd.
>
> Please know that this is not a decision I have taken lightly. However, having steered the Company for close on 10 years, and with it now on a stronger footing than it has ever enjoyed previously, the time seems right. I hope that by leaving at this time, any impact on the Company can be minimised.

> I am required to give a minimum of 6 months' notice and therefore, subject to holiday entitlement, I would expect my employment to cease on 10/Aug/16.
>
> My interest in AvantiCell Science shall of course continue, and the Company, the Executive, and the Board can be assured of my continuing support of commercial endeavours."

60. The First Resignation letter was unequivocal and unambiguous. It evidenced the Claimant's intention to resign from her employment with the Respondent. It was written following on discussions between the Claimant and the Respondent's Chairman at which he – (and therefore the Respondent as such) – had tried to persuade her not to resign from her employment. And it was written following on from discussions between the Claimant and Mr Thomson at which it had been agreed that although in terms of the Claimant's Contract the notice that she was obliged to give the Respondent was six months her actual, post-intimation-of-resignation, period of active involvement as the Respondent's CEO would be very much less than six months.

61. Prior to 10 February 2016 the Claimant, as the Respondent's CEO, had negotiated asset-purchase loan facilities with a company known as Asset Advantage Limited – (hereinafter, where the context permits, "AA". Such negotiations had been completed prior to 10 February 2016.

62. It had been agreed during the course of the negotiations leading to that funding being made available to the Respondent by AA that the Respondent would enter into a hire purchase agreement in respect of equipment it wished to acquire, that the agreement would be between the Respondent and AA and that each of the Claimant and Dr Wilde would separately be required to enter into a Guarantee and Indemnity Agreement with AA.

63. At some stage on 10 February 2016, the same date as the date in which she sent the First Resignation letter to the Respondent, the Claimant entered into a Guarantee and Indemnity Agreement – (hereinafter, "the Guarantee") - with AA in respect of the Respondent's hire purchase agreement with that company. Notwithstanding the strange coincidence of dates the Claimant signed the Guarantee voluntarily. She was not coerced into doing so either by the Respondent or by AA.

64. The Guarantee stated that "this document is important", that "before you sign it we recommend that you get advice from your solicitor or other Independent Legal Adviser", that "your liability under this document covers the obligations of the Customer as defined in this document", that "you may be liable both instead of and as well as that Customer" and that "you should not sign this document unless you agree to be legally bound by its terms and unless you are signing freely without pressure or influence on you from the Customer or anyone else". It also stated that the Claimant undertook to indemnify AA "against all losses you may suffer in respect of any failure by the Customer to observe and perform the Customer's obligations set out in the Agreement and to pay you on demand any sums which the Customer has agreed to pay to you under the Agreement and any sums which may become payable to you as a consequence of the Customer's said failure."

65. The Guarantee stated that "if two or more of us provide this Guarantee and Indemnity the undertakings given above shall be binding on each of us separately and all of us jointly", phraseology which the Claimant accepts she understood at the time to mean that if the Respondent defaulted in its obligations under the hire purchase agreement entered into between it and AA – (and notwithstanding that Dr Wilde had also acted as guarantor) – she, the Claimant, could be called upon to wholly indemnify AA in respect of any such default by the Respondent.

66. The Guarantee made no reference to its being given by the Claimant either only on the basis that she continued to hold office as a Director of the

Respondent company or only on the basis that she continued to be employed by the Respondent – (or on any basis which was a combination of office-holding and employment).

67. Neither at the meetings between the Claimant and Mr Thomson on 19 and 26 January nor at the meeting among her, Mr Thomson and Dr Wilde on 10 February had the Claimant made any reference to the, then ongoing and within her control, negotiations in respect of a guarantee to be granted to AA or to what steps the Claimant would require the Respondent to take to procure her release from any completed guarantee if and when she ceased to be employed by the Respondent and/or ceased to be a Director of the Respondent company. These matters were never raised by the Claimant or otherwise discussed at any of these meetings.

68. The First Resignation letter made no reference to the existence of the Guarantee or to what steps the Claimant would require the Respondent to take to procure her release from it if and when she ceased to be employed by the Respondent and/or ceased to be a Director of the Respondent company.

69. The Claimant had not been "induced" or "duped" into signing the Guarantee. As was evidenced by her signature of it she accepted that she was signing it "freely without pressure or influence… from the Customer or anyone else" and she did so notwithstanding that, in terms, the Guarantee documentation had itself recommended that she obtain advice from a solicitor or other Independent Legal Adviser before signing it.

70. Mr Thomson has always had sympathy with the Claimant's point of view that she should not have to remain as guarantor after she ceased either to be a Director of the Respondent company or to be its employee but accepts that it was the Claimant who had negotiated the terms of the guarantee and that she had voluntarily signed the Guarantee even although the Guarantee had itself, in terms, recommended that she obtain advice from a solicitor or other Independent Legal Adviser before signing it.

71. Since the effective date of termination the Respondent has in fact procured agreement from AA to release the Claimant from the Guarantee.

72. Also on 10 February 2016, at a stage after tendering the First Resignation letter, the Claimant met with Mr Thomson and Dr Wilde to discuss arrangements that she perceived would have to be made for her responsibilities as CEO to be transferred prior to the end of her notice period.

73. On 16 February 2016 the Claimant met again with Mr Thomson and Dr Wilde. At that meeting Mr Thomson advised her that the Respondent would tell its staff of the Claimant's resignation and that the Claimant herself should not do so. That was a strategy to which the Claimant took exception and which she suggested to Mr Thomson at the time was, "odd", but it was one which the Respondent's Board of Directors was entitled to formulate and implement.

74. The Claimant had a further meeting with Mr Thomson on 16 February at which he raised the question of the Claimant's Directorship of the Respondent company.

75. Mr Thomson believed that the Claimant had no contractual right either in terms of the Claimant's Contract or in terms of the Articles to either remain a Director of the Respondent company for as long as she chose to do so or to re-appoint herself as a Director at any time after she had ceased to be a Director.

76. At that 16 February meeting Mr Thomson suggested that the Claimant should resign from office as a Director.

77. The First Resignation letter had made no reference to the fact of the Claimant's resignation, or the timing of her resignation, or the calculation of the effective date of termination of her employment, being in any way linked

to the Claimant's holding of office as a Director of the Respondent company. The Claimant's Contract had made no reference to the Claimant's employment as the Respondent's CEO being in any way linked to or dependent on her holding office as a Director of the Respondent company. The Claimant's holding of office as a Director of the Respondent company and her employment with the Respondent, latterly as its CEO were distinct from each other and not in any way associated or inter-dependent. But notwithstanding all of these facts the Claimant did not take kindly to the suggestion that she should resign from office as a Director.

78. It was not within the power of Mr Thomson as Chairman to singularly remove the Claimant from office as a Director or to procure that she remained in office as a Director, these being matters which were regulated by the Articles.

79. At the stage of the Claimant sending the First Resignation letter to the Respondent it was not the Respondent's intention to remove her from her office as a Director of the Respondent company but by 8 March 2016, particularly following discussions that Mr Thomson had had with the Claimant on 3 March 2016, it was Mr Thomson's view as Chairman that it was in the commercial best interests of the Respondent for it to remove the Claimant from office as a Director.

80. The Respondent is a limited liability company and as such, in terms of the Companies Acts 1985 to 2006, its constitution is governed by Articles of Association which were accepted by the Company, by written resolution of its shareholders, on 21 March 2014. Those Articles of Association – (hereinafter, "the Articles") - define holders – (of whom the Claimant was one) – of "A Ordinary Shares" as "Shareholders" and "A Ordinary shares" are defined as meaning "the A ordinary shares with a nominal value of £1.00 each in the capital of the Company."

81. The Articles define "Bad Leaver" as meaning "the cessation of (i) employment with the Company or any Group Company or (ii) holding the office of Director or consultant of the Company or any Group Company,

other than" for example, "by reason of wrongful dismissal of the employee" or "by reason of the unfair dismissal of the employee" or "by reason of the removal of a Director and employee as Director in circumstances where simultaneous dismissal as an employee would fall within the categories…" of wrongful dismissal or unfair dismissal.

82. The Articles define "Founders" as meaning the Claimant and Dr Wilde.

83. Under the heading "Compulsory Transfer – Employees" the Articles provide that,-

> "17.1 If any employee (other than a Founder or Non-Executive Shareholder except as provided in Article 17.1.3) ceases for any reason to be an Employee the relevant Employee shall be deemed to have given a Transfer Notice in respect of all the Employee Shares on the Effective Termination Date. In such circumstances the Transfer Price shall be determined as follows;
>
> 17.1.1 Where the Employee is a Bad Leaver, except where otherwise agreed by the Investor Majority, the Transfer Price shall be the lower of the par value and the Fair Value; and
>
> 17.1.2 In all other circumstances, the Transfer Price shall be the Fair Value.
>
> 17.1.3 For the avoidance of doubt, if a Founder or Non-Executive Shareholder ceases to be an employee, director or consultant of the Company he shall not be deemed to have given a Transfer Notice and he shall not be deemed to be a Bad Leaver, except where the employee, director or

> consultant is dismissed for gross misconduct or becomes concerned, engaged or interested directly or indirectly (in any capacity whatsoever) in any trade or business selling, licensing, commercialising, providing advisory or consultancy services in respect of or otherwise dealing with cell based assays."

84. The Articles define the "Fair Value" of shares as being the value to be determined by an Expert Valuer applying specific assumptions and bases and it is apparent from the Articles that the Fair Value is anticipated as being a value higher than the at par nominal value of the shares in question. The Articles define "Investors" as meaning "Barwell and Scottish Enterprise, and, in each case, their Permitted Transferees".

85. Under the heading, "Appointment of Directors", the Articles state that "the Investors for so long as they and their Permitted Transferees hold not less than 10 per cent of the Shares in issue shall be entitled by Investor Majority to nominate one person to act as a Director of the Company by notice in writing addressed to the Company from time to time and the other holders of Shares shall not vote their Shares so as to remove that Director from office…"

86. The Claimant, as a Shareholder who was not an Investor as defined by the Articles, was not entitled to nominate either herself or any other person to act as a Director of the Company.

87. Under the heading "Disqualification of Director" the Articles provide that the office of a director shall be vacated if "in the case of Directors, other than an Investing Director,… a majority of his co-Directors serve notice on him in writing, removing him from office."

88. The Claimant was not and had never been an "Investor" or "Investing Director" as envisaged by the Articles.

89. At the meeting on 16 February Mr Thomson suggested to the Claimant that she should work solely from her home for the foreseeable future and limit her, by then only occasional, visits to the Respondent's offices to visits agreed between Mr Thomson, as the Respondent's Chairman, and the Claimant.

90. In the context of such discussions about working from home and restricting visits to the Respondent's office premises to agreed visits only Mr Thomson made it clear to the Claimant on 16 February that she, the Claimant, was not "being placed on garden leave", "definitely not".

91. The Claimant accepts that at that meeting with Mr Thomson on 16 February she understood that what the Respondent, as her employer, expected of her was that whatever work she continued to do for it would be done from her home and not at its offices.

92. Following the various meetings on 16 February the Claimant chose to return her set of keys to the Respondent's office premises to the Respondent. She was not asked to do so. She felt that following her discussions with Mr Thomson "I had no further use for them".

93. On 18 February 2016 the Claimant had a telephone discussion with Mr Thomson, a discussion which was followed up by Mr Thomson e-mailing the Claimant at 17:49 on 18 February. That e-mail – (hereinafter, where the context permits, the "18 February e-mail") – included statements or comment that,-

> "You have requested that you be removed/replaced from the Director guarantees that you have previously executed. Namely, the recent Asset Advantage guarantee... I am following this up and assessing the impact with the loan company of changing guarantors so shortly after putting this in place and I will get back to you. However, I can confirm that you and Colin are <u>not</u> guarantors on the 2011 asset agreement as this was settled in April 2015. There is still an ongoing

asset agreement from that time but apparently you and Colin were never guarantors on this agreement. For the guarantee in Malaysia the board has already indemnified the guarantors and it is anticipated that the Board will do the same for the Asset Advantage guarantees."

And,-

"We exchanged views on the articles and particularly articles 17 and 24 and we did not come to a final agreed position on your continuing rights to be a director and/or observer. However, the company's position is clear that its preference would be that you resigned from the directorship of AvantiCell Science as of the 8th March board meeting. When you have had a chance to consider and reflect further please let me know what you wish to do?"

And,-

"…you requested clarity on the duties required of you during the transition period. I will take this up with Colin and Peter and get back to you. In the meantime, I was surprised to hear that you had handed in your keys to the offices. This was not requested; I merely indicated that the majority of the activities should be conducted on an "arms-length" basis with you working from home, to allow the remaining team to adjust to the new circumstances."

And,-

"I look forward to your response… and achieving an early outcome so that the Board can consider and make a final determination before or at the 8 March board meeting."

94. On 25 and 26 February 2016 there was an exchange of e-mails among – (or between a combination of) - the Claimant, Mr Thomson and Dr Wilde. These e-mails related to a particular project in which the Respondent was a

project-partner. The e-mail chain included an e-mail sent at 19:16 on 25 February by Mr Thomson to the Claimant and Dr Wilde, with a copy to the Respondent's Finance Executive Ms Young, which stated,-

> "Could you now please provide the response to Colin (and Ann is she does not already have it)? Also, for future and I would consider this obvious as we go through the hand-over, please confirm with the company first before you respond to this and other information requests that may come up. In that way there will be no confusion and miscommunication."

The e-mail chain also included an e-mail sent by Mr Thomson to the Claimant at 08:08 on 26 February which stated,-

> "Thank you for complying with my request going forward to ensure that we co-ordinate the response. For the record, responses should now come from Anne after, if required, approval by the Board. To assist her and Colin and as requested in my previous e-mail, please send a copy of the response that you did send.
>
> Further, as you write, as it may be that communications are not automatically copied to others. Accordingly, please forward on e-mails/letters etc. you receive on this and similar matters to Anne so that she can know what needs to be done in good time and we can determine the most appropriate respondent.
>
> Re Biosid – thank you for completing this. Pleas ensure that a copy of the audit response is provided to Anne and Colin if they do not already have it so that we can pick this up as required."

95. The Claimant met with Mr Thomson again on 3 March 2016 and at that meeting a variety of issues, including those referred to in Mr Thomson's 18 February e-mail, were discussed. At that meeting the Claimant expressed her feeling that the respondent was undermining her position, that she was

"being cut off at the knees" and, in the context of the Guarantee, that she, the Claimant, felt that it was not appropriate for her to resign from office as a Director of the Respondent company until such time as she was released from her obligations under the Guarantee.

96. On 4 March 2016 the Claimant wrote to the Respondent's Board of Directors. In that letter she stated,-

> "As you will all be aware I have been asked in advance of the next Board Meeting scheduled for 8 March 2016 to tender my resignation from the position of Director of AvantiCell Science Ltd. In other circumstances I would do this willingly, but the lack of resolution of various matters prevents me from taking this step. Most notable among the unresolved issues is the recently entered into Director's Guarantee, which I signed on the basis of a scenario discussed fully with the Chairman prior to signing, which was very different from the one now emerging. This means that I signed the Guarantee under false pretences and a situation has been created that is unsustainable.
>
> I would ask that this letter be tabled at the meeting on 8 March 2016 and that any action by the Board in connection with my removal as a Director be taken against this backdrop."

97. The Claimant was removed from office as a Director of the Respondent company at its Board Meeting on 8 March 2016.

98. The decision that the Directors took at the Board Meeting on 8 March was a decision that they were entitled by the Articles to take and a removal-from-office which they were entitled to effect.

99. At 07:50 on 9 March 2016, the day after the 8 March Board Meeting, the Respondent sent an e-mail to the Claimant. Specifically, that e-mail was

sent in the name of a Ms Jennifer Garland who the Claimant describes as her then personal assistant. That e-mail sent by Ms Garland stated,-

> "I am not to e-mail you the bank balance any more.
>
> I'm upset that all of this has happened and hope that some of us can meet up at some point in the future.
>
> I would like to thank you for all that you have done for me over the last six years and I will miss you a lot."

100. Mr Thomson, accepts that the coincidence of the e-mail being sent and of what was stated in it, when taken in the context that there had been a Board Meeting the previous day at which the Claimant was removed from office as a Director of the Respondent company, was a coincidence in respect of which it was reasonable for the Claimant to draw conclusions. But he denies that he gave any such instruction to desist from sending the Claimant bank balances or any instruction to Ms Garland to send such an e-mail.

101. On 21 April 2016 the Respondent's finance executive, Ms Young, sent an e-mail to the Claimant which included the statement that "I… wanted to inform you that any e-mails sent to you @ J. Oliver@ AvantiCell.com will now be re-directed to the main office…"

102. On 28 April 2016, during the course of a pre-arranged telephone conversation which did not ever deal with the matters in respect of which such a telephone conversation had been arranged, Mr Thomson told the Claimant that a decision had been taken to suspend the Claimant because the Respondent had "found irregularities". Following on from that telephone conversation the Respondent wrote to the Claimant on 28 April 2016. The letter was headed "Re: Matters of Concern & Suspension" and, where the context permits, is hereinafter referred to as "the Suspension Letter".

103. The Suspension Letter was two, closely-typed, A4 pages long. It included explanations and statements as follows,-

> "Further to our call today.
>
> I write to you on behalf of AvantiCell Science Ltd (the "Company") in my capacity as Chairman of the Board.
>
> During the period since your resignation as CEO on the 10 February, 2016, termination as a Director on the 8 March, 2016 and subsequently, a number of matters of concern have become apparent to the Board. I write now to make you aware of these matters of concern and to advise you of the actions that we are taking."

And,-

> "There appear to be a number of irregularities in the presentation of the accounts to the Board that failed to provide an accurate picture of the Company's financial position to the Board as well as payment of fees and other charges that require specialist investigation. There also appears that there may be a conflict between the handling of the Company's cash reserves secured from grant funding and the proper objectives of the business. As the CEO of the Company these matters were in your responsibility."

And,-

> It appears that the Company has no secured commercial revenues, any leads or any activities that would lead to commercial sales. As the primary Commercialisation Officer of the Company it was your duty to ensure commercial revenues were secured to the benefit of the Company."

And,-

"Preliminary investigations have demonstrated that AvantiCell Science Ltd may be significantly exposed to damaging commercial risk through its engagement with AvantiCell AsiaPacific and that that engagement is not on a proper footing. As CEO of the Company, these matters were your responsibility."

And,-

"The above matters and other issues are of a serious nature and, accordingly, I am writing to confirm that, as of the date of this letter, you have been suspended from work on full pay until further notice. The purpose of your suspension is to enable the Company to carry out further investigations in relation to matters raised."

And,-

"Importantly, your suspension does not constitute disciplinary action and does not imply any assumption that you have been guilty of any misconduct or wrongdoing. We'll keep your suspension under review and will aim to ensure that the period of suspension is no longer than is reasonably necessary. Following a review of your suspension, it may be continued or lifted at any time with immediate effect."

And,-

"During your suspension, the Company will continue to pay your salary in the normal way. You also remain entitled to your normal contractual benefits during this period. You continue to be employed by the Company throughout your suspension and you remain bound by all the terms and conditions of your employment. In particular, you are reminded that you must not use or disclose any confidential

information of the Company or undertake any other paid employment during your suspension."

And,-

"You are required to co-operate in the Company's investigations and you may be required to attend investigation interviews or (if appropriate) disciplinary hearings. However, you are not otherwise required to (and must not) carry out any of your duties or attend the workplace or any premises of the Company, any Group Company, or those of any of our customers or suppliers unless duly authorised in writing by me to do so. You must also not communicate with any employee, contractor, customer or officer of the Company or any Group Company (or the employees or officers of any of our customers, contractors or suppliers) unless duly authorised in writing by me."

And,-

"If you know of any documents, witnesses or information that you think would be relevant to the matters under investigation, please let me know as soon as possible (if you have not already done so). If you think that you require access to the Company's premises or computing network for the purposes of assisting with the investigation, please let me know so that appropriate arrangements can be made for this."

And,-

"Please refer any queries that you receive in relation to work-related matters to me in the first instance. You should not discuss the matters under investigation with any employees, contractors, customers or officers of the Company or any Group Company without prior authorisation from me."

And,-

"If you have any queries about this letter or the terms of your suspension, please do not hesitate to contact me."

104. On 12 May 2016 Mr Thomson sent an e-mail to the Claimant which, under the subject heading, "Suspension Update", included the statements that, "I write to update you that we had a Board meeting yesterday and have moved forward with the investigation including appointing an external reviewer" and that "I will update you on timelines when that information comes available."

105. Over the period beginning at 15:14 on 17 May 2016 and ending at 09:02 on 18 May 2016 there was an exchange of e-mails between Mr Thomson and the Claimant. Referring to such e-mail exchange,-

- At 15:14 on 17 May 2016 Mr Thomson sent an e-mail to the Claimant which stated,-

  "Dear Jo:

  I write to you on a separate operational matter.

  We have received an urgent request for clarification of the Category 4 management costs claimed under the Pathchooser Project. It is not obvious from the project financial material supplied by Jennifer to you the derivation of the €23,208 inputted by you to the system. We are not, therefore, able to respond to the Pathchooser lead partners' urgent request for clarification, following rejection of the entire consortium's periodic claim.

Could you please by return provide either, 1. the breakdown of the costs, or 2. provide the information of where the calculation is filed.

Thank you

Douglas.

Kind regards."

- On 17 May 2016, at 16:24, the Claimant replied stating,-

"The €23,208.83 is made up of the T & S costs associated with three project meetings in Dublin and numbers 179 hours of management time, as stated in the online Activity Report, which you have access to. Rejection of the entire submission should come as no surprise given the issues flagged up regarding the treatment of budget by some partners."

- At 17:26 on 17 May Mr Thomson sent an e-mail to the Claimant which stated,-

"Dear Jo:
Thank you for the prompt response. However, the only spreadsheet to which we have access is the attached and we need to be able to support the numbers. As you will be able to see from the spreadsheet, the numbers do not tally/match with the timing you note below of 179 hours or the amounts reported. There also seems to be some errors in the spreadsheet itself.
Is there any further light that you can shed on the matter?

Thank you.

Douglas."

- At 09:02 on 18 May Mr Thomson sent a further e-mail to the Claimant which stated,-

> "Dear Jo:
>
> Could I have an answer please to this e-mail? If we are unable to get to the bottom of this matter then we will have no choice but to report (this morning) that the numbers have been reported incorrectly previously.
>
> Thank you.
>
> Douglas."

106. By a time no later than 47 minutes after she had received Mr Thomson's 09:02 18 May e-mail the Claimant had formed a view that the 09:02 18 May e-mail "constitutes a threat" that "it would be my name that would be reported to the Commission as having been responsible for the "previous incorrect reporting" and that if she, the Claimant, was to take the "final straw" approach to what she perceived to be "a breakdown of trust and confidence" then "this", i.e. the 09:02 18 May e-mail, "would be the final straw".

107. The Claimant does not deny that she had reached that conclusion by 09:49 on 18 May 2016, i.e. within 47 minutes after receiving Mr Thomson's 09:02 e-mail that morning.

108. The 17 and 18 May e-mail chain referred to above had not at any time included any reference being made by Mr Thomson to any report being made to the European Commission. It had referred to the relevant project's lead partner's request for clarification. And it had referred to the Respondent's belief that "if we are unable to get to the bottom of this matter" then it, the Respondent, would have no choice "but to report (this morning) that the numbers have been reported incorrectly previously".

109. It was the Claimant who interpreted what Mr Thomson had said I that e-mail chain as meaning that the Respondent intended to report previously incorrect financial reporting to the European Commission, but that is not what was implicit within what Mr Thomson said in the e-mails that he had sent on 17 and 18 May.

110. On or about 17 May 2016, prompted by an enquiry from the co-ordinator of a multi-partner project -(of which the Respondent was one partner) - Dr Wilde had asked Mr Thomson to liaise directly with the Claimant to try to clarify the figures which had caused the European Commission to reject the multi-partnership project's application for grant funding. At that time the Claimant had been suspended and was on suspension so that Mr Thomson felt that the only person who should contact the Claimant in respect of such a matter was himself. He did so by initiating what he intended to be – (and still believes to have been) – "a clearly 'operational-matter' enquiry" in respect of matters which had been under the control of the Claimant as the Respondent's CEO.

111. Mr Thomson did not think that it was unreasonable to e-mail the Claimant at 17:26 on 17 May or to send a reminder e-mail to her at 09:02 on 18 May. He believed that not only had the Claimant happily dealt with e-mails in the past which had been sent before, or after, 9-5 business hours but that in fact the Claimant's Contract made it clear that the Claimant was not an employee who was expected to work only within those 9-5 hours.

112. It was because the Claimant was not "working" normally during her period of suspension that Mr Thomson chose to be the only person within the Respondent business who would contact her in respect of the matters raised in the 17 and 18 May e-mails. He believed that by doing so he was not in any way violating the terms set out in the Suspension Letter and that it was not unreasonable for him, as Chairman of the Board and as the person who had the most day to day contact with the Claimant at Board level, to have sent the e-mails to her.

113. Having read the 09:02 18 May e-mail the Claimant decided that it, that e-mail, was "the final straw" and that she would resign. In fact, that she would resign again, but this time with immediate effect.

114. On 20 May 2016, some two days after deciding that she would resign again, but this time with immediate effect, the Claimant wrote to Mr Thomson in his capacity as the Respondent's Chairman. Effectively, she was writing to the Respondent. That letter, although posted to the Respondent as hard copy on 20 May – (a Friday) – was copied to Mr Thomson by e-mail on 20 May and was read by him, the Respondent's Chairman, on 20 May.

115. Where the context permits, that 20 May 2016 letter is hereinafter referred to as "the Second Resignation letter" and, where the context permits, the resignation effected by it is hereinafter referred to as "the Second Resignation".

116. The Second Resignation letter stated,-

> "I write to inform you that as a result of the treatment I have received by and on behalf of the Company during the period since I first intimated my intention to resign, on 19 January 2016, including; being deceived into acting as a guarantor for the Company in respect of the hire purchase agreement with Asset Advantage; subsequently being told not to attend the Company (when we had agreed a 3-4 month orderly hand over period); being prevented from doing my job and handing over in a proper and appropriate manner; my administrative assistant being told to desist from sending me a daily note of the Company's bank balance; being removed as a director of the Company without a "by your leave"; and, in my view, my improper suspension, culminating in what I regard as a threatening e-mail from you earlier this week (Wednesday 09:02), I consider that I have no alternative but to terminate my employment with immediate effect.

> Payment of outstanding salary should include accrued holiday amounting to 10.5 days (as of the date of this letter) and should be accompanied by all unpaid expenses. Please also let me have my P45 in due course."

117. The Second Resignation letter made no request for any salary or for any payment in lieu of notice or for any payment in lieu of any holiday accrued in respect of any date after 20 May 2016 to be paid to her.

118. The fact that the Second Resignation letter affected the Second Resignation at a time when an earlier intention by the Claimant to terminate her employment had been intimated to the Respondent by the First Resignation letter is an apparent anomaly which will be referred to in greater detail in the discussion section of this Judgment. But, on the face of it, the Second Resignation as intimated in the Second Resignation letter was unequivocal and unambiguous and evidenced the Claimant's intent to resign from her employment with the Respondent with effect from the date on which the Respondent became aware of the fact and content of the Second Resignation letter.

119. The Respondent became aware of the fact and content of the Second Resignation letter when Mr Thomson received an e-mail copy of it and read that e-mail copy of it on 20 May 2016. That being the case, the effective date of termination of the Claimant's employment with the Respondent was 20 May 2016.

120. On 23 May 2016 Mr Thomson wrote to the Claimant referring to the Second Resignation letter. That letter included the statements that "The Company makes note of the various statements in your letter and rejects each of them as without merit" that "Notwithstanding the rejection of the various accusations we hereby accept your termination from the position with effect from the 20th May, 2016" and that "The sums due to you will be calculated in the normal manner and paid through pay roll in accordance with Company Policy".

121. The Claimant accepts that prior to sending the Second Resignation letter her expectation that she remain as a Director of the Respondent company was that she could only expect to remain such a Director until the notice period referred to in the First Resignation letter had expired.

122. As at the effective date of termination the Claimant owned 14.1% of the issued "A Ordinary" shares in the Respondent company.

123. The Claimant admits that if the Respondent had found her guilty of gross misconduct she could have been forced to sell or relinquish her shareholding at the lower of £1 per share or the price that she paid for the shares and that that was a fear that she had maintained since her discussions with Mr Thomson in January 2016 and continued to hold as at the date of her sending of the Second Resignation letter.

124. On 16 February 2016 Mr Thomson had sent an e-mail to Dr Wilde and Mr Bishop. That e-mail had not been seen by the Claimant before she sent the Second Resignation letter and neither the fact that such an e-mail had been sent nor its specific content, as such, could have contributed to the Claimant's decision to resign without notice or to send the Second Resignation letter. Nevertheless, the email contains comment which the Tribunal considers to be relevant to the Respondent's directors' views as to why and how the "transition" element of the contractual notice period triggered by the First Resignation letter might be foreshortened in which case, in the view of the Tribunal, it is relevant to set out, as a Finding in Fact, that that e-mail included narratives, purportedly made following on discussions between Mr Thomson and the Claimant, which stated that,-

> "• She has agreed to step down as a Director of AvantiCell. She has agreed that this should occur on 8 March where she will briefly join the Board Meeting and then exist after we have thanked her for her contribution. I think that she is surprised at

how quickly we are moving this on but did not resist. However, see more later, which may change her view."

And,-

"• She wants to reserve her right to return as a Director 'in case the Company is not operating as [she] likes'. I indicated that this was not our view and that I could find no basis for this in the Shareholders' Agreement. She commented that it was actually in the articles (this is different from what she previously told me) and has subsequently provided the current articles (see attached) directing me to articles 17 and 24 as being the basis. I have read the noted articles and, unless the amendments to the Table A articles provides this right, I cannot see any basis for her having a continuing right to appoint a Director (herself). I suspect that she is trying to rely on the 10% but to my reading that is only Investors, which does not include Jo. My view is that we should confirm this position and then inform Jo and that we think it inappropriate that she can retain such a right. Are we agreed?"

And,-

"• We discussed timing of asking her not to attend the Company's offices and mooted 6-8 weeks to which she appeared agreeable (but see my comment below). My view is that this is not actually gardening leave but simply that it is the company's power to ask her to fulfil the duties set by the company from another location. In that manner she remains available for the whole 6 months."

And,-

"• We discussed the share options and I indicated our position that options 'earned' already are retained and those are not should lapse. I have asked her to provide a listing of the various options, amounts, conditions etc. for the board's consideration. She will provide and we can then discuss."

And,-

"• We discussed together with Colin the collaborators and how they should be told. We agreed that this should be on a case by case basis rather than some big announcement (which is what she wanted) with a prioritisation for those that are business critical."

And to record, as a Finding in Fact, that it went on to state that,-

"My position now is that, despite the disruption, we should ask Jo to remain at home as soon as possible. Her position will very quickly become untenable as CEO but not a director and consequently excluded from many of the activities and decisions of the Board. Today's interaction where she believed that she would tell the staff makes that clear I would be inclined to move very quickly to that position (next week), as her to provide the various handovers and then work from home. I am now of the view that delaying provides limited benefit and risks a continuing disruption though I am worried that much of the information is in Jo's head."

125. The Claimant now admits that "between 10 February 2016 and 8 March 2016" any breakdown of trust between herself and the Respondent "was not irreparable at this juncture."

126. The Claimant did not regard any acts or omissions on the part of the Respondent occurring between 10 February 2016 and 8 March 2016 as

being repudiatory breaches of any fundamental term or terms of her contract which were either repudiatory breaches which she accepted or were repudiatory breaches entitling her to terminate the contract under which she was employed in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

127. Even with the benefit of hindsight the Claimant remains of the view that it was the combination of the fact, content and timing - "just two minutes into a normal working day and at a time when I was no longer required to do work for the Company") - of the 09:02 18 May 2016 e-mail which both upset her and, so far as she was concerned, was "the final straw" or "the final straw event" and the reason why she tendered the Second Resignation letter.

128. The Claimant has received all salary due to her in respect of the period ended 20 May 2016 and payment in lieu of all holiday accrued during the period ended 20 May 2016.

129. As at the effective date of termination of the Claimant's employment her gross salary was £84,895 per annum which, after deduction of PAYE tax and Employee National Insurance Contributions, amounted to a net take home pay of approximately £4,360 per calendar month. In addition she received the benefit of employer pension contributions equivalent to 10% of her gross salary.

130. During the course of the Claimant's employment with the Respondent she carried out consultancy work outwith that employment with the Respondent. That consultancy work has continued and has meant that since the effective date of termination the Claimant has had some income from a self-employed business but it was not income that she did not already have during the course of her employment with the Respondent.

131. During the period which began on the day after the effective date of termination and ended on 10 August 2016 the Claimant had not otherwise

been in receipt of any income from employment or from a self-employed business carried on by her.

132. During the period which began on the day after the effective date of termination and ended on 10 August 2016 the Claimant had made little or no attempts to find alternative work and she had not either registered as a Jobseeker or received any Jobseeker's Allowance.

133. In addition to her salary and to the employer pension contributions that the Claimant received as part of her overall remuneration package the Respondent paid her £45 per calendar month as a contribution towards the cost of her mobile phone contract and call charges.

134. As part of the overall expense of bringing her claim to the stage of Final Hearing the Claimant has paid Employment Tribunal fees totalling £1,200.

135. Throughout the period from date of presentation of the ET1 until the date before the first day of the Final Hearing the Claimant had been represented by solicitors although she was not represented at the Final Hearing itself.

The Issues

136. The Tribunal identified the issues which it considered to be relevant to the Claimant's complaint that she had been unfairly (constructively) dismissed contrary to the provisions of the Employment Rights Act 1996 as being whether the Claimant terminated the contract under which she was employed in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct, all as envisaged by section 95 of that Act and, if so, whether such (constructive) dismissal was fair or unfair in terms of section 98 of that Act, an issue the determination of which requires consideration of, -

- Whether the Respondent was in breach of its contract of employment with the Claimant.

- Whether such breach was repudiatory, i.e. went to the root of the contract of employment between the Respondent and the Claimant and justified the Claimant's termination of the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

- Whether the Claimant's resignation from her employment with the Respondent was a direct result of that repudiatory breach.

- Whether the Claimant resigned timeously or whether she waived such repudiatory breach by delaying in resigning.

- Whether, if the Claimant's resignation from her employment with notice was justified, i.e. was effected in circumstances in which she was entitled to terminate her employment without notice by reason of the Respondent's conduct, that constructive dismissal was unfair.

137. The Tribunal identified the issues which it considered to be relevant to the Claimant's complaints that she was owed both notice pay and pay in lieu of any holiday which had accrued at any time after the effective date of termination – (20 May 2016) – as being an integral part of any assessment of compensation.

138. The Tribunal identified the issues which it considered to be relevant to the Claimant's, *esto*, complaint that the Respondent had breached its contract with her and in so doing had wrongfully dismissed her as being whether the Respondent had wrongfully and in breach of contract summarily terminated the Claimant's Contract by virtue of repudiatory conduct culminating in the 18 May 2016 09:02 email resulting in the Claimant having no alternative but to immediately rescind the Contract.

<u>The Relevant Law</u>

139. **(a) Legislation and Codes**

- The Employment Rights Act 1996, particularly Sections 95 and 98.

(b) Case Law

- Western Excavating (ECC) Limited v Sharp, 1978 IRLR 27.
- Omilaju v Waltham Forest London Borough Council, 2005 ICR 481, CA.
- Walker v Josiah Wedgwood & Sons Limited, 1978 IRLR 105.
- Nottinghamshire County Council v Meikle, 2004 IRLR 703.
- Jones v F Sirl & Son (Furnishers) Limited, 1997 IRLR 493.

Discussion

140. The Tribunal considers that it is not necessary within this Judgment to paraphrase or even summarise the evidence that was obtained over the course of the Final Hearing on the merits of the Claimant's claims, especially so when what it considers it to be the relevant Findings in Fact have been set out in such detail earlier in this Judgment, but that it is appropriate to add some explanation to the Findings in Fact so set out by making reference to some of the oral evidence, to some of the productions and to some of the closing submissions made by, respectively, the Claimant and the Respondent's representative and, by doing so, to put the Findings in Fact relevant to each aspect of the Claimant's claim into context when applying the relevant law to that element of the Claimant's claim.

141. Section 95 of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") – states that,-

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if) –
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) he is employed under a contract for a fixed term and that term expires without being renewed under the same contract, or
>
> [(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
>
> (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 Respondent's conduct.

142. The Claimant resigned from her employment with the Respondent. In fact, she resigned twice. She resigned for the first time when she sent the First Resignation letter to the Respondent on 10 February 2016, an unequivocal and unambiguous resignation letter which, if not superseded by the second resignation, would have seen the Claimant's employment ending on 10 August 2016. She resigned for the second time when she e-mailed the Second Resignation letter to the Respondent on 20 May 2016, a letter which, once read by the Chairman on 20 May 2016, had the effect of ending the Claimant's employment with the Respondent that day.

143. Which begs the question of how and on what legal basis the Claimant could have resigned for the second time when she had already resigned for the

first time and was working out her notice period in respect of her earlier resignation.

144. The Tribunal was satisfied from consideration of the relevant authorities that it is competent – (and far from rare) - for an employer to dismiss an employee who is otherwise serving out a period of notice and that it is extremely common for such dismissal during a period of notice to be summary dismissal. That is a strategy which, once applied by an employer, has the combined effects of accelerating the effective date of termination of employment and of foreshortening a period of continuous employment.

145. But what happened in this case is that it was the Claimant herself who, by tendering the Second Resignation letter, acted to foreshorten the period of notice that was already running in terms of the First Resignation letter.

146. To put it another way, having given the Respondent notice in the First Resignation letter that her employment would end on 10 August 2016 the Claimant herself, during that First Resignation letter period of notice, tendered the Second Resignation letter in terms of which the Second Resignation took effect on 20 May 2016. It was her choice to do so, but by exercising her choice she ensured that the effective date of termination of her employment was 20 May 2016 and not, as anticipated in the First Resignation letter, some three months later on 10 August 2016.

147. The words used by the Claimant in the Second Resignation letter were unequivocal, unambiguous and, in the finding of the Tribunal, genuinely understood by the Chairman, Mr Thomson, at face value, i.e. as constituting intimation by the Claimant to the Respondent on 20 May 2016 that she was resigning on and as of that date.

148. Clearly, the Claimant did resign twice and whether or not the Second Resignation should be considered by the Tribunal to be constructive

dismissal it was within the Claimant's own hands to decide to do so and thereby to bring her employment to an end on 20 May 2016.

149. The Claimant claims that she has been unfairly (constructively) dismissed by the Respondent.

150. For her claim of unfair (constructive) dismissal to succeed the Claimant must prove a fundamental or repudiatory breach of the employment contract by the Respondent.

151. Section 95 of ERA 1996 envisages a situation where an employee terminates the contract under which she or he was employed, with or without notice, in circumstances in which she or he is entitled to terminate it without notice by reason of the employer's conduct. Section 95(1) of ERA 1996 makes it clear that if an employee terminates the contract under which she or he is employed (with or without notice) in circumstances in which she or he is entitled to terminate it without notice by reason of the employer's conduct that self-determination, that resignation, is dismissal. And there is no doubt that if in such a circumstance the contract is terminated without notice it is summary dismissal.

152. The crucial question is whether the Claimant terminated the contract under which she was employed in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

153. The Claimant has sought to demonstrate that she did, to discharge that onus of showing that she was entitled to terminate the contract under which she was employed without notice in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct, by referring in her evidence to her contention that over a period prior to 20 May 2016 the Respondent had perpetrated a series of repudiatory breaches of fundamental terms of its contract of employment with her and by referring repeatedly to the "final straw" which, she has consistently insisted, was the fact, content and – (not least so far as she

was concerned) – timing of the e-mail sent by Mr Thomson to her at 09:02 on 18 May 2016.

154. When considering a claim of unfair constructive dismissal an Employment Tribunal must decide whether there has been a breach by the employer of its employee's contract and, if so, whether that breach was fundamental because, as it was explained by Lord Denning in the case of **Western Excavating Limited v Sharp**, it is only "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract" that "the employee is entitled to treat himself as discharged from any further performance" by terminating the contract "by reason of the employer's conduct".

155. Which begs the question of what constitutes a fundamental breach of contract on the part of the employer.

156. The Tribunal has borne it in mind that whether a breach of contract by an employer is fundamental is a question of fact and degree and that, as in this case, it is for the Employment Tribunal to make that decision based on the evidence that it hears at a Final Hearing.

157. The Tribunal has borne it in mind, too, that a key factor which it has to take into account when deciding if any breach is fundamental is the effect that the breach has on the employee concerned, in this case the Claimant, who, prior to tendering the Second Resignation letter, was already working out a period of notice triggered by the tendering of the First Resignation letter and who was by then not expected by the Respondent to be doing much, if any, work as its CEO other than to be available to it, at her home, if needed.

158. It is accepted law that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" or "final straw" incident even although the last straw by itself does not amount to a breach of contract. But

it is also accepted law that the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.

159. The Claimant has told the Tribunal that her perception had been, and still is, that until, at the earliest, 10 February 2016 – (when the First Resignation letter was tendered) - the relationship between her and the Respondent, including the relationships between her and the Respondent's Directors, was "very good". In which case the Tribunal is satisfied that nothing that the Respondent, as the Claimant's employer, had done or failed to do in its actings with her as its employee prior to 10 February 2016 can be regarded by it, the Tribunal, as having been a repudiatory breach of a fundamental term of the Claimant's Contract which she, the Claimant, accepted.

160. In her evidence the Claimant instanced a variety of actions on the part of the Respondent which, she argued, were breaches of fundamental terms of her contract, each of them, she contended, being a breach of the implied term of trust and confidence which is a fundamental term of any contract of employment. She instanced,-

- That at that meeting with Mr Thomson on 16 February 2016 the Respondent was breaching the term of trust and confidence which was implicit within her contract of employment with it by effectively excluding her from the respondent's office premise and, as she saw it, putting her in a position where other members of the Respondent's staff would "infer" that she had been guilty of some type of misconduct.

- That the terms of that e-mail sent by Mr Thomson at 19:16 on 25 February was being evidence that "my position was being undermined at that point" by the Respondent.

- That the 08:08 e-mail on 26 February 2016 evidenced the Respondent's intention to undermine both her status as the Respondent's CEO and also, as she saw it, "my position with the

European Commission" and amounted to a further breach of the implied term of trust and confidence which was implicit within her contract of employment with the Respondent.

- That being removed from office as a Director at the Board Meeting on 8 March 2016 by her fellow Directors was a repudiatory breach by the Respondent which went to the heart of her contract.

- That being voted off the Board resulted in her employment as the Respondent's CEO becoming untenable.

- That the 9 March e-mail placed her in a position where, without daily access to bank account information, what she could do as CEO was being curtailed, that her "whole CEO financial function had been removed" and that "at that point my role became untenable".

- That diversion of her business e-mails further evidenced the Respondent's intention to breach the terms of her contract of employment with it, a contract which included, as part of the wording of the Claimant's Contract, the statement that "as part of your duties you will be granted access to AvantiCell Science Ltd computing facilities, including the use of e-mail and internet systems."

- That if a report had been made to the European Commission – (in the terms that by 09:49 on 18 May 2016 she had perceived such a report was to be made to the European Commission) - the making of such a report would have damaged her professional reputation with the European Commission "who manage huge budgets and with whom I hoped to work in the future".

161. The Tribunal has borne it in mind that when presenting her case at its Final Hearing the Claimant admitted, indeed volunteered, to the Tribunal that she did not regard any act or omission on the part of the Respondent which occurred at any time prior to 8 March 2016 as being an act or omission

which irreparably broke the terms of her contract of employment. She told the Tribunal that in her view any such acts or omissions were "not irreparable at this juncture". In which case the Tribunal is satisfied not only that nothing that the Respondent, as the Claimant's employer, had done or failed to do in its actings with her as its employee prior to 10 February 2016 can be regarded by it, the Tribunal, as having been a repudiatory breach of a fundamental term of contract which she accepted but also that nothing that the Respondent had done or failed to do at any time during the period which began on 10 February 2016 and continued up to and including 7 March 2016 can be regarded by it as having been a repudiatory breach which she accepted.

162. Which leaves it open to the Tribunal to consider whether the alleged repudiatory breaches on which the Claimant does seek to rely – (breaches, including the "final straw" breach, alleged to have been perpetrated by the Respondent after 7 March 2016) – amounted to conduct on the part of the Respondent which entitled the Claimant to terminate the contract under which she was employed without notice in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

163. Looking at these, post-7-March, alleged breaches chronologically, -

164. So far as the events of 8 March were concerned these centred round the Board's decision to remove the Claimant from office as a Director of the Respondent company.

165. The Claimant has alleged that when she was removed from office as a Director at the Board Meeting on 8 March 2016 that act by her fellow Directors was a repudiatory breach by the Respondent which went to the heart of her contract and that being voted off the Board resulted in her employment as the Respondent's CEO becoming untenable. But in terms

of the Claimant's Contract there was no linkage, no inter-dependency, between the Claimant's employment by the Respondent as its CEO and the Claimant's holding of office as a Director of the Respondent company. None at all. Nor do the Articles require that any of the Respondent's employees, even its CEO, must be a Director or that any Director must be an employee. Not at all.

166. The Tribunal was satisfied that in terms of the Articles the Claimant's then fellow Board members were entitled to remove her from office as a Director of the Respondent company when they did. She was not an Investor Director who might have had protection from such removal. Nor was she an Investor Shareholder who might have had the right to immediately re-appoint herself to the Board.

167. In the view of the Tribunal the Claimant, in her capacity as an employee of the Respondent, did not suffer any significant detriment by being removed from office as a Director of the Respondent company. She undoubtedly felt aggrieved that she had been voted off the Board, but that is another matter.

168. In the view of the Tribunal the decision taken by the Claimant's then fellow Directors to vote her off the Board did not amount to a breach of any term of the Claimant's Contract of employment.

169. The Tribunal has considered whether, if not in itself a breach of a fundamental term of the Claimant's Contract, the Board's act of removing the Claimant from office as a Director of the Respondent company might have had a consequence which in itself amounted to a repudiatory breach of a term of her contract.

170. The Tribunal can envisage a circumstance where an employee enjoys a status, even status as a Director of a company, which confers the right to see or be advised of, for example, financial information which any normal employee might not be privy to. It can also envisage a situation where denial of that right might so affect the employee's ability to do his or her job

that it might well amount to a repudiatory breach which might trigger application of Section 95(1)(c) of ERA 1996. But in this case, by the time that the Board removed the Claimant from office as a Director of the Respondent company, the Claimant had already tendered the First Resignation letter, had had detailed discussions – (even if not, from her point of view, satisfying discussions) - with fellow Directors about what would happen during the contractual six months' period of notice and she was working out her notice. She was already working solely from home and knew that that was what the Respondent required her to do. She knew that she was expected by the Respondent to be handing over responsibilities. And she was still being paid full salary by the Respondent even although she was not just permitted by the Respondent to do less and less work but was being expected by the Respondent to do less and less work. All this as part of the winding-down arrangements that had been discussed at the January 2016 meetings previously referred to and then decided upon by the Respondent once she had, of her own volition and at a time of her own choice, tendered the First Resignation letter.

171. In the view of the Tribunal there was no consequence flowing from the decision taken by the Claimant's then fellow Directors to vote her off the Board which, in itself, amounted to a fundamental breach of any term of the Claimant's Contract of employment.

172. What happened on 9 March was also instanced by the Respondent as being a repudiatory breach of her contract.

173. The Claimant received an e-mail from Ms Garland at 07:50 on 9 March 2016 which advised her that she, Ms Garland, was "not to e-mail you the bank balance any more." Ms Garland did not disclose in that e-mail whether she had been instructed by the Respondent not to e-mail bank information to the Claimant but it is reasonable to assume that that was the case. Nor did she say who it was who had instructed her to stop sending bank balances to the Claimant or to e-mail the Claimant as she did. Mr Thomson denies knowledge of either such an instruction being given or of

such an e-mail being authorised but he has explained to the Tribunal that as part of the expected handover/transition process the Claimant had been expected to give more and more responsibility to the Respondent's Finance Officer, Ms Young and that the Respondent certainly expected that by 9 March 2016 there was simply no need for the Claimant to be sent bank balances on a daily basis; indeed, that for the Claimant to be maintaining at that level of financial awareness and control was preventing a successful handover/transition.

174. In the view of the Tribunal, for whatever reason the Claimant was deemed by the Respondent to be a person to whom bank balances should not be sent on a daily basis that decision by the Respondent did not, at that period-of-notice, transition, time amount to a repudiatory breach of a fundamental term of the Claimant's contract of employment.

175. The claimant has relied on the e-mail sent to her by Ms Young on 21 April 2016 in which Ms Young told the Claimant that "any e-mails sent to you @ jo.oliver@avanticell.com will now be re-directed to the main office..".

176. The Claimant has argued that that redirecting her incoming business emails was a repudiatory breach of the implied term of trust and confidence. The Tribunal does not agree. The Tribunal noted that the Claimant had a right in terms of the Claimant's Contract to access the Respondent's computer systems, including its e-mail system, but it has never been argued by the Claimant that she was denied that access. What happened, and what the Claimant took exception to, was that her incoming business e-mails were redirected so that another member of the Respondent's staff could deal with them. The Tribunal believes that it was entirely reasonable for the Respondent, an employer intent on achieving a smooth transfer of power and transition, to take steps to ensure that any business e-mails which the Claimant might otherwise have been sent would be re-directed so that they might be dealt with by her successor or successors.

177. The Tribunal realises that receipt of such an e-mail giving intimation that business e-mails would be re-directed to someone else within the Respondent's main office might have upset the Claimant. But in the view of the Tribunal hurt feelings do not equate to an act on the part of the Respondent amounting to a repudiatory breach.

178. Nor does the Tribunal accept that the sending, as such, of that email was a repudiatory breach.

179. 28 April 2016 was a significant day. Indisputably so.

180. The Tribunal was left in no doubt that certainly until the stage when the First Resignation letter was tendered to it the Respondent, in the form of, particularly, its Chairman, Mr Thomson, had tried to persuade the Claimant not to resign from her employment. It is equally clear, however, that after the First Resignation letter had been tendered, and as time progressed, the Respondent became keener and keener to achieve the transition and the transfer of CEO powers from the Claimant as quickly as possible without, in the process, harming its business or its relationships with its partners or customers. What has clouded the issue is that at a stage even after the Respondent had devised a strategy to achieve a transition, a handover of authority, sooner rather than later, and even at a stage after the Claimant's fellow Directors has decided that it was in the best interests of the Respondent company to remove her from office as a Director, the Respondent was alerted to matters which caused it to have concerns about matters which specifically – (if not exclusively) - involved the Claimant. Those concerns were set out in an e-mail that Mr Thomson sent to Dr Wilde and Mr Bishop on 16 February 2016, an email which had not been seen by the Claimant before she sent the Second Resignation letter and could not have contributed to her decision to resign without notice or to send the Second Resignation letter.

181. The Tribunal was in no doubt from the evidence that it heard that by the time the Suspension Letter was sent the Respondent was, at the very least,

entertaining the possibility of bringing the Claimant's active involvement in her role as its CEO to an end much sooner than the, then intended, end-stop date of 10 August 2016.

182. Following on from a telephone conversation that she had had with Mr Thomson earlier that day, the Claimant was sent the Suspension Letter. The Tribunal can understand why any employee, let alone a CEO, receiving such a Suspension Letter might be upset. But the Suspension Letter explained what the allegations that the Respondent felt had to be investigated were.

183. Given the Claimant's level of seniority within the Respondent's business the Tribunal finds it difficult to envisage what the Respondent could or should have done other than send such a letter as a follow-on from a direct, one-to-one, telephone discussion. In the view of the Tribunal there was, on the one hand, little – (if any) -detriment to the Claimant other than hurt feelings but it might be argued that, on the other hand, there was little benefit to the Respondent in suspending an employee whose duties were being phased down, who was expected to work primarily from home and not to attend at the Respondent's offices without prior agreement with Mr Thomson and who had, of her own accord and without ever being asked to do so, returned her keys to the office.

184. The Tribunal was not persuaded that the sending of the Suspension Letter was either intended to repudiate the Claimant's Contract of employment or could reasonably be interpreted as having had that effect.

185. The Tribunal realises that as in the case of redirection of incoming business e-mails – (but to an even greater extent) - receipt of the Suspension Letter must have upset the Claimant but it was satisfied that the issuing of the Suspension Letter was not, in itself, a repudiatory breach of a fundamental term of the Claimant's Contract which entitled her to terminate that contract without notice by reason of the Respondent's conduct.

186. Which, following the chronological order of the events instanced by the Claimant as repudiatory breaches, leads to the events of 17 and 18 May 2016.

187. The Claimant has made it very clear throughout the presentation of her case at the Final Hearing that the "final straw" on which she seeks to base her claim of unfair constructive dismissal was the fact, content and – (not least so far as she was concerned) – timing of the e-mail sent by Mr Thomson to her at 09:02 on 18 May 2016.

188. When issuing the Court of Appeal's Judgment in the case of **Omilaju v Waltham Forest London Borough Council** Lord Justice Dyson gave detailed guidance about what the necessary quality of a final straw is if it is to be successfully relied on by an employee as a repudiation of the contract. That guidance envisaged a situation where an employer stops short of a breach of contract but "squeezes out" an employee by making the employee's life so uncomfortable that he resigns and went on to explain that a final straw, not in itself a breach of contract, may result in a breach of the implied of term of trust and confidence but that the quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. It must contribute something to that breach, although what it adds may be relatively insignificant. When issuing the Court of Appeal's Judgment Lord Justice Dyson explained that there is no need to characterise the final straw as "unreasonable" or "blameworthy" conduct and that viewed in isolation the final straw may not always be unreasonable, still less blameworthy, but that the question is whether the final straw is or is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence.

189. The Claimant may genuinely have misinterpreted what Mr Thomson had been saying to her and asking of her over the period which began at 15:14 on 17 May and ended with the 09:02 e-mail on 18 May. The upsets caused to the Claimant within the previous month or so may by then have rendered

her susceptible to a feeling that the fact, content and timing of that 09:02 18 May e-mail had given her justification to bring her employment to an end sooner than might otherwise have been the case had she worked on – (or, more correctly, stayed at home not even working at all) – until the expiry of the period of notice set out in the First Resignation letter. Whatever misunderstanding there was, or whatever was in her mind, there is no doubt that within 47 minutes of receiving the 09:02 e-mail on 18 May the Claimant had decided both that she would resign from her employment and claim unfair constructive dismissal and that she would rely on the fact and content of that 09:02 18 May e-mail as being the "final straw" to be referred to in any Tribunal proceedings.

190. In the view of the Tribunal the Claimant read more into what that 09:02 18 May e-mail said than it was reasonable for her to do.

191. The e-mail chain on 17 and 18 May clearly referred to an enquiry having been received from a project co-ordinator and it could clearly be inferred- (and in the view of the Tribunal should have been inferred only) – from the e-mail chain that the person to whom Mr Thomson felt a need to report by noon on 18 May was the project co-ordinator, not the European Commission.

192. In the view of the Tribunal, read in context, what Mr Thomson said to the Claimant in the 17 and 18 May 2016 e-mail chain, even in the 09:02 18 May e-mail itself, was innocuous, certainly not a threat let alone the threat that the Claimant told the Tribunal she perceived.

193. In the finding of the Tribunal the view formed by the Claimant and her subsequent actions were unjustified and even if the Claimant genuinely, but mistakenly, interpreted the fact and content of such e-mails as hurtful and destructive of her trust and confidence in the Respondent it cannot be considered to have been a final straw justifying the Claimant's resignation and her contention that she was unfairly constructively dismissed.

194. In the determination of the Tribunal the fact and content - (or fact, content and timing) - of Mr Thomson's 09:02 e-mail to the Claimant on 18 May, whether read on its own or in conjunction with the other e-mails in the 17 and 18 May e-mail chain, could not reasonably be regarded by the Claimant as being a repudiatory breach by the Respondent of a fundamental term of her contract of employment but, as has been stated earlier in this Judgment, a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" or "final straw" incident even although the last straw by itself does not amount to a breach of contract, i.e. if the last straw has contributed to the breach of the implied term of trust and confidence. That said, however, the Tribunal was satisfied that none of the events instanced by the Claimant as occurring after 7 March 2016 was a repudiatory breach by the Respondent of a fundamental term of the Claimant's contract, not even the 09:02 18 May e-mail, and that that 09:02 18 May e-mail did not fall into the category of a "last straw" or "final straw" incident which, even although by itself not amounting to a breach of contract, contributed to any breach of the implied term of trust and confidence.

195. The Tribunal has borne it in mind, too, that it heard no evidence which even hinted at the possibility that the Claimant had raised any grievance at any time during the period after the First Resignation letter was tendered on 10 February 2016. Working backwards from 20 May, -

- The Claimant had not raised any grievance or even telephoned Mr Thomson at any time between 15:14 on 17 May and 09:02 on 18 May or at any time after 09:02 on 18 May, i.e. in respect of the fact and content of the e-mail chain referred to.

- The Claimant had not raised any grievance or even contacted Mr Thomson at all about the Suspension Letter.

- The Claimant had not raised any grievance or even contacted Mr Thomson at all about her e-mails being re-directed.

- The Claimant had not raised any grievance at all about being told that she was no longer to be provided with financial information on a daily basis.

All of which leads the Tribunal to form the belief that whatever the Claimant might have felt when tendering the Second Resignation letter so as to bring her employment with the Respondent to an end that day she had not expressed views to the Respondent during the currency of her employment that what they were doing to her, or failing to ensure was done in respect of her, amounted to any form of repudiatory breach of a fundamental term of her contract.

196. The Tribunal accepts that for a claimant to successfully prove unfair (constructive) dismissal she or he must prove that she or he left in response to a breach committed by the employer , the guidance given in the case of **Walker v Josiah Wedgwood & Sons Limited** being that, -

> "..it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves.. . And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him".

197. But since that decision in the case of **Walker v Josiah Wedgwood & Sons Limited** was handed down it has been established by the Court of Appeal in the case of **Nottinghamshire County Council v Meikle** and by the EAT in the case of **Jones v F Sirl & Son (Furnishers) Limited** that the repudiatory breach or breaches need not be the sole cause provided it or they is or are the effective cause.

198. The Respondent and the Respondent's representative have consistently denied that the real reason for the Claimant tendering the Second

Resignation letter was the fact or/and content or/and timing of the 09:02 18 May e-mail. The Respondent's representative contended in his closing submissions that even if the Claimant had genuinely, but mistakenly, interpreted that e-mail as a threat there was no legal basis on which the Claimant could rely upon it as being the final straw and in this context the Respondent's representative referred the Tribunal to the decision of the Court of Appeal in the case of **Omilaju v Waltham Forest London Borough Council** to which reference has been made earlier in this Judgment.

199. In that case of **Omilaju v Waltham Forest London Borough Council** guidance was given to Employment Tribunals that an entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. It reminded Tribunals that rather than being subjective in the mind of the employee the test of whether the employee's trust and confidence has been undermined is an objective test. The Tribunal has extended the guidance given by Lord Justice Dyson in that case about innocuous acts which might be interpreted by an employee as being hurtful and destructive of her or his trust and confidence in her or his employer to events referred to by the Claimant, events which the Tribunal has readily acknowledged would upset her but nevertheless fell short of being acts which were repudiatory breaches perpetrated by the Respondent. In this context the Tribunal refers back refers back to the post-7-March 2016 events instanced by the Claimant, i.e., -

- That being removed from office as a Director at the Board Meeting on 8 March 2016 by her fellow Directors was a repudiatory breach by the Respondent which went to the heart of her contract.

- That being voted off the Board resulted in her employment as the Respondent's CEO becoming untenable.

- That the 9 March e-mail placed her in a position where, without daily access to bank account information, what she could do as CEO was being curtailed, that her "whole CEO financial function had been removed" and that "at that point my role became untenable".

- That diversion of her business e-mails further evidenced the Respondent's intention to breach the terms of her contract of employment with it.

- That if a report had been made to the European Commission – (in the terms that by 09:49 on 18 May 2016 she had perceived such a report was to be made to the European Commission) - the making of such a report would have damaged her professional reputation with the European Commission "who manage huge budgets and with whom I hoped to work in the future".

All of which, even if regarded by the Claimant as being hurtful and destructive of her trust and confidence in the Respondent cannot, in the view of the Tribunal, reasonably be considered to have been repudiatory breaches of fundamental terms of the Claimant's contract of employment justifying her terminating the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

200. The Respondent's representative has suggested that the real reason why the Claimant resigned when she did by tendering the Second Resignation letter when she did was to avoid investigation and a finding of misconduct or gross misconduct after disciplinary process. The Tribunal cannot say whether that was what was in the Claimant's mind or not. The Tribunal heard enough evidence, even from the Claimant herself, to point it to the possibility that an alternative reason, if not the only alternative reason, for the Claimant resigning when she did on 20 May 2016 was an awareness on the part of the Claimant that if she stayed longer and was then was found to have been guilty of misconduct or gross misconduct, and was dismissed by

the Respondent because of it, she would be considered to be a "Bad Leaver" in terms of the Articles and that in itself would have had a very substantial and – (to her) – adverse impact on the value of the 14.1% "A Ordinary" Shareholding that she held in the Respondent company. But the Tribunal cannot determine, or find as fact, that that was the reason, or even a reason, why the Claimant tendered the Second Resignation letter when she did.

201. Whatever the reason for the Claimant acting as she did when resigning, without notice, by tendering the Second Resignation letter, the Tribunal was not satisfied that the Claimant resigned in response, at least in part, to fundamental breaches of contract by the Respondent. Nor was it satisfied that the Claimant had terminated the contract under which she was employed by the Respondent in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

202. The Tribunal has determined that the Claimant was not constructively dismissed by the Respondent, i.e. that she did not terminate the contract under which she was employed by the Respondent in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct. She voluntarily resigned from that employment on 20 May 2016.

203. That finding having been made by the Tribunal, it follows that there is no need for the Tribunal to determine whether any constructive dismissal, as envisaged by Section 95(1)(c) of ERA 1996, was fair or unfair in terms of Section 98 of that Act.

204. It follows that by voluntarily resigning from her employment on 20 May 2016 the Claimant forfeited any right to be given notice by the Respondent of termination of her employment and/or any right to receive what is frequently, colloquially, referred to as "payment in lieu of notice". It follows, too, that by voluntarily resigning from her employment when she did the Claimant forfeited the right to accrue holiday in respect of any period after 20 May

2016 or to receive payment in lieu of holiday accrued after that date. The Claimant's claims that she was owed notice pay and holiday pay by the Respondent have failed and are dismissed.

205. The ET1 included a claim of breach of contract and wrongful dismissal. Specifically, it contended that, "the Respondent wrongfully and in breach of contract summarily terminated the claimant's contract by virtue of repudiatory conduct culminating in the said e-mail of 18 May 2016 at 09:02 hours resulting in the Claimant having no alternative but to immediately rescind the Contract which she did by letter of 20 May 2016" and that "the Claimant was entitled to damages for breach of contract….". During the course of the Final Hearing the Claimant has argued, albeit on an *esto* basis, that even if she was not unfairly constructively dismissed she was nevertheless subjected to conduct by the Respondent which amounted to repudiatory breaches of her contract of employment and that by effecting such repudiatory breaches the Respondent breached the terms of its contract with her and wrongfully dismissed her.

206. This is an argument about which, or in respect of which, the Tribunal sought to obtain more information from the Claimant at various stages of the Final Hearing. When making such attempts it had become apparent to the Tribunal that the Claimant's argument was effectively a circular one, i.e. that whether or not she had been constructively dismissed in terms of Section 95(1)(c) of ERA 1996 – (and disregarding any follow-on consideration of whether any such constructive dismissal had been unfair in terms of Section 98 of ERA 1996) – the Respondent had nevertheless been guilty of repudiatory breaches of the Claimant's contract of employment, breaches which even if not justifying acclaim of constructive dismissal, as such, might nevertheless be considered by the Tribunal to be repudiatory breaches which allowed the Claimant to rescind her contract and to seek damages. The Tribunal was not persuaded that the Respondent had breached any fundamental term of the Claimant's contract of employment, was not convinced that the Respondent had wrongfully dismissed the Claimant and

was not convinced that because of any such breach, or any such wrongful dismissal, the Claimant was entitled to any of the breach of contract/wrongful dismissal remedies sought by her in the ET1 – (or in the Schedule of Loss submitted to the Tribunal in advance of the Final Hearing of her claim). To the contrary, the Tribunal has determined that the Claimant's, *esto*, claim that the Respondent breached its contract with her and wrongfully dismissed her has failed and is dismissed.

Employment Judge: CH Lucas
Date of Judgment: 03 April 2017
Entered in register: 04 April 2017
and copied to parties