



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON

**BETWEEN:**

**Mr M Foxwell**

**Claimant**

AND

**Ntrinsic Consulting Europe Limited**

**Respondent**

**ON:** 19-21 November 2018

**Appearances:**

**For the Claimant:** Mr L Godfrey, Counsel

**For the Respondent:** Mr J Susskind, Counsel

## **JUDGMENT**

1. The Claimant was not constructively dismissed by the Respondent. His claim of constructive unfair dismissal therefore fails and is dismissed.
2. The Claimant's claim for notice pay is dismissed. The Respondent did not breach the Claimant's contract of employment.
3. The Respondent's counterclaim is dismissed on withdrawal.

## Reasons

### Introduction

1. By a claim form presented on 19 December 2017 the Claimant brought to the tribunal claims of constructive unfair dismissal and breach of contract in relation to his notice period. The Respondent resisted the claims and brought a counter claim against the Claimant that it withdrew during the course of the hearing.
2. Over the three days of the hearing I heard evidence from the Claimant himself and from Keith Reilly on behalf of the Respondent. I was also given a witness statement written by Bruce Henderson, but as he did not attend the hearing to be cross examined I gave this little weight. Mr Chapman had prepared a statement in support of the Respondent's counter-claim, but as this was dropped there was no need for me to hear his evidence. All the witnesses had prepared statements which I read before hearing the evidence.
3. There was a bundle of documents of 248 pages. References to page numbers in this judgment are references to page numbers in that bundle.

### The issues

4. The issues for the hearing were those that arise in a claim of constructive unfair dismissal. I will deal with the legal test below.
5. The matters on which the Claimant relied in resigning from his employment are set out in his resignation letter (page 157-8) which in turn refers to an letter attached to an email sent to his co-directors on 25 April 2017 (page 143-4). That letter set out the following concerns:

**“I wanted to send an email after various telephone conversations and meetings recently with Keith.**

- **The facts are that I have been left isolated from the day to day sales environment in working from the current location. This has left me demoralised, unhappy and far less driven and motivated than I would have been in a busy sales team environment.**
- **Keith left a message saying that 'things were not working out' on 20 March by phone, but this has not been qualified or explained, despite my asking.**
- **The idea of building a sales team, which was suggested by Keith on 11 April by phone, is clearly predicated on at least a reasonable business flow and prospects, which has been undermined by isolation and therefore not feasible.**
- **The lack of invitation from the Japanese hosted 'group' sales meeting and subsequent social event on November 2nd 2016 was another indicator of the exclusion from company activities. Indeed I had to ask on a number of occasions over a period of four months why the exclusion had occurred in the first place without any explanation until recently. The explanation was that the senior Japanese management did not want a discontented person attending, and that the numbers attending were limited by senior Japanese management. These are not reasonable justifications, and add to the feelings of isolation and**

discontentment.

- Following the November meeting there was also a Christmas party to which I received an invitation only after Bruce Henderson asked me if I had been invited and he had arranged his and Zoe Henderson's transport for it.
- Finally I was perplexed that I was not involved in the decision to recruit Robin Miller who was an extremely senior recruiter dealing with numerous clients in the Oracle space (some the same as mine) and who therefore has a major influence over the direction of the company."

6. The Claimant also referred in his resignation letter (page 157) to:
  - a. The fact that Mr Reilly's response to the letter of 25 April had not addressed his concerns;
  - b. The unsatisfactory nature of his meeting with James Parker on 17 May 2017; and
  - c. His conviction that his grievances had not been and were not going to be addressed which he characterised as a "fundamental breach of the implied term of trust and confidence" which had brought about his resignation.
7. The Claimant also maintained that because he resigned in response to what he considered to be breaches of contract by the Respondent he was entitled to damages for breach of contract arising from the termination of his employment before the end of his notice period.

### The law

8. The parties were agreed that this was a constructive dismissal case and that the tribunal's jurisdiction arose from s95(1)(c) Employment Rights Act 1996 which provides:

**95 Circumstances in which an employee is dismissed.**

**(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) F1 . . . , only if)—**

.....

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

9. The case of ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***, sets out the relevant test for establishing a constructive dismissal as follows: "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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed." In ***Malik v Bank of Credit and Commerce International SA [1998] AC 20*** the concept of constructive dismissal was considered in relation the implied term of trust and confidence, a breach of which will ordinarily amount to a repudiatory breach of the employment contract.

10. More recently, in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal set out five questions that it said it should be sufficient to ask in order to determine whether an employee has been constructively dismissed in a case in which a series of alleged breaches are relied upon.
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
  - b. Has he or she affirmed the contract since that act?
  - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
  - d. If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju [2004] EWCA Civ 1493***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
  - e. Did the employee resign in response (or partly in response) to that breach?
11. The fact that other contractual arrangements between the parties were in force at the time via a shareholders' agreement and that duties of a fiduciary nature arose out of that agreement and were owed by the parties to the company in their capacity as directors, does not affect my reasoning in relation to the legal relationship between the Claimant and Respondent as employee and employer and how that relationship came to an end. In a constructive dismissal case I must make findings as to whether the Respondent committed a fundamental breach or breaches of the express or implied terms of the Claimant's employment contract, whether the Claimant resigned in response to such a breach or a series of them and if so, whether he delayed too long in doing so. In relation to the question of delay and potential waiver of breaches, there may also be the question of whether there was a "last straw" event that revived earlier breaches that had previously been waived. However the other relationships that existed between the parties provide the context for the facts in the case and explain some of the parties' actions. The Claimant was not in a subordinate position in his relationship with the Respondent. He was a director and a key player in the business.

### **Findings of fact and conclusions**

12. Based on the witness and documentary evidence I make the following findings of fact and reach the following conclusions on the issues I was required to decide. Where facts were in dispute the facts are what I consider to have been the most probable on the evidence available to me. I have found

that given the nature of the claim it was preferable not to separate my findings of fact from my conclusions and in relation to each point the Claimant relied on I have set out my conclusion as to whether there has been a fundamental breach of contract. I have also considered the matters the Claimant relied on in resigning in chronological order rather than the order in which he referred to them in the letter of 25 April 2017.

13. The Claimant was employed by the Respondent from formation of the company on 1 November 2011 until his employment terminated on 28 August 2017. He had given notice of termination on 5 June 2017.
14. The Respondent is a recruitment company specialising in IT and in particular individuals with expertise in Oracle products. It places individuals for temporary and permanent roles. It was common ground that the company was founded in 2004 by the Claimant and James Parker together with Keith Reilly who took on a role as operations manager. Kieran Kelly joined in 2005. The company operated mainly out of Brussels, where James and Kieran were based and Brighton where the Claimant was based. All four were directors and shareholders. No one individual had a majority of the shares and no individual was treated at any time as having authority over the others or a final say. No-one carried the title of managing director. Keith Reilly's role changed in 2008 and he adopted the title of non-executive chairman. He acted as a go-between between the sales directors, the Claimant, James Parker and Kieran Kelly and chaired board meetings, which were not frequent. In general the parties' interests were well aligned for about ten years and the company was successful.
15. At the time of the matters giving rise to the dispute the Claimant was working in the Brighton office with Bruce Henderson, a sales manager and Zoe Fortune, described as a "resourcer", with whom Bruce soon formed a romantic relationship. The Claimant found that awkward and he did not like working in a small office with two people who were romantically attached.
16. In 2014 the directors decided to seek a buyer for the company. On 25 August 2015 65% of the equity was sold to a Japanese investor, OSI. All the shareholders stood to receive significant sums from the sale.
17. Prior to the sale taking place there was a meeting in Brussels between James, Keith and the Claimant. During a break Keith told the Claimant that James was not willing to go ahead with the sale to OSI unless he received a lump sum payment of £155,000 from the other directors, so as to increase his earnings from the sale. Kieran and Keith were only prepared to pay £30,000 and £25,000 respectively and if the deal were to go ahead the Claimant would have to find the balance of £100,000. This took the Claimant by surprise. In his submissions Mr Godfrey said that the Claimant felt that he had no choice but to agree. It is not clear to me why he felt that. The Claimant unsuccessfully applied to amend his claim on the second day of the hearing to include the terms of this transaction as part of his constructive dismissal claim. I refused the application for reasons given orally at the hearing, namely that the Respondent was being ambushed by an application that should have

- been made at a much earlier stage (the Claimant having been represented throughout the proceedings) and not having come prepared to deal with it.
18. Nevertheless I find as a fact that the transaction marked a turning point in the Claimant's relationship with the Respondent and that matters began to deteriorate from that point onwards. Although I am not required to determine whether the manner in which the proposal was put to the Claimant or the outcome of the discussion involved a breach of the Claimant's contract, I find that the Claimant was prevailed upon to agree to what was on the face of it an inequitable arrangement. This may have been a consequence of what Mr Godfrey described as the Claimant's generally co-operative nature and dislike of confrontation. It may be that that nature was taken advantage of on that occasion by the Claimant's fellow directors. I make no finding on that as I do not need to do so, but I will observe that the fact that a person who is not in an unequal bargaining position is prevailed upon to do a deal that they afterwards regret having agreed to, there is in my judgment unlikely to have been a breach of the implied term of trust and confidence, in the absence of any improper pressure, misrepresentation or other wrongdoing by the other parties.
19. The Claimant did come to feel resentful about what he had agreed to however as he sought to change his mind two months later on 12 August when he emailed Keith to that effect. Keith's response was at page 47 and the tone is one of exasperation. As there had been a great deal of work being done to bring the sale into effect that is not surprising. The Claimant did not push the point and agreed to pay the extra money. It is clear that there was a risk that the sale to OSI would be lost if he had not done so. I find on a balance of probabilities that the Claimant was also concerned about potentially losing his share of the sale proceeds (£1.4 million after the payment to James). The Claimant undertook a calculation of the risks involved and decided that he would be better off protecting the sale and his share of the proceeds of it. Nevertheless he continued to feel resentful at what he perceived to have been inequitable treatment on the part of his co-directors and shareholders.
20. The matters on which the Claimant relies as representing breaches of his contract leading to his decision to resign (as set out in the letter of 25 April 2017) began in April 2016 when Bruce Henderson resigned to take a job elsewhere. His reasons for doing so were explained some time later in an email to the Claimant at page 138 (set out in the next paragraph) and included that fact that the Claimant had become negative and lost his focus and that Bruce was significantly outperforming him in terms of sales. The sales figures set out on page 207 make this quite clear – the Claimant's sales had declined from 18 in 2012 to 3 in 2016. Bruce's sales on the other hand had increased from 4 in 2015 to 9 in 2016. The Claimant welcomed Bruce's potential departure and thought it would relieve the difficult atmosphere in the office, but given his good sales record and value to the business, in fact Bruce was prevailed upon to stay, but with new working arrangements put in place. Instead of reporting to the Claimant Bruce would report to James. The Claimant would also move into a new smaller office away from Bruce.

21. The Claimant relies on two matters as representing breaches of his contract: the loss of his sales team at that point and his removal to a smaller office where he would work in isolation from the others. In relation to the second point Mr Reilly himself acknowledged that carrying out a sales job whilst in isolation from a team is difficult, but it is necessary to see the issue and the new arrangements in context, namely that the Claimant's sales had been steadily declining (as noted in the previous paragraph) and although Mr Henderson's evidence was not tested in the tribunal, the document at page 138 carries some weight as an account of the Claimant's growing disaffection. The document was an email written by Mr Henderson on 12 January 2017, some months after the situation had begun to deteriorate, but well before the Claimant's resignation. The Claimant emailed him, seemingly in the wake of a conversation between the two of them saying "Good to talk yesterday...Just a thought after it - I was told that you didn't want me in the office last year when things changed? Mr Henderson replied:

**"I would like to answer ...**

**I think it was more that two people managing would not be ideal.**

**I'm sure we had that conversation.**

**From a business point of view you have lost your focus/desire ... quite negative, went missing etc etc for whatever reason ... also lost the desire to recruit and drive it forward. I have the desire to recruit and drive it forward but it is not happening fast enough for me at the moment as we talked about ...**

**All water under the bridge and we have been over this many times ...**

**It seems pretty clear to me.**

**I resigned, if I went Zoe would too which would leave you alone in Brighton. On past 18 months to two years your performance was way below mine so the business answer was to retain myself and Zoe and stop us leaving. It was felt that if we went that would be the end of Brighton ... on your previous performance.**

**It would not work you working for me (I'm certain you would not answer to me) as such so the decision was made ... quite amicable and with an understanding of the situation I was led to believe. It's pretty black and white really, are you still looking for answers? Be straight with me, what is it??**

**I will try and answer."**

22. The Claimant does not deny that he was becoming disaffected at the time referred to in that email, but he does point to a series of very difficult challenges in his personal life as having contributed to his lack of focus at work. In his witness statement at paragraph 37 he said that his colleagues were aware of his predicament but when I asked Mr Godfrey to remind me of the evidence that showed that the Claimant had raised these issues with the Respondent at the time he conceded that the Claimant had not specifically done so. The Claimant was upset that Mr Reilly had not enquired about his welfare after his mother in law, to whom he was very close, had died, but that seems to me a very different matter from complaining that having pointed to his personal difficulties as an explanation for his declining performance that the Respondent did not respond appropriately or make allowances. It is not the Claimant's case that he told his colleagues about his personal difficulties and as a result those difficulties had in my view limited relevance to the discussions that were taking place with his colleagues at the time.

23. In fact contrary to asking the Respondent to make allowances for him the

Claimant participated in putting the new arrangements in place by talking to Mr Henderson about what might persuade him to stay and going to look for new premises (pages 82-84). He also, crucially in my view, agreed that his own contractual terms would vary (beneficially) in consideration of his agreeing to the new arrangements. Page 85 sets out what was agreed with Mr Reilly on 26 April 2016: 35% PSC (an increase from 20%) and a 10% override on lead/candidate referrals plus Team Sales Commission payable until the end of Q2. Mr Godfrey sought to persuade me that the Respondent did not plead in its Grounds of Resistance that there had at this point been a consensual variation of the Claimant's contract, but I respectfully disagree. It is clear that that is what the Respondent is pleading in paragraph 3 of the Grounds and it does not matter that the words 'variation' or 'consideration' do not appear. The substance is clear – the Claimant negotiated a favourable enhancement to his earnings in exchange for agreeing to relocate to a different office and losing his team to James. Again I think it more likely than not that the Claimant calculated that the value of his shareholding in the Company would be better protected by that course of action than by digging his heels in. The fact that his negotiating position was not stronger than it was not attributable to any breach of his contract of employment on the part of the Respondent. It seems to me to have been primarily a function of his decline in performance, which the Claimant himself attributes principally to matters that were outside the Respondent's control, namely events in his personal life. I note also that there was a relocation clause in the Claimant's contract of employment and whilst such clauses must always be operated consistently with the implied term, in this instance, where the terms of the relocation were agreed, and the Claimant did not protest about them at the time there would have been no breach of contract involved in relying on the clause.

24. I therefore find as a fact that the Claimant was not correct to say that his sales team was removed and he was relocated to another office in a manner that amounted to breaches of the implied term. The business evolved in a particular way in response to Bruce's resignation, which presented a problem that needed to be solved. The Claimant was actively involved in reaching the solution that was eventually decided upon and there was no breach of his employment contract on the part of the Respondent on that issue. The Claimant may not have liked the position he was in and the fact that this meant that he had to make compromises for the sake of the business, or the fact that because his sales performance had declined he was in no position to impose his will, but that state of affairs did not arise from breaches of his contract on the part of the Respondent. The same applies to the office relocation.

25. The Claimant moved into the new offices in Maritime House in May 2016 and remained working there until his resignation in June 2017. The Respondent paid the rent. From that point onwards the Claimant became more disaffected rather than less. On 1 June 2016 he wrote to Keith (page 94), describing his position as untenable and seeking an agreement that he leave the Respondent on agreed terms:

“Hello,



I have found myself in an untenable position as a result of recent decisions being made in relation to the sales function of the company without any reference to me as a director of my views. I was aware that Bruce had resigned. I was not formally consulted about seeking to keep him at the business and was most shocked to be advised that he would be running the sales function from the Hove office. This meant that I was removed from the Hove office and told to find alternative office space. I am a director and shareholder and yet decisions are being made which should be at board level with my input and not behind my back. This is seriously undermining my position.

I would be prepared, as it is clear that I am no longer wanted in the business, to agree to a termination of my employment, to resign as a director and to sell my shareholding providing terms can be agreed.

I look forward to hearing from you in this regard in the hope that we can conclude issues amicably rather than my having to resort to the legal options available to me in view of the above conduct.

Regards

Mark Foxwell”

26. I find the terms of that letter to be disingenuous given my findings of fact above – it was not the case that decisions had been made without any reference to the Claimant. It may have been the case that Bruce was spoken to by James and Keith before the Claimant spoke to him but I also find as a fact that the Claimant was consulted by Keith as to the arrangements that should be put in place in order to keep Bruce and that the Claimant agreed to them because he could see that that was where his own best interests lay. It was inaccurate to say that he had been told to find alternative office space. I find as a fact that this was a matter that was discussed with the Claimant and not imposed on him and as I have noted, he actively participated in making the arrangements. This letter was also I find the Claimant’s opening gambit in his attempt, ultimately unsuccessful, to negotiate his departure from the business on favourable terms.
27. Mr Reilly wrote a long email in response at page 95 refuting in clear terms the Claimant’s suggestion that he was no longer wanted in the business and setting out the detailed facts of the discussion leading to the new working arrangements. It was the Claimant’s case that this communication and other similar ones that followed lacked sincerity and that the Respondent was saying one thing on paper but doing something else in reality. I find no evidence that this was in fact the case – the Claimant was not achieving all that he wanted in his negotiations with his colleagues because his bargaining position had been weakened by his declining sales performance. But the declining performance does not automatically mean and I find that in this case it did not mean that the Respondent wanted him to leave, was isolating him, trying to force him out or making his position untenable. That may have been the Claimant’s perception, but I find that it is not borne out by the facts. On the contrary I find that Keith’s email expresses a sincere desire that the Claimant remain a part of the company after a long and hitherto fruitful working relationship. The Claimant provided no evidence other than his own oral evidence of his perception of the situation, to back up his assertion that Mr Reilly’s email was not sincerely meant.
28. The crux of the difficulty between the parties at this point was that the

Respondent wanted the Claimant to improve his sales figures before it would invest in new staff for the Claimant's team and the Claimant's point was that working alone was demoralising and he could not improve his figures without the support of a team. This was ultimately a difference of perception about what was likely to lead to success –the Respondent's view was clearly set out by Mr Reilly on page 96 where he says:

**“I am pleased that you have remained given the marketplace throughout this entire period and my view remains that you will have a great opportunity, without the distractions of a team (we always said we needed a lot of support from you) to build your contractor numbers and, with the benefit of a much enhanced commission scheme, generate a very significant personal income for the foreseeable future. Of course I am hopeful that should your contractor numbers grow sufficiently we can then discuss finding you some additional support too. The key point I want to remind you of here is that we want you to stay with Ntrinsic. We are not interested in entering into an agreement with you about your exiting the business as we just do not want you to leave and see absolutely no reason for you to leave, let alone for the company to pay you to do so.”**

29. The question for me is whether, by taking that approach the Respondent was in breach of the express or implied terms of the Claimant's contract, in some sense setting him up to fail. I find as a fact that there is nothing in the Respondent's approach that represents a breach of the Claimant's contract – it took a valid commercial standpoint, particularly given that it was taken in relation to a highly experienced and hitherto successful sales director. The tone of the communication at page 96 is entirely constructive and business-like and it points to an aspect of the arrangements put in place at the time that in my judgment fatally undermine the Claimant's case that he was being edged out of the business. That is the enhanced commission scheme that was clearly designed to re-motivate and incentivise the Claimant – an objective that it is not possible reconcile with his assertion that he was being marginalised.
30. Moreover the Respondent's stance was publicised to the business (page 89) in an announcement that had first been shown to the Claimant (page 88) and contained nothing that could have been construed as undermining him or suggesting to the outside world that he was no longer central to the business.. The announcement made it clear that “we are looking to build: both Mark and Bruce, who will ultimately be in separate locations, will be adding new people to their teams once we have achieved certain milestones”.
31. The Claimant continued to complain of a lack of support until his resignation. He says in his witness statement that he was not shown empathy or compassion during this period, but he had not presented the tribunal with any evidence as to why the Respondent should have understood that that is what he needed at that time. I accept his evidence about the tragic death of his godson and have no doubt that that would have had a serious impact on his morale at that time, but in the absence of any evidence that he drew the situation to his colleagues' attention and that they failed to respond appropriately I am unable to find that there was any breach of contract in the Respondent's conduct towards the Claimant arising from the very difficult

- situation he was faced with.
32. I also find as a fact that the Claimant was not isolated or ostracised to the extent he suggested after the move. He was still able to communicate with colleagues in other offices via Skype (as he had done previously); he added items to the Respondent's news feed (pages 110-112); Keith congratulated him in October 2016 on a permanent placement at Agility (page 122). He was also involved in discussions about the recruitment of a new operations director on June 13 (page 98), informed of an upcoming meeting with OSI (page 118A and 119A) on 13 and 27 September and on 12 October asked to comment on a presentation to be given to Mr Doi, Chair of the OSI Board (which in fact the Claimant failed to do). I also find as a fact that the Claimant could have asked for the assistance of Zoe had he wished to.
33. In the early part of 2017 the Claimant was unresponsive when invited by Keith to have an off the record "no agenda" chat. He also refused opportunities to talk to his fellow directors in March and May 2017. I find that the Respondent did not therefore isolate the Claimant to the extent that he alleges and did not therefore breach his contract by doing so. The evidence suggest that the Claimant had become disengaged and was frustrated by the failure of his attempt to leave the Respondent's employment on agreed terms – the Respondent repeatedly assured him that it did not want him to leave and saw no reason to facilitate his exit.
34. The Claimant also complains of his exclusion from the presentation to Mr Doi and the dinner that followed it. The Claimant was not the only director who was not invited (Mr Chapman was not invited either). The Claimant also complained that he did not get a satisfactory response to his question as to why he had not been invited to the dinner. I find as a fact that he became aware that he was not going to be attending and the reasons why on 15 October 2016 via an email to the directors from Mr Reilly (page 128) and that he did not complain at the time. The explanation in the email for the Claimant not being invited was as follows: "Mr Doi wants to get all the presentations into one day so our slot has been reduced to 90 minutes. I have also been told that our team is James, Kieran and myself – so Mark and Neil you can relax! I'll be circulating a further draft of the presentation later this weekend. I'd appreciate any comments as soon as you can thereafter." I therefore find as a fact that the decision not to invite the Claimant was taken by OSI and not by the Respondent itself. This is unsurprising given that OSI would have been aware at the time that the Claimant was trying to negotiate an exit from the business (it had been copied into the relevant correspondence) and was therefore on the face of it not fully committed to its future. I find no breach of the Claimant's contract in the manner in which the Respondent dealt with this issue. On the contrary, by acting in a manner that showed respect for the wishes of the company's major shareholder, the Respondent was acting in accordance with the implied term, by acting in the best interests of the business and its participants.
35. The Claimant asked for an explanation on 11 November 2016 (page 132), eight days after receiving an account of the meeting from Mr Reilly (page

- 130). He then chased for a response on 2 December (page 131). He was still unhappy about the issue on 25 April 2017 when he set out the series of complaints in a letter to Mr Reilly, James Parker and Kieran Kelly, that formed the basis of his decision to resign from the Company. It would appear that by then he had had a further explanation because he says "The lack of invitation from the Japanese hosted "group" sales meeting and subsequent social event on 2 November was another indicator of the exclusion from company activities. Indeed, I had to ask on a number of occasions over a period of 4 months why the exclusion had occurred in the first place, without any explanation until recently". I consider that approach to be disingenuous, as the Claimant was given an explanation right at the start, in the email of 15 October. He goes on however, "The explanation was that the senior Japanese management did not want a discontented person attending and that the numbers attending were limited by senior Japanese management. These are not reasonable justifications and add to the feelings of isolation and discontentment".
36. I consider that to have been an unreasonable approach for the Claimant to have taken to the Respondent's explanation. The underlying reason for his exclusion was in my judgment plainly valid and coherent. There may have been some discourtesy on the part of the Respondent in not answering the Claimant's request for a further written explanation sooner than it did, but that is not in my judgment close to being capable of representing a repudiatory breach of contract by the Respondent, particularly given that an explanation had in fact been available from 15 October 2016, before the meeting took place.
37. The Claimant also complained of being excluded from the office Christmas party in December 2016. I find as a fact that the Claimant received an invitation and the Claimant has not otherwise proved any facts that show that he was deliberately overlooked, or only invited as an afterthought. It was not in any event a whole company event but an impromptu gathering organised by the Brussels office. Only one of the founder Directors was present. The Claimant did not show that the manner in which he was invited to that event represented a breach of the express or implied terms of his contract of employment.
38. I also find that there was no breach of contract by the Respondent on the matter of the recruitment of Robin Miller. The Claimant presented very little evidence about this issue. There were no relevant documents and in his witness statement he said simply "In February 2017 it transpired that a new member of the UK Sales team had been recruited without any consultation with me. This caused further confusion as it became apparent that this new member would be working with the same clients that I had been working with, again without consultation". Hence the Claimant's case was that Mr Miller would be working in the Oracle space and would therefore be a potential rival to him in generating sales. In fact in cross examination the Claimant accepted that he had known just over a year earlier at the end of 2015 that the Respondent was interested in recruiting Mr Miller, who had a good relationship with James Parker and that there had been a discussion at a

board meeting of his potential usefulness to the business. He accepted that he had not objected at that time. His complaint appeared to be that a high level appointment had been made without consultation with him. In principle I accept that such a decision could reasonably, in some circumstances, be perceived as undermining and evidence of an intention to exclude an employee from decision making. The Respondent's case, again undocumented, but articulated by Mr Reilly, was that the Claimant had been supportive of Mr Miller's appointment at the end of 2015, that the appointment had not worked out then and that when Mr Miller got back in touch in early 2017 the Respondent had not thought it necessary to consult the Claimant about it again. Mr Miller would have been based in Kingston, not Brighton and he wanted to report to Mr Parker. Furthermore, by the time Mr Miller had re-established contact, the Claimant had made his disaffection with the Respondent's business abundantly clear and was still trying to negotiate an exit. The Respondent calculated that putting Mr Miller in touch with him at that juncture would be likely to jeopardise the appointment.

39. I considered this issue with care as it seemed to me that the Claimant had a valid concern – why was he not told that someone working in the Oracle space was going to be appointed, but reporting to James Parker and why was he not involved in the recruitment process? Of the reasons put forward by the Respondent the most compelling was its concern that the Claimant might derail the process by communicating his disaffection to Mr Miller or otherwise conveying a negative message. Its other reason – that the Claimant had been part of a discussion about Mr Miller a year earlier and had supported the appointment then was not as persuasive in my judgment as the Claimant's complaint was about being excluded from recruitment process itself. But the question for me was whether on the particular facts the Respondent was acting in breach of the implied term by recruiting another employee to a revenue generating role without involving the Claimant in the process, bearing in mind the context, namely that that the Claimant had been indicating his own desire to leave the business for a period of ten months. (The Claimant did not appear to be relying on an express right to be consulted and I find that there was no such right in any event).
40. The question is not whether the Respondent acted reasonably – if that had been the correct test I would have said that it was reasonable of the Respondent to take the view that Mr Miller should not have been talking to the Claimant at that point. The question of whether the Respondent breached the implied term in the Claimant's contract by acting as it did is not quite as straightforward. The term could be breached by excluding a senior member of staff from an important appointment that might have an impact on their work. I have however come to the view that there was no breach on the facts of this case. The nature of the implied term is not fixed and it evolves as the employment relationship evolves. The nature of the duty is different in relation to an employee whose commitment to the business has diminished. The Respondent had clear grounds for seeing the Claimant in those terms at that juncture. The implied term cuts both ways – an employee does not breach the term merely by making it known that he would like to leave his employment, but he will change the nature of the relationship between the parties by doing

so and with it the nature of the implied term owed to him. I therefore find that there was no breach of the implied term on the part of the Respondent in deciding not to consult the Claimant about Mr Miller's appointment, involve him in the recruitment process or let Mr Miller talk to the Claimant.

41. On 20 March 2017 the Claimant claims to have received a phone message from Mr Reilly expressing the view that “things are not working out”. He also relies on this as a fundamental breach of the implied term. Mr Reilly gives a detailed explanation of what he meant in his witness statement and in cross examination he maintained that the purpose of the remark was to persuade the Claimant to engage in a once and for all conversation about the future. I was able to see the force of the Claimant’s argument that a remark such as “things aren’t working out” taken in isolation, could be shocking and could amount to a rupture of the employment relationship. But I find that that was not the case on these facts, where there had been a history of difficulties in the working relationship that did not appear to be improving. It is worth noting that at this point the Claimant's sales performance had not improved and he had completed only one deal over the preceding 12 months. In that context the remark was not a repudiatory breach – it could perhaps have been better expressed, but on an objective view I see it as a description of the status quo and an overture to discussion and resolution. In any event Mr Reilly and the Claimant met on 30 March and Mr Reilly explained what he had meant. When he asked the Claimant what he could do to improve the situation the Claimant replied that there was nothing Mr Reilly could do – the Claimant simply wanted a pay-out.
42. I find therefore that none of the matters referred to in the letter dated 25 April 2017 amounted to a fundamental breach of the express or implied terms of the Claimant’s contract of employment. The question of whether there was conduct on the Respondent’s part that amounted to a last straw does not therefore arise on the facts as I have found them. As noted however in paragraph 6 of these reasons the Claimant relied on three further matters in his resignation letter:
- a. The fact that Mr Reilly’s response to the letter of 25 April had not addressed his concerns;
  - b. The unsatisfactory nature of his meeting with James Parker on 17 May 2017; and
  - c. His conviction that his grievances had not been and were not going to be addressed which he characterised as a “fundamental breach of the implied term of trust and confidence” which had brought about his resignation.
43. Taking these points in turn, Mr Reilly was very surprised to receive the letter of 25 April and he responded by email on 3 May 2017 (page 145). He suggested a meeting between the Claimant, Kieran Murphy, James Parker and himself. The Claimant sought to characterise the letter of 25 April as a grievance and the Respondent’s failure to deal with it as such as capable of being a last straw. As the last straw argument falls away for the reasons set out in the preceding paragraph I have asked myself whether Mr Reilly

responding to the letter of 25 April in the way that he did (including by not treating it as a formal grievance) represented a breach of contract on the Respondent's part that entitled the Claimant to resign and claim that he had been constructively dismissed. I find that what Mr Reilly did was consistent with what had always been done – to seek to meet and discuss a way forward, albeit this time with all four directors present. Whilst it was common ground during submissions that this case is a constructive dismissal case concerned only with the Claimant's employment rights, the context is not irrelevant to the manner in which the Respondent sought to comply with those rights. It was appropriate and consistent with the implied term in my view for Mr Reilly to suggest a meeting with the Claimant's co-directors to discuss a way through the impasse rather than a conventional grievance meeting. I find nothing untoward in that suggestion, certainly nothing approaching a repudiatory breach of contract.

44. Instead the Claimant chose to meet in person with James Parker, and as Mr Parker himself had resigned from the business at that point it is unsurprising that he did not have a set of proposals available to move the situation on. Nor however did the Claimant put forward any constructive suggestions at that meeting. Plainly the Claimant was deeply dissatisfied with the way in which events were unfolding, but he has not shown how the meeting with James Parker on 17 May, however unsatisfactory he found it, involved a repudiatory breach of contract.

### **Submissions**

45. I was grateful for the very helpful submissions of both Counsel. It is not necessary for me to summarise them here.

### **Overall conclusion**

46. My overall conclusion on the Claimant's constructive dismissal claim is that it must fail. The Claimant failed to establish that the Respondent was at any stage in repudiatory breach of his contract such that he would have been entitled to regard the Respondent as no longer intending to be bound by the terms of his contract of employment.
47. If I am wrong about that and there had been matters that the Claimant could have properly characterised as repudiatory breaches of contract, I find that he waived those breaches by waiting until June 2017 to resign from his employment. It was unclear from the manner in which the Claimant put forward his case what he would have relied on as the last straw if he had wished to argue that breaches that he had not acted upon at the time had been revived as a result of action by the Respondent that tipped him into a decision to resign. I would have concluded that the Claimant did not establish that there had been a last straw and that there had therefore been a waiver of the breaches he sought to rely on. Even if one of the additional matters referred to in his resignation letter had been capable of being a last straw (and I find that none of those matters were so capable) I accept the submission made by Mr Susskind that the Claimant still waited 18 days from the meeting

on 17 May to tender his resignation. There is no explanation for that delay and I would therefore have concluded that he had waived any breaches that there had been.

48. It follows that the Claimant's claim for breach of contract arising from his shortened notice period must also fail. He gave shorter notice than that required under his contract of employment but that was a not a result of the Respondent's actions, none of which entitled him to regard himself as discharged from further performance of the contract.
49. There is one final point I wish to make concerning the evidence that throughout the events leading to these proceedings there were without prejudice discussions taking place between the parties. Mr Godfrey made the rather surprising submission that to the extent I had relied on any of these documents I ought to give them little weight because of their privileged nature. With respect to Mr Godfrey I reject that argument and there is no legal principle underpinning it that I am aware of. As it happens I did not read or rely on the content of those documents but I was cognisant of the fact that there were without prejudice discussions taking place. That fact alone is not privileged - it is the content of without prejudice discussions that is privileged from disclosure to the tribunal, not the mere fact of their existence.

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Employment Judge Morton

Date: 23 January 2019